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DE BRAUW BLACKSTONE WESTBROEK

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

PLEADING NOTES:
RELIEF SOUGHT
17 DECEMBER 2020
of *mr.* J. de Bie Leuveling Tjeenk, *mr.* N.H. van den Biggelaar and *mr.* D. Horeman

in the case of:

MILIEUDEFENSIE ET AL. versus
ROYAL DUTCH SHELL PLC

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1 INTRODUCTION

1. It has already been explained in the proceedings why the claims are not eligible for award. But assuming the District Court were to find that RDS has a legal obligation to ensure that the 1,100 companies in the Shell Group reduce their scope 1 and 2 CO_2 emissions, and the emissions of end-users of their energy products (scope 3), the question arises as to whether the relief sought itself is such that it can be awarded. That is not the case, and we will discuss that now.

2. All parts of the relief sought assume that Shell must reduce certain CO_2 emissions in line with, briefly put, reduction targets which, according to Milieudefensie et al., must apply for the world as a whole.

   (a) The relief sought at 1(b) and 2 is directly linked to this. Milieudefensie et al. are seeking a reduction of absolute CO_2 emissions at year-end 2030 by *"at least*", "*at least net*" 45%, 35% or 25% compared to the 2019 level. In the summons, they

linked that first percentage (45%) to the idea that, according to Milieudefensie et al., this is, according to the IPCC, *"the correct reduction route", "from global reduction scenarios"* to achieve enough of an emission reduction to limit the temperature increase to 1.5 or at least 2ºC with a sufficient likelihood.[1] It then applies this one-to-one to RDS, because according to Milieudefensie et al., it must "*contribute proportionally […] to achieving the global emissions target"*, "*follow the CO_2 emission reduction scenario indicated by the IPCC to be used globally"* and do so "*in a consistent (linear) manner* ".[2]

(b) This is no different for the relief sought at 1(a). There they seek a declaratory judgment that RDS will be acting unlawfully if[3] there is no reduction in the future "*in accordance with the global temperature objective* […]". In their explanation, they assert, also with reference to their explanation just summarised, that according to Milieudefensie et al., Shell must reduce proportionally to what applies for the world as a whole: "*alignment is sought with the global reduction challenge as the average challenge to be achieved*."[4]

1 Summons, margin numbers 846 and 850-851.

2 Summons, margin numbers 733 and 745.

3 See RDS's Statement of Defence of 1 December 2020, margin numbers 2-3 and footnote thereto.

4 Document explaining Milieudefensie et al.'s amendment of claim, margin number 16. In the explanation to the new relief sought at 1(a), margin number 31 also refers back to the aforementioned parts of the summons.

3. There are three fundamental objections to this, which we will now go through.

   (a) Milieudefensie et al. have left key elements of their relief sought entirely unexplained, which already prompts dismissal (part 2).

   (b) Milieudefensie et al. based their claims and the relief sought on the idea that "*the correct reduction route"* can be designated for the world. That is not the case, and that means their claims cannot succeed (part 3).

   (c) In addition, Milieudefensie et al. based their claims and the relief sought on the idea that RDS is legally obliged to follow "*the correct reduction route*" that allegedly applies worldwide, *"proportionately*" by reducing its absolute (net) emissions. That, too, is incorrect and, for that reason as well, the foundation for all the claims is lost (part 4).

   A few other points follow below (part 5).

2 MILIEUDEFENSIE ET AL. DO NOT EXPLAIN KEY POINTS FROM THE RELIEF SOUGHT

4. Milieudefensie et al. have not explained key points in the relief sought. For that reason alone, the claim can be dismissed.

