DE BRAUW
BLACKSTONE
WESTBROEK

The Hague District Court
Case number: C/09/571932 2019/379
Hearing date: 13 November 2019

STATEMENT OF DEFENCE

in the matter of:

ROYAL DUTCH SHELL PLC,
Having its registered office in London and The Hague,

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

versus:

1. **VERENIGING MILIEUDEFENSIE AND THE OTHERS IT REPRESENTS,**
2. **STICHTING GREENPEACE NEDERLAND**,
3. **LANDELIJKE VERENIGING TOT BEHOUD VAN DE WADDENZEE**,
4. **STICHTING TER BEVORDERING VAN DE FOSSIELVRIJBEWEGING,**
5. **STICHTING BOTH ENDS,**
6. **JONGEREN MILIEU ACTIEF,**
7. **STICHTING ACTIONAID**

Claimants,
Attorneys: *mr.* R.H.J. Cox and *mr.* D.M.J. Dexters

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1 INTRODUCTION

1.1 Factual background

1. The importance of addressing climate change is not in dispute between Royal Dutch Shell ("**RDS**")[1] and the claimants in these proceedings (seven non-governmental organisations ("**NGOs**") and 17,379 individual co-claimants, hereinafter collectively referred to as "**Milieudefensie et al.**"). Support for the goals of the Paris Agreement to "*keep the rise in global average temperature to well below 2°C* [...] *and to pursue efforts to limit the temperature rise to 1.5°C*" is not in dispute either.[2] Shell has long endorsed the objectives of the international climate agreements. What is in dispute, however, is the appropriateness of asking the court to order a single private party, in this case the holding company of an international group of energy companies, to – in short – reduce the group's CO_2 emissions and the CO_2 emissions associated with the production, sale and use of Shell products by ultimately (net) 45% in 2030, 72% in 2040 and 100% in 2050 compared to 2010 levels. The answer is no; these legally untenable claims must be rejected.

2. Climate change is a serious challenge that requires effective, urgent and ambitious action from the whole of society. At the same time, obtaining and maintaining access to reliable energy is also a common challenge. A primary source of sustenance, energy is crucial for economic and social development, security (including public security) and the autonomy of states. A billion people currently do not have access to a reliable energy supply. The general scientific understanding is that human activities contribute to climate change by the build-up of greenhouse gases ("**GHGs**") in the atmosphere. One of these activities is energy consumption through the burning of fossil fuels. In order to achieve a balance in the future between man-made (so-called "anthropogenic") CO_2 emissions on the one hand and their removal on the other, as provided for in the Paris Agreement,[3] a transition to a lower carbon intensity energy system is required. This energy transition is underway and needs to be accelerated.

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1 Royal Dutch Shell plc ("**RDS**") is the ultimate holding company of the Shell group. RDS and its subsidiaries are collectively referred to in this Statement of Defence as "Shell", "the Shell group" or "the Shell companies". These descriptions are used to refer to RDS and – collectively – to the companies in which it has a direct or indirect controlling interest where it is not necessary to name the specific company or companies.

2 **Exhibit RK-1**, Paris Agreement (NL), 2015, Article 2(1)(a). In this Statement of Defence, RDS will use the letter "**R**" when referring to its exhibits in order to distinguish them from the exhibits of Milieudefensie et al. RDS further distinguishes between the key exhibits relied upon ("**RK**") and its other exhibits ("**RO**").

3 Paris Agreement, Article 4(1).

3. Shell comprises an international group of energy companies with global operations. Shell is aware of the dual challenge facing society: addressing climate change on the one hand and meeting the growing global demand for energy in a world with a rapidly growing population on the other. Shell wants to play an important role in addressing this challenge from a solid economic position. Shell is widely regarded as a front runner in the industry because of its ambition to reduce the CO_2 intensity of the energy products it sells to around half by 2050, in line with society's move towards the goals of the Paris Agreement. It wants to achieve this particularly by controlling the CO_2 emissions associated with the production of energy products and by changing the mix of energy products it sells. This will ultimately lead to a change in Shell's energy portfolio, including an increasing share of renewable energy sources (such as wind and solar energy), biofuels, hydrogen, electricity and vehicle charging stations and the provision of more natural gas to replace the use of coal. Shell will also manage the CO_2 emissions associated with the production of energy products. In addition, Shell contributes to the development of carbon capture and storage ("**CCS**") to prevent the release of CO_2 into the atmosphere, and to investments in natural carbon sinks, such as forests and swamps, to extract CO_2 from the atmosphere by natural means.

4. It is – ultimately – the responsibility of the government to drive the energy transition and achieve the climate goals, by creating policy and regulatory frameworks within which the various actors – industry, governments and individuals – can act. The various states have long recognised the need for a coordinated global response to climate change at state level. To this end, the United Nations Framework Convention on Climate Change (the "**UNFCCC**") was adopted in 1992, and was followed by subsequent international agreements such as the Kyoto Protocol and the Paris Agreement. These international treaties and agreements apply to State parties. Through these treaties, the participating States have agreed to set a target for limiting global warming. Contrary to what the claimants assert, the Paris Agreement does not provide anything about the reduction or cessation of the production or use of fossil fuels. The objective laid down in the Agreement is to achieve a balance between anthropogenic GHG emissions and their removal in order to meet the goal of limiting the rise in temperature.[4] To accomplish this, the Paris Agreement provides for a coordinated system of reduction targets for individual States in the form of so-called National Determined Contributions ("**NDCs**") and long-term strategies. The existence of NDCs shows that although States are

[4] Paris Agreement, Article 4(1).

collectively dedicated to the common goal of achieving the aforementioned global balance, they individually retain autonomy to determine their own objectives and methods, as well as the timing thereof. It is therefore left to the participating States to adopt an ambitious yet feasible national energy policy and to implement it by means of national legislation and regulations. In this way, they shape and direct the change in energy consumption and demand, and ultimately also the change in energy supply.

5. The global energy transition and the solutions applied in that context are constantly evolving. The form and pace of the energy transition, including the adoption of policy and the implementation of regulations, vary from state to state. There are also differences between the various sectors of the economy. For example, specific industries such as steel, cement, aviation and maritime transport require a longer-term solution, as these activities will still continue to require the use of fossil fuels. In those sectors it will therefore be considerably more difficult to reduce CO_2 emissions in the short term. According to scenarios developed by independent organisations such as the International Energy Agency, the use of fossil fuels will continue even after 2050. Nevertheless, Milieudefensie et al. claim that it would be unlawful for RDS in particular to continue to meet this demand for energy. However, Milieudefensie et al. fail to give a convincing reason why this would be unlawful in view of the persistent demand for fossil fuels in society during and after the transition to a low-carbon energy system.

6. Milieudefensie et al.'s unique and far-reaching claim fails for various reasons. The key event giving rise to damage, in Milieudefensie et al.'s view, is the emission of CO_2, both in business activities comprising the production of fossil fuels and in the use of those products by end users. This consequently requires the application of the laws of each country in which the relevant CO_2 emissions take place. However, Milieudefensie et al. do not provide any basis for concluding that the behaviour held against RDS is unlawful under each of those legal systems. Furthermore, Milieudefensie et al. claim to defend the similar interests of the (individual) claimants, but those interests are diverse, also in terms of how tackling climate change should be approached. In determining that approach – and who should contribute to it and to what extent – many other relevent interests also come into play. Consequently, the requirement of similarity of interests is not met.

7. The requirements under Dutch law for liability based on endangerment are not met either. Milieudefensie et al.'s claim against RDS as the ultimate holding company cannot be based on an existing duty of care arising from

what – according to unwritten law – is generally accepted in society, neither in the Netherlands nor worldwide, precisely because society as a whole – as Milieudefensie et al. themselves also acknowledge – is currently not yet on track to achieve the goals of the Paris Agreement. The claim is ultimately based on the desire to bring about behavioural change in society. Milieudefensie et al. give their own interpretation of what this would require and then move for the District Court to intervene in RDS's business policies on that basis, thus imposing behavioural change – but only and exclusively on RDS. This goes significantly further than what is generally accepted according to unwritten law at present. There is no written or unwritten rule requiring individual parties to act in accordance with the goals and timelines advocated by Milieudefensie et al. This is all the more true as those goals and timelines are not consistent with national legislation and policy.

8. Even if it were to be assumed that RDS would act in breach of existing unwritten legal standards or other legal obligations in certain instances, which is not the case, Milieudefensie et al.'s claims would still not be eligible for award. First of all, a claim relating to future actions can only be awarded if it has been established that such action would be unlawful under all circumstances in the future. The existing uncertainty as to how and within what timeframe the energy transition will take shape makes it impossible for Milieudefensie et al. to demonstrate that the behaviour on which their claims are based – effectively Shell's future production and sale of fossil fuels – will be unlawful in ten years' time, let alone thirty years' time. Moreover, an order prohibiting the production and sale of fossil fuels imposed on a single group of energy companies will not be effective, and there is thus a lack of sufficient interest because it: (i) would not affect demand; society would continue to use such products and thus purchase them from other suppliers; and (ii) would also not affect supply, as other energy companies would jump in to fill the gap. In addition, there is no reason to assume that those other parties would perform better than Shell in terms of CO_2 emissions.

9. Milieudefensie et al.'s reliance on human rights cannot lead to an award of the claim either. Milieudefensie et al. are trying to apply provisions intended for States directly to RDS, whereas only individuals can invoke these provisions against those States.

10. Shell has publicly stated that it will move in tandem with society and help support the transition to a lower-carbon economy. However, there is no legal basis for courts to develop climate change law in civil proceedings against a single private company and, in doing so, to determine which

global reductions in CO_2 emissions and what timeline for achieving these reductions should be prescribed for the business activities and energy products of that single specific private party. This is all the more true because such targets and timelines are not specified in the applicable national regulations, which are aimed, moreover, at reducing emissions by end users, over which Shell has no control. The solution cannot come from the courts, but must come from the legislature and the political branch, especially where the interests of other states are also at stake, as in this case.

1.2 Milieudefensie et al. have not provided a sound factual basis for their claims

11. The present proceedings are part of a range of activities undertaken by activists and interest groups to raise awareness of climate change and to encourage governments and society to take action. Milieudefensie et al. are misstating facts by oversimplifying the issue. They profess that Shell (and fossil fuels) are the main obstacle to achieving global climate ambitions. In order to press home that argument, they present the factual basis for their claims with general statements and in sweeping terms. Many of their statements lack any substantiation whatsoever and are simply incorrect, whereas Milieudefensie et al. themselves draw far-reaching conclusions from them. In **Chapter 2** of this Statement of Defence, RDS responds to those statements by providing an overview of the factual background. These facts show that climate change is society's true adversary, and that climate change must be combated by means of effective cooperation and coordinated actions by governments, companies and individuals, and not by bringing legal action against a single private party (in this case, the holding company of an international group of energy companies) and attempting in those proceedings to fabricate a duty of care that goes beyond the framework of applicable law.

12. First, Milieudefensie et al. misrepresent RDS, the nature of its business, and the extent to which it has control over CO_2 emissions. RDS will correct this misrepresentation of its business and its CO_2 emissions in Sections 2.1 and 2.3 and Subsections 2.2.6 and 2.6.4. To avoid confusion, it should be noted here that RDS is the British holding company of the Shell group, but cannot be equated with it. RDS has control over the CO_2 emissions caused by its own activities, which, because it is a holding company, are virtually non-existent. The other Shell companies each have control over the CO_2 emissions associated with their own business activities. None of the

companies in the Shell group have control over the CO_2 emissions caused by end users of Shell products.

13. Second, in their Summons, Milieudefensie et al. discuss the nature and the effects of climate change and the need to reduce CO_2 emissions at great length, yet hardly address the existing global energy system and the challenges of transforming that system towards a low-carbon energy future while *also* meeting global energy demand. Milieudefensie et al. fail to consider this crucial aspect in this current action against RDS, which ultimately amounts to nothing more than an alleged violation of what is generally accepted in society according to unwritten law. As will be explained in Section 2.2 below, it is essential to understand the complex global energy system in order to fully understand how Shell is meeting society's demand for energy as part of that system, and which adjustments are required of society as a whole to address climate change. It remains unclear and uncertain how, and also how quickly, society's transition to a low-carbon energy system will be achieved. What is clear, however, is that even in the course of this transition, demand for fossil fuels will persist for decades to come, also in scenarios in which the objective of keeping the temperature increase below 1.5°C is achieved. As already stated, Milieudefensie et al. simply ignore the fact that since society's demand for energy will still have to be met, other fossil fuel producers will fill the gap left by a court order such as the one currently requested by Milieudefensie et al. Milieudefensie et al. also ignore the fact that other producers may be less attentive to the impact of their business activities than Shell.

14. Third, Milieudefensie et al. ignore Shell's role in the transition to a low-carbon energy system, or at least take it out of context, as explained in Section 2.3 below. Shell is indeed taking steps in the transition of the energy system and has embraced them. Shell plays a leading role with its Net Carbon Footprint ("**NCF**") ambition and invests in new energy sources, in CCS and in nature-based solutions to reduce CO_2 emissions (natural carbon sinks), in addition to investing in oil and gas. It has been developing scenarios to develop its plans for more than 50 years, and its recent scenarios titled Mountains, Oceans and Sky all address the energy transition. Shell supports Carbon Pricing initiatives to achieve negative emissions as a means of reducing final emissions and removing CO_2. Shell also initiates and supports industry initiatives and industry cooperation to tackle climate change. Shell is transparent about the role it plays and the activities it carries out in that respect, as will be explained in greater detail below.

15. Fourth, Milieudefensie et al. are trying to apportion greater responsibility to RDS for addressing climate change than to the rest of society. The information presented by Milieudefensie et al. themselves already shows that scientific research on the impact of CO_2 on the atmosphere and the climate has been publicly available since the mid-1800s. This research continued to develop during the 20th century, always in the public domain. Shell has monitored this research and reported on it, as have many others, including, it appears, Milieudefensie et al. themselves. The development of scientific understanding of climate change is set out in Section 2.4. It clearly follows from that development that Shell had no unique knowledge and was not in any special position compared to the rest of society when it comes to climate change.

16. A fifth point concerns Milieudefensie et al.'s assertions regarding the current state of climate change science. Milieudefensie et al. attribute all sorts of statements to the Intergovernmental Panel on Climate Change ("**IPCC**"), as well as a degree of certainty in relation to other statements, that simply do not reflect the actual wording of the IPCC reports. Section 2.5 deals with the unique nature and role of the IPCC, which was established in the 1980s by states that felt that it would be useful to appoint a group of scientists to study the scientific, technical and socio-economic information available, and to report on it every five years. As will be explained, the IPCC chooses its words deliberately and with great care in order to reflect the wide variety of available materials examined, as well as the degree of certainty that can be derived from those materials. Milieudefensie et al. ignore this important element of the IPCC's working method. Milieudefensie et al. also ignore the fact that the IPCC does not establish policies or carry out any scientific research of its own. The IPCC's role is to study existing scientific research. All of the IPCC's reports are publicly available.

17. Sixth, Milieudefensie et al. similarly interpret the UNFCCC and associated international instruments, including the Paris Agreement, in a manner inconsistent with the content thereof. In Section 2.6, RDS will explain the scope of the UNFCCC and the nature of the obligations expressed in it. International instruments, in essence, always focus on relations between States and thus do not apply to private parties. Their aim is to reflect the delicate balance of state interests, as well as the right to development enjoyed by individual nations and the important principle of differentiated responsibility.

18. Seventh, and lastly, Milieudefensie et al. ignore the role played by states in addressing climate change. For this reason, RDS explains in Section 2.7 how states implement commitments arising from international instruments in the form of national policy and regulations. Recent developments in this area in the European Union, the Netherlands, and the United Kingdom show that even in developed countries with similar economic circumstances, climate change policies differ from state to state. Those differences are even greater among developing countries.

1.3 There is no legal basis for Milieudefensie et al.'s claims

19. The general and excessively far-reaching position of Milieudefensie et al. with regard to the relevant facts outlined above also extends to their legal arguments. As will be explained in Chapters 3 through 7, there is no legal basis for Milieudefensie et al.'s claims. This would even hold true if the positions put forward by Milieudefensie et al. were to be accepted in full (which is obviously not the case).

20. The following chapters contain various independent defences that each by themselves preclude the claims from being granted. For the sake of legibility, these defences are briefly introduced in boxes numbered I through VIII.

21. First, Milieudefensie et al. wrongly argue that their claims are exclusively governed by Dutch law. This is not the case, particularly because of the very broad nature of the claims, as will be explained in **Chapter 3**.

> **I.** The claimants have failed to substantiate their claims' eligibility for award to a sufficient degree as they are governed by various legal systems, a fact the claimants do not even attempt to address.

Milieudefensie et al. identify the production of CO_2 emissions as the harmful event that forms the basis of their claims. They then seek to have a Dutch court rule on much more than the CO_2 emissions produced by RDS as a defendant in the Netherlands. After all, the claim extends to CO_2 emissions produced by all the business activities of the entire Shell group around the world, and even to CO_2 emissions produced by end users around the world. Shell's activities take place in dozens of countries, and emissions from end users are produced worldwide (as are, incidentally, the harmful effects thereof, according to Milieudefensie et al.). Therefore, the claims are governed by the laws of each of those countries. This is also consistent with the structure of the Paris Agreement, which recognises the autonomy of individual States to determine national climate policy and the legal

framework, including targets to reduce CO_2 emissions and the associated timelines.

22. Second, the very broad nature of Milieudefensie et al.'s claims means that they cannot base these claims on Article 3:305a DCC, as this would require Milieudefensie et al. to be defending sufficiently similar interests; given the range of individuals they represent, that is not the case (**Chapter 4**).

> **II.** Milieudefensie et al. have no cause of action. The organisations acting as claimants have no cause of action for their claims based on Article 3:305a DCC due to a lack of similarity of interests (and even if those organisations did have a cause of action, the private co-claimants would still lack sufficient interest in their claims).

It will be demonstrated that the very broad claims of Milieudefensie et al. are based on a one-dimensional vision aimed at ultimately prohibiting the production and sale of fossil fuel products by Shell. In this way, Milieudefensie et al. are wrongfully entirely ignoring the very diverse interests of the very broad group of people they represent and whom they claim to defend. If, as Milieudefensie et al. suggest, global interests were indeed to run in parallel with regard to the goals of CO_2 emissions reduction, the timeline for these goals, and the methods used, states would have long since created clear and consistent regulations to combat climate change. Although the Paris Agreement was an important step in this direction, it does not prohibit future fossil fuel production and otherwise leaves it to individual States to decide on future policy and future regulation. The reality, therefore, is that development and interests in the areas of economy, society and security, as well as many other interests, have to be weighed against the reduction of CO_2 emissions. This is precisely why there is a need for continuous cooperation and innovation.

23. Third, Milieudefensie et al. have failed to provide a basis for essential aspects of the relief sought (**Chapter 5**).

> **III.** Failure to meet the obligation to furnish facts on crucial parts of the relief sought. This applies to several points, each of which leads to the rejection of the entire claim.
>
> - The substantiation in the Summons concerns the entire Shell group, but the relief sought is aimed at only one company,

namely RDS, meaning that the substantiation does not correspond with the relief sought.

- The relief sought is focused on "net" emissions. According to Milieudefensie et al., this concept is relevant for determining the goal of society as a whole. There is no substantiation whatsoever of how this could be applied to one actor, namely to RDS as a defendant.

- Milieudefensie et al. in no way explain what exactly they see as "*2010 levels*", on which the reduction they are seeking hinges.

- As the reduction required by Milieudefensie et al. is linked to 2010 levels, Milieudefensie et al. (implicitly) assume a static situation in which different actors take the same position in relation to each other. They fail to provide any explanation whatsoever as to why a reduction in respect of those levels can be demanded regardless of the developments in the market in which Shell is active.

- Milieudefensie et al. do not explain how awarding the claims would lead to the result it desires (see also Subsection 2.2.4).

Each of those points is elaborated and explained in greater detail in this chapter.

24. In **Chapter 6**, RDS explains that the claims are so far-reaching in several respects that there can be no question of them being awarded.

IV. The questions submitted by Milieudefensie et al. are ultimately about the structure of the energy system (and therefore of society) in the Netherlands and abroad. This involves policy issues that go beyond the role of civil courts in the development of law (Section 6.2).

V. It will be explained in a later chapter that RDS does not act unlawfully and, particularly, that it does not act in breach of a standard of care as advocated by Milieudefensie et al. However, it will not be necessary to make this particular assessment. A claim that pertains to future acts even though not all of the acts concerned are unlawful, or not unlawful under all circumstances, is, after all, never eligible for award. Indeed, it is clear that the claims relate to lawful acts, as is obvious simply because of the uncertainties about the developments between the present and the years to which the claims pertain, namely 2030, 2040 and 2050 (Section 6.4).

25. In Section 6.2, RDS addresses the important national and foreign policy issues that Milieudefensie et al.'s claims raise, require a weighing of broad social interests that simply cannot be carried out adequately in legal proceedings, and should be left to the political domain. Section 6.3 explains that Milieudefensie et al.'s view that RDS is responsible for very substantial CO_2 emissions is unacceptable. The main reason for this is that roughly 85% of those emissions result from the consumption of fossil fuels by the end users of Shell products, while the ultimate decision to use fossil fuels – for what purpose, how efficiently, and whether countermeasures such as CCS are taken – ultimately lies with those end users. Moreover, RDS is a separate legal entity that cannot be equated with other Shell companies, so that Milieudefensie et al. also wrongly attribute the CO_2 emissions of those separate companies to RDS. In Section 6.4, RDS explains that, by their very nature, the claims raise questions about the uncertainties regarding the circumstances in the future; after all, the claim is directed at acts in 2030, 2040 and 2050. For this reason, too, the District Court cannot establish that the future acts are unlawful under all circumstances. This means that the order sought with regard to future acts must be denied in its entirety, in line with the Supreme Court's case law on this point.

26. Although superfluous in view of all the points referred to above, **Chapter 7** explains in detail why RDS does not act unlawfully and that the claims must therefore fail.

VI. RDS does not act in breach of a standard of care. There are several reasons for this. One of these is that Shell's activities are expressly allowed under government-issued permits to emit CO_2, indeed under a system that explicitly takes into account the need to take measures against climate change. In addition, courts cannot predict with sufficient certainty what – in view of the developments in society that are still ongoing and uncertain – the standard of conduct will be in 2030, 2040 and 2050 (Sections 7.1 - 7.3 and 7.6).

VII. Due to the absence of a causal link, the claims cannot be awarded, or at any rate, sufficient interest is lacking, meaning that Milieudefensie et al. have no cause of action. They have entirely failed to demonstrate that the order sought will have the intended effect, and it is far from obvious that total CO_2 emissions would decrease if the order sought were to be handed down (Subsections 2.2.4 and 7.4).

VIII. The relativity requirement has not been satisfied. Milieudefensie et al. state hardly anything about the individuals they represent. It is obvious, however, that the claimants, themselves – through the use of fossil fuels and otherwise – also contribute to CO_2 emissions. Alternative measures frequently meet with broad opposition. The required relativity is consequently lacking (Section 7.5). Moreover, it is undesirable, by awarding claims such as the present one, to open the floodgates to claims by everyone, against everyone (Subsection 7.2.4).

Chapter 7 first explains that there is no legal provision (or any reference to such a provision) or any unwritten legal obligation based on what is generally accepted according to unwritten law that obliges RDS to reduce – in accordance with the objectives and within the timeline outlined by Milieudefensie et al - CO_2 emissions resulting from its business activities or the activities of Shell companies or the use of their products by end users. Moreover, Milieudefensie et al. entirely ignore the fact that the production and use of fossil fuels is permitted in the countries in which Shell companies are active, and that, for all kinds of activities, permits allowing CO_2 emissions have even explicitly been granted. RDS will explain that Milieudefensie et al. cannot construe breach of any standard of care under the label of endangerment, and that Milieudefensie et al. cannot invoke human rights against RDS. Moreover, the requisite causal link is lacking and the relativity requirement has not been satisfied: the individual claimants in particular have not made any statements in relation to their

own concrete situation, while society as a whole, like Shell, engages in activities that involve CO_2 emissions.

2 THE FACTS

27. Milieudefensie et al.'s Summons contains many far-reaching assertions, often without being substantiated or otherwise supported by facts or evidence. Whilst many of Milieudefensie et al.'s assertions are irrelevant in the light of the claims they have lodged, RDS will nevertheless respond to these assertions, albeit not exhaustively.

28. In this chapter, RDS will respond to:

- the description of RDS given by Milieudefensie et al. (Section 2.1),
- the interplay between the energy transition and the demand for energy (Section 2.2),
- Shell's activities and the measures it is already taking for the energy transition (Section 2.3),
- the current state of affairs regarding scientific knowledge on climate change and how this knowledge has evolved over the years (Section 2.4),
- the role of the IPCC (Section 2.5),
- the international legal framework for combating climate change as established between States (not private parties) and the responsibilities assumed by States (Section 2.6),
- the national legislation and regulations that have been implemented worldwide by governments following, inter alia, the Paris Agreement, and important differences between them (Section 2.7).

2.1 Defendant party: Royal Dutch Shell plc

29. RDS is the only defendant in these proceedings. A public limited company, RDS is a private legal entity under English law. Unlike the defendant in *Urgenda*, RDS is not a State and not a party to the UNFCCC, the Paris Agreement or other associated international law instruments.

30. RDS is the ultimate holding company of the Shell group, and is incorporated under the law of England and Wales. Although RDS's head office is located in The Hague, RDS is not and has never been a legal entity under Dutch law. RDS is the ultimate shareholder of more than 1,100 separate

companies in many dozens of different countries across six continents.[5] RDS became the ultimate holding company in 2005 by, as part of the so-called unification, acquiring the shares in N.V. Koninklijke Nederlandse Petroleum Maatschappij and "Shell" Transport and Trading Company Ltd., which were until then the holding companies of the Shell group. For that reason alone, no legal relevance can be discerned in allegations relating to the period before 2005 (apart from the fact that these are irrelevant when assessing the eligibility for award of claims relating to acts in 2030 and beyond). Contrary to what Milieudefensie et al. suggest, RDS itself is no more than a ultimate holding company. For the reasons set out in Section 6.3, Milieudefensie et al. seek to extend their claims – without any legal basis for doing so – to the entire Shell group. Moreover, they also try to attribute the acts of end users of Shell's products to RDS, again without any legal basis.

2.2 The pace and manner of society's transition to a low-carbon energy system remains uncertain and, even during the transition, there will be a continuing demand for fossil fuel energy products for decades to come

2.2.1 Introduction: the dual challenge of the transition to a low-carbon energy future

31. The world is facing an enormous dual challenge. On the one hand, society must fulfil the population's continuing and growing demand for energy, which is essential for meeting basic human needs and economic development in both developed and developing countries. On the other hand, society must, at the same time, transition to a low-carbon energy system in order to reduce CO_2 emissions and thereby combat the risks of climate change, as set out in the Paris Agreement.

32. As an experienced party in the energy sector, Shell is taking action to provide appropriate and meaningful support for the energy transition that society must undertake. However, whatever the overall scope of these measures, it is a certain fact that Shell's actions *alone* cannot change the global energy mix. The energy transition requires *collective* action from society as a *whole* and must be underpinned primarily by national legislation and regulations.

33. Energy is essential for human welfare and health and the continued existence of modern society. Energy is needed and used in homes,

[5] See footnote 1 above.

schools, hospitals, factories, shops, personal and goods transport, sanitation, water systems, agriculture and construction, and plays a vital role in the manufacture and delivery of almost all products and services modern society takes for granted.[6] Moreover, it underscores many of the sustainable development objectives incorporated in Milieudefensie et al.'s Articles of Association. In this sense, the challenges facing society conflict: on the one hand, we need to meet the growing demand for energy resulting from, among other things, population growth and economic development, while, on the other, we need to reduce CO_2 emissions.

34. During the energy transition, society must opt for products with lower CO_2 emissions, and, in addition, increase energy efficiency *and* offset emissions. Contrary to what Milieudefensie et al. assert, however, that does not mean that the world must be fossil fuel free by 2050. This argument is not supported by the Paris Agreement either. Instead, the consensus is that fossil fuels will still play a role in 2050. For example – as outlined below – both the IPCC and the International Energy Agency recognise the continued role of fossil fuels in meeting global energy demand during the transition and afterwards.

35. In order to support their very broad claims, Milieudefensie et al. present the transition to a low-carbon energy system as simple and clear: (i) climate change is a danger; (ii) fossil fuels cause climate change; and therefore, (iii) Shell – alone – must effectively stop the production and sale of fossil fuels in order to prevent further climate change.

36. In reality, fossil fuels will continue to play an important role in energy supply and sit alongside renewables and other low-carbon options in the energy transition. As will be explained below, the scope and pace of that transition will vary depending on the economic sector and region.

2.2.2 There is no prescribed pathway to achieve the goals of the Paris Agreement; the goals of the Paris Agreement are aimed at achieving net zero emissions, and that does not require the complete elimination of fossil fuels

37. Pursuant to the Paris Agreement, States have committed to take action to keep the overall rise in global average temperature this century well below 2°C compared to pre-industrial levels and to pursue efforts to limit the rise in temperature to 1.5°C. The objective is to stop the concentration of global GHGs in the atmosphere rising over time. In this respect, the Paris

6 **Exhibit RK-2**, Shell, Sky Report 2018, p. 12.

Agreement prescribes a non-binding aim of achieving net zero emissions, which is defined as "*a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases.*"[7] Net zero emissions do not therefore require that each individual, organisation or State itself have net zero emissions; in a net zero world, some anthropogenic emissions will – by definition – continue to occur alongside the reduction and removal of GHGs, for example through forestation or underground storage.

38. The Paris Agreement aims to achieve net zero GHG emissions "*in the second half of this century*".[8] States expressly recognised in the Paris Agreement "*that peaking will take longer for developing country Parties*" and that balancing should occur "*on the basis of equity*".[9]

39. Milieudefensie et al.'s claims are directed at the operations of a group of separately incorporated companies that operate in many dozens of countries worldwide and aim to enforce an "*increasingly drastic, phased transformation*" upon all of those companies.[10] However, these claims fail to recognise that States have widely varying needs and priorities depending on local circumstances. Examples include differences in respect of the development phase countries are in, or factors such as the type of economy, availability of domestic energy resources, the ability to make investments and – resulting from the foregoing – national energy policies. The Paris Agreement explicitly takes these different factors into account by emphasising that countries have "*differentiated responsibilities*".[11] This

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7 Paris Agreement, Article 4(1).
8 Paris Agreement, Article 4(1).
9 Paris Agreement, Article 4(1).
10 Summons, para. 57.
11 The Paris Agreement Recitals expressly recognise that Parties to the Paris Agreement are guided by (among other things) "*[...] the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances, [...]", that "[...] Parties should, when taking action to address climate change, respect, promote and consider […] the right to development [...] ", and emphasise "[...] the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty […]*" (preamble). Article 2(2) requires that the Agreement "*will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.*" Article 4(1) recognises that "*[i]n order to achieve the long-term temperature goal set out in Article 2, [...] Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties [...] so as to achieve a balance […] on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty*"; Article 4(19) recognises that "*[a]ll Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies, […] taking into account their common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*"; Article 13(3) ensures that measures recognise "*[...] the special circumstances of the least developed countries and small island developing States, and be implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing undue burden on Parties.*"

approach is not novel. The concept of differentiated responsibilities between States first appeared as Principle 7 of the Rio Declaration at the first Earth Summit in Rio in 1992.[12] Similar language was drafted into the UNFCCC, which also recognises that parties should act to protect the climate system on the basis of respective capabilities.[13]

40. Each individual signatory State to the Paris Agreement makes fundamental choices on behalf of its people, which requires making its own trade-offs between reduction of CO_2 emissions (and other GHG emissions) and economic, social and other factors. These may include the right to development and eradication of poverty, impact on jobs, the economy, national security and general development, but also the availability of alternatives and possibilities for CO_2 removal. As discussed in Section 2.6, it is the task and role of the legislative and executive branches of each signatory State to make these choices.

41. The object of the Paris Agreement – and the UNFCCC and other treaties in this respect – is to limit global warming and to combat its consequences. The object is not to eliminate or "phase out" fossil fuels. The elimination of fossil fuels is thus not mentioned in these treaties. The Paris Agreement refers broadly to balancing emissions and removing GHGs, but aside from setting and reporting so-called National Determined Contribution ("NDC") commitments, it does not prescribe a precise pathway that would be necessary to achieve the 2°C objective (or the 1.5°C objective).

42. Because there is not one "right way" to achieve net zero emissions and reach the goals of the Paris Agreement, different organisations and bodies have crafted various scenarios describing different potential pathways to achieve that balance. These scenarios require continual updating and developing as scientific knowledge improves, technological developments progress and more data become available. There is no single pathway to success or one single solution, including "phasing out" fossil fuels on a 10, 20 or 30 year timetable, as Milieudefensie et al. desire. These scenarios reach different conclusions in terms of the pace and manner in which society could achieve net zero GHGs in the second half of this century. The *IPCC Special Report on Global Warming of 1.5°C* dated October 2018 (the

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12 **Exhibit RK-3**, UN, Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 1992, Principle 7, which specifically states: "*In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.*"

13 Summons, Exhibit 096, UNFCCC 1992 (ENG), Article 3.1.

"**IPCC Special Report**") concluded that global CO_2 emissions need to reach net zero around the middle of this century to give a reasonable chance of limiting warming to 1.5ºC, while other scenarios envisage net zero CO_2 emissions by 2070, for example.[14]

43. The existing global energy system is vast and complex. The energy transition requires a global transformation in the way energy is currently produced, distributed and used. It will take far-reaching actions and investments to modify existing infrastructure, and it will also require a reversal in current energy consumption. The complete elimination of fossil fuels is neither feasible nor necessary at present to achieve net zero CO_2 emissions. Moreover, given the central role of fossil fuels in the global energy system, such an elimination is not consistent with existing societal standards and demands.

44. As will be discussed in more detail in Section 2.3 below, Shell is engaged in various initiatives to play an appropriate and meaningful role in the energy transition. At the same time, Shell recognises that continuing global energy demand across sectors and countries drives production and sale of oil and gas for global energy use. However, in the Summons Milieudefensie et al. make no mention whatsoever of this continuing energy demand from global society and instead focus almost exclusively on one single goal: the elimination of Shell's fossil fuels.

2.2.3 Continuing investment in oil and gas is needed to meet the projected energy demands of a growing and developing world

45. Milieudefensie et al. suggest throughout the Summons that it is feasible to stop using all fossil fuels entirely, including oil and gas, by 2050. While they acknowledge that a transition period would be necessary, they do not address the technological, infrastructure and economic challenges of such a transition, or the time needed for it.[15]

46. Milieudefensie et al. instead sketch an over-simplistic picture of the functioning of energy demand and supply. For example, the Summons refers to rapid developments in renewable energy (particularly solar and wind) technologies that contribute to low-carbon electricity generation, as a substitute for fossil fuels.[16]

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14 See for example **Exhibit RO-1**, UNEP, The Emissions Gap Report 2014, p. xv; **Exhibit RK-4**, IEA, World Energy Outlook 2018, p. 89; **Exhibit RK-2**, Shell, Sky Report 2018 .

15 Summons, para. 349.

16 Summons, paras. 772-774.

47. Even if all global electricity generation could be promptly and reliably transitioned to renewables – which it cannot – Milieudefensie et al. ignore non-electricity global energy consumption, which currently accounts for more than 80% of total consumption.[17] Oil and gas products provide reliable and affordable energy in economic sectors and regions where electricity from renewables is not yet a viable substitute. The energy transition therefore requires different solutions. For reasons that will be set out in more detail below, the demand for oil and gas will continue both during and following the energy transition. To meet that anticipated future demand, further investment in, as well of production of, oil and gas are thus required.

2.2.3.1 Global energy demand will continue to grow as a result of a growing world population and economic development

48. Overall global energy demand is expected to increase in the coming years as a result of a growing world population and increased development. Global energy demand grew by 2.3% in 2018, its fastest rate in the past decade.[18] According to the United Nations ("**UN**"), the global population will increase from nearly 7.6 billion (as of mid-2017) to 9.8 billion by 2050 and to 11.2 billion by 2100.[19]

49. Some countries, such as those with large emerging markets, are likely to demand increased energy as they seek to improve their economies to the level of more developed nations. Economic activity goes hand-in-hand with energy use, enabling opportunities for growing populations seeking to improve their quality of life. People cannot do, move or build anything without using energy. Where infrastructure is poor or unemployment is very high, for example, average annual energy use per person is typically less than half that seen in more technologically developed economies.

