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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: SUBSTANTIVE ASSESSMENT OF THE CLAIMS 17 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. In these proceedings, Milieudefensie et al. are suing RDS in its role as top holding company of the Shell Group. In this part of the oral arguments, I will explain that the claims have insufficient basis in Dutch law. This requires addressing legal distinctions, such as the distinction between a parent company and its subsidiaries and the distinction between the Shell companies and the end-users of Shell's energy products.

2. Milieudefensie et al. are suing RDS for the CO_2 emissions of the Shell Group as a whole and the end-users of the Shell Group's products. RDS is not liable for those emissions. Those are not RDS's emissions, nor can those emissions be attributed to RDS in the sense that RDS would be liable for them.

3. This legal argument is necessary because it is a lawsuit. It is another matter that the importance of tackling climate change is beyond dispute. RDS and the Shell companies are also already taking many steps in the energy transition. This has already been extensively explained in other parts of the oral arguments.

2 IF THE EMISSIONS ARE NOT UNLAWFUL, RDS'S POLICY CANNOT BE UNLAWFUL EITHER.

4. Milieudefensie et al. direct their claims at RDS, as the top holding company of the Shell Group. They believe that in that capacity, RDS determines the group policy with regard to the energy transition and climate change, and that RDS can therefore be held accountable in that role for the CO_2 emissions of the Shell Group as a whole and the end-users of the Shell Group's products. That position taken by Milieudefensie et al. is incorrect.

5. Milieudefensie et al. explicitly do not hold RDS liable for specific conduct by its 1,100 subsidiaries, as evidenced by its position on 3 December 2020 in the context of the discussion about the applicable law:[1]

> *"Milieudefensie et al. do not, therefore, direct their accusations at the conduct of the 1,100 individual group companies operating in the world under the central management of RDS. Milieudefensie et al. also did not assert anything about the conduct of the 1,100 and it would also be impossible to investigate that conduct and to have that conduct included in the District Court's assessment in these proceedings. Nor is that necessary because none of these 1,100 companies is responsible or in the position to, alongside or instead of RDS, determine the group policy or to conduct and coordinate the management of the entire group*."

6. RDS allegedly acted unlawfully as a result of its "own conduct":[2]

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1 Written arguments 3 Milieudefensie et al., margin number 10.

2 Written arguments 3 Milieudefensie et al., margin number 11.

"*RDS is exclusively being held liable for its own conduct as head of the Shell Group comprising 1,100 companies*."

7. Milieudefensie et al. state that RDS must adjust its "policy" and align it with the global climate objective.[3] With its current climate policy, RDS is allegedly guilty of violating the right to life and the right to an undisturbed family life as laid down in Articles 2 and 8 ECHR. According to Milieudefensie et al., RDS should remedy this unlawful situation by seeking alignment with the global climate objective of the Paris Agreement. Milieudefensie et al. rely on the fact that the climate policy applicable to the Shell Group is adopted by the board of RDS.[4] According to Milieudefensie et al., it is within the power of RDS to (i) pursue a policy such that the emissions of its activities and products are adequately reduced, (ii) thus contribute its proportionate part towards achieving the Paris objective to prevent very serious danger, and (iii) promote a transition to a sustainable energy supply.[5]

8. This position must already fail because it is not clear how RDS's policy could be unlawful, while the subject of that policy, namely the CO_2 emissions of Shell and the end-users of its products, is not unlawful. It is the CO_2 emissions that lead to the danger of climate change. If Milieudefensie et al. do not assert that those emissions are unlawful, how can they assert that RDS's policy, which they claim results in these emissions, is indeed unlawful?

9. Milieudefensie et al. did not explicitly address this question. In so far as the answer is embodied in the five "core criteria" submitted by Milieudefensie et al. as the basis for the assertion that a "high degree of care"[6] can be expected of RDS, the following applies.

10. The first criterion is that a party "has been well aware of the major dangers and risks of climate change for a long time." It is unclear what exactly qualifies as a "long time" or "well aware." Milieudefensie et al. states that RDS has been aware of "the problem" "for decades."[7] This

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3 Summons, margin number 44.

4 Summons, margin numbers 84 and 103.

5 Summons, margin number 640.

6 Summons, margin number 41 and Written arguments 1 Milieudefensie et al., margin number 23.

7 Summons, margin number 44.

is incorrect. RDS was incorporated in 2004 and became the top holding company of the Shell Group in 2005. Consequently, there is no knowledge on the part of RDS relevant here from prior to 2005. RDS is not a legal successor to any other Shell company.

11. For the rest, Shell did not have unique knowledge in the period before RDS became the top holding company. The relevant knowledge has developed in the public domain over time.[8] Milieudefensie et al. respond to this by noting that when it comes to the 'trapdoor' criteria (from the *Kelderluik* ruling), it does not matter whether RDS had had unique knowledge. It is only relevant whether there is awareness of and foreseeability of the damage.[9] That may well be the case, but this does not explain why RDS in particular would have a duty of care with regard to the risk of climate change and would be liable for the CO_2 emissions of Shell and the end-users of its products.

12. Milieudefensie et al.'s assertion that, in any event as from 2007, there can be no disagreement about the awareness and foreseeability on the part of RDS[10] is irrelevant for the same reason. In 2007, RDS had no awareness different to the awareness many others, scientists, governments, policymakers and private parties had. The comparison that Milieudefensie et al. draw with the awareness of an "average citizen"[11] fails. The point is that RDS had no relevant advantage in terms of knowledge in relation to other informed parties.

13. The second criterion is that a party "has a sufficiently substantial share in the global emissions, or at least bears a certain responsibility for that share." Milieudefensie et al. do not say how a "sufficiently substantial share" should be determined. The scope of the alleged "share of RDS" in the global emissions also does not provide an adequate explanation of why RDS should have a duty of care as argued by Milieudefensie et al. Milieudefensie et al. fully acknowledge that the emissions of Shell and the end-users of its products do not "in themselves lead to the danger described" and "are not all-decisive in

8 Statement of Defence, part 2.4.
9 Written arguments 6 Milieudefensie et al., margin number 78.
10 Written arguments 6 Milieudefensie et al., margin number 81.
11 Written arguments 6 Milieudefensie et al., margin numbers 83-88.

causing the climate problem."[12] It is therefore an established fact that the danger raised by Milieudefensie et al. in this case - the risk of dangerous climate change - is not caused by RDS, not even if it is presumed that the emissions of Shell and the end-users of its products can be attributed to RDS.

14. The third criterion is that a party “has it in its power to exert control on the relevant emissions." Apparently, Milieudefensie et al. believe that if this criterion is met, the relevant emissions, even if they are not RDS's emissions, can nevertheless lead to a duty of care on the part of RDS. This position fails. This criterion of “control over emissions" has not been met, whatever Milieudefensie et al. precisely mean by this. I will explain this in more detail from various perspectives in this part of the oral arguments.

15. The fourth criterion is that a party "has an important role in the transition to a sustainable society." This has not been met either. As explained earlier, Shell's role in the global energy system is much more limited than suggested by Milieudefensie et al. Shell has no systemic influence on the energy transition.[13] It is true that RDS plays a role in that transition. However, RDS does not have it in its power to accelerate that transition. The pace of the transition depends on the demand for energy from society and the steps taken by the government to regulate that. To that extent, RDS cannot have an "important" role in the energy transition, but can only flesh out the role it can play in that, which it is also doing.

16. The fifth criterion is the possibility of taking "effective mitigation and precautionary measures" "without having to do the impossible." This criterion has not been satisfied either. As evidenced by the Mulder report, the reduction measures as sought by Milieudefensie et al. will not be effective. After all, as long as there is no change on the demand side, reduction as a result of the award of Milieudefensie et al.’s claims will be compensated by additional demand for products from Shell's competitors. To that extent, assuming a duty of care is asking "the impossible" of RDS. It would in that case have to take far-reaching

12 Summons, margin numbers 509 and 644.

13 Written arguments on Court’s role in development of the law from RDS, margin numbers 2-3.

measures, while those measures would have no effect and, moreover, would disrupt the level playing field between Shell and its competitors.

17. Milieudefensie et al.'s assertion that the five criteria they themselves have formulated are met therefore fails. Incidentally, those criteria are not supported by law. In this context, Milieudefensie invokes the judgment of the District Court in *Urgenda*,[14] but that judgment does not show that if these five criteria are met, a private party such as RDS has a duty of care that corresponds substantively to what Milieudefensie et al. are arguing. Nor can that be derived from the judgments of the Court of Appeal and the Supreme Court in *Urgenda*.

18. The idea that RDS has a duty of care in this respect is moreover at odds with the principles of the law of legal entities and liability law.

19. Milieudefensie et al. are essentially calling RDS to account for the emissions of the entire Shell Group and the end-users of its energy products. By doing so, Milieudefensie et al. ignore the fact that the "Shell Group" has no legal personality. The "Shell Group" refers to the group of which RDS is the top holding company. Legal obligations can only be imposed on individual group companies. RDS is one of them. As the top holding company, RDS holds direct and indirect participating interests in the Shell companies. The starting point is that it is not liable for the acts or omissions of the Shell companies.

20. While climate change is caused by emissions and RDS itself has virtually no emissions, RDS cannot be considered the (primary) perpetrator. There can only be liability on the part of a secondary perpetrator, such as a regulator, if the primary perpetrator is also liable.[15] Milieudefensie et al. do not assert the latter. There is no adequate factual and legal basis for the idea that RDS would be the primary perpetrator in this case.

21. Under Dutch law, the liability of a parent company based on tort in situations where the subsidiary is the primary perpetrator is only possible in very exceptional cases. This case is far removed from that.

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14 Summons, margin number 41.

15 Cf. in this respect: Asser/Sieburgh 6-IV 2019/73.

Milieudefensie et al. rightly do not invoke the doctrine of liability in group relationships.

22. Milieudefensie et al.'s position assumes that a parent company could be liable for acts or omissions of its subsidiary, regardless of whether the subsidiary is liable. After all, Milieudefensie et al. argue that the actions of the Shell companies need not be assessed in these proceedings because that would be impossible.[16] That is the superlative of the exception to the main rule that the shareholder is not liable for the company's debts. There is no point of reference for this thinking in case law or literature.

23. The foregoing is also not altered in light of the third criterion just discussed, namely that RDS reportedly has it in its power to exercise control over the relevant emissions. RDS has no operational control over the emissions of the Shell companies. RDS also has no control over the emissions from the end-users of Shell's products. Absent that control, it is not clear on what basis RDS is liable for the emissions of third parties, whether they be Shell companies or other third parties. In any event, no basis for this can be found in the *Urgenda* case. After all, the State has the power to restrict the emissions of its nationals by means of regulations. RDS cannot do that.

24. As question 6, the District Court asked whether RDS can further explain the structure of the Shell Group and RDS's position therein in relation to its subsidiaries and discuss how and by whom the policy of the Shell Group is determined.

25. The Shell Group consists of a top holding company (which is therefore RDS), intermediate holding companies, Operating Companies and Service Companies. RDS's activities consist of holding the shares in the intermediate holding companies, complying with its obligations to shareholders based on its listings in New York, London and Amsterdam, and determining the group's general policy. RDS does not undertake any operational activities such as the extraction and transport of oil and gas, the production of wind energy or the supply of fuels or electricity. The Operating Companies perform the operational

16 See margin number 5 above.

activities. The Service Companies provide the other group companies with assistance and services for the performance of their activities.

