

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

PLEADING NOTES PART I:

INTRODUCTION

1 DECEMBER 2020

mr. J. de Bie Leuveling Tjeenk,
mr. N.H. van den Biggelaar and
mr. D. Horeman

in the case of:

**MILIEUDEFENSIE ET AL. versus
ROYAL DUTCH SHELL PLC**

1 INTRODUCTION

1. The importance of tackling climate change is beyond dispute. RDS has spoken out in that sense for a long time.
2. RDS also endorses that it is important and desirable for society to achieve the goals of the Paris Agreement. Nor is there any question of the fact that, alongside the Contracting States, all sorts of parties, including Shell, as energy producer, will make a contribution to this.
3. The issue of climate change is of enormous societal importance. But what the present case is mainly about is the question of whether it is really the intention for private parties to be able to enforce through the courts what contribution another private party must make to the energy transition. This, while no single private party can independently change the energy system, not even Shell. This, while that transition is moreover ongoing and States, legislators and policymakers worldwide are working on fundamental questions about how society is

to be organised in that energy transition. If the court were to go along with the idea that, in that context, it can direct the energy transition by passing judgment against a private party, then a situation arises in which countless parties can sue each other via the court in relation to their role in the energy transition. This creates a situation in which the court plays a central role in an active and delicate political process on the organisation of society, causing legal uncertainty to arise and a steady stream of lawsuits. The court should not take on that role, and there is no legal rule on the basis of which the court can take on that political role. RDS will moreover be prejudiced if it is already bound at this point by a court judgment which does not apply to other parties, while Milieudefensie et al. do not demonstrate, and cannot prove, that the measures sought will help to achieve the Paris climate targets, among other reasons because other providers of energy products can jump into that gap left behind by Shell. We will explain this in the next few days.

4. These first oral arguments during these hearing days are divided into two parts. In part A, RDS will explain the following.
 - The social energy transition is under way. In the midst of those developments, Shell is already taking serious steps that support and in some respects anticipate the energy transition (under heading 2).
 - Key elements of the global social energy transition are currently being shaped by governments. That is a political decision-making process concerning the organisation of society. The Urgenda judgment revolved around that function of governments (more specifically: the Dutch State), and also recognised the importance of political decision making to shape the energy transition. The latter is not an easy task. This requires many considerations by States with regard to the energy system. Shell is only one player in that system. It is not appropriate, in the midst of that transition, which is still being shaped, to bind only RDS in advance and force far-reaching choices while broader changes are still unclear, partly because regulation is still being formed (under heading 3).

- In that situation, there is also no legal basis for Milieudefensie et al.'s claims. There is no legal rule that renders Shell's CO₂ emissions unlawful according to the current situation and there is no legal rule that obliges a private party to, by 2030, make the specific emission reduction envisioned by Milieudefensie et al. (under heading 4).
5. Subsequently, in part B, RDS will discuss in more detail Shell's role in the energy system and the further evolving regulation with regard to tackling climate change.
6. One more practical comment before we continue these oral arguments. We talk about RDS and Shell in these oral arguments. You must take those terms literally. We use the term RDS in passages which are indeed only about RDS. If we use Shell, this means the group, RDS and its subsidiaries, without it being possible to specifically state which individual group company is involved. That is in accordance with the Statement of Defence¹ and the District Court's instruction². In many cases, facts and circumstances will be discussed hereafter that cannot be traced back to one or more specific Shell companies. This could involve all the Shell companies or a number of them. That is why we speak of Shell in those cases. It should be noted that each individual Shell company is a separate legal entity, while the group has no legal personality.

¹ Footnote 1 Statement of Defence.

² Email on behalf of the president to the parties of 25 November 2020.

PART A: INTRODUCTION OF THE PROBLEM AND ESSENCE OF THE CASE**2 THE DESIGN OF THE SOCIAL ENERGY TRANSITION IS UNDER WAY**

7. Achieving the objectives of the Paris Agreement is not easy. It requires a worldwide social transition. States have committed themselves to taking steps to implement the Paris Agreement and are working on this. An important part of this is that States take measures on both the supply and demand side of the market. The design of the transition is fully ongoing and requires time. New developments follow quickly and continuously on each other, worldwide. This District Court asked about relevant current developments dating from after the last procedural documents.³ The fact that a far-reaching political and legislative process is ongoing is a strong indication that the civil court must show restraint, as we will also explain on later hearing days.

2.1 States are shaping the energy transition

8. A number of examples, limited to the period after the submission of the Statement of Defence, will suffice to illustrate this.
- (a) The European Commission presented its Green Deal to tighten the climate policy in December 2019,⁴ which was followed by a proposal for a European climate law in March 2020⁵ and an amended proposal which was presented on 17 September 2020.⁶ The essence of this is that the European Union aims to be CO₂ neutral by 2050.⁷ The scope and comprehensiveness of that proposed revision of existing European regulation is described briefly and satisfactorily in a press publication by the European Commission in response to the 2030 Climate Target Plan of 17 September 2020.⁸ We will return to this further on.

³ Question 4 from the District Court to both parties (8 September 2020).

⁴ Green Deal of the European Commission of 11 December 2019, COM (2019) 640 final. See also *Parliamentary documents II*, 2019/20, 35 377, No. 1.

⁵ COM (2020) 80 final.

⁶ COM (2020) 563 final.

⁷ **Exhibit RO-267** (COM (2020) 562 final (2030 Climate Target Plan)).

⁸ See European Commission, State of the Union: Questions & Answers on the 2030 Climate Target Plan, question 7, available at

The point for now is that the instruments in which responsibilities are divided among the different parties and which do justice to their respective interests are still under development. These instruments, all of which are aimed at tackling climate change and achieving the objective of the Paris Agreement, are based on numerous considerations. How will the burden be divided, what measures are needed to prevent carbon leakage outside the EU and so on?

- (b) In the Netherlands, too, the government is working hard to shape the energy transition. In April 2020, the Climate Plan 2021-2030 was adopted under the Climate Act.⁹ It announces further regulation because: *"With choices with regard to organisation and regulation, the central government determines the playing field and the rules of play for public and private parties. By anticipating system change, the central government can accelerate the energy transition. This is never done without costs and risks, which must be weighed within a framework of public interests,"* according to the Climate Plan. We will return to this in more detail later.
- (c) Chinese President Xi Jinping announced during the General Assembly of the United Nations on 22 September 2020 that China intends to reach the peak of CO₂ emissions by 2030 and be CO₂ neutral in 2060. Japan followed in October 2020 with the announcement that it intends to be CO₂ neutral in 2050.
- (d) Joe Biden won the presidential election in the United States. An important point in his campaign was the fight against climate change. His predecessor had caused the United States to withdraw from the Paris Agreement. After their election, the website of the President-elect and Vice president-elect reported the following in relation to the transition: *"He will not*

https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_1598 (last accessed 25 November 2020).

⁹ **Exhibit RO-266**, Climate Plan 2021-2030.

only recommit the United States to the Paris Agreement on climate change - he will go much further than that."¹⁰

9. Of the 197 countries that are members of the UN Climate Convention, 188 countries are parties to the Paris Agreement; these include the countries where the various Shell companies operate. In those countries, policy is being formed to shape the energy transition. Shell will have to adjust its priorities and investments in line with that policy in all of those countries.
10. As stated, shaping the global energy transition is no simple task. On the one hand, there is the need to provide society with energy that facilitates countless essential activities; in addition to this the world's population is growing and the demand for energy is increasing, especially in developing countries. On the other hand, there is the need to limit greenhouse gas emissions, including CO₂ emissions. The district court asked about that two-pronged challenge.¹¹ Milieudéfensie et al. place a great deal of emphasis on one side of that challenge, invoking the Paris Agreement, but the other side of the challenge is equally serious in nature. This other side is recognised in, for instance, the *Agreement on an International Energy Programme*, a treaty in which the importance of energy supply is very clearly laid down and in which the recitals already emphasise "*the special responsibility of governments for energy supply*."¹² The Energy Charter Treaty also makes it clear that States have a role to coordinate different interests, including "*the trilemma between energy security, economic development and environmental protection, and efforts by all countries to achieve sustainable development*", as summarised in a statement by the parties to that Convention.¹³ Despite the decline in demand due to Covid-19, even in its most recent report the International Energy Agency ("IEA") still expects growth in energy demand.¹⁴ The IEA is an

¹⁰ See www.buildbackbetter.com (last accessed 12 November 2020).

¹¹ Question 8 from the District Court to Milieudéfensie et al. (8 September 2020).

¹² Treaty Series 1975, 47 as later amended.

¹³ Energy Charter Treaty, *Treaty Series* 1995, 108. The quote originates from the Concluding document of the Ministerial ("The Hague II") Conference on the International Energy Charter, 20 May 2015, p. 2, available at https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/IEC_Certified_Adopted_Copy.pdf (last accessed 26 November 2020).

¹⁴ **Exhibit RK-36**, IEA, World Energy Outlook 2020, p. 23 and Figures 5.2 and 5.3 on pp. 166-167.

international organisation within the OECD framework.¹⁵ The IEA also states that investments in the different energy sources are still lagging significantly behind the expected demand.¹⁶ Added to this is the fact that the situation varies greatly from country to country, which is also why the Paris Agreement has "*common but differentiated responsibilities*" (we will discuss an illustration of dilemmas in less developed countries at margin number 29(a) below).

2.2 Shell is already taking measures that support and anticipate the energy transition, in line with the measures States are taking to shape the energy transition

11. Shell must navigate in the midst of those worldwide changes. What the world will look like along the way and after the transition cannot be predicted at this time, and that certainly does not make navigation easy. Nevertheless, Shell already specifically shapes the role it can play in the energy transition.
12. In 2017, RDS announced its ambition to reduce the *Net Carbon Footprint (NCF)* of Shell's energy products, thus reducing the carbon intensity of Shell's products.¹⁷ That is an ambition that not only pertains to emissions in connection with Shell's activities, but also to emissions caused by users when Shell products are used. This made RDS the first holding company of the large energy companies with fossil energy activities to announce such an ambition. RDS aims to reduce Shell's Net Carbon Footprint in a society transitioning towards the goals of the Paris Agreement. Short-term targets have been set, including the link with the remuneration of senior management.¹⁸ Since then, a number of other companies have also formulated CO₂ reduction ambitions. RDS reported in its 2019 annual report on the progress of the NCF and short-term NCF targets.

¹⁵ Agreement on an International Energy Programme and the related *Decision of the Council establishing an International Energy Agency for the Organisation*, Treaty Series 1975, 47 as later amended.

¹⁶ **Exhibit RO-262**, IEA, World Energy Investment 2020, p. 15.

¹⁷ **Exhibit RO-39**, Shell, Shell's Net Carbon Footprint ambition: frequently asked questions and section 2.3.2 Statement of Defence.

¹⁸ See, inter alia, **Exhibit RK-32(c)**, Shell 16 April 2020, Responsible Investment Annual Briefing, Slides, slide 9.

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13. In April 2020, RDS announced its new climate ambition to, in 2050 or earlier, ensure Shell is an energy company with net zero emissions, in line with society. Shell will work towards this ambition in 3 ways, in summary as follows.¹⁹

SHELL'S CLIMATE AMBITION

A NET-ZERO EMISSIONS ENERGY BUSINESS BY 2050 OR SOONER

Own operations: net-zero emissions	Energy products: carbon intensity in line with 1.5° C	Remaining customer emissions: fully mitigated
Reduce the emissions from the manufacture of all our products ¹ to net-zero by 2050 or sooner	Reduce the Net Carbon Footprint ² of the energy products we sell by 30% by 2035 and by 65% by 2050. This is consistent with society's ambition to achieve a 1.5°C future	Work with customers to reduce the emissions from their use of our energy products ³ to net-zero by 2050 or sooner

Changing our products and operations in step with society and our customers

¹Refers to the Scope 1 and 2 emissions in absolute terms associated with operations under direct Shell control. ²The Net Carbon Footprint (NCF) is a weighted average of the lifecycle CO₂ intensities of different energy products sold by Shell normalising them to the same point relative to their final end-use. The calculation includes all emissions associated with bringing these energy products to the market as well as our customers' emissions from using them. ³Refers to the Scope 3 emissions in absolute terms associated with the use by customers of the energy products Shell sells.

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- (a) Firstly, by pursuing net zero emissions related to the production of all Shell products no later than in 2050. This ambition includes the emissions created by Shell's activities, including the emissions related to the energy that Shell consumes (scopes 1 and 2).²⁰
- (b) Secondly, by reducing the Net Carbon Footprint of Shell's energy products. In order to achieve this, Shell will have to sell more products with lower carbon intensity, such as renewable energy, biofuels and hydrogen. Shell now intends to reduce the

¹⁹ **Exhibit RO-281**, Press release on Shell's third quarter 2020 figures, p. 16 of Shell's presentation of its third quarter 2020 figures.

²⁰ See, inter alia, **Exhibit RK-32(c)**, Shell 16 April 2020, Responsible Investment Annual Briefing, Slides, slide 12, and regarding scope 1, 2 and 3, margin number 96 of the Statement of Defence.

NCF by 30% in 2035 (in 2017 this target was 20% in 2035) and by 65% in 2050 (in 2017 this target was 50%). Ben van Beurden, CEO of RDS, said in this regard on 16 April 2020: *"[t]he Net Carbon Footprint ambition covers the carbon intensity of the products we sell in society. Today most of those products we sell create emissions when they are used, by being burned by our customers. Over time, Shell aims to sell fewer of these products that create emissions, and more products that are low or no-carbon".*²¹ However, society will still need energy products; in the foreseeable future that will also include energy products with CO₂ emissions. All credible scenarios show this, including the IPCC Special Report.²² Shell will continue to sell those products in the foreseeable future. But that does not mean that Shell cannot be an energy company with net zero emissions, because customers can also take action themselves against their emissions.