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17 **Exhibit RK-4**, IEA, World Energy Outlook 2018, p. 38.
18 **Exhibit RO-2**, IEA, Global energy demand rose by 2.3% in 2018, its fastest pace in the last decade, 26 March 2019.
19 **Exhibit RO-3**, UN, World Population Prospects 2017 Revision, p. 1.

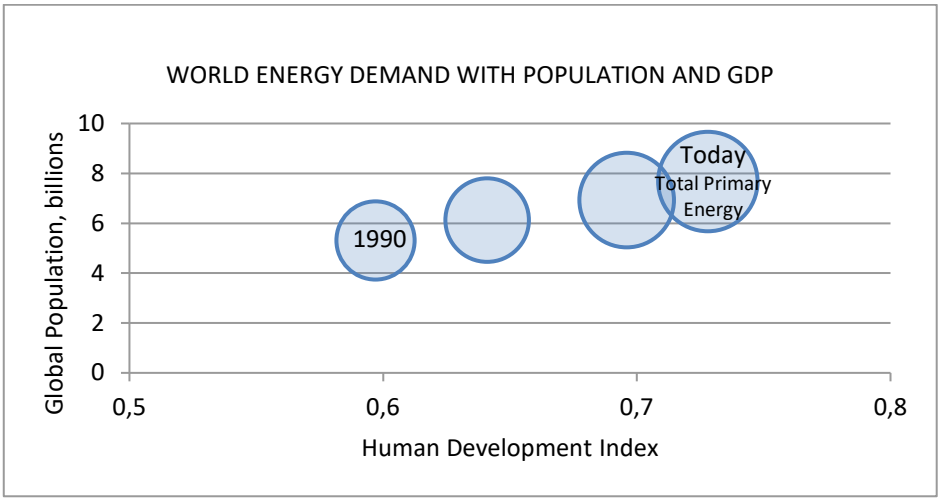

Figure 1[20]

2.2.3.2 Access to energy is essential for continued economic development and for meeting basic human needs, as recognised by the UN Sustainable Development Goals

50. The UN Sustainable Development Goals (hereinafter: "**SDGs**") were defined in order to enable many people all across the world to improve their lives through access to clean water, sanitation, nutrition, health care and education. Energy is a key enabler for these basic needs. In SDG 7 (Affordable and Clean Energy), the UN describes energy as "*central to nearly every major challenge and opportunity the world faces today. Be it for jobs, security, climate change adaptation, food production or increasing incomes, access to energy for all is essential.*" One of the targets of SDG 7 is universal access to affordable, reliable and modern energy services by 2030.[21] However, almost a billion people still live without access to electricity, according to the International Energy Agency.[22] In order to maintain and improve quality of life for everyone on the planet, the energy transition must therefore go hand-in-hand with extending the economic and social benefits of energy access.

51. Developments such as population growth, economic development, new services requiring energy (like the introduction of refrigerators in the past and data centres in the internet age) and the extended use of existing

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20 **Exhibit RO-4**, UN, Development Index (1990-2017); See also **Exhibit RK-4**, IEA, World Energy Outlook 2018; internal Shell analysis. The latest IEA data on energy demand are available until 2016. For internal analyses, Shell uses data from the period up to and including 2018.

21 **Exhibit RO-5**, UN, Energy - Sustainable Development Goals.

22 **Exhibit RK-4**, IEA, World Energy Outlook 2018, p. 95.

services will all contribute to growth in global energy demand.[23] This expectation is supported by various scenarios describing the transition pathways towards a new energy system. For example, the International Energy Agency's 'Current Policies' scenario, based on existing laws and regulations as at mid-2018, projects energy demand at almost 40% higher by 2040.[24] The International Energy Agency's 'New Policies' scenario assumes that by 2040, global energy demand could be over 25% higher than it was in 2017.[25] The IEA's '66% 2°C scenario' assumes global energy demand to be 4% higher in 2050 than in 2014.[26] The "*Sky*" scenario, published by Shell – which, like the scenarios discussed above – describes a pathway for society to achieve the goals of the Paris Agreement and which will be explained in more detail in Subsection 2.2.3.4 below – assumes that total world energy demand could nearly double by 2100 compared to 2010 levels, while the 2°C goal of the Paris Agreement would still be comfortably achieved.[27] Even with huge improvements in energy efficiency, the world is likely to be using considerably more energy by 2070 compared to today.

52. Consequently, the dual challenge that society faces is how to meet this worldwide energy demand, thus extending the economic and social benefits of energy to all people on earth, while transitioning to a low-carbon energy future in order to limit the risks of climate change.

2.2.3.3 It is not currently feasible to meet the growing demand for energy and simultaneously to replace all fossil fuels with solar and wind energy; renewables are not adequate substitutes for the total energy demand

53. Currently fossil fuels provide more than 80% of global energy supply.[28] The existing energy system is the result of nearly 100 years of choices by global

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23 **Exhibit RK-2**, Shell, Sky Report 2018, p. 13; **Exhibit RK-5**, OECD, Energy Report 2011, p. 1; **Exhibit RO-6**, Sorrell, Reducing energy demand: A review of issues, challenges and approaches, July 2015, pp. 74-82.

24 **Exhibit RK-4**, IEA, World Energy Outlook 2018, p. 38.

25 Id.

26 **Exhibit RK-6**, IEA, Perspectives for the Energy Transition 2017, p. 56.

27 Shell has been developing scenarios for more than 50 years in order to be better positioned with regard to the development of future energy systems and the associated uncertainties. These scenarios also serve to support and assess Shell's business decisions. None of these scenarios are forecasts, business plans or policy proposals. They merely describe what *could* happen under certain circumstances, offering plausible pathways for the future. Shell has developed its own scenario that is in line with the goals of the Paris Agreement: Sky. Sky envisions society reaching net zero emissions by 2070, holding the global average rise in temperature well below 2°C. The Joint Program on the Science and Policy of Global Change of the Massachusetts Institute of Technology ("MIT") has confirmed that the transition pathway described by Sky would hold warming of the climate system to around 1.75°C by 2100. In *Sky*, significant reforestation and restoration of natural ecosystems enhance the possibility of limiting global warming to 1.5°C. Sky has been recognized by the IPCC and is referenced in the IPCC Special Report.

28 **Exhibit RK-4**, IEA, World Energy Outlook 2018, p. 38.

society – including those by consumers, governments, and all varieties of industry. Energy users demand energy that is reliable, widely available and affordable, such as fossil fuels.[29]

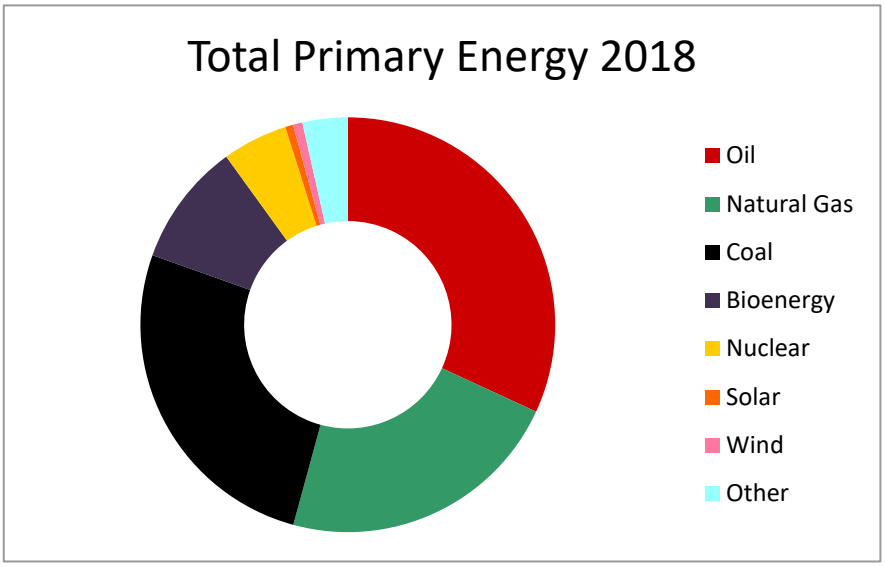

Figure 2[30]

54. Renewables primarily generate electricity, but electricity currently accounts for less than 20% of total global end energy-use consumption.[31]

55. To make the entire global energy system net CO_2 neutral, the proportion of electricity – and specifically renewables-based electricity – used in total energy consumption will have to increase considerably compared to current levels. This will take several decades. According to the IPCC's analysis of pathways to reaching the 1.5°C target (with no or limited overshoots)[32] – i.e. the more optimistic scenarios – electricity could represent some 34 to 71% of total global end energy-use consumption by 2050. This is a big increase compared to the current proportion of electricity but still well short of 100%.[33] Shell's *Sky* scenario falls within this bandwidth indicated by the IPCC, as this scenario expects that the proportion of electricity could rise to approximately 40% by 2050 and to 55% by 2070.[34] It is expected that the

29 **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 14. See also **Exhibit RO-7**, EY, Why the environment is a consumer priority, but affordability is paramount, 15 July 2019.
30 **Exhibit RK-4**, IEA, World Energy Outlook 2018.
31 Id., p. 42.
32 Summons, Exhibit 228, IPCC AR5, SYR, p. 126. The IPCC defines overshoot pathways as "[e]*missions, concentration or temperature pathways in which the metric of interest temporarily exceeds, or overshoots the long-term goal*."
33 Summons, Exhibit 136, IPCC 2018 SR15, Ch. 2, p. 134.
34 **Exhibit RK-2**, Shell, Sky Report 2018, p. 37.

remainder of the demand for energy will have to be met by other energy sources, particularly oil and gas.

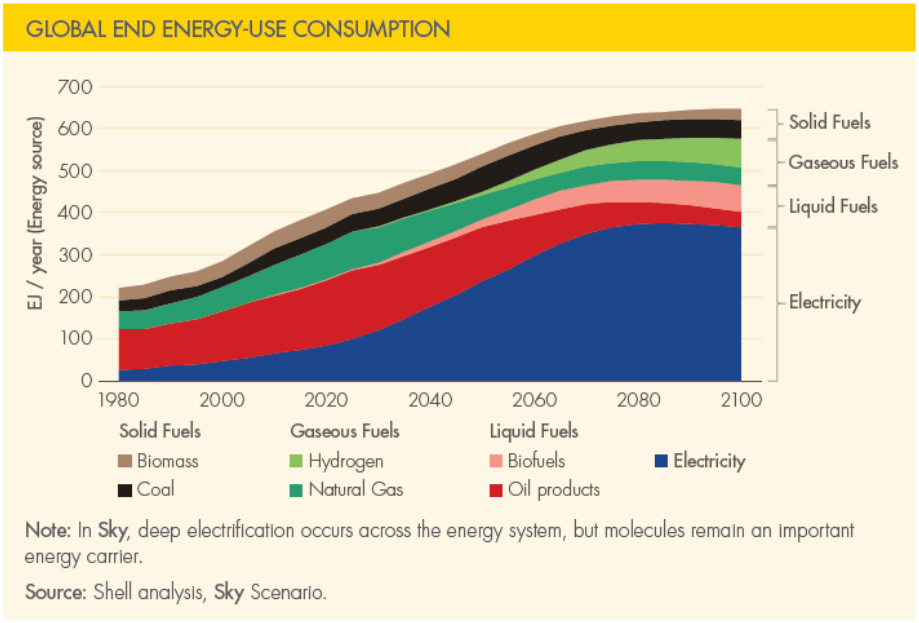

Figure 3[35]

56. There are still some complex challenges to be overcome in order to reach the levels of electrification from renewable energy sources that are expected in any of the scenarios mentioned above. For example, renewable sources of energy are intermittent and subject to seasonal variability, which means they are not consistently available or reliable.[36] Moreover, some forms of electricity from renewable energy sources require a great deal of land, particularly electricity generation from biomass.[37] Further, while at the global level solar and wind resources may be sufficient to support the renewables expansion, at the same time there are large variations between different regions around the world in terms of the availability and cost of these renewable resources and the extent to which sufficient network capacity is becoming available (for example in the Netherlands).[38]

57. In addition, significant operational barriers to the transition to a low-carbon economy currently still exist. Some sectors such as the clothing and

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35 **Exhibit RK-8**, Shell, Sky Report (Overview), 2018, p. 5.

36 **Exhibit RO-8**, BBC, Smart power: Fresh winds are blowing, 27 February 2018; **Exhibit RO-9,** Mulder, Journal of Renewable and Sustainable Energy, 2014.

37 **Exhibit RO-10**, Phys.org, Renewable energy sources can take up to 1000 times more space than fossil fuels, 28 August 2018.

38 **Exhibit RK-9**, Energy Transitions Commission, Mission Possible, 2018p. 109; **Exhibit RO-11**, Energy Today, Barriers to Renewable Energy Technologies Development, 25 January 2018.

foodstuffs industries have low-temperature production processes, making electricity a suitable source of energy. These can therefore be powered by low and zero-carbon sources of electricity, including renewable energy. By contrast, the iron, steel, cement, plastic and chemical industries, and transportation of heavy loads by air or water, rely on the ability of fossil fuels to provide extremely high temperatures, chemical reactions or dense or portable energy storage. Today, many of these sectors cannot be electrified at all, or electrification is associated with very high costs, or the necessary technology is not available.[39]

58. The pathway to achieving net zero CO_2 emissions in fossil fuel-dependent sectors is still far from clear. It is also impossible to determine this in advance, as this transition depends on various factors, will lead to unpredictable future costs and will vary from region to region.[40] Methods for capturing and reusing CO_2, such as *Carbon Capture and Storage* ("**CCS**") and *Carbon Capture Utilization and Storage* ("**CCUS**"), are likely to be required, as the IPCC Special Report also recognises.[41] Opportunities for electrifying these sectors vary enormously and require major developments in technology.[42] Moreover, decarbonisation of these sectors by 2050 requires more than the mere application of new technologies: it also requires rapid transition to a more circular economy to limit growth of energy demand and achieve unprecedented efficiency gains.[43]

59. Currently, existing systems for infrastructure, land use and industry all require continued use of oil and gas for purposes other than energy generation. For example, oil is used to produce lightweight plastic, insulation materials and wind turbines – all of which, incidentally, are products required for a low-carbon economy. Oil and gas will also continue to be needed for everyday products. Components of gas are used to produce fertilisers, which are needed to help feed billions of people. Oil products have many uses, including in medicines, cleaning agents, cosmetics, clothing and electronics.[44]

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39 **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 15; **Exhibit RO-12**, Heinberg et al., Chapter 5 Other Uses of Fossil Fuels: The Substitution Challenge Continues.

40 **Exhibit RK-9**, Energy Transitions Commission, Mission Possible, 2018, Mission Possible, p. 65.

41 Id., p. 27; Summons, Exhibit 136, IPCC 2018 SR15, Ch. 2, pp. 134-136.

42 Id., p. 15. See also **Exhibit RO-13,** Davis et al., Net-zero emissions energy systems, 29 June 2018, which estimates the proportion of such hard-to-abate sectors to be 27% of worldwide CO_2 emissions (p. 1).

43 Id., p. 146.

44 See also **Exhibit RO-14**, International Association of Oil & Gas Producers, Oil in Everyday Life.

60. Finally, Milieudefensie et al. lump all production of fossil fuels together and incorrectly assume that all fossil fuels have an equal effect on CO_2 emissions and, consequently, on the climate.[45] However, different fossil fuels can have significantly different CO_2 impacts. For example, the combustion of natural gas produces up to nearly 50% less CO_2 emissions than the combustion of coal.[46] Replacing a coal-fired power plant with one powered by natural gas can therefore substantially reduce CO_2 emissions from energy generation. Generating electricity by using a combination of natural gas and renewable resources may support further spread of lower-carbon electrification. Indeed, one of the ways that Shell believes it can help in the energy transition is by supplying more natural gas, and as recently announced, by expanding its investments in renewable energy.

2.2.3.4 Virtually all credible transition scenarios, including scenarios consistent with the 1.5°C target, assume continued demand for oil and gas

61. Most Paris Agreement-based scenarios prepared by the IPCC or by major international organisations such as the International Energy Agency assume a significant quantity of oil and gas both during and after the transition to carbon-neutral energy supply. This is underpinned by all of the reasons referred to above: (1) the continuing demand for energy, (2) the inability of renewables to meet substantial energy needs, especially as long as it remains impossible to store enough energy for the periods when renewables do not provide enough energy to satisfy demand, (3) the principle of creating a balance between anthropogenic CO_2 emissions and the removal of CO_2, and (4) the different circumstances in each country.

62. Across most pathways described in the IPCC Special Report, energy supply from fossil fuels declines over time, dependent on the type in question. Coal, for example, will be largely phased out, but natural gas will not. Even in the pathways for achieving the 1.5°C target – with no or limited overshoot – which are the most stringent CO_2 reduction scenarios covered in the IPCC Special Report, fossil fuels will still comprise between 9% and 61% (median 33%) of energy supply in 2050 (median oil and gas 26%).[47] This broad bandwidth demonstrates the inherent difficulty and uncertainty in attempting to project potential oil and gas (and energy) supply several decades into the future.

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45 See Summons, paras. 590-592.

46 **Exhibit RO-15**, U.S. Energy Information Administration - FAQ (website page 29 August 2019).

47 Summons, Exhibit 136, IPCC 2018 SR15, Ch. 2, pp. 131-133.

63. Similarly, the International Energy Agency has stated that "*oil and natural gas are set to remain part of the energy system for decades to come in all of our scenarios*".[48] Under its 'Current Policies' scenario, fossil fuel demand declines only slightly to 78% (oil and gas 54%) of the total worldwide demand for energy by 2040. The 'New Policies' scenario also assumes that the fossil fuels' share could decline only to 74% (oil and gas 53%) by 2040. According to the 'Sustainable Development' scenario, which assumes a small reduction of the total energy demand by 2040, fossil fuel demand could still represent 60% (oil and gas 48%) of total energy demand by 2040.[49] Even in the International Energy Agency's more stringent CO_2 reduction scenarios, the '66% 2°C' and 'Beyond 2°C' scenarios, fossil fuels' share of total energy demand is 39% (oil and gas 29%) and 33% (oil and gas 19%), respectively, in 2050.[50]

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48 **Exhibit RK-4**, IEA, World Energy Outlook 2018, p. 511.

49 Id., pp. 38, 479. The IEA is preparing a new Sustainable Development Scenario. The 'Current Policies' scenario is based on existing laws and regulations as at mid-2018. The 'New Policies' scenario takes into account policy ambitions that had been announced as of August 2018 and incorporates the commitments made in the NDCs under the Paris Agreement. The 'Sustainable Development' scenario starts with a set of desired outcomes, as defined by the UN SDGs related to energy, and works back to the present to show how the energy sector could achieve those goals in an integrated and cost-effective way.

50 **Exhibit RK-6**, IEA, Perspectives for the Energy Transition 2017, p. 57. The '66% 2°C' scenario was developed to provide a 66% chance of limiting the rise in global mean temperature to 2°C by 2100 without any temporary overshoot. The 'Beyond 2°C' scenario is consistent with a 50% chance of limiting the future average rise in temperature to 1.75°C and falls within the scope of the goals of the Paris Agreement. See **Exhibit RK-10**, IEA, Energy Technology Perspectives Report 2017, scenario summary data (see https://www.iea.org/etp/etp2017/secure/).

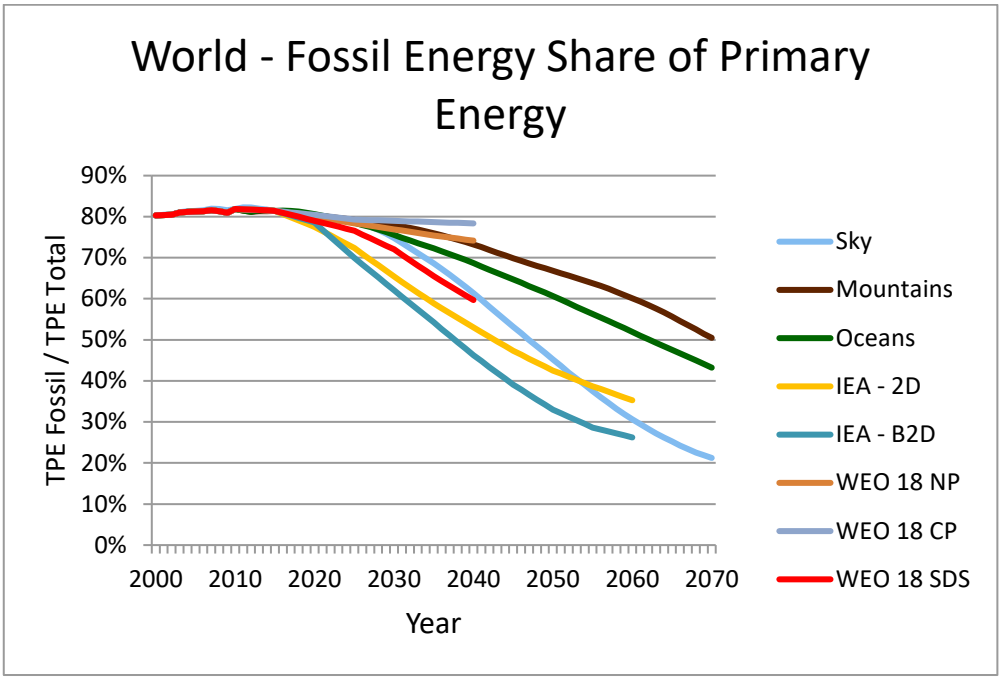

Figure 4[51]

64. Like the International Energy Agency's scenarios and other scenarios in the IPCC Special Report, Shell's scenarios have long assumed rapid growth in renewable energy sources (such as wind and solar energy) and low-emission fuels (such as biofuels), alongside continued long-term demand for oil and gas. Furthermore, these scenarios envisage a substantial increase in CCUS to limit CO_2 emissions into the atmosphere.[52]

65. *Sky* assumes that even in a carbon-neutral energy system, with net zero CO_2 emissions in 2070, fossil fuels will – if combined with CCUS – still comprise 22% of the total energy supply (oil and gas 16%).[53] This could be 45% by 2050 (oil and gas 33%).[54]

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51 The scenarios referred to come from Shell Sky (see **Exhibit RK-2**, Shell, Sky Report 2018), Shell Mountains and Shell Oceans (see **Exhibit RK-11**, Shell, Mountains and Oceans Report, 2013), the IEA 2°C Scenario and IEA Beyond 2°C Scenario (see **Exhibit RK-10**, IEA, Energy Technology Perspectives Report 2017), the IEA World Energies Scenario and the IEA World Outlook 2018 Current Policies Scenario (see **Exhibit RK-4**, IEA, World Energy Outlook 2018).

52 **Exhibit RK-7**, Shell, Energy Transition Report 2018, pp. 68-69.

53 **Exhibit RK-2**, Shell, Sky Report 2018, pp. 32, 43.

54 Id., p. 43.

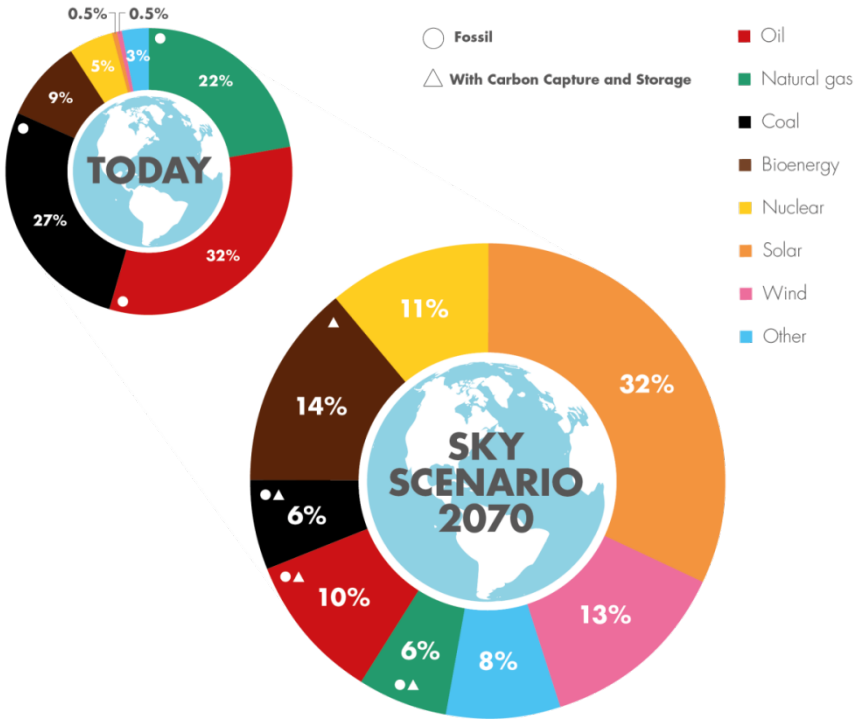

Figure 5: A possible primary energy mix for a net zero emissions world[55]

66. *Sky* assumes a doubling of total world energy demand by 2100. It expects per capita consumption to remain relatively low (approximately 100 GJ per year) due to unprecedented efficiency gains in the energy sector. This figure is far below current consumption levels in industrialised economies (e.g. 300 GJ per capita in the US) but will nevertheless provide for the energy services necessary for improving the quality of life.[56]

55 **Exhibit RK-2**, Shell, Sky Report 2018, p. 32.
56 **Exhibit RK-2**, Shell, Sky Report 2018, pp. 26-27.

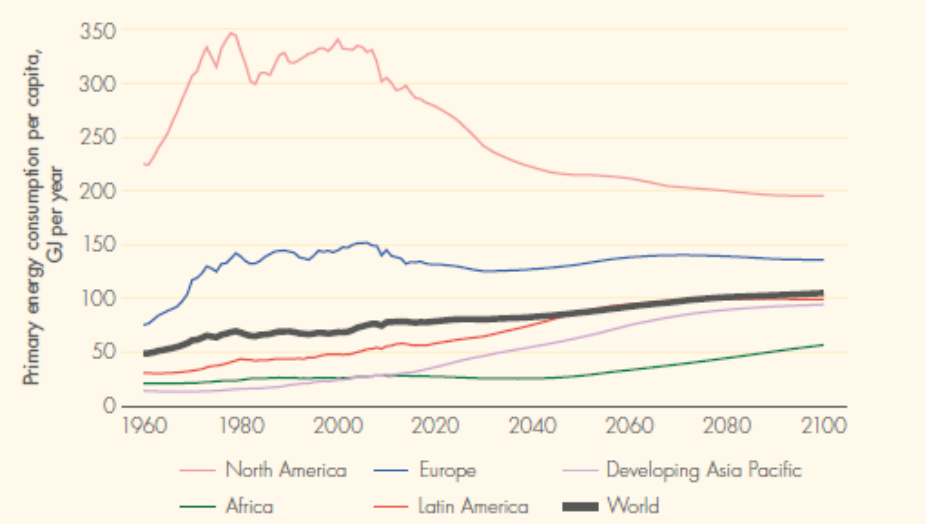

Figure 6[57]

67. Comparisons by independent third parties between *Sky* and other scenarios limiting the global rise in temperature to well below 2°C demonstrate that Sky projections for oil and gas demand are in line with those other scenarios.[58] While *Sky* projects further forward in time than the IPCC and International Energy Agency scenarios in attempting to envisage energy demand up to 2100, Shell recognises the significant uncertainty inherent in any attempt to project the extent and composition of that demand.

57 **Exhibit RK-2**, Shell, Sky Report 2018, p. 26.

58 **Exhibit RO-16**, Cicero, Shell in a low carbon world, 28 March 2018; **Exhibit RO-17**, Carbonbrief.org, In-depth: Is Shell's new climate scenario as 'radical' as it says?, 29 March 2018; **Exhibit RO-18**, Vox, Shell's vision of zero carbon world by 2017, explained, 30 March 2018.

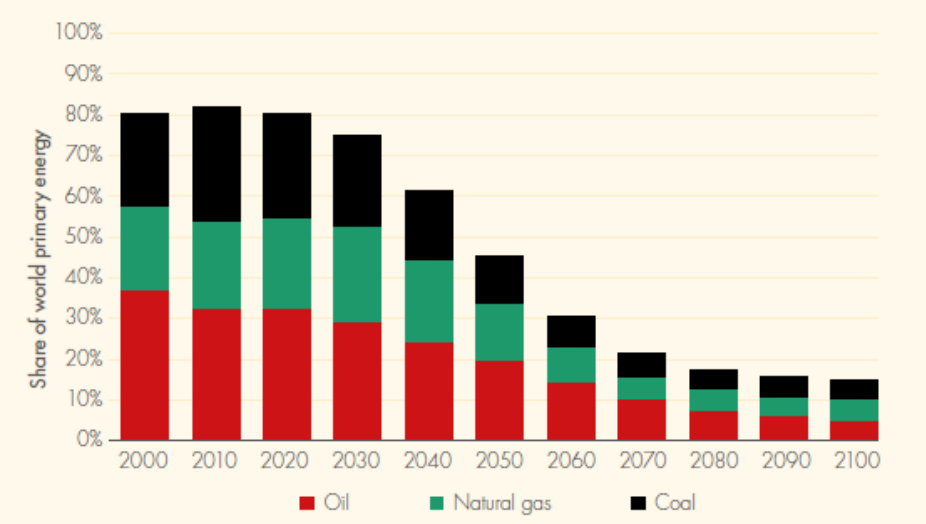

Figure 7[59]

68. Milieudefensie et al. state in the Summons that the IPCC Special Report refers to a growing number of studies supporting 100% renewable energy scenarios and claim that these studies emphasise the economic and physical feasibility of these goals.[60] However, neither of the two studies cited by Milieudefensie et al. presents a 100% renewable energy scenario. Grubler et al.'s study assumes a significant proportion of oil and gas in the global end demand for energy by 2050, while meeting the 1.5°C target.[61] The Navigant study envisages a small but continuing role for natural gas and even coal (largely combined with CCS) in the industrial sector, even in 2050 when the global energy system is completely decarbonised under that scenario.[62]

69. The IPCC Special Report itself states that none of its projections identify 100% renewable energy solutions for the global energy system as part of cost-effective transition pathways.[63] Milieudefensie et al. do not explain, for example, how renewables can provide a realistic alternative for many uses

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59 **Exhibit RK-2**, Shell, Sky Report 2018, p. 42.
60 Summons, para. 775.
61 **Exhibit RO-19**, Nature Energy, A low energy demand scenario for meeting the 1.5ºC target and sustainable development goals without negative emission technologies, June 2018, p. 521.
62 Summons, Exhibit 235, Navigant 2018, The Energy Transition Within 1.5º C, pp. 9-10.
63 Summons, Exhibit 136, IPCC 2018 SR15, Ch. 2, p. 100 ("*While the representation of renewable energy resource potentials, technology costs and system integration in IAMs has been updated since AR5, leading to a higher renewable energy deployment in many cases [...], none of the IAM projections identify 100% renewable energy solutions for the global energy system as part of cost-effective mitigation pathways (Section 2.4.2).*").

of oil and gas, as described above in Subsection 2.2.3.3. Shell therefore considers such extreme energy mix pathways to be impracticable.

70. Importantly, the IPCC Special Report also notes that some transition pathways for achieving the 1.5°C target show that there may be trade-offs with the SDGs discussed in Subsection 2.2.3.2 above: that mitigating the impact of climate change through those means could negatively impact SDGs 1 (poverty), 2 (hunger), 6 (water) and 7 (energy access), if not managed carefully.[64] This could lead to economic problems and social dislocation. A number of developing countries have stated that they find it hard to accept that they would not be allowed to use fossil fuels, where these are the cheapest and most suitable sources of energy, because the developed countries – which have historically relied on fossil fuels to drive their own growth – now seek to curb the use of fossil fuels.[65] Such a position would also be inconsistent with the SDGs: by failing to meet the fundamental SDG 7 (energy access), the world cannot realise many of the other SDGs. 100% renewable energy scenarios are therefore not currently credible, also for the reasons outlined previously in Subsection 2.2.3.

2.2.3.5 Continued investment in, and production of, oil and gas currently remain necessary to meet global energy demand across economic sectors and countries

71. Milieudefensie et al. criticise RDS for "*invest*[ing] *about 20 to 25 billion annually in its oil and gas business*".[66] First of all, RDS observes that Milieudefensie et al. refer to Shell's <u>total</u> annual investments here, i.e. not just investments in its oil and gas activities. In reality, as shown below, this level of investment fulfils only a small portion of global demand and the investment necessary for it.

72. As illustrated below, while demand for oil and gas is expected to decrease over time due to the impact of alternative energy sources, this will occur more slowly than the natural decline in production from existing oil and gas fields.[67] Without ongoing investment to boost production from existing oil or gas fields or to develop new fields, such a production decline would further increase the already significant gap between world demand for oil and gas (as shown by International Energy Agency scenarios as well as those of

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64 Summons, Exhibit 136, IPCC 2018 SR15, Ch. 1, p. 22.
65 **Exhibit RO-20**, Deutsche Welle, Asia faces contradictions in dealing with climate change, 15 December 2018.
66 Summons, para. 589.
67 **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 22.

Shell) on the one hand and supply from existing and planned fields on the other.[68]

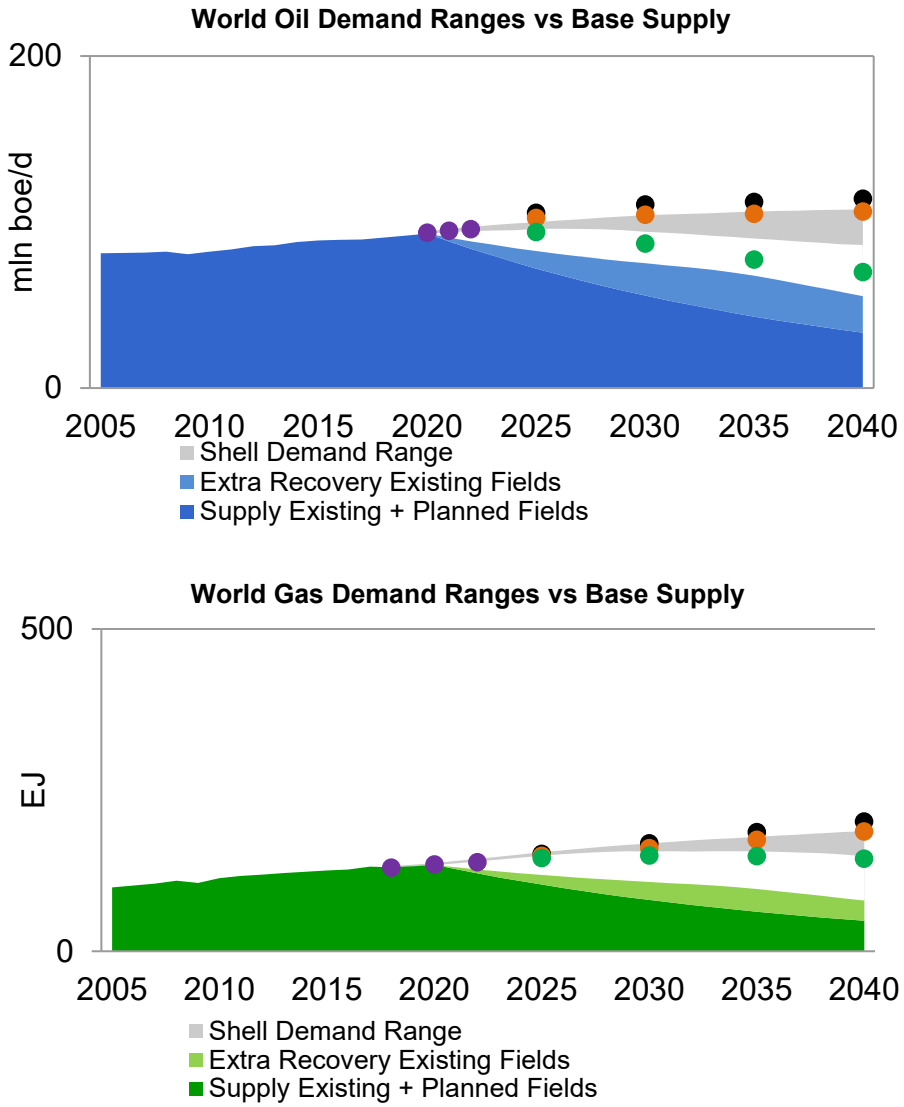

Figure 8[69]

73. The remaining gap between supply and demand needs to be met through investments in new projects, which can take a decade or more to start production. Consequently, the International Energy Agency highlights "*the importance of continued upstream investment, even during the transition away from a fossil-based energy system*" and a "*critical need to develop*

[68] Id., p. 23.
[69] Shell internal analysis; **Exhibit RK-4**, IEA, World Energy Outlook 2018 (Current Policies Scenario, New Policies Scenario and Sustainable Development Scenario).

new fields to fill the supply-demand gap".[70] Under its 'New Policies' scenario, the annual average investment in upstream oil and gas will be USD 684 billion worldwide between 2018 and 2040. Even under the 'Sustainable Development' scenario, these investments still amount to USD 427 billion per year.[71]

74. Shell's total annual investments of USD 20-25 billion (which include more than just its oil and gas activities) thus represent – as already stated – only a relatively small percentage of the necessary global investments in oil and gas.

