|  |  |  |
| --- | --- | --- |
| **District Court of The Hague** | | |
| Case number: Session: | C/09/571932 2019/379 03 December 2020 | **NOTES ON ORAL ARGUMENTS 5**  **The double challenge** |
|  |  | 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.   Claimants Hereinafter 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 |

**The double challenge of the climate response and energy provision, the Paris Agreement and the Sustainable Development Goals and public international law**

**Your Honours,**

**Introduction**

1. In the discussion of the international private law issues, there was a brief discussion of the cross-border effects which may emanate from the requested judgment 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.
2. RDS believes, however, that even if the case is fully assessed under Dutch law, the District Court must take account of the cross-border effects. According to RDS, in the shaping of its climate and energy policy every country must make a consideration between unique national interests, which comes down to complex choices. Mitigating dangerous climate change would, moreover, be contrary to other national and international interests such as the interest of universal access to energy, an interest that is acknowledged and included in the UN Sustainable Development Goals. According to RDS the District Court should therefore show reserve.
3. Against the background of these defences of RDS I will explain in this part of my oral arguments that RDS’ defences fail because the 196 countries which are signatories of the Paris Agreement and the UN Sustainable Development Goals, aligned both documents to each other so that together they form a synergetic whole. The international community deems the approach to dangerous climate change as crucial for addressing all other national and international development goals.
4. Without the approach to dangerous climate change as foreseen in the Paris Agreement, the international community believes the Sustainable Development Goals will be impossible to achieve. Contrary to what RDS appears to suggest, tackling climate change is in the interests of all countries, thus also the developing countries and in particular the interests of the very poorest countries in the world.
5. It will then be explained in further detail that on the basis of the rules of public international law, including the Vienna Convention on the Law of Treaties, the District Court does not have to show reserve under Article 3:296(1) of the Dutch Civil Code in awarding the claim. Indeed, awarding of the claim will in fact be fully in line with the international obligations accepted by contracting states in order to achieve an approach to climate change.
6. In short, it will appear that a reserved assessment of the District Court is neither necessary nor wanted.

**Part 1: the synergy between the Sustainable Development Goals and the Paris Agreement**

**1A: UN Sustainable Development Goals**

1. The Sustainable Development Goals are included in Resolution 70/1, adopted by the General Assembly of the United Nations on 25 September 2015. The Sustainable Development Goals are the new global sustainable development agenda for 2030. These are the worldwide goals for sustainable development which apply to all countries. Every country in the world is expected to implement this global agenda.
2. The Sustainable Development Goals have been submitted into the proceedings by Milieudefensie et al. as **Exhibit 335**. This is the authentic English version but for the sake of convenience of this part of the oral arguments, Milieudefensie et al. is making use of the Dutch translation so that the Dutch version can be cited. You can find a link to the Dutch version at the bottom of the page.[[1]](#footnote-1) In the footnotes, however, I will refer to both the English and the Dutch version.
3. The Development Goals consist of 17 goals which must be seen as an integrated ‘holistic’ whole. The intended result with the realisation of the entirety of these 17 goals is consequently greater than the sum of the parts. Striving to achieve one goal will help to achieve the other goals, provided they are properly and carefully aligned to each other. This is the task which the countries have set for themselves in this resolution.

**1B: The alignment between UN Resolution 70/1 and the Paris Agreement**

1. The Sustainable Development Goals were established three months before the Paris Agreement. One of the 17 goals of Resolution 70/1 concerns the approach to climate change. The climate goal is concisely and firmly formulated as Goal 13 (quote):

*“Goal 13. Take urgent action to combat climate change and its impacts.”* [[2]](#footnote-2)

1. The approach to climate change is the only one of the 17 goals in the resolution that always has an asterisk to reference a footnote. The footnotes always make it clear that the UN Climate Convention is and remains the primary international and intergovernmental forum for the global approach to climate change.[[3]](#footnote-3) The UN Sustainable Development Goals thus do not have priority over the climate approach of the UN Climate Convention of 1992 but are subordinate to that treaty law approach to climate issues.   
   This is logical, as the UN Climate Convention, contrary to the resolution, is legally binding and consequently has a higher status than the UN resolution.
2. In the resolution in which the Sustainable Development Goals are adopted, the General Assembly emphasised the separate status of the UN Climate Convention and the importance of the approach to the climate problem by all countries (quote):

*“We acknowledge that the United Nations Framework Convention on Climate Change is the primary international, intergovernmental forum for negotiating the global response to climate change. We are determined to address decisively the threat posed by climate change and environmental degradation. The global nature of climate change calls for the widest possible international cooperation aimed at accelerating the reduction of global greenhouse gas emissions and addressing adaptation to the adverse impacts of climate change.” [[4]](#footnote-4)* (underlining by counsel)

1. Resolution 70/1 shows that the member states of the UN, in the formulation of the Sustainable Development Goals, was very well aware that the approach to the climate problem will have to take place within the framework of the UN Climate Convention of 1992. This Convention prevails over the resolution and that is emphasised in several places in the resolution.
2. The General Assembly explicitly anticipated the climate agreement to be made three months later in Paris that was to be an ambitious and global agreement (quote):

*“Looking ahead to the twenty-first session of the Conference of the Parties in Paris, we underscore the commitment of all States to work for an ambitious and universal climate agreement.” [[5]](#footnote-5)*

1. The resolution on the Sustainable Development Goals thus shows that the more stringent temperature goal which was agreed three months later in the Paris Agreement, was established precisely against the background of these Sustainable Development Goals. The more stringent temperature goal of Paris, whereby the upper limit of the maximum warming up of 2˚C has been tightened to well under 2˚C and preferably 1.5˚C, is precisely intended to serve the Sustainable Development Goals which were adopted three months earlier.
2. The desired synergy with sustainable development ensues from the Paris Agreement itself. Following the Dutch translation of the Paris Agreement, reference can be made to several passages in the Agreement. For example, the central Article 2 of the Paris Agreement starts in paragraph 1 with the words:

*“This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;”* [[6]](#footnote-6) (underlining added by counsel)

1. The central objective of the Paris Agreement thus unequivocally shows that the tightening of the temperature goal is in part intended to promote sustainable development and eradicate poverty. Similar considerations can be found in the preamble to the Paris Agreement in paras. 8 and 9 which read:

*“Emphasizing the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty” [[7]](#footnote-7)*

and

*“Recognizing the fundamental priority of safeguarding food security and ending hunger, and the particular vulnerabilities of food production systems to the adverse impacts of climate change.” [[8]](#footnote-8)*

1. That the prevention of dangerous climate change is in the interests of sustainable development and in the interest of protecting ecosystems and global food security, was already made a key point in 1992 in the UN Climate Convention. Article 2 of the Climate Convention stipulates this in so many words, as already discussed in the opening arguments.
2. In short: the Sustainable Development Goals of September 2015 take account of the UN Climate Convention of 1992 and the higher status of said Convention; the Sustainable Development Goals anticipated the Paris Agreement that was to be made three months later in December 2015 and that, in the context of sustainable development, must further shape the climate approach; the Paris Agreement then refers back to the Sustainable Development Goals and establishes that in the context of sustainable development, food security and eradicating poverty, it is necessary to limit the warming up of the earth to well under 2˚C and preferably to 1.5˚C because a warming up of a maximum of 1.5˚C will considerably limit the consequences of climate change.

**1C: The threat of climate change to the Sustainable Development Goals**

1. 196 countries agree that what the world needs to be able to achieve all 17 Sustainable Development Goals, is a limiting of the warming up of the earth to, preferably, 1.5˚C and in any event a limiting of the warming up to well under 2˚C. This relationship between the sustainable development goals and the international climate regime is not only legal in nature, but is also factual in nature.   
     
   If dangerous climate change is not prevented, the Sustainable Development Goals will be doomed to complete failure in advance.
2. The following can therefore be read on the website of the UN Climate Convention on the relationship between the climate approach and the Sustainable Development Goals:

*“Climate change presents the single biggest threat to sustainable development everywhere and its widespread, unprecedented impacts disproportionately burden the poorest and most vulnerable. Urgent action to halt climate change and deal with its impacts is integral to successfully achieving all Sustainable Developments Goals (SDGs)” [[9]](#footnote-9)* (underlining added by counsel)

1. In 2019 the UN Climate Change Secretariat, when so requested, made a contribution to the High Level Political Forum on Sustainable Development. This Forum is under the supervision of the General Assembly and the Economic and Social Council of the UN and must see to the follow-up of the Sustainable Development Goals. The following can be read in said contribution:

*“Climate change threatens many of humanity’s biggest achievements as well as its future goals – goals reflected in the 2030 Agenda for Sustainable Development. Climate change is a cross-cutting and immediate threat to the achievement of the Sustainable Development Goals, and to the survival and well-being of island nations and coastal communities.”* [[10]](#footnote-10) (underlining by counsel)

The UN Climate Change Secretariat also states in that contribution:

*“Pursuing climate action [..] with sustainable development in an integrated and coherent way will enable countries to achieve their goals efficiently and quickly under the Paris Agreement and the 2030 Agenda for Sustainable Development”* [[11]](#footnote-11)

1. In the scientific magazine Nature Climate Change, the Executive Secretary of the UN Climate Convention and the Under-Secretary-General for Economic and Social Affairs of the UN write:

*“Climate change is more than just one of the 17 Sustainable Development Goals (SDGs) specified in the 2030 Agenda for Sustainable Development [..] It is a threat multiplier, with the potential to worsen some of humanity’s greatest challenges, including health, poverty, hunger, inequality and ecosystem preservation, among others. Conversely, addressing climate change also offers humanity’s greatest chance to positively impact these goals.”* [[12]](#footnote-12)(underlining added by counsel)

The following was added:

*“It is clear that climate change threatens decades of development progress and jeopardizes inclusive and sustainable growth.” [[13]](#footnote-13)* (underlining by counsel)

1. This latter point, that climate change is threatening to reverse decades of development and development aid and in addition also jeopardises inclusive and sustainable growth in developing countries, is a central reason why two NGOs which are engaged in providing development aid, i.e. the NGO Both Ends and the NGO ActionAid joined in this lawsuit against RDS. They experience daily in their development work how great the consequences of climate change already are and how consequently the poorest and most vulnerable are hit particularly hard.
2. The United Nations Development Programme (UNDP) came to the same conclusion in its Strategic Plan for 2018-2021:

*”Climate-related disasters have increased in number and magnitude, reversing development gains. Over the past decade, more than 700,000 women, men and children lost their lives, over 1.4 million were injured and approximately 23 million are homeless as a result of disasters.” [[14]](#footnote-14)* (underlining by counsel)

1. Due to climate change hundreds of thousands are dying now and millions of people are becoming homeless. The UNDP continues in its strategic plan with a very disconcerting prospect:

*“The impact of climate change will continue to disrupt economies and the lives of billions. Extreme weather events are becoming more frequent and devastating, resulting in the reversal of development gains even in countries with significant levels of socioeconomic progress.” [[15]](#footnote-15)* (underlining by counsel)

1. The threat of climate change for the Sustainable Development Goals is consequently comprehensive. Climate change not only threatens the future, but much of what was built up in the past in development and via development aid. RDS may have the ambition to sell its oil and gas everywhere in Africa in the future, but the customers will be scarce if the world around it is dried out, water and food are scarce and people are relegated back to living in poverty without sustainable economic growth and an inclusive society ever being possible.