26. RDS determines the group's general policy by approving policy principles and general guidelines, which are often developed by the Service Companies. The implementation of that general policy is the responsibility of the Operating Companies. The management board of the Operating Company must ensure the implementation of the policy in a manner that is in line with the specific circumstances of that Operating Company and which is economically sound. The board of the Operating Company is also responsible for compliance with the laws and regulations applicable to the Operating Company. As stated, RDS has no operational control over the CO_2 emissions of the other Shell companies. RDS does report on those emissions, in accordance with the reporting obligations that RDS has as a listed company under the English law applicable to it.[17]

27. Milieudefensie et al. repeatedly assert, in varying terms, that RDS determines the "climate policy" of the Shell Group. That is only correct to the extent that this is understood as follows. RDS determines the overall strategic direction of the group. This includes developing an ambition to move towards "*a net-zero emissions energy business by 2050 or sooner*" (April 2020). This is meant by the comment in the Statement of Defence (margin number 93) that RDS's general policy includes "guidelines for investments to support the energy transition." Achieving that ambition requires that all Shell companies cooperate with this. If they fail to do so, RDS cannot enforce this in a legal sense. This is because this involves investment decisions that are not taken by RDS and which are only submitted to RDS for approval in certain cases (in other words, if the financial interest of the investment exceeds a certain threshold). RDS also does not have the manpower to prepare the relevant investments. That is precisely the task of the Service Companies, especially with regard to the larger investments, and of the group's Operating Companies. This means that RDS determines the strategic direction, but the implementation takes place

17 Specifically: Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 en Companies (Directors' Report) and Limited Liability Partnerships (Energy and Carbon Report) Regulations 2018.

by the Operating Companies. Investments are actually made, in a legal sense, not by RDS, but by the Operating Companies.

28. Milieudefensie et al. believe that RDS nevertheless has a duty of care to reduce the emissions of Shell and the end-users of its energy products. It will now be explained in more detail that there is no legal basis for this.

3 REASONS WHY, REGARDLESS OF THE BASIS, THE CLAIMS MUST ALREADY BE DENIED

29. I will begin with the discussion of five points, each of which precludes the award of the claims:

(1) RDS is not liable for scope 1 and 2 emissions of other Shell companies, and certainly not for scope 3 emissions;

(2) the necessary causality is lacking;

(3) awarding the claims will not actually lead to a reduction of CO_2 emissions;

(4) the necessary relativity is lacking;

(5) Milieudefensie et al. have not demonstrated that RDS is acting unlawfully throughout the period from now until the end of 2030.

3.1 RDS is not liable for scope 1 and 2 emissions of other Shell companies, and certainly not for scope 3 emissions

30. It was already explained above that RDS is not liable in a legal sense for the acts of its subsidiaries and does not actually have any operational control over the scope 1 and 2 emissions of other Shell companies. The substantiation by Milieudefensie et al. to the contrary is summary. They merely refer to a passage from the UN Special Rapporteur on Human Rights and the Environment: "The five main responsibilities of businesses specifically related to climate change

are to reduce greenhouse gas emissions from their own activities and their subsidiaries".[18]

31. This statement cannot support Milieudefensie et al.'s assertion. The passage cited by Milieudefensie et al. is in line with the UN Guiding Principles on Business and Human Rights ("**UN Guiding Principles**"). The Special Rapporteur does not say that what he notes is a legal obligation, but, in line with the UN Guiding Principles, refers to "*responsibilities*." Below, it will be explained in more detail that this expresses very precisely that it is not a legal obligation.[19]

32. In line with the non-legal nature of the report, it is not remarkable that the quote refers to "*responsibilities of businesses*" for emissions *"from their own activities and their subsidiaries*." This is referring to businesses in general. In legal terms, this involves a group, such as the Shell Group. Against that backdrop, it cannot even be said with certainty that the Special Rapporteur had in mind that it is precisely the top holding company that is "*responsible*" for the emissions of the group companies. The report does not pertain to legal obligations and the Special Rapporteur therefore does not have to take into account the distinction between the individual group companies. This is indeed necessary in order to establish RDS's legal obligations.

33. In the assessment of what Milieudefensie et al. submit to substantiate their assertion that RDS is liable for the scope 3 emissions, meaning the emissions from the end-users of Shell's energy products, it also emerges that a sufficient basis is lacking. I will go through the sources referred to by Milieudefensie et al.

34. Firstly, a report by the Special Rapporteur.[20] Milieudefensie et al. cite a quote in which he says in general terms that "*responsibilities of businesses*" would include "*to* […] *reduce greenhouse gas emissions from their products and services*."

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18 Written arguments 7 Milieudefensie et al., margin numbers 8, 10, 12 and 24 and Exhibit MD-270.

19 See paragraph 5.4 below in this regard.

20 Written arguments 7 Milieudefensie et al., margin numbers 8, 10, 12 and 24 and Exhibit MD-270.

(a) As stated, "*responsibilities*" expresses that it is not a legal obligation.

(b) The source also says nothing about the extent to which companies would have to reduce emissions related to end-use of their products (scope 3 emissions). To that extent as well, the reference to this source is meaningless.

(c) The source also says nothing about what reduction obligation would apply to energy companies. That is important because the view that this precisely also applies to energy companies is very far-reaching. Since CO_2 emissions are largely linked to the conduct of everyone around the world in terms of energy consumption, the energy companies would literally bear the burden of the whole world if it is believed that they - independent of others - are required to reduce the emissions arising from end-use.

35. Secondly, a series of sources that also do not show that energy producers like Shell are legally liable for emissions by end-users. There, Milieudefensie et al. refer to the broad initiatives Non-State Actor Zone for Climate Action, the Climate Ambition Alliance, the Race to Zero initiative and the Science Based Targets Initiative.[21]

(a) None of those documents expresses any legal obligation for "businesses" referred to therein. Milieudefensie et al. themselves also say that this is an expression of "*best practices"*, which certainly does not suggest that a firm legal obligation is expressed.[22]

(b) The sources support RDS's position that the energy transition requires adaptation of all actors in conjunction. There is talk of "*partnership,*" "*mobilization of actors across all segments of society*."[23] And it is explained that - because the scope 3 emissions of one person are the scope 1 and 2 emissions of

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21 Written arguments 7 Milieudefensie et al., margin numbers 13-15 and 30-33 and Exhibits MD-285, MD-286 and MD-322.

22 This word is used in Exhibit MD-322.

23 Exhibit MD-286.

another - this is pre-eminently a system issue: "[s]*ince a company's scope 3 emissions often overlap with other companies' emissions, strategies to reduce scope 3 emissions are particularly fertile ground for opportunities to identify synergies and collaborate*".[24] In particular, the sources also emphasise the importance of the choices made by end-users themselves in their decisions to reduce energy consumption and to opt for a low CO_2 energy source.[25] How Milieudefensie et al. then arrive at (top holding companies of) energy companies being nevertheless independently liable in a legal sense to reduce those joint emissions from many parties is a mystery.

(c) Possible differentiation between sectors is also underlined, a point to which RDS has also referred a number of times to make it clear, for example, that some sectors will have more difficulty reducing emissions *(hard to abate)[26], and* that the smaller reduction or even growth in scope 3 emissions from a particular party or sector is not necessarily bad for global emissions as a whole, as emerges from the replacement of coal with gas.[27] After all, the source cited by Milieudefensie et al. states:

> "*Best practices in defining scope 3 target ambition would entail setting targets that are, at a minimum, in line with the percentage reduction of absolute GHG emissions required at a global level over the target timeframe. Alternatively, the company may apply a sector-specific method*"[28] (emphasis added, attorneys).

36. And then Milieudefensie et al. mentions a publication from Oxford University.[29] That, too, contains no indication that there is a legal

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24 Exhibit MD-322, p. 5.

25 Exhibit MD-322, p. 21.

26 Statement of Defence, margin number 57 and Written Arguments Part I RDS, margin number 56.

27 Statement of Defence, margin number 60, Written Arguments Part I RDS, margin number 46(b) and Written Arguments Facts and questions from the District Court RDS, margin number 37.

28 Exhibit MD-322, p. 6.

29 Written arguments 7 Milieudefensie et al., margin numbers 16-22 and 25 and Exhibit MD-287.

obligation for energy companies to reduce scope 3 emissions in absolute and uniform steps, as argued by Milieudefensie et al., on the contrary. For example, the publication mentions the following.

> "*Given the heterogeneity of actors setting net zero targets, no single approach or standard for net zero emissions would be appropriate or effective*."[30]
>
> "*There is broad consensus that achieving net zero for any actor will almost always depend to varying degrees on the actions of other actors. The interlinkages are operationalized in different ways. Net zero is a collective goal, and so cooperation between different actors is essential*."[31]
>
> "*Another key question is how sub- and non-state actors' net zero targets relate to national policy frameworks (Alliances for Climate Action). For many cities, states, and regions, achievement of net zero may be highly contingent on national policies (RAMCC). The private sector is also often dependent on national frameworks (CDP, Fashion Charter). For this reason, some actors emphasize that actors setting net zero targets should also align or advocate for national policy frameworks that will allow them to successfully meet their targets*"[32] (emphasis added, attorneys).

37. The sources cited by Milieudefensie et al. therefore show one consistent picture: nowhere does it say that (top holding companies of) energy companies can be held liable individually and in a legal sense for the emissions by end-users of their products.

38. The lack of a legal basis becomes even clearer where Milieudefensie et al. starts on another theme. At that point it refers "for example" to scope 3 emissions "from properties that the Shell Group leases from other parties, the emissions related to business trips by Shell personnel and the emissions from goods and services purchased by

30 Exhibit MD-287, p. 1.
31 Exhibit MD-287, paragraph 1.6.
32 Exhibit MD-287, paragraph 1.6.

the Shell Group."[33] The sources describe that customers (in this argument by Milieudefensie et al.: Shell) can, to a certain extent, exert pressure on their suppliers (in this argument by Milieudefensie et al., for example: airlines). According to Milieudefensie et al., customers influence the emissions of their suppliers. But the lion's share of what they ultimately want to achieve with their claims is clearly something else, namely to enforce the reduction in emissions from customers/end-users via (the top holding company of) an energy company.

39. If we think better about what Milieudefensie et al. are actually saying here, it turns out that this lends support not to Milieudefensie et al.'s position, but to RDS's position. The emphasis that Milieudefensie et al. places on a customer's ability to force their suppliers to take certain measures underlines that customers have a choice. Shell's customers, end-users of energy products, do indeed have a choice. They can opt, for example, for an electric car or a hydrogen car, and Shell is taking initiatives to satisfy their demand in that case as well. But without the customer making that choice, Shell alone cannot achieve the energy transition.

40. What remains is the entire general notion submitted by Milieudefensie et al. to argue for RDS's liability for scope 3 emissions. That is the following:[34]

> "*It is also the most basic logic that the six oil and gas companies have that control over scope 3 emissions because each company independently and in free will determines how much fossil fuel it wishes to sell.* […] *The fact that RDS has complete and total control over the scope 3 emissions of the energy products it sells cannot therefore be at issue."*

41. This assertion is also insufficient. RDS does not "sell" any energy products, that is what the relevant Operating Companies do. Indeed, apart from contractual delivery obligations, they can, in theory, decide to sell less. However, this does not explain why it should follow from

33 Written arguments 7 Milieudefensie et al., margin numbers 11, 28 and 36-39.

34 Written arguments 7 Milieudefensie et al., margin number 7.

this that RDS is liable for the scope 3 emissions of the end-users. Nor is there any explanation for this, and in any event no explanation that carries weight in the assessment of RDS's legal liability.