2.2.4 An order prohibiting Shell from producing CO_2-emitting fossil fuel / energy products would have no or only limited effect on global supply or CO_2 emissions reduction, as others would step in to meet demand

75. The world's demand for energy is not simply created by the producers who supply that energy. It is primarily driven by end users and consumption patterns. An order requiring Shell to completely phase out CO_2 emissions from its business activities and end products would make it impossible for Shell to supply fossil fuels or other products with CO_2 emissions, while the demand and the associated need for annual investment of hundreds of billions of euros would continue. That gap between supply and demand would be filled by others. State-owned energy companies (which hold greater oil and gas reserves than Shell) and other private energy companies would simply re-license or buy Shell's oil and gas reserves and other assets, thereby meeting society's demand.[72] This also shows that the award of Milieudefensie et al.'s claims would not lead to a reduction in CO_2 emissions. In that case, another energy producer would take Shell's place and produce and supply the same tradable products. Award of the orders sought may even have a counterproductive effect: the replacement of Shell and its products by another party may lead to more rather than less CO_2 emissions.

76. Milieudefensie et al.'s themselves admit that the measures they seek will not have the desired effect, because climate change will still occur independently of RDS's actions.[73] In fact, Milieudefensie et al. acknowledge that RDS's conduct is not in itself relevant. They try to evade this with their

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70 **Exhibit RK-4**, IEA, World Energy Outlook 2018, pp. 158, 163.
71 Id., p. 150.
72 State-owned energy companies hold up to 90% of the world's oil and gas reserves and produce approximately 55% of oil and gas worldwide. See **Exhibit RO-21**, Natural Resources Governance Institute, The National Oil Company Database, April 2019.
73 See Summons, para. 509.

– unsubstantiated and disputed – allegation that, in brief, awarding the claims will send a signal that will cause society to change as a whole.[74]

77. There is therefore no reason whatsoever to assume that a court order would have the effect desired by Milieudefensie et al. In the absence of any explanation from Milieudefensie et al. on this point, it is not necessary for RDS to address this in detail. Nevertheless, RDS would mention three points by way of illustration.

78. First, if Shell were indeed to cease its own fossil fuel production, this implies it would no longer use existing concessions for the extraction of oil and gas and no more new concessions would be acquired. If concessions are left unused, the competent authorities will withdraw them and may grant them to other parties. It is also a fact that authorities are currently still granting concessions, and that exploration is still foreseen in the longer-term future. As noted in Subsection 2.2.3.5, the International Energy Agency also sees the need to invest in exploration. Closer to home, for example, reference can be made to publications by Energie Beheer Nederland, which is owned by the State and implements part of the energy and climate policy on behalf of the State. In a 2018 publication, it refers to the need for natural gas after 2030 and the need to invest in new sources of natural gas in the North Sea.[75]

79. Second, past experience has shown that when one supplier is removed, the "gap" left by that supplier is filled by others. RDS will cite three examples.

    (a) During the First Gulf War – which took place from August 1990 to February 1991 – Iraq's oil production fell by 90% and Kuwait's by 87%. Although Iraq's invasion of Kuwait removed more than four million barrels per day of crude oil from the market, other OPEC members made up this shortfall after only a brief hiatus. As a result, global production recovered after only a slight dip in 1991 and continued its upward trajectory thereafter.[76]

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74 See Summons, paras. 648-650.
75 **Exhibit RO-22**, Kennisbank, Focus: energie in beweging, 2018.
76 **Exhibit RK-12,** World Bank, Special Focus Report 2015, p. 7.

Oil: Production*

Thousand barrels daily	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998
Iraq	2838	2149	285	531	455	505	530	580	1166	2121
Kuwait	1408	964	185	1077	1945	2085	2130	2129	2137	2232
Total World	**63793**	**65001**	**64839**	**65709**	**65965**	**66986**	**67974**	**69642**	**71647**	**73192**
OPEC	22181	23746	23837	25715	26481	27046	27465	28218	29493	30915

Figure 9 – Oil Production of Iraq and Kuwait Compared to World Production[77]

(b) Similarly, in 2011, during the First Libyan Civil War, oil production in Libya dropped by 75% while global supply continued to grow.

Oil: Production*

Thousand barrels daily	2010	2011	2012	2013
Libya	1799	516	1539	1048
Total World	**83255**	**84009**	**86228**	**86647**
of which: OECD	18531	18571	19487	20621
Non-OECD	64724	65438	66742	66026
OPEC	35894	36724	38292	37293
Non-OPEC	47361	47285	47936	49354
European Union #	1981	1712	1518	1425

Figure 10 – Oil Production of Libya Compared to World Production[78]

(c) Milieudefensie et al. themselves refer to Ørsted (formerly Danish Oil and Natural Gas Energy, or Dong Energy A/S). However, Ørsted sold its oil and gas investments. The purchaser of Ørsted, INEOS, immediately announced that it intended to integrate those activities into its own portfolio and to *expand* its oil and gas activities in doing so. Four hundred and thirty staff were transferred from Dong Energy to INEOS.[79] Overall there was thus no (or a minimal) reduction in the supply of fossil fuels, nor in CO_2 emissions from the end users of those products. Milieudefensie et al. cite the example of Ørsted in support of their assertion that an oil and gas company can commit to an immediate transition.[80] On the contrary, this example thus

77 **Exhibit RK-13**, BP, Statistics Oil Production - Barrels (1989-1998).
78 **Exhibit RK-14**, BP, Statistical Review of World Energy, 2019, p. 18.
79 **Exhibit RO-23**, INEOS, INEOS completes the acquisition of the entire Oil & Gas Business from DONG Energy A/S, 28 September 2017.
80 Summons, paras. 823-826.

demonstrates the ineffectiveness of the remedy Milieudefensie et al. seek in terms of reducing global CO_2 emissions or meeting the goals of the Paris Agreement.

80. It follows from these examples that, although supply shortages generally result in increased prices due to changes in international trade flows, prices retreat as new supplies reach the market.[81] In any case, eliminating one source of oil and gas does not decrease demand. Consumers will exchange time and money for both when they must, because it is still necessary to modern life[82] If one particular supplier ceases production, that gap will be filled. This is even more pronounced where supply by a private company is discontinued, in part because private oil and gas production is relatively limited compared to State production.

81. And the third point: the use of alternative sources of supply can also lead to an increase in CO_2 emissions. It is not a given that, if a particular party such as Shell ceases or reduces production, the alternative will be more favourable in terms of CO_2 emissions. By way of illustration, RDS refers to the consequences of ceasing the exploration of gas fields in Groningen. The Dutch government recently decided that production from the Groningen natural gas field must be phased out by 2022. The Groningen gas field – operated by a joint venture between Shell and Exxon Mobil – is the largest gas field in Europe.[83] Gas from Groningen will now be replaced by imported gas from, for example, Algeria or Russia. This could lead to an extra CO_2 footprint in the Netherlands of at least 10-20%.[84]

82. In short, Milieudefensie et al. have not demonstrated that the court order sought would have the desired result of reducing total CO_2 emissions. Nor is there any reason to believe that this would be the case. All this is not only a crucial omission in the factual narrative of Milieudefensie et al., but also results in a legal defect in their claims. The claims of Milieudefensie et al. must be rejected for the reasons mentioned above alone, as explained in Chapters 5 et seq.

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81 **Exhibit RK-12**, World Bank, Special Focus Report 2015, pp. 7-8; **Exhibit RO-24**, Bloomberg, Coups, sanctions, tainted pipelines...and oil just keeps falling, 4 May 2019. See also **Exhibit RO-25**, Zacks Investment Research, Oil Hits $70 Barrel After Three Weeks: 5 Top-Ranked Picks, 31 July 2018.

82 See, for example, **Exhibit RO-26**, The East Bay Times, Angry Venezuelans wait hours for gas as shortages worsen, 18 May 2019; **Exhibit RO-27**, Energy Monitor Worldwide, Oil-rich Venezuela now experiencing fuel shortages, 27 March 2017.

83 **Exhibit RO-28**, GEO ExPro, The Groningen Gas Field, April 2009.

84 See **Exhibit RO-29**, Van de Graaff et al., The termination of Groningen gas production - background and next steps, July 2018, p. 5. At the time of this publication, the end of the gas production was still planned for 2030, but it has since been adjusted to 2022.

2.2.5 The transition to a low-carbon energy system is necessary, but must primarily be driven by government policies and consumer choice, while the pace and manner of the transition should vary from country to country to reflect the differentiated responsibilities

83. As the IPCC observes, successful energy transition is dependent on – in addition to a changed energy demand from end users – multiple elements, including: (i) a change in the global energy supply mix (the mix of energy products in the energy system), including expansion of the use of lower-carbon products such as renewable energy, hydrogen, biomass and natural gas, (ii) improving energy productivity (for example by increasing energy efficiency), and (iii) use of methods for CO_2 removal, including carbon sinks.[85]

84. The *demand* from society for different sources of energy drives the global energy market, *not the supply* by Shell or any other energy company. While interconnected, energy demand is not created or driven by energy suppliers only. Providing alternative forms of energy supply can be helpful in expanding the range of consumer choice. However, energy producers or traders cannot force consumers to buy or use products they do not want or that do not satisfy their needs. Moreover, as a matter of basic economics in a free market economy, energy producers can only sell what consumers can afford or are willing to pay.

85. In simple terms, energy suppliers cannot make people fly less or use public transport more often or cause the transport sector to switch from combustion engines to other modes of propulsion. As long as society uses petrol or diesel engine cars, Shell cannot power these with renewable energy. Shell could install charging and fuelling stations for electric and hydrogen vehicles at all of its retail sites, but it could not force consumers to use them. Prerequisites in this regard are a desire or decision by consumers to buy these vehicles and the actual production of such by the automotive industry. If Shell were to replace all of its petrol pumps with electric charging stations now, most motorists would simply go to petrol stations operated by others. [86]

86. It is clear that the world must address consumption patterns to meet the goals of the Paris Agreement. However, energy companies have only

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[85] Summons, Exhibit 136, IPCC 2018 SR15, Ch. 1, p. 14; Ch. 2, p. 129.

[86] Incidentally, this is not to say that Shell is not taking some of these steps anyway. In fact, it already has an expanding network of electric vehicle charging stations at Shell-branded retail sites in Europe, and hydrogen is available at stations in the UK, Germany and the state of California in the US.

limited influence on consumption patterns on a national or global scale. And global experience demonstrates that it is not enough just to leave change to the will of the market.

87. As discussed in Section 2.7, the most appropriate and effective way to change CO_2 emissions levels, including through energy demand and supply, is for governments to set legal frameworks and policies to move behaviour in the direction of the desired change.

88. Consumers of energy (individually and by sector) determine the demand for fossil fuels. The choice to transition to other energy sources depends on the economy and consumer income. Such a transition to energy sources other than fossil fuels is more difficult to achieve in developing countries, where stable energy sources are still few and far between, and where the least expensive and most readily-available sources of energy are coal and traditional biomass. Therefore, to address the disparate impact of mitigation in the context of climate change on different countries and different populations within countries, energy transition will move at different paces and produce different outcomes and energy mixes in those different countries and groups.

89. The UNFCCC and the Paris Agreement expressly recognise these distinctive pathways, specifically through the principle of "*common but differentiated responsibilities*". The developed countries that are parties to the Paris Agreement should take the lead in mitigation, adaptation and finance in relation to climate change. Furthermore, the specific circumstances of each developing country should be taken into consideration.

90. Milieudefensie et al. do not recognise any of this and they frustrate it with their claims. Imposing a transition process forced in a certain direction, also affecting activities in vulnerable countries, does not take account of these internationally recognised and established principles. In particular, a court order would entail forcing RDS to follow a specifically defined investment strategy for *all* Shell companies, in the many dozens of different countries where they emit CO_2 through their activities. This wrongly disregards the wide-ranging and differentiated national interests.

2.3 Shell is already taking steps in response to climate change in anticipation of society's transition to a carbon-neutral energy supply

91. Shell supports the goals of the Paris Agreement. Even though Shell has no influence on global demand for fossil fuels, it continues to look for ways to

contribute to the global energy transition to carbon-neutral energy supply. Investors committed to combating climate change have described Shell – in response to its investment decisions – as having "*taken the lead and committed to the process to steer the company's transition to a low-carbon future*", and hope this "*will inspire other leaders to take bold action*" and "*encourage the rest of the sector to follow Shell's lead*".[87]

92. In the first place, RDS, as noted above in Section 2.1, is the ultimate holding company of more than 1,100 individual companies. Separateness between the different legal entities in the Shell group is respected as it is underpinned by important legal and regulatory considerations. Each of the more than 1,100 legal entities within the Shell group is subject to the laws of the country in which it operates, and thus not necessarily the laws of the Netherlands. Each Shell company must also comply with the contractual and other legal obligations governing its relations with third parties.

93. As the ultimate holding company, RDS performs various activities for the so-called business lines in the countries where Shell companies operate, including setting the general policy (for example, guidelines for investments to support the energy transition) and business principles for Shell companies, reporting on the consolidated performance of Shell companies, and maintaining relationships with investors. However, the relevant companies are themselves responsible for the implementation and execution of general policy in a way that is economically sound as well as compliant with applicable law and contractual obligations.[88]

94. Within that corporate structure, Shell companies, as set out in Subsection 2.3.1 below, are already taking steps to track, account for and report on CO_2 emissions. Shell companies also take steps to manage the CO_2 emissions caused directly by Shell's business activities. They do so in accordance with the existing legal and industry standards as they apply from time to time, in so far as these are appropriate to the activities of the company in question.

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87 **Exhibit RO-30**, Shell, Leading investors back Shell's climate targets, 3 December 2018, pp. 3-4.

88 Cf. Summons, para. 84. **Exhibit RO-31**, RDS, Annual Report 2018, pp. 71-72, which includes the passage: "[...], *and each Shell subsidiary has operational responsibility for implementing climate change policies and strategies*".

2.3.1 RDS already properly reports and accounts for GHG emissions from Shell business activities based on legal and industry standards

95. RDS itself does not own any assets or infrastructure for the production of oil, gas or other energy. Nor does RDS hold any licences to carry out oil exploration, production or extraction activities anywhere in the world. As such, RDS itself already complies with the orders sought: its business activities cause little if any CO_2 emissions in the Netherlands or elsewhere. After all, RDS does not produce any energy products, and the CO_2 emissions under RDS's control are therefore close to nil.

96. In addition, as the ultimate holding company, RDS reports on the GHG emissions of the various Shell companies, both on the basis of operational control of the relevant company (100% of emissions from companies and joint ventures where a Shell company is the operator) and on the basis of the share capital of the relevant company (equity share of emissions from companies and joint ventures in which Shell participates).[89] The World Resources Institute Greenhouse Gas Protocol ("**GHG Protocol**") regulates the accounting for and reporting of scope 1, 2 and 3 GHG emissions, which are defined as follows:

(a) Scope 1 (direct) emissions arise from installations that a party owns (partially or not) or over which it has operational control;

(b) Scope 2 (indirect energy) emissions arise from installations of third parties from which electricity, steam or heat is purchased for business operations; and

(c) Scope 3 emissions are other indirect emissions that result from the activities of a particular party, but that arise from GHG sources that are owned or controlled by third parties, such as other organisations and consumers. Scope 3 emissions include, for example, emissions from the third-party use of purchased crude oil and gas.[90]

97. RDS's reporting methodology and the information on Shell's GHG emissions have long been public and available in its annual reports, the Sustainability Reports, the Carbon Disclosure Project and on the Shell

89 See **Exhibit RO-32**, Shell, Greenhouse gas emissions (website page 21 October 2019).
90 **Exhibit RK-15**, Greenhouse Gas Protocol, A Corporate Accounting and Reporting Standard 2015; **Exhibit RO-32**, Shell, Greenhouse gas emissions (website page 21 October 2019).

website.[91] When reporting on its GHG emissions, RDS takes account of various guidelines and non-binding industry standards, including:

(i) the Task Force on Climate-related Financial Disclosures ("**TCFD**"), which urges companies to disclose information in the areas of governance, strategy, risk management, risk measures and targets; Shell publishes this information in its Annual Report/20F, the Shell Energy Transition Report, its Annual Sustainability Report, and on the Shell website;[92]

(ii) the IPIECA Petroleum Industry Guidelines for Reporting GHGs, which provide accounting and reporting guidelines to establish credible and consistent GHG reporting practices for GHG emissions;[93]

(iii) the Sustainability Reporting Guidelines, developed by the Global Reporting Initiative, for voluntary use by organisations reporting on the economic, environmental and social dimensions of their activities, products, and services;[94]

(iv) the United Nations Global Compact, a UN initiative aimed at aligning business operations with social as well as environmental principles;[95] and

(v) ISO 14064–3:2006 – Specification with guidance for validation and verification of greenhouse gas assertions.[96]

98. In determining the direct (Scope 1) GHG emissions, Shell uses the Global Warming Potentials ("**GWPs**") calculation method from the Fourth Assessment Report of the IPCC on a 100-year time horizon in order to

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91 **Exhibit RK-16**, Shell, Sustainability Report 2018, pp. 81-82; **Exhibit RK-17**, Shell, CDP Report 2019, pp. 95-125; **Exhibit RO-32**, Shell, Greenhouse gas emissions (website page 21 October 2019).

92 See, for example, **Exhibit RO-32**, Shell, Greenhouse gas emissions (website page 21 October 2019).

93 IPIECA was established in 1974 as the International Petroleum Industry Environmental Conservation Association. See also **Exhibit RO-33**, Shell, Reporting Standards and Guidelines (IPIECA, API, OGP Oil and Gas Industry Guidance) (website page 7 November 2019)

94 **Exhibit RO-34**, Shell, Sustainability Report 2018 (GRI Index).

95 See **Exhibit RO-35**, Shell, Reporting Standards and Guidelines (UN Global Compact) (website page 7 November 2019).

96 **Exhibit RO-36**, Lloyd's Register, Assurance Statement related to the Royal Dutch Shell plc Greenhouse Gas Assertion for the Operational Control Greenhouse Gas Inventory for calendar year ended December 31, 2018, 26 February 2019; See also **Exhibit RO-37**, ISO 14064-3:2006: Greenhouse gases - Part 3: specification with guidance for the validation and verification of greenhouse gas assertions. The ISO 14064-3 standards were revised in April 2019. Companies that comply with the regulations have three years to adjust their working methods in accordance with the revision.

calculate GHG emissions from 2015 onwards.[97] The GWPs compare the impact of GHG emissions with the impact of emissions of the equivalent amount of CO_2. Scope 2 emissions are calculated using the market (and location-based) methodology in accordance with the GHG protocol.[98]RDS reports voluntarily and transparently on fifteen categories of Scope 3 emissions as described in the GHG Protocol Corporate Value Chain (Scope 3) Accounting and Reporting Standard, in so far as it is possible to estimate these emissions.[99] Data from 2018 relating to the Scope 1 and 2 GHG emissions from Shell company installations have been subjected to an external audit on a limited assurance basis.[100] Shell estimates that the overall uncertainty regarding direct GHG emissions over which it has operational control is around 2%.[101]

99. In 2018, RDS reported that 88% of its emissions consisted of Scope 3 emissions, based on the above standards.[102] Further, Scope 1 and Scope 2 emissions decreased in 2018 compared to 2017, a reduction resulting primarily from divestments and decreasing levels of flaring in Upstream and Integrated Gas businesses, partly offset by increases elsewhere.[103]

100. In addition to accounting for and reporting on direct and indirect GHG emissions associated with its operations, Shell also adopts management plans to manage its own GHG emissions.[104] These plans implement a range of actions, including improving the schedules for business equipment maintenance, installing and electrifying more energy-efficient equipment, and investigating the potential role of CCS in the design of Shell projects. This will be discussed in more detail in Subsection 2.3.4.

2.3.2 Shell is an industry leader through its NCF Ambition – a voluntary initiative to reduce the carbon intensity of energy products sold by the Shell group

101. In late 2017, RDS's announcement of its Net Carbon Footprint Ambition ("**NCF Ambition**") marked an innovative step within the energy sector.

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97 See **Exhibit RO-32**, Shell, Greenhouse gas emissions (website page 21 October 2019).
98 Id. See also **Exhibit RK-16**, Shell, Sustainability Report 2018, p. 81; **Exhibit RK-18**, Greenhouse Gas Protocol, Protocol Scope 2 Guidance 2015, p. 8.
99 **Exhibit RK-19**, Greenhouse Gas Protocol, Corporate Value Chain (Scope 3) Accounting and Reporting Standard 2011, p. 32; **Exhibit RO-38**, Shell, Scope 3 Indirect GHG Emissions according to GHG Protocol Corporate Value Chain (Scope 3) Accounting and Reporting Standard, 2 August 2019.
100 **Exhibit RO-32**, Shell, Greenhouse gas emissions (website page 21 October 2019); **Exhibit RK-16**, Shell, Sustainability Report 2018, p. 80. Limited assurance is understood to mean: a limited degree of certainty.
101 **Exhibit RK-16**, Shell, Sustainability Report 2018, p. 81.
102 Id., p. 48.
103 Id.
104 Id., p. 47.

Shell plans to reduce the Net Carbon Footprint of the energy products it sells, in a society transitioning towards the goals of the Paris Agreement.

102. The NCF Ambition is Shell's long-term ambition to reduce the CO_2 intensity of the energy products it sells by around 50% by 2050, and by around 20% by 2035 as an interim measure.[105] To further this NCF ambition, Shell also started to set shorter-term targets in 2019. For example, it aims to reduce the CO_2 intensity of its energy products by 2 to 3% compared to 2016 within a period of three years. These short-term targets will be set annually for a three or five-year period.[106] Every five years, Shell will evaluate progress, informed by the Paris Agreement's five-yearly "*global stocktake*", among other things. Shell will report annually on progress regarding the NCF ambition in the RDS Sustainability Report.[107]

103. Shell wants to position itself to support demand, which is shifting towards a lower-carbon mix of energy products. The NCF Ambition is a metric designed to track the change in the energy products that Shell sells, in order to provide a comparison with the global energy mix. Shell's NCF is therefore an intensity-based metric focusing on Shell's contribution to the energy system. This metric enables Shell to provide energy to society while developing its business in a sustainable manner, thus fulfilling its obligations to its shareholders as well. As demand for energy grows, the total amount of energy that Shell contributes is likely to increase. An intensity-based metric allows Shell to focus on providing the energy that consumers want while contributing to the supply of a lower-carbon energy mix.

104. Shell will seek to reduce the CO_2 intensity per unit of energy products sold by the Shell companies, by increasing the proportion of products with lower emissions in the mix of products sold to consumers. This means fewer products with high emissions, and more products with lower or no emissions.[108]

105. To achieve this, the Shell companies will continue to manage emissions from their own business activities. Shell will continue to invest in low carbon technologies and operations to facilitate the transition, including via its New Energies business, which is discussed in Subsection 2.3.3 below.

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105 **Exhibit RO-39**, Shell, Shell's Net Carbon Footprint ambition: frequently asked questions.
106 Id.
107 Id.
108 **Exhibit RO-39**, Shell, Shell's Net Carbon Footprint ambition: frequently asked questions.

2.3.3 Shell is investing significantly in its New Energies business

106. In the Summons, Milieudefensie et al. assert that it must be feasible for Shell to achieve the emission reduction Milieudefensie et al. demand, because, among other things, having previously acknowledged the need for transformation to renewable energy, Shell moved away from renewables after 1998, according to Milieudefensie et al. Milieudefensie et al. assert that "*during the last ten years* [Shell] *failed to progress with expanding its renewable energy portfolio*".[109] This is not an accurate reflection of Shell's operations and decisions. It does not do justice to Shell's investments in renewable energy and the other initiatives that it is developing and will continue to develop for the energy transition. Shell is preparing itself to be well-positioned to meet consumer demand in a society transitioning towards the goals of the Paris Agreement.

107. The Shell group has a long history, dating back more than 100 years. Over that time, business operations have been modelled to reflect market movements and technological developments. In addition to the existing production and sale of fossil fuels, these business operations also include renewable energy.

108. The Shell group has long been investing in renewable and alternative energy sources. However, how those activities have been integrated into the different companies has varied over time, sometimes as part of stand-alone businesses, sometimes within existing business units, and sometimes both. It is correct, as Milieudefensie et al. assert,[110] that at some point Shell established Shell International Renewables ("**SIR**"). The intention was for SIR to stand alongside Shell's regular business operations. In 1997, Shell announced that it would be investing USD 500 million in this area over a five-year period.[111] SIR involved a number of different sources, such as solar energy, biomass, and investments in forestry, wind and hydrogen. Some of SIR's activities were more successful than others due to market conditions and technological challenges. Some of SIR's activities were also more in line with Shell's core business than others. It is correct that SIR has been discontinued as a stand-alone unit, as Milieudefensie et al. assert, but a number of activities have simply continued within the Shell group. Other activities were discontinued or scaled back. It is therefore incorrect to assert, as Milieudefensie et al. do, that Shell has abandoned its investments in and activities relating to renewable energy sources. As

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109 Summons, para. 624.
110 Summons, para. 567.
111 **Exhibit RO-40**, Shell, Sustainability Report 1998, p. 9.

mentioned above, some of the 'renewables' activities were continued within the Shell group. Shell continues to invest in wind, solar energy, hydrogen and biofuels, as well as in other low carbon initiatives, and is also always looking for opportunities to expand these investments.

109. Shell's early forays into the renewable energy sector demonstrated that companies cannot sell products if consumers are unwilling or unable to use them or if there is a lack of technology or government policy to support new steps in that direction. At that time, for example, Shell built hydrogen fuelling stations for cars in various countries, but there was no demand for them, so there was no reason for further expansion of the network at the time. Hydrogen vehicles have been taken into production on a commercial scale only recently, prompting the expansion of Shell's network of hydrogen fuelling stations. Sustained expansion into renewable energy requires the support of market forces. Those market forces are then driven in part by national governments implementing the required national policy and legal frameworks to promote and support consumer demand and investments by businesses.

110. Many of the renewable (also known as alternative or lower carbon) energy activities have now been transferred to the New Energies business. The New Energies business was set up in 2016. Up to and including 2020, Shell aims to invest an average of USD 1 to 2 billion a year in lower carbon solutions, including biofuels, hydrogen, solar and wind energy, and electric car charging facilities.[112] Shell's lower carbon activities can be found not only in the New Energies business, but also in business units such as Shell Downstream, Integrated Gas and Power.

111. Shell anticipates strong growth in demand for New Energies in the coming decades.[113] In light of this, Shell expects to develop new business models swiftly, implement projects at scale and make them commercially viable.[114]

112. The success of many of the New Energies initiatives, as well as other initiatives to reduce or offset CO_2 emissions, depends on market conditions

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112 **Exhibit RO-41**, Shell, This is Shell's New Energies business.

113 **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 43.

114 **Exhibit RO-42**, Shell, Shell New Energies to add Hundreds of Jobs in the Netherlands; Shell to Invest More than $200 Million in New Shell Campus in The Hague, 10 September 2018. In the Netherlands alone, the New Energies business has added around 150 jobs over the last two years, organically and through acquisitions. By 2023, Shell expects that number to grow to around 500 to 700 jobs in the New Energies hub in the Netherlands, and sees potential for this number to rise further beyond that date, depending on business opportunities in the Netherlands and globally.

and other factors.[115] As these in turn depend on the relevant regulatory framework and public policies, they vary from country to country, as discussed in Section 2.7 below. Market mechanisms, for example, are key to the success of CCS, which requires a stable CO_2 price to be economically viable. The following are examples of New Energies initiatives and projects, many of which are still in the start-up phase.

113. First, Shell has investments in solar and wind renewables, including:

(a) interests in a number of wind and solar power generation projects in the USA (five) and the Netherlands (one) and interests in three more under development, with an installed capacity of more than 5 gigawatts, (the Netherlands Borssele III and IV wind farms alone, which are currently under development, are designed to have a total installed capacity of 731.5 MW, enough to power around 825,000 Dutch households);

(b) an acquisition of nearly 44% in U.S. solar company Silicon Ranch Corporation, a solar company with an existing portfolio of approximately 880 megawatts;

(c) interests in solar projects in the USA, South East Asia, and India, and an agreement to purchase electricity from solar plants in the UK, Italy, and the USA; and

(d) the use of solar photovoltaic deployment in its own operations, including offices, retail sites, distribution terminals, refineries, and offshore installations.[116]

114. Second, Shell is one of the world's largest producers and distributors of biofuels and continues to invest in new ways of producing advanced biofuels from sustainable feedstock.[117] Biofuels today make up around 3% of global transport fuels, and Shell expects that share to grow as the world shifts to lower carbon energy.[118] On an entire life cycle basis, from cultivation to consumption, some biofuels emit significantly less CO_2 than regular petrol, depending on factors such as how the feedstock is cultivated (in particular land use changes) and the way the biofuels are produced.[119]

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115 One of these factors is the availability of raw materials, such as the requisite minerals and metals. See, for example, **Exhibit RO-43**, World Bank, New World Bank Fund to Support Climate-Smart Mining for Energy Transition, 1 May 2019.
116 **Exhibit RK-16**, Shell, Sustainability Report 2018, pp. 56-57.
117 **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 66.
118 Id.
119 Summons, Exhibit 021, IPCC, AR5, WGII, Ch. 8, pp. 616, 624, 629.

In 2019, Shell partnered with Maersk and other companies in a pilot project to have a Triple-E vessel sail on biofuel blends alone, using up to 20 per cent sustainable second generation biofuels.[120] Shell has also partnered with other companies to advance the use of sustainable aviation fuel.[121] In Brazil, the Raizen joint venture (in which Shell has a 50% interest) produces approximately two billion litres of low-carbon biofuel (ethanol) annually from sugar cane. From cultivation of the sugar cane to using the ethanol as fuel, this can reduce CO_2 emissions by around 70% compared with regular petrol.[122]

115. Third, Shell is helping to build the infrastructure needed to promote the generation of electricity from hydrogen. Electricity from hydrogen has great potential to help meet growing demand for transport fuel, while reducing emissions and improving air quality. Hydrogen fuel-cell electric vehicles produce no CO_2 emissions – the only emission is water vapour. If the hydrogen is produced using renewable energy, this means that the fuel for these vehicles is virtually emission-free from production to distribution.[123]

116. Hydrogen and fuel cell technologies have the potential to facilitate the transition to a clean and low carbon energy system. Shell is taking part in several initiatives in various countries to encourage the adoption of hydrogen-electric energy as a transport fuel.[124] Shell is also working in Germany with the German government to develop a national network of around 400 hydrogen-electric fuelling stations. With 70 fuelling stations already in operation, the network should be finished by 2023.[125] In April 2018, Shell – together with Anglo American Platinum – invested in High-Yield Energy Technologies. This is a Dutch company that has developed new technology that will support the adoption of hydrogen fuel-cell electric vehicles by cost-effectively and reliably compressing hydrogen.[126]

117. Fourth, in line with RDS's strategic purpose of providing more and cleaner energy solutions, Shell is also expanding into supplying electricity for transport. In 2019, Shell New Energies US LLC acquired Greenlots, a leader in electric vehicle charging and energy management software and

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120 **Exhibit RO-44**, Maersk, Maersk partners with global companies to trial biofuel, 22 March 2019; **Exhibit RO-45**, Van Oord, Van Oord and Shell together in biofuel pilot for vessels, 19 September 2019.

121 **Exhibit RO-46**, Shell, Shell Aviation and Skynrg agree to strategic collaboration to advance use of sustainable aviation fuel, 30 May 2018.

122 **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 66; **Exhibit RK-16**, Shell, Sustainability Report 2018, p. 59.

123 **Exhibit RK-16**, Shell, Sustainability Report 2018, p. 60.

124 **Exhibit RK-16**, Shell, Sustainability Report 2018, p. 61.

125 Id. See also https://h2.live/en for an overview of all fuelling stations.

126 **Exhibit RO-47**, Anglo American Platinum, Anglo American Platinum Invests in High-Yield Energy Technologies, 18 April 2018.

solutions.[127] In October 2017, Shell acquired Netherlands-based NewMotion, one of Europe's largest electric vehicle charging providers. NewMotion operates more than 40,000 private electric charge points in homes and offices in the Netherlands, Germany, France and the UK. It also provides 100,000 registered charge card users access to over 80,000 public charge points across 28 European countries. Shell introduced electric charging points on 10 of its forecourts in the UK in 2017 growing that number to 50 today.[128] Shell service stations in the UK are powered by 100% renewable electricity. Shell is also building a connected network of fast charging points across Shell retail stations in the Netherlands. In 2017, Shell signed an agreement with charging network operator IONITY to offer high-powered charging points in ten European countries, with one station already operational near Apeldoorn.[129]

118. Fifth, Shell is expanding its power business in anticipation of the world moving to lower-carbon energy. In June 2019, RDS announced that power is one of its new growth engines. Electricity from renewable sources, such as wind and solar, can be combined with electricity produced by natural gas. Together, they can provide cleaner sources of power.[130]

119. In particular, Shell is expanding its business by marketing and selling (though not producing) electricity, including power from renewable sources, in the Americas and Europe. Shell already plays a significant role as an electricity trader and wholesale supplier in North America, managing more than 10,000 MW of power generation in the continent, with more than a third of that electricity produced by renewables.[131] Shell is also developing ways to provide electricity to those who have unreliable access or none at all. Shell's ambition is to provide a reliable, lower-carbon electricity supply to 100 million people in the developing world by 2030,[132] and is committed to supplying electricity generated from renewable sources to all Shell Energy customers.

120. In 2018, Shell started supplying energy to residential customers directly for the first time by acquiring First Utility (now Shell Energy Retail Ltd), a leading independent UK energy provider to 720,000 households in the

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127 **Exhibit RO-48**, Greenlots, Greenlots announces acquisition by Shell, one of the world's leading energy providers, 30 January 2019.
128 For an overview, see https://www.shell.co.uk/motorist/station-locator.html (select "EV charging").
129 **Exhibit RK-16**, Shell, Sustainability Report 2018, p. 60; **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 65.
130 **Exhibit RK-16**, Shell, Sustainability Report 2018, p. 56.
131 Id.; **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 64.
132 **Exhibit RK-16**, Shell, Sustainability Report 2018, p. 56.

UK.[133] In 2019, Shell Overseas Investment B.V. acquired *sonnen*, a leader in smart energy storage systems for households.[134] This takes advantage of Shell's existing gas and power trading capabilities while creating opportunities for future growth in those areas.

121. Sixth, new technologies complement Shell's activities, adding to its work in the New Energies business, in both new fuels and power. In an effort to help society in the energy transition, Shell has developed and invested in a range of technologies to help its customers reduce their GHG emissions, decreasing the demand for fossil fuels.

122. Shell is also helping customers better manage their energy use, including the use of solar and electricity storage. In 2017, Shell Technology Ventures invested in Innowatts, which aggregates data from smart meters to help customers understand how to lower energy bills by making changes to their energy use – for example, by limiting consumption during peak times or making insulation and efficiency improvements to homes and businesses.[135]

123. In the Netherlands, Shell offers non-Shell companies and consumers the opportunity to compensate for the carbon emissions associated with the use of their vehicles by paying a fee per litre of fuel, which Shell invests in reforestation and other related projects. The programme is set up in such a way that emissions have already been offset at the time of the consumer's purchase. This calculates and compensates for CO_2 emissions from fuel used in vehicles (with Shell offsetting CO_2 emissions from the extraction of crude oil until the petrol station), helping companies and individuals reduce the environmental impact of their operations. Shell also offers carbon offsetting to consumers and business customers in the United Kingdom, and to business customers in Belgium, France, Germany, Luxembourg, and Hong Kong, and continues to explore opportunities to expand this service to customers in other countries.[136]

124. Further, Shell works to help its customers improve their energy efficiency through the development and sale of advanced fuels, lubricants and chemicals.[137] Energy efficiency can help deliver up to 35% of what is

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133 Id., p. 57.
134 **Exhibit RO-49**, Shell, Shell agrees to acquire sonnen, expanding its offering of residential smart energy storage and energy services, 15 February 2019.
135 **Exhibit RO-50**, Innowatts, Innowatts Raises $6 Million in Series A Round, 22 August 2017.
136 **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 69; **Exhibit RK-16**, Shell, Sustainability Report 2018, p. 51; **Exhibit RO-51**, Shell UK, Drivers Set to Go Carbon Neutral With Shell (website page 28 October 2019).
137 **Exhibit RO-52**, Shell, Energy Transition Report 2016, p. 20.

needed to keep global warming below 2°C by 2050, according to the International Energy Agency.[138]

125. Shell continues to invest in research and development to improve the efficiency of its products, processes and operations, and additionally to commercialise new technologies for the transition to a low-carbon future.