- (c) Thirdly, Shell intends to work together with its customers to tackle the emissions produced when customers use the energy products purchased from Shell (scope 3 emissions). Shell can help customers with this, but only to a limited extent. After all, there is also a role and responsibility for end-users, who make their own choices, and for policymakers. Shell wants to contribute where it itself is actually able to do so. This means that Shell wants to work together with broad coalitions of businesses, governments and other parties, sector by sector, to identify and facilitate low-carbon pathways. An example of this is the development and supply of biofuels to Amazon Air, whereby Shell, together with World Energy, assists aviation in the decarbonisation process.²³ Customers who have emissions can reduce these (by opting for other products with less carbon intensity) or by compensating them (for example by means of Carbon Capture Storage ("**CCS**") or nature-based solutions). These include certified reforestation projects, for instance.

²¹ **Exhibit RK-32(b)**, Shell 16 April 2020, Responsible Investment Annual Briefing, Address by Ben van Beurden, p. 6 at top.

²² Margin number 62 of the Statement of Defence with references.

²³ See <https://www.aboutamazon.com/news/operations/promoting-a-more-sustainable-future-through-amazon-air> (last accessed 26 November 2020).

Shell can help with this, but ultimately cannot dictate the choices made by end-users.

14. Shell's current business plans will have to be adapted to this ambition and will have to change over time because society and Shell's customers will have to change as well. On 29 October 2020, RDS already provided a brief explanation of its strategic direction during the announcement of the third-quarter figures. In addition, the CEO indicated, among other things, that Shell wants to further develop its integrated power business sustainably, and wants to commercialise hydrogen and biofuels in order to support its customers in achieving net zero emissions. As mentioned above, it was also announced that more investments would be going to this Growth business.²⁴ In February 2021, Shell will explain the future portfolio and plans in more detail.
15. It is therefore not at all logical to, as Milieudefensie et al. do here, want to largely restrict a player like Shell who indeed publicly expresses its ambitions in the energy transition while, in doing so, potentially providing precisely more room for other parties - who might not have any progressive plans for the energy transition like Shell - to jump into the gap that would arise if the claim is awarded. This is explained in more detail in Professor Mulder's report: if the order sought were to be awarded, another energy producer will take Shell's place and produce and supply the same tradable products.²⁵
16. I mention a number of examples of Shell's activities in the energy transition since the submission of the Statement of Defence.
 - (a) The consortium Crosswind, a joint venture of Shell and Eneco, has won the tender for the subsidy-free offshore wind farm Hollandse Kust (North).²⁶ The wind farm will contribute to achieving the objectives of the Dutch Climate Agreement and the European Green Deal. The wind farm, to be realised in 2023, has an installed capacity of 759 MW in total and will

²⁴ Margin number 11 of RDS's Statement of Defence.

²⁵ **Exhibit RK-35**, the Mulder Report, paragraphs 6-7 and section 2.2.4 Statement of Defence.

²⁶ **Exhibit RO-257**, Shell, 29 July 2020, 'CrossWind wins tender for Hollandse Kust (North) wind farm'.

supply at least 3.3 TWh per year. This is enough to supply more than 1 million households with green power.

- (b) Plans are being made for an ambitious project for the production of green hydrogen in Rotterdam, and Shell, together with other parties, is also investing in a feasibility study for large-scale hydrogen production in the north of the Netherlands. Both projects involve green hydrogen, made from renewable sources.²⁷ Green hydrogen is key for a number of visions for the future. According to the Climate Plan 2021-2030, hydrogen "*appears, based on the various analyses of the future energy supply, to be able to play a key role, although various technological and economic bottlenecks still need to be overcome.*"²⁸ The support of such initiatives by parties other than Shell, as currently envisaged, is essential. RDS has already explained that earlier initiatives developed by Shell were ultimately unsuccessful due to a lack of demand from consumers and government policy.²⁹
- (c) Electrification of transport is supported by offering charging points. These points are supplied with green power. The number of these is being expanded in various Shell initiatives. One of these initiatives has already been mentioned, namely the 165,000 charging points since realised in Shell's NewMotion network.³⁰ This too involves a development that, according to the Climate Plan, requires "stimulation," in which "inter alia, the focus is on an acceleration of the roll-out of the charging infrastructure."³¹
- (d) Shell's investments in renewable energy projects are described in detail in the Sustainability Report 2019.³² These investments

²⁷ **Exhibit RO-252**, Shell, 27 February 2020, 'Europe's largest green hydrogen project starts in Groningen' and **Exhibit RO-254**, Shell, 7 May 2020, 'Wind as an energy source for green hydrogen plant in Rotterdam'. For the record, it is noted that no Final Investment Decision (FID) has yet been taken for both projects.

²⁸ **Exhibit RO-266**, Climate Plan 2021-2030, paragraph 2.1.3.

²⁹ Margin number 109 Statement of Defence.

³⁰ **Exhibit RO-256**, Shell, 22 July 2020 'NewMotion erreicht durch Erweiterung seines Roaming-Netzwerks Meilenstein von über 150.000 Ladepunkten'.

³¹ **Exhibit RO-266**, Climate Plan 2021-2030, paragraph 2.2.2(b).

³² **Exhibit RK-31**, Shell, Sustainability Report 2019, p. 45-55.

continue at a considerable pace.³³ I refer to the various new projects that are being rolled out worldwide, including, for example, the solar park in Australia, which will be operational in 2021.³⁴

- (e) There are various CCS initiatives in which Shell participates. We will return to this later.
- (f) A very recent example in which Shell is reducing its own emissions is the costly replacement of ovens at the chemical facility in Moerdijk, which will save 10% on energy, the emissions of around 50,000 passenger cars. Shell offers to submit its announcement of this to the proceedings as evidence.³⁵

The exhibits submitted by RDS on 2 September 2020 contain more examples.

17. And a brief word about the following. Milieudefensie et al. criticise Shell's role in the energy transition.³⁶ According to Milieudefensie et al., Shell is reportedly trying to effectively frustrate or weaken climate policy. It also submitted a few new exhibits in this respect.³⁷ In its Statement of Defence, RDS already explained that Milieudefensie et al. have advanced many incorrect or incomplete facts and are thus misrepresenting Shell's position with regard to climate change.³⁸ Nor do Milieudefensie et al.'s new exhibits change this. Shell is in fact working with national governments and international and national

³³ **Exhibit RO-252**, Shell, 27 February 2020, 'Europe's largest hydrogen project starts in Groningen', **Exhibit RO-253**, Shell, 7 February 2020, 'Shell Australia to build its first large-scale solar farm in Queensland', **Exhibit RO-254**, Shell, 7 May 2020, 'Wind as an energy source for green hydrogen plant in Rotterdam', **Exhibit RO-255**, Amazon, 8 July 2020, 'Promoting a more sustainable future through Amazon Air', **Exhibit RO-256**, Shell, 22 July 2020 'NewMotion erreicht durch Erweiterung seines Roaming-Netzwerks Meilenstein von über 150.000 Ladepunkten', **Exhibit RO-257**, Shell, 29 July 2020, 'CrossWind wins tender for Hollandse Kust (noord) wind farm', **Exhibit RO-259**, Shell, 18 June 2019, 'Tokyo Gas and GS Energy to receive world's first carbon neutral LNG cargoes from Shell' and **Exhibit RO-260**, Shell, 22 June 2020, 'CNOOC to receive Chinese mainland's first carbon neutral LNG cargoes from Shell'.

³⁴ **Exhibit RO-253**, Shell, 7 February 2020, 'Shell Australia to build its first large-scale solar farm in Queensland'.

³⁵ Also available at: <https://www.shell.nl/over-ons/shell-moerdijk/nieuwsberichten-shell-moerdijk/nieuwsberichten-2020/shell-moerdijk-verlegt-horizon-met-nieuwe-fornuizen.html> (last accessed 22 November 2020).

³⁶ Section VIII.2.1.3.e Summons.

³⁷ Exhibits 324-331 from Milieudefensie et al.

³⁸ Inter alia, sections 2.3.7.1-2.3.7.3 Statement of Defence.

organisations with regard to climate change. Shell has also adopted clear positions on government climate policy, has consistently expressed support for the objectives of the Paris Agreement and monitors whether organisations of which it is a member are detrimental to that support.³⁹ And let us look at how Shell's statements actually relate to the elements that have just come to light.

- (a) Shell contributes by developing scenarios and by expressing support for policy.⁴⁰ We will also return to this later in the oral arguments.
- (b) The EU ambitions, the Green Deal, the Climate Agreement and the objectives of the Dutch Climate Act: they can count on Shell's support.⁴¹ Shell Netherlands is the only major industry party that supported the Dutch Climate Agreement.
- (c) On 12 November, the House of Representatives voted in favour of the legislative proposal for a CO₂ levy for industry.⁴² Shell has long encouraged CO₂ pricing as part of an international context and has also spoken out in favour of the Dutch levy as part of the Climate Agreement.⁴³

18. Milieudefensie et al.'s criticism on these kinds of points can be put in the right perspective if statements made by the government are examined. The prime minister spoke unsparingly in Parliament about the challenge of the transition facing not only Shell, but society as a whole, and commented on the role of many, not just energy producers like Shell.

"I used Shell as an example for the Parliamentary Debate on the Speech from the Throne. That company is, of course, in the process of a huge transition, which runs parallel to the major

³⁹ See, inter alia, **Exhibit RO-90**, Shell, Industry Associations Climate Review 2019.

⁴⁰ **Exhibit RK-32**, Shell 16 April 2020, Responsible Investment Annual Briefing and **Exhibit RK-34**, Shell, Sketch. A climate-neutral EU by 2050.

⁴¹ Section 2.3.7.1 Statement of Defence, **Exhibit RK-34**, Shell, Sketch. A climate-neutral EU by 2050 and **Exhibit RO-266**, Climate Plan 2021-2030.

⁴² Section 2.3.8 Statement of Defence.

⁴³ *Parliamentary Documents I* 2020 /21, 35 575, A (amended legislative proposal). Reference was also made to this on p. 31 of the Climate Plan. See also *Parliamentary documents II* 2019/20, 35 300, no. 1 (Budget Memorandum), pp. 47-48.

*transition that the Netherlands has to make. They are almost similar in size and complexity. How exceptional that the company is here. The major universities that support that company and the supply industries are all working on this large climate transition. Of course, Shell will continue to refine oil in the years ahead. That is unavoidable, because otherwise the lights will go out. That is necessary. We would be very angry if they stopped doing so, because then we would have a very big problem. But you do want that refining to take place as environmentally friendly as possible. They are preparing an enormous investment in order to do so."*⁴⁴

And Minister Wiebes also expressed himself in no uncertain terms on the question of whether the responsibility for emission reductions should lie exclusively with energy producers.

"With regard to Mr Van Raan's sharp comment on the Shell lobby, I really want to be much more positive. We will soon be able to provide an important part of the emission reduction in industry. Industry makes products that we all use. In his private life, Mr Van Raan is also a very extensive user of all the products originating from chemistry and from fuel production. We are talking about these industries. We should be happy that there is a party that was until now, or until recently, focused almost entirely on fossil-product manufacturing who is taking this very seriously and who is working with the best scientists and extraordinarily considerable resources to do something about it in a variety of areas, such as hydrogen. This manufacturer wants to become a frontrunner and even has plans to become a frontrunner worldwide. We need these parties. If there is a party that can make Shell's products superfluous, that is us. That is what would happen if we all stop consuming at the same time. But we are not doing that, and Mr Van Raan is not doing that either. I would like to celebrate that there is a purely fossil party who is trying to lead the way in

⁴⁴ Parliamentary documents II 2020/21, 21501-20, 1621 (Report from policy document consultations of 14 October 2020).

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this. I am celebrating that. I am proud that this is a Dutch party".⁴⁵ (emphasis added, attorneys).

⁴⁵ *Parliamentary Documents II 2020/21 32 813, 611* (Report from policy document deliberations of 7 October 2020).

3 STATES ARE SHAPING ESSENTIAL PARTS OF THE GLOBAL SOCIAL ENERGY TRANSITION; THAT IS CURRENTLY HAPPENING AND IT REQUIRES THAT STATES CONSIDER PUBLIC INTERESTS IN THE ENERGY SYSTEM, AND SHELL IS JUST ONE PLAYER IN THAT SYSTEM. IN THIS SITUATION, THEREFORE, WHAT IS BEING SOUGHT CANNOT BE EXPECTED OF RDS AND AWARD IS ALSO NOT USEFUL

3.1 Introduction: Urgenda and a global, social energy transition

19. The District Court asked about the significance of the Supreme Court's Urgenda judgment for the present case.⁴⁶ That case differs from this case on important points because Urgenda is characterised by the fact that the claim was directed against the Dutch State in order to achieve that policy would be made. It did not, like here, involve measures being required of a private party, nor did it involve claims directed at the worldwide activities of a group such as Shell. In Urgenda, too, reference was made to specific obligations that the State itself had undertaken, such as the obligations that are directly incumbent on the State under the UN Climate Convention,⁴⁷ and those instruments are precisely not addressed to private businesses.⁴⁸ Consequently, such obligations do not apply to Shell. What Urgenda does confirm, however, is the State's role in shaping energy policy. The concrete structure of the policy is a democratic process in the Netherlands. In this context, politicians must make complex considerations in a global transition that is ongoing, but the progress of which has not yet been crystallised. In Urgenda, the District Court and the Court of Appeal therefore emphasised that the State has the task of making all sorts of considerations, and that it is free in how it makes these considerations. The District Court held: *"[i]n the event that the claim is awarded, the State retains full freedom, which accrues pre-eminently to it, to determine how it complies with the order in question,"* and the Court of Appeal, too, emphasised that *"the reduction order gives the State sufficient leeway to flesh out how it implements this order."*⁴⁹ The

⁴⁶ Question 7 from the District Court to both parties (8 September 2020).

⁴⁷ Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), paras. 5.7.3-5.7.4 and 7.3.2.

⁴⁸ Margin number 239 Statement of Defence.