**1D: No conflict between Goal 7 and Goal 13**

1. This brings me to the conflict which RDS alleges exists between the climate change response of Goal 13 of the Sustainable Development Goals and the response of Goal 7 which deals with universal access to energy. In addition to RDS, this alleged conflict is also used as an argument by the other big oil and gas companies to continue fully investing in fossil fuels.[[16]](#footnote-16) This conflict does not exist, however, because Goal 13 and Goal 7 are aligned to each other and are synergetic.
2. To start with, it is beyond doubt that achieving Goal 7 must not be at the expense of tackling dangerous climate change, as prescribed in the UN Climate Convention and the Paris Agreement. What was remarked about the relationship between the Sustainable Development Goals and the UN Climate Convention is also relevant here: in no way can a political goal laid down in a UN Resolution detract from binding obligations which are laid down in conventions.
3. It is furthermore emphasised at various points in the UN resolution that the goals must be seen and implemented in conjunction with each other and integrally (quote):

*“The interlinkages and integrated nature of the Sustainable Development Goals are of crucial importance in ensuring that the purpose of the new Agenda is realized.” [[17]](#footnote-17)* (underlining by counsel)

1. The goals are thus an integral and indivisible whole. The goals are related to each other and are connected with each other – a point the resolution keeps repeating (quote):

*“We reiterate that this Agenda and the Sustainable Development Goals and targets, including the means of implementation, are universal, indivisible and interlinked.” [[18]](#footnote-18)* (underlining by counsel)

1. Goal 7 thus cannot be seen separately from the need to prevent dangerous climate change. Goal 7 therefore clarifies that everyone must work toward achieving sustainable and modern energy:

*“Goal 7. Ensure access to affordable, reliable, sustainable and modern energy for all” [[19]](#footnote-19)*

1. Because of this central goal, the sub-goals of Goal 7 for 2030 are specifically geared to, on the one part, substantially increasing the share of sustainable energy in the global energy mix and on the other, geared to the worldwide improving of energy efficiency: [[20]](#footnote-20)

Goal 7.2 reads*: “By 2030, increase substantially the share of renewable energy in the global energy mix”*

Goal 7.3 reads: *“By 2030, double the global rate of improvement in energy efficiency.” [[21]](#footnote-21)*

1. It is thus important that Goal 7 is elaborated by, on the one part, dealing with energy more efficiently and by substantially increasing the share of sustainable energy on the other. Goal 7 can thus only contribute in an integral manner to achieving the other development goals if there is a strong focus on energy efficiency and sustainable energy.
2. Goal 7 and Goal 13 are thus intended to reinforce each other. This is also emphasised in the IPCC report of 2018 about the 1.5˚C goal:

*“The sustainable development goal of affordable and clean energy (SDG 7) specifically targets access to renewable energy and energy-efficiency, which are important to ambitious mitigation and limiting warming to 1.5˚C.” [[22]](#footnote-22)*

1. The UN conference of last year on reinforcing the relationship between the Paris Agreement and the Sustainable Development Goals uses similar terms:

*“Participants stressed that accelerating the implementation of Agenda 2030 is critical for more effective climate action. The energy transitions envisaged in SDG 7 on sustainable energy for all in particular will contribute significantly to lowering GHG emissions relative to business-as-usual pathways, thereby contributing to the objectives of the Paris Agreement.” [[23]](#footnote-23)* (underlining by counsel)

1. Goal 7 is thus crucial for achieving the goals of the Paris Agreement and is geared to the worldwide transition to sustainable energy.

**1E: Goal 7 relates to the global energy transition**

1. It is important to determine that Goal 7 concerns the worldwide energy transition because this also makes it clearer why Goal 7 is so important for achieving the climate goal. Goal 7 thus not only concerns providing access to energy for the approx. 1 billion people who do not yet have access to energy, as RDS appears to suggest.[[24]](#footnote-24) It concerns the global goal of ensuring by means of an energy transition that everyone in the world can have access to affordable, reliable, sustainable and modern energy. Goal 7 applies, just like the other Sustainable Development Goals, just as much for the Netherlands as for Namibia. Dutch citizens must have access to climate-friendly energy, but this applies equally for citizens in Namibia.
2. Just like Goal 7 the other Sustainable Development Goals are about goals which the countries take on both for themselves and for all other humans on earth. This appears, inter alia, from the preamble (quote):

*“This Agenda is a plan of action for people, planet and prosperity. [...] All countries and all stakeholders, acting in collaborative partnership, will implement this plan. We are resolved to free the human race from the tyranny of poverty and want and to heal and secure our planet. We are determined to take the bold and transformative steps which are urgently needed to shift the world on to a sustainable and resilient path. As we embark on this collective journey, we pledge that no one will be left behind.” [[25]](#footnote-25)*

1. In short, all countries stated in the resolution that worldwide they want to take the *“bold and transformative steps*” which are *“urgently needed”* to put the world on a sustainable path and no one in the world may be left behind.
2. Sustainable energy and energy efficiency are important for that transformation to a sustainable world, so that on the one part more can be done with less energy and on the other the energy to be used does not cause further damage to the planet. This means that, as the UN conference of last year summarised in the above-cited quote, there must be deviation from a business-as-usual scenario. All countries understand this and want this too.
3. A business-as-usual scenario means a scenario in which the use of fossil fuels by a growing global population continues to increase because too little is invested in sustainable energy and energy efficiency. In other words: without investments in sustainable energy and energy efficiency, there cannot be any deviation from the business-as-usual scenario. After all: if no work is carried out on energy efficiency, the demand for energy for a growing global population cannot decrease; and if too little is invested in sustainable energy, there will be inadequate alternatives to fossil fuels.   
   It is therefore crucial that the investment flows in energy are substantially switched from fossil fuels to climate-friendly energy sources and to energy efficiency. If this occurs, everyone in the world, even with a growing global population, can be provided with energy while at the same time the Paris goals are achieved. This is the synergy which exists between Goal 7 and Goal 13 and that synergy can only be achieved if there is deviation from the business-as-usual scenario.
4. This need to deviate from the business-as-usual scenario and the switching of investments to climate-friendly energy forms and energy efficiency, is therefore also part of the central goal of the Paris Agreement as worded in Article 2 of the Paris Agreement. Article 2(1)(c) of the Agreement makes it clear that the contracting parties must realise the temperature goal laid down in Article 2 by aligning the finance flows. According to paragraph c, the key goal of Article 2 is therefore (quote):

*“(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.” [[26]](#footnote-26)*

1. In conjunction with the beginning of Article 2, which states that a climate approach is necessary for sustainable development and the eradication of poverty, it turns out that all countries have committed to shift investments within the energy sector and other sectors. If this is the consequence of Milieudefensie et al.’s claim, this thus fits in fully with the global goal to say farewell to the business-as-usual scenario by shifting finance flows to a low greenhouse gas development. In this manner the integral task of universal energy access and a climate response will be satisfied.

