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| **District Court of The Hague** |
| Case number:Session: | C/09/571932 2019/37917 December 2020 | **NOTES ON ORAL ARGUMENTS 9****Reply** |
|  |  | in the matter of1. **Vereniging Milieudefensie** both on its own behalf, and in its capacity of representative ad litem and representative of the co-claimants 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 DefendantCounsel: Mr. D. Horeman Mr. J. de Bie Leuveling Tjeenk Mr. N.H. van den Biggelaar  |

Your Honours,

**Energy market**

1. In relation to RDS’ responsibility for its scope 3 emissions as argued by Milieudefensie et al., RDS presented the argument that its scope 3 emissions are also the scope 1 and 2 emissions of others. This is correct and this is also precisely why RDS bears such great responsibility. I will explain this one more time.
2. If RDS supplies electricity generated by gas or oil to businesses or consumers, then it is these businesses and consumers who after procurement of this electricity from RDS emit the CO2 which is connected with this generated electricity.
3. If RDS thus only supplies fossil electricity, RDS’ customers can also do nothing other than emit emissions as RDS does not have any alternatives on offer. But if RDS reduces its investments in its fossil energy portfolio, consequently more investments can be made in sustainable energy, either because RDS will itself be investing in sustainable energy, or because it consequently is freeing up more space on the energy market for others to invest in sustainable energy.
4. As was already argued on 15 December, there are many forms of causality between limiting investments in fossil energy and limiting emissions.[[1]](#footnote-1) One of these is that consequently it becomes easier for sustainable energy to gain market share and this is what is necessary to achieve the Paris goals. Limiting investments in fossil energy results in limiting the production of fossil energy and this has the important advantage, inter alia, that carbon lock-in will be prevented and sustainable energy consequently becomes more competitive or, as the study, submitted as Exhibit 311, puts it:

*“[I]t is increasingly clear that supply-side policies can bring important benefits [..] They can reduce carbon lock-in effects, making it easier for low-carbon alternatives to compete with fossil fuels, and weakening the carbon entanglements that makes it hard for many governments to adopt strong climate policies.”* [[2]](#footnote-2)

1. That RDS is continuing to push for the overproduction of oil and gas with its investments, so that businesses and consumers are offered too few alternatives at too slow a pace so that they will not be able to reduce their emissions quickly enough, is precisely part of the reproach that can be made against RDS. Consumers and businesses precisely need RDS, being one of the biggest energy providers in the world, to offer them alternatives in order to become sustainable. At the very least, consumers and businesses need RDS to phase out its dominant fossil position so that more room can be created for sustainable energy. It is only in this manner that consumers and businesses will be able to reduce their own scope 1 and 2 emissions.
2. Because RDS is one of the biggest players in the global energy chain, others in the chain are very dependent on what RDS chooses to invest in. This is also the reason why, according to the Oxford analysis, there is general consensus between the various climate protocols and guidelines, that certainly for companies with a lot of scope 3 emissions it is necessary that they be held accountable for those scope 3 emissions and must reduce the scope 3 emissions of their customers. After all, anyone who has a lot of scope 3 emissions by definition sells a lot of fossil products.[[3]](#footnote-3) And it is precisely the big sellers of fossil products who bear great responsibility for the guidelines.
3. That Shell’s scope 3 emissions are the scope 1 and 2 emissions of others, in fact precisely underlines RDS’ responsibility for those emissions. This has also been set out in great detail in the notes on oral arguments 7.
4. RDS sells its fossil fuels to consumers and businesses worldwide, including in China. That RDS is making agreements with the Chinese government or other governments on the sale of oil and gas, does not detract from its own responsibility to mitigate the scope 3 emissions which are connected with the sale. The countries in which and with which RDS trades are all a party to the UN Climate Convention and the Paris Agreement, they have all called for more action from non-state parties and they all wish to make a switch of investments to climate-friendly energy forms. Milieudefensie et al. has already discussed in detail in the notes on oral arguments 5 that the order sought in the claim does not interfere with the interests of countries, or in any event not in a manner which should lead to a reserved assessment by the District Court.
5. In this respect it is good to emphasise two things, i.e. that Milieudefensie et al.’s claim does not interfere with the principle of “common but differentiated responsibilities”, nor does the claim mean that there will no longer be any oil and gas available as of tomorrow.
6. The principle of “common but differentiated responsibilities” does not cause interference because Milieudefensie et al. bases its claim on the global emissions reduction scenario and not on the emissions reduction scenario of the developed countries. As discussed on day 3, RDS believes that it must follow the faster pace of the developed countries,[[4]](#footnote-4) but Milieudefensie et al. intentionally did not opt for this because it wanted to take account of the special position of the developing countries. That is why Milieudefensie et al. precisely sought alignment with the pace in which the entire world, and that is thus including the developing countries, must reach the net-zero point. That is also the reason why the company protocols and guidelines are based on this global pace. Interference with the principle of “common but differentiated responsibilities” is thus not at issue.
7. This brings me to the point that awarding of the claim does not mean that RDS would not be allowed to sell oil and gas in the coming decades. It will only have to scale down sales at a pace that corresponds with achieving the global climate goal. Within the given emissions reduction goal, RDS can keep selling oil and gas. The reduction goal only relates to the year 2030 and RDS will then, at the current emissions intensity of its oil and gas products, still have approx. 55% of its current sales. If it were to achieve its Net Carbon Footprint ambition, this would mean that this percentage could even increase, because fewer CO2 emissions will be released per unit of oil and gas sold. This case is not about what must occur after 2030, so we do not have to look beyond 2030. In so far as RDS is trying to create the picture that the world will be left without oil and gas tomorrow because of the judgment, this is definitely not correct.
8. Another point that Milieudefensie et al. would like to touch upon is that RDS makes it appear as if coal production would have to be phased out first and only then would it be the turn of oil and gas production. However, everything presented by Milieudefensie et al. shows that in all sectors a reduction must be set in motion if in the coming decade sufficient emissions reductions are still to be able to take place to deflect dangerous climate change. The coal industry cannot keep looking at the oil and gas industry, nor vice versa, the oil and gas sector cannot keep looking at the coal industry.
9. Thus if RDS had wanted to argue by referring to its gas project in China that within the still available carbon budget the world can first transform from coal to gas and then from gas to sustainable, then this is incorrect.
10. If every gas company were to do what RDS is doing, i.e. fully gear to offering gas as an alternative to coal, far too much will be invested in gas and the carbon budget will therefore be seriously overrun. And because every gas company is doing precisely what RDS is doing, i.e. investing too much in gas because of growth ambitions, the carbon budget will be overrun. This was already made clear on day 3 with the figure below, which was discussed at the time. (Milieudefensie et al.’s notes on oral arguments 7 on page 17)