⁴⁹ Margin numbers 410-412 of the Statement of Defence with more detailed quotes.

Supreme Court held: *"in the Dutch form of government, the decision making on reducing greenhouse gas emissions is up to the government and parliament. They have a great deal of freedom in making the political considerations necessary for that. It is up to the court to assess whether, when using that freedom, the government and parliament remained within the limits of the law to which they are bound."*⁵⁰ The role played by the State in that respect - making fundamental choices that in aggregate can result in climate targets being achieved, whereby these interests are also weighed against other considerations - is different from that of a private company that is at the head of a global group of energy companies. The latter cannot independently determine the energy transition or direct or determine what level of energy consumption is appropriate for society. The various States in which Shell operates can do that. The legal obligations of a State are therefore of a different nature than those of a private company.

20. We will now discuss the considerations that States have to make when shaping the energy transition and why they must be given leeway in that process. It would be wrong to pre-empt that political process by, via legal proceedings, already binding one private party to a specific end result that, according to Milieudefensie et al., should have effect in all countries in which Shell operates. I will explain this in more detail.
21. Since the industrial revolution, a society has been built that is largely based on the use of fossil fuels in the energy supply, industry, the built environment, land use, transport and all kinds of other sectors and processes that result in CO₂ emissions. A change is needed. This change encompasses a total, global, social change affecting all these areas.
22. The fact that this necessary change affects society as a whole and that it will require change from everyone in order to succeed has already been explained at length.⁵¹ A recent IEA report also underlines this. In October of this year, the IEA published a scenario to provide insight into the type of change needed to achieve a net zero scenario

⁵⁰ Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), para. 8.3.2.

⁵¹ Margin number 43 and section 2.2.3.4 (with references) Statement of Defence.

in 2050.⁵² This is, of course, a scenario. It does not describe that something must or will happen, but investigates the question: *“what it would mean for the energy sector globally to reach net-zero emissions by 2050”*.⁵³ Whether this is likely to be achieved is also left moot. It is important that in a comparison with the Sustainable Development Scenario (SDS), it is noted that: *“Realising the pace and scale of emissions reductions in the NZE2050 would require a far-reaching set of actions going above and beyond the already ambitious measures in the SDS. A large number of unparalleled changes across all parts of the energy sector would need to be realised simultaneously, at a time when the world is trying to recover from the Covid-19 pandemic”*.⁵⁴ The scenario describes what kind of change would be necessary to achieve it. The reduction requires enormous adjustment in power, end-use and behaviour. For the next ten years, the IEA shows this schematically as follows:⁵⁵

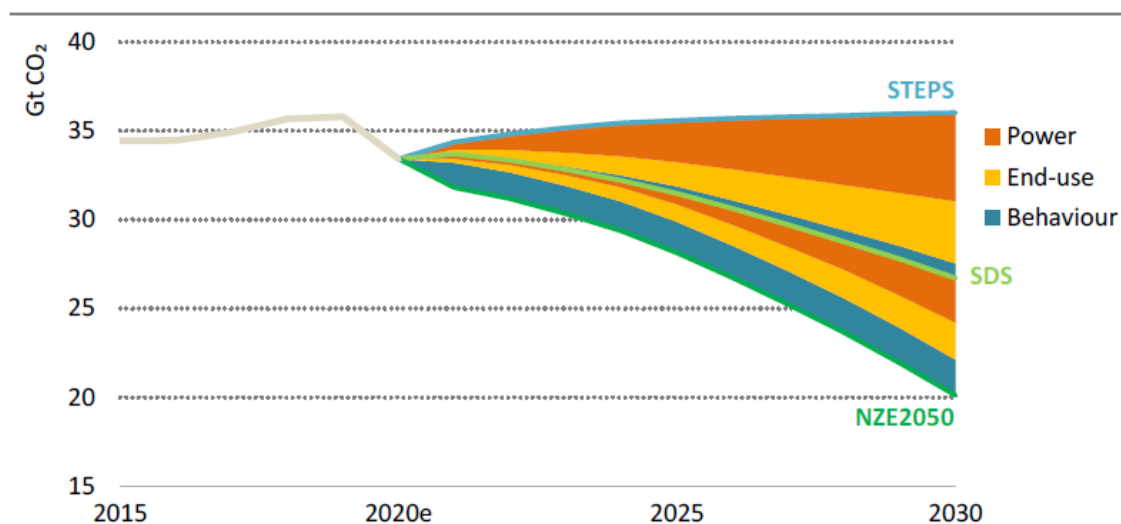
⁵² **Exhibit RK-36**, IEA, World Energy Outlook 2020, chapter 4.

⁵³ **Exhibit RK-36**, IEA, World Energy Outlook 2020, p. 123.

⁵⁴ *Ibid.*

⁵⁵ **Exhibit RK-36**, IEA, World Energy Outlook 2020, p. 124.

Figure 4.1 ► Energy and industrial process CO₂ emissions and reduction levers in the scenarios



An unparalleled transformation of the energy sector and major behaviour changes in the next ten years would be needed to achieve global net-zero emissions by 2050

Note: 2020e = estimated values for 2020.

23. There is little need to explain that such a transition also requires an acceleration in the tempo of the steps to be taken, for example in the government approval of the construction of the necessary infrastructure, which is incomparable with its usual pace.
24. In its elaboration, the IEA writes the following (emphasis added, attorneys):⁵⁶

⁵⁶

Exhibit RK-36, IEA, World Energy Outlook 2020, pp. 123 and 124.

- Primary energy demand in the NZE2050 falls by 17% between 2019 and 2030, to a level similar to 2006, even though the global economy is twice as large. Electrification, efficiency gains and behaviour changes are central to achieving this. Coal demand falls by almost 60% over this period to a level last seen in the 1970s.
 - CO₂ emissions from the power sector decline by around 60% in the NZE2050 between 2019 and 2030. Worldwide annual solar PV additions in the NZE2050 expand from 110 GW in 2019 to nearly 500 GW in 2030, while virtually no subcritical and supercritical coal plants without CCUS are still operating in 2030. The share of renewables in global electricity supply rises from 27% in 2019 to 60% in 2030 in the NZE2050, and nuclear power generates just over 10%, while the share provided by coal plants without CCUS falls sharply from 37% in 2019 to 6% in 2030. Power sector investment nearly triples from \$760 billion in 2019 to \$2 200 billion in 2030, with more than one-third spent to expand, modernise and digitalise electricity networks.
 - CO₂ emissions from end-uses in the NZE2050 fall by one-third between 2019 and 2030. Close to half of the existing building stock in advanced economies is retrofitted by 2030, and one-third is retrofitted elsewhere. Half of all air conditioners sold globally between 2020 and 2030 are the most efficient models available. Over 50% of passenger cars sold in 2030 are electric, up from 2.5% in 2019. Around 25% of total heat used in industry in the NZE2050 in 2030 comes from electricity and low-carbon fuels such as hydrogen, up from negligible levels today. Global battery manufacturing capacity would need to double every two years, and hydrogen production and distribution infrastructure would need to ramp up substantially.
 - Addressing emissions from existing infrastructure would be unavoidable in the NZE2050. In addition to investment in technologies, such as CCUS, low-carbon gases and buildings retrofits, behaviour changes would form an integral part of the emissions reduction strategy. We have examined 11 individual measures related to behaviour, which in total would reduce CO₂ emissions by 2 Gt in 2030 in the NZE2050. The majority of these reductions are in the transport sector. Examples include replacing flights under one hour with low-carbon alternatives, walking or cycling instead of driving by car for trips under 3 km, and reducing road traffic speeds by 7 km/h. If implemented in full today, these measures would reduce transport sector CO₂ emissions by more than 20%. These are illustrative measures, and not all of them would be possible for everyone, but they highlight the importance of behaviour changes for NZE2050, and the scale of what is needed.
25. In order to achieve the climate targets, States will have to make difficult choices, whereby they will also to take into account a level playing field and the competitiveness of the business sector, for instance. Shell cannot make those choices. Examples of this are given

in the Statement of Defence. How far-reaching and important those choices are, and how different those choices can be in different countries, cannot be emphasised enough if this District Court is being asked to essentially regulate that social transition via one company. It is important to realise here that Shell companies are active in many areas and in many countries.

3.2 Shell is just one of many providers of fossil energy products in the energy system. Changing the supply side of that system requires fundamental choices by States. As long as this has not happened, another energy producer will take Shell's place if the injunction were to be awarded

26. If we look at the supply side of the energy market, it is immediately clear that Shell is just one of the energy providers. Shell extracts, processes and sells oil and gas and it produces and also offers renewable energy. As regards fossil fuels, too, Shell is one producer alongside many others. The market is dominated by state oil companies from the countries where oil and gas reserves are located. Shell is a relatively small player in that respect.
27. The fact that Shell is just one player in this broad context of energy providers means that the measure requested against RDS cannot have the effect that Milieudefensie et al. intend. If the order sought were to be awarded, another energy producer will take Shell's place and produce and supply the same tradable products.⁵⁷ An effective change in the supply side requires government policy, as also follows from the exhibits submitted to the proceedings by Milieudefensie et al.⁵⁸
28. We illustrate the fact that governments are very active in this area with three examples.

⁵⁷ **Exhibit RK-35**, the Mulder Report, paragraphs 6-7 and section 2.2.4 Statement of Defence.

⁵⁸ See, for example, Exhibit 280 of Milieudefensie et al., p. 36: "Twenty-five years of climate politics has thoroughly embedded the notion that climate change should be addressed at the point of emissions, while the supply of fossil fuels should be left to the market. That view is now no longer supportable (if in fact it ever was). Our analysis indicates a hard limit on the amount of fossil fuels that can be extracted, pointing to an intervention that can only be implemented by governments." (underlining added, attorneys). See also Milieudefensie et al.'s Exhibits 310-313.

- (a) The first example is that States largely determine the energy mix in their country. Those choices are not always easy and, among other things, the *Agreement on an International Energy Programme* calls on the countries that are parties to that Convention to take "co-operative action" for the "[d]evelopment of alternative sources of energy such as domestic oil, coal, natural gas, nuclear energy and hydroelectric power"⁵⁹ and the European Energy Charter focused on "co-ordinated actions" of the participating States for "access to and development of energy resources".⁶⁰ All energy sources - for various reasons and with different backgrounds - provoke significant social debate. That applies in this case to oil and gas as produced by Shell. A hefty public debate also arises for energy sources other than these. This applies, for example, to coal, which is more CO₂-intensive. This also applies for nuclear energy, which is fiercely opposed by many parties. And it also applies for renewable energy sources. The development of solar and wind farms regularly encounters long-term and fierce resistance, often also due to other environmental considerations, as is also evident from the many decisions from administrative courts in this regard.⁶¹ Weighing all these social interests and desires is a far-reaching political process. Minister Wiebes aptly illustrated that in the Senate on 23 June 2020:⁶²

"People also say: goodness, well there is still no complete clarity about how we should generate our energy by 2030. No, that is not exactly clear either. That is more or less clear, and we keep adjusting that on the basis of the latest insights. There is an entire control philosophy behind this. It doesn't have to be finished

⁵⁹ *Treaty Series* 1975, 47, as later amended, Article 42(1)(b).

⁶⁰ *Treaty Series* 1995, 108, Annex 3, Title II (Implementation).

⁶¹ See, for example, the Council of State's Annual Report for 2017 <https://www.raadvanstate.nl/publicaties/jaarverslagen/pagina-jaarverslag/raad-bestuursrechter/> (last accessed 26 November 2020). In the summary press publication, the Council of State states: "Since the second half of 2017, there has been a strong increase in appeals against large wind farms. The Administrative Jurisdiction Division has since ruled in proceedings regarding Windpark de Drentse Monden en Oostermoer, Windpark de Veenwieken, Windpark Spui and Windpark Bijvanck. These cases are characterised by the large number of objectors, including both environmental and residents' organisations and residents."

⁶² *Parliamentary documents I* 2019/20, 32 813 and 35 377, Q, p. 3.

tomorrow; we can take 30 years. For the first step, to 2030, we will take ten years.

It is all guaranteed, but in all sorts of areas, perhaps more than we have been accustomed in recent years, government coordination of the energy system is needed. That is because we have to make major choices, both centrally but also locally. We have RESes for that, Regional Energy Strategies. This means that each region itself has to decide how it generates its energy. The structure of the system is something the government has to do. There are market parties that compete with each other. Something is tendered out. Municipalities take charge."

The supply side is therefore largely determined by governments, against the backdrop of how the energy system has developed in recent decades. Private parties, such as Shell, cannot take steps as long as the frameworks have not been determined. Specific examples: will the necessary infrastructure be installed (in time), will there be permits for offshore wind farms? Of course, large investment decisions by private parties such as Shell are dependent on that. The rules provide clarity so that companies know where they stand, can compete and can work efficiently. This is necessary in order to achieve an effective and efficient energy transition. In the Climate Plan 2021-2030, the government therefore writes in the chapter "System issues":⁶³

"State vision on the market organisation for the energy transition

By making choices with regard to organisation and regulation, central government determines the playing field and the rules of play for public and private parties.
By anticipating system change, the central government can accelerate the energy transition. This is never

⁶³

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

without costs and risks, which must be weighed within a framework of public interests. In 2020, the central government adopted the Government's vision of the market organisation for the energy transition. This vision discusses the organisation, regulation and funding of new infrastructure for, in particular, heat, hydrogen and CO₂ from a system perspective. It takes into account the implications for gas and electricity networks and spatial impact and departing from scenarios for 2030 and 2050. In 2019, a government vision was provided on the market organisation of collective heat networks; the statutory frameworks for this must be adjusted no later than 2021. In mid 2020, the central government will also present views on the market organisation of the heating supply (guaranteed in the Heating Supply Act 2.0), hydrogen, and CCS and the funding of CO₂ infrastructure. The legal frameworks for this must be adjusted no later than 2022" (emphasis added, attorneys).