126. As can be seen through all these activities, Shell is already invested in the energy transition despite no (legal or other) obligation to do so, and without court intervention.

2.3.4 Shell is investing in CCS and nature-based projects

127. Shell is investing in CCS projects and nature-based projects in order to capture or offset emissions. CCS uses a combination of technologies to capture CO_2 produced by major industrial facilities, such as steel, chemical, and power plants, and to store the captured CO_2 deep underground, preventing its release into the atmosphere. In some cases, the CO_2 is used rather than stored, for example by injecting it into ageing fields to enhance the volume of oil recovered or by using it as a feedstock in industrial processes. This technology is called Carbon Capture Usage and Storage (defined earlier as "**CCUS**").[139]

128. CCS is considered a vital technology for achieving net zero CO_2 emissions globally. For example, it has the potential to cut emissions from stationary fossil fuel combustion sources by 65-85%.[140] The International Energy Agency also states that "*CCS is currently the only large-scale mitigation option available to make deep reductions in the emissions from industrial sectors such as cement, iron and steel, chemicals and refining.*"[141] CCS projects are happening and the technology is proven, but many more of such projects are necessary. This also requires a government policy of incentivisation.

129. The use of CCS will be necessary to meet the goals of the Paris Agreement and reach global net zero emissions. Various scenarios based on the goals of the Paris Agreement emphasise that CCS must play a significant role in the global climate response. For example, of the four transition pathways in the IPCC's Special Report: "Global Warming of 1.5°C", three include large

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138 **Exhibit RK-16**, Shell, Sustainability Report 2018, p. 52.
139 **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 69.
140 Summons, Exhibit 110, IPCC AR5, WGIII, SPM, p. 20; **Exhibit RO-53**, Benson et al., Carbon Capture and Storage, 2012, Chapter 13: Carbon Capture and Storage, p. 997. See also Summons, Exhibit 136, IPCC 2018 SR15, Ch. 2, pp. 134-136.
141 **Exhibit RO-54**, IEA, Technology Roadmap: Carbon capture and storage 2013, p. 8.

components of CCS (including Bioenergy with CCS, or BECCS, which uses "*biomass conversion technologies and underground storage*" to remove CO_2 from the atmosphere).

130. Recognising that demand for energy will continue to increase and that some level of fossil fuel use will remain within global energy systems in the long term, the IPCC Special Report concludes that "*early scale-up of industry CCS is essential to achieve the stringent temperature target.*"[142] The International Energy Agency estimates that a scenario consistent with a 50% chance of limiting global warming to 2°C would require deploying CCS to capture 6.8 gigatonnes annually, compared to only 30 million tonnes actually captured in 2017.[143] The IPCC has estimated that keeping to a 2°C pathway would cost global society approximately 140% more without CCS.[144]

131. According to Shell's Sky scenario, CCUS will also be a leading solution for industrial transformation. The technology may be utilised to manufacture certain building materials, plastics, or biomass feedstock. Sky also envisages a greater utilisation of conventional CCS facilities, with thousands being built near large source emitting facilities. All told, these mechanisms could handle trillions of tonnes of CO_2 over the course of the century.[145] By the end of 2018, 43 large-scale CCS projects were in operation or under construction globally.[146]

132. Shell has invested in the development of various CCS programmes for many years.[147] Shell actively shares its know-how about CCS publicly by sharing technical designs.[148]

133. The Court of Appeal held in *Urgenda* that scenarios based on technologies that remove CO_2 from the atmosphere are not very realistic, given the uncertainty surrounding their eventual development. However, these

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142 Summons, Exhibit 136, IPCC 2018 SR15, Ch. 2, p. 140.
143 **Exhibit RK-10**, IEA, Energy Technology Perspectives Report 2017, p. 38.
144 Summons, Exhibit 020, IPCC AR5, SYR, p. 25 (Table SPM.2).
145 **Exhibit RK-2**, Shell, Sky Report 2018, p. 56.
146 **Exhibit RO-55**, Global CCS Institute, Status Report 2018.
147 **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 69; **Exhibit RK-16**, Shell, Sustainability Report 2018, p. 50; **Exhibit RO-56**, Shell, Sustainability Report 2017, pp. 21-22; **Exhibit RO-52**, Shell, Energy Transition Report 2016, pp. 24-25; **Exhibit RO-57**, Shell, Sustainability Report 2016, pp. 18-23; **Exhibit RO-58**, Shell, Sustainability Report 2015, pp. 19-21.
148 **Exhibit RO-59**, Shell, Carbon Capture and Storage Projects (website page 29 August 2019), p. 2: "*Shell is sharing the knowledge and lessons learned from building Quest to encourage more widespread implementation of CCS.*"

reservations do not appear to relate to current forms of CCS as such, but rather to direct air capture technologies.[149]

134. Established CCS projects demonstrate that CCS technology *is already in place and works.* The IPCC's Special Report reinforces the importance of government and public investment in CCS technologies. The IPCC states that the uncertainty surrounding CCS concerns "*the feasibility of timely upscaling,*" which is only uncertain because of "*lack of regulatory capacity and concerns about storage safety and cost.*" The primary limitation on CCS, the IPCC noted, is not the *technology*, but the lack of "*social acceptance*" and public engagement.[150] Governments can overcome these through regulatory and financial incentives, such as in the Dutch Climate Agreement (*Klimaatakkoord*).

135. CCUS, which includes the *usage* of captured CO_2, is gaining increasing global recognition as a key tool, for example by the UK Committee on Climate Change, which provides independent advice to the UK and Dutch governments on climate change matters.[151] However, commercial viability for CCUS plants would require governments to lower CCUS deployment costs.[152]

136. Market mechanisms to mitigate GHG emissions and support sustainable development – as envisaged in Article 6(2) and 6(4) of the Paris Agreement – can ultimately result in a coordinated, global carbon market. This will help create a carbon price that will make CCS more economically viable and give end users the option of neutralising CO_2 emissions.

137. Government policy and appropriate financial incentives are for the time being essential to the success of CCS. The failed Peterhead project in the UK is an illustrative example. In 2012, recognising that CCS technology was likely to be a crucial part of the most efficient path to net zero CO_2 emissions in the UK, and thus that there was a need to facilitate CCS investment, the UK government announced its CCS Commercialisation Programme. CCS contracts were awarded to two parties, Shell UK and Scottish Southern Energy, for the Peterhead project in Aberdeenshire.[153] In November 2015, the UK government announced that the GBP 1 billion ring-

149 Court of Appeal of The Hague 9 October 2018, ECLI:NL:GHDHA:2018:2591, para. 49.
150 Summons, Exhibit 136, IPCC 2018 SR15, Ch. 4, pp. 175, 191, 197.
151 **Exhibit RO-60**, Committee on Climate Change, Net Zero: the UK's contribution to stopping global warming, May 2019, pp. 326, 383.
152 **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 68.
153 **Exhibit RO-61**, HM, Future of carbon capture and storage in the UK, Second Report of Session 2015-16, p. 15.

fenced capital budget for the project would be withdrawn.[154] Without this funding, the economic and commercial case for the Peterhead project was undermined and Shell UK had to abandon the project.[155]

138. One of Shell's current projects is the Quest CCS project in Canada, which captures and stores CO_2 from the Scotford Upgrader. The project, for which the governments of Canada and the Canadian province of Alberta provided USD 120 million and USD 745 million respectively,[156] has been very successful. In its first three years of operation, Quest captured and safely stored more than 3 million tonnes of CO_2.[157] In May 2019, Quest hit another milestone, sequestering 4 million tonnes of carbon dioxide around six months ahead of schedule, and at a lower cost than estimated.[158]

139. Shell is also involved in the Gorgon CO_2 injection project in Australia, which is due to commence in 2019 and will be the world's largest CCS operation when completed. This project will capture and store 3.4 to 4 million tonnes of CO_2 per year. It is envisaged that around 100 million tonnes of CO_2 will be captured and stored over the entire life of the project.[159]

140. Shell also invests in enhancing the effectiveness of existing CCS technology. For example, Shell recently extended its ongoing collaboration with the Norwegian government at the Technology Centre Mongstad (TCM) to further research and development into CCS and reduce this technology's costs. Shell and TCM are also working on a large-scale project to capture CO_2 from industrial facilities in Eastern Norway.[160] Shell will provide a monetary contribution to support the work of the International Energy Agency over the next three years to enable the agency to increase its focus on partnerships and work with partner countries to accelerate CCUS deployment.[161]

141. Further, Shell is supporting the EU's efforts to attain deep emission cuts in heavy industries such as cement, steel and petrochemicals by utilising CCS technology.[162] The EU signalled its recognition of the vital role of this

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154 **Exhibit RO-62**, Telegraph, UK scraps £1bn carbon capture and storage competition, 25 November 2015.
155 **Exhibit RO-63**, Shell UK, Energy and Climate Change Committee Inquiry into the Future of CCS in the UK, 15 January 2016.
156 **Exhibit RO-64**, Shell, Quest carbon capture and storage project reaches significant one-year milestone, 14 September 2016.
157 **Exhibit RK-16**, Shell, Sustainability Report 2018, p. 50.
158 **Exhibit RO-65**, Shell, Quest CCS Facility Reaches Major Milestone: Captures and Stores Four Million Tonnes of CO_2, 23 May 2019.
159 **Exhibit RK-16**, Shell, Sustainability Report 2018, p. 50.
160 Id.
161 Id.
162 **Exhibit RO-66**, EURACTIV, EU Clarifies funding scope for CO_2 capture technology, 10 July 2019.

technology by extending funding for CCS. The EU has called on national governments to similarly improve CCS project funding in their countries.[163]

142. At the same time, Shell is also engaged in nature-based projects. These projects, which also support local communities and conserve biodiversity, generate carbon-emission rights – each right representing one tonne of carbon dioxide not emitted – that can then be bought by energy consumers around the world.[164] Nature-based climate solutions have the potential to deliver more than a third of the greenhouse gas emissions reductions.[165]

143. Just this year, Shell committed to a substantial reforestation initiative with a global scope. Shell will work with Dutch forestry service Staatsbosbeheer to plant more than 5 million trees in the Netherlands, while in Spain Shell is working on a 300-hectare reforestation project with a goal of planting 300,000 trees by the end of the year.[166] Shell companies have also advanced projects in Australia and Malaysia, and have committed to investing a total of USD 300 million in such nature-based projects.[167]

144. Most nature-based projects that Shell companies work with are certified by the Verified Carbon Standard, the largest voluntary GHG certification programme, and the Climate, Community & Biodiversity Standard, which verifies that projects not only address climate change, but also support local communities and conserve biodiversity.[168] In addition, Shell supports third-party projects such as the Kasigau Corridor project in Kenya, which protects 500,000 acres of a threatened area of forest while preserving biodiversity and wildlife habitat.[169]

2.3.5 Shell also invests in oil and gas to meet continued demand

145. In order to meet growing energy demand during and beyond transition to a carbon-neutral society, Shell intends to continue investment in its oil and gas business. These investments are part of Shell's energy transition-aligned strategy.[170]

146. The continuing need for investment in oil and gas projects has been explained in Subsection 2.2.3. Milieudefensie et al. argue that continuing to

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163 Id.
164 **Exhibit RK-16**, Shell, Sustainability Report 2018, p. 51.
165 **Exhibit RO-67**, Griscom et al., Natural Climate Solutions, 31 October 2017.
166 **Exhibit RO-68**, Shell, Shell invests in nature as part of broad drive to tackle CO_2 emissions, 8 April 2019.
167 Id.
168 **Exhibit RK-16**, Shell, Sustainability Report 2018, p. 51.
169 **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 69.
170 **Exhibit RO-69**, RDS, Management Day 2019.

invest in fossil fuels exposes RDS to the risk of projects being prematurely terminated due to stricter climate policies, leading to 'stranded assets' or a 'carbon bubble'.[171] To the extent that RDS's investments even involve such risks, these are business matters that are solely for RDS to evaluate. Given the fact that energy demand will increase in the decades ahead, and various transition scenarios contemplate the continued relevance of oil and gas to meet that growing demand, RDS's current conclusion is that there is a low risk of stranded assets in the medium term.[172]

147. Milieudefensie et al. further argue that Shell's ongoing investments in fossil fuel activities will create 'carbon lock-in' as Shell will seek to protect and develop its investments, thereby delaying the energy transition in Milieudefensie et al.'s view.[173] Milieudefensie et al. once again give an incomplete and incorrect representation of reality. As previously noted, current and future oil and gas investments are required to meet continuing and growing energy demand. These investments thus actually *complement* investments in renewables, power, and new fuels, as well as CCS and nature-based solutions to serve as carbon sinks and to prevent CO_2 emissions or remove emitted CO_2 from the atmosphere. All of these measures will be essential in the energy transition and to meet the world's continuing energy demand.[174]

148. More specifically, Milieudefensie et al. criticise RDS for Shell's oil sands investment in Canada from 2007 onwards.[175] However, the relevant Shell company, Shell Canada, divested most of this investment in 2017.[176] As explained above in Subsection 2.3.4, Shell Canada is currently involved in the Quest CCS project with full support from the Canadian government. Shell's experience in Canada demonstrates the point made in Subsection 2.2.5: the pace and shape of energy transition varies from country to country and is largely driven by regulatory frameworks within each country and national government policy.

149. Milieudefensie et al. nevertheless use a decade-old advertisement about Shell Canada's oil sands investment to suggest that, rather than collaborating to move the energy transition forward, RDS is instead

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171 Summons, paras. 781-786.
172 **Exhibit RK-7**, Shell, Energy Transition Report 2018, pp. 11, 27, 37.
173 Summons, paras. 787-793.
174 **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 26.
175 Summons, paras. 577-580. They also mention shale oil and gas and LNG, but without giving any explanation of what these are.
176 **Exhibit RO-70**, Shell, Shell completes divestment of oil sands interests in Canada, 31 May 2017.

misleading the public "*about the (non) sustainability of its course*".[177] This concerns the ruling of the UK Advertising Standards Authority regarding an advertisement about Shell's climate policy.[178] The UK Advertising Standards Authority found that, in light of 'sustainability' being an ambiguous term, absent "*data that showed how Shell was effectively managing carbon emissions from its oil sands projects and that showed the extent to which those emissions would be lowered*" the use of the word 'sustainability' in the ad was misleading. The Authority determined that the ad must not be reprinted in its current form and was satisfied by Shell's assurance that it "*was a one-off and would not be repeated*".[179]

150. Milieudefensie et al. refer to three other advertisements where they also – erroneously – allege that RDS was reprimanded for misleading the public "*by selling fossil fuels as being sustainable*".[180] Two of the examples relate to an advertisement in the UK and the Netherlands about using waste CO_2 to grow flowers and waste sulphur to make concrete.[181] The complaint was partly upheld, on the grounds that the language was too absolute: some, but not most or all, recovered CO_2 and sulphur waste was used for growing flowers and making concrete respectively, and the advertisement did not make that clear.[182] The later 2011 Dutch Advertising Code Committee complaints cited by Milieudefensie et al. related to Shell's reduction of CO_2 emissions in certain projects and its focus on natural gas as a cleaner alternative to other fossil fuels, such as coal. Shell was not reprimanded on either occasion; in fact, the 2011 complaints were rejected in their entirety.[183]

151. Shell has made clear its aim to continue to produce and sell the oil and gas products that society demands, while expanding the mix of low-carbon energy products and it aims to do so in a commercially responsible manner.[184] Current investments in oil and gas also generate funds for Shell to pursue research and development opportunities and to develop new technologies. In 2017, Shell's New Energies business allocated USD 1 to 2 billion in cash capex on average per year until 2020.[185] In June 2019, Shell

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177 Summons, paras. 581-585. As the statement in Exhibit 198 to the Summons referred to is nothing but a response to the same examples, it will not be discussed separately.
178 **Exhibit RO-71**, Ruling UK Advertising Standards Authority, 13 August 2008.
179 Id.
180 Summons, paras. 583-584.
181 **Exhibit RO-72**, Ruling UK Advertising Standards Authority, 7 November 2007.
182 Id.
183 **Exhibit RO-73**, Dutch Advertising Code Committee (2011/00012), 7 March 2011; **Exhibit RO-74**, Dutch Advertising Code Committee (2011/00012A), 7 March 2011.
184 **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 37.
185 **Exhibit RO-75**, RDS, Royal Dutch Shell plc 2017 Management Day: Shell updates company strategy and financial outlook, and outlines net carbon footprint ambition, 28 November 2017.

expressed to investors its expectation to increase its power cash capex to an average of USD 2 to 3 billion per year from 2021 to 2025 subject to demonstration of a path towards self-funding and meeting financial milestones by 2030.[186] Importantly, these investments would not be commercially plausible without Shell's existing revenue streams.

2.3.6 RDS carefully considers the future direction of Shell energy investments, taking account of shareholder views

152. The energy system is undergoing enormous change. Energy providers must continue to meet growing demand in the face of these developments and do so in a sustainable way. Shell is seeking to be a key player in the energy transition by taking the opportunities to be found within that transition and changing the mix of energy products it sells to meet evolving demand.[187] It is exercising its best business judgement to this end based on years of expertise and experience, taking into account duties to its shareholders. Shell's leading role is recognised by investors, who describe Shell as "*setting the pace*"[188] for other major companies to follow its lead.[189]

153. In these proceedings, Milieudefensie et al. are seeking, by way of a court order, to force RDS not only to bypass that business judgement, but also to bypass the will of the shareholders themselves. Indeed, the issues surrounding climate change, energy transition and Shell's investments (and the course to be taken going forward) were discussed several times at the Annual General Meetings of 2015, 2016, 2017, 2018 and 2019. On each occasion, the shareholders rejected the very relief sought by Milieudefensie et al. in this action.

154. In 2015, the shareholders resolved, with 98.9% support, that "*in order to address* [their] *interest in the longer term success of the Company, given the recognised risks and opportunities associated with climate change,*" annual reporting from 2016 would include further information, including the current handling of emissions from business operations, low-carbon energy research and development and related investment strategies, and government positions as regards climate policy. The Summons incorrectly states that "*climate-related shareholder resolutions of 2015* [...] *previously*

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186 **Exhibit RO-69**, RDS, Management Day 2019.

187 See Ben van Beurden Speech at 2019 Royal Dutch Shell Annual General Meeting, **Exhibit RK-20**, RDS, Annual General Meeting Speeches 2019.

188 **Exhibit RO-30**, Shell, Leading investors back Shell's climate targets, 3 December 2018, p. 2.

189 See also **Exhibit RO-76**, CNBC, Shell activist investor withdraws resolution targeting climate policy, 8 April 2019; **Exhibit RO-77**, Bloomberg, Shell Activist Investor Withdraws Climate Resolution for 2019, 7 April 2019; **Exhibit RO-78**, Reuters, Activist group withdraws resolution challenging Shell climate policy, 8 April 2019.

submitted [...] *were rejected by the management and the shareholders' meeting*".[190] Instead, as part of its commitment to transparency, the RDS Board of Directors had recommended that the shareholders support the climate-related shareholder resolution of 2015.[191] RDS has followed that policy ever since.

155. In 2016, the Dutch NGO Follow This submitted a resolution requesting that Shell swap its investment in oil and gas for renewables.[192] The RDS Board recommended that the shareholders reject this resolution as being against the best interests of the company. The Board emphasised that the energy transition would take multiple decades, with a significant scale of investment being required. As a result, the Board stated that "*tying the Company's hands to a renewables only mandate would be strategically and commercially unwise*".[193] 97.2% of shareholders agreed with this recommendation and rejected the resolution.[194]

156. In 2017 and 2018, Follow This submitted resolutions requesting that Shell set and publish concrete targets aligned with the 2°C goal of the Paris Agreement.[195] The Summons incorrectly states that in 2017 "*the management* [...] *formally decided that Shell will not conform to* [the Paris Agreement] *objective*".[196] As a matter of fact, prior to the 2017 Annual General Meeting, the Board of Directors had already expressly stressed its support for the Paris Agreement and set out why the proposed resolution would be ineffective – or counterproductive – to achieving the object of that agreement.[197] Milieudefensie et al. mistakenly argue that the Board rejected the 2017 resolution because it was "*still in favour of the expansion of its fossil fuel activities*".[198] The Board clearly explained that it was in the best interests of RDS to maintain the flexibility needed to thrive in step with society however the energy transition plays out. In both 2017 and 2018, the Board of Directors warned that "*the resolution could, if supported, tie the hands of existing and future Shell group companies' management to measures which could force the Company to move too quickly – or too*

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190 See **Exhibit RO-79**, RDS, Notice of Annual General Meeting 2015, pp. 5, 9-10. Cf. Summons, para. 812, which incorrectly states that "*climate-related shareholder resolutions of 2015* [...] *previously submitted* [...] *were rejected by the management and the shareholders' meeting*".

191 Speech of Chairman and CEO, Annual General Meeting 2015, **Exhibit RO-80**, RDS, Annual General Meeting Speeches 2015, p. 4.

192 See **Exhibit RO-81**, RDS, Notice of Annual General Meeting 2016, p. 10.

193 Id.

194 See **Exhibit RO-82**, RDS, Results of Annual General Meeting 2016.

195 **Exhibit RO-83**, Follow This, Climate resolutions for BP and Equinor in 2019, 21 December 2018.

196 Summons, para. 809.

197 Summons, Exhibit 097, Shell Notice of Annual General Meeting 2017, p. 7, as cited in Summons, para. 811.

198 Summons, para. 811.

slowly – through the energy transition," the pace of which will be determined by end users of energy and the steps taken by governments to influence market behaviour.[199]

157. The shareholders rejected these resolutions on climate targets. Specifically, the climate resolutions submitted by Follow This in 2017 and 2018 secured the support of only 6.3%[200] and 5.5%[201] of the votes, respectively. The shareholders considered it was in the best interests of the company to maintain flexibility in the continuously changing energy transition landscape.[202]

158. Milieudefensie et al. have long been shareholders in RDS. Nonetheless, Milieudefensie et al. have been unable to convince their fellow shareholders to adopt the stringent limits they are now requesting from the court. Milieudefensie et al. are attempting to argue that the RDS Board wrongly urged shareholders to reject the resolutions, thereby implying that these shareholders blindly followed RDS's recommendations.[203] Milieudefensie et al. are wrong: (i) in discharging its legal duties, the Board must take all actions necessary to promote RDS's success and, therefore, must communicate with shareholders regarding whether a shareholders' resolution is in RDS's best interest;[204] and (ii) RDS has many thousands of shareholders who represent all sorts of diverse economic and social interests.

159. Many of RDS's institutional shareholders, including Robeco, the Church of England Pensions Board and APG on behalf of ABP, have – in a manner similar to some of the Claimants – expressed public commitment to responding to climate change.[205] These shareholders had before them not only the RDS Board's views but also those presented by Follow This in support of its resolution. They were able to make independent judgements on each of the resolutions. Indeed, it is important to note that many of these shareholders expressed public support for RDS's progressive

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199 Summons, Exhibit 098, Shell Notice of Annual General Meeting 2018, p. 8. See also Summons, Exhibit 097, Shell Notice of Annual General Meeting 2017, p. 7.

200 See **Exhibit RO-84**, RDS, Results of Annual General Meeting 2017.

201 See **Exhibit RO-85**, RDS, Results of Annual General Meeting 2018.

202 See Speech of Chairman and CEO, Annual General Meeting 2018, **Exhibit RO-86**, RDS, Annual General Meeting Speeches 2018, p. 6.

203 Summons, paras. 300-301.

204 **Exhibit RO-87**, UK Companies Act 2006 (Article 172), Section 172. See e.g. The Companies (Miscellaneous Reporting) Regulations 2018, which require directors to explain how they have had regard to the best interests of the company in performing their duty to promote the success of the company, in Section 172 of the Companies Act 2006. Further, the UK Corporate Governance Code 2018 requires directors to use general meetings to communicate with and encourage engagement from shareholders.

205 See, for example, **Exhibit RO-88**, Joint Statement RDS and Climate Action 100+, 3 December 2018.

announcement in late 2017 of its NCF Ambition, discussed above in Subsection 2.3.2.[206]

160. In late 2018, Follow This submitted a third and final resolution, requiring Shell to set and publish concrete targets aligned with the goal of the Paris Agreement. In April 2019, Follow This withdrew this resolution. In doing so, it cited RDS's considerable progress in developing its climate policies.[207]

161. RDS listens to its critics, supporters and shareholders to understand their views of Shell's investments and strategy. Climate is and remains a mainstream concern at investor meetings and Annual General Meetings. RDS is listening and responding to that in alignment with its business decisions as it aims to provide more and cleaner energy as the world moves to a low-carbon energy system.

2.3.7 Shell collaborates with others, seeking to work as part of a coordinated effort to drive system transformation in the energy sector

162. In Shell's view, a coordinated global response is the only way to tackle climate change. This requires assertive government action, including through change in national regulatory and policy frameworks, as well as through multi-stakeholder collaboration. Shell recognises the benefits of collaboration in tackling climate change. Even prior to the Paris Agreement, RDS's CEO, Mr Ben van Beurden, publicly urged the oil and gas industry to take an active role in discussions on credible ways of addressing climate change.[208] In addition to Mr Van Beurden, other RDS executives have often publicly addressed the important role that the oil and gas industry can have in discussions on the energy transition.

163. Shell has a long history of cooperating with others – including market participants, academics and NGOs – to consult on international and national policy and other frameworks, sharing its knowledge and experience in respect of the energy system, including with policymakers. Milieudefensie et al. attempt to characterise RDS as "*hampering the energy transition*", presenting "*a formidable obstacle to the solution*" on climate change[209] and contributing to "*the lobbying power of the big multinationals around the*

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206 **Exhibit RO-75**, RDS, Royal Dutch Shell plc 2017 Management Day: Shell updates company strategy and financial outlook, and outlines net carbon footprint ambition, 28 November 2017, https://www.shell.com/investors/news-and-media-releases/investor-presentations/2017-investor-presentations/2017-management-day.html.

207 See **Exhibit RO-76**, CNBC, Shell activist investor withdraws resolution targeting climate policy, 8 April 2019. See also **Exhibit RO-77**, Bloomberg, Shell Activist Investor Withdraws Climate Resolution for 2019, 7 April 2019.

208 **Exhibit RO-89**, RDS, CEO Speech UK – Less aloof, more assertive, 12 February 2015.

209 Summons, para. 28.

world".[210] That is a mischaracterisation. As will be explained in Subsections 2.3.7.1-2.3.7.3, Shell works constructively with national governments, international organisations and trade associations as regards climate change.

2.3.7.1 Shell works with national governments

164. At the national government level, Shell supports solid energy and energy transition policies.[211] There are many examples of this both in the Netherlands and abroad. In the Netherlands, for example, Shell is working with policymakers and industry representatives to help the Dutch government meet its target of reducing GHG emissions by 80 to 95% by 2050.[212] As recently as September 2019, Shell Netherlands confirmed its support for the Dutch Climate Agreement in a letter to the chair of the Dutch Climate Commission.[213] In July 2019, CEO Ben van Beurden voiced his express support for the EU target of net zero emissions by 2050, describing RDS and the government as "*natural partners*".[214] Over sixty countries, including the Netherlands and the UK, responded to the latest IPCC report by declaring their intention to achieve net zero CO_2 emissions by 2050.[215] The UK has now also enshrined this intention in statute, for which Shell has publicly expressed its support.[216]

165. There are also numerous examples in the US showing that Shell in fact embraces sound climate-related initiatives. Milieudefensie et al. suggest that RDS has "*resisted all kinds of intended, similar climate legislation in the United States.*"[217] This suggestion ignores not only Shell's positions on climate change legislation but also its support for a large number of initiatives over the last decade:

(a) In 2007, Shell joined the US Climate Action Partnership, an alliance of environmental groups and businesses formed to assist with the drafting of federal cap-and-trade legislation. On 5 March 2009, a Shell manager, Graeme Martin, testified before the US Congress

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210 Summons, para. 34.
211 **Exhibit RO-90**, Shell, Industry Associations Climate Review 2019, p. 7. Shell notes in this respect that it has clear guidelines on political activities. In line with the Shell General Business Principles and Code of Conduct, Shell companies do not make payments to political parties, political organisations or their representatives. Shell requires trade associations to confirm that Shell funds or resources are not used for payments to political parties, political organisations or their representatives either directly or indirectly.
212 **Exhibit RO-91**, RDS, CEO Speech NL – Non solus: new energy for the Netherlands (and the world), 19 May 2018; http://www.transitie-coalitie.nl/wat-doen-wij/.
213 **Exhibit RO-92**, Shell Netherlands, Letter to Ed Nijpels, 12 September 2019.
214 **Exhibit RO-93**, Shell, Getting to net zero emissions, 9 July 2019.
215 **Exhibit RO-94**, UN, Climate Ambition Alliance: Net Zero 2050, 2019.
216 **Exhibit RO-95**, Shell, The road to decarbonisation, 3 July 2019.
217 Summons, para. 601.

about carbon offsets in an emissions trading system. On that occasion, Mr Martin expressed Shell's support for "*cap-and-trade as the surest way to reduce CO_2*". Further, he urged the United States to engage assertively in international climate dialogues and lead the effort to reform the international offset programme.[218]

(b) In 2010, Marvin Odum, the President of Shell Oil Company, testified in support of the Waxman-Markey bill – a federal cap-and-trade package proposed in the House of Representatives that was not passed by the US Senate. In his statement, he said that:[219]

> *"Shell supports legislating a solution to energy and climate issues as a means to create a secure U.S. energy future, to reduce dependence on imported oil, and to decrease greenhouse gas emissions.* [...] *this requires setting a price for carbon."*

(c) Shell companies in the US have also long supported carbon pricing initiatives at the State and regional levels. Examples include the California cap-and-trade programme launched in 2013 and the Regional Greenhouse Gas Initiative, a cap-and-trade programme among Northeastern States.[220] While Shell did not agree with the specifics of a 2018 "ballot initiative"[221] in Washington State, it did not commit any funds to other parties' efforts to challenge the initiative, instead expressing its full support for a "*well-thought-out carbon tax*."[222]

(d) Shell is a member of the Carbon Capture Coalition, which supports federal legislation such as the 45Q Tax Credit that advances the deployment of CCS projects.[223]

(e) Shell is a founding member of the CEO Climate Dialogue, a partnership of leading companies and non-profit organisations

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218 **Exhibit RO-96**, Hearing before the Subcommittee on Energy and Environment of the Committee on Energy and Commerce, House of Representatives, Statement of Graeme Martin, 5 March 2009, pp. 70-71.

219 **Exhibit RO-97**, Hearing before the Subcommittee on Energy and Environment of the Committee on Energy and Commerce, House of Representatives, Statement of Marvin Odum, 15 June 2010, p. 59.

220 **Exhibit RO-90**, Shell, Industry Associations Climate Review 2019, p. 24; **Exhibit RK-17**, Shell, CDP Report 2019, p. 154.

221 This procedure is somewhat similar to a citizens' initiative (*burgerinitiatief*) in the Netherlands.

222 **Exhibit RO-98**, The Seattle Times, Shell CEO: Support a price on carbon – but not at any cost, 5 October 2018.

223 **Exhibit RO-99**, Carbon Capture Coalition, Federal Policy Blueprint 2019, p. 4.

founded in 2016 for the purpose of urging the US federal government to enact market-based climate legislation.[224]

(f) Shell supports the Paris Agreement and has co-signed a letter urging the US to remain in the Paris Agreement.[225]

(g) In 2017, Shell co-founded the Climate Leadership Council, an international research and advocacy organisation which promotes the enactment of carbon dividends legislation around the world.[226]

(h) Shell Oil Company President Gretchen Watkins has urged the U.S. Environmental Protection Agency ("**EPA**") to continue regulating methane emissions and to broaden regulations to include methane emissions from existing oil and gas assets.[227]

(i) In 2019, Shell opposed the EPA's decision to roll back emissions standards.[228]

166. Shell has taken and continues to take a similar approach to other governments, as described below in Subsection 2.3.8.

167. Milieudefensie et al.'s Summons misrepresents RDS's position on climate-related initiatives, presenting many factual inaccuracies and half-truths. For example, Milieudefensie et al. cite a 2015 Shell statement at the World Gas Conference, where a Shell spokesperson advocated for government measures to incentivise the increased use of LNG, as "*another example of* [RDS's] *working methods*" to "*hamper*" energy transition.[229] Yet LNG is not an obstacle to energy transition, but in fact a key piece in the energy transition. LNG is a 'bridge fuel' necessary while other forms of energy and energy storage are still in development that will enable the energy transition away from high-emitting fuels and towards a lower-carbon future. Milieudefensie et al. also cite a 2017 speech by Mr Wetselaar, Integrated Gas & New Energies Director, in which he proposed LNG as a suitable alternative to more CO_2-intensive energy sources such as coal. They then describe this as an attempt to "*actively* [block] *progress in combating*

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224 **Exhibit RO-100**, CEO Climate Dialogue, About (website page 28 October 2019).
225 **Exhibit RO-101**, Shell, Collaboration and vision: shaping the energy future, 9 January 2017; **Exhibit RO-102**, NPR, Energy Companies urge Trump To Remain In Paris Climate Agreement, 18 May 2017; **Exhibit RO-103**, Chicago Tribune, Trump's plan to cut basic energy research finds an unlikely opponent: oil executives, 8 June 2017.
226 **Exhibit RO-104**, Climate Leadership Council, Mission (website page 28 October 2019).
227 **Exhibit RO-105**, Watkins, Shell supports the direct regulation of methane – here's why, 12 March 2019.
228 **Exhibit RO-106**, Shell Oil Products US, Letter to EPA Docket Center, 24 October 2018.
229 Summons, para. 605 and Chapter VIII.2.1.3.e.

climate problems" or "*to enrich* [RDS] *at the expense of society and future generations.*"[230] However, Mr Wetselaar did not present gas as CO_2 neutral;[231] he simply – and rightly – noted that its use in certain circumstances may reduce the carbon intensity of energy products in the energy system and help transition to a low-carbon future in that way. This is entirely consistent with the crucial role that lower CO_2 emitting energy products play in energy transition, a view shared by many governments and organisations such as the International Energy Agency.

2.3.7.2 Shell works with international organisations

168. At an international level, Shell has long worked together with various organisations. RDS refers to just a few recent examples in this subsection. For example, Shell is working with the World Resources Institute ("**WRI**"), a global research organisation. Shell has joined the WRI's Corporate Consultative Group to learn about best sustainability practices and share its own knowledge on that point with other members.[232]

169. In 2015, Shell helped establish the Energy Transitions Commission ("**ETC**"),[233] an international body which aims to accelerate change towards low-carbon energy systems.[234] The ETC's latest report 'Mission Possible' outlines possible routes to reaching net zero CO_2 emissions from harder-to-abate sectors: heavy industry (particularly the production of cement, steel and plastics) and heavy-duty transport (trucking, shipping and aviation).[235] Shell has voiced its support for the 'Mission Possible' report and also participated in its development.[236]

170. As already discussed in Section 2.3.1, Shell was also an early subscriber to and remains an active supporter of the TCFD. The TCFD is a global partnership of preparers and users of climate-related financial disclosures. The Financial Stability Board, set up by the G20, selected its current members. The TCFD encourages companies to actively share information, to help investors understand climate-related risks *and* opportunities. RDS's

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230 Summons, paras. 600 and 602.
231 Summons, Exhibit 202.
232 **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 73.
233 Notable NTC Commissioners include, among others, Chad Holliday, Ajay Mathur, Philip New, Adair Turner and Cathy Zoi. See **Exhibit RO-107**, Energy Transitions Commission, Who we are (website page 28 October 2019). Other notable members have included Al Gore in his capacity as Chairman of Generation Investment, Rachel Kyte in her capacity as Special Representative to the UN Secretary-General, and Andrew Steer in his capacity as President and CEO of the World Resources Institute.
234 See **Exhibit RO-108**, Energy Transition Commission, Better Energy Greater Prosperity: Achievable pathways to low-carbon energy systems (Executive Summary), April 2017.
235 **Exhibit RK-9**, Energy Transitions Commission, Mission Possible, 2018, pp. 38-45.
236 RDS President Chad Holiday helped prepare the Mission Possible report as ETC Commissioner.

commitment to transparency is not only evident from its support for the TCFD, but also from the reports it publishes each year in which the impact of the energy transition plays a role, such as the Shell Energy Transition Report, the Sustainability Report and its Annual Report. Shell continues to work with the TCFD to help develop best practices for reporting linked to climate change.[237]

171. Through these and its many other engagement activities, Shell aims to take a leadership role in helping society to address climate change and energy transition issues.