1. The transformation from coal to gas can thus only take place in so far as there is still room for it within the carbon budget. For the remainder, there will have to be a switch from coal immediately to sustainable energy sources. RDS’ growth strategy for gas thus does not fit within the carbon budget and that is precisely what the production gap report and the other reports on the production gap unequivocally show. RDS can only offer gas as a replacement for coal, as long as it fits within the reduction task. Gas is thus not the transition fuel RDS is making it appear to be. Within the limits of the necessary climate approach there is no freedom of choice for governments to first transform from coal to gas and only after that to climate-neutral energy.
2. This also appears from the Net Zero Emissions 2050 scenario of the IEA which was discussed on day 3, which also shows that the energy sector must have effected a 45% reduction in 2030. It was also discussed in this respect that all sectors must have embarked on the path to net-zero emissions.[[5]](#footnote-5) There are no division agreements between fossil companies or between fossil sectors and that is why the companies and sectors will have to adhere to the global pace. As stated, the claim only relates to the period 2030, as an important interim station to be achieved for the net-zero goal in 2050. In 2030 one can take stock according to the situation of that moment. Because the energy supply from after 2030 is not part of this dispute, the period after 2030 needs no further discussion.
3. Another point that Milieudefensie et al. wishes to emphasise once more is that for the oil and gas activities that RDS develops and for the associated infrastructure, worldwide cooperation with governments is necessary, permits must be obtained from governments for this and the like. RDS’ argument that putting sustainable energy on the market requires cooperation with governments, permits must be obtained and the like, is thus no different for fossil fuel project development than for sustainable energy project development. Fossil fuel projects, just like some sustainable energy projects, have to deal with resistance from society. RDS’ years of attempts at exploration in the North Pole area is such an example. It concerned an ultimately unsuccessful attempt at project development for which cooperation with the US and Alaskan government was necessary and many very specialist environmental permits were necessary because there was drilling in one of the most vulnerable areas in the world. After many unsuccessful drilling attempts and after ever increasing societal resistance from all corners of the earth, this ultimately led to RDS’ decision to terminate the entire North Pole project. The cost of this failed adventure for RDS was a loss of some 7 billion dollars.[[6]](#footnote-6)
4. Like every oil and gas company, RDS has experience with successful and less successful project development. This will undoubtedly also be the case with sustainable project development projects, but this is of course not a reason, let alone a legally valid reason, to just continue making abundant investments in new oil and gas projects.
5. I would now like to get to the argument why RDS should not be allowed to expand its emissions by taking over other oil and gas companies. It has been explained in detail that and why RDS must effect a reduction which is in accordance with the global emissions reduction scenario. Within the limits of that emissions reduction task, RDS can develop its business activities as it sees fit. Remaining within those limits is not only of great importance for the emissions reductions which are achieved in this respect, but also because consequently RDS’ investments in the fossil infrastructure will decrease, the lock-in effect will decrease, and consequently RDS’ interest in obstructing the energy transition will decrease, making it easier for governments to accept a more stringent climate policy, thus resulting in more space for sustainable investments and consequently opening up the path toward globally achieving the drastic emissions reductions in the coming 10 years which are necessary as of 2030.
6. For all these reasons RDS naturally cannot be permitted to continue expanding CO2 emissions as long as they only come from oil and gas projects taken over from other fossil companies. This cannot be permitted because RDS will continue to use its capital and investments to increase its oil and gas portfolio. This means that its investment interests will continue to conflict with the Paris goal. RDS will thus remain the dominant fossil party in the energy chain which it is now (or will become even more dominant) and it will continue to increase its scope 1, 2 and 3 emissions in a manner which is not in line with the carbon budget. Such an escape clause for RDS would make the judgment completely void because neither the intended emissions reduction goal will be achieved, nor will the other important goals which are connected with the emissions reduction goal be achieved, which I mentioned (in the preceding paragraph).
7. In addition, the fossil fuel company to which RDS pays the transaction sums will itself continue investing in fossil projects with the proceeds of sales it receives. There is nothing to stop that fossil fuel company from doing that. In that manner there is no guarantee whatsoever that emissions reductions will be achieved, nor that investments of fossil energy will be transferred to climate-neutral energy. As stated, the judgment will then be void and the status quo will be maintained, as was explained on day 3.