**1F: Access to energy for the 1 billion poorest people is consistent with the Paris goals**

1. RDS refers in its statement of defence to variations of business-as-usual scenarios to reinforce its argument that in the future a lot of oil and gas will still be necessary. This is correct: in a global business-as-usual scenario in which no or little work is carried out on the combination of energy efficiency and sustainability of the energy supply, the world will, for the aforementioned reasons, naturally remain dependent on fossil fuels to a great extent. But this is an ‘open door’. It ignores the fact that the global climate policy and the Sustainable Development Goals are precisely geared to avoiding a business-as-usual scenario. Instead of focusing on the investment choices and the energy scenario that the global community is asking for, RDS is continuing to focus on the scenario that the global community precisely wishes to prevent.
2. Milieudefensie et al. reproaches RDS for having sought and continuing to seek the legitimacy for its investment choices in a scenario that the entire global community is precisely trying to prevent to avoid great danger. It is precisely this fervent adherence by RDS to global business-as-usual scenarios, against its better judgment, that shows that RDS willingly and knowingly is on a collision course with the global climate goal.   
   Adhering to this scenario does not align with the national and international generally prevailing legal views and has therefore not been tenable for some considerable time and certainly no longer is now.
3. Nor can RDS justify its concern policy with a reference to the almost one billion poorest people in the world, who are still living without access to modern energy. This justification does not exist because the synergy between Goal 7 and Goal 13 also encompasses the ensuring of energy access to the approx. 1 billion people who do not currently have such access. I will briefly explain this.
4. That the ensuring of energy access to the approx. 1 billion must and can go together with the goals of the climate regime, appears not only from the descriptions of Goal 7 and Goal 13 but also from scientific research. For example, the International Council for Science concluded that the goal of realising universal energy access in 2030 does not detract from the climate response and is consistent with the goals of the Paris Agreement. The International Council for Science has the following consideration in this respect:

*“Of particular importance to the poor in developing countries (in South Asia, Southeast Asia, and Sub-Saharan Africa), the scientific literature indicates that ensuring universal access to modern energy services by 2030 (7.1) is fully consistent with the SDG13 and Paris Agreement climate goals. In other words, energy access provision will not exacerbate climate change, as it is likely to have only a minor effect on global carbon emissions, even if the modern fuels supplied are still fossil fuels (e.g. natural gas, kerosene, LPG)” [[27]](#footnote-27)*

1. Providing energy access to the approx. 1 billion poorest people in the world does not stand in the way of achieving the temperature goal of Paris, not even if they were provided with fossil energy sources. This sounds strange and contradictory, but according to the International Council for Science this has to do with the fact that the energy consumption of the 1 billion poorest people is limited and that these people are now by and large burning wood and biomass as fuel. This burning of wood and biomass causes an unnecessary, large amount of CO2 emissions because it is an old-fashioned and inefficient manner of heating and cooking. Compared with this, modern gas cookers, for example, are much more efficient.
2. The Council points out that the poorest can naturally also be provided with energy via decentralised sustainable energy systems such as solar panels, small-scale hydropower projects and small-scale wind energy projects.[[28]](#footnote-28) This is, of course, better, but it is important that the Council indicates that however the energy provision for the 1 billion poorest people is realised, it can never be an excuse not to achieve the global climate goal.
3. UNEP comes to the same conclusions in its Emissions Gap Report. UNEP even points out that it ensues from the World Energy Outlook of the IEA of 2019 that providing universal energy access in the sub-Saharan countries, the part of the world where there is the greatest lack of energy access, on balance will even be accompanied by a reduction in emissions and not by an increase in emissions.*[[29]](#footnote-29)*
4. RDS’ defence that providing access to energy to all inhabitants of the earth does not go together with the necessary climate approach, is therefore legally and factually incorrect. The share in the CO2 pollution of the 1 billion poorest is so small, that it has no material effect on whether or not the Paris goals are met. The task is to have the other 6.8 billion people in the world who do already have access to energy (and who use far more energy than the poorest) make the transformation to sustainable energy and energy efficiency.
5. This is also the focus and strategy of the United Nations Development Programme (UNDP) in helping implement the Sustainable Development Goals in 170 countries.[[30]](#footnote-30) In its approach UNDP draws a distinction between those persons who do not yet have access to energy and those who do. UNDP’s approach on this point is:

*“[W]here energy does not yet reach everybody, it will be necessary to focus on supporting innovative private and public solutions to increase access and delivery… [W]here energy is already available to most or all people, the focus will be on transitioning to renewable energy generation and energy efficiency measures and policies.” [[31]](#footnote-31)*

1. With this the UNDP confirms the importance of this sustainable approach geared to sustainable energy and energy efficiency. This is the way in which dangerous climate change can be prevented, while at the same time enabling sustainable economic development for everyone and all countries.