- (b) The second example is that States determine whether and to what extent natural resources can be exploited and by whom. There is hardly any need to explain that this has major consequences for the countries in question. In Suriname, the discovery of an oilfield off the coast was great news, as it offered prospects for an economy that was in difficulty. For countries, it is strategically important to not be dependent on other countries for their own energy needs.⁶⁴ And, not insignificantly, there are large producing countries whose economies depend largely on the export of fossil fuels and other natural resources, such as Saudi Arabia, Kuwait and Russia. It is of course not the case that if Shell's production of oil and gas were to be eliminated, those countries would

⁶⁴ See also the Agreement on an International Energy Programme, *Treaty Series* 1975, 47 as later amended, Article 41 (1) and the Energy Charter Treaty, *Treaty Series* 1995, 108, Article 18.

terminate their exploitation activities. If Shell does not use a concession, it is taken back and granted to other parties.⁶⁵

- (c) The third example is that States also determine whether, where and under what conditions those resources can be produced, are processed and are used. For example, States enact mining regulations for the exploration and exploitation of mineral resources, environmental regulations for refineries and product regulations for fuels. In the European Union, specifically with a view to achieving climate targets for a variety of sectors, including oil refineries, the EU emissions trading system ("EU ETS")⁶⁶ is an exhaustive cap and trade scheme for CO₂ emissions for all installations in sectors falling within the scope of the emissions trading system. We will discuss this in more detail in the second part of these oral arguments.

3.3 The lion's share of CO₂ emissions from fossil products occurs when used. Changing the demand side of the energy system requires fundamental choices by States that can use legislation to encourage end-users to make choices that save energy and combat emissions. In this respect, the responsibility for saving energy and combating emissions also largely lies with end-users

29. Our society is built on fossil fuels. In the EU alone, 70% of the use of energy comes from fossil fuels.⁶⁷ That is the reality. While social dependence on fossil energy needs to change, demand will continue

⁶⁵ See also **Exhibit RK-35**, the Mulder Report, paragraphs 6-7 and section 2.2.4 Statement of Defence.

⁶⁶ In this respect, see section 2.7.1 and margin number 277 Statement of Defence.

⁶⁷ **Exhibit RK-36**, IEA, World Energy Outlook 2020, p. 366, Table A.3 Energy demand - European Union (column 2019 Shares (%), sum of Coal, Oil and Natural Gas).

to exist during the transition. Ultimately, the use of energy also largely determines the causing of CO₂ emissions: the user of fossil products burns these and thus creates CO₂ emissions. Users determine how much energy they use and what measures they take to limit CO₂ emissions. For example, they can opt for energy-saving measures or to compensate emissions. If we look at that demand side of the energy market, it is striking that States are faced with important policy choices in shaping energy policy that suits the national circumstances; that requires difficult considerations and choices. This, too, can be illustrated using three examples.

- (a) The first example is that States are faced with the question of how the total energy needs will be met. As stated above, the *Agreement on an International Energy Programme* emphasises "*the special responsibility of governments for energy supply*".⁶⁸ The fact is that demand for energy is increasing enormously, partly due to the growth of the world population.⁶⁹ For example, the IEA described in detail at the end of 2019 how important an energy supply is to achieve the Sustainable Development Goals in Africa. However, the IEA also noted that Africa is "*a key source of global oil demand growth in our projections*".⁷⁰ This shows how the growth and economic development of countries that sorely need this development is at odds with reducing oil consumption.⁷¹
- (b) The second example is the eminent importance of energy efficiency and renewable energy in allowing the transition to succeed. The *European Energy Charter* of the Energy Charter Treaty already provides, for example, that it is necessary for States who are party to that convention to be responsible for "*creating mechanisms and conditions for using energy as economically and efficiently as possible, including, as appropriate, regulatory and market-based instruments*" and "*the creation of framework conditions for profitable investment*

⁶⁸ *Treaty Series* 1975, 47 as later amended.

⁶⁹ In this respect, also see section 2.2.3 Statement of Defence.

⁷⁰ **Exhibit RK-33**, IEA, World Energy Outlook 2019, p. 509.

⁷¹ **Exhibit RK-33**, IEA, World Energy Outlook 2019, inter alia p. 79 et seq. and 508-509.

in energy efficiency projects".⁷² The IEA states that "[a] sharp pick-up in efficiency improvements is the single most important element that brings the world towards the Sustainable Development Scenario".⁷³ That is no mean feat. Industries use fossil fuels in their production process and emit CO₂, and the EU ETS regulates this with emission allowances: power plants and all sorts of other users of fossil fuels also need those emission allowances. And at a smaller level within the Netherlands, it emerges that many users are not making the contribution to reducing energy consumption that is necessary.⁷⁴ Will that be different in 2030? For example, the IEA writes: *"one-third of the cars sold in Europe are SUVs. [...] a SUV today consumes around 25% more oil than a medium-sized car per kilometre travelled. The rise of SUV sales therefore has important implications for oil use in the future."*⁷⁵ In a table, it shows that the share of SUVs in sales between 2010 and 2018 rose from less than 10% to more than 30% in Europe.⁷⁶ The cars being sold now will still be running for a long time, and the IEA estimates the additional oil needed because of this trend in the use of SUVs at 2 million barrels a day.⁷⁷ Here, too, there are important choices for the government to make. The government regulates energy efficiency, for example, by imposing levies on car manufacturers depending on the type of cars they make and by encouraging electric transport.⁷⁸ The composition of fuels is also influenced by (European) rules⁷⁹, such as the regulation as of 2020 that bioethanol (without CO₂ footprint) must be added to petrol at petrol stations (E10).

Another example of a method for the government to promote energy efficiency and sustainability and reduce CO₂ emissions

⁷² Treaty Series 1995, 108, Annex 3, Title I (Objectives) and II (Implementation).

⁷³ **Exhibit RK-33**, IEA, World Energy Outlook 2019, p. 25.

⁷⁴ Margin number 569 Statement of Defence.

⁷⁵ **Exhibit RK-33**, IEA, World Energy Outlook 2019, pp. 150-151.

⁷⁶ *Ibid*, p. 151.

⁷⁷ *Ibid*, p. 26.

⁷⁸ Regulation (EU) 2019/631, OJ L111/13 (determining CO₂ emission standards for new passenger cars and new light commercial vehicles).

⁷⁹ Directive 98 /70/EC, OJ L 350/58 (Fuel Quality Directive).

is to increase the pressure to take action through taxes on emissions. The explicit aim of this is *"a public-private approach in which the business community invests in a sustainable future, the government facilitates and supports that in a targeted manner, and in which the focus is on creating (new) value [...] [and] to induce businesses to make investments in the Netherlands."*⁸⁰ On Prinsjesdag, the day of the Queen's speech, the Dutch government presented plans to introduce a CO₂ levy for industry⁸¹ and the European Commission has announced that it will also look into *"carbon pricing"*.⁸²

- (c) The third example is that States will have to determine whether measures must be taken in relation to activities that cause CO₂ emissions to prevent emissions from entering the atmosphere and, if so, who must take such measures. There are various possibilities in this respect, both with regard to the measures to be required and the question of who should be subject to the obligation to take them, questions that are pre-eminently political in nature and which cannot be answered by the court in these proceedings.
- (i) The countermeasures by the end-user can sometimes be direct, as in the case of a coal-fired power plant that captures CO₂ and uses CCS in this context. This use of CCS, with CO₂ being stored in the soil, sometimes also prompts opposition. In itself, this therefore also requires an important consideration by the State. We will return to this later.
- (ii) The countermeasures can also consist of compensation using 'carbon sinks', such as the planting of forests and the prevention of deforestation. That, too, is another point that requires political decision making. In Brazil, for example, in recent years a different course has been decidedly followed as a result of deforestation in the

⁸⁰ **Exhibit RO-266**, Climate Plan 2021-2030, p. 30-31.

⁸¹ *Parliamentary Documents II* 2019/20, 35 300, No. 1 (Budget memorandum), pp. 47-48.

⁸² **Exhibit RO-267** (COM (2020) 562 final (2030 Climate Target Plan), p. 16.

Amazon area. But whatever the case may be, States are faced with the choice of whether or not to require countermeasures for activities that cause greenhouse gas emissions and, if so, on whom they impose that obligation.

These examples concern the Netherlands and Europe, but these kinds of considerations and policy must be made in all countries, and Shell operates in dozens of countries.

30. Although Shell wants to facilitate the user in making their own choices by offering energy with lower carbon intensity, that choice and responsibility (both in practice and legally) lies with the user. In this respect, the measures that the legislator uses and considers are often directed precisely at the end-user. Therefore, although Shell wants to facilitate the user, it cannot ultimately determine whether its customer chooses an electric car instead of a petrol car and whether products are used energy-efficiently by the end-user. Nor whether that end-user takes measures to capture CO₂ or opts to compensate CO₂ emissions. The government can indeed do this; an example can be given of how the Dutch legislator influences car use by levying excise duties on diesel and petrol on the one hand, and, on the other hand, by introducing tax measures to encourage electric driving. This does not diminish the fact that Shell enables things like green power generation, facilitates electric driving through charging stations and also takes initiatives to support CO₂ capture, as already discussed above.

3.4 The global energy system and the necessary energy transition are not helped by confronting one private party in civil proceedings

31. The energy transition is part of a global economic and social transition. A global social energy transition is not helped by a judgment against a single energy producer to limit emissions in a manner that does not change the energy system, but which forces the producer to overhaul all kinds of activities individually and thus prejudices the competition in a one-sided way. The serious disruption of the level playing field entailed by limiting a company in this way calls, again, for restraint in the judicial intervention being sought by Milieudefensie et al. In order

to achieve the climate targets, States must define, regulate and enforce policy as RDS has already explained.⁸³ The parties in those States will then have to operate within that system. Shell can only make a meaningful contribution to the global energy transition if society as a whole also makes enormous efforts to achieve this Herculean task together.

32. That idea can also be found in the most recent *World Energy Outlook 2020*. "*The magnitude of the changes required,*" according to the IEA, "*are not something that would be within the power of the energy sector alone to deliver. It is for governments and their citizens to decide on the way ahead*".⁸⁴

⁸³ Margin number 4 and sections 2.6-2.7 Statement of Defence.

⁸⁴ *Ibid*, p. 161.

4 ACCORDING TO THE CURRENT SITUATION, IT IS IMPOSSIBLE TO POINT TO A LEGAL STANDARD THAT DETERMINES EXACTLY HOW A PARTY LIKE RDS MUST OPERATE, AND IN PARTICULAR THERE IS NO LEGAL STANDARD THAT DETERMINES WHICH REDUCTION OF CO₂ EMISSIONS CAN BE REQUIRED

33. Where does this leave us in a legal sense in this case? Milieudefensie et al. are requesting that this District Court rule that emissions are already unlawful and that RDS must be required to individually ensure that the (net) CO₂ emissions related to the business activities of companies in the Shell group and the use of their products are significantly reduced as of 2030. Milieudefensie et al. apparently believe that a single private player must already be bound to a particular contribution to the energy transition, without taking into account the energy transition that society as a whole still has to go through, including the claimants themselves. On the third hearing day, we will discuss in more detail the lack of a legal basis for Milieudefensie et al.'s claims, and those claims therefore cannot succeed. We will now suffice with a few comments.
34. In essence, Milieudefensie et al.'s claims seek a judgment against RDS that goes much further than the current regulations require, while further regulations are being developed, and while other private parties are not to be bound by what is now indeed being required of RDS. Such claims cannot be awarded: tort law has limitations and intervention under tort law requires a legal rule that has been violated, and that therefore does not automatically include the standards that one would have to comply with "according to conscience" or concern about a complex social problem, matters about which people can and are permitted to have different ideas.⁸⁵ The court applies the law, but does not make any policy choices for the structure of society; for example, the courts in the Netherlands are prevented from issuing a substantive legislative order by "*the freedom of the legislature to bring*

⁸⁵ The words quoted come from the parliamentary history; see margin number 468 and footnote 546 Statement of Defence.

*about legislation with a certain content [...]. That remains reserved for the legislature concerned."*⁸⁶

35. There is no written or unwritten legal rule that stipulates that RDS is already acting unlawfully, nor that RDS, as a private party, is obliged to do what Milieudefensie et al. want, namely reduce CO₂ emissions from "all of the Shell group's business activities and the energy-carrying products it sells" by a specific percentage as of 2030. The Paris Agreement certainly does not do so. Milieudefensie et al. are attempting to transform the Paris Agreement into a source of such a legal rule, but that fails to appreciate both the nature and the scope of that treaty. The fact that Milieudefensie et al.'s view is incorrect is firstly evidenced by the fact that the specific rules invoked by Milieudefensie et al. to substantiate their claims are directed at States, and not at private parties.

(a) The Paris Agreement is invariably addressed to the Parties, the States, therefore, as its target group.⁸⁷ And those States must make important, different choices, unique to each of them, in the process of implementation. For instance, Article 4(19) of the Paris Agreement stipulates that:

"All Parties [the States, therefore, attorneys] should strive to formulate and communicate long-term low greenhouse gas emission development strategies, mindful of Article 2 taking into account their common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."

(b) Further to that, the findings of the Supreme Court in Urgenda, both with regard to the climate conventions and with regard to the ECHR, also focus on the obligations of the State - and other States alongside the Dutch State.⁸⁸

⁸⁶ Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), para. 8.2.5.

⁸⁷ **Exhibit RK-1**, Paris Agreement (NL), 2015. See also section 2.6.4 Statement of Defence.

⁸⁸ Supreme Court 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), para. 5.7.