5. After amendment of claim, Milieudefensie et al. are seeking emission reductions of percentages, "*or at least net*" percentages. At the eleventh hour, last Tuesday, Milieudefensie et al. came with a surprise. Their claim is meant in such a way that, as far as they are concerned, emissions may not be compensated by, for example, forest planting (or CC(U)S) with biomass).[5] According to Milieudefensie et al., this is "*in accordance with the IPCC standard*" because, according to Milieudefensie et al., "*the IPCC refers to an absolute 45% reduction for 2030 and not a net 45% reduction*".[6] Apart

5 Written arguments 8 Milieudefensie et al., margin numbers 11 and 39.

6 Written arguments 8 Milieudefensie et al., margin numbers 39-42.

from the fact that a net 45% reduction is also an absolute reduction, this is not what the IPCC says. It states (emphasis added, attorneys):[7]

> C.1 In model pathways with no or limited overshoot of 1.5°C, global net anthropogenic CO_2 emissions decline by about 45% from 2010 levels by 2030 (40–60% interquartile range), reaching net zero around 2050 (2045–2055 interquartile range). For limiting global warming to below 2°C[11] CO_2 emissions are projected to decline by about 25% by 2030 in most pathways (10–30% interquartile range) and reach net zero around 2070 (2065–2080 interquartile range). Non-CO_2 emissions in pathways that limit global warming to 1.5°C show deep reductions that are similar to those in pathways limiting warming to 2°C. (*high confidence*) (Figure SPM.3a) {2.1, 2.3, Table 2.4}

It is also not what Milieudefensie et al. themselves asserted in the summons (margin number 742):

> "*The SR15 report adds to that that an interim reduction or a reduction of (net) 45% must have been achieved (range of 40-60%) compared to 2010."*

It is generally accepted that any reduction targets take into account compensation via CC(U)S or nature-based solutions. This applies, for example, for the reduction objective of the Dutch State in the Climate Act.

> "*The definition of greenhouse gas emissions also implies the inclusion of negative emissions. These are processes that extract greenhouse gases from the atmosphere, such as a combination of the use of biomass capture and storage of CO_2 (Carbon Capture and Storage - CCS). The manner in which these negative emissions can be deducted from greenhouse gas emissions is regulated in the monitoring mechanism regulation."*[8]

Negative emissions also play an important role in the latest climate plans for the European Union.[9] The IPCC does the same in scenarios.[10] The technology for such use of CC(U)S is already in place and works, the

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7 Exhibit MD-135, p. 14.

8 *Parliamentary Documents II*, 2015-2016, 34 534, no. 3 (Explanatory Memorandum), p. 21.

9 See, for example, "net greenhouse gas emission reduction" in **Exhibit RO-267**, bottom of page 27 and - with regard to negative emissions from carbon sinks - e.g. p. 19.

10 Statement of Defence, margin number 129.

IEA emphasises its importance, and the opening arguments also mentioned recent new Shell projects in that field.[11]

6. Then the claim in so far as it does indeed read "net". In its Statement of Defence, RDS already pointed out that it is unclear what that key word "net" means in the relief sought according to Milieudefensie et al.[12] On the one hand, they assign RDS responsibility for emissions that arise as end-users use Shell products, but on the other hand they do not explain in any way how and whether efforts by those end-users to capture and store CO_2 emissions or otherwise compensate for them, may then be deducted from RDS's responsibilities. Nor do they explain how that is kept track of. Despite the defence on that point, Milieudefensie et al. did not explain the word "net" in the amendment of claim, or in the document explaining the amendment of claim. And that is problematic. That is problematic because the lion's share of all CO_2 emissions raised by Milieudefensie et al. in these proceedings are emissions by end-users (so Shell's scope 3 emissions).

7. Milieudefensie et al. did not provide any substantiation for the percentages of 25% and 35% referred to in the alternative by Milieudefensie et al. until last Tuesday. Anyone searching for "25" and "35" in the summons, the document amending the claim and the explanation from Milieudefensie et al. would not find any reference to those percentages, except in the relief sought itself and when discussing a claim in *Urgenda* about reductions in the Netherlands between 1990 and 2020, regarding which Milieudefensie et al. subsequently notes that these are not relevant in this case.[13]

   (a) Last Tuesday, Milieudefensie et al. stated that they derive this percentage of 25% from "the scenario," but go on to mention several scenarios, and state that it “seems […] appropriate" that a scenario that remains well below 2ºC comes to 1.8ºC and not 1.9ºC.[14] They do not provide a source for that apparently arbitrary choice. They refer to the *Urgenda* decisions, but none

11 Statement of Defence, margin number 134 and Written Arguments Part I RDS.
12 Statement of Defence, margin number 377.
13 Document explaining Milieudefensie et al.’s amendment of claim, margin number 16, second to last sentence.
14 Written arguments 8 Milieudefensie et al., margin number 113.

of them mentions 1.8ºC or 1,8ºC. RDS therefore concludes that Milieudefensie et al. themselves have chosen this percentage arbitrarily and disputes it for this reason.