3.2 The necessary causality is lacking

42. Milieudefensie et al. fully acknowledge that the emissions of Shell and the end-users of its products do not "in themselves lead to the danger described" and “are not all-decisive in causing the climate problem."[35] It is therefore an established fact that the danger raised by Milieudefensie et al. in this case - the risk of dangerous climate change - is not caused by RDS, not even if it is presumed that the emissions of Shell and the end-users of its products can be attributed to RDS. Milieudefensie et al. nevertheless assign *partial* responsibility to RDS. Milieudefensie et al. assert that the CO_2 emissions of Shell and the end-users of Shell products make a "*non-negligible and even substantial contribution to the increase of the CO_2 concentration in the atmosphere*."[36] According to Milieudefensie et al., it follows from the *Urgenda* case and the *Kalimijnen* judgment that in situations like this, measures must be taken to avoid the disputed danger.[37]

43. This argument does not hold. The *Urgenda* case concerned emissions in the Netherlands that must and can actually be reduced by the State. After all, the State has, among other things, the means of legislation and regulations to control the emissions of everyone in its territory. RDS does not have that power. For that reason, there is no condicio sine qua non connection between RDS's alleged unlawful conduct and the risk of dangerous climate change. As will be explained below, awarding the claims will not actually lead to a reduction of CO_2 emissions. Likewise, without the conduct of which RDS is accused, there would have been no fewer CO_2 emissions. This applies to the scope 3 emissions. The end-users of Shell's energy products would have purchased the energy products from another provider if those products had not been offered by Shell. As a result, Shell's scope 1 and 2 emissions would have been the emissions of other providers.

35 Summons, margin numbers 509 and 644.
36 Summons, margin number 509.
37 Summons, margin numbers 642-644.

This applies in any event to the period from 2005 onwards, when RDS became head of the Shell Group. What would have happened prior to that is irrelevant for the assessment of the claims against RDS. Milieudefensie et al. wrongly assert that RDS's conduct “clearly" bears a causal relationship to global warming.[38] There is no causal relationship whatsoever.

44. Milieudefensie et al. assert that they are calling RDS to account for a partial responsibility for causing dangerous climate change, in a similar manner as the Dutch State was called to account for this in the *Urgenda* case.[39] However, the comparison that Milieudefensie et al. make with the *Urgenda* case does not hold.

45. The Supreme Court held in *Urgenda* that the State is obliged pursuant to Articles 2 and 8 ECHR to "do its part" in order to prevent dangerous climate change, even if it concerns a global problem.[40] In the opinion of the Supreme Court, this partial responsibility of the State ensues from the UN Climate Convention, the various decisions of the *Conference of the Parties* at the annual climate conferences under the UN Climate Convention, and the generally accepted principle of international law that countries may not harm each other (the "no harm" principle), to which reference is also made in the preamble to the UN Climate Convention. After all, according to the Supreme Court, this partial responsibility entails that every country can effectively be held accountable for its share in greenhouse gas emissions. This gives the greatest likelihood that all countries will actually contribute, in accordance with the principles laid down in the preamble to the UN Climate Convention.[41]

46. The findings of the Supreme Court in the *Urgenda* case cannot be applied to RDS. For the obligation of the Dutch State to "do its part," and more generally the obligation of states to "do their part," the Supreme Court expressly ties in with the specific principles of the UN Climate Convention and its reference to the "no harm" principle. Based on that, States have individual partial responsibility for their

38 Written arguments 8 Milieudefensie et al., margin number 49.
39 Written arguments 8 Milieudefensie et al., margin number 100.
40 Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda v State*), para. 5.7.1.
41 Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda v State*), para. 5.7.7.

contribution to the global emission reduction. The State has therefore committed itself to this via the UN Climate Convention. The findings of the Supreme Court regarding the State's partial responsibility must be understood against this backdrop.

47. RDS is not a party to the UN Climate Convention. The partial responsibility that, according to the Supreme Court, rests with the State on the aforementioned grounds therefore cannot apply to RDS.

48. Milieudefensie et al. believe that, on the grounds of the *Kalimijnen* judgment, RDS cannot defend itself by referring to its negligible share in total global CO_2 emissions. Milieudefensie et al. fail to recognise that the relevant finding of the Supreme Court in the *Kalimijnen* judgment concerned a different question, namely the question of a sufficient causal link within the context of assessing a claim for damages. That finding is therefore not about the question of unlawfulness. This case does pertain to the question of whether the emissions for which RDS is being held liable contribute to the occurrence of the risk of dangerous climate change to such an extent that RDS is acting unlawfully, also for that reason. This is not altered by the fact that the Supreme Court refers to the *Kalimijnen* judgment in footnote 35 of the *Urgenda* judgment.[42] That footnote is to the entire general consideration: "*Many countries have rules in their liability law that are consistent with this*." The Supreme Court did not assume partial responsibility of the State on the basis of this finding, but, as stated, on the basis of a meticulous analysis of the State's obligations under the UNFCCC.

49. Milieudefensie et al. assert that it follows from the *Urgenda* case that the defence that an obligation to reduce emissions will not help because other countries nevertheless continue their emissions does not hold because there is no reduction which would be negligible.[43] That assertion misses the mark. First of all, as stated, the partial responsibility borne by the State according to the Supreme Court does not apply to RDS. In addition, it is important that the State, as it itself also acknowledged in the *Urgenda* case, can actually achieve an

42 Written arguments 8 Milieudefensie et al., margin number 100.

43 Written arguments 8 Milieudefensie et al., margin number 44.

emission reduction (in its own territory). RDS cannot achieve a reduction in emissions by third parties. It is therefore also not the case that an order to reduce emissions will result in 1.2% of the total global emissions being reduced by 45% over 10 years.[44]

50. Milieudefensie et al. also assert that the judgment of the US Supreme Court in *Massachusetts v Environmental Protection Agency* reinforces the Supreme Court's argumentation and reportedly shows that it is correct for reasons of principle that RDS can be sued for "its share."[45] In the Statement of Defence, RDS already explained that the reliance on that case does not hold for several reasons, including the fact that the particular case did not pertain to causality in the event of unlawful conduct: not in general and not in this case.[46]

3.3 Awarding the claims will not actually lead to a reduction of CO_2 emissions

51. If Milieudefensie et al.'s claims were awarded, RDS must ensure that the Shell Group's activities that cause CO_2 emissions are (partially) discontinued. These activities will have to be divested or the rights to produce oil and gas fields (such as concessions and extraction permits) will have to be returned to the competent authorities. In both cases, Shell's activities will be continued by the parties to whom Shell transfers those activities, or to whom the relevant authorities give the right to continue those activities. The consequence of this is that the production activities of the Shell Group will be continued, but by other parties. The supply of and demand for oil and gas will consequently not change. The same applies to the CO_2 emissions of end-users of energy products that Shell sells. As a result, global CO_2 emissions will not decrease.

52. The global CO_2 emissions will also not decrease in the - hypothetical - event that Shell (partly) terminates its production but the activities are not continued by others. In order to meet the demand for oil and gas, other providers will produce more oil and gas from the fields they produce or drill new fields. Since the increasing global demand for oil

44 Written arguments 8 Milieudefensie et al., margin number 43.
45 Written arguments 8 Milieudefensie et al., margin numbers 45-46.
46 Statement of Defence, footnote 577.

and gas will continue to be met in this hypothetical situation, end-users of these fuels will continue to emit the same amount of CO_2 emissions and the global emission of CO_2-emissions will not decline.

53. Awarding Milieudefensie et al.'s claims will therefore have no positive effect on global emissions of CO_2 emissions.

54. RDS has already shown that this is not theory but practice, with reference to the example of Ørsted cited by Milieudefensie et al. themselves.[47] When Ørsted hived off its oil and gas activities, those activities were continued by another group (Ineos). These conclusions are further confirmed by the report prepared under the leadership of Professor Machiel Mulder, Professor of Energy Market Regulation at the University of Groningen, which RDS submitted to the proceedings as Exhibit RK-35.[48] Professor Mulder investigated to what extent the termination of the extraction of oil and gas by a single energy company - in this case Shell - contributes to limiting global CO_2 emissions.

55. Professor Mulder notes that Shell is active in a large number of countries. In most of these countries, there are, in addition to Shell, a large number (often dozens) of companies involved in oil and/or gas extraction, while worldwide hundreds of companies operate in this industry. Briefly put, the research shows that permits are frequently exchanged between companies (via sales), but also that permits are frequently terminated, renewed and granted anew.

56. Professor Mulder therefore concludes that if Shell were forced to reduce its activities in oil and gas extraction, it would be logical for Shell to transfer its existing permits (or participations therein) to other companies or for Shell to return them to the relevant government. Governments of countries with oil and gas reserves generally aim to generate as much financial revenue as possible from these. According to the research, this also applies for the countries in which Shell operates. On this basis, Professor Mulder expects that if Shell is forced to reduce its production and cannot transfer its permits to other parties, the authorities will cancel the permits in order to give other

47 Statement of Defence, margin number 79(c).

48 **Exhibit RK-35**, the Mulder Report.

companies the opportunity to take over the activities. In both situations, Shell's permits will be transferred to other parties, and the production of oil and natural gas will remain unchanged, and thus also the related CO_2 emissions.

57. In addition, Professor Mulder discusses the scenario in which Shell does not sell its permits to other companies and governments do not ask any other parties to take over Shell's activities. This would mean that the reserves that Shell currently has at its disposal would be withdrawn from the global markets. This decline in production by Shell would currently amount to a maximum of 2% of global consumption. Professor Mulder points to abrupt disruptions in the supply of oil or gas that have occurred in the past, such as following the revolution in Iran and following Iraq's invasion of Kuwait, with 4 to 6% of global consumption being withdrawn from the market for a number of years. However, this decline in supply did not lead to a reduction in global production, as other producers proved able to rapidly step up their production. In view of such experiences in the oil and gas markets with a sudden substantial reduction in production by/in some countries, Professor Mulder believes that a drop in production by a few percentage points will have no effect on global consumption. This is because the global oil and gas markets operate in such a way that other producers will be economically incentivised to compensate for that decline in production. This effect will occur even more strongly because Shell's envisioned reduction in production would extend to 2030. As a result, other market parties would have ample time to anticipate this and to expand their production capacity or increase the production of existing fields. This is possible because there are still significant oil and gas reserves worldwide, with Shell's share in the current global reserves of oil (0.25%) and gas (0.5%) being small.

58. During the previous hearing day, Milieudefensie et al. contested Professor Mulder's conclusion on various points that an order on Shell to reduce the production of oil and gas will not affect the worldwide consumption of fossil fuels. They did so with, inter alia, reference to a memo with criticism of the Mulder report from Peter Erickson.[49] RDS

49 Exhibit MD-337.

will go through Milieudefensie et al.'s points and demonstrate that this criticism does not hold. In that respect, RDS refers to, inter alia, Professor Mulder's memo, submitted as Exhibit RK-37, in which he refuted Erickson's - in his words: "summary" - criticism (and thus also that of Milieudefensie et al.).

59. Firstly, Milieudefensie et al. assert that a "*perfect substitution*" would not take place because a production restriction would indeed have an effect. Milieudefensie states that "*as soon as less is produced*, *less of a commodity will be available"* and therefore "*the price of a commodity goes up*," resulting in less consumption.[50] This, according to Milieudefensie et al., would be "*the basic economics of supply and demand*."[51]

60. With this assertion, however, Milieudefensie et al. completely ignore the essence of Professor Mulder's report, namely that Shell's activities will be taken over by other parties in the event of a forced (full or partial) termination. Limiting Shell's production will not therefore lead to less oil and gas being extracted, but only to *Shell* extracting less oil and gas. Consequently, the price of oil and gas will not increase in the event of (full or partial) termination of Shell's production and - more importantly - consumption will not decrease.

61. With reference to Erickson, these findings are only criticised by Milieudefensie et al. on three points. In his memo, Professor Mulder explained that this criticism was incorrect.