**Science (tipping points)**

1. I would briefly like to respond to RDS’ scientific considerations on day 3.
2. Shell rightly states that the IPCC and its reports offer an objective basis for policy choices. There is a good reason why these reports form the source and substantiation for the realisation of Article 2 of the Paris Agreement. The IPCC AR5 Synthesis report of 2014 also states this explicitly in the introduction on p. 2 of the report.

"*This report includes information relevant to Article 2 of the United Nations Framework Convention on Climate Change (UNFCCC)*." [[7]](#footnote-7)

1. It is on the basis of these scientific findings of the IPCC AR5 report, that the global community established in the Paris Agreement in 2015 what is to be deemed dangerous climate change and that therefore the warming up of the earth must be limited to well below 2°C and the goal is to limit warming up to a maximum of 1.5°C.
2. Overrunning of that maximum warming up limit must be prevented because, inter alia, ecosystems can no longer adjust to the speed of the warming up and thus cannot adapt. That poor adaptability is explicitly part of the description of Article 2 of the UN Climate Convention, which makes it clear that the warming up must be limited to a level in which ecosystems can adapt to climate change. I am only pointing this out because RDS appears to suggest that the world will not have a problem adapting to a somewhat higher warming up and that the risks are therefore better than expected.
3. It is thus the global community itself which on the basis of IPCC science has determined what danger threshold must not be breached to protect humans and the environment and make adaptation possible. It is that safety standard which is based on universal consensus on which Milieudefensie et al. is basing its case and the District Court need not determine whether dangers are tolerable or not tolerable because the global community has already done this for the District Court.
4. After the AR5 of 2014, the IPCC published a number of reports, which represent an up-to-date picture of the climate science with regard to specific topics. These reports were thus all compiled on the request of the Conference of Parties of the UNFCCC, the UN Climate Convention. These are, inter alia, the Special Reports on 1.5 degrees, land use and oceans.
5. Contrary to what RDS asserts, these Special Reports are subject to the same quality controls and procedures, which is explained in detail in the IPCC Principles and Procedures[[8]](#footnote-8). The Summaries for Policy Makers of these reports have been approved and adopted by all contracting states of the UN Climate Convention. These have been submitted as Exhibits 135, 289 and 290.
6. The IPCC Special Report on 1.5 degrees (the SR15 report for short) which was published in 2018 merits special attention in this respect. The report was drawn up by all three IPCC work groups and was written by more than 90 authors from all over the world. Shortly after publication the General Secretary of the UN said the following about this report (quote):

*“This report by the world’s leading climate scientists is an ear-splitting wake-up call to the world. It confirms that climate change is running faster than we are – and we are running out of time.”* [[9]](#footnote-9)