2.3.7.3 Shell participates in various industry bodies and trade associations

172. In addition to contributing to collaboration with national governments and international organisations, Shell is also a member of various industry bodies and trade associations whose efforts also include climate-related work. These memberships are consistent with Shell's principles governing such partnerships. For example, Shell group companies participate in all sorts of industry bodies that specifically promote climate change initiatives, including:

(i) the Oil and Gas Preparer Forum, initiated by the TCFD and convened by the World Business Council for Sustainable Development, an advocacy association working "[to] *accelerate the transition to a sustainable world*";[238]

(ii) as a co-founder of the Oil and Gas Climate Initiative, which aims to increase the ambition, speed and scale of companies' individual initiatives to reduce their GHG footprint and explore new business models and technologies;

(iii) the Environmental Partnership in the USA, which requires companies to apply voluntary methane reduction measures in areas such as leak detection and the repair, replacement or update of equipment;[239]

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237 **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 72.
238 See **Exhibit RO-109**, World Business Council for Sustainable Development – About Us (website page 29 August 2019).
239 **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 75.

(iv) the Hydrogen Council, a global coalition of chief executives working to raise the profile of hydrogen's role in the transition to a low-carbon energy system;[240]

(v) IPIECA, the global oil and gas industry association for environmental and social issues; and

(vi) the Getting to Zero Coalition, a global alliance of companies, supported by governments and international organisations, working to decarbonise maritime shipping.[241]

173. Shell also participates in various informal cross-stakeholder discussions on topics including biodiversity and climate change.[242]

174. Shell is also involved in a broad range of energy sector initiatives focused on the reduction of methane emissions and minimisation of flaring. These include the Climate and Clean Air Coalition,[243] the Oil & Gas Methane Partnership[244] and the Oil and Gas Climate Initiative.[245] At an operational level, Shell's initiatives include using advanced technology to detect and reduce fugitive emissions at facilities[246] and operating a voluntary "Leak Detection and Repair" programme to monitor all new and existing production facilities.[247] Shell was one of the initiators of the Methane Guiding Principles, which now have over 30 signatories.[248] In September 2018, Shell announced a target to bring Shell's methane emissions intensity below 0.2% by 2025.[249]

175. Shell is also involved in a collaboration among the Environmental Defense Fund, various oil and gas companies, US-based technology developers and other experts. The purpose of this collaboration is to detect and repair GHG leaks in real time.[250] And it also endorses the World Bank's "Zero Routine Flaring by 2030" initiative and continues actively to pursue its commitment

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240 Id., p. 74.
241 **Exhibit RO-110**, Global Maritime Forum – Getting to Zero Coalition.
242 **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 75.
243 **Exhibit RO-111**, Climate & Clean Air Coalition, Initiatives (website page 10 November 2019).
244 A voluntary partnership of entities working together to systematically and responsibly address methane emissions; see **Exhibit RO-112**, CCAC Oil & Gas Methane Partnership (website page 10 November 2019).
245 A voluntary CEO-led initiative working to reduce the collective average methane intensity of aggregated upstream gas and oil operations; see http://oilandgasclimateinitiative.com/.
246 **Exhibit RK-16**, Shell, Sustainability Report 2018, p. 49.
247 **Exhibit RO-113**, Shell, Shell Onshore Operating Principles in Action in North America: Methane Fact Sheet, Shell.com, p. 2.
248 See **Exhibit RO-114**, CCAC Oil & Gas Partnership, Guiding Principles Methane, November 2017.
249 See **Exhibit RO-115**, RDS, Shell announces methane emissions intensity target for oil and gas assets, 17 September 2018.
250 **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 60.

to eliminate associated gas flaring at its operations by 2030.[251] Shell's policies reflect this commitment.[252]

176. Shell companies are also members of various trade associations in the energy sector. Shell values its membership in trade associations, as they serve many functions. For example, trade associations offer the opportunity to collaborate in setting industry standards and best practices. More importantly, industry bodies and trade associations allow their members to communicate effectively with policymakers on vital topics such as climate change. This is an essential part of the cooperation that is required to synchronise views on climate change.

177. Shell has committed to investors to be even more transparent around trade association activities. As part of that commitment, in April 2018 Shell conducted a review of existing relationships with nineteen different trade associations and those associations' positions on climate change relative to its own positions and policy views on climate change. The results of that review were published in a freely available report in April 2019.[253] The report outlines the actions Shell intends to take in the event of differences of opinion within the associations where Shell companies are members. In such situations, Shell aims to clearly communicate its own position and, where possible, also help shape the positions of the association. Shell has opted not to renew membership in the American Fuel & Petrochemical Manufacturers trade association due to its materially different climate change policy positions.[254] Shell previously withdrew from two other trade associations, in 1988 and 2015, for similar reasons.[255] Further, Shell recently incorporated stronger governance procedures to review important decisions on activities with industry associations that have climate-related policy positions, and monitor industry associations' alignment with Shell on climate change.[256]

178. Nevertheless, Milieudefensie et al. use Shell company (sometimes past) memberships of certain trade associations as a further basis to argue that RDS has "*hampered*" energy transition. This completely mischaracterises both the role of a ultimate holding company and the nature and role of a trade association. These bodies represent many (and sometimes even

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251 **Exhibit RK-7**, Shell, Energy Transition Report 2018, pp. 61, 75; see also **Exhibit RO-116**, The World Bank, Countries and Oil Companies Agree to End Routine Gas Flaring, 17 April 2015 (showing Royal Dutch Shell as an endorser).
252 **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 61.
253 See **Exhibit RO-90**, Shell, Industry Associations Climate Review 2019.
254 Id., pp. 5, 15, 24.
255 Id., p. 8.
256 **Exhibit RO-90**, Shell, Industry Associations Climate Review 2019, p. 20.

hundreds of) members with diverse and competing interests. It is inconceivable and simply incorrect that every trade association member could ascribe to every public statement by the relevant association, many of which are quite broad. Accordingly, the fact that Shell companies are trade association members does not in any way imply that RDS (or previous holding companies) agreed or currently agree(s) with each and every statement and position of those associations. Trade association statements and publications are not attributed to the individual members, nor is this even possible, especially where the top holding companies of those individual members are concerned.

179. Milieudefensie et al. appear to rely on two instances to demonstrate RDS's so-called "hampering" through its trade association membership. Both are misplaced.

180. First, Milieudefensie et al. refer to BusinessEurope, which they describe as "*a European lobby club of which Shell is a member*".[257] Membership of BusinessEurope is reserved for national industry bodies. Shell is only a member of the Corporate Advisory and Support Group and has no voting rights in BusinessEurope.[258] In 2018, BusinessEurope produced a memorandum that Milieudefensie et al. describe as containing the "*'usual arguments'*" against further climate ambitions in the EU. Milieudefensie et al. omit to mention that, in September 2018, Shell had made its position on the memorandum absolutely clear:[259]

> *"Shell does not lobby against the EU goals under the Paris agreement and is still strongly supporting this. We ask Business Europe to recognize that the framework for 2030 needs to be consistent with these goals. It is up to the several EU-institutes to set the goals for 2030."*

181. Second, Milieudefensie et al. refer to a 2016 'InfluenceMap' publication. Why they refer to a publication from 2016 instead of a more recent publication is not clear. In any event, RDS fundamentally disagrees with the conclusion reached in the publication that these figures represent anti-climate lobbying and has noted its full disagreement in a response to InfluenceMap's most recent publication.[260]

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257 Summons, para. 598.

258 **Exhibit RO-117**, Business Europe, ASGroup – Our Partner Companies (website page 28 October 2019).

259 See **Exhibit RO-118**, Shell Nederland, Twitter, 25 September 2019.

260 **Exhibit RO-119**, Shell, Response regarding Influence Map report raising concerns about its alleged use of shareholder funds for misleading cilmate-related [sic] branding and lobbying, 10 May 2019.

182. Milieudefensie et al.'s attempt to characterise RDS as actively blocking energy transition is belied by the facts.[261] Shell actively works to position itself as an industry leader in the energy transition. This is reflected in a wide variety of public reports and other statements, such as its December 2018 joint statement with long-term institutional investors who participate in Climate Action 100+,[262] which identified several initiatives demonstrating Shell's industry leadership and prioritisation of climate change. In that statement, investors commented that they believed that "*Shell has taken a significant leadership position within the oil and gas sector.*"[263] Noting "*Shell's other important actions on climate change*" related to methane emissions, implementation of the TCFD recommendations, and work with other organisations, these investors stated that they "*share the desire of the Board and management of the company to seek a positive future for the company which is aligned to the goals of the Paris Agreement on climate change.*"[264]

2.3.8 Shell actively encourages carbon pricing and negative emissions initiatives

183. Shell actively encourages governments to put a price on carbon and has done so for a very long time. This aims to incentivise industry, the power sector and consumers to improve energy efficiency, reduce carbon emissions and help encourage different solutions such as carbon capture and storage (CCS) and nature-based solutions. These comprise all activities related to the protection, creation or redevelopment of natural ecosystems – such as forests, grasslands and wetlands – to help absorb GHGs from the atmosphere. They can help deliver many other benefits, including improvements in biodiversity, water quality, flood protection and livelihoods.

184. Contrary to Milieudefensie et al.'s erroneous claim that Shell has lobbied against EU and US CO_2 emission reduction action, Shell has actively and openly supported and advocated for market mechanisms for carbon pricing and use of CCS to achieve the balancing of anthropogenic GHG emissions and removals, and continues to do so.

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261 Summons, para. 602.

262 Climate Action 100+ is a five-year initiative led by investors to engage systemically important GHG emitters and other companies that have significant opportunities to drive the clean energy transition and help achieve the goals of the Paris Agreement. To date, 310 investors with more than USD 32 trillion in assets under management have signed on to the initiative.

263 **Exhibit RO-88**, Joint Statement RDS and Climate Action 100+, 3 December 2018.

264 Id.

185. Here are a few examples:

(i) Shell is an IETA founding member and sponsor. IETA is a non-profit organisation that has been a strong advocate of setting up an international emissions trading system since the late 1990s. IETA is currently working to shape Article 6 of the Paris Agreement, which established a mitigation mechanism to reduce emissions and support sustainable development.[265]

(ii) Shell is involved in the UK Emissions Trading Group, which created a carbon trading desk in 2001 and has long supported the EU's Emissions Trading Scheme. The UK Emissions Trading Group has worked with policymakers, industry groups and NGOs to reform the system after 2020,[266] including pushing for higher carbon prices.[267]

(iii) In 2015 Shell became a member of the World Bank's Carbon Pricing Leadership Coalition, which is made up of governments, businesses and organisations with the long-term objective of achieving a government-led carbon price throughout the global economy. This coalition published its first report in 2017.[268]

(iv) The 2015 'six CEO' letter to the Executive Secretary of the UNFCCC and President of the Twenty-First Conference of the Parties ("**COP21**") promoting government-led carbon pricing systems.[269]

(v) The American Clean Energy and Security Act of 2009 (the "Waxman-Markey bill"), American legislation passed by the House of Representatives in 2009, aimed at creating a cap-and-trade

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265 See, for example, **Exhibit RO-120**, IETA, Effective Article 6 trading rules could save up to $250 billion/yr for climate action by 2030, study finds, 24 September 2019.

266 **Exhibit RO-121**, Shell, Environmental Products (website page 10 November 2019).

267 **Exhibit RO-90**, Shell, Industry Associations Climate Review 2019, p. 18; see also **Exhibit RO-122**, RDS, Letter to the European Commission on 'DG Climate Action consultation on the report from the Commission to the European Parliament and the Council – The state of the European carbon market 2012', 28 February 2013.

268 **Exhibit RO-123**, Carbon Pricing Leadership Coalition, Who We Are (website page 28 October 2019); **Exhibit RO-124**, Carbon Pricing Leadership Coalition, Partners (website page 28 October 2019); **Exhibit RO-125**, Carbon Pricing Leadership Coalition, Report 2016-2017, p. 46; **Exhibit RO-126**, Shell, Twitter, 21 September 2019 ("*The world needs immediate action towards government-led carbon pricing mechanisms to encourage low-carbon choices. More via the #CPLC's new report on #PriceOnCarbon: go.shell.com/31GLBNN*"); **Exhibit RO-127**, Carbon Pricing Leadership Coalition, Report 2019.

269 Summons, para. 600.

269 **Exhibit RO-52**, Shell, Energy Transition Report 2016, p. 17; **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 73.

system for heat-trapping GHG emissions.[270] American legislators called on Shell Oil Company as a progressive industry leader to muster necessary support for the bill.[271]

(vi) More generally, Shell expressed its support for plans to tax carbon dioxide emissions in order to address climate change.[272]

2.4 Climate change related scientific knowledge has developed over time in the public domain; Shell had no unique knowledge

191. The development of scientific knowledge regarding climate change has always played out in the public domain. The government and society as a whole have also long been duly aware of the existence of climate-related scientific research, particularly in the last half-century. Shell has had no unique knowledge or role in that regard.

192. The public nature of the long history of scientific study of the nature of CO_2 and its potential effect on the atmosphere is well-documented. In the Summons, Milieudefensie et al. cite various examples of scientific climate change studies. On certain points, Milieudefensie et al. are more confident than the sources themselves, suggesting that "[a]*ccording to the IPCC, scientists have known for more than 100 years that CO_2 is a greenhouse gas and that CO_2 in the atmosphere causes additional warming*"[273] and that "*more than 100 years ago, at the end of the 19th century, it was demonstrated that the combustion of fossil fuels releases CO_2 and CO_2 is a greenhouse gas*."[274]

193. Milieudefensie et al. wrongly fail to appreciate in that regard that Earth sciences – like all other scientific study – developed over time, were subject to debate and have only gradually achieved consensus in some respects.[275] Current scientific research, as assessed and evaluated by the IPCC, logically follows on from scientific understanding that has developed over a

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270 Shell Oil Company was an integral member of the U.S. Climate Action Partnership, which co-sponsor of the bill Henry Waxman credited with creating the "blueprint" for the bill. See Henry Waxman's statement of 22 April 2009 in **Exhibit RO-128**, The American Clean Energy and Security Act of 2009, Hearings (excerpt), which states: "*As Chairman Markey and I worked on the draft legislation our blue print was a plan proposed by the U.S. Climate Action Partnership, a coalition of industry CEOs and environmental organizations*." See also **Exhibit RO-129**, USCAP, A Blueprint for Legislative Action, January 2009.

271 **Exhibit RO-130**, New Yorker, As the World Burns: How the Senate and the White House missed their best chance to deal with climate change, 3 October 2010 (explaining that John Kerry called on Shell to take a leadership position in industry).

272 **Exhibit RO-131**, Forbes, Why This 'Big Oil' CEO Believes In Applying A Price To Carbon, 23 September 2014.

273 Summons, para. 331.

274 Summons, para. 3.

275 Summons, Exhibit 111, IPCC 2007 AR4, WGI, Ch. 1, p. 98.

period of time. Even now, although scientists understand the climate issue much better than in the 19th century, scientific knowledge about some aspects of climate change continues to evolve. Indeed, the changes in the IPCC reports in the last two decades show that the understanding of climate change and how it might be combated continues to develop as more data become available, and that science continues to evolve on that basis.[276]

194. Milieudefensie et al. suggest, yet do not explicitly state and substantiate, that Shell had *unique* or *specific* knowledge other than the climate science that was publicly available at any point in time. RDS disputes any suggestion by Milieudefensie et al. that Shell's knowledge of or familiarity with climate science – which, as stated, were no different than the knowledge or familiarity of the rest of society – results in foreseeability or any specific legal obligation for Shell.[277] Since Milieudefensie et al.'s claims relate to future acts, in the sense that Milieudefensie et al. require Shell to reduce future emissions, the allegations about past knowledge and conduct are largely irrelevant. For that reason, RDS will discuss a number of Milieudefensie et al.'s suggestions and allegations only in general terms in this section.

2.4.1 Scientific understanding of climate change has gradually developed in the public domain from the mid-19th century onwards

195. Scientists started to discern a link between GHGs and the climate in the 19th century.[278] Contrary to what Milieudefensie et al. suggest, the development of climate science from the 19th century onwards shows that this science evolved in incremental stages, and new findings frequently involved uncertainties and also raised new questions. The same is true as regards the understanding of the potential impact and timing of climate change: it is constantly evolving. For example, it was not until the mid-20th century that scientists were able to measure CO_2 concentrations in the atmosphere and became concerned about them.

196. Milieudefensie et al. do not hesitate to overstate the scientific findings somewhat. Contrary to what Milieudefensie et al. suggest, early scientific

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276 Id. See also **Exhibit RO-132**, Stanhill, The Growth of Climate Change: A Scientometric Study, 2001, pp. 517-18.

277 Including, but not limited to, those in Summons, Section VIII.2.1.2.

278 See **Exhibit RO-133**, Fleming, The Callendar Effect, 2007 pp. 66-68 (citing the work of Fourier and Tyndall); **Exhibit RO-134**, Weart, Bibliography of the Year: The Discovery of Global Warming (website page 20 September 2018) (listing at least twenty publications on the science and theory of the greenhouse effect from 1801 to 1899); see generally **Exhibit RO-135**, Arrhenius, The Influence of Carbonic Acid in the Air upon the Temperature of the Ground, April 1986, pp. 237-276 (citing the work of Fourier, Tyndall and others).

research did not discern the causes or effects of climate change, or when these effects could actually manifest themselves. Swedish scientist Svante Arrhenius did not conclude in 1896 that "*the large-scale combustion of fossil fuels* [...] *would result in global warming.*"[279] Arrhenius suggested a link between CO_2 concentrations in the atmosphere and the melting of glaciers and ice mass.[280] He considered the combustion of fossil fuels as a force for good that would prevent a new Ice Age and inaugurate "*a new carboniferous age of enormous plant growth*".[281] Meanwhile, the Industrial Revolution proceeded, with a heavy reliance on fossil fuels and bringing enormous global development.

197. Even in the early 1900s, the accumulation of CO_2 in the atmosphere was reported in the media.[282] However, devoted study of the causes, nature and degree of climate change did not begin to develop until after World War II.[283] After World War II, meteorologists and geographers began to notice an increase in local and regional temperatures, particularly in the northern hemisphere.[284] Meanwhile, the results of research based on long-gathered but unused atmospheric data were published. These were discussed within the scientific community and among the public, in particular with governments and policymakers.[285]

198. However, it took time to reach the now broadly accepted view that climate change is occurring, and that human activity is contributing. Although British meteorologist Guy Callendar suggested a link between human activities and global warming in 1938, there were few scientists at that time expressing similar concerns.[286] Even Callendar himself was not certain of the implications of his findings and, as Milieudefensie et al. themselves also state,[287] he thought it obvious to study the potential effects of such change.

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279 Summons, para. 333.
280 Summons, Exhibit 111, IPCC 2007 AR4, WGI, Ch. 1, p. 105.
281 See **Exhibit RO-133**, Fleming, The Callendar Effect, 2007, p. 68.
282 See, for example, **Exhibit RO-136**, Rodney and Otamatea Times, Waitemata and Kaipara Gazette, Coal Consumption Affecting Climate, 14 August 1912; **Exhibit RO-137**, Talman, Is our Climate Changing?, 1930, p. 817.
283 See **Exhibit RO-133**, Fleming, The Callendar Effect, 2007, pp. 66-68; **Exhibit RO-138**, National Academy of Sciences, Carbon Dioxide and Climate: A Scientific Assessment, July 1979, p. vii ("*For more than a century, we have been aware that changes in the composition of the atmosphere could affect its ability to trap the sun's energy for our benefit.*").
284 **Exhibit RO-133**, Fleming, The Callendar Effect, 2007, pp. 77-78. The first global surface temperature time series were published only in the early 1960s. See Summons, Exhibit 111, IPCC 2007 AR4, WGI, Ch. 1, p. 101.
285 See, for example, **Exhibit RO-139**, The Conservation Foundation, Implications of Rising Carbon Dioxide Content of the Atmosphere, 1963; **Exhibit RO-140**, The White House, Restoring the Quality of Our Environment, November 1965, pp. 111-133.
286 **Exhibit RO-133**, Fleming, The Callendar Effect, 2007, pp. 71, 72 and 87.
287 Id. See also Summons, para. 334.

199. During the 1950s and 1960s, there was a growth in geophysical scientific study internationally, including study of the atmosphere. More funds for research were made available and high-speed automatic computers made it possible to create mathematical models of the atmospheric system.[288] The National Science Foundation did note in 1966 that the computing models were still "rudimentary" and that international climate data were still "inadequate".[289] The Foundation stated that scientists were unable to separate the "artificial disturbances" from the "natural variations of the atmosphere", and there was an especially "critical" lack of understanding of the interactions between the atmosphere, land and sea.[290] While Milieudefensie et al. rightly state that Charles Keeling started measuring atmospheric CO_2 concentrations in the 1950s, Keeling himself states on that point that he and his researchers actually did not really understand what was going on, even into the 1980s.[291] The precise nature and timeline of the climatic effects of increased levels of CO_2 in the atmosphere remained uncertain.[292]

200. Theories on global warming were receiving more attention then, with newspaper articles recounting anecdotal evidence of regional warming and discussing early scientific theories.[293] Scientists started making statements before governmental bodies about the risks of climate change, the scientific uncertainties that existed and the need for more funding to help resolve or clarify these uncertainties. In 1965, US President Lyndon Johnson warned that: "[t]*his generation has altered the composition of the atmosphere on a global scale through radioactive materials and a steady increase in carbon dioxide from the burning of fossil fuels.*"[294]

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288 See, for example, **Exhibit RO-141**, Hearings before Subcommittees of the Committee on Appropriations House of Representatives, Statement Revelle, 23 February 1956, pp. 467, 473-74; **Exhibit RO-142**, Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, Statement of Revelle, 1 May 1957, pp. 106-07; **Exhibit RO-143**, National Science Foundation, Weather and Climate Modification Problems and Prospects, January 1966, pp. 15-16, 18.

289 **Exhibit RO-143**, National Science Foundation, Weather and Climate Modification Problems and Prospects, January 1966, pp. 6, 9.

290 Id., pp. 7, 10.

291 **Exhibit RO-144**, Keeling, Rewards and Penalties of Monitoring the Earth, 1998, pp. 54, 66.

292 **Exhibit RO-133**, Fleming, The Callendar Effect, 2007, p. 72; **Exhibit RO-139**, The Conservation Foundation, Implications of Rising Carbon Dioxide Content of the Atmosphere, 1963, p. 1 ("*There is a lack of exact knowledge of the carbon cycle which is part of the general lack of quantitative knowledge of the biogeochemistry of the earth.*"); **Exhibit RO-140**, The White House, Restoring the Quality of Our Environment, November 1965, p. 114 ("[…] *we cannot make a useful prediction concerning the magnitude or nature of the possible climatic effects*.").

293 See, for example, **Exhibit RO-145**, New York Times, The Weather Is Really Changing, 12 July 1953; **Exhibit RO-146**, TIME Magazine, Invisible Blanket; **Exhibit RO-147**, Neumann, The Neumann Compendium: Can We Survive Technology?, 1955, p. 512.

294 **Exhibit RO-148**, President Lyndon Baines Johnson, Special Message to the Congress on Conservation and Restoration of Natural Beauty, 8 February 1965.

201. The 1970s and 1980s saw an improvement in scientific modelling of the causes and potential effects of climate change, although the data was still developing and uncertainties persisted regarding a number of conclusions.[295] As Milieudefensie et al. themselves state, from 1978 it became possible for the first time to obtain global climate data on a large scale by means of satellites.[296] Disagreements about the analysis and interpretation of the data dominated the debate on the meaning of the climate data. Until the mid-1970s, many experts thought there was a cooling trend.[297] The theory that climate change was happening, and was contributed to by human action, gained greater acceptance among scientists. However, the degree, timing and nature of the change still remained unclear. Scientists emphasised the need for further research and increasing budgets for it, in order to resolve uncertainties.[298]

202. National governments had their own scientists who researched climate and reported on developments in climate science, including at international conferences of the UN, as described by Milieudefensie et al.[299] Governments in other countries also commissioned and published scientific climate research from the mid-20th century onwards.[300] For example, it was reported that Friends of the Earth, the international network of which Milieudefensie is a member,[301] first became aware of early global warming

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295 See, for example, **Exhibit RO-144**, Keeling, Rewards and Penalties of Monitoring the Earth, 1998, pp. 50, 61 (describing the new analytical tools used to study the atmosphere in the 1970s, and continued disagreement on and flaws in scientific modelling techniques in the 1980s). See id., p. 66 ("*As I have already explained, these records* [of atmospheric CO_2] *by 1972 were long enough to see evidence that CO_2 varied on a decadal time scale in a manner that couldn't be explained by emissions from fossil fuel combustion.*").

296 Summons, para. 335.

297 **Exhibit RO-149**, Hecht & Tirpak, Framework Agreement on Climate Change: A Scientific and Policy History, 1995, p. 377 ("*It is ironic that the propelling concern for climate research in the 1970s was the possibility of climate cooling, rather than climate warming*") and p. 378 (the U.S. Domestic Policy Council concluded in 1994 that its ability "*to anticipate and explain either natural fluctuations or man-induced changes of climate falls short of being useful to the planners and policy makers.*").

298 See, for example, **Exhibit RO-150**, Hearings before the Subcommittee on Science, Technology, and Space of the Committee on Commerce, Science, and Transportation, United States Senate, Statement of Porter, 1977; **Exhibit RO-151**, Hearings before the Subcommitee [sic] on Science, Technology, and Space of the Committee on Commerce, Science and Transportation, United States Senate, Statement of Changnon, 1977.

299 Summons, paras. 352-362; **Exhibit RO-149**, Hecht & Tirpak, Framework Agreement on Climate Change: A Scientific and Policy History, 1995, p. 378.

300 See, for example, **Exhibit RO-152**, University of East Anglia Climatic Research Unit, Reports (1957-2009) (listing reports written for or in collaboration with the government, including 56 for the UK, 17 for the US, 2 for Morocco, 2 for Ireland, 1 for the Netherlands, and 1 for Finland); **Exhibit RO-153**, Science Council of Canada, Living with Climatic Change, 1976, p. 11 ("*we may be changing the climate by our own actions.*"); **Exhibit RO-149**, Hecht & Tirpak, Framework Agreement on Climate Change: A Scientific and Policy History, 1995, p. 379 (noting that the Australian Academy of Science reported the possibility of "*man-induced climate change*" in 1976); **Exhibit RO-154**, Second Netherlands' National Communication on Climate Change Policies, 1997, Ch. 10 (describing the national climate research in the Netherlands in the 1990s).

301 Summons, para. 124.

theories in 1979, when their deputy legislative director Rafe Pomerance learned of two studies by US government scientists from 1978 and 1979.[302]

203. However, governments, fully aware of the scientific information on climate, did not respond with action to these developments.[303] In the first half of the 1980s, other environmental issues, such as air and water pollution norms, had greater priority to governments and the public, as well as to civil society organisations such as Friends of the Earth.[304] Despite growing concerns about climate change, there was no consensus about what steps should be taken to tackle that problem.[305]

204. Governments tried to balance future climate change risks with more immediate environmental concerns, including air pollution, depletion of the ozone layer and release of chemicals into the ground and water, while also taking account of the necessary energy supply and the furtherance of economic development.[306] Governments around the world, including the Netherlands, continued to issue licences to companies to extract, develop and sell hydrocarbons and continued to collect royalties on the sale of hydrocarbons, whether or not through state-owned companies.[307] There

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302 **Exhibit RO-155**, New York Times, Losing Earth: The Decade We Almost Stopped Climate Change, 1 August 2018. See also **Exhibit RO-156**, EPA, Environmental Assessment of Coal Liquefaction Annual Report, 1978, p. 66 (stating that while the scientific findings were "*not conclusive*", climatic change induced by global warming could be "*both significant and damaging*"); **Exhibit RO-157**, Jason, The long term impact of atmospheric carbon dioxide on climate, 1979, pp. iii, 2, 8, 24-25 (stating that, despite fundamental limitations in the models and persistent scientific uncertainty about the "*magnitude and character of the climate fluctuations*", it was clear that "*the carbon dioxide content of the atmosphere has been rising*" and that "*the general theory of the influence of carbon dioxide on climate is widely accepted among atmospheric scientists*").

303 **Exhibit RO-149**, Hecht & Tirpak, Framework Agreement on Climate Change: A Scientific and Policy History, 1995, p. 382 (In 1986, the US Department of Energy still believed that "*there was an inadequate scientific basis for policy actions on global warming.*"); Id., p. 378 (The US Domestic Policy Council concluded in 1994 that its ability "*to anticipate and explain either natural fluctuations or man-induced changes of climate falls short of being useful to the planners and policy makers*.").

304 **Exhibit RO-155**, New York Times, Losing Earth: The Decade We Almost Stopped Climate Change, 1 August 2018.

305 **Exhibit RO-158**, Council on Environmental Quality, Annual Report 1980.

306 See, for example, **Exhibit RO-159**, World Bank, Energy Efficiency and Conservation in the Developing World: The World Bank's Role, 1993 (which includes a list of documents on global warming in a document about pollution); **Exhibit RO-160**, World Conference on the Changing Atmosphere: Implications for Global Security, 1988; **Exhibit RO-161**, James Hansen-Transcript of Pivotal Climate Change Hearing, 1988.

307 See, for example, **Exhibit RO-162**, Business Monitor Online, Norway Oil & Gas Competitive Landscape, 1 October 2019 (which states that state-owned companies produce 49% of all oil and 69% of all gas in Norway, and that Norway granted 83 exploration licences in 2018); **Exhibit RO-163**, Andalou Agency, Norway awards record 75 oil exploration licenses, 17 January 2018; **Exhibit RO-164**, Oil Daily, UK Awards Offshore Blocks, 14 June 2017; **Exhibit RO-165**, UK Oil & Gas, License Data: Seaward Exploration Licenses (August 2019) (which shows that 14 "*seaward exploration licenses*" were granted); **Exhibit RO-166**, NLOG, Annual Reports: Exploration and production of hydrocarbons, 1 January 2019 (as of 1 January 2019, there were 193 licences in the Netherlands for the extraction, development and sale of hydrocarbons.

was as yet no real regulation of emissions from agriculture, cement and steel manufacturing, or other contributors to GHG emissions.

205. Despite persistent uncertainties, a growing number of scientists and international scientific organisations concluded by the late 1980s that the risks were sufficiently great that coordinated action by governments on the international level should be taken.[308] This prompted the creation of the IPCC under the UN's auspices in 1988.[309] That same year, in a speech to the Royal Society, British Prime Minister Margaret Thatcher stated that the increase in GHGs in the atmosphere could lead to "*climatic instability*" that would exceed "*the capacity of our natural habitat to cope*". [310] Still, it took almost a decade for participating States to agree on concrete, coordinated action, marked by their adoption of the Kyoto Protocol in 1997.

206. In 1990, the IPCC reported that, at that time, observed global warming "[wa]*s broadly consistent with predictions of climate models, but it* [wa]*s also of the same magnitude as natural climate variability*."[311] The IPCC concluded that "*unequivocal detection of the enhanced greenhouse effect from observations is not likely for a decade or more*."[312]

207. In 1995, the IPCC stated in the Second Assessment Report that: "[o]*ur ability to quantify the human influence on global climate is currently limited because the expected signal is still emerging from the noise of natural variability* […] *the balance of evidence suggests that there is a discernible human influence on global climate*."[313] At that time, there were still many uncertainties about the potential implications of rising CO_2 levels in the atmosphere, including whether climate change could have net adverse or beneficial consequences for a particular region.[314] The Second Assessment Report states:

> *"Although our knowledge has increased significantly during the last decade, and qualitative estimates can be developed, quantitative projections of the impacts of climate change on any particular*

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308 See **Exhibit RO-167**, Bodansky et al., International Climate Change Law, 2017 (pp. 96-103). Pages 98-99 discuss the way in which scientists acting as "knowledge brokers" worked to bring the science of climate change to the attention of the global policy community. Also stated here: "*The period from 1988 to 1990 was transitional: non-governmental actors still had considerable influence, but governments began to play a greater role.*"

309 Id., p. 98; **Exhibit RO-168**, IPCC, History (website page 11 September 2019).

310 **Exhibit RO-169**, Thatcher, Speech to the Royal Society, 27 September 1988.

311 **Exhibit RO-170**, IPCC 1990, AR1: Scientific Assessment of Climate Change, Working Group I, Summary for Policy Makers, p. xii.

312 Id.

313 **Exhibit RO-171**, IPCC 1995 Second Assessment Report, Working Group I, Summary for Policy Makers, p. 5.

314 **Exhibit RO-172**, IPCC 1995, Second Assessment Report, Working Group II, Summary for Policy Makers, p. 4 et seq.

> *system at any particular location are difficult because regional-scale climate change projections are uncertain; our current understanding of many critical processes is limited; systems are subject to multiple climatic and non-climatic stresses, the interactions of which are not always linear or additive; and very few studies have considered dynamic responses to steadily increasing concentrations of greenhouse gases or the consequences of increases beyond a doubling of equivalent atmospheric CO_2 concentrations."*[315]

208. Ultimately, according to the IPCC's Second Assessment Report, policymakers will have to decide to what degree they want to take precautionary measures.[316]

209. In 1997, the participating States took a decision in UN context in relation to climate change, adopting the UNFCCC-based Kyoto Protocol, the first of its kind to set specific GHG emission reduction targets in developed countries. Cor Herkströter, then Chairman of the Committee of Managing Directors of the Royal Dutch/Shell Group and President of N.V. Koninklijke Nederlandse Petroleum Maatschappij, welcomed the outcome of Kyoto and publicly confirmed Shell's position that "*precautionary measures such as the emission limits for greenhouse gasses set in train by the Kyoto agreement are necessary.*"[317] The Shell group agreed with the Kyoto signatories that "*the world must respond to the possibility that human activities are causing damaging climate change*", stressing the urgency of a carbon emissions trading system[318] and supporting the need for adequate government policy.

210. By 2001, science had progressed even further, with the IPCC Third Assessment Report stating that "[t]*he warming over the past 100 years is very unlikely to be due to internal variability alone* […]."[319] Nevertheless, it was not until the Fourth Assessment Report in 2007 that the IPCC concluded: "[t]*he understanding of anthropogenic warming and cooling influences on climate has improved since the* [Third Assessment Report]*, leading to very high confidence that the global average net effect of human activities since 1750 has been one of warming.*"[320] [emphasis added by attorneys]

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315 **Exhibit RO-173**, IPCC 1995, Second Assessment Report, Working Group I, Synthesis, p. 6.
316 **Exhibit RO-172**, IPCC 1995, Second Assessment Report, Working Group II, Summary for Policy Makers, p. 4 ("*Policymakers will have to decide to what degree they want to take precautionary measures* […]").
317 **Exhibit RK-21**, Herkströter, Reflections on Kyoto, p. 2.
318 **Exhibit RK-22**, STTC Annual Report 1997, p. 3.
319 **Exhibit RO-174**, IPCC 2001, TAR: Climate Change 2001: The Scientific Basis, Working Group I, Summary for Policy Makers, p. 10.
320 **Exhibit RO-175**, IPCC 2007, AR4: Climate Change 2007: The Physical Science Basis, Working Group I, Summary for Policy Makers, pp. 3, 10.