    (a) First of all, it is incorrect that if Shell were to return its permits to governments, governments would not issue these permits again to other parties.[52] As Professor Mulder explained in his report, countries have a financial interest in the exploitation of oil and gas reserves. It is therefore not to be expected that governments would stop issuing permits for oil or gas extraction.[53] Milieudefensie et al. (and Erickson) have not demonstrated this, either. Erickson merely refers to a number

50 Written arguments 8 Milieudefensie et al., margin number 56.
51 Written arguments 8 Milieudefensie et al., margin number 56.
52 Written arguments 8 Milieudefensie et al., margin number 69.
53 **Exhibit RK-37**, p. 8.

of examples from which it cannot be concluded that this is the case. For example, Erickson and Milieudefensie et al. refer specifically to the recent report that the Danish government is stopping issuing future extraction permits. The explanation for this is not so much the Danish government's wish, but particularly the fact that companies were no longer interested in a permit. Professor Mulder writes in this regard: "*Evidently, the costs of oil extraction in the Danish continental shelf are too high for companies to apply for new permits for that purpose."*[54]

(b) In addition, it is incorrect that other oil and gas companies are unable to produce oil and gas at the same cost price as Shell.[55] The assertion that Shell has a relatively low cost price is based only on one publication which shows, moreover, that other manufacturers have a lower cost price. Apart from that, the costs at which a company operates an oil or gas field do not, in principle, affect the prices of oil and gas. Oil and gas prices are determined by the production costs of the most expensive fields, such as shale oil fields. All other fields can be produced at lower cost. The producers of those fields therefore make (more) profits. If - in the hypothetical situation - the production costs of these fields were to go up, the oil or gas prices would not rise, but this would only be at the expense of the supplier's profit.[56]

(c) Lastly, it is incorrect that the award of the emission reduction sought by Milieudefensie et al. would have a broader effect on investors' risk perception and the investment climate for oil and gas. According to Milieudefensie et al., this would lead to higher costs and lower consumption of oil and gas.[57] As Professor Mulder indicates, what Erickson asserts in this respect is *"highly speculative*" and is only based on implicit assumptions that he (or Milieudefensie et al.) failed to substantiate. And even if this assertion were true and any

54 **Exhibit RK-37**, p. 8.
55 Written arguments 8 Milieudefensie et al., margin number 70.
56 **Exhibit RK-37**, p. 7.
57 Written arguments 8 Milieudefensie et al., margin number 71.

award of Milieudefensie et al.'s claims would lead to higher costs, it is doubtful this would apply for producers in other parts of the world where such legal or reputation risks would not be involved. In that case, these producers could maintain their production, whereby oil and gas prices could remain the same.[58] Moreover, as stated, higher production costs do not (automatically) lead to higher oil or gas prices.

62. Secondly, Milieudefensie et al. dispute Professor Mulder's conclusion that, assuming that a restriction of Shell's production results in oil and gas reserves that Shell currently has in its possession not being extracted, this does not lead to lower oil and gas consumption. According to Milieudefensie et al., a decrease in supply would lead to less demand and therefore also to reduced consumption. Milieudefensie et al. and Erickson substantiate this assertion in several places with another study by Erickson (Exhibit MD-313).[59] It allegedly follows from this study that:*" for each barrel of oil left undeveloped due to a supply restriction, net global oil consumption will be reduced by 0.2 to 0.6 barrels over the long term*."[60]

63. Milieudefensie et al. fail to recognise, however, that this study, just like the studies referred to by Milieudefensie in margin numbers 63-65 of their written arguments 8, only pertained to the effect of government restriction of the supply of oil for an entire market and not to restricting the supply of a single private party that only has a relatively small share in the global oil and gas reserves.[61] For that reason alone, the findings from these studies cannot be applied to this case.

64. More importantly, Erickson's study to which Milieudefensie et al. refer is theoretical in nature and is based on assumptions that are not in line with reality. For example, the study assumes that if the price of oil increases, the supply of oil will *not* increase. Professor Mulder stated that this assumption "[is] *far removed from how the oil market has*

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58 **Exhibit RK-37**, p. 8-9.

59 See Written arguments 8 Milieudefensie et al., margin numbers 59, 62 and 66.

60 Written arguments 8 Milieudefensie et al., margin number 59. The quote included here originates from Erickson's memo (Exhibit MD-337), p. 3.

61 **Exhibit RK-35**, the Mulder Report, p. 75.

functioned so far."[62] He indicated that higher oil prices have always led to more exploration and production activity on the supply side in the past. According to Professor Mulder, the reason for this is that the parties will be incentivised to drill new fields or expand the production of existing fields if the price of oil (or gas) increases. A high price is also an "*incentive to develop and apply non-conventional methods for oil and gas extraction (such as shale and tar sand oil), as we have seen in recent years*."[63] As a result, the supply of oil or gas increases, causing oil or gas prices to fall again in the long term. The assumption on which Erickson's investigation is based is therefore unrealistic. It cannot be maintained on the basis of that study that every barrel of oil that is not produced would lead to a reduction in consumption of 0.2 to 0.6 barrels of oil in the long term.

65. Finally, Milieudefensie et al. also assert - with reference to Erickson's memo - that the conclusions from the Mulder report are not scientifically sound, inter alia because Professor Mulder failed to "*make a scientific comparison between the situation of price development without measures to restrict production, on the one hand, and the situation of price development with production-restricting measures, on the other*."[64] This criticism is wrong. Firstly, the conclusions from the Mulder Report are based on factual observations of how oil and gas markets actually function.[65] By contrast, the findings from Erickson's report (Exhibit MD-313) to which Milieudefensie et al. refer are only based on “storylines”.[66] In other words, hypothetical scenarios. Furthermore, Professor Mulder also performed a scientific analysis. He compared what the Dutch gas price would both be in the situation with restrictions on limiting gas extraction in the Groningen field and the situation without such restrictions. It followed from this analysis that, although the Groningen field is one of the largest gas fields in Europe, a substantial reduction in gas production due to the earthquake issue had no impact on the Dutch gas price.

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62 **Exhibit RK-37**, p. 6.
63 **Exhibit RK-37**, p. 2.
64 Written arguments 8 Milieudefensie et al., margin number 67.
65 **Exhibit RK-37**, p. 1.
66 Exhibit MD-313, p. 32.

66. Erickson's comments are therefore an attempt to refute Professor Mulder's conclusions without good reason.[67]

3.4 Relativity missing

67. The next point is, as explained in the Statement of Defence,[68] that the relativity requirement has not been met. Today, RDS makes two other comments in this regard. The first pertains to the relief sought. The second concerns the "in pari delicto" defence.

68. Firstly: Milieudefensie et al. are seeking declaratory judgments in these proceedings that RDS is acting unlawfully “vis-à-vis the claimants”. As such, Milieudefensie et al. fail to recognise the nature of the causes of action that the NGOs can lodge pursuant to Article 3:305a DCC. The NGOs litigate in their own name, but in the interests of those they represent. Consequently, no declaratory judgment can be awarded in these proceedings that RDS is acting unlawfully *vis-à-vis* the NGOs. This would only be possible if the NGOs had lodged the claims on their own behalf, and therefore not on the basis of Article 3:305a DCC.

69. Secondly: Milieudefensie et al. assert that RDS’s relativity defence cannot succeed, in view of the special nature of the societal standard of due care at issue.[69] RDS’s position is reportedly special and therefore incomparable to the claimant NGOs and individual citizens.[70]

70. Again, Milieudefensie et al. fail to recognise the nature of the class action. RDS’s relativity defence entails that Milieudefensie et al.’s accusation against RDS applies to the same extent to those whose interests the NGOs represent in this case. That is the general interest, in the sense of the interest of all natural and legal persons on earth, alternatively in the Netherlands. It is not a good answer to that to say that RDS has a different position than the claimants in this case. Even apart from the fact that the NGOs and the individual claimants also emit CO_2 , the point is that if the NGOs’ class action is admissible,

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67 **Exhibit RK-37**, p. 9.

68 Statement of Defence, part 7.5.

69 Written arguments 6 Milieudefensie et al., margin number 101.

70 *Ibid*, margin number 102.

RDS's relativity defence must be assessed in the light of the general interest that the NGOs are protecting.

71. The essence of the "in pari delicto" defence is the following. According to Milieudefensie et al., RDS is acting unlawfully because of its special position. If that were correct, which RDS disputes, the same applies to those represented by the NGOs, namely primarily the world population, alternatively the Dutch population. It cannot be maintained that RDS has a heavier duty of care in connection with the risk of dangerous climate change than the rest of the world has, or even the whole of the Netherlands in that case. In so far as Milieudefensie et al. argue that it must be assessed in this context whether "the citizens" or "an arbitrary claimant" meets these criteria,[71] and to that extent violated the same standard as RDS, that is incorrect. That would mean the following. RDS's behaviour would then be assessed in the light of the interests of the entire world population, or in the alternative, in the light of the interests of the population of the Netherlands. At the same time, the 'in pari delicto' defence would be assessed in the light of the conduct viewed at the level of one individual citizen. Those do not go together.

3.5 In order to be able to award claims, it must be established that the litigious CO_2 emissions are always unlawful, and that is not the case

72. Milieudefensie et al. assert that RDS is acting unlawfully if RDS does not reduce the current emissions that Milieudefensie et al. attribute to RDS. Milieudefensie et al. are seeking that RDS be ordered to limit the emissions Milieudefensie et al. attribute to RDS's activities by 25% to 45% by no later than ten years, i.e. by 2030. RDS notes that it understands the claim (as amended) in such a way that Milieudefensie et al. mean that RDS's conduct is unlawful at this moment *because* RDS is not pursuing the policy that Milieudefensie et al. feel RDS should be pursuing.[72] If this is not the case, RDS notes that Milieudefensie et al. did not explain why the current emissions that

71 Written arguments 6 Milieudefensie et al., margin number 102.

72 See also the Document Explaining the Amendment of Claim Relief Sought Part 1a, margin numbers 8-10.

Milieudefensie et al. attribute to it are unlawful, also in view of the fact that those CO_2 emissions are currently permitted worldwide.

73. Milieudefensie et al. make it appear as if there is a static situation in which only RDS's conduct would be relevant, but that is not the case, of course. The risk of climate change is the consequence of the actions of society as a whole, today and in the future. RDS does not operate in a vacuum and there are many players in the world that affect each other's actions - and thus their CO_2 emissions as well. It cannot be said at this time how CO_2 emissions will develop, and therefore not what will be permissible in a year or at the end of 2030 in terms of CO_2 emissions by the Shell companies and the end-users of their energy products. From now on, society will continue to undergo many developments that cannot be predicted at this time, influenced by (global) politics, among other things. For example, the incoming President of the United States has announced that the United States will rejoin the Paris Agreement, after the United States of America actually withdrew from the Agreement under the sitting president. It is also unknown which measures are still or will be necessary in the near future and beyond to combat climate change. It is also logical that governments will have taken further measures by that time and have further regulated CO_2 emissions. Think, for example, of the announced tightening of the European ETS, to which RDS will devote further attention below. It is therefore impossible to predict what action with regard to climate change will be permissible in 2030: for the world or for Dutch society as a whole, or for individual parties such as RDS or Milieudefensie et al. As such, Milieudefensie et al. have not substantiated that RDS will be acting unlawfully in 2030, or at any time prior to that, by, at that moment, not having restricted the emissions attributed to it as sought by Milieudefensie et al.

