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| **District Court of The Hague** |
| Case number:Session: | C/09/571932 2019/37901 December 2020 | **NOTES ON ORAL ARGUMENTS 3****IPL** |
|  |  | in the matter of:1. **Vereniging Milieudefensie** both on its own behalf, and in its capacity of representative ad litem and representative of the co-complainants who are listed on Annex A, which annex is attached to the summons and forms part thereof, having its registered office in Amsterdam, the Netherlands;
2. **Stichting Greenpeace Nederland**,

having its registered office in Amsterdam, the Netherlands;1. **Landelijke Vereniging tot Behoud van de Waddenzee**, having its registered office in Harlingen, the Netherlands;
2. **Stichting ter bevordering van de Fossielvrij-beweging**, having its registered office in Amsterdam, the Netherlands;
3. **Stichting Both ENDS**, having its registered office in Amsterdam, the Netherlands;
4. **Jongeren Milieu Actief**, having its registered office in Amsterdam, the Netherlands;
5. **Stichting ActionAid**, having its registered office in Amsterdam, the Netherlands.

ClaimantsHereinafter also called: “Milieudefensie et al.” |
|  |  | Counsel: Mr. R.H.J. Cox  Mr. D.M.J. Dexters Mr. A.J.M. van Diem Mr. S.J. Keuls |
|  |
| Versus |
|  |  | **Royal Dutch Shell plc**Having its registered office in The Hague, the Netherlands Defendant Counsel: Mr. D. Horeman Mr. J. de Bie Leuveling Tjeenk,  Mr. N.H. van den Biggelaar  |
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**IPL**

1. Milieudefensie et al. presented and explained the grounds for the jurisdiction of this District Court in the summons, including the international jurisdiction to hear and determine this dispute. RDS agreed there was such jurisdiction, or in any event did not object to it. This establishes the jurisdiction of this District Court between the parties. This point will therefore not be discussed any further.
2. Milieudefensie et al. has also set out in the summons that and why the dispute must be adjudicated by this District Court under Dutch law. RDS acknowledges with regard to this point, on the one part, the application of Dutch law, but it disputes that only Dutch law applies.
3. I will argue and discuss on behalf of Milieudefensie et al. that the legally relevant and decisive facts are occurring in the Netherlands and that indeed only Dutch law must apply. While arguing this issue I will touch upon the various defences as presented by RDS.
4. The following should be noted with regard to the fact that the legally decisive facts all take place in the Netherlands:

**The disputed event giving rise to damage is occurring in the Netherlands (Handlungsort)**

1. Pursuant to Article 7 of the Rome II Regulation, which applies to (likely) environmental damage, the law of the country where the damage arises applies, unless the claimant opts for the law of the country where the event giving rise to damage occurred. Milieudefensie et al. opts for the application of Dutch law, first of all because the disputed event giving rise to damage is occurring in the Netherlands. I will explain this.
2. RDS’ head office is based in The Hague, the Netherlands, which is also where its executive board is based. RDS is the only defendant in this case and Milieudefensie et al.’s reproach is only directed at RDS.
3. The reproach is directed against RDS due to the control which it has from the Netherlands over the Shell Group and because of the legal and societal responsibility which this control entails under Dutch law.
4. RDS’ executive board determines the concern policy, including the climate policy and the transition policy, as well as the concomitant investment policy and portfolio policy. The executive board is also in charge of the concern-wide management of its policy and has final accountability therefor. These matters have already been explained in the opening arguments.
5. It is these activities of RDS, which are taking place in the Netherlands, which are being exposed in these proceedings by Milieudefensie et al. as the event giving rise to damage and which form the basis of the wrongful act of which RDS is accused. The Netherlands is therefore, in common IPL terminology, the Handlungsort.
6. Milieudefensie et al. is thus not directing its complaints against the conduct of the 1,100 individual group companies which are active in the world under the central management of RDS. Milieudefensie et al. has not presented any facts about the conduct of said 1,100 companies and it would be impossible to research said conduct and have this District Court include these in the assessment by this District Court in these proceedings. Nor is this necessary because none of these 1,100 companies has the responsibility for, nor are any of them in a position to determine, concern policy in addition to or in the place of RDS or to be charged with and to coordinate the management of the entire concern.
7. The foregoing means that RDS is not being held liable for specific acts of its 1,100 subsidiaries. RDS is only being held liable for its own acts as head of the Shell Group and its 1,100 companies.
8. Because the acts of the subsidiaries will not be individually assessed, there is no need to answer the question as to the law in accordance with which the acts of the subsidiaries should be assessed. The reproached acts only relate to RDS and said acts take place from within the Netherlands.
9. Further on I will come back to the RDS defence that not only the Netherlands but many countries are a Handlungsort in this dispute. This is legally and factually incorrect. The Netherlands is the Handlungsort with regard to the concern policy and the accountability of RDS as head of the Shell Group, and is thus also the only Handlungsort in this dispute. The consequence of this is that the entire dispute can be assessed under Dutch law.