1. The importance of this report cannot be underestimated and it therefore surprises Milieudefensie et al. that RDS is doubting the quality and legitimacy in para. 11 of its oral arguments on the science. RDS makes no further mention of the report after that.
2. Milieudefensie et al. does not wish to leave any room for misunderstandings. The Special Reports are of very great scientific importance, they form an important addition to the Assessment Reports and are used as the basis for international and national climate policy. The state of the art with regard to 1.5 degrees and 2 degrees is even better reflected in the Special Report on 1.5°C than in the AR5. The IPCC AR5 Report appeared before 1.5°C was laid down in the Paris Agreement. By frequently referring to AR5 in 2014 and not taking the SR15 report of 2018 into account, the impression is created that Shell wants to focus attention on 2°C and wants to avoid discussion of the globally agreed 1.5°C.
3. In its oral arguments RDS went into a number of the documents on climate change submitted by Milieudefensie et al. In the quotes of the IPCC AR5 cited by RDS, the seriousness of the climate crisis is emphasised at all levels. RDS then focused attention on yellow-marked sections, gave a veritable presentation on them, while the cited quotes themselves make it clear that RDS’ representation is not correct.
I will give a single example to make this clear.
4. RDS gave an extensive presentation in which tipping points in physical and ecological systems such as, inter alia, ice sheets, oceans and forests were discussed, to then reproach Milieudefensie et al. of having incorrectly interpreted the science by speaking about tipping points in the climate system. According to RDS, physical and ecological systems like oceans, ice sheets and forests are not part of the climate system. But on p. 16 it cites a citation that states precisely the contrary and shows that this *does* concern components of the climate system, like Milieudefensie et al. argued. I will briefly quote the relevant citation:

*“****Abrupt Change****. Several components or phenomena in the climate system could potentially exhibit abrupt or nonlinear changes, and some are known to have done so in the past.”*

1. The IPCC then gives examples of components of the climate system which already went through tipping points in the past. This concerns situations of millions of years ago. I quote the IPCC:

*“Examples include AMOC [*the Atlantic gulf stream*][[10]](#footnote-10), Arctic sea ice, the Greenland ice sheet, the Amazon forest and monsoon circulations.”*

1. And this is precisely what Milieudefensie et al. means by tipping points in the climate system, as all these components and many others belong to the climate system and are all connected with each other. Things that are connected with each other, can also influence each other and that is what the “cascading effects” discussed in the summons are about and these are also charted by the IPCC, in a separate chapter in fact.[[11]](#footnote-11)
2. In the summons Milieudefensie et al. only did what the IPCC is doing, i.e. on the one hand charting the consequences of 1.5°C and 2°C and on the other charting the consequences of the “business as usual” scenario, the scenario in which the world continues on the same road. If there is one party which does not have the right to reproach Milieudefensie et al. of sticking to a “business as usual” scenario, then it is RDS. If there is one party which bases its business model on the “business as usual” scenarios of the International Energy Agency, it is RDS.
3. Milieudefensie et al. correctly set out and presented the science in its summons and other court documents and there may be no misunderstanding about the seriousness and scope of a warming up which exceeds 1.5°C or 2°C. The temperature goal of the Paris Agreement is the safety standard which must not be exceeded and that is what Milieudefensie et al.’s claim is based on.