74. This must lead to the denial of the claims. After all, the Supreme Court already decided in the nuclear arms ruling that in the event of a declaratory judgment concerning allegedly unlawful conduct in the future: *"it will have to be assessed whether they have been formulated in such a way that there is a situation of unlawfulness in all of the cases covered by that"* and that *"if it already transpires in advance that the actions which the court is asked to prohibit in these proceedings have*

been defined in such a way that not all of them are unlawful or they are not unlawful under all circumstances, and the question of whether or not they are unlawful, unlike in the case of actions performed in the past, cannot be assessed on the basis of the circumstances of the case either, the declaratory judgment has not been defined concretely enough."[73] The scope of that rule is broad and pertains not only to matters such as a claim against the State regarding nuclear weapons, but also to claims related to software as noted in the Statement of Defence[74], and Advocate General Wissink recently also referred to it in a financial services case.[75] The claim is therefore described too broadly. It cannot be established in advance that the emissions in respect of which Milieudefensie et al. are seeking a declaratory judgment that these are unlawful and must be reduced (relief sought under 1), or in respect of which Milieudefensie et al. are seeking an order to limit these emissions or cause them to be limited (relief sought under 2), are indeed not all unlawful or not unlawful under all circumstances.

4 NO UNLAWFUL ENDANGERMENT, SO NO DUTY OF CARE ON THE BASIS OF *KELDERLUIK* FACTORS

4.1 No - unlawful - endangerment as a result of RDS's conduct

75. The basis for Milieudefensie et al.'s claims is primarily that RDS's conduct constitutes unlawful endangerment. That is not the case, and I will explain this on the basis of each of the four factors from the *Kelderluik* ruling ['trapdoor ruling'], namely (1) the likelihood of damage, (2) the nature and seriousness of any damage, (3) the nature of the conduct (including the usefulness of the activity or the object pursued with it) and (4) the onerousness and customariness of taking precautionary measures.

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

74 Statement of Defence, margin number 444.

75 Opinion of Advocate General Wissink, ECLI:NL:PHR:2018:1429, no. 5.10.1. The Advocate General did opine that another part of the decision should be quashed, but the Supreme Court did not follow the Advocate General on that other point, which is separate from the point referred to here. See Supreme Court 12 April 2019, ECLI:NL:HR:2019:590.

(1) The likelihood of damage, including the degree of probability that potential sufferers of damage will not observe the required attention and care

76. When applying the *Kelderluik* factors, one must consider the likelihood that a specific risk will be created as a result of RDS's activities and that this will result in damage. In other words, there must be a connection between the danger asserted by Milieudefensie et al. and the conduct of RDS that reportedly causes that danger. Milieudefensie et al. have not demonstrated that connection. In fact, Milieudefensie et al. believe that they do not have to demonstrate this and can suffice by invoking the general danger of climate change and its general consequences. This is incorrect.

77. RDS already explained that RDS's own emissions, even together with the emissions of Shell and the end-users of its products, did not and will not lead to the danger of climate change asserted by Milieudefensie et al.[76]

78. Milieudefensie et al. believe that individual facts and circumstances do not play a role in this case in the assessment of the question of unlawfulness. In particular, Milieudefensie et al. believe that they do not have to state exactly by whom, where and when damage will be suffered as a result of RDS's policy, because this case concerns a preventive injunction.[77]

79. That argument, too, is unfounded. The application for a court order pertains to the performance of the obligation pursuant to Article 6:162 in conjunction with Article 3:296 DCC to prevent (future) unlawful conduct. This therefore requires that there be an unlawful act, or at least that there be a real threat of unlawful conduct. Milieudefensie et al. assert that the general consequences of dangerous climate change are sufficient for requesting a preventive injunction on the basis of Article 3:305a DCC. They believe they can derive this from *Urgenda*. Milieudefensie et al. fail to recognise, however, that there must be unlawful conduct (or the real threat thereof), and not a general danger

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76 Statement of Defence, margin number 504 et seq.

77 Written arguments 2 Milieudefensie et al., margin numbers 36-42.

(or the real threat thereof). The fact that in the *Urgenda* case, the Court of Appeal deemed it sufficient for the issue of an order that there be a real threat of a danger against which measures must be taken is related therefore to the fact that the State's (imminent) unlawful conduct lay in the violation of Articles 2 and 8 ECHR and the State's obligation to take adequate measures due to the danger of climate change in light of the precautionary principle. In this case, Milieudefensie et al. assert that RDS is acting unlawfully on the basis of the societal standard of due care of Article 6:162 DCC, also informed with reference to the *Kelderluik* factors. In order to establish that there is an (imminent) unlawful act, it must therefore be sufficiently asserted that RDS would have to take measures to counteract a specific danger that it creates, inter alia in view of the likelihood that this will cause damage. Milieudefensie et al. have not done this.

80. In addition, Milieudefensie et al. must assert that there is a likelihood of damage as a result of the inattention and carelessness of the injured parties and that RDS is obliged to take certain safety measures in view of this. Milieudefensie et al. did not assert this, either. Here too, attention must be paid to the nature of the class action. The NGOs are protecting the public interest, in the sense of the interest of all natural and legal persons on earth, or alternatively in the Netherlands. In that case, it must also be taken into account in assessing this *Kelderluik* factor that this concerns the likelihood of damage as a result of inattention or carelessness on the part of the entire world population, or alternatively of Dutch residents. The risks of climate change are generally known. Consequently, there is no risk that manifests as a result of inattention or carelessness. The entire world, or, as the case may be, the Netherlands, is sufficiently aware of the risk. Governments can take measures and are doing so. In that case, there is no room to impose further-reaching measures on RDS, as the only private party.

81. Here, too, it is not a good answer to refer to the limited possibilities of an individual citizen to avert this risk. That is not in line with the nature of a class action. That would mean the following. RDS's behaviour would be assessed in the light of the interests of the entire world population, or alternatively, of the population of the Netherlands. At the same time, the question of whether there is damage as a result of

inattention or carelessness on the part of the injured party would be assessed in light of the conduct viewed at the level of individual citizens. Those do not go together.

(2) The nature and seriousness of the damage

82. RDS already pointed out above that the parties agree that the emissions of Shell and the end-users of its products do not "*in and of themselves lead to the danger described*."[78] RDS's conduct therefore does not create the danger that Milieudefensie et al. raise in these proceedings, and in any event not the possible damage as outlined by Milieudefensie et al. as a result of climate change as such.

83. In addition, the nature and seriousness of the possible dangers of climate change are dynamic rather than static. The measures taken and yet to be taken by governments and other actors will affect CO_2 emissions and thus to what extent the temperature on earth rises and the risks materialise. After all, there are all sorts of possible scenarios for achieving the objectives of the Paris Agreement and it is currently not possible to determine with certainty exactly which scenario will be followed. RDS being straitjacketed by these proceedings into achieving a certain court-ordered emission reduction for a long period of time does not correspond to that.

(3) Nature of the conduct and utility it serves

84. Another *Kelderluik* factor is the nature of the conduct and the utility it serves. Nor does this *Kelderluik* factor point to a duty of care on the part of RDS.

85. Society as a whole emits CO_2. The risk of dangerous climate change is therefore the result of the actions of everyone in society, not just RDS. Certainly in recent years, the relationship between the use of fossil fuels, CO_2 emissions and climate change has become very widely called to the attention of public and political parties, both in the Netherlands and abroad. The fact that everyone in society, including the claimants, to a greater or lesser extent displays the same conduct

78 Summons, margin number 509.

as the conduct of RDS which Milieudefensie et al. is taking action against indicates that this conduct is permissible.

86. The Shell Group's activities also fulfil a role in society that is recognised as useful and important. For the time being, the use of oil and gas is essential for the functioning of society. Even if the transition to other energy sources has been started, society will still be dependent on fossil fuels for the time being, and this will also be the case in a net-zero world in the current state of affairs. RDS explained this, inter alia, in its introductory oral arguments and in the discussion of the energy transition, and refers here to what it noted there.

87. The Shell Group's activities are permitted and regulated, which RDS also explained when discussing the energy transition. That regulation pertains to all sorts of aspects of the chain: from production of fossil fuel to its sale and use. Examples include permits that Shell needs to be able to produce oil or gas, the requirements that the refineries must meet, the quality requirements for petrol as sold at the pump and the requirements imposed for the engines in which that same petrol is used. CO_2 emissions are also regulated in that chain and are therefore permitted, within the framework of that regulation. This means that there is no basis to qualify the conduct within the framework of that regulation as unlawful.

88. The fact that the activities of the Shell companies are permitted and regulated, specifically with regard to CO_2 emissions, precludes the idea that RDS is acting unlawfully. The fact that the Shell Group's activities are regulated and permitted must be taken into account separately in the assessment of the nature of RDS's conduct in the context of the *Kelderluik* factors. After all, this fact confirms that the actions of the Shell Group are permitted and, in themselves, are not of such a nature that they would force RDS to act differently and would lead to a duty of care on the part of RDS.

89. RDS will explain this in more detail based on the EU ETS already mentioned. With the ETS, EU law provides for an exhaustive regulation for the emissions of the installations covered by the ETS. The ETS scheme was explicitly created to meet the EU's climate change objectives. The EU has now adopted these objectives in the

light of the Paris Agreement. The ETS is therefore explicitly intended to combat climate change.

90. The nature of the granting of an allowance is precisely that a right to emit CO_2 is granted. Article 3 of Directive 2003/87 provides that an emission allowance is: "*an allowance to emit one tonne of carbon dioxide equivalent during a specified period, which shall be valid only for the purposes of meeting the requirements of this Directive and shall be transferable in accordance with the provisions of this Directive.*" And Article 6(1): "*The competent authority shall issue a greenhouse gas emissions permit granting authorisation to emit greenhouse gases from all or part of an installation if it is satisfied that the operator is capable of monitoring and reporting emissions."* It is also provided that permits issued under the Industrial Emissions Directive[79] do not entail further restrictions: "*the permit shall not include an emission limit value for direct emissions of that gas unless it is necessary to ensure that no significant local pollution is caused*." That directive was implemented in the Netherlands in the Environmental Management Act and the Living Environment Law Decree. Milieudefensie et al.'s thinking that this is not an exhaustive regulation because the Environmental Management Act states in another provision that civil claims can exist is not in line with the idea behind the (European law) ETS.

91. Shell is subject to the ETS for a significant part of its activities in the EU, for example for oil refining. In so far as Shell has the emission allowances required on the basis of the ETS, these emissions have been "permitted" by the government to Shell. In other words, Shell is therefore permitted to give off emissions for which it has emission allowances. When granting those allowances, the interest in combating climate change was expressly taken into account.

92. The fact that Shell has emission allowances therefore precludes assuming the unlawfulness of Shell's conduct, also vis-à-vis RDS.

93. Since Shell has emission allowances, this precludes the assumption of the unlawfulness of the emissions caused with the use of those

79 Directive 2010/75/EU.

allowances. In the *Ludlage v Van Paradijs* judgment, the Supreme Court held that "*the answer to the question of whether and to what extent a permit granted by the government affects the assessment of the liability based on unlawful act of the party who acts in accordance with the permit granted but who causes damage or inconvenience to third parties depends on the nature of the permit and the interest pursued by the regulation on which the permit is based, in connection with the circumstances of the case* […]. *In addition, the permit holder may generally rely on the permit having been granted in accordance with the law and that the interests to be taken into account in accordance with the law have been fully and properly weighed by the licensing authority, and that he is entitled to use that permit*." These criteria have been met.

(a) After all, Shell holds permits in the sense referred to by the Supreme Court. Those permits and emission allowances give Shell the right to emit CO_2. Incidentally, this also applies to various industrial customers of Shell's products for the emissions they cause with these products. From Shell's perspective, those are scope 3 emissions (namely of its end-users). For Shell's industrial customers, however, these are emissions that are independently covered by the ETS (such as power plants, chemical industry parties or, for example, the steel industry) and which must therefore also be covered by emission allowances.