(b) For the alternative claim of 35%, Milieudefensie et al. provide no other substantiation than that the middle point between two scenarios they themselves mention is, in their view, logical.[15]

(c) Only for the percentage of 45% do they, very summarily, point to a reduction, mentioned by the IPCC as an average, of various global emissions scenarios.[16] RDS already explained earlier that such scenarios only show potential routes and involve many variables and alternatives.[17]

With this kind of basis, put forward last Tuesday, no proper debate on percentages is possible. Milieudefensie et al. certainly cannot simply be followed therefore.

8. After amendment of claim, the relief sought also pertains to CO_2 emissions “associated" with “energy-bearing products" instead of "fossil products," both at 1(a) and at 1(b). The terms chosen are unclear and, last Tuesday, Milieudefensie et al. explained them so summarily that it is unclear what “associated" and “energy-bearing products" mean exactly here.

9. It is unacceptable for the claimants to leave key points in the relief sought unclear, especially because of the far-reaching consequences that their award would have for RDS. It must be made clear to RDS in good time precisely what it has to defend itself against, especially where the basis for these types of key points of the relief sought is concerned. In addition, it must be crystal clear to RDS what it must do to comply with any court order, which clarity is lacking based on the present relief sought.

10. For the rest, as far as RDS is concerned, this will not prove necessary. The ideas on which the relief sought is based, including the

15 Written arguments 8 Milieudefensie et al., margin number 130.
16 Summons, margin number 742.
17 Statement of Defence, margin number 42.

aforementioned percentages, are so flawed that they cannot be awarded, as I will now explain.

3 THERE IS NOT ONE CLEAR-CUT GLOBAL REDUCTION PATH FOR TO THE END OF 2030

11. The relief sought departs from the idea that just one clear-cut reduction path for global emission reductions exists now and as of the end of 2030. Milieudefensie et al. refer to this as "*the correct reduction route*." There is not one single route of this kind, nor is it the case that one particular reduction route applies as the measure of things worldwide.

12. Milieudefensie et al. confuse *scenarios* with mandatory, well-defined reduction paths. What scenarios make clear above all is that there are different possibilities in shaping the transition, each with its own advantages and disadvantages and it is up to an individual's judgement whether that scenario is possible. In the summons, Milieudefensie et al. themselves say in fact that the aim they prioritise "*consequently* [depends] *on multiple interdependent conditions and partly boils down to political will and decisiveness*."[18]

13. Milieudefensie et al. themselves suggest that, in their opinion, the world as a whole is not on track with the reductions it is indeed requiring from Shell. Nevertheless, they want to bind RDS to that. Whatever the case may be, RDS explained in detail in the opening arguments that policymakers are fully involved in shaping the route to be followed during the energy transition, and in that process have to make countless political choices for society as a whole and the division of roles between different parties in that transition.

14. Milieudefensie et al. wish to limit the scenarios to scenarios without what they call "*negative emission technologies*."[19] To what extent such technology will be used is one of the many variables that determines the extent to which the carbon budget that Milieudefensie et al. continuously hold out will indeed have been used such that no new

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18 Summons, margin number 770.

19 Summons, margin numbers 747, 750 and 757 et seq. and written arguments 8, margin number 11.

emissions are made. There are choices in this respect. The world is not standing still, although Milieudefensie et al. continue to refer to a report from several years ago. The fact is that the use of such technology is described in numerous scientific sources, that many techniques have been proven and that it is moreover unclear why technological progress cannot be assumed in the future (see also margin number 5 above). The fact that progressive policymakers such as the European Commission consider that such technology can play an important role, especially after 2050, is telling in this respect.[20] For example, the Impact Assessment that was part of the announcement by the European Commission in September 2020 states the following.

> "*By 2030, changes in projected biomass demand in the scenario applied for this assessment are not significant, while by 2050 these will be larger with the power sector more than a doubling its use of bioenergy notably to generate negative emissions. In this time-frame, coupling the use of solid biomass with CCS installations in power and industry sectors would contribute to the removal of CO_2 from the atmosphere.*"[21]

The firmness with which Milieudefensie et al. present the carbon budget and reject negative emission technology is incompatible with this. However, Milieudefensie et al. do not explain why those scenarios should be completely disregarded when determining the strict legal obligations of a private party like RDS.