**The ETS**

1. RDS refers to the European Emissions Trading System (hereinafter: “ETS”) and argues that awarding of the claim would interfere with this system.[[12]](#footnote-12) The mere fact that in Europe there is a general system for the regulation of emission credits, which covers RDS, does not stand in the way of RDS being held liable under civil law due to its special position and global influence on the problem. Nor does this mean that awarding of the claim would interfere with the ETS. This was explained on day 2 of these multi-day oral arguments. I will go into this in further detail now.
2. As previously explained, the ETS has no exhaustive, civil law exculpatory effect as its goal, nor can any leads be found therefore in the history of its creation.
3. Nor is there an exhaustive effect from a public law perspective. RDS refers in this respect to Article 5.12 of the Dutch Environmental Law Decree, that stands in the way of attaching emissions threshold values to environmental permits. However, this is only a measure to prevent concurrence between two permit systems, so that there are not two permit systems covering the same subject-matter. If this were to have a farther-reaching purport, it would not be possible to take all kinds of other measures which affect the ETS sector and the emissions rights market. Both the Member States and the EU themselves are, however, taking various additional measures, including national CO2 pricing systems. With regard to some of these systems, including that of the Netherlands, it is explicitly stated that a reason for this is that the ETS does not lead to a sufficiently high CO2 price to be effective.
4. Another example of an additional measure is the phasing out of coal-fired power stations. The reason for this is comparable to the interests which are also at stake in this case, i.e. the phasing out of the fossil infrastructure and the high emissions that accompany it. Just as coal cannot be reconciled with the Paris goal, this applies equally, however, to oil and gas, in view of the production gap which has been discussed. Gas is not a transition fuel and the prevention of dangerous climate change simply cannot be reconciled with an increasing production of gas, as RDS would like. The ETS thus does not stand in the way of taking additional measures. After all, there is no waiting period until the ETS, with its cap and trade system, makes the fossil coal-fired power stations unprofitable.
5. As previously indicated, the State also presented (inter alia) the defence in the Urgenda case that the ETS is exhaustive, in such sense that this system, with regard to the ETS sector, stands in the way of taking measures to further reduce the emission of greenhouse gases. This defence was rejected by the District Court of The Hague and the Court of Appeal.[[13]](#footnote-13)
6. If the conclusion cannot be drawn that there is an exhaustive effect under public law, an exhaustive effect under civil law is a considerable step further. This would completely deprive citizens of a fundamental right: the right to prevent damage via a claim on the ground of wrongful act. This even though it is clear that the ETS and the measures by governments globally do not offer sufficient protection against dangerous climate change and consequently human rights are under pressure.
7. Now the issue of interference. RDS insinuates that the awarding of Milieudefensie et al.’s claim would have a disrupting effect on the ETS and the market within it. However, this cannot be maintained, nor has it been substantiated.
8. It is common knowledge that at this time there is a structural imbalance between supply and demand in the ETS. This structural lack of balance is caused, inter alia, because in the first stages of the ETS an excessively high emissions ceiling has been created and too many emission credits have been issued.[[14]](#footnote-14) This means there is a very large surplus in emission credits on the market and the market effect of the ETS has been impaired. The ETS is not giving the necessary signal to investors to reduce CO2 emissions in a cost-effective manner, so that the ETS is not a driving force behind low carbon innovation which contributes to economic growth and employment. This is (literally) considered in recital 4 of the preamble of Decision 2015/1814, establishing the market stability reserve.
9. The market stability reserve was established to deal with this surplus in emission credits, but is not doing enough at present. For example, as of 2019 the ETS still has a surplus of some 1.4 billion emission credits and it does not look as if this surplus will be sufficiently reduced any time soon. This ensues from the annual Report on the functioning of the European carbon market published by the EU.[[15]](#footnote-15)
10. In comparison to the surplus of some 1.4 billion emission credits, it is not clear that the awarding of the claim against RDS would in any way constitute interference with the ETS. With regard to the emissions of the Shell Group under the ETS, 10,199,702 emission credits were obtained for free and 3,294,187 emission credits were purchased, as set out in RDS’ CDP report of 2019.[[16]](#footnote-16)
11. So according to RDS there would be interference with the ETS, if a few million emission credits were added to an already existing surplus of some 1.4 billion emission credits or if RDS were not to purchase any extra emission credits. This does not make sense. The reproach is that a leak has been sprung in a boat that has already been holed below the waterline.
12. In addition, the claim seeks to effect that on the part of RDS there will be a phasing out of emissions which, if the ETS were to have or set a goal which is in line with the Paris goal, keeps pace with the linear reduction which is to be broadly effected by the ETS. In essence, RDS is moving in sync with what the ETS is intended to achieve. This is not interference.
13. This applies all the more now that the market effect and the cost effectiveness of the ETS serves an alternative and subordinate interest compared to the primary interest: the reduction of emissions. The market effect relates to a tool to achieve the goal of the emissions reduction. This primary interest takes precedence and the awarding of the claim is the best way to serve this interest.
14. As stated, the market stability reserve was created to solve the problem of the non-functioning ETS market, but it is not yet functioning sufficiently. Maybe this will be rectified, maybe not. Up to now this has in any event not been achieved. This is problematic as this keeps the prices low and all that time the ETS provides insufficient incentive to invest in sustainable technology. Credits can simply be purchased when necessary. This allows companies to keep investing in fossil infrastructure and in the longer term it becomes more difficult to further effect the reduction to 2050. Because of the carbon lock-in, the investments for the fossil infrastructure must be earned back at a term of (only) 15 years. This will cause further resistance in the industry to the transition to sustainable energy.
15. In so far as RDS believes that there is interference, because the order requested in the claim specifically sets requirements for RDS, while the ETS does not set any requirements geared to the individual circumstances of the case, this cannot succeed either. The requirements to be set for RDS if the order is granted, are justified by the special position of RDS – which has been explained in detail – and the wrongful act committed by it.
16. The ETS does not encompass any good reason not to award the claim with regard to a party like RDS. RDS has an enormous influence on the worldwide climate problem, both with regard to the cause thereof and the potential contribution to the solution. This even though the claim only entails that RDS must move in sync with the reduction goal that the whole world has agreed is necessary to prevent dangerous climate change.
17. RDS furthermore states that awarding of the claim within the ETS would not be successful, because other parties would then have the leeway to increase their emissions. This argument – which presumes the existence of a ‘waterbed effect’ – cannot succeed.
18. The Court of Appeal already rejected this in the Urgenda case (quote):[[17]](#footnote-17)