(b) With its emissions, Shell is acting in accordance with that permit (as are the aforementioned customers of Shell products with their emissions).

(c) The interest pursued by the regulation on which the permit is based is, on the one hand, to limit CO_2 emissions in order to prevent climate change and its consequences and, on the other, to enable industry to carry out their activities in the EU and thus, inter alia, to prevent carbon leakage. The European legislature therefore, briefly put, considered precisely what Milieudefensie et al. raise here. Milieudefensie et al. are attempting to avoid this by arguing that this consideration was not made during the acquiring of an emission allowance. But

what Milieudefensie et al. fail to mention is the crucial fact that the EU legislator itself made this consideration, namely when determining what the total EU emission cap would be. The granting and trading of the emission allowances is then merely a question of allocation: the weighing of interests was made when the cap was set.

(d) Milieudefensie et al. have not made it at all clear why Shell should not be entitled to rely on the permit granted. Their argument that the permit only has the aforementioned effect if it is demonstrated that it is guaranteed that damage is fully compensated or prevented is not substantiated by them at all. That is not surprising, because the point is precisely that the interests were weighed in determining the total EU emission cap, the allocation and auction of a certain quantity of emission allowances and the granting of permits based on that, and that is not the same as the question of whether certain interests are left completely intact. This is all the more true because Milieudefensie et al. presented a completely one-sided story. That one-sided story does not involve a weighing of interests. The reality is more complex, and the considerations provided for in treaties and made by the EU legislator are therefore also more complex.

94. This is not altered by the fact that not all of Shell's activities fall under the ETS. After all, the point is that the emissions covered by the ETS cannot be unlawful in any event for the reasons stated.

95. It could be the case that Shell receives a relatively high number of those emission allowances and others relatively fewer. This means that Shell will have to reduce less than others, but the objectives of the ETS are indeed achieved. Shell and its customers can therefore have access to the required emission allowances which allow more emissions than Milieudefensie et al. consider permissible with their claims. Even aside from the fact that this order sought goes beyond what RDS is required to do as the party being held liable, this also means that the order sought is directed at Shell emissions that are not unlawful - and certainly not under all circumstances. With this situation, it therefore cannot be established that RDS's conduct is

always unlawful. For the reasons I have already mentioned above, this point also precludes the award of the claims.

96. In margin numbers 81-84 of written arguments 4, Milieudefensie et al. also argued in this respect that “an inadequately functioning public-law framework cannot have indemnifying effect." Milieudefensie et al. have not demonstrated that the ETS functions inadequately. Milieudefensie et al.'s criticism basically means that the scheme does not go far enough, but that is not a basis for assuming that the scheme functions inadequately. In addition, RDS also points out that the EU ETS has been and is being further tightened up. It is a fact that fewer emission allowances will be available in the future, including 2030, and it is likely that the number of emission allowances will be further reduced as a result of the tightening. Milieudefensie et al. seem to acknowledge that the ETS will in any event be in line with its interpretation of the Paris Agreement after that tightening.

97. Lastly, the EU ETS is not the only “cap and trade” scheme and the only way in which emissions are regulated. Similar “cap and trade” schemes also apply, for example, in other (states within) countries, such as California and Quebec, and are also being considered in more countries for the future. In addition, there is much more regulation aimed at reducing CO_2 emissions in various sectors from which it follows that certain products and their use are expressly permitted, as RDS explained in Part B of the opening arguments. Milieudefensie et al.’s argument that regulation is only relevant in connection with European emissions therefore does not hold.

(4) Onerousness and customariness of taking measures

98. Milieudefensie et al. acknowledge that imposing the measure they seek will have far-reaching consequences for RDS and the Shell Group as a whole. That in itself already argues against assuming the duty of care asserted by Milieudefensie et al.

99. After all, the consequence of that would be that the Shell Group's activities must be drastically reduced. There would be an unparalleled intervention by the court in the freedom of the Shell companies to conduct their business. During the previous hearing day,

Milieudefensie et al. even anticipated that Shell could be “smaller by about half in 2030” compared to its current size.[80] This is a measure that is clearly extremely onerous and highly unusual, and that is being conservative. It goes without saying that such a measure has no precedent. Milieudefensie et al. try to justify this measure by arguing, among other things, that otherwise "the entire world would have to undergo catastrophic climate changes because it would be too onerous for Shell (and other large emitters of CO_2) to change."[81] That justification does not hold. The CO_2 emissions of Shell and the end-users of its products do not cause the risk of dangerous climate change and that risk is not avoided if the measure sought is imposed. RDS would be the only one on whom this measure is imposed, while it is clear that it would have no effect. Milieudefensie et al. acknowledge this, because it points out in the quote just cited that other CO_2 emitters would also have to change.

100. Finally, awarding Milieudefensie et al.’s claim would drastically obstruct RDS's operations in another way as well, because it would no longer be able to respond to developments that occur between the time of award and 2030, while the rest of society would indeed have this possibility. This therefore also applies to RDS’s competitors. This would completely disrupt the level playing field between RDS and its competitors. In its oral arguments of last Tuesday, Milieudefensie et al. argued that the consequences for the level playing field are not that serious, again by attributing to RDS "a special" and even “absolutely dominant position."[82] Milieudefensie et al. did not clarify on what they base all of this. In any event, it is not correct. RDS does not have an absolutely dominant position on the oil and gas market. As stated, it only has a small share in the worldwide reserves of oil and gas. However, the vast majority of that - approximately 80% - is owned by state-owned companies that are many times larger than RDS and whose position Milieudefensie et al. do not discuss.[83] Furthermore, Milieudefensie et al. argue that there are also parties active in the oil and gas market that are smaller than RDS and which still operate

80 Written arguments 8 Milieudefensie et al., no. 81.

81 Written arguments 8 Milieudefensie et al., no. 91.

82 Written arguments 8 Milieudefensie et al., margin number 75 et seq.

83 RDS referred to this point earlier, inter alia in Written arguments on Court’s role in development of the law from RDS, margin number 2 et seq.

profitably, and that the same should therefore also apply to RDS if it were forced to reduce its activities. In so doing, Milieudefensie et al. disregard the relevant point. Awarding the claims would mean that RDS would - but its competitors would not - be obliged to reduce the scope of their activities. Unlike RDS, RDS's competitors would therefore not be limited in their operations for years.

5 NO DUTY OF CARE FOR RDS BASED ON CLIMATE TREATIES, HUMAN RIGHTS OR SOFT LAW

5.1 Introduction

101. In support of their claims, Milieudefensie et al. invoke treaties (in particular the ECHR, but now also the UN Climate Convention and the Paris Agreement), as well as "soft law" instruments (such as the UN Guiding Principles) in support of their argument that RDS has an unwritten duty of care to reduce its CO_2 emissions. None of these categories results in the legal obligations for RDS that Milieudefensie believes it can derive from this.

102. Today, I will explain - in more detail - the following points:

- the UN Climate Convention and the Paris Agreement do not give rise to any safety standard that is binding for RDS.
- as a treaty, the ECHR is only directly binding on States and not on private parties, while the other instruments cited by Milieudefensie et al., such as the UN Guiding Principles, are not binding as such. They therefore do not entail any legal obligations for RDS.
- the policy latitude that States have and the interests taken into account in cases where Articles 2 and 8 ECHR apply are broad and diverse, and also include other interests worthy of protection, such as the creation and retention of access to energy and the standard of living.
- partly for these reasons, the judgment of the Supreme Court in *Urgenda* does not support Milieudefensie et al.'s claims.

103. In doing so, I will also discuss the questions posed by the District Court in September in this respect. That pertains to the significance of the judgment of the Supreme Court in *Urgenda* for this case (question 7) and, in addition, the question of what interests and factors must be taken into account in the weighing of interests in relation to Articles 2 and 8 ECHR, and "*what conclusion can or must be drawn from the circumstance that RDS committed itself to the UN Guiding Principles*" (questions 15 and 16).

5.2 No (binding) safety standard follows from the UN Climate Convention and Paris Agreement

104. At the hearing, Milieudefensie et al. argued on several occasions, in addition to their previous argument, that the temperature objective of the Paris Agreement constitutes "a universally supported and accepted safety standard."[84] According to Milieudefensie et al., the temperature objective of the Paris Agreement, together with certain scientific findings, also leads to a hazard limit that may not be exceeded. According to Milieudefensie et al., this safety standard and hazard limit reportedly also have independent legal significance for non-state parties such as RDS, namely in the context of both Article 6:162 DCC and human rights.

105. It does not follow from the wording of the Paris Agreement that the contracting parties intended the temperature objective to set a universal safety standard and, following that, a hazard limit. Milieudefensie et al. also failed to explain where it derives that position. In any event, Milieudefensie et al.'s position is not confirmed in the *Urgenda* decisions to which they refer.

106. In any event, the Paris Agreement does not entail any obligations or rights for non-state parties. RDS is not a state and cannot be equated with one. For that reason, the alleged safety standard that Milieudefensie et al. derive from the Paris Agreement cannot bind RDS in any event. This is not altered by the fact that the parties to the UN Climate Convention and the Paris Agreement also see a role reserved

84 See, inter alia, Written Arguments 1 Milieudefensie et al., margin numbers 14-22 and Written Arguments 6 Milieudefensie et al., margin number 22.

for non-state parties (Non-Party Stakeholders) in tackling climate change. On the contrary, the position of the contracting parties confirms in fact that the Paris Agreement does not impose any obligations on non-state parties. Consequently, the Paris Agreement does not give rise to a universal safety standard that Milieudefensie et al. could invoke vis-à-vis RDS, not even in the context of Article 6:162 DCC.

5.3 ECHR does not give rise to any obligation for RDS to reduce its CO_2 emissions

5.3.1 No effect of the ECHR

107. There is no doubt that the ECHR does not directly bind private parties like RDS.[85] The provisions of the ECHR impose obligations on States, and not on private parties. As it just explained, RDS cannot be equated with States, either.

108. Milieudefensie et al. assert that they are relying on the "indirect" horizontal effect of Articles 2 and 8 ECHR, which, according to Milieudefensie et al., entails that the societal standard of due care of Article 6:162 DCC is “coloured" by the provisions of the ECHR.[86] Milieudefensie et al., however, go beyond "colouring" an open private-law standard in two respects:

(1) Based on Articles 2 and 8 ECHR, Milieudefensie et al. construe a *positive* obligation for RDS, linked to the precautionary principle;

(2) Milieudefensie et al. assert that RDS is obliged on the basis of that positive obligation to *“act (pro)actively and take measures that prevent citizens from violating each other's fundamental rights*."

109. This approach from Milieudefensie et al. does not hold. As explained in the Statement of Defence,[87] when it comes to violations of the

85 Statement of Defence, part 7.6.2.
86 Summons, margin number 667.
87 Statement of Defence, part 7.6.5.

provisions of the ECHR, these are, in horizontal relationships, at most just one of the many factors that may arise when fleshing out open standards in private law.[88]After all, case law shows that human rights only have "indirect" effect in horizontal relationships, in the sense that the interests they protect are included in the weighing of interests made by the court in the application of the open standard of Article 6:162 DCC.[89] That weighing of interests can - and must - take into account the fact that, by their nature, these provisions are not formulated for relations between private parties.[90] Moreover, according to this case law, the court exercises restraint based on the notion that the freedoms of the defendant may not be overly interfered with either.[91]

110. In this case, no indirect horizontal application of Articles 2 and 8 ECHR within the context of Article 6:162 DCC will lead to a different result when it comes to the question of whether RDS violated any standard of due care. The interests protected by Articles 2 and 8 ECHR which Milieudefensie invokes are already taken into account in the assessment based on the *Kelderluik* factors, and do not change that weighing. RDS refers to its discussion of the individual *Kelderluik* factors. Incidentally, even if it should come to a weighing of human rights interests in the context of the assessment based on the *Kelderluik* factors, RDS's constitutional interests must also be taken into account, such as the right to undisturbed enjoyment of its property (Article 1 First Protocol ECHR and Article 17 Charter of Fundamental Rights of the European Union) and the right to free enterprise (Article 16 Charter of Fundamental Rights of the European Union). On balance, the reliance on human rights does not add anything essential to the assessment in this case.