211. The reason that Milieudefensie et al. state that the "*relationship between fossil fuels, CO_2 and global warming has been known for more than 100 years*"[321] is that they want to use this as a basis for concluding that this constitutes foreseeability. However, this cannot be used as a basis for that conclusion. Rather, scientists have expressed their hypotheses and conclusions in terms of likelihood, uncertainty and probability, similar to the language the IPCC still uses today.[322] Scientists have studied the potential atmospheric impacts of CO_2 as well as the nature and possible timing of these impacts, with the conclusions becoming gradually more accurate over the past decades because of consecutive studies and climate data.[323] Science is not static: it is therefore unacceptable to allege on the basis of today's knowledge and science that all such things were "foreseeable" in the past.[324]

212. At any rate, this is largely irrelevant to this case. Milieudefensie et al.'s claims pertain to 2030, 2040 and 2050 after all. Actions should then not be assessed according to a former situation.

2.4.2 Shell's knowledge of climate change was based on information in the public domain and was not unique to Shell

213. Milieudefensie et al. surmise that "[f]*or many decades now,* [Shell] *has been aware of the fact that the use of fossil fuels leads to climate change and that this may have serious consequences for people and the environment.*"[325] Milieudefensie et al. also assert that Shell has "*for some time now*" been aware of the fact that its activities and the products it supplies make a "*substantial, measurable and defined*" contribution to global warming[326] and has been privy to emerging developments in the field of climate change science. Based on this knowledge, Milieudefensie et al. allege that Shell was long on notice that it had to adopt "*precautionary measures.*"[327]

214. Milieudefensie et al. seem to suggest, without substantiation, that Shell's knowledge was different from the climate knowledge and understanding

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321 Summons, Chapter IV.4.
322 See Subsection 2.5.1 below.
323 Summons, Exhibit 111, IPCC 2007 AR4, WGI, Ch. 1, p. 98. See, for example, Summons, para. 332 (explaining that physicist John Tyndall suggested "*that changes in CO_2 in the atmosphere may explain all of the historical climate change discovered by geologists*"); para. 333, n. 225 (quoting the IPCC's description of Svante Arrhenius's "*prediction based on greenhouse gases, suggesting that a 40% increase or decrease in the atmospheric abundance of the trace gas CO_2 might trigger the glacial advances and retreats*").
324 Summons, Chapter VIII.2.1.2.a.
325 Summons, para. 532. See also paras. 533–547, 555–574.
326 Summons, para. 551.
327 Summons, para. 572.

within society. Milieudefensie et al.'s attempts to argue that Shell's awareness of the state of scientific research was unique or created "foreseeability" fail. After all, that would improperly suggest that Shell, a private company, *should* or *could* have acted differently than the rest of the world, and even *ahead of* the rest of the world.

215. Like the rest of the world, Milieudefensie first focused in the 1970s on traditional environmental themes such as air and water contamination, not climate change, despite possessing the same public knowledge they rely upon to argue that Shell was long aware of the effects of climate change.[328] Then, in the 1980s, Milieudefensie turned to the imminent threat to the ozone layer, just as the rest of the world worked on the Montreal Protocol.[329] It was only from 1990 that Milieudefensie began to concentrate more on the "climate issue".[330]

216. The duty of governments is to create legislation and policies, based on the generally accepted scientific understandings of the time and with due regard to diverse competing interests within society. This creates the frameworks for the business community in the various countries. Like other companies, Shell acts in accordance with national regulations and policies and ensures that these are reflected in its business plans, business decisions and its conduct.

217. As a major player in the oil and gas industry, Shell has an interest in subjects that affect its business, including the impact of its operations on the environment and the impact of the environment on its operations. To that end, Shell has been attentive to all sorts of developments, including the decades-long evolution of climate change knowledge. As the documents referred to in the Summons show, Shell has made efforts to understand the evolving scientific knowledge, even before the IPCC was founded, and advocated the creation of national climate policy long before governments themselves were ready to do so.[331]

218. The documents and activities referred to by Milieudefensie et al. in the Summons regarding Shell's alleged knowledge[332] immediately show that Shell had no unique knowledge and merely reflected on the state of scientific knowledge at that time. For example, Milieudefensie et al. refer to the fact that a Shell employee attended the 1979 World Climate Conference

328 Summons, para. 132.
329 Summons, para. 133.
330 Summons, para. 135.
331 See Subsection 2.4.1.
332 See generally: Summons, paras. 530-547.

(WCC) in Geneva. The document concerned includes a long list of all sorts of government and university representatives, including from national Ministries of Agriculture, so that information went straight to those who had to start working with it, i.e. governments.[333]

219. Milieudefensie et al. seem to suggest that the 1988 Shell report, *The Greenhouse Effect*, shows that Shell conducted its own research. That is simply not correct. First, this 1988 report is clearly only a review of external research and not Shell's own research; it contains many references to scientific studies.[334] The report contains a description of the climate change knowledge that was available to the public at the time as well as a description of the state of climate science in general. The report also gives an analysis of current international legislation and studies that were underway.[335]

220. Second, the 1988 report shows that Shell tried to help resolve a number of uncertainties by financially supporting research. The report discusses Shell-sponsored research about the potential consequences of GHGs, conducted by the University of East Anglia.[336] This research was not confidential – it was shared, and provided to the US Department of Energy.[337] There are other examples of Shell-sponsored research. For example, at an early stage Shell sponsored – and still sponsors – research by the Massachusetts Institute of Technology's Global Change Program.[338]

221. While the 1988 report indicates that there was "*reasonable scientific agreement that increased levels of greenhouse gases would cause a global warming*", there was "*no consensus about the degree of warming and no very good understanding what the specific effects of warming might be.*"[339] This statement was consistent with climate science at that time, as

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333 Among the attendants were: a Shell agro-chemicals employee, a delegate from the Ministry of Agriculture from Ecuador, government officials from Canada, Italy, Saudi Arabia, the former Soviet Union, Hungary, the United States, Libya, Portugal, Spain, Germany, India and Angola, and academics from the University of Nottingham, University of Nebraska, College of Agriculture and Michigan State University. See also Summons, Exhibit 119, WMO 1979 Proceedings of the World Climate Conference, Appendix B. At any rate, information shared at such a conference cannot on the basis of the presence of a Shell employee be attributed to RDS as knowledge of Shell.

334 Summons, Exhibit 176, Shell 1988 The Greenhouse Effect, p. 6.

335 Id.

336 **Exhibit RO-176**, University of East Anglia, History of the Climate Research Unit, 2012.

337 See, for example, Summons, Exhibit 176, Shell 1988 The Greenhouse Effect, p. 86, Appendix 8 (which observes that a study conducted by the university in 1981 based on a Shell grant was subsequently extended by the US Department of Energy, which then published the study). Milieudefensie et al. state in the Summons that this report dates from 1986, but in reality, this report was published in 1988.

338 See **Exhibit RK-7**, Shell, Energy Transition Report 2018, p. 18. See also **Exhibit RO-177**, MIT Joint Program, Sponsors (website page 10 November 2019).

339 Summons, Exhibit 176, Shell 1988 The Greenhouse Effect, p. 1.

indicated by reports by the United Nations Environmental Programme ("**UNEP**") and the U.S. National Research Council. The latter warned that "[e]*stimates of effects of increasing CO_2 on climate also embody significant uncertainties, stemming from fundamental gaps in our understanding of physical processes, notably the processes that determine cloudiness and the long-term interactions between atmosphere and ocean*."[340]

222. UNEP declared in 1984 that while it was generally accepted that "*future increases in the atmospheric CO_2-level will cause a rise in the average global temperature*", there was "*still debate over the magnitude of this warming.*"[341] And then "*Currently* […] *there is no evidence that there has been a CO_2-induced increase in the global temperature. The detection of such an effect is made difficult by the inherent variability in climate.*" [342]

223. Although global warming was not yet detectable at that time, this 1988 report shows that Shell nevertheless already advocated a proactive approach: "*It is estimated that any climatic change relatable to CO_2 would not be detectable before the end of the century. With the very long time scales involved, it would be tempting for society to wait until then before doing anything, The potential implications for the world are, however, so large that policy options need to be considered much earlier.*"[343] A report by the National Research Council that had appeared in the US five years earlier, cited in the Shell report from 1988, still warned against taking premature action: "*We do not believe, however, that the evidence at hand about CO_2-induced climate change would support steps to change current fuel-use patterns away from fossil fuels. Such steps may be necessary or desirable at some time in the future, and we should certainly think carefully about costs and benefits of such steps; but the very near future would be better spent improving our knowledge* […] *than in changing fuel mix or use.*"[344] Ultimately, the 1988 report concluded that, while the "*energy industry will clearly need to work out the part it should play in the development of policies and programmes,*" only "*governments can tackle the whole problem.*"[345]

224. Shell has always strived to contribute to increasing public awareness of climate science based on existing knowledge. In 1991, just one year after

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340 **Exhibit RO-178**, NRC, Changing Climate: Report of the Carbon Dioxide Assessment Committee, 1983, p. 1.
341 Summons, Exhibit 176, Shell 1988 The Greenhouse Effect, Appendix 4, pp. 16-17.
342 Id., p. 17.
343 Summons, Exhibit 176, Shell 1988 The Greenhouse Effect, p. 6.
344 **Exhibit RO-178**, NRC, Changing Climate: Report of the Carbon Dioxide Assessment Committee, 1983, p. 4.
345 Summons, Exhibit 176, Shell 1988 The Greenhouse Effect, pp. 23-29.

the first IPCC report was published, Shell released the film *Climate of Concern*, which showed the state of contemporary science. Explaining the basics of the greenhouse effect, the film showed, based on computer models, that the average temperature could rise by 1.5°C to 4°C by 2050. The film described many examples of the effects of such global warming. It concluded with a discussion of the different options available to society to limit GHG emissions. The film is an example of Shell's efforts to raise overall public awareness of early scientific research.

225. Milieudefensie et al. also refer to a 1998 Shell document: *Climate Change: What does Shell think and do about it?*[346] This document concludes that while "[t]*he balance of scientific evidence suggest*[ed] *a link between human activities – especially the burning of fossil fuels – and climate change*," there are still "*tremendous uncertainties*" that make it difficult "*to estimate the size, nature, distribution and speed of any future changes*". This is in line with the First Assessment Report and the Second Assessment Report cited above.

226. In short, the documents referred to by Milieudefensie et al. primarily show that Shell has always been attentive to climate science, did not have any unique knowledge, and has consistently and publicly stressed the importance of balancing the growing energy needs with the preservation of a sustainable world for future generations.[347]

2.5 The IPCC was established to assist policymakers by assessing scientific, technical and socio-economic information relevant to climate change

227. With the IPCC's establishment, climate science gained considerably more influence and recognition outside the scientific community as well. The IPCC is regarded as "*the leading international body for the assessment of climate change.*"[348] Since 1988, IPCC scientists have been studying and analysing the thousands of scientific articles published each year on climate change. They summarise what is currently known about these topics and identify the degree of scientific agreement reflected therein.[349] However, the comparison made by Milieudefensie et al. in this context with "*the process of hearing both sides of the argument used in the legal world*"[350] is flawed.

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346 Summons, paras 562-565.
347 See, for example, **Exhibit RK-23**, Shell, The Three Cornered Challenge, 1992; **Exhibit RO-179**, STTC Annual Report 1991p. 1.
348 Summons, para. 369.
349 **Exhibit RO-180**, IPCC, About (website page 9 November 2019); **Exhibit RO-181**, IPCC, Factsheet: what literature does the IPCC assess?, 2013.
350 Summons, para. 369.

In view of the nature of the scientific process – which is cumulative, self-correcting and constantly evolving – the IPCC will never present any fully definitive conclusion.[351] Each IPCC report contains new findings, which may disprove old notions and raise new questions needing answers.

228. As shown by the Shell documents referred to by Milieudefensie et al., Shell has long endorsed the IPPC's work. Given the major relevance of the IPCC reports and the fact that Milieudefensie et al. base certain legal elements of their claims on these IPCC reports, it is important to have a clear understanding of the purpose, nature and content of these reports. As will be explained in more detail below, the following aspects are particularly important: (i) the IPCC does not itself carry out independent research;[352] (ii) the IPCC uses calibrated language to reflect the fact that findings are never absolute and final;[353] (iii) the IPCC reports are neutral with respect to policy; and (iv) the IPCC reports consider a number of causes of climate change, including GHG emissions from combustion of fossil fuels. The only up-to-date IPCC reports currently available are the Fifth Assessment Report ("**AR5**") from September 2013 and October 2014, the IPCC Special Report on Global Warming of 1.5°C ("**SR15**") from October 2018, the Special Report on Climate Change and Land ("**SRCCL**") from August 2019 and the Special Report on the Ocean and Cryosphere in a Changing Climate ("**SROCCC**") from September 2019. Earlier reports have now been superseded.

2.5.1 IPCC reports analyse existing scientific research and express the diversity of evidence

229. As stated, the IPCC does not carry out any scientific research of its own, but studies and analyses existing research published by other experts and scientists. The IPCC uses careful language to do justice to the diversity of evidence in the literature and the degrees of certainty and uncertainty of that evidence.[354] For example, the IPCC explains that "*Antarctic warming, Antarctic sea ice extent, and Antarctic mass balance, confidence in attribution to human influence remains low due to modelling uncertainties and low agreement between scientific studies*".[355]

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351 Exhibit 111, IPCC, AR4, WGI, Ch. 1, p. 95.
352 **Exhibit RO-182**, IPCC, Preparing Reports (website page 29 August 2019).
353 Id.
354 **Exhibit RO-183**, IPCC, Appendix A to the Principles Governing IPCC Work, Section 4.2.
355 **Exhibit RO-184**, IPCC 2013, AR5: Climate Change 2013: The Physical Science Basis, Working Group I, Technical Summary, p. 115.

230. The IPCC's Fifth Assessment Report (AR5) communicates that the validity and certainty that it ascribes to scientific findings are assessed through four metrics: (i) the type, amount, quality, and consistency of the evidence, on a scale from limited to robust; (ii) the degree of agreement among experts, from low to high; (iii) the experts' level of confidence, from very low to very high; and (iv) the likelihood of outcomes, expressed quantitatively as probabilities.[356]

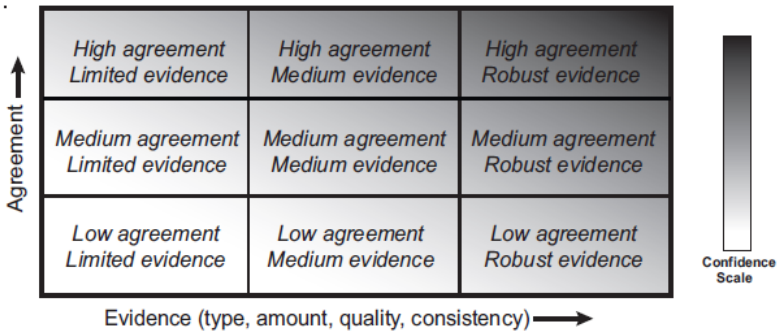

Figure 1: A depiction of evidence and agreement statements and their relationship to confidence. Confidence increases towards the top-right corner as suggested by the increasing strength of shading. Generally, evidence is most robust when there are multiple, consistent independent lines of high-quality evidence.

Table 1. Likelihood Scale

Term*	Likelihood of the Outcome
Virtually certain	99-100% probability
Very likely	90-100% probability
Likely	66-100% probability
About as likely as not	33 to 66% probability
Unlikely	0-33% probability
Very unlikely	0-10% probability
Exceptionally unlikely	0-1% probability

* Additional terms that were used in limited circumstances in the AR4 (*extremely likely* – 95-100% probability, *more likely than not* – >50-100% probability, and *extremely unlikely* – 0-5% probability) may also be used in the AR5 when appropriate.

356 **Exhibit RO-185**, IPCC, Guidance Note for Lead Authors of the IPCC Fifth Assessment Report on Consistent Treatment of Uncertainties, 6-7 July 2010.

231. Milieudefensie et al. assert that it follows from the climate science that certain future events will occur as a matter of certainty unless particular steps are taken (including by RDS).[357] Milieudefensie et al. thus ignore the nature of the IPCC's findings, consequently separating a number of claims from the underlying scientific consensus. As a result, their claims are inappropriate and unfounded. For example:

(a) Citing the IPCC, Milieudefensie et al. state that "[t]*here is scientific consensus that we, humans, are causing global warming by using fossil fuels and that this is causing the climate to change*".[358] However, the scientific reality is not so simple as Milieudefensie et al. would have us believe. The IPCC certainly states that "[w]*arming of the climate system is unequivocal*,"[359] but it does not attribute warming to the use of fossil fuels or to the energy sector alone. Rather, warming is caused by "[n]*atural and anthropogenic substances and processes that alter the Earth's energy budget*",[360] which in turn is primarily caused by the increased concentration of CO_2 in the atmosphere since 1750.[361] This increase has come "*primarily from fossil fuel emissions and secondarily from net land use change emissions.*"[362] In fact, from 1750 to 2011, land use changes contributed an estimated one third of the cumulative anthropogenic emissions released into the atmosphere, according to the IPCC.[363] Emissions from agriculture, forestry and other land use (abbreviated in the IPCC reports to "AFOLU") represented about one third of total net cumulative anthropogenic GHG emissions from 2007 to 2016. The main sources of "AFOLU emissions" are deforestation, livestock (ruminants) and fertilizers.[364]

(b) Milieudefensie et al. fail to mention the IPCC's recognition of the role that CCS and negative emissions technologies may play – and are already playing – to capture GHG emissions after combustion or after release into the atmosphere.

(c) Milieudefensie et al. also ignore the significant uncertainties surrounding the so-called "tipping points". According to the IPCC,

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357 Summons, Chapter III.
358 Summons, para. 309.
359 Summons, para. 307 (citing Summons, Exhibit 099, IPCC, AR5, WGI, SPM, p. 4).
360 Summons, Exhibit 099, IPCC, AR5, WGI, SPM, p. 13.
361 Id.
362 Cf. Summons, para. 308 and Summons, Exhibit 099, IPCC, AR5, WGI, SPM, p. 11 [emphasis added by attorneys].
363 Summons, Exhibit 099, IPCC, AR5, WGI, SPM, p. 12.
364 **Exhibit RO-186**, IPCC 2019, Special Report on Climate Change and Land, Summary for Policy Makers, pp. 7, 11, 1-8.

identifying the existence of tipping points "*remains a major source of uncertainty. . . probabilistic statements about the range of outcomes are possible in this context, but ecosystem science is as yet mostly unable to conduct such analyses routinely and rigorously.*"[365] The IPCC's analyses of worldwide tipping points ("*large-scale singular events*") boast only low or medium confidence.[366] In particular, the IPCC has only low confidence about the "*precise levels of climate change sufficient to trigger tipping points*"[367] and the IPCC cannot determine *when* these may occur, because their "*onset may be abrupt,* [and] *hard to predict precisely*."[368] Milieudefensie et al. also make incorrect scientific claims with regard to tipping points. For example, they refer to the decrease of the sea ice as a possible tipping point.[369] However, the IPCC stated that while "[the] *ice is often cited as a tipping point in the climate system* [...] *studies suggest that changes in Arctic sea ice are neither irreversible nor exhibit bifurcation behaviour*".[370]

232. Shell agrees that all stakeholders globally should make a proper effort to study and understand the science as presented in the IPCC reports. It does caution against the temptation to be drawn to overly general conclusions too readily on the basis of sensationalist headlines, as opposed to carefully considering what those reports actually say while taking account of the careful, calibrated language that is deliberately adopted by the authors to say it.

2.5.2 IPCC reports are policy neutral

233. As noted above, the IPCC reports are "*neutral with respect to policy.*"[371] The IPCC does not assess the merits of different policy choices. Its mandate is not to make policy but "*to provide policymakers with a clear view of the current state of scientific knowledge relevant to climate change.*"[372]

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365 Summons, Exhibit 155, IPCC, AR5, WGII, Ch. 4, p. 328.
366 Summons, Exhibit 136, IPCC 2018 SR15, Ch. 3, pp. 257-58.
367 Summons, Exhibit 149, IPCC, AR5, WGII, TS, p. 62 and Summons, Exhibit 150, IPCC 2014, AR5, WGII, Ch. 19, p. 1045. See also **Exhibit RO-187**, IPCC 2019, SR Oceans and Cryosphere, Chapter 4: Sea Level Rise and Implications for Low Lying Islands, Coasts and Communities pp. 55, 57 ("*There is deep uncertainty about whether and when a tipping point will be passed*").
368 Summons, Exhibit 155, IPCC, AR5, WGII, Ch. 4, p. 278. See also IPCC, AR5, WGII, Ch. 19, pp. 1079-80.
369 Summons, para. 438.
370 Summons, Exhibit 136, IPCC 2018 SR15, Ch. 3, p. 270.
371 Summons, Exhibit 125, Principles Governing IPCC Work, para. 2.
372 **Exhibit RO-181**, IPCC, Factsheet: what literature does the IPCC assess?, 2013.

234. Milieudefensie et al. repeatedly allege that warming to above 2°C pre-industrial levels equates to "*dangerous climate change*" or "*catastrophic*" results.[373] In support of this assertion, Milieudefensie et al. refer to a "*special update report from 2009*," which they allege updated the IPCC's Fourth Assessment.[374] However, the cited "*update report*" is *not* an IPCC report[375] and has never been included by the IPCC in an assessment. In addition, the 2009 report agrees that "*defining 'dangerous climate change' is ultimately a value judgment made by societies as a whole,*" which is precisely why – see also Sections 2.6, 2.7 and 6.2 – governments must set both the targets for society to achieve and the pathways for society to follow.[376]

235. As yet, there is no consensus on what steps various stakeholders must take in order to prevent certain dangers or risks resulting from climate change. To the extent that Milieudefensie et al. take any positions about what constitutes "*dangerous climate change*", and when such a threshold will be reached for the purpose of supporting their unlawful endangerment claims, RDS contests those positions.

2.5.3 IPCC reports identify various factors contributing to climate change

236. Milieudefensie et al. ignore reality by stating that the global systems transition is inhibited only by RDS's "*current inadequate climate policy*"[377] and *would* be achieved by the award of their claims.[378] With this assertion, Milieudefensie et al. also ignore the fact that GHGs come from all sorts of human activities worldwide, from various industrial sectors and from consumers.[379]

237. The IPCC reports emphasise that GHG emissions come from a wide variety of sources and that global emissions reductions require complex, global changes to society and the economy.[380] The IPCC states that most anthropogenic GHG emissions from fossil fuel use are not caused by the energy sector. They are "*mainly driven by population size, economic activity, lifestyle, energy use, land use patterns, technology and climate*

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373 See Summons, paras. 13, 23, 28, 31, 231, 330, 350, 394, 507, 520, 547, 621 and 635.
374 Summons, para. 393.
375 Summons, Exhibit 138, Richardson 2009, IPCC, SYR (2009 Update Report), p. 5.
376 Id., p. 12.
377 Summons, para. 55.
378 See Subsection 2.2.4 above and Section 7.4.
379 **Exhibit RO-188**, IPCC 2014, AR5: Climate Change 2014: Mitigating Climate Change, Working Group III, Chapter 5: Drivers, Trends and Mitigation, p. 358; Summons, Exhibit 136, IPCC 2018, SR15, Ch. 2, pp. 136-137.
380 **Exhibit RO-188**, IPCC 2014, AR5: Climate Change 2014: Mitigating Climate Change, Working Group III, Chapter 5: Drivers, Trends and Mitigation, p. 358; Summons, Exhibit 228, IPCC, AR5, SYR, pp. 11-12; Summons, Exhibit 136, IPCC 2018, SR15, Ch. 2, pp. 138-48.

policy."[381] The IPCC reports do not show that fossil fuel use is the only cause of climate change or that preventing one company from extracting and selling oil and gas will meaningfully lower GHG emissions. Milieudefensie et al.'s summary of the IPCC's findings omits other important sources of GHG emissions.[382] Milieudefensie et al.'s reliance on the IPCC to support their assertion that the "*'business as usual' use of fossil fuels*" will cause GHG concentrations in the atmosphere to rise to 750-1300 ppm by 2100, is too simplistic. After all, the IPCC reports refer not only to fossil fuel use, but also to emissions from all sectors and sources.[383]

2.6 The international law framework for climate change action applies to States, not to private companies

238. In their Summons, Milieudefensie et al. set out the international efforts to address climate change, focusing primarily on the international legal framework.[384] Shell endorses that international law framework. It represents the coordinated approach by States to aim to reduce GHG emissions in order to limit the adverse consequences of climate change to the extent possible.

239. These international frameworks place the responsibility for addressing climate change on States. None of the international law instruments within the UNFCCC cited by Milieudefensie et al. create any legal responsibility for private actors, including RDS.

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381 Summons, Exhibit 228, IPCC, AR5, SYR, p. 8; see also Summons, Exhibit 136, IPCC 2018, SR15, Ch. 2, p. 139, Figure 2.20.

382 Other major GHG emitters include the industrial sector (see Summons, Exhibit 110, IPCC, AR5, WGIII, SPM, p. 23 and **Exhibit RO-189**, IPCC 2014, AR5: Climate Change 2014: Mitigating Climate Change, Working Group III, Chapter 10: Industry, pp. 10, 743-45; Summons, Exhibit 136, IPCC 2018, SR15, Ch. 2, pp. 138-40), urban infrastructure (see Summons, Exhibit 110, IPCC, AR5, WGIII, SPM, p. 23 and **Exhibit RO-190**, IPCC 2014 AR5: Climate Change 2014: Mitigation of Climate Change, Working Group III, Chapter 9: Buildings, pp. 677-78; Summons, Exhibit 136, IPCC 2018, SR15, Ch. 2, pp. 140-42), the transport sector (see Summons, Exhibit 110, IPCC, AR5, WGIII, SPM, p. 21 and **Exhibit RO-191**, IPCC 2014, AR5: Climate Change 2014: Mitigating Climate Change, Working Group III, Chapter 8: Transport, p. 603; Summons, Exhibit 136, IPCC 2018, SR15, Ch. 2, pp. 142-44), as well as agriculture, arable farming and other land use (see Summons, Exhibit 110, IPCC, AR5, WGIII, SPM, p. 24 and **Exhibit RO-188**, IPCC 2014, AR5: Climate Change 2014: Mitigating Climate Change, Working Group III, Chapter 5: Drivers, Trends and Mitigation, p. 354; Summons, Exhibit 099, IPCC 2013, AR5, WGI, SPM, p. 11 and **Exhibit RO-192**, IPCC 2013, AR5: Climate Change 2013: The Physical Science Basis, Working Group I, Chapter 6: Carbon and Other Biogeochemical Cycles, pp. 473-75; Summons, Exhibit 136, IPCC 2018, SR15, Ch. 2, pp. 144-48; **Exhibit RO-186**, IPCC 2019, Special Report on Climate Change and Land, Summary for Policy Makers pp. 4, 11, 1-8.

383 Cf. Summons, para. 329 and Summons, Exhibit 110, IPCC AR5, WGIII, SPM, p. 8.

384 See generally Summons, Chapter V.

2.6.1 States began to cooperate and collaborate in response to scientific research on climate change from the late 20th century

240. Milieudefensie et al. describe key moments in the history of governmental action to address climate change starting in the 1970s and 1980s,[385] but fail to place that history in the larger historical context. Development of scientific knowledge about climate change has been public from the very beginning. The call for action was rightly addressed to governments and also placed the responsibility for taking measures on governments. After all, governments have the power and the instruments to define energy policy, economic policy and legal frameworks for their countries.

241. In response to scientists' call for international governmental action against climate change, policymakers in the 1970s and 1980s explicitly called on countries to adopt "precautionary measures". This concept of "precaution" was later incorporated into public international law and has become known as the "precautionary principle". The precautionary principle is intended to prevent environmental and climate damage where future effects are uncertain.[386] The precautionary principle essentially prescribes that the lack of scientific certainty about the nature, timing and scope of the risks may not prevent governments from taking action. For example, the precautionary principle was explicitly incorporated in the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, which describes the treaty's task as protecting the ozone layer "*by taking precautionary measures.*"[387] The Bergen Declaration of 1990,[388] the Rio Declaration of 1992[389], and the UNFCCC of 1994 each incorporated the precautionary principle as well.[390]

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385 Summons, Chapter V.

386 **Exhibit RO-193**, Weiner, Precaution and Climate Change, 2016, Ch. 8, p. 165.

387 **Exhibit RO-194**, 1987 Montreal Protocol, Preamble. See also **Exhibit RO-167**, Bodansky et al., International Climate Change Law, 2017 (pp. 96-103)("*Second, the development of the climate regime in the late 1980s and early 1990s rode a wave of environmental activity that began in 1987 with the adoption of the Montreal Protocol* […]", p. 98).

388 **Exhibit RO-195**, Ministerial Declaration, Bergen Conference 1990, p. 190 ("*In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation.*").

389 **Exhibit RK-3**, UN, Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 1992, principle 15 ("*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*").

390 Summons, Exhibit 096, UNFCCC 1992 (ENG), Article 3(3) ("*The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of*

242. These treaties impose an obligation on States to take preventive action where there are uncertain risks. Milieudefensie et al. acknowledge that the precautionary principle is "*imposed on all countries*". The precautionary principle indeed does not create obligations for, allocate responsibility to or otherwise bind private actors. Private actors such as RDS must act in accordance with the applicable national legislation, where the details of these international law arrangements and obligations are implemented at the national level and which contains specific and binding obligations for private actors.

2.6.2 The UNFCCC provides for a coordinated and balanced reduction of GHG emissions

243. Reducing global GHG emissions requires balancing of often conflicting interests and a coordinated approach by States. Scientists and national policymakers have long agreed that the tension between diverse interests further necessitates a coordinated global governmental strategy. For example, the Declaration following the 1979 World Climate Conference stated:[391]

> *"The climates of the countries of the world are interdependent. For this reason, and in view of the increasing demand for resources by the growing population that strives for improved living conditions, there is an urgent need for the development of a common global strategy for a greater understanding and a rational use of climate."*
> [emphasis added by attorneys]

244. In economic terms, climate change presents precisely the sort of "common pool resources" problem that, as Nobel Prize economist Elinor Ostrom explained, requires "*dialogue among interested parties, officials, and scientists,*" as well as "*complex, redundant, and layered institutions.*"[392] As another economist and Nobel Prize winner, Gary S. Becker, put it: "*meaningful efforts to successfully correct this externality must then hinge on collective and harmonized action by nations worldwide*."[393]

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full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.").

391 Summons, Exhibit 119, WMO 1979 Proceedings of the World Climate Conference.

392 **Exhibit RO-196**, Dietz et al., The Struggle to Govern the Commons, 12 December 2003p. 1907. See also **Exhibit RO-197**, Ostrom, A Polycentric Approach for Coping with Climate Change, October 2009; **Exhibit RO-198**, Ostrom, Nested externalities and polycentric institutions: must we wait for global solutions to climate change before taking actions at other scales?, 2012, p. 353 ("*Building a global regime is a necessity, but encouraging the emergence of a polycentric system starts the process of reducing greenhouse gas emissions and acts as a spur to international regimes to do their part*.").

393 **Exhibit RO-199**, Becker et al., On the Economics of Climate Policy, 2011, p. 1.

245. This analysis is not only economic, it has also informed scientific approaches of the IPCC. For example, the IPCC relied upon Dr Ostrom's research on "*manag*[ing] *the climate problem*" through "*collective action, trust and cooperation*".[394] The IPCC thus agrees that climate change is a "*collective action problem at the global scale*" and that "[i]*nternational cooperation is therefore required to effectively mitigate GHG emissions.*"[395]

246. The coordinated governance 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.[396] 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. The International Energy Agency has warned that a total cessation of new oil investments will have dangerous consequences for the global economy.[397]

247. States are best placed to weigh the social and economic consequences of emissions reduction and only governments can set the policies that drive national emissions reductions to net zero. This is also clearly apparent from *Urgenda*, on which Milieudefensie et al. repeatedly rely: "*the protection sought by Urgenda c.s. against the excessive total Dutch CO_2 emissions can only be provided by the State*" because "*the State in fact holds the power to reduce Dutch CO_2 emissions or have them reduced*."[398]

248. Courts cannot set energy policy or other national policies that affect both the achievement of national net zero emissions and international coordination on such important issues as climate change, trade, and energy security. In *Urgenda*, the District Court and the Court of Appeal recognised the limits of their role in the development of law. Although the Court of Appeal in *Urgenda* upheld the District Court's judgment imposing an

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394 **Exhibit RO-200**, IPCC 2014, AR5: Climate Change 2014: Mitigating Climate Change, Working Group III, Foreword, Preface, Dedication and In Memoriam, p. xiii.

395 Summons, Exhibit 110, IPCC AR5, WGIII, SPM, p. 5.

396 See Exhibit 096, UNFCCC 1992 (ENG), Recital 6, Articles 3(1), 4(1); **Exhibit RK-24**, Kyoto Protocol 1998, Article 10; Paris Agreement, Recital 3, Articles 2(2), 4(3), 4(19).

397 **Exhibit RK-25**, IEA, Outlook for Producer Economies 2018, p. 49; **Exhibit RK-4**, IEA, World Energy Outlook 2018, pp. 62, 72-73.

398 Urgenda Summons, 25 June 2014, paras. 292 and 293, available at https://www.urgenda.nl/wp-content/uploads/Translation-Summons-in-case-Urgenda-v-Dutch-State-v.25.06.10.pdf.

emissions reduction obligation on the Dutch State, the Court refrained from opining in any way on how the State was to fulfil that obligation.[399]

249. States collectively negotiate their international instruments – including the UNFCCC and Paris Agreement – and governments then adopt national policy and legal frameworks to govern private actors. Governments only look at their own jurisdictions in doing so. Urgenda acknowledged this point before the Court of Appeal, admitting that the Dutch government's responsibility is limited to "*the emissions from Dutch territory,*" and that the Dutch government cannot intervene in emissions from other countries, particularly lesser-developed countries.[400]

2.6.3 Milieudefensie et al. rely on international law instruments between States that do not impose obligations on private parties and do not have the prescriptive elements they claim

250. Milieudefensie et al.'s assertion that RDS, a private party, has a legal obligation to act in line with the Paris Agreement – by achieving net zero CO_2 emissions by 2050 or otherwise[401] – fails to appreciate both the scope of public international law and the language of the Paris Agreement.

251. Public international law is derived from treaties, general legal principles and customary international law.[402] In general, it binds State parties and governs inter-state relations.[403] The UNFCCC and all public international law pertaining to tackling climate change are premised on State commitments that aim to ensure that society as a whole meets agreed climate change mitigation and adaptation goals.[404] Therefore, the UNFCCC and any agreements entered into within its framework, such as treaty instruments between States, can only impose obligations on the State parties.

252. One of those instruments, the Kyoto Protocol, which was the first emissions-related treaty, imposed "*quantitative restrictions on emissions*"

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399 Court of Appeal of The Hague 9 October 2018, ECLI:NL:GHDHA:2018:2591, paras. 71-76.
400 Court of Appeal of The Hague 9 October 2018, ECLI:NL:GHDHA:2018:2591, para. 28.
401 Summons, para. 851.
402 **Exhibit RO-201**, Brownlie, Principles of Public International Law, 2012 (pp. 2-19), p. 6; **Exhibit RO-202**, Bodansky et al., International Climate Change Law, 2017 (pp. 34-39), p. 36.
403 **Exhibit RO-203**, Brownlie, Principles of Public International Law, 2012 (pp. 115-127), pp. 115-116, 121-122 ("*In principle . . . corporations do not have international legal personality*."); **Exhibit RO-202**, Bodansky et al., International Climate Change Law, 2017 (pp. 34-39), p. 37.
404 **Exhibit RO-201**, Brownlie, Principles of Public International Law, 2012 (pp. 2-19), pp. 360, 362; **Exhibit RO-204**, Bodansky et al., International Climate Change Law, 2017 (pp. 10-11), pp. 10-11.

with regard to six GHGs on Annex I (developed) countries.[405] By ratifying the Kyoto Protocol, Annex I countries such as the Netherlands accepted that the responsibility for policy to tackle climate change lay with their national governments.[406]Shell publicly expressed support for the Kyoto Protocol in a speech at the 1998 World Economic Forum and urged every signatory State to "*consider the implications of its own targets, and put together policies and measures to meet them.*"[407]

253. Since Kyoto, subsequent international law instruments, including the Copenhagen Accord and the UN SDGs, have recognized that States have the role of striking a balance between conflicting interests. Importantly, because the UN SDGs include *both* a goal of climate action *and* a goal of affordable and clean energy, they contemplate a primary role for States in balancing the need to increase access to energy with the development of cleaner fossil fuel technology.[408]

254. In contrast to the Kyoto Protocol, the Paris Agreement did not set any substantive emission reduction targets or precise timelines. Instead it set a primary goal for States to limit "*the increase in the global average temperature to well below 2°C above pre-industrial levels*" while also agreeing to "*pursu[e] efforts to limit the temperature increase to 1.5°C*".[409] Each State that is party to the Agreement defines its own emissions reduction targets in its NDC.[410]

255. The temperature goals are not prescriptive,[411] despite Milieudefensie et al.'s claim to the contrary.[412] Similarly, while the Paris Agreement requires States to lay down NDCs with the intention of achieving them, there is no

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405 **Exhibit RO-205**, Calkarne, Oxford Handbook on International Climate Change Law, 2014 (pp. 26-37), p. 32. See also **Exhibit RK-24**, Kyoto Protocol 1998, Articles 2-3.