*“This argument wrongly assumes that other EU Member States will utilise the available emissions scope under the ETS system to the utmost. Just like the Netherlands, other EU Member States have their own responsibility to limit CO2 emissions as much as possible and it cannot be presumed a priori that the other Member States will take less far-reaching measures than the Netherlands. On the contrary, in comparison to Member States like Germany, the United Kingdom, Denmark, Sweden and France, Dutch reduction efforts are lagging far behind. In addition, Urgenda, with submission of various reports, including a report of the Danish Council on Climate Change[[18]](#footnote-18) (Exhibit U131), presented a substantiated argument that in any event up to 2050 no ‘waterbed effect’ can occur as a result of the surplus in ETS rights and the cushioning effect over time of the ‘Market Stability Reserve’.*
19. In short, there cannot be a waterbed effect because of the enormous surplus in emission credits. Should the market stability reserve ever function adequately at some point in time, this will also have an effect on reducing waterbed effects, because the surplus in emission credits will be removed from the market.
20. This also concerns a somewhat strange reasoning; that moving in sync with a reduction goal which is comparable to the reduction goal which the ETS will potentially and hopefully have in the future, will not be successful.
21. In addition, if RDS were to be overly concerned about a waterbed effect, it can of course just as easily not sell its emission credits on the market. This should not be particularly cumbersome, as it receives these emission credits for free.
22. Lastly, in this respect reference is made to the consideration of the Netherlands Supreme Court in the Urgenda case under 5.7.8 (quote):[[19]](#footnote-19)

*“In this respect it is still relevant that, according to the considerations in 4.6 above regarding the carbon budget, every reduction of the emission of greenhouse gases has a positive effect on mitigating dangerous climate change. Every reduction means, after all, that more space is left in the carbon budget. The defence that an obligation of the individual states to reduce the emission of greenhouse gases will not be of any use because other countries will still continue with their emissions, fails for this reason too: no single reduction is negligible.”*
23. The above also applies to the reduction of RDS’ emissions, both within the ETS system and worldwide. This has already been fully explained.

*Conclusion*

1. The point is, of course, that it would be wonderful if the ETS did function properly. RDS is, of course, more than welcome to achieve its goals within the ETS and together with the ETS, but the ETS as such cannot be a reason to dismiss this claim. The system is not meant to be exhaustive, it has flaws, and is in any event only relevant for a mere 2.5% of the emissions which RDS controls and to which the claim relates. The fact remains that all government measures worldwide are insufficient to prevent dangerous climate change and that action is necessary on the part of large, non-state parties like RDS.

**The legal task of the court**

1. RDS has furthermore argued that the awarding of Milieudefensie et al.’s claim cannot be reconciled with the law-forming task of the court.
2. According to RDS there are three topics which entail that this District Court has no role to play in this matter:

1. There are various solutions, considerations at system level are necessary and the issue requires political decision making;

2. The legislator has already taken on the subject-matter and the court must not interfere with this; and,

3. Demarcation problems and legal uncertainty result when the court takes on a law-forming role.

*Re. 1*

1. The judgments mentioned by RDS under para. 32 of its notes on oral arguments regarding the law-forming task of the court are evidently not comparable to this case. They all concern lawsuits against the State – not a private party like here – in which the claim would result in a change to the system. Action was brought against tax legislation (the Fixed Employment Expenses Deduction case and the ‘Tax Box 3 cases’, as stated in para. 32, under a and b), action was taken against possible policy of the State with regard to the use of nuclear weapons (the Nuclear Weapons case, mentioned in para. 32, under c) and the request was to create a legal remedy that did not yet exist (para. 32, under d). None of these are at issue in these proceedings. The only issue is whether under Article 3:296(1) of the Dutch Civil Code, one private party must be protected against a wrongful act of the other party.
2. Aside, it is pointed out that these cases also do not exclude the court from intervening at some point in time. When the passage cited by RDS from the Fixed Employment Expenses Deduction case is quoted in full, a different picture arises than that shown by RDS (quote):