36. According to today's situation - based on applicable regulations and permits - it cannot be said that RDS, or Shell, is currently acting unlawfully and is obliged to ensure that the emissions of Shell and the end-users of its products are reduced to the level desired by Milieudefensie et al.
37. Taking action against climate change is important and necessary, and Shell is taking steps in the energy transition, but this does not provide a legal basis for the claim of Milieudefensie et al. The energy transition is surrounded by so many uncertainties that it cannot be accepted today as a legal standard that one holding company based in the Netherlands is acting unlawfully as of now and is obliged to reduce the net emissions associated with the products of its subsidiaries to a certain percentage by 2030, regardless of what energy users - the customers who buy and ultimately burn Shell products, thus causing CO₂ emissions - do, regardless of what other energy producers do, and regardless of what States do in determining the frameworks of the transition and the allocation of roles therein.
38. In their claim, Milieudefensie et al. are, among other things, trying to hold RDS liable for emissions that are not caused by Shell but by others, namely during the end-use of energy products, specifically in the combustion of oil and gas ('scope 3' emissions). Although Shell wants to help its customers reduce their CO₂ emissions, it cannot be held legally responsible for these emissions. Recognised calculation methods illustrate that such emissions are not attributed to the producer of fossil fuels, but to the users of those fuels.⁸⁹ Without any actual substantiation, Milieudefensie et al. are deviating from this and are holding RDS to account for the whole without properly substantiating this. Nor can this be regulated via RDS in a practical sense, not even in the event of a court judgment against RDS (see the aforementioned report from Professor Mulder in this regard, from which it follows that other providers would fill the gap that Shell would leave behind).⁹⁰

⁸⁹ Sections 2.6.4 and 6.3 Statement of Defence.

⁹⁰ **Exhibit RK-35**, the Mulder Report, paragraphs 6-7.

39. Moreover, awarding a claim aimed at specific emission restrictions by Shell as of 2030 also requires assumptions that, in the midst of a transition that still needs to take shape, simply cannot be made, such as:

- (a) Assumptions about the demand side of the energy market. What it will look like in 2030 is unknown. What if car sales - contrary to the IEA's NZE2050 scenario - do not comprise 50% electric cars in 2030? What if flights under 1 hour have not been abolished worldwide by 2030, as assumed in that scenario? What if distances of less than 3 kilometres are not travelled on foot or by bike as assumed there, but by car? What if households need more energy to heat their homes, because half of the homes have not yet been insulated? And what if those end-users do not compensate their emissions? Milieudefensie et al. seem to imply that Shell must then say "no" and stop the supply of fuels. Even aside from whether that would be desirable (see margin number 45 below), it is unclear why RDS would have a legal obligation to ensure this as long as it is unclear how society and the regulation will be structured.
- (b) Assumptions about Shell's market position. In the Statement of Defence, RDS already explained that the claim which would require RDS to ensure a reduction in emissions by a certain percentage compared to emissions in the past assumes a static system in which Shell and other players continue to hold the same position in relation to each other.⁹¹ With a simple example, RDS explained that if Shell, for example, were to take over a competitor - or the market share of that competitor - and thus expand its market position, it is not logical for a desired reduction to not take that expansion into account, because the desired reduction must then depart from a different starting point than just Shell's activities in 2019.⁹² Nevertheless, even after the explanation requested by the District Court,

⁹¹ Margin number 379 Statement of Defence.

⁹² Margin number 32 of RDS's Statement of Defence.

Milieudefensie et al. leave entirely moot why the relief sought takes 2019 as the base year.

- (c) As a result of the amendment of claim, the claim now pertains to a larger range of Shell activities, i.e. not the CO₂ emissions of its fossil products, but to emissions of energy-carrying products. But what if emissions in 2030 are greater because, for example, Shell is at that point causing emissions because it is building large installations that will in turn ensure fewer emissions in the future (such as alternative energy sources, CCUS installations, etc.)? There is also no reason to find those activities unlawful.
 - (d) The assumption that society does indeed successfully achieve the reduction desired by Milieudefensie et al. That is not certain and the necessary measures are extremely far-reaching (see the IEA NZE2050 scenario that we discussed). The point is not to bind an individual private party to that outcome in the midst of these developments.
40. The issue in this case is not whether it would be desirable for the world to make such a movement that CO₂ emissions are indeed quickly limited: that is certainly desirable. But there is no legal standard that makes current emissions unlawful, or a legal standard that already requires RDS to ensure specific reductions by 2030 and regarding which it can be said with certainty that this will exist in 2030.⁹³ In addition, imposing that obligation on RDS - without this social revolution being a fact - simply cannot have the effect desired by Milieudefensie et al., because other parties can and will meet the demand.⁹⁴ The divestment of oil and gas activities by Shell would be a possibility to comply with the claim, but that also illustrates that this does not serve the purpose envisioned by Milieudefensie et al. at all, because, as we have already explained, the divestment of such activities by Ørsted only meant, for example, that the activities were continued in another group, namely Ineos.⁹⁵ There are, of course,

⁹³ Margin number 468 et seq. Statement of Defence.

⁹⁴ **Exhibit RK-35**, the Mulder Report, paragraphs 6-7 and section 2.2.4 Statement of Defence.

⁹⁵ Margin number 79(c) Statement of Defence.

more examples: Saudi company Sabic has been one of the largest emitters of CO₂ since the acquisition of DSM's chemical activities.

41. If the District Court were to award the claim, it opens the way for everyone's claims against everyone.⁹⁶ That is not what the law of liability is intended for. The flood of procedures that would then arise would be a highly undesirable development and might even lead to a delay in the energy transition. The legal uncertainty that would arise if the energy transition - in the midst of rapidly evolving regulations in many countries - were to also be regulated by the court in proceedings against individual private parties should not be underestimated. Businesses will then not be able to predict what they must specifically focus on when it comes to investments. This is detrimental to the government policy that is being formed to steer investments. All of these factors make it clear not only that a legal standard is lacking, but also that it would go beyond the court's judicial task to formulate a rule as yet in these proceedings.
42. As explained in the Statement of Defence,⁹⁷ there are many more reasons why the claim is factually and legally unsound. We will discuss these specific points in the next hearing days. This also includes the question of whether RDS has a duty of care with regard to the emissions of Shell companies other than itself. It will be explained that this is not the case, while RDS itself has virtually no emissions.

PART B: FURTHER EXPLANATION OF THE FACTUAL BACKGROUND

43. Before explaining at a more detailed level the reasons why there is no legal basis for awarding Milieudefensie et al.'s claims, we would like to discuss in this next Part (B), in more detail a number of factual grounds for RDS's defence that place the legal defence in a broader social context. This concerns, in addition to what was noted above: (i) the energy transition and Shell's role in the energy system and (ii) the regulatory framework and recent developments in this respect. In doing so, we will zoom in on developments at European level that have taken place after the submission of the statement of defence. These

⁹⁶ Section 7.2.4 Statement of Defence.

⁹⁷ Sections 5-7 Statement of Defence.

developments illustrate the role that governments, with their 'regulatory power' and possibilities of incentives, must play in tackling climate change.

5 THE ENERGY TRANSITION AND SHELL'S ROLE IN THE ENERGY SYSTEM

5.1 The societal energy transition and the role of governments

44. Milieudefensie et al. present the transition to a low-carbon energy system as simple and transparent: (i) climate change is dangerous, (ii) Shell's fossil fuels cause climate change, and therefore (iii) RDS, as the only party being held liable, must be required to reduce the Shell group's emission level in 2019 in order to prevent further climate change.
45. With this, Milieudefensie et al. fail to recognise the complex reality of the energy system and the role of an energy company like Shell in that. On the one hand, the continuing and - because of an ever-growing global population - growing demand for energy must be met in order to meet basic human needs and economic development, as also referred to in the Sustainable Development Goals.⁹⁸ In both developed countries and countries that are still developing. RDS explained this in detail in its Statement of Defence.⁹⁹ On the other hand, it is clear that society must, at the same time, transition to a net zero CO₂ system, which includes a net zero energy, agriculture and industrial system in order to reduce CO₂ emissions and thereby combat the risks of climate change, as set out in the Paris Agreement.
46. Looking at the way in which authoritative institutes such as the IEA describe energy transition scenarios and the way in which the climate and energy policy of, for example, the European Union has been designed,¹⁰⁰ there are - briefly put - three mechanisms to address global greenhouse gas emissions in the energy system:

⁹⁸ Section 2.2.3 Statement of Defence and in particular section 2.2.3.2 Statement of Defence.

⁹⁹ See, in particular, section 2.2 Statement of Defence.

¹⁰⁰ See, for example, the way in which the 2030 targets have been set up within the EU to meet the obligations under the Paris Agreement, with three key objectives: (i) reduction targets for

- (a) ***improving energy productivity through more efficient use of energy***, combined with the use of technology and modal shifts (for example, travelling by train instead of flying, or using a bicycle instead of a car), to control energy demand;
 - (b) ***change in the mix of energy products in the energy system*** for which there is a demand in society (end consumers). This means that products with high carbon intensity are replaced by products with lower or no carbon emissions. See the IPCC Special Report,¹⁰¹ which points in this context to the expansion of the use of low-carbon products such as renewable energy, hydrogen, biomass and natural gas. One example is replacing coal with natural gas in the production of electricity. Another example is replacing petrol in cars that use a combustion engine with renewable electricity in vehicles that use a battery or hydrogen cells; and
 - (c) ***the use of methods for CO₂removal***, including carbon sinks¹⁰², by using (i) CO₂ capture and storage (CCS) and (ii) nature-based solutions, such as certified reforestation.
47. Only by combining the use of all of these mechanisms can a reduction in CO₂ emissions in the energy system be achieved in line with the temperature objectives of the Paris Agreement in order to aim to limit the increase in global average temperature to 1.5 °C compared to the pre-industrial level.¹⁰³
48. It is clear that the approach to climate change requires unprecedented cooperation and action between all sections of society. Governments, civil society organisations, consumers and other end-users of energy and businesses, including energy producers and suppliers, must be involved in this. In RDS's view, they will all have to take action:
- (a) The design of the energy transition and the weighing of social interests are reserved for States. States must pursue a long-

greenhouse gas emissions, (ii) increasing the share of renewable energy sources and (iii) improving energy efficiency.

¹⁰¹ Summons, Exhibit 136, IPCC 2018 SR15, Ch. 1, p. 14 and Ch. 2, p. 129.

¹⁰² Summons, Exhibit 136, IPCC 2018 SR15, Ch. 1, p. 14; Ch. 2, p. 129.

¹⁰³ See, for example, **Exhibit RK-36**, IEA, World Energy Outlook 2020, p. 123-124.

term policy (inter alia through policy and legislation) which gives a new shape to the economy and the energy system for our society. States must also facilitate and encourage the development of low-carbon and renewable energy sources (for example, via subsidies and CO₂ pricing). States must support low-carbon technologies, and technologies and infrastructure for CO₂ capture and storage. But States must also support their timely implementation, inter alia by issuing the necessary permits for sustainable energy projects and CO₂ storage projects in good time. This does not always happen without a struggle. This is often preceded by lengthy administrative law processes.

- (b) Energy end-users, from individuals to companies/industries and governments and cities have a crucial role to play by the choices they make. This concerns the type of energy they use, the amount of energy they consume and the efficiency of that use. The choice for a product and how to handle this choice ultimately lies with the end user, who can be supported by new technologies. In that case, they must be made available in an affordable, timely manner and in sufficient quantities, with governments and businesses playing a role.
- (c) Finally, businesses will have to adapt their strategies, will have to innovate and will have to develop technologies that support the transition to a low-carbon future, where their business model (in the end) must be profitable. Energy producers and suppliers, such as Shell, will have to contribute to make this transition possible at the same time.

49. In short, in order to mitigate the effects of climate change, among other things the entire energy system will have to change. The agricultural and industrial sectors, for example, will also have to change. In line with the pace at which society is willing and able to limit greenhouse gas emissions related to energy consumption, Shell, as an energy company, will contribute to this as well through innovation and market development. However, there are many factors on which Shell has no influence and where Shell also depends on steps taken by society and policymakers and national legislator in the various countries. Added to

this, in line with the UN Climate Convention (UNFCCC) and the Paris Agreement, different States around the world make different choices and must also be able to do so because of the "*common but differentiated responsibilities*" they have according to the Paris Agreement.¹⁰⁴

5.2 Shell's role in the energy system

50. Shell operates in more than 80 countries and in many different parts of the energy system. Shell's activities range from primary extraction and production of oil and gas, the generation of electricity with windmills and solar panels, activities involving hydrogen, the production of lubricants and fuels for, for example, the production of plastics and other chemicals, to the production and sale of fuels to customers.¹⁰⁵
51. All of these Shell activities are regulated in the more than 80 countries in which Shell operates. In different stages of the process, from exploration to production, from production to delivery and from delivery to use. Part of that regulation pertains specifically to tackling climate change and is often based on the achievement of (internationally or nationally) agreed greenhouse gas emission reduction targets. It is important to emphasise that because of the legal significance of this in answering the question of whether RDS can be liable for Shell's conduct in accordance with these rules and the permits and consents based thereon. These rules are broadly divided into three categories:
- (a) rules aimed directly at the activities of companies such as Shell, such as general rules and permits for authorised greenhouse gas emissions in the production of oil or gas, or in the refining, including, for example, the European emissions trading system (EU ETS);

¹⁰⁴ **Exhibit RK-1**, Paris Agreement (NL), 2015, for instance Article 2(2) and Article 4(19).

¹⁰⁵ **Exhibit RK-31**, Shell, Sustainability Report 2019, p. 10, provides a global overview of what activities Shell carries out worldwide in that respect in the various stages of the production and sales process. See also **Exhibit RO-281**, Press Release and presentation Q3 2020 figures, slides 15 through 21.