111. Milieudefensie et al. argue the opposite on the basis of the argument that RDS has a *"very exceptional dominant position in relation to*

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88 J. Emmaus, *Handhaving van EVRM-rechten via het aansprakelijkheidsrecht* (diss. Utrecht), Amsterdam: Boom juridische uitgevers 2013, p. 22; A.W. Hins and A.J. Nieuwenhuis, *Hoofdstukken grondrechten,* Nijmegen: Ars Aequi 2017, p. 171.

89 R. Nehmelman and C.W. Noorlander, *Horizontale werking van grondrechten*, Deventer: Kluwer 2013, para. 5.3.3.

90 Asser/Hartkamp 3-I 2018/227-228.

91 J.H. Gerards and C. Sieburgh (ed.), *De invloed van fundamentele rechten op het materiële* recht, Deventer: Kluwer 2013, p. 40; A.W. Hins and A.J. Nieuwenhuis, *Hoofdstukken grondrechten,* Nijmegen: Ars Aequi 2017, p. 162. See also Asser/Hartkamp 3-I 2018/227.

causing and preventing climate change." That dominant position is allegedly *"at least comparable*" to that of a State.[92] RDS could reportedly even exceed the role of a state "*in terms of power and influence*."[93] It has already been explained in these oral arguments that this is factually incorrect. RDS has no special position in causing or in averting the risk of dangerous climate change. Moreover, a material difference between RDS and a State is that a State can impose emission reductions by means of legislation and regulations. RDS cannot do that. This pulls the rug from under Milieudefensie et al.'s argument that human rights should weigh heavily in this case.

112. Milieudefensie et al. are essentially asking the District Court to give direct effect to Articles 2 and 8 ECHR regarding the connection with Article 6:162 DCC, and not just to take Articles 2 and 8 ECHR into account in the manner described above. In that respect, Milieudefensie et al. assert not only that RDS should refrain from an alleged violation of human rights, but also that it must actively take measures to prevent human rights from being violated, and on top of that prevent citizens from violating each other's human rights.[94]

113. As such, Milieudefensie et al. fail to recognise that, by their nature, the provisions of the ECHR are not suitable for direct application in horizontal relationships, precisely because they were written for the vertical relationship between citizens and the government.[95] The obligations of States pursuant to Articles 2 and 8 ECHR cannot be applied one-to-one to private parties via the open standard of Article 6:162 DCC.

114. This therefore also applies - and in fact even more so - to the positive obligations invoked by Milieudefensie et al. with reference to *Urgenda*. Under certain circumstances, States may have a positive obligation under the ECHR, on the basis of which they may be required to actively take measures to protect citizens from infringements of their rights (contrary to the negative obligations, which, briefly put, boil

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92 Written arguments 6 Milieudefensie et al., margin number 55. Cf. Summons, margin number 668.

93 Written arguments 6 Milieudefensie et al., margin number 56.

94 Summons, margin numbers 668 and 670.

95 Asser/Hartkamp 3-I 2018/227.

down to States having to refrain from infringing treaty rights). There are various reasons for this.

- The assessment of the question of whether a State has a positive obligation depends on a weighing of interests between the individual invoking protection, on the one hand, and society as a whole, on the other. However, that weighing of interests cannot be made in the same way in the horizontal relationship between private parties, and that fact already precludes the effect in such relationships. RDS will return to this when it discusses the District Court's question about the weighing of interests that must be made in the application of Articles 2 and 8 ECHR.

- By their nature, the ECHR and the measures required by the ECtHR in that respect are directed at States, which have the ability to make laws to that end and have (state) means to enforce them. This applies in particular to the positive obligations that States may have to use appropriate measures to prevent the infringement of the rights to be protected, which, in the case law of the ECtHR, always consist of securing an adequate legal framework and ensuring compliance with and enforcement thereof.[96]

- These measures cannot be required of a private party like RDS as if they were a state. RDS is not a state. RDS also does not have the same possibilities or means as a state which are necessary to provide the protection that Milieudefensie et al. believe that RDS should provide, and it therefore cannot have any positive obligations like States.

115. On the second hearing date, Milieudefensie et al. asserted that, pursuant to Article 13 ECHR, the national court must be able to provide for "effective legal protection" against an (imminent) violation of the rights safeguarded by the ECHR. That RDS "*could hide behind inadequate, defective or even absent climate regulations"* is, in Milieudefensie et al.'s opinion, at odds with this. As such, Milieudefensie et al. fail to recognise, however, that it is the State that must provide this effective legal protection on the basis of Article 13

96 See Written arguments 4 Milieudefensie et al., margin numbers 18 and 19.

ECHR. The State is also able to provide that protection, since it can introduce legislation and guarantee its enforcement. However, this does not mean that the court, as a body of the State, is obliged to introduce the same protection by imposing reduction obligations on private parties in horizontal relationships under the guise of indirect effect of fundamental rights.

5.3.2 The need to weigh various interests and the policy latitude in that respect confirms that no reduction obligation follows for RDS from the ECHR

116. The District Court asked which interests and factors should be considered in the weighing of interests under Articles 2 and 8 ECHR.

117. In this respect, RDS puts first and foremost that Articles 2 and 8 ECHR cannot play a role in this case, not even indirectly. The fact that the weighing of interests necessary for the application of Articles 2 and 8 ECHR cannot be made by RDS confirms this again and RDS will explain why.

118. It is up to States to make the weighing of interests in relation to Articles 2 and 8 ECHR: how they weigh the interests protected by Articles 2 and 8, and what interests they take into account in that weighing. This therefore also includes other interests that are protected by Articles 2 and 8 ECHR, but also other human rights as they follow from, inter alia, the ECHR. This also applies when it comes to tackling climate change and the energy transition necessary for that. Milieudefensie et al. ignore the fact that a multitude of interests worthy of protection play a role in combating climate change and that awarding their claims will also have an impact on other interests worthy of protection. Milieudefensie et al. themselves refer to such interests where they defend that these interests are ultimately affected by the consequences of climate change, such as food supply, living environment and living standards.[97]

119. The necessary weighing of interests will also have to take place for every country where the Shell Group operates (in which respect it

97 For example, see Summons, margin number 654 et seq.

should be noted that Shell is of course also active in countries where the ECHR does not apply and is not applied). Local conditions differ enormously from country to country. Milieudefensie et al. acknowledge this and mention in the Summons all sorts of relevant differences, such as different histories, backgrounds and cultures, the stage of development, whether poverty or prosperity exists, differences in national priorities and differences in political and economic systems.[98] This means that the same applies to the interests that must be weighed, and the outcome of that weighing of interests can also vary from country to country, therefore.

120. This is emphasised, for example, by the necessity in countries other than the Netherlands to have access to energy sources, including those supplied by Shell. In some developing countries, for example, access to affordable energy is not a given but is necessary to achieve the Sustainable Development Goals. RDS already explained this in the Statement of Defence, and the International Energy Agency subsequently made this point poignantly clear as regards Africa in particular: "[t]oday*, 600 million people in sub-Saharan Africa (one-out-of-two people) do not have access to electricity*."[99] Access to energy is a matter of vital importance there and for large parts of the world.

121. There is therefore no single answer to the question of how the interests in different countries should be weighed against each other.

122. States lay down the result of their weighing of interests in regulation and policy. We have already outlined that the considerations that States have to make in the energy transition are numerous and fundamental. We have also already outlined that governments are actively involved in this, with the Dutch climate plan, the plans presented by the European Commission in September, and, for example, the announcement by China in the same month that it wants to be CO_2 neutral in 2060.[100] Against that backdrop, it is not up to the parties or up to the court in these proceedings to identify precisely which interests can or should be weighed there. Private parties - such

98 Summons, margin number 704.

99 Statement of Defence, part 2.2.3.2 and **Exhibit RK-33**, IEA, World Energy Outlook 2019, Chapter 10.

100 Written arguments Part I RDS, margin number 8(c).

as RDS - ultimately have to comply with the policy that the various States make.[101]

123. It is also unclear how the weighing of interests required by Articles 2 and 8 ECHR could be made by a private party like RDS. This applies in particular in cases in which positive obligations for States are derived on the basis of Articles 2 and 8 ECHR. The purport of the ECHR is to establish the obligation that a State has vis-à-vis the residents in *its* territory and that means that the weighing of interests also pertains to that.

124. Therein lies another key difference between this case and the *Urgenda* case: *Urgenda* was very specifically concerned with the obligations of the Dutch State vis-à-vis *its* residents. The State can make the necessary weighing of interests for its territory and could also be held accountable for that, according to the court in *Urgenda*. According to the ECtHR, States also have ample policy latitude when adopting the measures.[102]

125. However, the scope of Milieudefensie et al.'s claims goes much further, because in this case, RDS is being called to account as top holding company for the activities that its subsidiaries carry out in dozens of countries worldwide and the CO_2 emissions of the users of Shell's products worldwide. As RDS already explained, the circumstances differ from country to country and therefore also in the countries in which the Shell Group operates. These different circumstances will therefore have to be taken into account. Because of the policy latitude that States have, they can also take such differences in circumstances into account, including when considering the pace at which CO_2 emissions must be reduced in the various countries and how the responsibilities for the measures to achieve that are allocated.

126. This confirms once again that the weighing of interests in relation to Articles 2 and 8 cannot be made by a private party like RDS and therefore cannot be required of RDS. Apart from that, Milieudefensie

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101 The necessity for States to weigh interests is explicitly recognised in instruments such as the UN Guiding Principles, as RDS pointed out above in the discussion thereof.

102 See also Statement of Defence, part 7.6.3.

et al. have not demonstrated that the weighing of interests turns out the same in all countries in which Shell companies operate, and that this weighing therefore culminates in all these countries in a reduction obligation for the Shell Group's activities, and that the size of any reduction obligation is subsequently always the same in all those countries. This alone precludes the claims from being allowed.

5.3.3 In conclusion: *Urgenda*

127. There is another reason why *Urgenda* does not have the significance for this case argued by Milieudefensie et al. The positive obligation that the State has to take reduction measures on the basis of Articles 2 and 8 ECHR is linked by the Court of Appeal and the Supreme Court in *Urgenda* to the precautionary principle that states must observe. The precautionary principle entails that States can be required to take preventive measures on the basis of Articles 2 and 8 ECHR, even if there is no (complete) certainty that a danger will materialise. These measures must be effective, proportionate and non-discriminatory.[103] In other words, in view of the precautionary principle, States must err on the side of caution, even if this requires a great deal from states or if it means that “further-reaching measures must be taken to reduce greenhouse gas emissions, rather than less far-reaching measures."

128. This is in line with the role of states in a democratic rule of law. States have a special and far-reaching obligation to effectively protect citizens' human rights. This special obligation means that even if measures do not seem appropriate due to a lack of certainty that a certain danger will materialise or that measures will be effective against it, States can nevertheless be obliged to take them. This is inherent to the special position of the State, which also has a special power to do so because it has the necessary regulatory power. A private party like RDS does not have this power.