“3.15 *This consideration will in general entail that the court itself will immediately make provision for the legal deficit if it can be sufficiently clearly deduced from the system of the law, the cases regulated therein and the principles forming the basis thereof, or the legislative history, how such is to be effected. However, in cases in which various solutions are conceivable and the choice thereof is partly dependent on general considerations of government policy or important choices of a legal-political nature must be made, it is appropriate that the court leaves that choice up to the legislator for the time being, both in connection with the constitutionally desired reserve of the court referred to in 3.14 and due to its limited possibilities in this area.
It is not excluded, however, that the consideration must be different in the event the legislator is aware that a specific statutory arrangement will lead to unlawful unequal treatment within the meaning of the aforementioned convention provisions, but fails to itself make an arrangement which eliminates the discrimination.* [underlining added by counsel]”
3. It is clear that there can indeed be circumstances in which the court has a role, e.g. when there is an inadequately functioning public law framework, and the legislator, despite being aware thereof, fails to intervene. This is relevant in relation to what has turned out to be inadequate climate measures of governments worldwide. That there must be intervention is, moreover, extremely urgent.
4. Furthermore, in para. 32, under e, RDS is also invoking the Urgenda case, but it applies a very strange interpretation of this judgment. Naturally, in the Urgenda case, in which the State was held liable, attention was paid to the discretionary room which the State has in making (climate) legislation and regulations to flesh out the imposed reduction order. The court determined the standard, the lower limit, within which the State must operate in this respect. Within the limits of the law, the State then has the discretionary scope to determine its policy.
5. The existence of this discretionary scope nevertheless does not mean – and this is what RDS is implying with its argument – that each elaboration of this discretionary scope involves an exculpatory effect, in such sense that the mere circumstance that the government is busy with climate legislation and regulations entails that private parties can no longer be held to account for their own special position and influence on dangerous climate change. There is no precedent for such a far-reaching interpretation.

*Re 2*

1. The invoking of the judgments cited by RDS under para. 33, cannot succeed either.
2. Once again these are cases which are not comparable to this case. For example, the cited judgments under a and b always relate to the invoking of a right that has not been laid down in or that cannot be deduced from an existing statutory arrangement, while the legislator is at the same time busy establishing legislation regarding the subject-matter in question. Milieudefensie et al.’s claim is based on an open standard that has long been anchored in the law. A legal standard which for decades has been suitable – and according to the international and national prevailing legal view is intended – to provide for situations such as this one. There is therefore not a situation in which the existing legislation does not provide sufficient basis to determine how this matter should be assessed. Which is why the reference in para. 30, under c, also fails. In addition, the legislator is not busy creating liability legislation in relation to climate change.

*Re 3*

1. Lastly, the cases referred to in para. 34 relate to a completely different situation than is at issue here. For example, it ensues from TNT/Weijenberg and Rooyse Wissel/Hagens that the Netherlands Supreme Court in principle is willing to provide for a societal need and to interpret an open standard – being a good employer as referred to in Article 7:611 of the Dutch Civil Code – broadly, but that such an interpretation has limits. This is in the event that there is a concurrence and interplay with a special and clearly demarcated and limited statutory arrangement, i.e. employer liability. In the Taxibus case too there was an interplay between the wrongful act legislation and a specially demarcated and limited compensation scheme, being Article 6:108 of the Dutch Civil Code, which regulates what compensation next of kin can claim in the event of the death of a loved one.
2. It ensues from these cases that in the event of such a concurrence, in the interpretation of an open standard account must be taken of the special, limited and demarcated liability or compensation scheme for which the legislator has already made provision. This applies all the more if the requested interpretation of the open standard were to *de facto* entail an expansion of the *lex specialis* provided by the legislator, which the legislator did not intend.
3. Such a situation is evidently not at issue in this case. There is no special, limited and demarcated statutory arrangement with regard to climate liability. The only thing there is, is the open standard of the societal duty of care. This can be fleshed out on the basis of the legal tools that do exist, i.e. the Kelderluik criteria, human rights law and soft law. RDS is already trying to nip a legal development on this point in the bud – even before it has started – and is in essence stating that every elaboration of wrongful act legislation in the area of climate change, must in advance be left up to the legislator. This is evidently incorrect. Any other interpretation would entail that with every application of the societal duty of care to a new subject-matter, law-forming problems would arise. This is not the case.

*Conclusion*

1. The fact that there is no regulation which prohibits the causing of climate change as such, does not mean that RDS can wait for the government to reduce its greenhouse gas emissions.[[20]](#footnote-20) In this respect reference can (again) be made to the asbestos cases, in which it was held that the party against which the claim was brought could not base a claim on a slack government. This matter concerns an independent obligation of RDS.
2. What RDS’ argument comes down to is that, if the political decision makers were to decide that they do not have to do anything and that other sectors must take action first, RDS has no obligation to take action either. However, this argument cannot succeed. It is clear what must be done to prevent dangerous climate change. It is also clear what this means for the increasing investment in and use of fossil fuels and oil and gas, as RDS intends to do. The increasing investment in oil and gas simply stands in the way of preventing dangerous climate change. With its position that the government could make considerations and that the political decision makers could decide that the desired reduction will come from other sectors than the sectors in which RDS is active,[[21]](#footnote-21) RDS is actually only providing further evidence that the government is taking inadequate measures, and that the government, because of the governance gap and because of regulatory capture, is not properly able to prevent this problem. The discretionary scope intended for considerations does not exist. There is a clear lower limit which the District Court can award without overstepping the mark. This does not require any further considerations or political decision making and there is no interference with statutory arrangements. Milieudefensie et al. again repeats its position that it cannot be the case that under Article 3:296(1) of the Dutch Civil Code it is impossible for citizens to hold multinationals accountable for their influence on dangerous climate change, regardless of whether states are taking sufficient action to prevent this worldwide damage or are themselves not able to sufficiently regulate multinationals like RDS.