- (b) rules aimed at (end) users, such as product standardisation of (motor) fuels, standardisation of permitted CO₂ emissions from vehicles, and rules aimed at the industry or the built environment regarding the observance of energy efficiency requirements; and lastly
 - (c) rules directed at the price of energy products, such as tax measures, subsidies, and, for example, CO₂ pricing mechanisms.
52. This set of rules, which relate to and intervene in different parts of the energy system, already shows that there is no single starting point from which to tackle climate change. It also shows that there is not one (arbitrary private) link in the energy system as a whole that can be singled out as having a special task, role or assignment in connection with tackling climate change, as suggested by Milieudefensie et al. with their claims. The energy transition requires the various States to make their own and differentiated choices in order to achieve their own policy regarding energy supply. States, not courts, are equipped to do this. It is then up to regulators to check compliance with the rules and up to policymakers and legislators of the States to tighten up rules if there is reason to do so.
53. Shell is certainly prepared to take steps in the energy transition, and it is already doing so. However, it is essential for Shell that these steps are supported and embedded in societal changes that make the energy transition possible with the accompanying regulatory framework. These necessary actions and measures affect many different areas (energy supply, industry, the built-up environment, mobility, and agriculture, etc.) and thus also affect various actors in society. The Dutch Climate Agreement also clearly shows this. It must be clear and unambiguous for private actors, such as Shell, on the basis of clear regulations and incentives, what is required of them in that respect and which meaningful investment opportunities exist. It is precisely because the Paris Agreement leaves it to the various States to take their own specific situation into account, and to make their own choices and determine which “*differentiated*” approach is necessary for different countries and regions.

5.3 Shell's role on the supply side of the energy market

5.3.1 The energy transition does not require a ban on fossil fuels; oil and gas are still needed

54. Currently, about 80% of the primary energy supply worldwide is supplied by fossil fuels.¹⁰⁶ Renewables, such as hydropower, wind and solar energy already generate a substantial share of electricity, but electricity currently accounts for less than 20% of total worldwide final energy consumption.¹⁰⁷ The level of electrification based on sustainable sources, such as wind and solar, will have to increase significantly in the coming decades.¹⁰⁸ Various challenges will have to be overcome, such as increasing the availability and reliability of renewable energy sources as a result of seasonal fluctuations (large volumes of electricity cannot yet be stored), and (timely) increasing of network capacity.
55. Therefore - contrary to what Milieudefensie et al. would have us believe - oil and gas will continue to play a role, both in material production (for example in steel, which is also necessary to build wind turbines, for example) and in the energy supply. Oil and gas have a place in the energy transition alongside renewable energy sources and other options with lower carbon intensity, as emerges from various scenarios developed by the IEA and IPCC on the basis of the Paris Agreement.¹⁰⁹ In recent publications, the European Commission also assumes a share for natural gas in energy supply in 2050.¹¹⁰
56. That applies precisely also for the supply of reliable and affordable energy in economic sectors and regions where electricity from renewables is not yet a viable or complete alternative. This concerns mainly the so-called "*hard to abate*" sectors, including the iron, steel,

¹⁰⁶ **Exhibit RK-36**, IEA, World Energy Outlook 2020, Table A.3 Energy demand - World, p. 342 (column 2019 Shares (%); the sum of Coal, Oil and Natural Gas).

¹⁰⁷ *Ibid.*, p. 342 (Total final consumption, Electricity, column 2019 Shares (%)).

¹⁰⁸ Section 2.2.3.3 Statement of Defence, margin number 55.

¹⁰⁹ Sections 2.2.3 and 2.2.3.4 Statement of Defence and the references to the scenarios of the IEA and IPCC (see margin numbers 61 et seq. and the IPCC Special Report referred to in footnote 47).

¹¹⁰ See COM (2020) 299 final, 8 July 2020, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Powering a climate-neutral economy: An EU Strategy for Energy System Integration, p. 15-16.

cement and plastic industries, where electrification is not yet a viable option because of the very high temperatures that need to be achieved. These sectors will therefore require methods for the capture and storage of CO₂ and the possible reuse thereof.¹¹¹ This is also relevant in the transport sector, where, for example, there are not yet any hydrogen aircraft engines available for aviation.

57. Continuous investment in oil and gas is needed to meet the projected energy demands of a growing and developing world. Although demand for oil and gas is expected to decrease over time, this decline in demand will be slower than the natural decline in production from existing oil and gas fields.¹¹² For this reason, the IEA emphasises the importance of these investments in order to provide for the gap between supply and demand. The IEA points out:

"the importance of continued upstream investment, even during the transition away from a fossil-based energy system" and a "critical need to develop new fields to fill the supply-demand gap".¹¹³

58. According to the World Energy Outlook 2020, that is still the case, even in the *Net Zero Emissions by 2050 (NZE2050)* scenario:¹¹⁴

"Demand for oil declines from 98 million barrels per day (mb/d) in 2019 to 65 mb/d in 2030 in the NZE2050, an annual average decline of more than 3.5%. This would represent a step-change in the trajectory of oil demand, although this decline rate is still slower than the underlying rate of decline in supply that we would see if there were to be no investment in new or existing fields, in which case oil supply would decline by around 8-9% per year (IEA, 2020b). This means that some upstream investment in oil would still be needed even in the NZE2050 world of rapidly falling oil demand." (emphasis added by attorneys)

¹¹¹ Section 2.2.3.3 Statement of Defence, margin number 58.

¹¹² Section 2.2.3.5 Statement of Defence.

¹¹³ **Exhibit RK-4**, IEA, World Energy Outlook 2018, pp. 158 and 163.

¹¹⁴ **Exhibit RK-36**, IEA, World Energy Outlook 2020, p. 131; see also p. 253, p. 259 and p. 266.

59. Unlike Milieudefensie et al., the Dutch government also does not assume that new investments in fossil activities must be stopped. Even in November this year, Minister Wiebes emphasised that he did not agree with a member of parliament who asked whether he believed that granting new licences for oil and gas production is at odds with the climate objectives: *"[n]o, as explained in the answer to question 4, natural gas will still be necessary to meet the energy demand in the coming period and production from our own country is better for the climate."*¹¹⁵
60. Against this background, it is clear that the simple way in which Milieudefensie et al. present their claim is not in line with the way in which the energy transition can develop, according to current insights.
61. The route for achieving the climate objectives and the energy transition required in that respect requires a variety of solutions from different actors in society, not an individual order to ensure that the (net) CO₂ emissions associated with Shell's operations and the use of Shell's products are significantly reduced by 2030. During the energy transition, society must opt for products with lower CO₂ emissions and, alongside that, increase energy efficiency and offset emissions.¹¹⁶

5.3.2 Shell's measures

62. The first part of these oral arguments already explained that the role of an individual stakeholder like Shell is limited both on the supply side and on the demand side of the energy market. Yet, Shell is certainly not standing still, as has also been explained. The Statement of Defence describes in detail what actions and measures Shell has taken, and will continue to take, as its contribution within the context of the energy transition.¹¹⁷
63. One of those actions was the formulation by RDS of the NCF ambitions in 2017. These NCF ambitions were raised in April this year. We already explained this earlier in these oral arguments, as well as

¹¹⁵ Appendix to the Proceedings II 2020-2021, no. 740, answer from Minister Wiebes to questions from Member Van Raan on the climate plans of oil and gas companies of 10 November 2020.

¹¹⁶ Exhibit RK-36, IEA, World Energy Outlook 2020, p. 123-124.

¹¹⁷ Section 2.3 Statement of Defence.

the steps that Shell companies are already taking globally to support the transition.¹¹⁸ At that point, however, CCS and *natural carbon sinks* were only briefly discussed as measures to prevent or compensate for CO₂ emissions into the atmosphere. They deserve a further factual explanation, which we will now give.

64. CCS involves the capture and storage of CO₂ emissions, so that this CO₂ does not end up in the atmosphere. According to the IPCC, the IEA and the European Commission, CCS solutions - which may include CO₂ (*Carbon Capture Usage and Storage* or “**CC(U)S**”) - are essential and indispensable in the global approach to climate change.¹¹⁹ For example, the IPCC Special Report indicates that “*early scale-up of industry-CCS is essential to achieve the stringent temperature target.*”¹²⁰ The IEA technology report issued in September of this year also shows that CC(U)S is a “*key pillar of efforts to put the world on the path to net-zero emissions*” and that “*Reaching net zero [will be] virtually impossible without CCUS*”.¹²¹ CC(U)S and the necessary infrastructure also play an important role in the Green Deal.¹²²
65. The Commission has also shown that these are not empty words. At the beginning of October 2020 it was announced that the European Commission proposed to the European Parliament (which must decide on this) to grant the CCS Porthos project EUR 102 million from the Connecting Europe Facility budget.¹²³ Porthos is the CCS project of a joint venture between the Havenbedrijf Rotterdam, Gasunie and EBN, in which CO₂ from industry in Rotterdam port is transported and stored in empty gas fields under the North Sea. To that end, Porthos concluded cooperation agreements with Air Liquide, Air Products,

¹¹⁸ Margin numbers 12-16 above.

¹¹⁹ Section 2.3.4 Statement of Defence, margin numbers 128-141 and the IEA reports mentioned there (**Exhibit RK-10**, IEA, Technology Perspectives Report 2017, p. 38) and the IPCC (Exhibit 136 to the Summons, IPCC Special Report, Ch. 2, p. 140).

¹²⁰ Exhibit 136 Summons, IPCC Special Report, Chapter 2, p. 140.

¹²¹ **Exhibit RO-263**, IEA, Energy Technology Perspectives, Special Report on Carbon Capture Utilisation and Storage, CCUS in Clean Energy Transitions (September 2020), p. 13.

¹²² Green Deal of the European Commission of 11 December 2019, COM (2019) 640 final, paragraphs 2.1.2 and 2.1.3.

¹²³ **Exhibit RO-269**, European Commission, Investing in new energy infrastructure: Green light for EU grants worth nearly €1 billion, 2 October 2020.

ExxonMobil and Shell in the autumn of 2019.¹²⁴ In a letter to the House of Representatives of 16 October 2020 in response to the advice of the Taskforce on Climate Agreement Infrastructure for Industry (TIKI), the government also emphasised the importance of CCS for the energy transition and thus specifically expressed support for the Porthos project:

*"In order to achieve the climate targets, the use of CCS and CCU is necessary. The development and realisation of the first large-scale CCS project, Porthos, is of great importance in this respect. In order to ensure that the parties can realise this project in good time, share experiences and give the market time and confidence to develop such activities, I support the development and execution of Porthos by state-owned companies Havenbedrijf Rotterdam and Gasunie and policy participation EBN."*¹²⁵ (emphasis added, attorneys)

66. A second example of a specific and also ongoing CCS project is Quest in Canada, which was already explained earlier.¹²⁶
67. A third, more recent example is the Northern Lights project announced by Shell in May of this year. This concerns the development of a large-scale CO₂ storage project that Shell is entering into with Total and Equinor in Norway. In September of this year, the Norwegian government granted the necessary approval for this.¹²⁷ The Norwegian Government recently wrote that *"[f]or many years, various Norwegian governments have supported technology development, test and pilot projects, and underscored the importance of carbon capture and storage as an important climate tool internationally", en "[t]his approach is a climate policy that works"*.¹²⁸

¹²⁴ For the record, it is noted that Shell has not yet taken a Final Investment Decision (FID).

¹²⁵ **Exhibit RO-270**, Government response to the advice from the Taskforce on Climate Agreement Infrastructure for Industry (TIKI), 16 October 2020, p. 6.

¹²⁶ Margin number 138 Statement of Defence.

¹²⁷ **Exhibit RO-258**, Shell, Northern Lights. See also **Exhibit RO-280**, Regjeringen.no, 21 September 2020, 'The Government launches 'Longship' for carbon capture and storage in Norway'.

¹²⁸ **Exhibit RO-280**, Regjeringen.no, 21 September 2020, 'The Government launches 'Longship' for carbon capture and storage in Norway'.

68. RDS would like to reiterate that the technical feasibility of CCS is not a question or obstacle. The IEA describes for instance that CC(U)S is already being applied and that *"[t]he overall technical capacity for failure CO₂ worldwide is vast, but detailed site-specific assessment is needed."*¹²⁹
69. The economic feasibility is, however. After all, these are projects that do not lead to saleable products, but are solely intended to capture emissions from existing business processes and to store them underground. This type of project is not profitable in itself without the support of the government.
70. The success of CCS depends firstly on clear and consistent government policy. This is all the more true because there is also resistance and the government must therefore make a decision. An example was already mentioned in the Statement of Defence,¹³⁰ but in the Climate Plan 2021-2030, the Dutch government also wrote explicitly: *"Use of CCS and biomass are part of a cost-effective way to achieve the goals. Limitations - for example due to public acceptance and, in the case of biomass reasons for reasons of sustainability and availability for competing applications within and outside the energy system - in principle lead to higher costs of the transition"* (emphasis added, attorneys).¹³¹ And then the government mentioned: *"[i]n mid 2020 the central government will also present views on the market organisation of [...] CCS and funding of CO₂ infrastructure. The legal frameworks for this must be adjusted no later than 2022"*.¹³² The IEA also confirms: *"[g]overnments have a critical role to play through policies that establish a sustainable and viable market for CCUS. But industry must also embrace the opportunity."*¹³³ Even though bodies such as IPCC, IEA and governments subscribe to CCS's major importance in the energy transition, the claimants, and Greenpeace in

¹²⁹ **Exhibit RO-263**, IEA, Energy Technology Perspectives, Special Report on Carbon Capture Utilisation and Storage, CCUS in clean energy transitions (September 2020), p. 16.

¹³⁰ Margin number 570(a) Statement of Defence.

¹³¹ **Exhibit RO-266**, Climate Plan 2021-2030, p. 24.

¹³² *Ibid*, p. 37.