**1G: Developing countries themselves have a desire for sustainability and being able to be more sustainable**

1. As RDS’ defences could create the impression that the developing countries have a strong focus on fossil fuels for the future, despite their obligations under the climate conventions and despite the Sustainable Development Goals which they entered into for themselves, I would briefly like to say something about the energy practice in the developing countries. This worldview is not correct.
2. The UNDP noted, inter alia in its strategic plan, that developing countries and certainly also the very poorest countries and communities favour sustainable development:

*“Even where widespread poverty exists, countries and communities aspire to achieve sustainable, low carbon development and inclusive societies.” [[32]](#footnote-32)*

And the UNDP continues:

*“Developing countries are also looking to accelerate structural transformations required to sustain progress. They seek to do so by addressing inequalities and exclusion, transitioning to zero-carbon development and building more effective governance systems [..]” [[33]](#footnote-33)*

1. The UNDP thus points out, that these countries and communities do actually want to make their energy supply sustainable (in so far as there were still any question about this). There are numerous examples of this.
2. As an example, Milieudefensie et al. submitted the framework of the Africa Renewable Energy Initiative as an exhibit (Exhibit 299). This African initiative was established under the mandate of the African Union. The African Union is the intergovernmental and supranational political union of Africa, of which all African countries are a member and which has its own parliament. The Africa Renewable Energy Initiative is supported by the Committee of African Heads of State and Government on Climate Change. This committee also speaks for Africa during the UN climate conferences, so that the African continent can speak with one voice.[[34]](#footnote-34)
3. The Africa Renewable Energy Initiative itself describes the initiative as follows:

*“The Africa Renewable Energy Initiative (AREI) is an inclusive, transformative, Africa-owned and Africa-led effort to accelerate and scale up the harnessing of the continent’s huge renewable energy potential.” [[35]](#footnote-35)*

1. This African initiative has two goals: first, ensuring that everyone in Africa has access to sustainable energy and second, helping the African countries to “leapfrog” to sustainable energy.[[36]](#footnote-36) The term “leapfrog” means that in connecting the poorest to modern energy systems, a direct choice is made for a connection to fully sustainable energy systems. There will be no need to connect to fossil energy systems. The fossil phase, which all other people in the world did go through, will simply be bypassed for the poorest. That group will, as it were, completely “leapfrog” over the fossil stage and directly into fully sustainable energy consumption.
2. This is also how it went in many African countries with the introduction of telephony. Most people in Africa went straight from having no phone to having a mobile phone.   
   Most people in Africa completely skipped the phase of having a land line.   
   This is what the Africa Renewable Energy Initiative wants to do with sustainable energy. As they say themselves: because it is necessary and because it is wise.
3. The Africa Renewable Energy Initiative has the following to say about the first (that it is necessary) :

*“The Basic premise of the Initiative is that all societies, including those in Africa, must transition to low-to-zero energy systems to avoid catastrophic climate change.” [[37]](#footnote-37)*

1. The Africa Renewable Energy Initiative has the following to say about the second (that it is wise) :

*“Renewable energy is already today cost-competitive with conventional, fossil fuel based new-build power systems in most countries [..] Leap-frogging to “smart” technologies will allow African countries to avoid costly lock-in of increasingly outdated technologies while addressing local and national energy service requirements.” [[38]](#footnote-38)*

1. By leapfrogging, the African countries want to prevent a lock-in of old-fashioned fossil infrastructure. According to UNEP, policymakers in developing countries understand that they can better shape the energy access which is being created now for the poorest properly in one go by remaining calm, developing knowledge and organising itself in such way that there can be a rapid transition by means of leapfrogging. UNEP says the following about this in its 2019 Emissions Gap Report (quote):

“*Policymakers in developing countries understand that making a rapid transition sometimes relies on a much slower process of technological and organizational change, for example to build capacities and knowledge about the technologies required to “leapfrog”. [[39]](#footnote-39)*

1. The international organisation Sustainable Energy for All, which works together with the United Nations to realise Goal 7, emphasises that for the African countries, investing in sustainable energy is more profitable than investing in fossil energy. With regard to investments in fossil energy, investments in sustainable energy will be more cost effective, provide cheaper energy, lead to more gross domestic product, lead to 3.5x more jobs, improve the health of people and reinforce the land yields in the agricultural sector.[[40]](#footnote-40)
2. UNEP points out that the chances for sustainability for the developing countries are very great precisely at this time because these countries (first) are not yet locked in to a fossil infrastructure and can thus leapfrog, and (second) at this time sustainable energy offers unprecedented possibilities for developing countries. UNEP says the following about this in its 2019 report under the chapter entitled “leapfrogging potential” (6.2.5):

*“[F]or countries and regions that host the world’s energy-poor, there remains significant scope to shape their energy transitions as they are not yet to be locked into a particular pathway [..]*

*Moreover, rapid technological progress in renewable energy is opening up and unprecedented opportunity for a wide range of applications and business models, including electrification through decentralized generation and mini-grids, with rapidly declining costs for photovoltaic modules, batteries, LEDs, smart metering mini grids and pay-as-you-go technology [..]”* [[41]](#footnote-41)(underlining by counsel)

1. In the Paris Agreement both the developed countries and the developing countries committed to the goal of timely achievement of net-zero emissions and the shifting of finance flows to a low greenhouse development. However, developing countries cannot do this alone. That is why the developed countries have committed to support the developing countries with financial resources and technology transfer. This is laid down in Articles 9 and 10 of the Paris Agreement. Article 11 of the Paris Agreement arranges in a comparable manner that the developing countries will receive support to strengthen their national “capacity-building” so that they will be able to properly coordinate and implement their own reduction task.

**1H: The technical and economic feasibility of the energy transition to net-zero emissions**

1. It will be clear from the foregoing that the goals of the Paris Agreement and the Sustainable Development Goals are synergetic with each other, including the goal to provide access to modern energy to the 1 billion people who still do not have that access. All countries and UN organisations have the goal, wish and conviction that the Sustainable Development Goals can be achieved in synergy and that the growing energy demand can be addressed via shifting investments and finance flows to sustainable energy and energy efficiency.
2. Contrary to RDS, these countries and UN organisations are of the opinion that it is technically and economically possible to phase out global oil and gas production in line with the Paris temperature goal and nevertheless continue providing everyone in the world with energy, both now and in the future.
3. The countries are supported in this conviction by, inter alia, the reports of the IPCC, UNEP, the International Energy Agency and the International Renewable Energy Agency. Milieudefensie et al. has submitted the reports of these international climate and energy organisations into the proceedings and will discuss them on day 3 of the handling of the claims.
4. I would like to point out here that RDS too now acknowledges that the 1.5˚C goal is technically and economically feasible. This appears from the presentation of CEO Ben van Beurden at Shell’s Responsible Investor Day event of 16 April this year, which presentation RDS has submitted as an exhibit. Van Beurden stated the following:

*“[S]ociety has raised its expectations further. Today, in many parts of the world, the goal is now the tougher Paris aim of no more than 1.5˚C. Shell has been listening and has taken a deeper look at the actions that the world could take to achieve such a goal. These actions are, inevitably, more challenging: the time available has shortened, the scale of action needed is even larger and the extent of the global collaboration required is certainly unprecedented. But, this pathway to 1.5˚C is still, just about, technically and economically possible.” [[42]](#footnote-42)*

1. It is quite a task, but according to the CEO of RDS, achieving 1.5˚C is technically and economically feasible. In that presentation of April of this year there was no mention that the climate task is significantly at odds with the growing energy demand. It is also remarkable that Van Beurden now also publicly attributes the importance of energy efficiency the weight that it deserves. He rightly points out in another part of his presentation that all economic sectors will each in their own right have to move toward net-zero and that the first step of the three steps toward achieving this is to invest in energy efficiency.[[43]](#footnote-43)
2. In view of the presentation of the CEO of RDS, it is therefore the question whether RDS is still maintaining its assertion that the climate response and the growing global energy demand are at odds with each other. Or does RDS now also admit that both issues are in synergy with one another?
3. It is of course true, and Milieudefensie et al. realises this as well, that the synergy between the Paris Agreement and the 17 development goals will not arise by itself because there is global consensus on the matter and by laying this consensus down in a UN resolution. This synergy must be intentionally sought in the effort toward implementing this in practice. This requires both insight into the synergy which can be achieved by wise choices and targeted policy, but also requires insight into the potential trade-offs which can arise between goals if unwise choices are made. The IPCC, UNEP and others, such as the aforementioned International Council for Science, therefore provide insight into where the synergy can be found and where the potential trade-offs can be found, so that the right choices can be made.[[44]](#footnote-44) In doing so, a handbook of Do's and Don'ts is written, as it were, on how to achieve synergistic implementation of the Paris Agreement objectives and the Sustainable Development Goals.  
     
   This ensures as much as possible that the urgently necessary energy transition is properly shaped and takes account of the other goals which the global community wishes to realise.
4. These Do’s and Don’ts which must be taken into account in the process which goes from achieving the Paris goal and the Sustainable Development Goals (implementation) to practical execution (transition), do not detract from the primary goals themselves. They have been established precisely to promote those sustainable goals. The goals are clear and demarcated, are globally accepted and have been laid down in treaties and in a resolution. The Do’s and Don’ts are intended to promote the most optimal synergy between the goals.
5. All countries have to make policy choices to promote the synergy between the goals and these will differ from country to country, but do not detract from the climate goals which the countries took on by means of obligations laid down in conventions. The convention-based climate goals are legal issues. The ways in which these goals are then achieved consist of policy choices which fall within the political domain. This distinction between legally relevant goals on the one part and political policy choices to achieve said goals on the other is also made clear in the Urgenda case.[[45]](#footnote-45)
6. The policy-based differences per country will be related, inter alia, to the differences in development levels between the countries. Not all countries will have the same issues to deal with. On the other hand, there will also be political issues which will be discussed in all countries, such as the issue relating to a fair transition. For example, attention will have to be paid to the transformation of employment from the fossil industry to the sustainable industry. Politically speaking, in all countries there will probably also have to be attention for redistributive measures, i.e. measures which prevent the poorer sections of society from being disproportionately burdened with, e.g., a carbon tax. Those sections of society will then, e.g., have to be compensated by means of energy subsidies which can be paid out of the extra state income generated by the carbon tax. This not only guarantees access to energy but also the affordability of that energy for the financially weak in society. These are choices which are and remain fully within the political domain and Milieudefensie et al.’s claim does not infringe this.
7. These kinds of policy issues also play a role in the Netherlands in the implementation of the Urgenda judgment, as affirmed in appeal and in cassation, and these policy issues are in principle at the discretion of the political arena because they are separate from the court order against the State to comply with a specific reduction obligation derived from the UN Climate Convention. As stated, this distinction between legally relevant goals and political policy choices to implement those goals is an important distinction.
8. These proceedings are concerned with the determination that by means of careful policy choices, the goals of the Paris Agreement and the Sustainable Development Goals can be achieved in synergy and that is the task which the global community has set for itself. Milieudefensie et al.’s claim under Article 3:296(1) in conjunction with Article 6:162 of the Dutch Civil Code does not stand in the way of that task, but is supported by it and consequently is in line with these goals. For that reason the District Court need not show reserve in this matter. That this is not necessary appears once again if the case is viewed from the perspective of public international law, which I will now go into.

**Part 2: Public international law supports awarding of the claim and does not stand in its way**

**2A: States must perform the (positive) obligations taken on in a convention**

1. If the Paris Agreement and the Sustainable Development Goals make one thing clear, it is that all countries realise that they are in the same boat and that not only all countries but also the private sector and the UN itself will have to follow the stipulated course in order not to sink the boat. Everyone is dependent on each other to be able to realise the goals. The Paris Agreement and the Sustainable Development Goals are well aware of this (quote from UN resolution):

*“The scale and ambition of the new Agenda requires a revitalized Global Partnership to ensure its implementation. We fully commit to this. This Partnership will work in a spirit of global solidarity, in particular solidarity with the poorest and with people in vulnerable situations. It will facilitate an intensive global engagement in support of implementation of all the Goals and targets, bringing together Governments, the private sector, civil society, the United Nations system and other actors and mobilizing all available resources.” [[46]](#footnote-46)*