103 Statement of Defence, margin number 640.

5.4 The *soft law* instruments cited by Milieudefensie et al. also do not entail any legal obligations for RDS

129. Milieudefensie et al. invoke not only the ECHR, but also *soft law* instruments such as the UN Guiding Principles.

130. In that respect, a distinction must be made between international treaties such as the ECHR to which the Dutch State is bound, and instruments that do not have that status, such as the UN Guiding Principles and the other sources of *soft law* invoked by Milieudefensie et al.[104] Those UN Guiding Principles also acknowledge that, where they specifically refer to the "*States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms*," and explicitly state that "[n]*othing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights*."

131. The nature of the provisions in such instruments is that they are not legally binding and are not intended to be so.[105] The wording of the various instruments clearly confirms that they do not create any legal obligations. In the UN Guiding Principles, States are said to have "*obligations to respect, protect and fulfil human rights*." But where the role of the business sector is described, for example, principle 13 talks about the "responsibility" of the business community. And unlike for the State, this does not involve a duty to "*respect, protect and fulfil*," but only "*to respect*." An article on the UN Guiding Principles clearly sets out what these express.

> "*According to international law, the duty to respect requires that actors 'refrain from interfering directly or indirectly with the enjoyment' of human rights. This 'entails the prohibition of certain acts …. that may undermine the enjoyment of rights.' Put more succinctly, it obligates actors "not to commit violations themselves." However, under the Guiding Principles, a further key distinction is drawn between obligation and responsibility.*

104 Summons, chapter X.5-X.8.

105 See the sources mentioned in the Statement of Defence, margin numbers 649-650.

> *The responsibility to respect human rights 'means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.' Yet the term responsibility, as opposed to duty or obligation, is intended to indicate 'that respecting rights is not currently an obligation that international human rights law generally imposes directly on companies, although elements of it may be reflected in domestic laws'*".[106] (footnotes omitted, attorneys).

132. Ruggie, the author of the UN Guiding Principles, also emphasises this in the article recently submitted by Milieudefensie et al.[107] He writes in so many words that instruments such as these are not, in themselves, a legally binding solution. He also points out that national circumstances and regulations differ so enormously that harmonisation of rules in a way that is practical is not feasible.[108]

133. In addition, the UN Guiding Principles also recognise that the responsibilities of States go further and are of an entirely different nature than actions that companies can take.

134. Firstly, RDS refers to the explanation of principle 8 of the UN Guiding Principles, which pertains to "*ensuring policy coherence*." It states, for example, the following.

> "*There is no inevitable tension between States' human rights obligations and the laws and policies they put in place that shape business practices. However, at times, States have to*

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106 Robert C. Blitt, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*, Texas International Law Journal 48/1, p. 43-44. Also available digitally at: https://respect.international/wp-content/uploads/2017/09/Beyond-Ruggie.pdf.

107 Exhibit MD-273.

108 In, for instance, Chapter 6: "*At the same time, creating an overarching legal regime, whether within human rights law as the current Ecuador and South Africa led initiative has framed it, or some other framing, seems highly implausible, not only on political but also on sheer logical grounds. It would involve harmonizing aspects of often vastly different bodies of national, sub-national and international law – for starters, investment law, trade law, corporate law and securities regulation, tax laws, consumer protection law, labor law, anti-discrimination law, other areas of human rights law, and criminal law, and impinge on underlying conceptions of property rights and private contracts. The point is not that these are unrelated, but that they embody such extensive problem diversity, institutional variations, and conflicting interests, not only across states but even within them, that any attempt to aggregate them into a general treaty, a global constitutional order of sorts, would have to be pitched at such a high level of abstraction that it would be without practical meaning*."

> *make difficult balancing decisions to reconcile different societal needs. To achieve the appropriate balance, States need to take a broad approach to managing the business and human rights agenda, aimed at ensuring both vertical and horizontal domestic policy coherence*."

135. States will therefore have to balance various societal interests and can also perform that balancing exercise, but that does not apply to companies.

136. The difference between the position of States and companies is also aptly summarised in an article on the UN Guiding Principles:

> "*There are two things the SRSG's Guiding Principles do not accomplish. First, as is evident from the title, the principles do not aspire to create binding international law or impose obligations on TNCs [Transnational Corporations, at which the UN Guiding Principles are aimed, attorneys]. Rather, its 'normative contribution lies … in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.' Similarly, the Guiding Principles do not offer a plug-and-play 'tool kit' for identifying corporate human rights responsibilities. Instead, they proffer a sliding-scale approach for corporations based on their size and, ostensibly, their location. In the words of the report, 'When it comes to means for implementation … one size does not fit all.'*
>
> *Inherent in the SRSG's approach is a rejection—to the relief of many corporate boardrooms—of what he labels the 'advocacy community's' attempt 'to lay on business itself all manner of responsibility for social outcomes.' The purpose, therefore, of the Guiding Principles is to 'clearly differentiate the respective roles of businesses and governments and make sure that they both play those roles.' In other words, while government retains the exclusive responsibility for protecting and fulfilling human rights obligations, the litmus test for corporations under the*

> *Guiding Principles only inquires whether business enterprises respect human rights.*"[109]
>
> (Emphasis added and footnotes with references to Professor Ruggie's statements and the explanation to the UN Guiding Principles have been omitted from the quote, attorneys).

137. This brings RDS to the District Court's question in response to the UN Guiding Principles. That question stated that "*RDS committed itself to the UN Guiding Principles*." Before RDS answers the question, it considers it useful to cite the quote from the summons invoked by Milieudefensie et al.:

> "*We are committed to respecting human rights. Our human rights policy is informed by the UN Guiding Principles on Business and Human Rights and applies to all our employees and contractors*" (emphasis added, attorneys).

138. RDS has stated that it is "*committed to respecting human rights*". Here, "*committed*" expresses that it is devoted to respecting human rights. RDS did not say here that it considers itself legally bound by the UN Guiding Principles. “Committed to” is therefore more pronounced than RDS's own statements about the UN Guiding Principles. Obviously, this does not make the UN Guiding Principles meaningless: RDS has stated that its conduct in specific areas is “informed” by, among other things, the UN Guiding Principles; climate is, incidentally, not one of these specific areas. RDS puts this into practice in all sorts of ways. For example, RDS has expressed that it “*manages*” the influence of its activities on those who live nearby “*in line with*" the UN Guiding Principles.[110] To that end, for example, “*community feedback mechanisms”* have been introduced for extensive activities and projects. On the basis of those, residents can report to Shell with

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109 Robert C. Blitt, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*, Texas International Law Journal 48/1, p. 43-44. Also available digitally at: https://respect.international/wp-content/uploads/2017/09/Beyond-Ruggie.pdf.

110 Exhibit RK-31, Shell, Sustainability Report 2019, p. 20. See also, for example https://www.shell.com/sustainability/transparency/human-rights.html#iframe=L3dlYmFwcHMvU3VzdGFpbmFiaWxpdHlfcmVwb3J0XzIwMTkv (last consulted 16 December 2020).

questions and complaints, so that Shell can monitor such questions and complaints and respond to them.

139. Consequently, Milieudefensie et al.'s assertion that RDS's "self-chosen commitment" precludes the defence that the UN Guiding Principles are not legally binding is incorrect.[111] After all, RDS has not "bound" itself to the UN Guiding Principles.

140. Nor can any significance or weight be assigned to the UN Guiding Principles and the other *soft law* sources invoked by Milieudefensie et al. when fleshing out the societal standard of due care. Firstly, the provisions in these *soft law* instruments are worded so broadly that they cannot play any significant role in fleshing out open standards. In so far as Milieudefensie et al. refer to literature from which it allegedly follows that there is room for this, those authors also ignore the fact that these provisions are far too general to be of any significance in the *fleshing out* of the open standard of Article 6:162 DCC. Milieudefensie et al. assert that *soft law* is ideally suited where "mandatory and clear rules of law are lacking" and the court will need "objective reference points."[112] Milieudefensie et al. do not say which objective reference points follow from the UN Guiding Principles or other *soft law* sources cited by Milieudefensie et al. The UN Guiding Principles contain very general recommendations for respecting human rights.

141. Secondly, Milieudefensie et al.'s reliance on a number of Dutch judgments does not hold.[113] Milieudefensie et al. believe that a development can be observed in this respect that non-binding rules have an increasingly decisive influence on the fleshing out of open standards. According to Milieudefensie et al., it can also be derived from this that *soft law*, briefly put, must be given serious weight in the court's balancing of interests in the context of its opinion on unlawfulness. However, Milieudefensie et al. lump together self-regulation in specific industries or sectors with general guidelines drawn up from the perspective of preventing human rights violations.

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111 Written arguments 6 Milieudefensie et al., margin number 61.

112 Written arguments 6 Milieudefensie et al., margin number 63.

113 Written arguments 6 Milieudefensie et al., margin numbers 69-72.

The judgments cited by Milieudefensie et al. always pertain to specific rules drawn up by an industry association or similar organisation. The UN Guiding Principles and the other *soft law* sources cited by Milieudefensie et al. are of a materially different nature and content. After all, these are general, unspecified recommendations to respect human rights, which, moreover, originate from an international organisation. No specific rules that companies must comply with can be derived from these, not even in relation to the connection with the open standard of Article 6:162 DCC.

6 IF THE NGOS ARE REGARDED AS STANDING UP ONLY FOR DUTCH RESIDENTS, NO WORLDWIDE MEASURE CAN BE REQUIRED FOR RDS

142. RDS contested that the NGOs' claims are admissible because they assert that they are defending the interests of the world population and consequently the interests in question are not sufficiently similar, which is required by Article 3:305a DCC. In response to that defence, the NGOs changed course and have taken the position that primarily, they are representing the world population and, in the alternative, the interests of Dutch residents only.[114] If the District Court were to reject the NGOs' primary position but were to accept the alternative position, this means that the NGOs would only be standing up for the interests of the Dutch residents. This also sheds an entirely different light on the claims of the NGOs and the private claimants (who, after all, are all Dutch residents and thus have an interest that is the same as the interest for which the NGOs are acting in this case). After all, the claims focus on RDS's policy with regard to the Shell Group's global emissions and have as basis that the award of these claims is necessary in order to prevent the danger of climate change worldwide.

143. The shift in focus from the entire world population to Dutch residents has important implications for the application of the *Kelderluik* factors. After all, whether there is unlawful endangerment must be assessed in light of the circumstances of the case, which includes the interests that require protection. In this case, those circumstances are therefore

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114 See also the cause-list decision of 4 December 2020, in which the District Court summarised the position of the NGOs on this point in, inter alia, para. 1.1.

limited to purely the interests of Dutch residents and in so far as those circumstances occur in the territory of the Netherlands. The likelihood of damage and the nature and seriousness of that damage as a result of RDS's conduct must therefore be considered in light of those Dutch interests and circumstances, and then set off against the onerousness and customariness of the precautionary measures being requested of RDS. Milieudefensie et al. have not asserted and in any event have not substantiated that RDS can be required to take a worldwide measure with a view to protecting Dutch interests.

144. Although climate change can also entail risks in the Netherlands and thus for Dutch residents, the likelihood of damage and the nature, seriousness and scope of that damage is, of course, not comparable to the damage that could occur elsewhere in the world. In addition, the Dutch are only a fraction of the total world population. With regard to the Netherlands, RDS discussed two risk factors in particular: heat stress and a rise in the sea level. Adaptation is possible for both risks. That is a relevant factor for the assessment of the question of whether the worldwide measure being sought can be awarded. The answer to this question is no. This applies in so far as the NGOs can stand up for the interests of the world population, but it applies a fortiori in so far as the NGOs can only stand up for the interests of Dutch residents. The claims focus on the emissions associated with the Shell Group's worldwide activities. The measure being sought, which is extremely onerous for RDS, is not justified when considered alongside the relevant interests of Dutch residents.

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Attorneys