**The damage is arising in the Netherlands (Erfolgsort)**

1. Secondly, climate damage is being and will be suffered in the Netherlands as a result of RDS’ climate-unfriendly concern policy. The seriousness and scope of this climate damage which is being caused to humans and the environment in the Netherlands, is caused by the total of worldwide activities of the Shell concern under the management of RDS and will continue to increase if RDS is allowed to continue its concern policy unaltered.
2. The harmful consequences of RDS’ global concern policy are experienced in the Netherlands by, inter alia, the increasing extreme weather forms in the Netherlands and the impairment of the Dutch environment and the living environment due to the warming up of the earth. This has already been discussed in sufficient detail in the summons and the introduction to these oral arguments.
3. Due to the fact that damage is being suffered as a result of RDS’ actions in the Netherlands, the Netherlands is, to stay with the IPL terminology, the Erfolgsort. Even if this case were to be assessed on the basis of the law of the Erfolgsort, this case should be adjudicated in accordance with Dutch law, pursuant to Article 7 of the Rome II in combination with the primary rule of Article 4(1) of the Rome II Regulation.

**Connection with the Dutch legal sphere and the Dutch legal system**

1. On the basis of the foregoing, a judgment awarded against the complainant can only be enforced against the Netherlands-based RDS. It is the only defendant, the wrongful act of which it is accused is occurring in the Netherlands and the requested order seeks to have an end put to this wrongful act in the Netherlands to have further wrongful acts of RDS from the Netherlands prevented. Only in this manner can the environmental damage which RDS causes from the Netherlands through its concern policy be halted globally.
2. Due to the fact that the Netherlands is both Handlungsort and Erfolgsort, there is a very close connection with the Dutch legal sphere and legal order. RDS’ close connection with the Dutch legal system furthermore appears, inter alia, from the fact that the Netherlands is the fiscal seat of RDS and its shareholders’ meetings are also held in the Netherlands. In addition, the connection with the Netherlands expressly also appears from its company name ‘Royal Dutch Shell’, in Dutch (freely translated): ‘Koninklijke Nederlandse Shell’.
3. In short, a conviction is being sought in the Netherlands of a company based in the Netherlands, which determines concern policy in the Netherlands, which policy is implemented under its management domestically and abroad, while the activities connected with the concern policy then lead to environmental damage and other kinds of damage such as harm to health in the Netherlands. That these facts and circumstances are situated in the Netherlands, is not a matter of discussion between the parties.

**Shell's activities outside of the Netherlands does not lead to application of other legal systems**

1. What RDS has argued is that this District Court cannot adjudicate the entire dispute in accordance with Dutch law. According to RDS this would be the consequence of the circumstance that the events giving rise to damage and the damage are in part arising abroad. In that case foreign legal systems would also apply to the dispute.
2. However, as Milieudefensie et al. will demonstrate, the Netherlands is the only Handlungsort, which is why the dispute can and must be assessed entirely in accordance with Dutch law. This also applies if action is being taken to combat the environmental damage which is being suffered abroad as a result of the concern policy which RDS is implementing from within the Netherlands. This follows from Article 7 of the Rome II Regulation which applies to the causing of environmental damage with cross-border consequences.

1. As mentioned, Article 7 of the Rome II Regulation stipulates with regard to international environmental damage, that the obligation under wrongful act which ensues from environmental damage or from personal injury or property damage as a result of environmental damage, is governed by either the law of the country where the damage arises (Erfolgsort) or the law of the country where the event giving rise to damage has occurred (Handlungsort).
2. In the event that environmental damage is suffered in a country other than the country where the damage is caused, it is possible to opt for different legal systems: either the law of the Handlungsort, or the law of the Erfolgsort.
3. Thus if a company based in the Netherlands causes environmental damage in Germany from the Netherlands, the German aggrieved party can choose to have the case assessed under German law, because that is where the damage is suffered. But the German injured party can also opt to have the case adjudicated under Dutch law because that is where the source and origin of the environmental damage is located.
4. Let us suppose that in addition to the German injured party there are also injured parties in Belgium, France and Spain as a result of the event giving rise to damage which occurred in the Netherlands, then they too can opt to have their respective claims against the Dutch company be adjudicated under Dutch law. The four injured foreign parties could also jointly bring such lawsuit in the Netherlands in accordance with Dutch law. Thus even if the damage arises in four different countries with four different legal systems, in such case the entire complex of facts can also be assessed in accordance with Dutch law, if the Netherlands is the Handlungsort.
5. The above also applies if the injured parties are on other continents in the world, according to Article 3 the Rome II Regulation has a universal area of application.

**The objective of prevention and the high degree of environmental protection under the Rome II Regulation**

1. The Rome II Regulation clarifies in recital 25 of the preamble the objective and the background of Article 7 on international environmental damage. It is indicated there that this arrangement is an elaboration of Article 174 of the (former) EC Treaty (now Article 191 of the TFEU) which prescribes (quote from Preamble):

*“[..] shall aim at a high level of protection [...]. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be mitigated at source and that the polluter should pay [..]”.*

1. Being able to hold the polluter liable in all cases – thus regardless of where and in what countries the environmental damage caused by him arises – with application of the law of the country where the polluting activities originate (Handlungsort), intends, inter alia, to make preventive action against cross-border environmental damage possible at source as much as possible. Combating damage at source seeks to prevent environmental damage as much as possible and to avoid unnecessary societal costs as much as possible. The local court is therefore best placed to decide on the application of the national law applicable there in order to assess the case. This is also to the advantage of the polluter against whom the claim has been brought.
2. The arrangement regarding environmental damage of Article 7 consequently has the goal of providing the environment and the victims of environmental damage with as much legal protection as possible. The victims can therefore choose the legal system which is most favourable to them (the “favour principle”).
3. In addition, Article 7 is intended to prevent that the industry can make use of or can abuse existing differences in environmental protection between the different countries. Due to the arrangement of Article 7 the industry is forced to take account of the highest level of environmental protection which relates to its actions.
4. According to Article 7, the law that offers the most protection may always be invoked, whether this is the law of the Handlungsort or of the Erfolgsort. The German, Belgian, French and Spanish injured party in our example can thus each determine for themselves whether their homeland offers the best protection or whether Dutch law offers the best protection. The Dutch company must thus take into account that it may face legal action in each of these legal systems.
5. This can also be read in the Commission proposal of the EU Commission relating to the Rome II Regulation (quote):