¹³³ **Exhibit RO-263**, IEA, Energy Technology Perspectives, Special Report on Carbon Capture Utilisation and Storage, CCUS in clean energy transitions (September 2020), p. 16.

particular, regularly expressed opposition to CCS and encouraged objections.¹³⁴

71. Secondly, there must be financial incentives. The CO₂ price plays a very important role in this respect. As long as the CO₂ price is still not high enough, funding or cofunding by governments will be indispensable, as the European Commission has also acknowledged.¹³⁵
72. "Nature-based solutions" involve projects that protect and develop ecosystems such as forests, grasslands and wetlands to enable more CO₂ to be removed from the atmosphere.¹³⁶ Shell is involved in various nature-based projects. Shell and State Forestry, for example, are planting over 5 million trees in the Netherlands. With nature-based solutions, Shell helps its customers to compensate their own CO₂ emissions caused in the use phase by means of carbon credits in a certified system. The World Resources Institute recognises and monitors the importance of natural-based solutions.¹³⁷

5.4 Shell's role on the demand side of the market is limited

73. It was indicated in the Statement of Defence that global demand for energy will continue to increase in the coming years as a result of a growing world population and increasing development.¹³⁸ How much and at what speed depends on many circumstances (such as the current global Covid-19 impact) and choices made by society, as evidenced by the various scenarios referred to in the Statement of Defence.¹³⁹

¹³⁴ Margin number 570(a) Statement of Defence.

¹³⁵ Margin number 141 Statement of Defence, and **Exhibit RO-66**, EURACTIV, EU Clarifies funding scope for CO₂ capture technology, 10 July 2019.

¹³⁶ Margin numbers 142-144 Statement of Defence.

¹³⁷ See <https://www.wri.org/news/coronavirus-nature-based-solutions-economic-recovery> (last accessed 26 November 2020).

¹³⁸ Margin number 48 Statement of Defence, **Exhibit RO-2**, IEA, Global energy demand rose by 2.3% in 2018, its fastest pace in the last decade, 26 March 2019, and **Exhibit RO-3**, UN, World Population Prospects 2017 Revision, p. 1.

¹³⁹ Section 2.2.3 Statement of Defence, in particular margin number 51.

In the IEA's most recent World Energy Outlook 2020, the *Stated Policy Scenario* assumes growth in the world energy demand of 19% in the period 2019-2040.¹⁴⁰

74. The point is that it is absolutely clear that society as a whole must also change its consumption patterns in order to achieve the objectives of the Paris Agreement. In this respect, we also pointed out the eminent importance of substantial and drastic changes in behaviour that are necessary for this.¹⁴¹
75. Finally, RDS also points out that the possibilities for influencing the demand side also depend in part on the development of new technologies (for example, hydrogen cars) and on investments in necessary infrastructure, which usually take many years. In addition, if Shell changes its retail stations to sell hydrogen, but no one is using hydrogen vehicles (yet), this has no impact on CO₂ emissions.
76. So energy companies have only a fairly limited and indirect influence on consumption patterns on a national or global scale. While interconnected, energy demand is not created or driven by energy suppliers alone, as Milieudefensie et al. seem to assume.

5.5 Preliminary conclusion: Milieudefensie et al. ignores the factual complexity of the energy transition and the role of governments in that regard

77. Shell's role is limited to those matters that are within its control. As an energy company, Shell takes all sorts of measures to appropriately and meaningfully support and facilitate the energy transition that society as a whole must undergo.
78. On the basis of many years of expertise and experience at Shell, an ongoing careful assessment is made of how the growing and changing demand for energy can be met in a sustainable manner.
79. Milieudefensie et al. are, with a simplification of the reality that does not do justice to the complexity of the energy system and Shell's role

¹⁴⁰ **Exhibit RK-36**, IEA, World Energy Outlook 2020, Annexes Table A.3 - Energy demand world, p. 342.

¹⁴¹ *Ibid*, paragraph 4.3.

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in it, attempting to seduce this District Court into intervening in this international political-economic and social process. That attempt must be rejected. Not only because it fails to recognise Shell's role in the energy system, but especially because Milieudefensie et al. seem to want nothing to do with the democratically legitimate decision-making processes in which political and policy choices are being made worldwide that do justice to the various responsibilities that the States have. And that brings me to the following.

**6 THE TRANSITION TO A CLIMATE-NEUTRAL ENERGY SYSTEM
REQUIRES REGULATION BY STATES: GOVERNMENTS MUST
ADOPT AND IMPLEMENT REGULATIONS AND POLICIES; ALL
ACTORS IN SOCIETY PLAY A ROLE IN THIS RESPECT**

**6.1 Regulatory frameworks by governments are indispensable for
the energy transition**

80. Whatever the overall scope of the measures discussed above, it is certain that Shell's actions alone cannot change the global energy mix.

81. The energy transition requires action by society as a whole. This requires effective action by the government, including by amending national regulatory and policy frameworks, to direct the behaviour of all parties involved (industry, agriculture, transport, built environment and consumers) towards the desired change and in doing so to facilitate cooperation between various stakeholders.

82. In the letter from Minister Wiebes to the House of Representatives accompanying the presentation of the government's vision on market development for the energy transition, the Minister says it aptly:¹⁴²

“The Climate Agreement and the Climate Act set out lines to achieve the climate targets for 2030 (49% CO₂ reduction) and 2050 (95% CO₂ reduction). These climate targets require major changes in our energy and resources system, which will not happen on their own. Under the direction of the government, businesses and citizens can shape the necessary changes in technical, financial and economic terms and socially. The government sets the frameworks to a significant extent and thus determines the pace of the transition.” (emphasis added by attorneys)

83. The frameworks for that direction and the action required by national governments are formed by the international law framework for combating climate change. The elaboration takes place at national level, and for EU countries, at European level as well. Both the international framework and its elaboration at European and national

¹⁴² Parliamentary Documents II 2019/20, 32 813 and 31 239, no. 536.

level require brief discussion. I will also discuss a number of important recent developments in the EU context.

6.2 The international law framework for combating climate change provides for a coordinated and balanced reduction of greenhouse gas emissions, including CO₂ emissions

84. The policy framework created by the UNFCCC applies the principle of "*common but differentiated responsibilities*", based on which account must be taken of the differing levels of development among States and the disproportionate impact of climate mitigation and adaptation on lower-income States.¹⁴³ Every State must balance unique national interests in designing its climate policy. This balancing involves complex choices about regulatory methods, energy supply and demand, the structure of the economy, energy security, and development goals.
85. States are best able to weigh the social and economic consequences of the measures necessary to achieve emission reductions. And only governments can determine the policy to speed up the reduction of national emissions. In the Urgenda case, in which the Dutch State was imposed an obligation to reduce emissions, this was the very reason why the Court of Appeal did not want to take a position on how the State should have to comply with that obligation.¹⁴⁴
86. As a private party, Shell is not bound by the agreements under international law between States as contained in the UN Climate Convention and the Paris Agreement. Private parties with activities in different jurisdictions, such as Shell, are and will be subject to various national laws and regulations. They will have to act in accordance with the applicable national legislation, in which international law agreements and obligations must be elaborated and implemented at national level. It is only at that point in time that these become specific and binding obligations for private parties. Milieudefensie et al.'s

¹⁴³ Section 2.2.2 Statement of Defence, margin number 39, with reference to, inter alia, Exhibit 096 Summons, UN Climate Convention UNFCCC 1992 (ENG), recital 6 and Articles 3.1 and 4.1, **Exhibit RK-24**, Kyoto Protocol 1998, Article 10 and **Exhibit RK-1**, Paris Agreement (NL), 2015, recital 3 and Article 2(2), Article 4(3) and Article 4(19).

¹⁴⁴ Court of Appeal of The Hague 9 October 2018, ECLI:NL:GHDHA:2018:2591 (*Urgenda*), paras. 71-76.

assertion that RDS, a private party, has a legal obligation to ensure that conduct is in line with the Paris Agreement – by ensuring a net 25% to 45% reduction is achieved by 2030 – therefore fails to appreciate both the scope of public international law and the language of the Paris Agreement.

87. RDS does fully support the objectives of the Paris Agreement. Shell also participated in various projects of the parties to the Paris Agreement.¹⁴⁵
88. To the extent Milieudefensie et al. are trying to convert the temperature targets of the Paris Agreement into binding emission reduction targets and deadlines for Shell, this attempt cannot succeed. Not even with reference to RDS's support of the objectives of the Paris Agreement. In light of all that RDS has already said above, it is evident that the desirability or feasibility of individual specific emission reduction targets for a single player in the energy market cannot in any way be derived from the Paris Agreement.

6.3 European climate policy and its recent strengthening: Green Deal and a European Climate Law

89. The Paris Agreement was elaborated in a European context by means of a package of European regulations and directives aimed at combating climate change, in cohesion with energy regulations.
90. Partly in response to question 4 from this District Court, regarding relevant developments after the last procedural documents, it would be good to point out that in spring 2020, in September and most recently in November of this year, various change proposals were submitted on the basis of the European Green Deal dating from December 2019.¹⁴⁶ With the Green Deal, the European Commission fleshes out its previously expressed ambition to achieve a climate-neutral energy supply by 2050.¹⁴⁷ In order to indicate the impact of the developments, I will first briefly discuss the current framework.

¹⁴⁵ Margin number 257 Statement of Defence.

¹⁴⁶ Green Deal of the European Commission of 11 December 2019, COM (2019) 640 final.

¹⁴⁷ Shell already expressed its support for that ambition. See **Exhibit RK-34**, Shell, Sketch, A climate neutral EU by 2050, pp. 32-35.

91. In a European context, the implementation of, inter alia, the UN Climate Convention and the Paris Agreement is subject to various regulations that intervene in the various parts of the energy system. I would like to mention the most important of these:

- First of all, the EU ETS Directive, which since 2003 includes the European emissions trading system for specific industry sectors (and now also aviation within the EU).¹⁴⁸

As already discussed above, the EU ETS is "*the cornerstone of the Union's climate policy*," the EU's most important instrument in the area of CO₂ reduction. According to the EU's legislator, this emissions trading system aims specifically to be in line with the EU's contribution to achieving the goals of the Paris Agreement.¹⁴⁹ It covers approximately 40% of total greenhouse gas emissions in the EU.¹⁵⁰

The EU ETS is an exhaustive scheme for all installations in sectors falling within the scope of the emissions trading system. The essence of the system is that a total budget is determined for the quantity of CO₂ that may be emitted in total with all installations to which the EU ETS applies.¹⁵¹ As a result of the emission ceiling reduced annually on a straight-line basis per trading period, the size of the carbon budget (the cap on permitted CO₂ emissions) at EU level is becoming ever smaller and the price on emissions increases. Installations covered by the EU ETS must have emission permits and have the obligation to submit one emission allowance each year for every tonne of CO₂ emissions. The total number of available allowances is capped but installations can freely exchange and trade these allowances among themselves. Companies must in principle obtain their emission allowances by auction, but for sectors exposed to carbon leakage (the 'leaking away' of CO₂

¹⁴⁸ Section 2.7.1 Statement of Defence.

¹⁴⁹ Recitals 6 and 23 of Directive EU 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to promote cost-effective emission reductions and low-carbon investments and Decision (EU) 2015/1814.

¹⁵⁰ See <https://ec.europa.eu/clima/policies/ets> (last accessed 27 November 2020).

¹⁵¹ Article 9 of Directive EC 2003/87, as most recently amended by Directive EU 2018/410 (the "**ETS Directive**").

by the move of production facilities to countries outside the EU, usually with less strict CO₂ emission reduction rules), emission allowances are (partly) made available free of charge. Companies then have the choice: either to emit less with the ETS installations or purchase emission allowances. As a result of this system, the predefined reduction objective is guaranteed to be achieved (after all, the cap or total limit is fixed), but this is done in the most cost-efficient way possible: the emissions are reduced where reductions are the cheapest. A similar system also exists in California and Quebec, for example.

In 2018, the ETS Directive was tightened up in order to accelerate the decrease in CO₂ emissions.¹⁵² It is important to remember: this is a predetermined cap at EU level. As such, this is one of the few instruments which achieves a predefined, directly effective emission reduction at an appropriate level of scale (that of the EU). The European Commission says: "*The EU Emissions Trading System has proven to be an effective tool in driving emissions reductions cost-effectively. Emissions from installations covered by the ETS declined by about 35% between 2005 and 2019.*"¹⁵³

As the total EU ETS budget would remain unchanged - even if Milieudéfense et al.'s claim were to be awarded - it is logical that other parties would be given the room to increase their emissions. Milieudéfense et al. therefore completely ignore the essence of the cornerstone of EU climate policy.

Finally, it is important that the (national) competent authority then grants ETS installations an emission permit granting permission to emit greenhouse gases from all or part of the installation if it is satisfied that the operator is able to monitor and report emissions. Pursuant to the ETS Directive, environmental permits for installations covered by the EU ETS

¹⁵² Directive EU 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to promote cost-effective emission reductions and low-carbon investments and Decision (EU) 2015/1814, and in particular recitals 6 and 14 thereof.

¹⁵³ See <https://ec.europa.eu/clima/policies/ets> (last accessed 27 November 2020).

may not impose any further restrictions with regard to CO₂ emissions, except in so far as this would involve limiting local nuisance. All of this in order not to disrupt the ETS system and to maintain a level playing field.¹⁵⁴

- The Effort Sharing Regulation is decisive for the sectors not covered by the EU ETS.¹⁵⁵ This second pillar of the EU's climate policy includes binding national reduction targets for the Member States, for the built environment, traffic, agriculture and waste management. These sectors account for approximately 60% of the EU's total emissions. According to the current framework, emissions from these non-ETS sectors must be reduced by 30% by 2030 compared to 2005. An important difference with the EU ETS is that the Member States themselves are responsible for the non-ETS sectors and can fill in the details for these sectors themselves.
- The Renewable Energy Directive,¹⁵⁶ which now includes a target of at least 32% renewable energy by 2030, is specifically aimed at increasing the share of sustainable (low-carbon) energy.
- Then there are various guidelines aimed at achieving emission reductions at end-users. I mention a few here:
 - the Energy Efficiency Directive¹⁵⁷ with a target of at least 32.5% of energy savings for 2030;
 - the Energy Performance of Buildings Directive¹⁵⁸ which contains rules for achieving increased energy efficiency of buildings;
 - the Regulation setting CO₂ emission performance standards for new passenger cars and for new light

¹⁵⁴ Article 26 of the ETS Directive. For example, for the Dutch implementation of this prohibition, see Article 5.12 (1) of the Environmental Licensing Decree, which, briefly put, includes the prohibition (i) to set an emission limit value for the direct emission of greenhouse gases and (ii) to require the promotion of efficient use of energy in the establishment.