15. The essence of Milieudefensie et al.'s position is therefore that there is a reduction route on a global scale that reportedly serves as "*the correct reduction route*," and they derive from that what Shell must do. But that is incorrect, because it cannot be said on a global scale that

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20 Exhibit RO-267, p. 19 in the middle.

21 COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Stepping up Europe's 2030 climate ambition Investing in a climate-neutral future for the benefit of our people, 17 September 2020, SWD(2020)176 final. Available at: https://ec.europa.eu/clima/sites/clima/files/eu-climate-action/docs/impact_en.pdf. Impact assessment pertaining to the document submitted as Exhibit RO-267.

one route is "*the correct reduction route*." Various routes are conceivable.

4 THERE IS NO BASIS WHATSOEVER FOR APPLYING A GLOBAL REDUCTION PATH PROPORTIONATELY TO SHELL

16. Milieudefensie et al. make a one-to-one translation of what they consider worldwide as the "*the correct reduction route*" to what Shell is reportedly legally obliged to do. After all, according to Milieudefensie et al., Shell must "*contribute proportionally* [...] *to achieving the global emissions target* " by reducing absolute CO_2 emissions.[22] That is not a loose, casual comment, but the essence of the claims submitted by Milieudefensie et al. to this District Court for assessment. This raises the question of what substantiation Milieudefensie et al. give for this.

17. The answer is: none. Until margin number 753 of the summons, they describe what they consider the global reduction scenario. And in margin number 754 it then reads: "*this means, in view of the IPCC data discussed above, that on the way to the zero point in 2050, Shell must, in 2030, already have arrived at an absolute emission reduction of 45% compared to its emission level in 2010*." This is based in any event on the incorrect idea that "the correct reduction route" can be designated for the world, but that has already been explained. The reference to IPCC and following this with a graph on the reduction desired from Shell suggests that there is an analysis that pertains to the contribution that one private party like Shell would have to make. But there is no such thing. The IPCC does not comment on whether and how its scenarios translate into contributions from the various actors and sectors, let alone a contribution from individual parties. The graph was compiled by Milieudefensie et al. themselves; it does not provide any substantiation. Thus, an essential point is missing in the substantiation of their claims, and they must be dismissed in their entirety. RDS also put this forward in the Statement of Defence.[23] One would therefore expect Milieudefensie et al. to provide adequate substantiation in the meantime. But that is not the case. In its oral

22 Summons, margin numbers 846 and 850-851.

23 Statement of Defence, margin number 379.

arguments, Milieudefensie et al. raised three points, but each of them is hollow upon further consideration.

(a) Firstly, this argument: a proportionate contribution "*is logical*." That is allegedly the case, according to Milieudefensie et al., "*because there are no agreements in the energy sector about which company or which part of the energy sector will make what contribution*."[24] But that is not an argument for Milieudefensie et al.'s position. It is rather the ascertainment that an argument is lacking.

(b) Secondly, Milieudefensie et al. believe that support can be found in a report by the Science Based Target Initiative that, according to Milieudefensie et al., applies "*this same percentage*" which would reportedly apply for the world as a whole in 2030 "*to individual (energy) companies*." Milieudefensie et al. do not say there what report they are referring to, but that must be Exhibit MD-322.[25] There are five objections to that supporting argument of Milieudefensie et al.

(i) It is unclear how a document in which private bodies summarise best practices is a relevant document on which to base far-reaching conclusions on civil-law obligations.

(ii) For 2030, the document does not mention the percentage of 45% mentioned by Milieudefensie et al. It mentions 30%, and this is only by way of illustration.[26]

(iii) Milieudefensie et al. quote the source as if it is said that every private party has reduction obligations whereby, automatically, "*at least the same objectives are applied*" as worldwide. However, Milieudefensie et al. can only use this quote in such a way by leaving out a sentence that follows immediately after their quote. The source

24 Written arguments 8 Milieudefensie et al., margin number 26.

25 Written arguments 8 Milieudefensie et al., margin number 26 in conjunction with Written Arguments 7 Milieudefensie et al., margin number 33.