*“Article 7 introduces a special rule with regard to third-party liability in the case of environmental violations. […] giving the victim the option of selecting the law of the place where the event giving rise to the damage occurred. […] The solution is also conducive to a policy of prevention, obliging operators established in countries with a low level of protection to abide by the higher levels of protection in neighbouring countries [...]. As such, the rule contributes to generally raising the level of environmental protection. […] After all, the excluding application of the laws of the location where the damage occurred could encourage a business owner to settle along the border and to dump hazardous substances in a river, speculating on the less strict legislation of a neighbouring country. This solution would be contrary to the underlying philosophy of the European substantive law of the environment and the “polluter pays” principle.” [[1]](#footnote-1)*

1. In short, partly in view of this intention to counteract use or abuse by the industry of differences in environmental regulations and to prevent environmental damage as much as possible, Article 7 thus seeks to be a special provision in the case of cross-border environmental damage to offer both the environment and the victims of environmental damage the greatest possible protection.
2. According to recital 24 of the preamble, environmental damage is understood to mean (quote):

*“[...] an adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.”*

1. Climate change covers all of the above-mentioned negative changes and impairments of the natural resources. It is consequently in respect of the cross-border environmental damage in particular for which preventive action at source must be a possibility. The anthropogenic CO2 emissions lead to a chemical change of the atmosphere, which leads to warming up of air, land, water and ice sheets, with all negative consequences for these natural resources and which furthermore impairs the diversity of living organisms (the biodiversity).

**Events giving rise to damage that are likely to occur and damage that is likely to occur are included**

1. That one of the key objectives of the Rome II Regulation is to be able to combat international environmental damage at source and to be able to take preventive action against the source of the international pollution or the likely source of the international pollution, is further clarified by the provisions in Article 2 of the Regulation.
2. Article 2(2) of this Regulation reads (quote):

*“This Regulation shall apply also to non-contractual obligations that are likely to arise.”* (underlining added by counsel)

 This provision in paragraph 2 achieves that not only the wrongful act but also the likely wrongful act falls under the scope of the Rome II Regulation.

1. Article 2(3) of the Regulation reads (quote):

*“Any reference in this Regulation to: (a) an event giving rise to damage shall include events giving rise to damage that are likely to occur; and (b) damage shall include damage that is likely to occur.”* (underlining added by counsel)

This provision in paragraph 3 achieves that the legal system of the Handlungsort where the damaging event arises or where the damaging event is likely to arise can apply.

This paragraph 3 equally achieves that the legal system of the Erfolgsort where the damage arises or where the damage is likely to arise can apply.

1. These passages of paragraphs 2 and 3 of Article 2 again clearly show the objective of the Rome II Regulation to be able to combat likely international environmental damage via a claim for a preventive order or injunction.
2. The foregoing may speak for itself, but can also be read in, inter alia, the Asser IPL series in which this background and scope is explained.[[2]](#footnote-2) All of this can be also be read in Dickinson's English language Oxford publication on the Rome II Regulation[[3]](#footnote-3) and in an edition of the English language Yearbook of Private International Law.[[4]](#footnote-4)

**The concern policy is a (likely) event giving rise to damage and leads to (likely) damage**

1. Against this background it is evident that RDS’ concern policy to this day and the concern policy it intends to implement in the future constitutes a very great threat. This threat consists of this current and future policy contributing to – to stay with the terminology of the Rome II Regulation - the realisation of environmental damage, in particular environmental damage to the atmosphere. As stated, the result of this is the warming up of air, land, water and ice sheets, with all negative consequences for humankind and the environment.
2. Under the Rome II Regulation it must be possible to take preventive action against this likely environmental damage to the atmosphere, which indeed forms the most likely international environmental damage which has ever confronted humankind.
3. The need for this preventive action naturally also ensues from the international climate treaties which have the central objective of preventing this environmental damage to the atmosphere.
4. It is only possible to take successful action against this likely environmental damage if the RDS concern policy can be affected and altered by means of a claim for a judicial order.
5. RDS stipulates, after all, with its concern-wide climate and transition policy and with its investment choices and portfolio choices what the scope of the emissions of the Shell concern into the atmosphere will be, now and in the future. Consequently, this concern policy of RDS is the necessarily decisive factor for the arising but also for the preventing of the (likely) environmental damage to the atmosphere.
6. RDS’ concern policy is therefore the cause and the likely cause of the environmental damage against which it must be possible to take preventive action. If this is not possible, the (likely) environmental damage to the atmosphere (in so far as caused or likely to be caused by RDS) cannot be prevented.
7. That a large-scale inadequate climate policy results in a great likelihood of environmental damage arising and that it must be possible to take preventive action against this by means of a court order, is made clear in the decisions in the Urgenda case. For example, the Netherlands Supreme Court held in the Urgenda case, inter alia (quote):

*“An exceptional situation has arisen in this case. There is, after all, the threat of dangerous climate change and it is clear that measures are urgently necessary, as the District Court and the Court of Appeal have determined and the State also acknowledges [..] The State's policy since 2011, which it intends to continue (see 7.4.2. above), whereby measures are postponed for a longer period of time, is consequently, as the Court of Appeal determined, evidently not in accordance therewith, or in any event the State has not been able to provide insight into the fact that this is the case [..]”* [[5]](#footnote-5) (underlining by consultant)