1. The Sustainable Development Goals and the Paris Agreement form, as it were, a new international social contract, a social contract for the future in which all countries together have very clearly indicated the direction which must be followed to protect humankind and the planet. Both to preserve ourselves and the current generation, but also so that we, the current generation, do not leave the world in smouldering ruins for the generations that will come after us.
2. It therefore cannot be a surprise for the countries if the urgent necessary energy transition requested of them does in fact occur, because states and other big actors in the energy transition, due to laws and regulations, due to court judgments, due to covenants, due to unilateral action or due to other forced or unforced choices, change the course we are on for the future. While BP decided of its own volition to reduce its oil and gas production by 40% before 2030,[[47]](#footnote-47) RDS will also, albeit not of its own volition, have to change course if this claim is awarded.   
   Voluntarily changing course has cross-border effects and involuntarily changing course will too. In both situations the universally formulated Sustainable Development Goals and the Paris Agreement are served in full and countries and other actors can continue to build on these universally desired transformative steps which are being taken by the private sector.
3. Looking at public international law, states are bound to, and consequently are presumed to, comply with the public international law obligations taken on under a convention with regard to other states to realise the content, goal and intent of the convention. This was also confirmed in the judgments in the Urgenda case.[[48]](#footnote-48)
4. The obligation to comply with obligations under a convention does not apply just to the State of the Netherlands, but to all states. This ensues from the Vienna Convention on the Law of Treaties (Vienna Convention), in particular Articles 26, 27 and 29 of the Vienna Convention.
5. Article 26 of the Vienna Convention, entitled **Pacta sunt servanda**, stipulates that every treaty which has entered into force binds the contracting parties and that the treaty must be interpreted by them in good faith.
6. Article 27 of the Vienna Convention then stipulates under the heading **Internal law and observance of treaties** that a contracting party may not invoke the provisions of its own internal law to justify failure to comply with a treaty.
7. It ensues from Articles 26 and 27 of the Vienna Convention that the internationally generally accepted ‘pacta sunt servanda’ rule logically entails that once a state is bound by a treaty, it cannot evade the treaty obligations by announcing conflicting domestic legislation or invoking older legislation which conflicts with the treaty.
8. Article 29 of the Vienna Convention, entitled **Territorial scope of treaties,** stipulates that, unless the treaty indicates another intention, a treaty binds every party with regard to its entire territory. All countries which are signatories of the UN Climate Convention and the Paris Agreement are thus bound with regard to their entire territory by the goals of both conventions.
9. When viewing these articles in conjunction with each other, it is clear that what in the Urgenda case was determined to be obligations for the State of the Netherlands, aligns with what on the basis of the Vienna Convention applies to all contracting states. All 196 countries which are signatories of the UN Climate Convention and the Paris Agreement, must comply with both international agreements and may therefore also be presumed to be willing to do so.   
   In particular, it may be presumed that they will wish to perform the most central goal of Article 2 of both conventions, i.e. to prevent dangerous climate change by means of a reduction in emissions and toward this end to bring the finance flows and economic activities in line with a pathway to low greenhouse gas development.
10. In short, public international law once again makes it clear that the necessary action to ensure the achieving of the climate goal of the climate conventions, does not undermine the other development interests of states.

**2B: The call for regulation from home states of multinational companies**

1. It was already discussed in the opening arguments that some agencies of human rights treaties, by invoking public international law and human rights law, argue that if a state or state agency can exert control over the international activities of a company based on its territory, extraterritorial obligations (could) arise to use that control in a manner which is conducive to respect for universal human rights. The substantiation thereof is not only based on the provisions of the Vienna Convention, but also on Article 55 of the Charter of the United Nations and unwritten international customary law such as the “no-harm principle”.
2. The imposition by state agencies, such as the judiciary, of human rights obligations on Dutch parent companies because of the control which they can exert by means of concern policy over their international group companies, is therefore certainly permitted under Article 3:296(1) of the Dutch Civil Code. That is why this District Court therefore has international jurisdiction.
3. Public international law therefore provides support, for several reasons, for the lawsuit against RDS and the imposition of the order on RDS as claimed by Milieudefensie et al. At the very least, public international law does not stand in the way of awarding the claim.

**A final note**

1. In these first two days of oral arguments it has become clear, inter alia, that the District Court has international jurisdiction and that public international law, human rights law and international guidelines such as the UN Guiding Principles on Business and Human Rights all point in the same direction, i.e. that the District Court can grant the order sought by Milieudefensie et al. and need not show reserve in this respect. It has also been demonstrated that with regard to its conduct RDS cannot hide behind permit systems and carbon pricing mechanisms such as the ETS system.
2. It has furthermore been explained in further detail that both the 7 NGOs and the individual citizens have a great interest in this lawsuit and that therefore their claims are admissible and that in Milieudefensie et al.’s opinion there is an important task for the District Court in ensuring that RDS will act in accordance with the temperature goal of the Paris Agreement pursuant to a court order. This is in view of the exceptional position which RDS has with regard to both causing and preventing dangerous climate change.
3. The reasons for the conclusion that RDS has an exceptional position and accountability in addressing the climate problem, have in the meantime already been explained in various sections. Milieudefensie et al. will come back to this on day 3 of these multi-day oral arguments in the discussion of, inter alia, the horizontal working of human rights law and the weighing of interests in relation to Articles 2 and 8 the European Convention on Human Rights. On day 3 the issues relating to, inter alia, relativity and causality will be discussed as well as, of course, the further substantiation of the orders which Milieudefensie et al. has requested with regard to RDS, what these specifically mean for RDS and why this can be demanded of RDS. This is where I will leave matters for the moment.