26 Exhibit MD-322, p. 12.

says the following, and the underlined part is omitted by Milieudefensie et al.

> "*Best practices in defining scope 3 target ambition would entail setting targets that are, at a minimum, in line with the percentage reduction of absolute GHG emissions required at a global level over the target timeframe. Alternatively, the company may apply a sector-specific method*"[27] (emphasis added, attorneys)

(iv) Contrary to what Milieudefensie et al. assert, the report says nothing about energy companies.

(v) SBTI is working on a methodology for targets for the oil and gas sector, but does not expect to publish this until 2021.[28] This alone shows that Milieudefensie et al. draw firmer conclusions from reports than those reports allow.

(c) Thirdly, Milieudefensie et al. refer to the approach in *Urgenda*. The thinking followed there was that so-called Annex A countries should apply a certain reduction objective, and it was established that the State had not explained why a lower reduction percentage should apply to it. However, it is incorrect to extend that idea to private parties.

(i) According to the court in those cases, there was a starting point between States that Annex-I countries should reduce by a certain percentage. This also followed from an instrument applicable to the State in EU law, the *Effort Sharing Decision.* There is no such starting point for private parties, as Milieudefensie et al. themselves now admit (point 17(a) above).

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27 Exhibit MD-322, p. 6.

28 See https://sciencebasedtargets.org/sectors/oil-and-gas#development-processhttps://sciencebasedtargets.org/sectors/oil-and-gas#development-process (last consulted 16 December 2020).

(ii) States can regulate their country's total emissions, and to that extent, the distribution between countries is not related to the much more complex issue of distribution between sectors in the economy.

(iii) If scope 3 emissions are included, all CO_2 emissions that society creates through energy consumption are counted for the energy sector. As described in the previous part of the oral arguments, Shell is certainly not solely responsible for this. However, if the "proportional" approach is applied as Milieudefensie et al. want, then that problem of society as a whole would be passed on to energy companies in full.

(iv) Milieudefensie et al. then drag out a statement by CEO Ben van Beurden that Shell wants to work towards net 0 as an ambition relatively quickly.[29] However, that does not mean in any way that a line is being drawn to what applies for Annex-I countries or that a legal obligation is accepted. On the contrary, in its ambitions, RDS also refers precisely to dependencies on other players in society as a whole in whether or not the ambitions can be achieved.[30]

(v) As we will now explain, it is also generally accepted that there are differences between sectors and between companies.

18. Merely by way of illustration of the fact that, without substantiation by Milieudefensie et al., a legal obligation to make such an individual reduction cannot be derived one-on-one from global reduction scenarios, so that an adequately asserted basis for the claim is entirely lacking, we mention a few reasons why this cannot be done. We limit these to three points: the global (net) CO_2 emissions reduction cannot be applied to the energy sector without considering what other sectors are doing (a), these reductions differ per part of the energy sector (b),

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29 Written arguments 8 Milieudefensie et al., margin numbers 32-33.

30 See the explanation of the ambitions given last Tuesday.

and there is also no reason to ignore shifts between providers within that sector, as Milieudefensie et al. do (c).

(a) In these proceedings, an energy company from the supply side of the energy market was summoned. But the global reduction scenarios are not only about reducing CO_2 emissions in the energy system. This likewise concerns, for example, the land use sector, which also contributes significantly to CO_2 emissions, as RDS has already noted.[31] But if global net emissions have to be reduced by a certain percentage by 2030, this also raises the question of whether all sectors must and can do that simultaneously and proportionately. It is clear, for example, that some sectors can do that faster (electricity generation) and other sectors more slowly (aviation), depending on the availability of technical solutions.