1. The observation that the policy does not contain the necessary measures to combat the threat of dangerous climate change, led to an order being made against the State, in which it was forced to change said policy. Tackling climate policy at the level of a state or a concern is also the only way to take those with final accountability at both levels to task if they are implementing a policy which is unlawful and violates human rights. There is no other legal way to bring this about.
2. That RDS as parent company within the global concern of the Shell Group barely emits any emissions itself, because far and away most emissions are emitted by its operating companies, is not at all relevant in this respect. The State of the Netherlands, as an organisation, also only emits an extraordinarily small part of the national Dutch emissions. It is the Dutch citizens and companies who together cause the great majority of the national emissions.
3. The court order issued against the State of the Netherlands was not because of its own share in the national emissions, but because the entire total volume of the national emissions over which the State has control was too large.
4. In the same manner, Milieudefensie et al. is not holding RDS liable for its own share in the emissions of the Shell Group, but for the entire collective volume of the emissions of the entire Shell Group, because as head of the Shell Group it has primary (final) accountability for and control over the scope of emissions within the group.
5. The control which RDS has via its central management and the dominant control over the emissions of its concern and the products sold by the concern, is even greater (or certainly no less great) than the control which the State of the Netherlands has over the emissions of its citizens and companies.

In addition, the decision making structures within RDS and its concern is much more direct and efficient than is the case with a state organisation in a democratic state system, as is explained in the research report of Chatham House, the Royal Institute of International Affairs.[[6]](#footnote-6)
6. So, if the State of the Netherlands is responsible for the scope of the emissions of Dutch society, then RDS can and must surely be held accountable for the scope of the emissions within its concern. Just as with the State of the Netherlands, the scope of the emissions over which there is control is ultimately dictated by the policy that is implemented. This is also why it must be possible to challenge that policy as an event giving rise to damage or an event giving rise to damage that is likely to occur.
7. It is therefore also not correct, as RDS asserts as a defence, that its concern policy cannot be seen as a likely cause of environmental damage, and that only the actual emissions can qualify as a likely cause of environmental damage.
8. This is not correct because the likelihood of emissions naturally does not ensue from the emissions themselves. By the time the emissions are actually emitted, the point of the likelihood of emissions has long passed. The emissions are taking place and are irreversible. That is also why worldwide there are calls to implement a different climate and energy policy, whereby all efforts must in fact be geared to preventing actual CO2 emissions. In order to prevent that likelihood of emissions there must thus be intervention at policy level. There cannot be any discussion about this.
9. It is therefore of the greatest importance, both for the environment and for the victims of environmental damage, that the RDS concern policy is deemed an event giving rise to damage within the meaning of the Rome II Regulation and will be assessed as such in these proceedings. After all, a great part of the future is determined on the basis of this concern policy. Suppose that RDS decides tomorrow to invest in a big new oil platform with the intention of being operated for 30 years, the result of this is that the day after, financing and building contracts will be made so that the completion and commissioning of the platform can take place in, let's say, 5 years. It will then be operated for 30 years.
10. This shows that today's policy and the choices made on the basis of today's policy cast a shadow that reaches decades into the future, in this example 35 years. Today's policy thus directly results in a lock-in of extra emissions during those 35 years. The oil to be pumped up and sold will be used to repay the loans and capital-intensive investments taken on now with interest and calculated and expected profits will have to be generated.
11. All parties involved in making this investment decision (such as RDS, its banks and the relevant operating companies) have a great interest, during those 35 years, in securing the right to exploit and sell the oil and will fight tooth and nail if someone threatens to undermine this right. As already explained in the summons, these parties are thereby creating their own resistance to the energy transition. With a multitude of these kinds of long-term investments in the fossil infrastructure by RDS (tens of billions are concerned annually) its interests and the interests of other financial stakeholders simply do not run parallel to the necessary energy transition. The importance of being able to affect this policy is thus extraordinarily great because it encompasses the greatest possible threat of decades of emissions.
12. RDS’ interpretation of the term ‘event giving rise to damage’ would entail in this example that it is not its policy and the related decision to invest that is an event giving rise to damage (or an event giving rise to damage that is likely to occur), but that only upon taking the oil platform into use and upon the sale of the oil products at the pump, would there be an event giving rise to damage (or an event giving rise to damage that is likely to occur). This shows that with such an interpretation there is no longer any practical possibility to prevent worldwide environmental damage at source.
13. According to the prevailing teaching, including the Asser IPL series, the place of the event giving rise to damage, moreover, is the place of the event or the likely event which the injured party is invoking to support its claim on the basis of wrongful act.[[7]](#footnote-7)
14. The point will be clear. RDS’ concern policy is the event giving rise to damage or the event giving rise to damage that is likely to occur within the meaning of the Rome II Regulation. The consequence thereof is that the asserted wrongful act and its consequences domestically and abroad can be adjudicated in accordance with Dutch law.