Counsel

1. Link to Dutch translation of Exhibit 335 <https://unric.org/nl/wp-content/uploads/sites/8/2019/10/resolutie-goedgekeurd-door-de-algemene-vergadering-op-25-september-2015.pdf> [↑](#footnote-ref-1)
2. UN Resolution on Sustainable Development Goals (Exhibit 335), pp. 14 and 23; see for the Dutch translation via link in footnote 1, pages 16 and 26. [↑](#footnote-ref-2)
3. Ibid [↑](#footnote-ref-3)
4. UN Resolution on Sustainable Development Goals (Exhibit 335), paragraph 31, idem Dutch version. [↑](#footnote-ref-4)
5. UN Resolution on Sustainable Development Goals (Exhibit 335), paragraph 32, idem Dutch version. [↑](#footnote-ref-5)
6. UN Climate Convention, see for the Dutch version Exhibit RK-1 of RDS and see Exhibit 145 for the official English version. [↑](#footnote-ref-6)
7. Ibid [↑](#footnote-ref-7)
8. Ibid [↑](#footnote-ref-8)
9. UNFCCC, Action on Climate and SDGs, Exhibit 293 [↑](#footnote-ref-9)
10. United Nations Climate Change Secretariat, Contribution to the 2019 High Level Political Forum on Sustainable Development, Exhibit 294, pp. 1 and 2 [↑](#footnote-ref-10)
11. Ibid, p. 1 [↑](#footnote-ref-11)
12. Nature Climate Change, Tackling climate change to accelerate sustainable development, Exhibit 295, p. 495 [↑](#footnote-ref-12)
13. Ibid [↑](#footnote-ref-13)
14. UNDP Strategic Plan, 2018-2021, Exhibit 298, p. 7 under 5 [↑](#footnote-ref-14)
15. UNDP Strategic Plan, 2018-2021, Exhibit 298, p. 12 under 31 [↑](#footnote-ref-15)
16. Exhibit 328, p. 11 [↑](#footnote-ref-16)
17. UN Resolution on Sustainable Development Goals (Exhibit 335), p. 2 under Partnership, idem Dutch version under Partnership. [↑](#footnote-ref-17)
18. UN Resolution on Sustainable Development Goals (Exhibit 335), para. 71, idem Dutch version [↑](#footnote-ref-18)
19. UN Resolution on Sustainable Development Goals (Exhibit 335), pp. 14 and 19, Dutch version pp. 16 and 22 [↑](#footnote-ref-19)
20. UN Resolution on Sustainable Development Goals (Exhibit 335), p. 19, Dutch version p. 22 [↑](#footnote-ref-20)
21. The global improvement of energy efficiency is approx. 2.2% per year (should have been 2.7%) and must thus double now, see UN Review for Goal 7 of 2018, Exhibit 301, p. 5 under 1 [↑](#footnote-ref-21)
22. IPCC, SR15, 2018, H5 p. 478, Exhibit 136 [↑](#footnote-ref-22)
23. Global Conference on Strengthening Synergies between the Paris Agreement and the 2030 Agenda for Sustainable Development, Exhibit 296, p. 2 under 5 [↑](#footnote-ref-23)
24. UNDP Strategic Plan, 2018-2021, Exhibit 298, p. 11 [↑](#footnote-ref-24)
25. UN Resolution on Sustainable Development Goals (Exhibit 335), p. 1, paras. 1 and 2, idem Dutch version [↑](#footnote-ref-25)
26. See UN Climate Convention, Exhibit RK-1 of RDS (Dutch version) and Exhibit 145 for the official English version. [↑](#footnote-ref-26)
27. International Council for Science, A Guide to SDG Interactions: from science to implementation, Exhibit 297, p. 163 [↑](#footnote-ref-27)
28. Ibid, pp. 161-164 [↑](#footnote-ref-28)
29. UNEP Emissions Gap Report 2019, Exhibit 274, p. 51 [↑](#footnote-ref-29)
30. UNDP Strategic Plan, 2018-2021, Exhibit 298, p. 1 (box) and p. 8 under 10 [↑](#footnote-ref-30)
31. UNDP Strategic Plan, 2018-2021, Exhibit 298, p. 14 under 40 [↑](#footnote-ref-31)
32. UNDP Strategic Plan, 2018-2021, Exhibit 298, p. 8 under 7 [↑](#footnote-ref-32)
33. UNDP Strategic Plan, 2018-2021, Exhibit 298, p. 11 under 29 [↑](#footnote-ref-33)
34. Africa Renewable Energy Initiative, Exhibit 299, p. 3 [↑](#footnote-ref-34)
35. Africa Renewable Energy Initiative, Exhibit 299, p. 3 [↑](#footnote-ref-35)
36. Africa Renewable Energy Initiative, Exhibit 299, p. 3 [↑](#footnote-ref-36)
37. Africa Renewable Energy Initiative, Exhibit 299, p. 3 [↑](#footnote-ref-37)
38. Africa Renewable Energy Initiative, Exhibit 299, p. 17 [↑](#footnote-ref-38)
39. UNEP Emissions GAP report 2019, Exhibit 274, p. 54 [↑](#footnote-ref-39)
40. Sustainable Energy for All, Exhibit 300, pp. 9-11 [↑](#footnote-ref-40)
41. UNEP Emissions GAP report 2019, Exhibit 274, Chapter 6.2.5, p. 51 (Leapfrogging potential), quote on p. 54 [↑](#footnote-ref-41)
42. Royal Dutch Shell plc Responsible Investment Annual Briefing 2020, 16 April 2020, Exhibit RK 032 B, p. 3 [↑](#footnote-ref-42)
43. Ibid, p. 6 [↑](#footnote-ref-43)
44. See, inter alia, IPCC SR15, Exhibit 135, under Chapter D: Strengthening the Global Response in the Context of Sustainable Development and Efforts to Eradicate Poverty, pp. 18-23; UNEP Emissions Gap Report 2019 , Exhibit 274, Chapter 5 (Bridging the gap: Transformations towards zero-carbon development pathways); International Council for Science, a Guide to SDG interactions: from science to implementation, Exhibit 297. [↑](#footnote-ref-44)
45. See, e.g., the District Court in the Urgenda case, para. 101 [↑](#footnote-ref-45)
46. UN Resolution on Sustainable Development Goals (Exhibit 335), para. 39, idem Dutch version [↑](#footnote-ref-46)
47. BP: From International Oil Company to Integrated Energy Company, Exhibit 283 [↑](#footnote-ref-47)
48. See inter alia the District Court in the Urgenda case, para. 4.43 and Procurator General Langemeijer and Wissink in their opinion under 2.30 [↑](#footnote-ref-48)