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1. See, inter alia, notes on oral arguments 8 of Milieudefensie et al. dated 15 December 2020 under paras. 65 and 66. [↑](#footnote-ref-1)
2. Ibid para. 65. [↑](#footnote-ref-2)
3. Notes on oral arguments 7 of Milieudefensie et al. dated 15 December 2020, para. 22 (and preceding paragraphs). [↑](#footnote-ref-3)
4. Notes on oral arguments 8 of Milieudefensie et al. dated 15 December 2020, paras. 32-35, para. 126. [↑](#footnote-ref-4)
5. See, inter alia, Milieudefensie et al.’s notes on oral arguments 8 dated 15 December 2020, paras. 23-27, paras. 128-134.
See further Milieudefensie et al.’s notes on oral arguments 7 dated 15 December 2020, paras. 33 et seq. [↑](#footnote-ref-5)
6. [https://www.bbc.com/news/business-34377434#:~:text=Royal%20Dutch%20Shell%20has%20stopped,%22for%20the%20foreseeable%20future%22](#:~:text=Royal%20Dutch%20Shell%20has%20stopped,%22for%20the%20foreseeable%20future%22) [↑](#footnote-ref-6)
7. Exhibit 228, p. 2, submitted by Milieudefensie et al. with the summons on 5-4-2019 [↑](#footnote-ref-7)
8. IPCC Principles and Procedures, <https://www.ipcc.ch/about/preparingreports/> [↑](#footnote-ref-8)
9. *The UN Secretary General on 8 October 2018,* <https://www.un.org/sg/en/content/sg/statement/2018-10-08/statement-secretary-general-ipcc-special-report-global-warming-15-%C2%BAc> [↑](#footnote-ref-9)
10. AMOC stands for Atlantic Meridional Overturning Circulation [↑](#footnote-ref-10)
11. See, for example, the Ocean Report, “Climate change is modifying multiple types of climate-related events or hazards in terms of occurrence, intensity and periodicity. It increases the likelihood of compound hazards that comprise simultaneously or sequentially occurring events to cause extreme impacts in natural and human systems. Compound events in turn trigger cascading impacts (*high confidence*).” <https://www.ipcc.ch/site/assets/uploads/sites/3/2019/11/10_SROCC_Ch06_FINAL.pdf> [↑](#footnote-ref-11)
12. RDS’ Oral arguments on law-forming task of the court, 15 December 2020, para. 17. [↑](#footnote-ref-12)
13. See the judgment of the District Court of The Hague of 24 June 2015 (ECLI:NL:RBDHA:2015:7145), para. 4.80 and the judgment of the Court of Appeal of The Hague of 9 October 2018 (ECLI:NL:GHDHA:2018:2591), para. 54. [↑](#footnote-ref-13)
14. Companies like Shell have earned a lot of money on the surplus in free emission credits which are issued under the EU ETS and in passing on the CO2 price to the consumer. Between 2008 and 2014, this method earned the company an average of € 385 million. See: Bruyn 2016, CE Delft, *Calculation of additional profits of sectors and firms from the EU ETS,* table 28, p. 57, The Netherlands [↑](#footnote-ref-14)
15. Brussels, 18.11.2020 COM(2020) 740 final (English version). P. 28. [↑](#footnote-ref-15)
16. Exhibit 315, p. 154. Submitted by Milieudefensie et al. by statement on 2 September 2020. [↑](#footnote-ref-16)
17. Court of Appeal of The Hague of 9 October 2018 (ECLI:NL:GHDHA:2018:2591), paras. 55 and 56. [↑](#footnote-ref-17)
18. ‘The Inflated EU Emissions Trading System - Consequences of the EU ETS and Surplus of Allowances for Danish Climate Policy’ <https://klimaraadet.dk/en/system/files_force/downloads/ets_final_english.docx.pdf>. [↑](#footnote-ref-18)
19. Netherlands Supreme Court 20 December 2019 (ECLI:NL:HR:2019:2006). [↑](#footnote-ref-19)
20. See also: S.J.M. Biesmans, De betekenis van het Urgenda-arrest voor ondernemingen, AV&S 2020, 31. [↑](#footnote-ref-20)
21. RDS’ Oral arguments on the law-forming task of the court, 15 December 2020, para. 21. [↑](#footnote-ref-21)