**The favour principle cannot be rendered meaningless**

1. If the RDS concern policy were not to qualify as an event giving rise to damage (or an event giving rise to damage that is likely to occur), the claimants, contrary to the explicit intention of Article 7 of the Rome II Regulation, would not have any possibility, invoking the law of the Handlungsort, to hold the source and origin of the cross-border (likely) environmental damage liable under one legal system. This would make the favour principle meaningless.
2. RDS’ argument that the events giving rise to damage are the emissions which occur worldwide, would entail that the law of many dozens of *Handlungsorten* would apply to the case. This is evidently not the intention of Article 7 of the Rome II Regulation. See also Professor Dr Von Hein in his comments on the Rome II Regulation (quote):

 *“[I]njured parties may opt for the place where the event giving rise to the damage occurred under article 7, 2nd part, in order to achieve the application of a single law to multiple injuries. Claims for injunctions are covered as well.”*[[8]](#footnote-8) (underlining added by counsel)

This too shows that RDS’ line of reasoning cannot be followed. Application of the law of the Handlungsort thus leads to the application of one legal system, i.e. Dutch law.

1. I will immediately add to this that in the event Dutch law is applied on the basis of the Erfolgsort, because the event giving rise to damage (or the event giving rise to damage that is likely to occur) occurs in the Netherlands, in the substantive review of the wrongful act and the requested order, full account must still be taken of all worldwide emissions which RDS causes with the Shell Group, because of the special characteristics of environmental damage in the form of climate change. It is, after all, the worldwide emissions which are causing this damage in the Netherlands.

**Jurisprudence shows that the term event giving rise to damage can also encompass policy**

1. RDS’ defence that its concern policy cannot be an event giving rise to damage, is not supported by the case law of the CJEU. Milieudefensie et al. refers in this respect to the decision of the CJEU in the case of Kolassa/Barclays Bank. That case was concerned with an Austrian private investor, which in Austria held Barclays Bank, based in England, liable for the furnishing of intentionally incorrect information in its prospectuses. The CJEU considered that the location of the event giving rise to damage (the Handlungsort) could be deemed equivalent to the location where the decision making for the investment modalities and content of the relevant prospectuses chosen by the bank had taken place.[[9]](#footnote-9) The location of the decision making of the bank was in this case England. Which is why Austria could not be deemed the Handlungsort, but only the Erfolgsort. It ensues from this case law that the place where board decisions are made and company policy is determined, can thus indeed qualify as the Handlungsort.
2. That the location of a decision (giving rise to damage) can qualify as Handlungsort also ensues, for example, from the Pez Hejduk case of the CJEU.[[10]](#footnote-10) In this case the location where (the board of) a company decided to put photos on its website, which photos constituted copyright infringement, could be deemed the Handlungsort.
3. In a general sense, on the basis of the aforementioned decisions, but also, for example, on the basis of the Kalimijnen case[[11]](#footnote-11) and the Shevill case of the CJEU,[[12]](#footnote-12) it must be concluded that the adjudicating body may look at the facts of the specific case and on the basis thereof may assess what in the given circumstances is the most reasonable to be deemed an event giving rise to damage or an event giving rise to damage that is likely to occur, taking account of the favour principle.
4. Finally, let us consider the following. The reasoning of RDS that all countries are a Handlungsort because the emissions occur all over the world, is a reasoning which the CJEU by definition rejects. The CJEU judged as follows in the Nintendo case (quote):[[13]](#footnote-13)

*“Where the same defendant is accused of various acts of infringement in various Member States, the correct approach for identifying the event giving rise to the damage is not to refer to each alleged act of infringement, but to make an overall assessment of that defendant's conduct in order to determine the place where the initial act of infringement at the origin of that conduct was committed or threatened to be conducted.”*

1. Even if one were to follow the RDS line to some degree and one were to qualify the emissions themselves as infringing actions, it ensues from this judgement that there can still only be one Handlungsort which is decisive for the law applicable to the case. According to the CJEU, a mosaic of applicable legal systems must be prevented, partly in view of legal certainty and in the framework of the foreseeability of the applicable law, which is also in the interests of RDS. Precisely in this case to the CJEU thus wants to designate a central source as Handlungsort in which all other events giving rise to damage find their origin. Only that source can qualify as Handlungsort. An application of this line to this case can only entail that the Netherlands is deemed the Handlungsort. This is where the policy is made which forms the source and origin of the cross-border (likely) environmental damage.
2. In view of this leading European jurisprudence, RDS’ reference to the judgment of the Netherlands Supreme Court in the BUS/Chemconserve case cannot be attributed the weight that RDS would like. Aside from the fact that RDS provides an unnuanced representation of the contents of this judgment, it concerns an out of date opinion which has in the meantime been surpassed by European jurisprudence. Said lack of nuance of RDS has to do with the fact, inter alia, that the Netherlands Supreme Court in para. 3.5.4, with reference to the Shevill case of the CJEU, could only have meant that, in so far as the Netherlands were not already to qualify as Handlungsort, there could be jurisdiction as Erfolgsort.
With this the Netherlands Supreme Court leaves the possibility open in the relevant case that Germany nevertheless qualifies as Handlungsort because of the policy choice made there.
3. In addition, when assessing judgments on this topic it must be borne in mind that almost none of them relate to the interpretation of the term event giving rise to damage in the context of Article 7 of the Rome II Regulation. These are usually judgments which relate to completely different situations, which in general relate to a jurisdiction matter and not to the question what law applies on the basis of Rome II, and to situations where the high level of protection connected with Article 7 does not play a role in the interpretation of the term event giving rise to damage (or event giving rise to damage that is likely to occur). Every interpretation of this term in the context of international environmental damage, must at all times take the background and objective of Article 7 into account as well as respect and promote the intention of the favour principle which lies enclosed in the article. Upon application of Article 7 there is therefore all the more reason for the adjudicating body to give a suitable and broad interpretation of the term damaging event.