406 **Exhibit RO-206**, Bodansky et al., International Climate Change Law, 2017 (pp. 26-31), p. 27.

407 See **Exhibit RK-21**, Herkstroter, Reflections on Kyoto, 2 February 1998 ("*measures such as the emission limits for greenhouse gases set in train by the Kyoto agreement are necessary*.").

408 **Exhibit RK-26**, UN, Sustainable Development Goals: Goal 13, which includes: Take urgent action to combat climate change and its impacts; **Exhibit RK-27**, UN, Sustainable Development Goals: Goal 7, which includes: ensure access to affordable, reliable, sustainable and modern energy for all ("*By 2030, enhance international cooperation to facilitate access to clean energy research and technology, including renewable energy, energy efficiency and advanced and cleaner fossil-fuel technology, and promote investment in energy infrastructure and clean energy technology*.").

409 Paris Agreement, Article 2(1)(a).

410 **Exhibit RO-207**, Falkner, The Paris Agreement and the new logic of international climate politics, 2016, pp. 1114-16.

411 Paris Agreement, Article 2(1)(a) ("*This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change [...] including by: (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels [...]*" [emphasis added].

412 Summons, para. 411 (where it is asserted that the NDCs "*must have been achieved by 2030*").

mechanism for enforcing NDC targets or otherwise enforcing the reduction of GHG emissions.[413] Instead, the architecture of the Paris Agreement permits States – through their own national governments – to adopt individualised targets and implement national policy and a legal framework on climate change based on their individualised energy and development needs.

256. Private parties remain outside the Paris Agreement architecture, save to the extent that States adopt national (legal) frameworks that bind private parties operating within their jurisdiction. The Paris Agreement refers only twice to non-parties to the Convention, both times in the context of emissions trading under Article 6.[414] Though the UNFCCC Conference of Parties welcomes the contributions of non-parties such as RDS, the Paris Agreement places no obligations on them, contrary to Milieudefensie et al.'s assertions.[415]

257. Shell fully supports the Paris Agreement's goals and has participated in various projects launched by the parties to the Paris Agreement, in addition to its own initiatives. For example, Shell has voluntarily participated in the Marrakech Partnership (which supports the implementation of the Paris Agreement by enabling collaboration on emissions reductions among governments, businesses, and investors),[416] the Talanoa Dialogue (which takes stock of the Parties' collective efforts and informs the preparation of NDCs),[417] and the development of carbon pricing and other market mechanisms under Article 6 of the Paris Agreement,[418] even though the COP's operational rules remain incomplete. Milieudefensie et al.'s claims,

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413 Paris Agreement, Art. 4(2) ("*Each Party **shall prepare**, communicate and maintain successive nationally determined contributions . . . [and] **shall pursue** domestic mitigation measures, with the **aim of achieving** the objectives of such contributions* ") [emphasis added by attorneys]. See also **Exhibit RO-208**, Bodansky et al., International Climate Change Law, 2017 (pp. 68-71), p. 70.

414 Paris Agreement, Art. 6(4)(b) ("*[…] a mechanism to contribute to the mitigation of greenhouse gas emissions […] [that] shall aim: To incentivize and facilitate participation in the mitigation of greenhouse gas emissions by public and private entities authorized by a Party"*); Id. Article 6(8)(b) ("*[…] recognize the importance of integrated, holistic and balanced non-market approaches being available to Parties [...] [that] aim to: ... (b) Enhance public and private sector participation in the implementation of nationally determined contributions*").

415 Summons, para. 38.

416 **Exhibit RO-209**, UNFCCC - Marrakech Partnership for Global Climate Action.

417 **Exhibit RO-210**, UNFCCC - 2018 Talanoa Dialogue Platform; **Exhibit RO-211**, UNFCCC, Governments Meet in Bonn To Step Up Climate Action Critical to the Implementation of Paris Agreement, 28 April 2018; **Exhibit RO-212**, UNFCC, Overview of Inputs to the Talanoa Dialogue, p. 1.

418 **Exhibit RO-213**, Decision 1/CP.21, 29 January 2016, paras. 9, 34, 39-40 ("**Decision 1/CP.21**"); **Exhibit RO-214**, UNFCCC - The Katowice Climate Package: Making The Paris Agreement Work For All.

however, attempt to transform the Paris Agreement's temperature goals into binding targets and timelines for private parties, with no legal basis.[419]

258. While voluntary industry initiatives are valuable, they primarily serve as a basis for dialogue and the provision of information for government decision-making, and "*there are limits to what they can achieve*".[420] At times, private companies have adopted the language of various international law instruments and frameworks, or indeed, like Shell, have made public statements in support of them and their goals. However, these statements represent voluntary business decisions to seek to support aspirational aims and goals – they are not legally binding and do not impose any legal obligations or responsibilities upon private parties.

259. Private parties with operations located across jurisdictions are and will be governed by diverse national regulatory and legislative frameworks arising out of individual State-determined NDCs and long-term strategies. There is no single, globally uniform approach or standard GHG emissions reduction target or timeline for States, let alone for private parties. Naturally, multi-jurisdictional private parties like Shell must tailor their operations to the laws of each jurisdiction in which they operate, according to the mitigation, adaptation, development, and energy goals of the governments in those jurisdictions.

260. It goes without saying that Shell will comply with all legal obligations imposed on it by national governments. In addition, it is committed to implementing policy incentives that promote the acceleration and making of investments that contribute to the energy transition, such as strong carbon pricing mechanisms and policies to support the development and deployment of alternative energy sources and technologies to reduce, remove or offset CO_2. Any such obligations, however, come from the national government, not from the Paris Agreement or the IPCC.

2.6.4 Milieudefensie et al. wrongly attribute end user emissions to RDS

261. By including emissions from the use of products sold by Shell (Scope 3 emissions) in their claims, Milieudefensie et al. overlook the simple fact that producers have no control over the emissions from end users, and indeed that no such control is possible. This approach thus runs counter to the principles of the UNFCCC as regards GHG reporting. In taking this

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419 Not to mention that the IPCC includes several 1.5ºC scenarios (those with "overshoot") that provide for achieving net zero emissions after 2050. Summons, Exhibit 136, IPCC 2018 SR15, Ch. 2, p. 112 et seq.

420 **Exhibit RK-4**, IEA, World Energy Outlook 2018, p. 512.

approach, Milieudefensie et al. seek to apply an entirely different – and much further reaching – standard to RDS. There is no basis in law or practice for this approach.

262. State GHG accounting attributes responsibility for GHG emissions to the State generating the emissions as opposed to the State producing the underlying product (that emits GHG when combusted in its end use).[421] Under the IPCC's Guidelines for emissions accounting and the Paris Agreement, States only report emissions actually occurring within their borders through combustion or leakage, in other words: the emissions falling within their jurisdiction.[422]

263. Furthermore, the IPCC Guidelines – contrary to Milieudefensie et al.'s assertions in these proceedings – break GHG emissions down in proportion to emissions generated at various steps in the supply chain.[423] They do not attribute *all* GHG emissions to the first producer in the chain. For example, emissions from fuel combusted during industrial processes and product use (such as in the chemical and metal industries) are attributed to the industrial sector and not to the energy sector where the fuel originated.[424] This method, used by the UNFCCC to determine States' accountability obligations under the Paris Agreement,[425] thus underscores the fact that end-use emissions are attributable to actors other than the producer of a given product.

264. Corporate guidelines and national legal frameworks applying to companies affirm that the latter are not responsible for reducing Scope 3 emissions, over which they necessarily have no control. Companies may – as Shell does – voluntarily report Scope 3 emissions. Most companies do not. The GHG Protocol, the most widely-used corporate reporting standard,[426] repeatedly emphasizes that the reporting of Scope 3 emissions is

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421 **Exhibit RK-28**, IPCC, 2006 Guidelines for National Greenhouse Gas Inventories, Chapter 8: Reporting Guidance and Tables, Sections 8.4-8.5. Incidentally, although this methodology has been under review since 2014, and was mostly recently "refined" in May 2019, the methodology has been broadly maintained because it was concluded that "*The 2006 IPCC Guidelines for National Greenhouse Gas Inventories (2006 IPCC Guidelines) provide a technically sound methodological basis of national greenhouse gas inventories, and therefore fundamental revision is unnecessary*". See **Exhibit RK-29**, IPCC, 2019 Refinement to the 2006 IPCC Guidelines.

422 **Exhibit RK-28**, IPCC, 2006 Guidelines for National Greenhouse Gas Inventories, Chapter 8: Reporting Guidance and Tables, Sections 8.4-8.5; Paris Agreement, Article 13.

423 **Exhibit RK-30**, IPCC, 2006 Guidelines for National Greenhouse Gas Inventories, Chapter 1: Introduction, Section 1.5 and Figure 1.1.

424 Id.

425 Paris Agreement, Article 13(7)(a).

426 **Exhibit RO-215**, Greenhouse Gas Protocol, Standards (website page 11 November 2019).

optional.[427] Other international guidelines adopt the same approach.[428] Similarly, the European Emissions Trading Scheme ("**ETS**") only applies to Scope 1 and 2 emissions from installations covered by the Scheme.[429]

265. Milieudefensie et al. base their claims against RDS – and their attempt to attribute almost 2% of CO_2 emissions since 1890 to RDS – on an outlier publication. The Heede publication referenced by Milieudefensie et al. runs contrary to international precedent and practice by attributing all Scope 3 emissions to fossil fuel extractors and producers.[430] The findings therein, which are entirely directed to the past, are not relevant to the claims lodged in these proceedings.[431] For that reason, inter alia, Milieudefensie et al.'s reliance on the Heede publication for the allocation of Scope 3 emissions to RDS is misplaced and erroneous. Their reliance on Heede is unsurprising, however, because that publication was commissioned by Greenpeace International, an NGO that conducts activist litigation against the oil and gas industry globally, including for attribution-based damages claims relating to climate change.

2.7 National laws and policies aimed at achieving the goals of the Paris Agreement are numerous and contain varying requirements; with operations in many dozens of countries, the activities of Shell are regulated by many different regimes

266. In general, regulations specific to the oil and gas sector apply to Shell in each of the countries in which it operates, which regulations are designed to regulate oil and gas exploration and production and to impose health, safety and environmental standards on Shell's activities. For example, in the United Kingdom, where RDS is incorporated, the Petroleum Act 1998 establishes the legal regime applying to oil and gas exploration and production. The Petroleum Act is supplemented by the Energy Act 2016, the Infrastructure Act 2015 as well as many other statutory controls prescribing environmental and health and safety legislative standards.[432] In

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427 **Exhibit RK-15**, Greenhouse Gas Protocol, A Corporate Accounting and Reporting Standard 2015, p. 25; **Exhibit RK-19**, Greenhouse Gas Protocol, Corporate Value Chain (Scope 3) Accounting and Reporting Standard 2011, pp. 4, 5.

428 **Exhibit RO-216**, UNFCCC, International Financial Institution Framework for a Harmonised Approach to Greenhouse Gas Accounting, November 2015.

429 Directive 2003/87/EC establishing a system for greenhouse gas emissions allowance trading, as amended by Directive (EU) 2018/410 of 14 March 2018, Articles 2.1, 3(e), 4 & Annex I, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02003L0087-20180408&from=EN; California Cap-and-Trade Program, §§ ("Emissions", "Facility"), 95852, available at https://ww3.arb.ca.gov/cc/capandtrade/capandtrade/ct_reg_unofficial.pdf.

430 Summons, para. 552; Summons, para. 179, Heede 2013 *Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers* pp. 231-232.

431 Summons, paras. 850-851.

432 See **Exhibit RO-217**, Global Oil & Gas: Guide to oil and gas regulation in the UK, 2017 Global; see also **Exhibit RO-218**, ICLG, Oil & Gas Regulation 2018, p. 269.

the Netherlands, the Mining Act (*Mijnbouwwet*) lays down the regulatory regime applying to oil and gas exploration. The Environmental Management Act (*Wet milieubeheer*) and the Environmental Permitting (General Provisions) Act (*Wet algemene bepalingen omgevingsrecht*), as well as the associated underlying regulations – such as the Activities Decree and the Major Accidents (Risks) Decree 2015 – prescribe environmental and safety standards for oil and gas exploration and production, including refining.

267. In addition, countries where Shell operates are developing their own national frameworks to implement the goals of the Paris Agreement. National climate policies for achieving the goals of the Paris Agreement should *not* be determined by the courts. The District Court in *Urgenda* made it clear that it is no easy task for States – who are responsible for determining the concrete measures to be taken to achieve the goals from the Paris Agreement – to actually do so.[433] This process involves a very complex consideration of various and often competing interests and local circumstances.

268. *Urgenda* concerns a single State – the Netherlands. Milieudefensie et al.'s claim is much further reaching. It concerns the activities of an English holding company with subsidiaries operating in many dozens of countries, each with its own political and regulatory scheme, NDC and – if applicable – plan for energy transition. These differentiated national approaches are expressly permitted by the Paris Agreement, which recognises the principle of equity and common but differentiated responsibilities and respective capabilities, in light of different national circumstances (as set out above at Subsection 2.6.3).

269. By seeking to impose additional measures on Shell, Milieudefensie et al. ignore and undermine the efforts already underway by governments to implement the energy transition in the context of the specific circumstances and capabilities of their countries. It is up to Shell to comply with the governing legal framework in the country or countries in which they operate and up to the national courts and regulators of those countries to enforce that compliance. A few examples of these frameworks are set out below.

433 District Court of The Hague 24 June 2015, ECLI:NL:RBDHA:2015:7145 (*Urgenda/Staat*).

2.7.1 The EU has established a climate change policy under which allowances to emit CO_2 are made available and EU member states negotiate appropriate GHG reduction targets

270. The EU has taken steps to create an EU-wide system based on the international legal framework relating to combating climate change.

271. The EU sets long-term GHG emissions reduction targets in the EU and uses a variety of instruments to achieve them. It imposes obligations on member states to support renewable energy production, improve energy efficiency, and adopt adaptation plans.[434] Obligations for private parties are laid down in a wide variety of legal instruments regulating various sectors and industries.[435]

272. To a large extent – and highly relevant in this case – obligations for private parties are established through the ETS, a market mechanism which regulates CO_2, N_2O, and perfluorocarbon emissions from a wide variety of industries using the cap-and-trade principle.[436]

273. The Emissions Trading System puts a limit on overall emissions from covered installations. Within this limit companies can buy and sell emissions allowances as needed providing companies with flexibility to reduce emissions in areas where it costs least to do so. In total, around 45% of total EU GHG emissions are regulated through the Emissions Trading System.[437]

274. The Emissions Trading System is implemented with a view to meeting the obligations to take measures to combat climate change, with reference to inter alia the UNFCCC and the Kyoto Protocol. It explicitly provides that a "greenhouse gas emissions permit" is required for numerous installations in industry.[438] Article 6 states: "*[t]he competent authority shall issue a greenhouse gas emissions permit granting authorization to emit greenhouse gases […]*". Many activities of Shell companies are subject to this regime. For example, the activities in scope include "refining of mineral oil", see Annex I, and specifically the emission of CO_2 is regulated in that context. It also provides for the distribution of "emission allowances", i.e. an

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434 **Exhibit RO-219**, European Commission, EU Climate Action, 23 November 2016.

435 See for example EU Regulation 2019/631 and EU Regulation 2019/1242, setting CO_2-emission performance standards for new passenger cars and for new light commercial vehicles respectively new heavy-duty vehicles.

436 **Exhibit RO-220**, European Commission, EU ETS, 23 November 2016.

437 **Exhibit RO-221**, European Commission, EU ETS Factsheet.

438 Articles 4 and 5 of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC, as amended by several later directives.

allowance "*to emit one tonne of carbon dioxide equivalent*" (Article 3(a) ETS Directive). Further permits issued, in principle, will not set further limitations on CO_2 emissions.[439] The total of allowances in the EU and per country is specifically capped.

275. The EU has an overall target to reduce EU-wide GHG emissions by 20% compared to 1990 levels by 2020 and by 40% compared to 1990 levels by 2030. The European Commission supports a long-term strategy for a bloc-wide net zero emissions target by 2050, and this target has received Shell's express support.[440] Nonetheless, such a strategy has not been met with complete agreement among Member States.[441] At the European Council Summit in Brussels on 20 June 2019, leaders failed to agree to a GHG net zero emissions target by 2050. Specifically, four eastern nations, Poland, Czech Republic, Hungary and Estonia, blocked the EU pledge.[442] Citing economic and social grounds, the Polish Prime Minister emphasised that Poland would need to receive an extensive compensation package in order to back the proposal.[443] Such an outcome demonstrates the need to take account of States' different positions and options when implementing the Paris Agreement.

2.7.2 The legal framework in the Netherlands; the Climate Act does not include a net zero GHG emissions target by 2050

276. The Netherlands has ratified the UNFCCC, the Kyoto Protocol and the Paris Agreement. As an EU member state, the Netherlands' climate-related legislation, regulations and policy are largely determined by agreements and regulations at EU level, including in relation to emissions trading, supporting renewable energy sources, and reducing the energy use of buildings and industries. On 6 March 2015, the EU submitted an NDC on behalf of all member states, including the Netherlands.

277. In the Netherlands, the Emissions Trading System is implemented in the Environmental Management Act. It requires permits from the Dutch Emissions Authority (NEa) for installations[444] and provides for distribution and trading of allowances (GHG emission rights).[445] Once permits and

439 Article 26 of the above-mentioned directive.
440 **Exhibit RO-93**, Shell, Getting to net zero emissions, 9 July 2019.
441 See **Exhibit RO-222**, European Commission, Our Vision for a Clean Planet for All, November 2018.
442 See **Exhibit RO-223**, Bloomberg, EU Closer to Setting a Target Date for Net-Zero Carbon Emissions, 3 October 2019.
443 See **Exhibit RO-224**, Financial Times, EU 2050 climate target blocked by eastern nations, 20 June 2019.
444 Article 16.5 Environmental Management Act.
445 Article 16.23 et seq. Environmental Management Act.

allowances have been issued, other permits for ETS activities (installations) generally do not set further limits for CO_2 emissions.[446]

278. On 28 June 2019, the Dutch Climate Agreement (*Klimaatakkoord*) was presented. The Agreement is actively supported by Shell Nederland B.V.[447] and contains a broad package of measures for sectors such as buildings, mobility, electricity, industry and agriculture. It has the active support of as many of the parties involved as possible and is based on the principle that reducing carbon emissions must be feasible and affordable for everyone. Further, the Climate Agreement dictates that GHG emission reduction measures should not be rushed: they will be introduced step by step.[448] The implementation of the Climate Agreement will be an adaptive process that leaves room to respond to relevant new developments.

279. On 1 September 2019 the Dutch Climate Act (*Klimaatwet*) entered into force.[449] The Climate Act provides a framework for the development of government policy to achieve a 95% reduction in GHG emissions by 2050 compared to 1990 levels. In addition, the Climate Act sets a target of a 49% reduction in GHG emissions by 2030 compared to 1990 levels.[450] The Climate Act does not include a net zero target for the Netherlands by 2050.

280. Pursuant to the Climate Act, the government is required to draw up a Climate Plan setting out measures to ensure that the targets stipulated in the Act are achieved. The Climate Agreement will be an essential part of the Climate Plan and the Integrated National Energy and Climate Plan (NECP) that Member States of the EU are required to submit to the European Commission. The Dutch government aims to submit the Climate Plan and the NECP to the States General by the end of 2019.

281. The Dutch government is thus implementing the policy and legislative frameworks necessary to meet the national emissions reduction

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446 Art. 5.12 Living Environment Law Decree (*Besluit omgevingsrecht*).

447 On 12 September 2019, Marjan van Loon (CEO of Shell Nederland) handed a letter to Ed Nijpels (Chair of the Climate Council) in which she expressed support for the Dutch Climate Agreement on behalf of Shell Nederland; see **Exhibit RO-92**, Shell Netherlands, Letter to Ed Nijpels, 12 September 2019. See also **Exhibit RO-225**, Shell Nederland, Shell Nederland supports the Dutch Climate Agreement (*Shell Nederland steunt het Nederlandse Klimaatakkoord*), 12 September 2019.

448 See **Exhibit RO-226**, Government of the Netherlands, Climate deal makes halving carbon emissions feasible and affordable, 28 June 2019.

449 Bulletin of Acts and Decrees 2019, no. 253. In the Netherlands, Shell founded the Transition Coalition, a group of 60 organisations. In 2016, the organisation requested the government to introduce legislation to implement the Paris Agreement, as well as investment mechanisms to incentivise new technologies. See http://www.transitie-coalitie.nl/globalassets/persbericht-def---bedrijfsleven-roept-overheid-op-tot-maken-van-klimaatwet---251016.pdf.

450 Article 2 Climate Act.

requirements, by imposing certain obligations on Shell companies active in the Netherlands.

282. The Dutch Climate Act does not purport to have any extra-territorial effect. It applies solely and exclusively to operations within the Netherlands.

283. Milieudefensie et al. are requesting the court to impose an order on RDS to reach net zero carbon emissions on the part of Shell by 2050, even though the State in which RDS is headquartered is subject to a lower target. Milieudefensie et al. are ignoring and undermining the actions already underway by the Dutch government to guide the Netherlands through the energy transition in an orderly and deliberate way and are seeking to impose additional measures on just one business.

2.7.3 The legal framework in the United Kingdom: the introduction of a statutory framework on climate change in 2008; the recommendation in 2019 for an ambitious net zero target for 2050

284. The UK has also ratified the UNFCCC, the Kyoto Protocol and the Paris Agreement. As an EU member state, the UK's climate change-related policies and laws are (at least at present) also largely determined by agreements and regulation at EU level. It is presently uncertain whether or not the UK will continue to participate in the ETS following its departure from the EU. Depending on the final exit agreement, the UK may continue to participate in the ETS or may establish a new stand-alone system. The UK Finance Act 2019 includes provision for UK carbon emissions tax at GPB 16 per tonne, which will apply in the event of a no-deal Brexit to encourage GHG reductions in the UK.[451]

285. Prior to the Paris Agreement, the UK legislated to incorporate the UNFCCC pursuant to the Climate Change Act 2008 and subsequent associated regulations. The Climate Change Act forms the basis for the UK's strategy for meeting the objectives of the Paris Agreement. The UK aims to achieve these objectives by, for example, committing to a long-term emission reduction target, setting carbon budgets, conducting ongoing risk assessments and developing and implementing policy strategies, setting up an independent advisory and review body and monitoring progress.[452]

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451 See **Exhibit RO-227**, UK, Carbon Emissions Tax, 29 October 2018; See also **Exhibit RO-228**, UK, Technical Note - Carbon Emissions Tax, 3 September 2019.

452 See, for example, **Exhibit RO-229**, Committee on Climate Change, Reducing UK emissions: 2019 Progress Report to Parliament, July 2019.

286. The Climate Change Act 2008 also created the Committee on Climate Change, an independent non-departmental public body, formed to advise the UK government on tackling and preparing for climate change. On 2 May 2019, the UK Committee on Climate Change released a report ("**CCC Report**") reviewing the emissions target presently legislated for under the Climate Change Act 2008.[453]

287. Following the recommendation in the CCC Report to that effect, the Climate Change Act 2008 was amended on 27 June 2019 to require a 100% reduction in net GHG emissions (compared to 1990 levels) by 2050.[454] The UK government's target of achieving net zero GHG emissions by 2050 has received Shell's express support.[455] In setting this target, the CCC Report acknowledges that the UK is among only a small number of countries globally with targets fully meeting the requirements of the Paris Agreement.[456]

288. The CCC Report expressly acknowledged – again – that climate change action must be led by governments. The target of reaching net zero emissions by 2050 is "*only possible if clear, stable and well-designed policies to reduce emissions further are introduced across the economy without delay*".[457]

289. Further, in acknowledging the principle of "*common but differentiated responsibilities*", the CCC Report emphasised that the UK is a rich economy with a high average income and therefore should act as a leader in combating climate change.[458] The Report advocates a "*leadership driven*" scenario in which the emissions of developed countries will fall relatively dramatically while those of developing countries will not have to reach net zero GHG emissions until well after 2050 and possibly not before 2100.[459]

290. Again, the British legislation, regulations and policy on climate change do not purport to have extra-territorial effect. The rules in question apply solely and exclusively to operators and operations within the UK. This national emission-reduction policy and the regulations in question reflect what the

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453 See **Exhibit RO-60**, Committee on Climate Change, Net Zero: the UK's contribution to stopping global warming, May 2019.
454 See **Exhibit RO-230**, Climate Change Act 2008 (2050 Target Amendment) Order 2019.
455 **Exhibit RO-231**, Shell UK, Our Response to Climate Change.
456 **Exhibit RO-60**, Committee on Climate Change, Net Zero: the UK's contribution to stopping global warming, May 2019, p. 8.
457 Id., p. 12.
458 Id., pp. 106, 107.
459 Id., pp. 96, 83: "*pathways developed for this report that rebalance effort towards existing climate leaders and richer nations appear more plausible than may existing published pathways that imply that most of the required increase in effort would come from middle-income and developing countries*".

UK government considers to be feasible based on the population's continuing land, energy and other usage needs.

2.7.4 The national (legal) frameworks for reaching the goals of the Paris Agreement are in development around the world

291. As explained above, the various Shell companies are bound by different regulatory systems in dozens of countries around the world. Each country has adopted a different approach to climate change by balancing a variety of factors, including the country's economic development and particular climate risk profile. Low-income economies[460] in particular face greater climate-related risks and greater barriers to climate action than developed countries. This is in addition to the significant economic challenges facing these countries.

292. Low-income economies more frequently employ executive policies instead of legislative instruments to demonstrate their intent of carrying out their commitments under the Paris Agreement.[461]Use of non-binding policies instead of binding legislative instruments is indicative of the challenges facing developing countries as they try to implement their commitments under the Paris Agreement in their unique economic circumstances. Greater emphasis on executive activities may also reflect the fact that climate policy developments are in their early phases.[462]

293. As at the end of 2016, in least-developed countries, only 23% of national climate actions were legislative, while 60% of such actions were laid down in legislation in G20 countries.[463] Some countries (such as Uganda, the Comoros, Equatorial Guinea, Libya, Somalia, and Sudan) have no legislative instrument addressing climate change at all,[464] and many others only mention climate change relatively briefly in general energy or environmental bills, without quantifiable emissions reduction targets.[465]

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460 **Exhibit RO-232**, World Bank, Country and Lending Groups Data (website page 29 August 2019).

461 See, for example, **Exhibit RO-233**, ICLG - Overview of Trends in Environmental and Climate Change Law in Sub-Saharan Africa; **Exhibit RO-234**, Grantham Research Institute on Climate Change and the Environment - Nigeria (website page 18 October 2019); **Exhibit RO-235**, Grantham Research Institute on Climate Change and the Environment - Uganda; **Exhibit RO-236**, Grantham Research Institute on Climate Change and the Environment - Tanzania (website page 29 October 2019).

462 **Exhibit RO-237**, Grantham Research Institute, Global trends in climate change legislation and litigation, 2017 Update, pp. 8-9.

463 Id.

464 Id., p. 8; **Exhibit RO-235**, Grantham Research Institute on Climate Change and the Environment - Uganda.

465 **Exhibit RO-236**, Grantham Research Institute on Climate Change and the Environment - Tanzania (website page 29 October 2019); **Exhibit RO-238**, Grantham Research Institute on Climate Change and the Environment - India.

294. India is a party to the Paris Agreement, having signed the agreement on 22 April 2016 and subsequently ratified on 2 October 2016. India's NDC targets are prefaced with a direct reference to India's development agenda, citing difficult trade-offs with economic growth and social development, "*particularly the eradication of poverty*".[466] Under its NDC, India has pledged to reduce the emission intensity of its GDP by 33 to 35% by 2030 from its 2005 level. At present, India has no legislation (through Parliamentary legislation or through delegated legislation by the union government) for the purpose of giving effect to the goals of the Paris Agreement.[467]

295. Similarly, China signed and ratified the Paris Agreement on 22 April and 3 September 2016, respectively. In 2017, China was the world's leading emitter of GHGs by a wide margin, emitting almost one-fourth of the world's total GHGs due to significant economic growth in the country.[468] In its NDC, China's GHG emissions are projected to *rise* until at least 2030, the point at which, according to the pledge made by China, it will have reached peak emissions.[469]

296. China's NDC emphasises that "*the country is currently in the process of rapid industrialization and urbanization*" and faces competing challenges of "*economic development, poverty eradication, improvement of living standards*". These goals are implemented by way of policy infrastructure, known as 'Five-Year Plans', which serve as a guide to action for government and market entities.[470]

2.7.5 Interim conclusion

297. Milieudefensie et al. are asking the court to impose an order on RDS that disregards, and surpasses, the numerous national commitments that apply to the various Shell companies operating in many dozens of jurisdictions. In doing so, Milieudefensie et al. undermine the actions being taken by these governments and, most importantly, ignore the nuanced application of differentiated responsibilities between these different States.

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466 See **Exhibit RO-239**, India's Intended Nationally Determined Contribution, p. 29.
467 See **Exhibit RO-240**, Economic and Policy Review Weekly, India's Domestic Climate Policy is Fragmented and Lacks Clarity, 16 February 2019.
468 See **Exhibit RO-241**, Sandalow, Guide to Chinese Climate Policy, 2018, p. 10.
469 China has also pledged that, by 2030, it will (i) lower carbon dioxide emissions per unit of GDP by 60%–65% from the 2005 level, (ii) increase the share of non-fossil fuels in primary energy consumption to around 20% and (iii) increase the forest stock volume by around 4.5 billion cubic meters from the 2005 level. See **Exhibit RO-242**, China's Intended Nationally Determined Contribution, 30 June 2015.
470 See **Exhibit RO-243**, China, The 13th Five-Year Plan (2016-2020).

3 APPLICABLE LAW: MILIEUDEFENSIE ET AL.'S CLAIMS ARE GOVERNED BY THE LAWS OF SEVERAL COUNTRIES

3.1 Introduction: Milieudefensie et al. wrongly conclude that only Dutch law applies

298. In Chapter II.2 of the Summons, Milieudefensie et al. argue that only Dutch law applies to their claims.

299. While RDS agrees with Milieudefensie et al.'s argument in the Summons that the law applicable to Milieudefensie et al.'s claims should be determined based on the Rome II Regulation, RDS contests their conclusion that according to Rome II, their claims are exclusively governed by Dutch law. That is not the case and is the consequence of the far-reaching and in every respect unprecedented scope of the claims of Milieudefensie et al. After all, they state that they are of the opinion that "*it is possible to sue and demand that Shell, like the State of the Netherlands, change its policy*",[471] but on a global scale. After all, Milieudefensie et al. assert that the threat of climate change is a global problem and that their claims are also meant to help prevent climate change globally. This extends beyond Dutch national borders, thus resulting in the applicability of the laws of other legal systems.

300. Milieudefensie et al. apparently also realised that their claims are not exclusively governed by Dutch law, as in para. 112 of the Summons they conclude in the context of their reliance on Article 3 of the Unlawful Act (Conflict of Laws) Act (*Wet conflictenrecht onrechtmatige daad*, 'WCOD') that "*Shell's liability must be assessed in any case on the basis of Dutch law*" [emphasis added by attorneys].

301. Below, RDS will first explain why Milieudefensie et al.'s argument that only Dutch law applies because they have chosen the law of the country in which the event giving rise to the damage occurred does not hold (Section 3.2). After all, the result of their choice is that, in that case, the laws of the many dozens of countries in which Shell operates are applicable. However, since Milieudefensie et al. have not demonstrated that their claims are eligible for award under the law of each of those countries, their claims are to be denied for that reason alone. Superfluously, RDS will then explain why paragraphs 2 and 3 of Article 4 of the Rome II Regulation are not applicable (Section 3.3). RDS will subsequently explain why, even if the law of a country other than that in which the actual event giving rise to the

471 Summons, para. 58.

damage occurred were applicable, Article 17 of the Rome II Regulation provides that account must also be taken of the rules which are in force at the place and time of the conduct complained of, and the conduct held against RDS cannot be unlawful for that reason either (Section 3.4). RDS will subsequently briefly discuss the WCOD, which is cited by Milieudefensie et al. but lacks all applicability in this case and does not lead to any other outcome anyway (Section 3.5). Finally, RDS will summarise its argument and explain its consequences with regard to the claims filed by Milieudefensie et al. (Section 3.6).

3.2 Environmental damage: Milieudefensie et al. base their arguments on the wrong event giving rise to damage

3.2.1 Milieudefensie et al. wrongly argue that RDS's purported adoption of policy in The Hague is decisive

302. Milieudefensie et al. rely on Article 7 of the Rome II Regulation, which includes a separate rule for determining the law applicable in the event of environmental damage. Based on Article 7 of the Rome II Regulation, the law applicable in the event of environmental damage is:

(1) the law of the country in which the damage occurs, in accordance with Article 4(1) of the Rome II Regulation; or

(2) the law of the country in which the event giving rise to the damage occurs, if the injured party chooses this option.

303. Milieudefensie et al. have expressly chosen the law of the country in which the event giving rise to the damage occurs, based on Article 7 of the Rome II Regulation.[472] Milieudefensie et al. state that the event giving rise to the damage is RDS's adoption of policy for the Shell companies – which they find unlawful. They believe this event occurs in The Hague: that is where RDS is based, where its Board of Directors is established and where RDS allegedly determines the challenged policy. On that basis, Milieudefensie et al. argue that the choice of the place of this event giving rise to damage results in the application of Dutch law. However, contrary to what Milieudefensie et al. believe, their choice of the law of the country in which the event giving rise to the damage occurs results in the application of many different legal systems, as RDS will explain below.

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472 Summons, para. 101.

3.2.2 The mere adoption of policy does not give rise to damage

304. Wrongly arguing that the law applicable can be determined on the basis of where RDS's policy is adopted,[473] Milieudefensie et al. disregard the fact that (the mere adoption of) policy cannot give rise to damage and therefore cannot qualify as the event giving rise to the damage either. Only the execution of policy, translating into specific actions, can give rise to damage. Even if the policy alleged to be unlawful by Milieudefensie et al. must be assumed to be determined by RDS in The Hague, the mere adoption of that policy does not in any way result in the damage asserted.

3.2.3 The term "event giving rise to damage" does not cover preparatory acts

305. The literature on Article 7 of the Rome II Regulation endorses the view that merely 'preparatory acts' cannot be regarded as an event giving rise to damage if those acts do not themselves cause the damage. Von Hein writes the following about this:[474]

> *"The 'event' giving rise to the damage has to be understood as any act or omission that caused the damage. Merely preparatory acts are excluded […]".*

306. The case law has confirmed that conclusion. The interpretation of the term "event giving rise to damage" within the meaning of Article 7 of the Rome II Regulation also hinges on the interpretation of the similar term "harmful event" from the Brussels I Recast Regulation.[475] After all, recital 7 of the Rome II Regulation indicates that its substantive scope and provisions should be consistent with the Brussels I Regulation, which has now been replaced by today's Brussels I Recast Regulation. Further to this, the Court of Justice of the EU ("**CJEU**") emphasised that, in the interpretation of the Rome II Regulation, account should be taken of the aim of consistency in the reciprocal application of this Regulation and the Brussels I Regulation (then in place).[476] Against this background, the Supreme Court ruled that the court is free to draw on the terms of the Brussels I Regulation (then in

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473 Also, that assertion is incorrect: RDS's role has been explained in para. 94 of Section 2.3. Each Shell company determines for itself how to implement and execute overall policy.

474 J. von Hein, 'Article 7 Environmental Damage', in: G-P. Calliess (ed.), *Rome Regulations Commentary*, Alphen aan den Rijn: Kluwer Law International 2015, p. 615.