(b) And within the energy sector? Milieudefensie et al. lump all the parties together, or at least apply net emission reductions proportionally, on a one-to-one basis, to Shell, which has activities in oil and gas in many countries. Also in those countries that initially need more fossil to achieve a certain standard of living, in Africa for instance. But that wrongly assumes that there are no relevant differences. These differences do exist, and we give an example. If net emissions need to be reduced between now and 2030, where should we start? It is not disputed that energy from coal causes more CO_2 emissions per unit of energy than oil and gas.[32] It is therefore no surprise that we are starting there. But at the same time, demand for energy is increasing in recent years, not decreasing.[33] In that case, another source of energy will have to be used, such as gas. And it is immediately clear then that it is not the case, as Milieudefensie et al. suggest without any substantiation, that every energy company must at this moment reduce absolute CO_2 emissions to the same extent as the world

31 Statement of Defence, margin number 231(a).

32 Written arguments Facts and questions from the district court RDS, margin number 37.

33 Written arguments Part I RDS, margin numbers 10 and 29 at (a). See also Statement of Defence, part 2.2.3.1.

as a whole, without taking into account the sectors and countries in which they operate and have capacity. There may also be energy companies whose scope 3 emissions increase, while they still contribute adequately to the transition and global reduction of CO_2 emissions. That is because their products with lower carbon intensity make it possible to eliminate other providers with higher carbon intensity. On balance, the world will be better off. We illustrate this at global level, at country level, and with a simplified illustration.

(i) The IEA has written in detail on the notion that switching from coal to gas, particularly in the generation of electricity, can contribute to reducing CO_2 emissions. What is more, it wrote in 2019:

> "*The substitution of one fuel by another is a fundamental part of energy system change.* […] *Natural gas is the cleanest burning fossil fuel. Combustion results in around 40% fewer CO_2 emissions relative to coal and 20% fewer than oil for each unit of energy output*. […] *Nearly 10 gigatonnes (Gt) of CO_2 emissions, around one-third of global energy sector emissions, come from coal-powered electricity generation, making this by far the largest single category of CO_2-emissions. Since 2010, we estimate that over 500Mt of CO_2-emissions have been avoided due to coal-to-gas switching*."[34]

If one fuel (coal) is exchanged for the other (gas), this does lead to a reduction of global emissions, but it also leads to an increase in the scope 3 emissions of gas suppliers.

(ii) In the section on the court's role in development of the law, we already pointed out examples from an IEA scenario, the European Commission and the Dutch

34 **Exhibit RK-33**, IEA, World Energy Outlook 2019, pp. 209-210.

government, which, in the short term, in fact focus more on reducing coal use than on other energy sources. The introduction on the third day also extensively discussed an example in China concerning this and Shell's contribution to that.

(iii) We arrived at all of this because of the relief sought, which Milieudefensie et al. have based entirely on the idea that an energy company like Shell that supplies oil and gas - and which, incidentally, develops and will develop many other activities in the transition as it has already announced - should be imposed proportionately exactly the same emission reduction path as, according to Milieudefensie et al., applies to the world as a whole. This demonstrates a fundamentally incorrect view of the energy system on the part of Milieudefensie et al. A simple example can be used to show that this is simply incorrect. Let us first assume that energy consumption is 400 units of energy and does not increase. And let us assume that there are four energy suppliers. Each initially supplies 100 energy units. The first supplies coal, the second oil, the third gas and the fourth emission-free energy, such as biomass, nuclear, hydro, wind and solar energy. Based on roughly the ratio in emissions outlined by the IEA in the quote just mentioned, we assume that the scope 3 CO_2 emissions of those suppliers are initially: 10, 8, 6 and 0, respectively. What do we see if coal is replaced by gas?

Producer	**Initial situation**		**Changed situation**	
	Energy units	Scope 3 emissions	Energy units	Scope 3 emissions
Coal	100	10	0	0
Oil	100	8	100	8

Gas	100	6	200	12
Emission-free energy	100	0	100	0
Total	**400**	**24**	**400**	**20**

The world has 4 fewer emissions, so 20%. But the gas supplier has 6 scope 3 emissions more, twice as much as before. It is therefore not necessarily bad for a particular producer's emissions, especially scope 3 emissions, to decrease less or even to increase. This simple example shows that there is no basis whatsoever for Milieudefensie et al.'s idea that there is a legal obligation for an energy company to achieve an absolute (net) emission reduction in 2030 compared to 2019 or in another year, certainly not during this transition period. And with this the foundation they submitted for their claims collapses.

(c) And then the relationship between providers, in the same energy market sector or more broadly. There are all kinds of reasons why, contrary to what Milieudefensie et al. want, no fixed absolute reduction is required from a private party measured according to a base year in the past, in any event not as a legal obligation. We mention two points by way of illustration.