**The RDS concern policy is public policy and has external effect**

1. The conclusion that the RDS concern policy which is implemented from the Netherlands is the central source of origin of the worldwide emissions of the Shell Group and that therefore the Netherlands is the Handlungsort, is reinforced because this policy is effective inside and outside of RDS and the Shell Group. This policy has effect within the concern with regard to the over 1,100 companies which are under RDS’ management, and outside of the concern with regard to the many tens of thousands of shareholders, (institutional) investors, suppliers and other chain partners of RDS.
2. Every year, in an annual report it is obliged to publish by law, RDS must present a public account of the concern policy it has implemented and will be implementing. The concern policy and the public accounting thereof forms the central source on which all stakeholders inside and around RDS and the Shell Group base their decisions for the future. The concern policy also forms the central source for the stock exchange value of the company.
3. The RDS concern policy is thus not a policy that is adapted daily, or a policy at purely conception level but not (yet) at implementing level. It is, on the contrary, a publicly announced policy of a listed company that according to the principles and best practice rules sets out a specific and firm long-term policy line in a transparent manner, which is clear to everyone, for the future of one of the biggest companies in the world.
4. In other words, it is policy from which the confidence is derived both inside and outside the concern that it will be implemented by RDS. This policy is not easily adapted, but only under great pressure of external factors, such as large fluctuations in market prices, fear of loss of good reputation and societal support or the loss of a lawsuit.
5. That is why these are also the kind of risks against which shareholders and other stakeholders in the company are warned in the annual report, because the course might change due to these external circumstances.
But as long as these charted external risks do not materialise, the policy is intended to be implemented worldwide, under the management of RDS. Without great pressure of these kinds of external factors, RDS is like an oil tanker which is difficult to take off course. Adapting the course of this tanker must therefore take place at concern level, which again emphasises the importance of the concern policy as event giving rise to damage (or event giving rise to damage that is likely to occur) within the meaning of Article 7 of the Rome II Regulation.

**Wrongful act or omission leads to the same conclusion**

1. RDS furthermore refers to jurisprudence relating to delicts of omission, from which it ensues that the designated place of the event giving rise to damage must be the place where the action has to occur. RDS has argued that the assertions of Milieudefensie et al. come down to the reproach that RDS is wrongly failing to itself reduce the CO2 emissions of other Shell companies and in line with this, of the end users of their products. This is, however, an incorrect interpretation of the assertions and claims of Milieudefensie et al.
2. Milieudefensie et al. takes the position that RDS is implementing a wrongful concern policy from the Netherlands and is failing to perform its societal duty of care in determining, coordinating and implementing (or instructing the implementing of) its concern policy. After all, as previously explained, the concern policy, including the climate and transition policy, is determined by RDS in the Netherlands. In connection with that concern policy RDS also determines what investments and divestments are made and what energy portfolio will be built up now and in the future. In the implementation of that concern policy RDS is even part of the decision making at project level, as we have already seen earlier in the plea with regard to the divestment of a refinery in California.
3. RDS thus leads in terms of concern policy and the group companies follow. This is a top-down relationship between parent company and subsidiaries.
4. It is this concern policy of RDS which according to Milieudefensie et al. is wrongful. This does not concern a delict of omission of RDS but a wrongful act of RDS. The reproach levelled against RDS is not that it does not intervene in the subsidiaries; the reproach against RDS is that it does not intervene when it comes to RDS itself. This is an important difference.
5. The judicial decisions which RDS has discussed to support its position that the matter concerns a delict of omission, do not apply to this dispute, because these are usually cases which deal with breaking through the liability of the subsidiary to reach the parent company. These are cases where the starting point is that the primary responsibility for the wrongful act lies with the subsidiary. Under certain circumstances, the parent can be held liable in addition to the subsidiary due to close involvement of the parent in the wrongful subsidiary activities in question.
6. This could be presented as bottom-up liability, in which the liability of a lower level in the concern creeps up to the top of the concern. This is an evidently different situation than that in which the parent company itself is the sole party responsible for the wrongful act which forms the basis of the dispute. This could be seen as top-down liability, in which the wrongful act takes place at the top of the concern. This could entail that consequently a wrongful act is also being committed at a lower level in the concern. Whether and in what degree there is wrongful act at a lower level is, however, irrelevant for the assessing of the wrongful act of the parent company itself.
7. In this respect I will briefly return to paragraph 93 of Milieudefensie et al.'s summons, in which it is pointed out that an international trend can be signalled to hold parent companies of multinationals liable in the country where they are based for damaging acts of their subsidiaries abroad. What Milieudefensie et al. meant to point out with this is that if RDS has to take into account that it has to appear in court in the Netherlands for liability derived from a subsidiary, it can definitely expect that it will be held liable for its own conduct in the Netherlands, including in so far as said conduct causes damage abroad.
8. This does not say or intend, however, to base RDS’ liability on a breaking through of the liability as a derivative of liability of the subsidiaries of RDS. It has already been mentioned, this case is purely and alone concerned with RDS’ own liability for its own actions, without the issue of liability of the individual subsidiaries being relevant.
9. There is thus not a delict of omission. But even if the matter were to concern an omission, which is not the case here, there is an omission of RDS to intervene in its own actions. The Netherlands is still the place where action is to be taken because that is where the head office and executive board of RDS are based and that is where it is determined, among other things, how much oil and gas will be produced now and in the future by the Shell Group and what emissions reduction will be the target at group level. The wrongful act is thus being committed in the Netherlands and that is what this case is about. This is why the reference to the Diner/Igielko case cannot help RDS.[[14]](#footnote-14) The acts of the subsidiaries are not relevant for the assessment, nor does the case concern what precise actions RDS should or should not have carried out or will have to carry out in relation to each of its 1,100 subsidiaries, let alone where those actions are precisely to take place. It is completely free in this respect, provided it ensures that the reduction target which is imposed is achieved.
10. Once again a parallel can be drawn with the Urgenda case. In that case too the State of the Netherlands was left entirely free to achieve the imposed reduction target at its own discretion, as long as the target was achieved.