¹⁵⁵ Regulation (EU) 2018/842, OJ L156/26.

¹⁵⁶ Directive 2018/2001/EU, OJ L 328/82.

¹⁵⁷ Directive 2012/27/EU, OJ L 315/1.

¹⁵⁸ Directive 2010/31/EU, OJ L153/13.

- commercial vehicles,¹⁵⁹ which will contribute to reducing emissions from road transport; and
- the Fuel Quality Directive,¹⁶⁰ which requires fuel suppliers to gradually reduce greenhouse gas emissions during the life cycle of fuel or energy supplied by 6% compared to the 2010 fossil fuel base value.
- Finally, I mention the Governance Regulation¹⁶¹, the 'overarching' part of European energy and climate legislation in which the European Energy Union is given shape. The Governance Regulation sets out how Member States will cooperate with each other and with the Commission to achieve the EU's ambitious objectives in the area of clean energy, including renewable energy and energy efficiency targets, as well as the EU's long-term greenhouse gas emissions targets. The Governance Regulation provides, *inter alia*, for the mandatory reports by Member States on their national contributions (the Nationally Determined Contributions or "**NDCs**") to the energy and climate plans that must be submitted under the UNFCCC and the Paris Agreement.
92. I already mentioned that the European Commission presented its Green Deal in December 2019 to tighten climate policy.¹⁶² The European Council of Government Leaders confirmed the ambition of climate neutrality by 2050 in December 2019.¹⁶³ This was followed by a Commission proposal for a European climate law in March 2020 and an amended proposal in September 2020.¹⁶⁴
93. The European Commission's concrete proposal is included in the 2030 Climate Target Plan.¹⁶⁵ This plan contains the proposal to reduce greenhouse gas emissions by at least 55% below 1990 levels by 2030. The 2030 Climate Target Plan and the new target, which is also

¹⁵⁹ Regulation (EU) 2019/631, OJ L 111/13.

¹⁶⁰ Directive 98/70/EC.

¹⁶¹ Regulation (EU) 2018/1999, OJ L328/1.

¹⁶² Green Deal of the European Commission of 11 December 2019, COM (2019) 640 final. See also *Parliamentary documents II*, 2019/20, 35 377, No. 1.

¹⁶³ For the report of this Council meeting to the House of Representatives, see *Parliamentary Documents II* 2019/20, 21501-20, no. 1508.

¹⁶⁴ COM (2020) 563 final.

¹⁶⁵ **Exhibit RO-267** (COM (2020) 562 (2030 Climate Target Plan)).

included in the amended proposal for the European Climate Law, is based on a comprehensive impact assessment, which shows how all sectors of the economy and society can contribute to this. In its communication on the 2030 Climate Target Plan, the Commission states this very clearly:¹⁶⁶

"Europe has a strong track record of cutting emissions whilst growing its economy. Achieving our new target of 55% greenhouse gas emissions by 2030 will require action across all sectors." (emphasis added by attorneys)

Shell expressed its support for the 2030 Climate Target Plan.¹⁶⁷

94. The new 2030 target will also form the basis for the discussions on the revision of the nationally determined contribution of the EU to reducing emissions under the Paris Agreement.
95. As indicated earlier, the European Commission will prepare legislative proposals and use other relevant policy instruments to achieve the additional emission reductions. The focus in this is on the following components and sectors:¹⁶⁸
 - The EU ETS, the Effort Sharing Regulation and the Land Use Regulation (the LULUCF Regulation)¹⁶⁹ will be tightened and the reduction targets for the sectors covered by these will be aligned with the new 55% reduction target by 2030. The cap for emissions in the EU under the EU ETS referred to above will be reduced, possibly both by a one-off reduction and by tightening the factor that lowers the cap every year.¹⁷⁰ While the EU increases its climate ambition, the European Commission is also working at the

¹⁶⁶ **Exhibit RO-268**, European Commission, EU Climate Target Plan 2030: Key contributors and policy tools, September 2020.

¹⁶⁷ **Exhibit RO-276**, Shell response to 2030 EU Climate Target Plan, 23 June 2020 and **Exhibit RO-278**, Shell, 16 September 2020, 'Shell statement on the European Commission's 2030 EU Climate Target Plan'.

¹⁶⁸ See European Commission, State of the Union: Questions & Answers on the 2030 Climate Target Plan, question 7, available at https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_1598 (last accessed 25 November 2020).

¹⁶⁹ Regulation (EU) 2018/841 on land use, land use change and forestry, OJ L156/1.

¹⁷⁰ **Exhibit RO-267** (COM (2020) 562 final (2030 Climate Target Plan), p. 17.

same time on introducing a Carbon Border Adjustment Mechanism to address "carbon leakage".¹⁷¹

- Expanding the scope of EU ETS to include other sectors, such as road transport, buildings and sea shipping, is being considered, and in the future the EU ETS could possibly cover all sectors that use fossil fuels. Further approach to aviation in the EU ETS will also be considered.
- In addition, the CO₂ requirements for cars and light trucks will also be tightened up further.

96. It is this sectoral approach and it is these types of regulatory initiatives that Shell believes deserve support. Shell also expressed public support for this. I refer to Shell's participation responses to, inter alia, the European Climate Law,¹⁷² the impact assessment for sustainable aviation fuels,¹⁷³ the roadmap for a European methane strategy¹⁷⁴ and the roadmap for the European hydrogen strategy.¹⁷⁵ It is the ensuing national obligations that private parties such as Shell must comply with.

97. All of this is again an illustration of the fact that isolating and limiting a private party in its operations (as Milieudefensie et al. are attempting to do in these proceedings) is not useful and would thwart the policy of States. And that is exactly what the EU does *not* want to achieve with the EU ETS, for example. The regulations that States enact specifically to combat climate change must fit in with the international agreements, which necessarily leave room for States to make their own social and political choices; it is up to the States to weigh the

¹⁷¹ Green Deal of the European Commission of 11 December 2019, COM (2019) 640 final, paragraph 2.1.1 and **Exhibit RO-267**, COM (2020) 562 final (2030 Climate Target Plan), p. 17.

¹⁷² **Exhibit RO-274**, Shell response to the public consultation on the proposal for a Regulation on the European Climate Law, 1 May 2020 and **Exhibit RO-272**, Shell response to the public consultation on the European climate law, 6 February 2020.

¹⁷³ **Exhibit RO-273**, Shell response to the consultation on: Inception Impact Assessment: ReFuelEU Aviation - Sustainable Aviation Fuels, 19 April 2020.

¹⁷⁴ **Exhibit RO-277**, Shell response to the public consultation on the EU Methane Strategy Roadmap, 28 July 2020.

¹⁷⁵ **Exhibit RO-275**, Shell Response to the Roadmap Consultation on the Hydrogen Strategy, 8 June 2020

various interests that can result in (emission) regulation with a view to combating climate change.

98. Finally, in the context of recent developments, I refer to the European Commission communication of 17 September 2020, which shows that it has approved the EU-wide evaluation of the 27 National Energy and Climate Plans (“**NECPs**”) submitted by the Member States to the European Commission implementing the Paris Agreement.¹⁷⁶ The 27 plans provide an overview of how Member States are tackling the first phase of their transition to climate neutrality and what they want to achieve in the period 2021 to 2030 in the five dimensions of the European Energy Union: decarbonisation, energy efficiency, energy security, the internal energy market, and research and innovation and competitiveness.¹⁷⁷ The evaluation of the NECPs shows that the EU is on track to achieve its current emissions reduction figure of at least 40% by 2030, in particular thanks to the ongoing progress in the roll-out of renewable energy in Europe. In order to achieve the new 55% target, the EU will have to further increase energy efficiency and the share of renewable energy and, as stated, the EU ETS will be adapted, among other things. The Commission intends to present the legislative proposals in June 2021.

6.4 National regulations and policy to address climate change continues to develop

99. As evidenced by the Annual Report, Shell operates in a large number of countries in its upstream activities. Its oil production originates mainly from the US (26%), Brazil (19%), Oman (11%) and Nigeria (9%), Russia (5%) and the United Kingdom (5%).¹⁷⁸ Natural gas production mainly comes from Australia (19%), the United States (10%), the Netherlands (6%), Malaysia (6%), Nigeria (6%), Canada (6%) and Norway (5%).¹⁷⁹ These countries (except for the US at the moment) are all parties to the Paris Agreement.

¹⁷⁶ COM (2020) 564 final.

¹⁷⁷ Regulation (EU) 2018/1999, Article 1(2), Article 3(2) and Article 4.

¹⁷⁸ **Exhibit RO-251**, RDS, Annual Report 2019, p. 66. See also **Exhibit RK-35**, the Mulder Report, p. 11.

¹⁷⁹ **Exhibit RO-251**, RDS, Annual Report 2019, p. 67. See also **Exhibit RK-35**, the Mulder Report, p. 12.

100. Like the EU and the Netherlands, each of these countries submitted their own NDC in 2015 (which will be updated in 2021) and each of the governments of these countries will work in accordance with national legislation to address climate change. By way of example, I will mention two:

- The Climate Change Act has been in force in the United Kingdom since 2008.¹⁸⁰ In 2019, the United Kingdom became the first major economy in the world to commit itself by law to reduce all greenhouse gas emissions to net zero by 2050 compared to the previous target of at least 80% reduction compared to 1990 levels.¹⁸¹ The UK has reduced emissions by 42%, while its economy has grown by 72%.¹⁸² This being is achieved by, for example, a growing share of electricity from renewable energy sources, the gradual abolition of combustion engines cars by 2030 and the introduction of CCS and 'nature-based solutions'.¹⁸³
- In Oman, the voluntary target in its NDC in 2015 was to reduce greenhouse gas emissions by 2% by 2030.¹⁸⁴ In October 2019, Oman adopted a 'National Strategy for Adaptation and Climate Change Mitigation 2020-2040' to slow down the growth of greenhouse gas emissions.¹⁸⁵ It calls for "*encouraging a low-carbon economy, the introduction of new technologies and the implementation of renewable energy projects*".¹⁸⁶ Based on

¹⁸⁰ See <https://www.legislation.gov.uk/ukpga/2008/27/contents> (last accessed 26 November 2020).

¹⁸¹ Department for Business, Energy & Industrial Strategy, 'UK becomes first major economy to pass net zero emissions law: New target will require the UK to bring all greenhouse gas emissions to net zero by 2050', 27 June 2019, available at <https://www.gov.uk/government/news/uk-becomes-first-major-economy-to-pass-net-zero-emissions-law> (last accessed 26 November 2020).

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ Sultanate of Oman Ministry of Environment and Climate Affairs, Submission on Intended Nationally Determined Contributions, 2015, p. 2, available at <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Oman%20First%20NDC/OMAN%20INDCs.pdf> (last accessed 26 November 2020).

¹⁸⁵ Sultanate of Oman Ministry of Environment and Cultural Affairs, Second National Communication Sultanate of Oman Submitted to: United Nations Framework Convention on Climate Change Submitted by: Ministry of Environment and Climate Affairs, December 2019, available at [https://www4.unfccc.int/sites/SubmissionsStaging/NationalReports/Documents/520417_Oman-NC2-1-Oman%202nd%20National%20Communication%20\(17%20November%202019\)%20-%20Final.pdf](https://www4.unfccc.int/sites/SubmissionsStaging/NationalReports/Documents/520417_Oman-NC2-1-Oman%202nd%20National%20Communication%20(17%20November%202019)%20-%20Final.pdf) (last accessed 26 November 2020).

¹⁸⁶ *Ibid.*, p. 44.

"partnerships with the international community" and the Oman Renewable Energy Plan, Oman intends to reduce its 2015 total greenhouse gas emissions by approximately 6%.¹⁸⁷

101. As shown above, each country sets its own objectives, implementation policies and timetables. These continue to evolve over time. Some NDCs, in particular for less developed countries, are explicitly dependent on international support. There is no uniform policy, purpose or implementation plan, nor does the bottom-up approach of the Paris Agreement provide for such a plan. This is done to do justice to the "common but differentiated responsibilities".

6.5 Preliminary conclusion: the energy transition cannot be structured in these civil proceedings

102. Shell cannot independently change the energy system, nor can Milieudefensie et al. do so by means of this lawsuit. States worldwide have significant control over the supply side of the market. States also have control over the demand side of the market. They therefore have a very important role in directing and facilitating the far-reaching social transition needed to move as a society towards the objectives of the Paris Agreement. As Professor Mulder's report makes clear, measures against one player in the market such as Shell cannot achieve what Milieudefensie et al. intend: without regulation, other parties would jump into the gap left behind by Shell.¹⁸⁸
103. What is more is that if the claims were awarded, the policymaking by governments in shaping the energy system and the energy transition would be thwarted. Governments must make all sorts of societal and political choices that differ from one country to another. In doing so, they have to deal with many considerations on both the demand and supply sides of the energy market. And the regulation also takes into account the creation of a level playing field where private market participants such as Shell compete with each other and thus contribute to cost-efficient solutions within that framework. The government summarised this in the comment: *"By making choices with regard to*

¹⁸⁷ *Ibid.*

¹⁸⁸ **Exhibit RK-35**, the Mulder Report, paragraphs 6-7.

*organisation and regulation, central government determines the playing field and the rules of play for public and private parties”.*¹⁸⁹ Milieudefensie et al.’s claims directed against RDS completely fail to recognise this.

104. In short: Milieudefensie et al. make it appear as if the energy transition can be shaped by judges in individual proceedings like the present one. That is not the case. Milieudefensie et al. are too simplistic on other points as well. We will return to this in the subsequent hearing days.

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Attorneys

¹⁸⁹ **Exhibit RO-266**, Climate Plan 2021-2030, p. 37.