(i) The EU ETS assumes that a gradually decreasing emission cap applies for big industry in the EU as a whole. A specific system was then set up for the allocation of emission allowances up to that cap, a matter of market organisation and economic efficiency. In this way, the legislator wants to ensure that the energy transition takes place properly and efficiently and wants to maintain market forces. This does not

mean that companies must achieve a fixed reduction; for example, they can take over emission allowances from another party that no longer need these allowances. This was explained in detail concerning the EU ETS on Tuesday.[35] Milieudefensie et al. argue against this by merely asserting that the EU ETS does not cover all of Shell's activities and then outlining the percentages.[36] But Milieudefensie et al. fail to recognise (a) that buyers and end-users also have emission allowances, (b) that the EU ETS is being expanded, (c) that RDS has already asserted that Quebec and California, for example, also have such a "*cap and trade"* system and (d) that this applies for many more countries such as New Zealand, Kazakhstan, Nova Scotia, Mexico and various parts of China and that these kinds of schemes are planned for many more countries and territories.[37]

(ii) In their relief sought, Milieudefensie et al. wrongly ignore the fact that shifts between providers can occur due to market forces within the frameworks given by governments and systems such as the EU ETS. Milieudefensie et al. compare apples to oranges by measuring Shell's future reduction (2030) against what Shell was years before (2019). In the relief sought, Milieudefensie et al. continue to compare Shell in the future against Shell in 2019. According to Milieudefensie et al., Shell must reduce net CO_2 emissions in an absolute sense. But what if Shell's market share grows or if it acquires a competitor? The only logical answer would then be that the total emissions would have to decrease at most in proportion to what that total basis was in 2019. Milieudefensie et al. do not want to know anything about this. This was

35 Written arguments on Court's role in development of the law from RDS, part 3.

36 RDS offers to prove this; see, for example, https://icapcarbonaction.com/en/ets-map and https://icapcarbonaction.com/en/?option=com_attach&task=download&id=613 (last consulted 16 December 2020).

37 Written arguments 4 Milieudefensie et al., margin number 25.

pointed out to them in the Statement of Defence and also in the opening arguments.[38] But following an amendment of claim, the claim is still that RDS must bring about a future limitation of emissions *"with respect to the Shell Group's emission level of the year 2019"* (relief sought 1(a)), or at least emissions "*from the Shell Group*" "*compared to the level in the year 2019*" (relief sought 1(b)). This would mean that in the event of an acquisition, Shell would have to immediately make an enormous CO_2 emission reduction for the group after that acquisition, merely because that acquisition took place. There is no serious reason that can be conceived of for this, and it is not necessary at system level, but Milieudefensie et al. are nonetheless demanding it. At the eleventh hour, Milieudefensie et al. explained why they are doing this.[39] The reason is that they need a base year to formulate their claim in the way they do, namely a reduction in 2030 compared to the base year 2019. That is classic circular reasoning: Milieudefensie et al. assert that they can claim this because otherwise their claim does not work. They also state that otherwise, after a possible acquisition by Shell, the party that divested activities to Shell would be able to start new activities that give off emissions. This, too, illustrates that Milieudefensie et al. do not understand the energy market. In the real world, legislators resolve this by, for example, a *cap and trade* scheme such as the EU ETS, in which the total emission cap is set and the allocation of emission allowances is left to a system of market organisation and economic efficiency.

19. The conclusion is this. Milieudefensie et al. have failed to explain key elements of their relief sought, and that alone prompts dismissal. But on top of this, Milieudefensie et al. based its claims and the relief sought on an idea comprised of two essential components, namely

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38 Statement of Defence, margin number 379 and Written Arguments Part I RDS, margin number 39(b).

39 Written arguments 8 Milieudefensie et al., margin numbers 93-95.

that "the correct reduction route" can be designated for the world, and that RDS is legally obliged to follow that “proportionally" by reducing its absolute (net) emissions. Both components are wrong. As a result, the foundation of all the claims collapses.