Nor was it at issue there in what manner the State should specifically have instructed and monitored or will have to instruct and monitor the provinces and municipalities and other government agencies. In that case the State was only held to account with regard to its own policy.
11. For these reasons RDS is now being held accountable for its own policy and in this case too it is not required that the discussion descend to the level of the instructions and control which RDS should give to its 1,100 group companies. None of those group companies determines the concern policy which is being exposed here as wrongful policy. They simply do not have the position within the concern relationships to do so. It is therefore completely pointless to make a reproach to them regarding the concern policy. The only reproach that can be made is against RDS and thus in the event of a failure to act, the Netherlands is the country where action is to take place.
12. Due to the fact that RDS has control over the quantity of oil and gas which is produced and put on the market by the Shell Group, in that context too it has a legal responsibility to change its policy. The actions of the consumers are not relevant in this respect. This broader topic will be fleshed out in further detail in these multi-day oral arguments.

**Milieudefensie et al.’s choice of law**

1. On the basis of the dispute at issue, the place where action is to take place is and remains in all cases the Netherlands. This applies both via the ground of the Handlungsort and via the ground of the Erfolgsort.
2. In the opinion of Milieudefensie et al., as via the ground of the Handlungsort both the exclusive application of Dutch law is guaranteed and furthermore in a more direct manner the foreign scope of damage which the RDS concern policy brings about can be involved in the assessment of the wrongful act and the order to be imposed, Milieudefensie et al. prefers to apply the Handlungsort as the ground for the application of Dutch law.
3. If, however, that preference for the Handlungsort would unexpectedly be less favourable for Milieudefensie et al. (for example if consequently various legal systems were to apply to the dispute at the same time), the District Court is requested to take the Erfolgsort as the ground for applying Dutch law.
4. The gist of the favour principle to which Milieudefensie et al. is entitled entails that the ground most favourable to it can be chosen. This is also the reason why the adjudicating instance, with that goal, can even alter the choice for Handlungsort or Erfolgsort *ex officio*, according to the Asser IPL series.[[15]](#footnote-15) This is even the case in cases in which the claimant has not made an explicit choice of law, which is also according to the Asser IPL series.[[16]](#footnote-16)
5. RDS therefore wrongly asserts that the preference for the Handlungsort is an irreversible, mandatory and binding choice. The only irreversible, mandatory and binding choice which Milieudefensie et al. makes is the choice for Dutch law, not for the Handlungsort. The specified preference for the Handlungsort is based on the wish to, with the application of Dutch law, obtain the most optimal possible protection against the environmental damage which RDS is causing. If that protection would be more optimal with application of the Erfolgsort as ground for the applicability of Dutch law, Milieudefensie et al. has a right to and interest in this ground being applied by the District Court.

**Foreign conduct rules and cross-border effects**

1. Because the challenged acts are all taking place in the Netherlands, Article 17 of the Rome II Regulation does not force this District Court to take account of the safety rules and conduct rules of other countries in its assessment. After all, the ‘place of the event giving rise to the liability’ referred to in Article 17 of the Rome II Regulation is the Netherlands. This is without prejudice to the fact that this District Court can attribute weight to the measures taken by governments worldwide in the framework of the assessment of the societal duty of care pursuant to Article 6:162 of the Dutch Civil Code. Even if it were assumed that RDS and its group companies worldwide satisfy the safety rules and conduct rules referred to here, this does not detract from the wrongful act of RDS. However, this will be explained in another part of the oral arguments, in the discussion of RDS’ defence that the permits which it has for its activities have an exculpatory working.
2. I would briefly like to say something about the cross-border effects which may result from the judgement and why they do not stand in the way of the conclusion that on the basis of the IPL rules, the dispute can and must be assessed fully in accordance with Dutch law.
3. The awarding of Milieudefensie et al.’s claim will only have as its direct consequence that RDS must adapt its concern policy that it determines and executes from the Netherlands, taking account of the judgement against it. The judgement will therefore only be enforced in the Netherlands. Only after RDS has adapted the concern policy in conformity with the judgement against it, will this have an effect abroad. It is impossible to say what effect this will be and what group companies will be affected by it. This is, after all, for RDS to evaluate.
4. Whether and in what degree a specific foreign subsidiary is affected, is thus not a direct consequence of the judgement but of the decisions which RDS will take in connection with the judgement to achieve the goal. RDS will determine what effect the judgement will ultimately have beyond the Dutch border.
5. Following the judgement RDS can, for example, decide to no longer invest in new oil fields, but rather in wind power. It can thus be the case that it takes over and expands an existing wind power company and that the judgement is thus the reason or incentive for RDS to set up a large wind power branch.
There will be an effect on third parties, including – but not per se exclusively – its group companies; not from the judgement, but from the actions of RDS which will be the result of the judgement.
6. But policy decisions of RDS already have an international influence and international effect now. Every decision of RDS, whether it is made without a judgement or because of the judgement, has an influence on its group companies and on third parties. Indeed, because of the enormous worldwide scope of the Shell concern, every decision which RDS takes from The Hague, has a gigantic influence on other persons and legal entities worldwide. This is also the reason for this lawsuit.
7. With or without a judgment, the impact of RDS’ actions is enormous. It has a greater economic impact than most countries in the world. This impact of RDS in the world is now – without a judgment – disastrous for humans and the environment domestically and abroad. This is what must be prevented and this will happen by means of obtaining the requested order.
8. The requested judgment thus does not create a cross-border effect, it only changes the cross-border effect that RDS has had for a long time and it changes this in a way in which this effect no longer causes any unacceptable damage in the Netherlands and the world. The judgment only creates a specific framework for RDS which it will have to adhere to in order to prevent unacceptable damage. Within these limits RDS remains completely free to act at its own discretion. As stated, the effects of the judgment will therefore depend on how RDS decides to achieve the imposed reduction objective.
9. These indirect consequences of the requested judgment fit and remain fully within the frameworks of IPL law. The case law of the Netherlands Supreme Court shows that even in the case of direct cross-border consequences of a judgment, the conclusions drawn by Milieudefensie et al. remain valid. This was emphasised in the Interlas case[[17]](#footnote-17).
10. In this judgment the Netherlands Supreme Court held that the Dutch court has competence to impose an immediate cross-border injunction (quote):

“*Unless the contrary ensues from the law, the nature of the obligation or from a legal transaction, the individual who is obliged with regard to another person to give something, do something or refrain from doing something, is ordered to do so by the court on the claim of the entitled party. In general there is no reason to assume that there is no scope for such an order when the matter concerns an obligation — including an obligation under foreign law — which must be performed outside of the Netherlands. A more limited view as defended by the appeal is not supported in law and in a time of increasing international contacts would lead to the result which is undesirable for practice which in the case of wrongful acts with an international character — such as infringement of intellectual property rights and unfair competition in several countries or cross-border environmental pollution —
the Dutch injured party could be forced to take the matter to court in all countries in question. The general assertion of the appeal ground therefore fails.*”

1. In view of the considerations of the Netherlands Supreme Court in the Interlas case (and other subsequent jurisprudence which is in line with said case)[[18]](#footnote-18), there is no objection whatsoever to the less far-reaching purport of the claim of Milieudefensie et al., which only has direct effect in the Netherlands and only has a vague indirect effect abroad, and which indirect effect abroad is purely and alone determined by RDS itself.

Counsel

1. Commission Proposal Rome II, COM (2003) 427 definite, Brussels, 22 July 2003. [↑](#footnote-ref-1)
2. Asser/Kramer & Verhagen 10-III 2015/981/993; [↑](#footnote-ref-2)
3. Dickinson 2008, “The Rome II regulation, the law applicable to non-contractual obligations”, 4.33, 3.241 (no. 5, with a reference to 3.240). [↑](#footnote-ref-3)
4. T. Kadner Graziano, “The Law applicable to cross-border damage to the environment, a commentary on article 7 of the Rome II Regulation”, Yearbook of Private International Law, Volume 9, 2007, pp. 71-86, para. IV. [↑](#footnote-ref-4)
5. Netherlands Supreme Court in the Urgenda case under 8.3.4 [↑](#footnote-ref-5)
6. Exhibit 314**,** 2018-11 Hale, T., Chatham House, The Role of Sub-state and Non-state Actors in International Climate Processes. [↑](#footnote-ref-6)
7. Asser/Kramer & Verhagen 10-III 2015/993 [↑](#footnote-ref-7)
8. Von Hein, Art. 7 Rome II, in Calliess (ed.) Rome Regulations, 2nd ed. 2015, pp. 614-615. [↑](#footnote-ref-8)
9. Kolassa/Barclays Bank, CJEU 28 January 2015, ECLI:EUC:2015:37, NJ 2015/332, para. 53. [↑](#footnote-ref-9)
10. Pez Hejduk, CJEU 22 January 2015, ECLI:EU:C:2015:28, para. 25. [↑](#footnote-ref-10)
11. Kalimijnen, ECJ 30 November 1976, no. 21/76, NJ 1977/494. [↑](#footnote-ref-11)
12. Shevill v Presse Alliance SA, ECJ 7 March 1995, ECLI:EU:C:1995:61, NJ 1996/269. [↑](#footnote-ref-12)
13. Nintendo, CJEU 27 September 2017, ECLI:EU:C:2017:724. [↑](#footnote-ref-13)
14. Netherlands Supreme Court 12 October 2001, ECLI:NL:HR:2001:AD3973 (Diner/Igielko); this case was concerned with an alleged act in the Netherlands of persons residing outside of the Netherlands, which entailed that the presumed wrongful act was deemed to have taken place in the Netherlands, which led to the applicability of Dutch law. [↑](#footnote-ref-14)
15. Asser 10-I 2018/277. [↑](#footnote-ref-15)
16. Asser 10-III 2015/1054. [↑](#footnote-ref-16)
17. Interlas, Netherlands Supreme Court 24 November 1989, NJ 1992/404. [↑](#footnote-ref-17)
18. Like Netherlands Supreme Court 21 February 1992, no. 14 454, NJ 1993, 164 and BenGH, 26-03-1993, no. A92/3 (Barbie); Netherlands Supreme Court 19 March 2004, RvdW 2004, 51 (Philips/Postech et al.). [↑](#footnote-ref-18)