5 OTHER POINTS, MENTIONED SUPERFLUOUSLY

20. A few superfluous comments are made regarding the relief sought.

21. The declaratory judgments sought cannot be awarded because Milieudefensie et al. have no interest in these. Firstly, Milieudefensie et al. have no interest in the declaratory judgment sought in the relief sought at 1(a). Milieudefensie et al. did not link a claim for an order to this. Nor can this be done, according to Milieudefensie et al. themselves, for other, successive claims of the persons whose interests they represent: "*this general interest action* [does not concern] *an action for damages but a preventive injunction*."[40] Since Milieudefensie et al. have not asserted any special circumstances that justify an interest in this declaratory judgment,[41] this claim can be dismissed.

22. Milieudefensie et al. also have no interest in the declaratory judgment sought in the relief sought at 1(b). Milieudefensie et al. lodged an identical claim for an order in the relief sought at 2. The ultimate objective of these claims is for RDS to adjust its policy. It is unclear what the declaratory judgment adds to it if the claim for an order were to be awarded. Milieudefensie et al. did not state anything about this either. For similar reasons, the District Court of The Hague denied the declaratory judgments sought in the *Urgenda* case:[42]

> “*Since the District Court deems the requested reduction order eligible for award in the aforementioned manner, it is of the opinion that Urgenda does not have a sufficient interest in the award of the declaratory judgments sought, which are presented in 3.1, under 1 - 6. After all, partly in view of*

40 Written arguments 2 Milieudefensie et al., margin number 37.

41 Supreme Court 30 March 1951, *NJ* 1952, 29 (*Dominee*). See also N.E. Groeneveld-Tijssens, *De verklaring voor recht* (Burgerlijk Proces & Praktijk no. XVIII) (diss. Tilburg), Deventer: Wolters Kluwer 2015, no. 39.

42 The Hague District Court 24 June 2015, ECLI:NL:RBDHA:2015:7145, para. 4.105.

Urgenda's cited explanation, it is unclear what such declaratory judgments, whatever the case may be, could add to the result it primarily envisioned and has now achieved. […]"

23. The conclusion of the relief sought at 1(a) entails that a declaratory judgment should be issued that the Shell Group's reduction obligation would have to take place "*in accordance with the global temperature objective of Article 2 (1) (a) of the Paris Climate Agreement and the related best available (UN) climate science*." Milieudefensie et al. have not explained these elements any further. In so far as this has been explained, this only shows that it envisions the same as the relief sought at 1(b).[43] If that is otherwise, the passage is unclear on two points, as a result of which it is also unclear what RDS has to defend itself against and, if this is awarded, it will likewise be unclear what RDS is required to do.

    (a) The temperature objective in the Paris Agreement means that the global average temperature should be kept well below 2°C (to be kept relative to the pre-industrial level) and that the aim is to limit the increase to 1.5°C. As such, the Paris Agreement does not have a single specific goal, so it is unclear what goal RDS allegedly has to comply with.

    (b) The passage *"best available (UN) climate science*" is insufficiently specific and it is unclear how and by whom it must be determined at some point in time what the best available climate science is at that time. The UN itself does not engage in science. Moreover, this passage assumes that it will always be clear on the basis of that climate science which emission reductions RDS should have to achieve, but that is anything but a given.

24. Apart from that, this part of the relief sought overlaps with the declaratory judgment sought at 1(b) and the order sought at (2). First of all, this raises the question of what interest Milieudefensie et al. have in the award. Moreover, there is - potentially - a conflict between these parts and the relief sought at 1(a). After all, with parts 1(b) and

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43 See margin number 2(b) above.

2, Milieudefensie et al. are seeking that the District Court determine which reductions RDS should have to achieve in the period up to the end of 2030, while something different could follow from the climate science referred to by Milieudefensie et al.

25. In the relief sought under 1(a), Milieudefensie et al. seek a declaratory judgment that "*the combined annual volume of CO_2 [...] emissions is unlawful vis-à-vis the claimants*" and in the relief sought under 1(b) "*that Royal Dutch Shell plc is acting unlawfully vis-à-vis the claimants* […]." However, the NGOs lodged their claims in these proceedings on the basis of Article 3:305a DCC. Consequently, no declaratory judgment can be awarded in these proceedings that RDS is acting unlawfully *vis-à-vis* the NGOs. This would only be possible if the NGOs had lodged the claims on their own behalf and not on the basis of Article 3:305a DCC, as they did here.

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Attorneys