475 The two terms are also sometimes referred to as the *Handlungsort*.

476 CJEU 21 January 2016, ECLI:EU:C:2016:40 (*ERGO Insurance v If P&C Insurance et al.*), para. 43.

place) and the related CJEU case law when interpreting the terms used in the Rome II Regulation.[477]

307. The CJEU further defined the term "harmful event" in its judgment rendered in *Pez Hejduk*. In that case, the CJEU held that this is the event which gives rise to the alleged damage.[478]

308. The Supreme Court's ruling in *BUS/Chemconserve*[479] regarding the term "harmful event" in Article 5(3) of the Brussels I Regulation (now Article 7(3) of Brussels I Recast) confirms that a merely internal decision cannot be regarded as the harmful event. The proceedings concerned a claim for damages from Chemconserve and other parties against BUS because BUS had broken off negotiations. A matter of discussion in determining the jurisdiction of the Dutch court was where the harmful event – breaking off the negotiations – had occurred. The Court of Appeal had ruled that the harmful event had occurred in the Netherlands, since that was where the letter had been received with BUS's notification that it terminated the negotiations. BUS complained in cassation that the opinion in question was not correct, as the event giving rise to the damage had to be deemed to have occurred in Germany, where BUS had taken the decision to terminate the negotiations. Rejecting the complaint, the Supreme Court held as follows:[480]

> "*First of all, the [ground for cassation] argues to that end [...] that only the actual termination of negotiations, possibly in combination with the drafting of the relevant letter, can be regarded as the event giving rise to the damage, not its receipt by the other party. This limb thus overlooks the fact that a merely internal decision to terminate negotiations, even if this has been laid down in a letter to be sent to the other party, cannot in itself be regarded as a breaking-off of negotiations giving rise to damage. This can only be the case if the decision has an impact because of its execution and the other party learns about this. […].*" [emphasis added by attorneys]

309. The Supreme Court's opinion confirms that mere decision making (in this case: RDS's adoption of policy) cannot be considered an event giving rise to damage.

310. In other respects, too, RDS cannot be said to have acted in a way giving rise to damage. The aspect that Milieudefensie et al. believe is relevant in

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477 Supreme Court 3 June 2016, ECLI:NL:HR:2016:1054 (*Dahabshiil*), para. 3.7.
478 CJEU 22 January 2015, ECLI:EU:C:2015:28 (*Pez Hejduk*), para. 23.
479 Supreme Court 21 September 2001, ECLI:NL:HR:2001:ZC3483 (*BUS/Chemconserve)*.
480 Id., para. 3.5.2.

this case, as may be inferred from their claims, are the carbon emissions from the Shell companies' operations, including end users' use of fossil fuels traded by them.[481] However, RDS does not have any production or trading activities of its own and its own CO_2 emissions are negligible.[482]

311. Consequently, Milieudefensie et al. cannot claim that RDS's adoption of policy qualifies as the event giving rise to the damage or that the place of the event giving rise to the damage is situated in the Netherlands. RDS therefore concludes that Milieudefensie et al.'s argument cannot lead to the application of (exclusively) Dutch law.

3.2.4 The place of the event giving rise to the damage is the place where emissions are caused

312. According to Milieudefensie et al., the emission of CO_2 leads to climate change and thus to damage. In other words, Milieudefensie et al. believe that the damage is caused by Shell's conduct and, by extension, by the use of Shell products by the end user. Only that conduct can therefore qualify as the event giving rise to the damage.

313. Shell's CO_2 emissions, let alone CO_2 emissions caused by end users' use of Shell products, cannot be attributed to RDS, as RDS will explain in Section 6.3. The – incorrect – position of Milieudefensie et al. means that the applicable law must be determined on the basis of the place of the events giving rise to the damage for which RDS is held responsible.

314. Milieudefensie et al.'s choice to apply the law of the place of the event giving rise to the damage based on Article 7 of the Rome II Regulation means that the events giving rise to the damage must be deemed to occur in each of the many dozens of jurisdictions in which Shell performs business activities that give rise to CO_2 emissions. As a result, the law of each of the aforementioned places applies to Milieudefensie et al.'s claims.

315. On top of this, Milieudefensie et al. are holding RDS responsible for the CO_2 emissions caused by end users' use of products. It should be noted in this respect that (1) RDS does not sell any products and (2) the CO_2 emissions caused by the use made by the ultimate end users of products cannot be attributed to the Shell companies and especially not to RDS. The – incorrect – position of Milieudefensie et al. means that end users' use of products of Shell companies will also have to be regarded as an event

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481 In addition, see for example also Summons, paras. 506, 612-613 and 850-852.

482 If Milieudefensie et al. were to argue differently, which they rightly do not do, the place where those acts occur would also have to be considered.

giving rise to damage. The Shell companies' products that cause CO_2 emissions when used are used worldwide, so the place of the event giving rise to the damage would then be situated in all countries worldwide and the laws of all those countries would apply to Milieudefensie et al.'s claims. Milieudefensie et al.'s claims will therefore have to be assessed on the basis of all those applicable legal systems. However, Milieudefensie et al. have failed to assert – let alone substantiate – that their claims are eligible for award on the basis of the applicable legal systems.

3.2.5 Place of the event giving rise to the damage if RDS fails to fulfil its alleged duty of care is also the place where CO_2 emissions are caused

316. To underpin their argument that Dutch law applies, Milieudefensie et al. argued in the Summons that the event giving rise to the damage is RDS's adoption of policy on the reduction of CO_2 emissions.[483] However, Milieudefensie et al. base the substance of their claims on an alleged omission by RDS, asserting that RDS has a duty of care regarding the prevention of dangerous climate change. According to Milieudefensie et al., this duty of care means that RDS must reduce the CO_2 emissions of the Shell companies and, in addition to that, the CO_2 emissions caused by the end users of Shell products, and that it has failed to comply with this purported duty of care. Superfluously, RDS observes that even in so far as the failure to fulfil that (alleged) duty of care must be considered an event giving rise to damage, this still does not result in the application of Dutch law alone.

317. In *Diner/Igielko*, the Supreme Court ruled that, in the event of so-called offences of omission, the place of the event giving rise to the damage is the place where the relevant act must be or should have been performed, rather than the place where the person who must act or should have acted has his domicile or his habitual residence.[484]

318. The basic tenor of Milieudefensie et al.'s assertions is that RDS is wrongly failing to reduce the CO_2 emissions of other Shell companies and, by extension, of the end users of their products. RDS could only achieve such carbon reduction in the places where those Shell companies carry out activities (or where end users emit CO_2). For the purpose of determining the applicable law, the acts that Milieudefensie et al. requires from RDS must be localised at the places where these acts should have an impact. In this

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483 Also, that assertion is incorrect: RDS's role has been explained in para. 95 of Section 2.3 above. Each Shell company determines for itself how to implement and execute overall policy.

484 Supreme Court 12 October 2001, ECLI:NL:HR:2001:AD3973 (*Diner/Igielko*), para. 3.6.

case, the places in question are thus all locations where Shell companies carry out activities causing CO_2 emissions, and all locations where end users of Shell products cause emissions, meaning that the laws of all of those locations apply to Milieudefensie et al.'s claims.

319. In proceedings instituted against Syria Shell Petroleum Development, the Court of Appeal of The Hague confirmed that the place of the event giving rise to damage must be determined on the basis of where the relevant act should have had an impact.[485] SSPD was held liable based on an unlawful act because it had allegedly failed to intervene at a Syrian joint venture company in which it held a minority stake. The Court of Appeal established that the case involved an offence of omission, to the extent that the claim was based on liability due to omission. Further to the Supreme Court's judgment in *Diner/Igielko*, the Court of Appeal then ruled that in such a case, the place of the event giving rise to damage is situated there where the respondent must act or should have acted, in other words the place where the act must have or should have had an impact. Because SSPD was accused of not having intervened in Syria, the Court of Appeal ruled that the event giving rise to the damage had occurred in Syria and that Syrian law was therefore applicable.[486]

320. The CJEU's judgment in *ÖFAB v Koot* also supports RDS's position.[487] In the main action, ÖFAB had sued the Dutch company Evergreen Investments B.V. and others for debts of Copperhill Mountain Lodge AB, its Sweden-based subsidiary. Copperhill had run into financial difficulties and was consequently unable to pay its contractors in full. ÖFAB accused Evergreen of having allowed Copperhill to continue to carry on business even though it was undercapitalised and eventually required to go into liquidation. ÖFAB took legal action against Evergreen in Sweden, but Evergreen asserted that the Swedish court did not have jurisdiction. This defence ultimately led to questions being referred for a preliminary ruling, including about what should be deemed to be the harmful event under Article 5(3) of the Brussels I Regulation. According to the CJEU, the dispute in the main action concerned the possible failure of monitoring by the shareholder.[488]

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485 The Hague Court of Appeal 6 March 2012, ECLI:NL:GHSGR:2012:BV8213 (*SSPD*).
486 The Hague Court of Appeal 6 March 2012, ECLI:NL:GHSGR:2012:BV8213 (*SSPD*), para. 7.
487 CJEU 18 July 2013, Case C-147/12, *NJ* 2014, 85 (*ÖFAB v Koot*).
488 Id., para. 53 "*[...] actions based on the allegation that a member of the board of directors and Copperhill's main shareholder have not fulfilled their legal requirements as regards monitoring the financial situation of that company and allowing it to continue to carry on business even though it was undercapitalised and required to go into liquidation, it is not the financial situation or the carrying-on of the business of that company which are at issue per se, but the*

321. The CJEU held that in that case that the place of the harmful event within the meaning of Article 5(3) of the Brussels I Regulation:[489]

> *"[...] is situated in the place to which the activities carried out by that company [in this case: Copperhill, addition by attorney] and the financial situation related to those activities are connected."*

322. In these proceedings, Milieudefensie et al. are also accusing RDS of not performing the obligations that they say RDS bears in its capacity as ultimate holding company of other Shell companies, specifically to change the policy on CO_2 emissions. The CJEU's judgment in *ÖFAB v Koot* indicates that in such a case the applicable law should be determined on the basis of the places where the activities are carried out by the companies that the respondent has failed to manage. Accordingly, applying the rule from *ÖFAB v Koot* also results in Milieudefensie et al.'s claims being governed by the laws of the places where CO_2 emissions are caused. All those applicable legal systems will therefore have to be considered in the assessment of Milieudefensie et al.'s claims, but Milieudefensie et al. have not substantiated their claims on this point in any way.

3.3 Milieudefensie et al. cannot rely on Article 4(2) and (3) of the Rome II Regulation

323. In para. 102 of the Summons, Milieudefensie et al. rely on Article 4(1) of the Rome II Regulation "*[i]n so far as necessary for the applicability of Dutch law*". Based on Article 7 of the Rome II Regulation, Milieudefensie et al. have chosen the law of the place of the event giving rise to the damage. As a result of this choice, the application of Article 4(1) of the Rome II Regulation, which provides that the law of the place where the damage occurs applies, is no longer relevant. Milieudefensie et al. therefore cannot rely on Article 4(1) of the Rome II Regulation either to support their assertion that their claims are exclusively governed by Dutch law. Incidentally, Article 4(1) of the Rome II Regulation would not have resulted in the exclusive application of Dutch law either.

324. Article 7 of the Rome II Regulation furthermore indicates that in the event of environmental damage, in addition to the option of choosing the law of the country in which the event giving rise to the damage occurs, only Article 4(1) of the Rome II Regulation is applicable. After all, Article 7 of the Rome II Regulation only refers to paragraph 1 of Article 4 and not to its

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conclusion to be drawn as regards a possible failure of monitoring by the member of the board of directors and the shareholder" [emphasis added by attorneys].

489 Id., para. 55 and at 2 of the operative part.

paragraphs 2 and 3. The drafting history of the Rome II Regulation shows that this was a deliberate choice of the European legislature.[490] Paragraphs 2 and 3 of Article 4 of the Rome II Regulation therefore do not apply to the determination of the law applicable to claims relating to environmental damage. For this reason alone, Milieudefensie et al.'s reliance on paragraphs 2 and 3 of Article 4 of the Rome II Regulation does not hold.

3.4 Article 17 of the Rome II Regulation: in assessing the claims, account must be taken of the rules of safety and conduct at the place of the event giving rise to the damage in all cases

325. Even if Dutch law were held to be applicable to the action, this would not justify disregarding the law in force at the time and place of the event giving rise to the damage.

326. After all, Article 17 of the Rome II Regulation provides that in assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability. According to recital 34 of the Rome II Regulation, rules of safety and conduct comprise "*all regulations having any relation to safety and conduct*", and the place where the harmful act was committed is important.

327. In the context of environmental damage, Article 17 of the Rome II Regulation addresses the situation in which an activity permitted in one State causes damage in another State, which does not permit such activities. In that scenario, the rule from Article 4(1) of the Rome II Regulation would result in application of the law of a country other than the country in which the event giving rise to the damage occurred.

328. Based on Article 17 of the Rome II Regulation, the court must take account of the fact that the party being held liable has complied with the rules in force in the country (or countries) in which the act not intended to have legal effect occurred and the (alleged) damage was caused. This may include the fact that the party being held liable conducts activities at the location of the event giving rise to the damage on the basis of, and in accordance with, a permit obtained to that end. Also under substantive

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490 Proposal of the European Commission for the Rome II Regulation, COM(2003) 427 final, pp. 21-22. As confirmed by Asser/Kramer & Verhagen 10-III (2015), no. 1052.

Dutch law[491], this is a fact that is relevant to the assessment of whether the actions concerned can be deemed unlawful based on the law applicable to the claim, since the permit may yield justification stripping the actions of their potentially unlawful nature. More generally, too, local rules of conduct are a factor to be considered in the assessment of lawfulness (or unlawfulness).[492] In Section 2.7, RDS has explained that the industry in which Shell operates is heavily regulated.

329. In the Summons, Milieudefensie et al. do not pay any regard to any legislation and regulations whatsoever in force in the countries in which Shell operates and its products are used, let alone explain how those will be relevant by 2030, 2040 and 2050. This is – once again – a telling example of how Milieudefensie et al. have failed to meet their obligation to furnish facts.

3.5 WCOD and events prior to 11 January 2009 do not lead to any other conclusion either

330. The Rome II Regulation applies to events giving rise to damage that occurred after its entry into force on 11 January 2009 (Articles 31 and 32 of the Rome II Regulation). Milieudefensie et al. also argue, on the basis of the WCOD, that Dutch law applies to the events giving rise to damage that occurred prior to 11 January 2009.

331. Milieudefensie et al. cannot gain from its reference to the WCOD, as the claims pertain to 2030, 2040 and 2050. The question whether RDS's past actions, let alone those prior to 11 January 2009, were unlawful is therefore irrelevant. This in itself already means that there is no reason to apply the WCOD.

332. For the avoidance of doubt: RDS disputes that its actions prior to 11 January 2009 were unlawful (which is also true as regards its actions after that date).

333. Entirely superfluously, RDS points out that Milieudefensie et al.'s argument that Dutch law is applicable under the WCOD does not hold.

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491 Supreme Court 21 October 2005, ECLI:NL:HR:2005:AT8823 (*Ludlage/Van Paradijs*), para. 3.5.1.

492 Asser/Kramer-Verhagen 10-III (2015), no. 1117.

334. As described by Milieudefensie et al. in para. 109 of the Summons, Article 3 of the WCOD yields three main rules for determining the law applicable to a claim based on an unlawful act:

(1) the law of the State in whose territory the act occurs;

(2) the law of the State in whose territory the act has an impact, if an act has a harmful impact on a person, an item or the natural environment in a place other than the State in whose territory that act occurs; and

(3) the law of the State where the perpetrator and the injured party have their habitual residence or place of business.

335. In the application of Article 3, its paragraph 3 takes priority over paragraph 2, and paragraph 2 takes priority over paragraph 1.

336. Article 3 of the WCOD does not result in the application of only Dutch law for the period prior to 11 January 2009 either, for the same reasons that Article 4(1) and Article 7 of the Rome II Regulation do not result in the application of only Dutch law. RDS refers to its comments in Section 3.2.

337. In addition, RDS notes the following with regard to the rule in Article 3(3) of the WCOD. In the application of that rule, the place of residence and/or business at the time that the act occurred must be considered.[493]

338. RDS explained in Subsection 2.1.1 that RDS only became the ultimate holding company in 2005. Consequently, there were in fact no actions by RDS prior to 2005 relevant to the case, let alone actions that could have been unlawful.[494]

339. Finally, RDS refers to Article 8 of the WCOD, which provides that Article 3 of the WCOD does not preclude taking account of traffic and safety rules, or comparable rules intended to protect persons or items, in force at the place of the unlawful act. For the sake of brevity, RDS furthermore refers here to what it already observed about this in its discussion of Article 17 of the Rome II Regulation in Section 3.4, which contains rules similar to those of Article 8 of the WCOD.

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493 See for example The Hague District Court 23 December 2005 ECLI:NL:RBSGR:2005:AU8685, para. 19.

494 In so far as Milieudefensie et al. believe that actions by N.V. Koninklijke Nederlandsche Petroleum Maatschappij and The "Shell" Transport and Trading Company plc can be attributed to RDS, there is no basis for such attribution, nor is a basis put forward.

3.6 Conclusion

340. Milieudefensie et al. argue on incorrect grounds that only Dutch law applies to their claims, relying on the law of the place of the event giving rise to the damage: the place where RDS adopts policy with regard to CO_2 emissions. However, as the adoption of such policy does not qualify as an event giving rise to damage within the meaning of Article 7 of the Rome II Regulation, Milieudefensie et al. cannot rely on the applicability of Dutch law on that basis.

341. In light of the positions taken by Milieudefensie et al., the application of the Rome II Regulation would result in Milieudefensie et al.'s claims being governed by the laws of the many dozens of countries in which Shell's business activities cause CO_2 emissions and the many other countries in which Shell products are used.

342. The fact that Dutch law does not apply exclusively means that all the laws applicable to Milieudefensie et al.'s claims against RDS must be applied distributively, with the consequence that Milieudefensie et al.'s claims can only be awarded if RDS's actions qualify as unlawful on the basis of each of the legal systems applicable. However, Milieudefensie et al. wrongly started from the position in their Summons that their claims are exclusively governed by Dutch law and that they only needed to base their claims on Dutch law. Milieudefensie et al. have not demonstrated and have failed to substantiate their argument that their claims are also eligible for award under those other legal systems. As RDS explains elsewhere in this Statement of Defence, Milieudefensie et al.'s claims are in any event not eligible for award based on Dutch law.

4 MILIEUDEFENSIE ET AL. HAVE NO CAUSE OF ACTION FOR THEIR CLAIMS

4.1 Introduction

343. The claimants as listed under 1 to 7 in the opening words of the Summons (defined above as the "NGOs") are bringing their claims against RDS pursuant to Article 3:305a of the Dutch Civil Code. However, as the admissibility requirements set in Article 3:305a of the Dutch Civil Code have not been met, the NGOs must be denied a cause of action for the claims filed against RDS in this class action. As RDS will explain, this is because the interests that Milieudefensie et al. claim to protect are not sufficiently similar as required under Article 3:305a(1) of the Dutch Civil Code and are even mutually conflicting. This is a direct consequence of the extremely broad nature of these claims, which are expressly aimed at a "*drastic, phased transformation*" with "*choices that will not always be easy*" and at "*sacrifices*" regarding Shell's current energy portfolio. Such an approach effectively makes it impossible to maintain that the interests of a large number of claimants and their members can be combined.[495]

344. Aside from that, RDS notes the NGOs do not have any interest in the claims to be respected by law either. As is evident from the way in which the NGOs seek to draw attention to these proceedings (see, for example, www.klimaatzaakshell.nl), as well as from para. 649 of the Summons, the real aim of these proceedings is to campaign for greater public awareness of climate change and thus to support the policy objectives of some of the NGOs with regard to the banning of fossil fuels. However, this interest is not sufficient for their claims to be admissible. Another fact to be considered here is that any injunction against RDS cannot be expected to have any impact at the level of global CO_2 emissions, as explained in Subsection 2.2.4.

345. In addition to the NGOs, 17,379 private individuals are also acting as claimants, as listed in Annex A to the Summons. If the District Court finds

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495 While FossielVrij's key object might be furthered by the award of the claims, that would not necessarily apply in the same way to other NGOs dealing with the much more complex interests of the people they respectively represent. For example, creating or maintaining access to reliable and affordable energy could be important for NGOs that focus on development cooperation, such as BOTH Ends or ActionAid. Indeed, ActionAid's objects clause under its articles of association includes the reduction of poverty and injustice, particularly in Africa (see Summons, para. 268). In addition, the individual claimants (or at least the vast majority of them) will undoubtedly continue to rely on fossil fuels in order to meet their energy needs. The "*drastic, phased transformation*" advocated by Milieudefensie et al. may run counter to the needs of the separate groups of people they represent and demand "*sacrifices*" that are even directly contrary to their interests.

the NGOs have a cause of action for their claims under Article 3:305a of the Dutch Civil Code, the individual claimants will no longer have an interest in those claims as a result, meaning that those private individuals must be denied a cause of action for their claims. In addition, RDS believes that the claims of the individual claimants are also not eligible for award simply because they have failed to meet their obligation to furnish facts. RDS will explain this in more detail in Section 7.5, where it will discuss why the relativity requirement has not been met.

4.2 NGOs have no cause of action: no similar interests that can be combined

346. According to Article 3:305a(1) of the Dutch Civil Code, a foundation or association with full legal capacity can bring legal action intended to protect similar interests of other persons to the extent that its Articles of Association promote such interests. Article 3:305a(1) of the Dutch Civil Code requires the interests being defended in a class action to be similar to such a degree that they can be combined. In *Stichting Baas in Eigen Huis/Plazacasa*, the Supreme Court held that the similarity requirement is met:[496]

> *"[…] if the interests that the legal action serves to protect can be combined, thereby promoting efficient and effective legal protection for the interested parties. This is because the points of dispute and claims raised by the legal action can then be adjudicated in a single action without any need to take the specific circumstances of the individual interested parties into consideration."*

347. The similarity requirement is therefore (partly) motivated by a desire to promote efficient and effective legal protection. However, the NGOs' class action is not capable of providing efficient and effective legal protection. The interests promoted by them for the people they claim to represent according to their various objects clauses are at odds with other interests of people who belong to that same group and whose interests are represented.

348. The NGOs assert in these proceedings that they stand up for the interests of present and future generations "*both in the Netherlands and abroad*" in preventing "*the dangers of climate change*". In seeking the orders in question, the NGOs fail to appreciate that various options exist for weighing the many compelling interests at stake when meeting global energy needs while addressing the risk of climate change at the same time. What is

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496 Supreme Court 26 February 2010, ECLI:NL:HR:2010:BK5756 (*Stichting Baas in Eigen Huis/Plazacasa*), para. 4.2.

important here is that, if the orders being sought by the NGOs were to have the effect they envisage, awarding them would have irrevocable consequences for other interests of persons within the same group being represented, which interests are also worth protecting (regarding the complexity of climate policy considerations, see also Sections 2.2 and 2.7). These other, possibly conflicting interests – which are moreover very difficult to get into focus in these proceedings – cannot be balanced sufficiently in this class action.

349. After all, the persons that the NGOs claim to represent[497] are all the people on Earth. The interests of the persons belonging to that group will not be limited to the mere reduction of CO_2 emissions by Shell companies in the manner sought by the NGOs.[498] The people represented by the NGOs also include people with more diverse and even conflicting interests. These include, for example, (1) persons in emerging economies such as India where the need for energy, including fossil fuels, will increase in the coming years, (2) persons who live in places where there is as yet little or no access to energy, and (3) companies that produce concrete or steel and that will, at least for the time being, remain dependent on fossil fuels for production because only these can generate the high temperatures required for the production process. The foregoing is a mere illustration of the interests of the people represented by the NGOs that are equally worth protecting and shows that there are competing interests within that group of people, also in relation to the interests that the NGOs claim to defend in these proceedings. These proceedings do not allow those interests to be properly taken into account and weighed.

350. As a result of this level of complexity, the NGOs' claims are not intended to protect similar interests that "*can be combined, thereby promoting efficient and effective legal protection for the interested parties*." Even if it were accepted that Article 3:305a of the Dutch Civil Code offers the option, under certain circumstances, of filing claims to serve interests that are "more diffuse", the climate issue nevertheless gives rise to so many complicated questions that the limit of sufficient similarity is lost from view.

351. What is more, interested parties cannot invoke Article 3:305a(5) of the Dutch Civil Code to evade the consequences of any judgment awarding the claims. While Article 3:305a of the Dutch Civil Code does not set a separate

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497 See, for example, para. 155 of the Summons, in which Milieudefensie notes that its Articles of Association state that it promotes interests at the "*global*" level and that such "*collective (legal) interests*" are served by the claims.

498 Not to mention whether awarding the claims will have the effect intended by Milieudefensie et al.

representativeness requirement, the absence of this option most certainly plays a role in the question of the admissibility of claims filed in a class action. This was also acknowledged in the 2010 *Plazacasa* judgment, in which the Supreme Court held that no representativeness requirement applies in the context of Article 3:305a DCC.[499]

352. The claim in *Plazacasa* pertained to an injunction for a well-known housing website to publish property data without the permission of the real estate brokers handling the sale of the houses concerned. In this regard, the Supreme Court held that the fact that one in three brokers had no objection to publication failed to preclude a cause of action, since, in the context of Article 3:305a of the Dutch Civil Code, "*support for the class action from a substantial part of the eligible interested parties cannot be set as a requirement*". Regarding the omission of such a condition, the Supreme Court then held as follows:[500]

> *"It is important to note here that persons who do not want a court judgment obtained in a class action to have any effect on them can evade its effect on the basis of the fifth paragraph of Article 3:305a (subject to the exception stated at the end of paragraph 5)."*

353. The Supreme Court then held that the brokers who had no objections could most certainly evade the consequences of the ruling as referred to in Article 3:305a(5) of the Dutch Civil Code:[501]

> "*Contrary to the Court of Appeal's subsequent finding, the fifth paragraph of Article 3:305a does offer solace to brokers who do not agree to the Foundation's claim in a case such as the one at hand. In light of the nature and content of the injunction with a penalty subject to non-compliance that is sought (and was imposed at first instance), its effect can be excluded in respect of certain persons, allowing brokers who do not agree to the Foundation's claim to oppose the judgment's effect on them if they so choose, based on the aforementioned fifth paragraph, which the Court of Appeal also effectively acknowledged.*"

354. The possibility for interested parties to evade the consequences of a ruling – at least *de facto* – also played a role in a 2010 judgment regarding a public interest action in the context of Article 3:305a of the Dutch Civil Code. *Clara Wichmann/Staat* involved an application for a court order requiring the government to take measures against the SGP's discrimination of women regarding their right to stand for election. Because

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499 Supreme Court 26 February 2010, ECLI:NL:HR:2010:BK5756 (*Stichting Baas in Eigen Huis/Plazacasa*), para. 4.2.

500 Id.

501 Id., para. 4.3.

of the general nature of the fundamental right to equal treatment, the requirement of similarity had been met, in the Supreme Court's view.[502] This was not altered by the fact that the specific group of women who might want to exercise their right to stand as candidates for the SGP were against the action. The Supreme Court thus reiterated, shortly after *Plazacasa*, that Article 3:305a of the Dutch Civil Code does not include a general representativeness requirement. However, the Court of Appeal had earlier rightly observed that awarding the claim in *Clara Wichmann* would not in any way force 'SGP women' to stand as candidates.[503] Just like the brokers in *Plazacasa*, therefore, they could *de facto* evade the consequences of the ruling. If the orders sought by the NGOs are awarded, there will be no such possibility to evade the consequences. As explained in Section 2.2, modifications to the energy system fundamentally affect all of society. If RDS is forced to modify its business operations in a manner to be determined by the court, the option of making use of its activities would be lost. *Clara Wichmann* specifically created an option (i.e. to make use of the right to stand as a candidate) that one was free not to make use of. In this sense, the NGOs' claims against RDS therefore differ from the situation in *Plazacasa* and *Clara Wichmann*.

355. That a cause of action does not require that (a significant part of) those represented support the class action, and that it is not precluded in any way if some of those represented do not want the action, cannot be equated with allowing other interests within that same group to be neglected. In fact, the consideration not to set a representativeness requirement in part flowed from Article 3:305a(5). This provision offers parties that are among those on whose behalf the class action was brought the option of evading the consequences of a judgment, thus avoiding being bound against their will. This is reflected not only in the case law of the Supreme Court (whether or not explicitly), but also explicitly in the legislative history. The Explanatory Memorandum links the absence of a representativeness requirement to the possibility of evasion in paragraph 5:

> *"Finally, paragraph 5 offers those directly involved – except in so far as a court order or injunction is requested – the possibility of evading the consequences of the proceedings by indicating that they do not wish to have the judgment enforced as far as they are concerned. This way, undesired conflicts of interest can be prevented. There is, ultimately, no need to state the requirement of representativeness in so many words."*

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502 Supreme Court 9 April 2010, ECLI:NL:HR:2010:BK4549 (*Clara Wichmann/Staat*), para. 4.3.2.

503 The Hague Court of Appeal, 20 December 2007, ECLI:NL:GHSGR:2007:BC0619 (*Clara Wichmann/Staat*), para. 3.4.

356. In light of the complex weighing of interests that the problem of climate change entails as well as the impossibility for interested parties to evade the consequences of an award of the orders, this class action does not meet the condition of similarity laid down in Article 3:305a(1) of the Dutch Civil Code.

357. In addition, similarity is also lacking for another reason. Similarity entails that the relevant interests can be combined not only with a view to more effective and efficient legal protection, but *also* in view of the questions of fact and law to be answered. This also follows from the previously cited Supreme Court *Plazacasa* judgment:[504]

> *"This is because the points of dispute and claims raised by the legal action can then be adjudicated in a single action without any need to take the specific circumstances of the individual interested parties into consideration."*

358. In other words, the relevant facts and circumstances on the part of the individuals being represented must be sufficiently identical to allow the claims to be assessed in one single action. This is also reflected in the legislative history of Article 3:305a DCC:[505]

> *"It is, therefore, possible that, despite there being a common point of dispute, the questions of law and fact involved in this point of dispute must be answered for each individual separately. The question of whether the nature of the claim and the relevant interests enable combination is thus one of the criteria to be applied when assessing whether a class action is permissible."*

359. The requisite similarity is lacking here. In this class action, the NGOs are seeking various declaratory judgments that will serve as the basis for the award of the court orders they also seek to obtain. These declaratory judgments are all intended to establish that RDS is acting unlawfully by – briefly put – emitting CO_2. However, the question whether this conduct of RDS is in conflict with any unwritten standard of care cannot be answered in a single action for all those represented. After all, in the system of Article 6:162 et seq. of the Dutch Civil Code, conduct is not unlawful in general but only in the specific context in which it occurs and only in relation to one or several specific persons.[506] This is all the more so because the NGOs have based their claims on endangerment (*Kelderluik*). That doctrine typically

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504 Supreme Court 26 February 2010, ECLI:NL:HR:2010:BK5756 (*Stichting Baas in Eigen Huis/Plazacasa*), para. 4.2.

505 *Parliamentary Documents II*, 1991-1992, 22 486, no. 3, p. 27.

506 K.J.O. Jansen, *Groene Serie Onrechtmatige daad. Article 6:163 of the Dutch Civil Code*, no. 1.1.

examines the link between the specific circumstances of the individual case and the standard of care that the relevant parties are required to observe.

360. To the extent that there are facts and circumstances that are relevant to the question of unlawfulness and are different for each individual, therefore, a class action is out of the question. In this regard, see also the ruling of the District Court of The Hague in *Milieudefensie and Stichting Adem/Staat*:[507]

> "*The same is true for the persons whose combined interest Milieudefensie and Adem seek to protect. As for them, moreover, the question whether the State acted unlawfully in respect of persons whose combined interest they seek to protect in these proceedings – by not meeting threshold values PM10 and NO2 on 11 June 2011 and 1 January 2015, respectively – can only be answered on the basis of the specific circumstances of the individual case, which may be very different for each person. However, no specific circumstances have been asserted. Relevant aspects are, for example, the specific locations where the threshold values were exceeded exactly, the specific harmful consequences resulting from the failure to observe the threshold values for PM10 and NO2 on 11 June 2011 and 1 January 2015 and whether or not the requirement of a causal link between the State's breach of this obligation and the damage has been met. This inextricable correlation with the special circumstances of the individual cases means that, on this point, there is an interest that cannot be sufficiently generalised in order to be grouped under the similar interests envisaged by Article 3:305a of the Dutch Civil Code. Cf. Supreme Court 13 October 2006, ECLI:NL:HR:2006:AW2080 (*Vie d'Or*). This class action based on Article 3:305a of the Dutch Civil Code is therefore not the right place for (any further) determination of whether the breach of the first obligation is unlawful in respect of Milieudefensie and Adem.*" [emphasis added by attorneys]

361. The facts and circumstances cannot be generalised in these proceedings in the sense that the alleged unlawfulness of RDS's conduct can be assessed in a single action. For this reason, too, the interests that the NGOs claim to represent cannot be combined since "*the points of dispute and claims raised by the legal action* [cannot] *be adjudicated in a single action without any need to take the specific circumstances of the individual interested parties into consideration.*"[508]

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507 District Court of The Hague 27 December 2017, ECLI:NL:RBDHA:2017:15380 (*Milieudefensie en Stichting Adem/Staat*), para. 4.111.

508 See the aforementioned finding in *Plazacasa*.

4.3 Individual claimants have no cause of action if NGOs do have a cause of action

362. In these proceedings, the claimants include not only the NGOs, but also 17,379 private individuals (listed in Annex A to the Summons). RDS has explained above that the claims by the NGOs are inadmissible pursuant to Article 3:305a of the Dutch Civil Code. If the District Court rejects this defence by RDS, the consequence is that the individual claimants have no, or in any event insufficient, interest in their claims and that their claims are inadmissible.

363. The individual claimants' claims do not add anything to the claims brought by NGOs, so that the individual claimants do not have a sufficient interest in their claims for this reason either. In this context, RDS also refers to the judgment of the District Court in *Urgenda*. Stichting Urgenda had brought claims in those proceedings pursuant to Article 3:305a of the Dutch Civil Code. In addition to Stichting Urgenda, 886 natural persons were claimants. The District Court held that the claims of those individual claimants:[509]

> *"[…] cannot lead to a decision other than the one on which Urgenda can rely for itself. In this situation, the court finds that the individual claimants do not have sufficient (own) interests besides Urgenda's interest. Partly in view of practical grounds, this had led the court to reject the claim in so far as it has been instituted on behalf of the claimants. The question of* locus standi *can therefore be left unanswered."*

364. The District Court therefore ruled that there was no sufficient interest with regard to the claims of the individual claimants because the same claims had already been brought by Urgenda. Exactly the same situation would arise in this case if the District Court were to find that the claims by the NGOs are admissible, as the claims brought by the NGOs are identical to those brought by the individual claimants. RDS therefore concludes that if the NGOs have a cause of action, the individual claimants must be denied a cause of action for their claims.

365. For the sake of completeness, RDS would also point out that in *Urgenda*, due to a lack of sufficient interest, the District Court ultimately denied the claims of the individual claimants instead of declaring that those individual claimants lacked a cause of action for their claims. In any event, it follows

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[509] District Court of The Hague 24 June 2015, ECLI:NL:RBDHA:2015:7145 (*Urgenda/Staat*), para. 4.109.

from the judgment of the District Court in *Urgenda* that the individual claimants' claims cannot be awarded if the NGOs have cause of action.

366. There are some other admissibility flaws in the claims brought by the individual claimants. Milieudefensie et al. assert with regard to the individual claimants that the latter have a cause of action due to the fact that they have a sufficient personal interest in their claims. Milieudefensie et al. only explain in very general terms and very briefly why the individual claimants allegedly have an interest in their claims. According to Milieudefensie et al., the required personal interest lies in the fact that (1) dangerous climate change is a global, major threat to, among other things, the right to life, the right to self-determination, the right to health and the right to a number of basic needs, (2) the individual claimants cannot, as Dutch residents, evade the direct and indirect consequences of dangerous climate change discussed in the Summons and (3) Shell does not have the right to drastically change their living environment and render it unsafe and that Shell has a legal obligation towards them to make a contribution to preventing dangerous climate change.

367. Article 3:303 of the Dutch Civil Code requires, on pain of denial of a cause of action, that the claimant have a sufficient interest in its claim. This applies to both the declaratory judgments sought and the orders sought. A claim for an order based on an unlawful act can, pursuant to Article 3:296(1) of the Dutch Civil Code, only be awarded if the claimant has a sufficient interest in his claim.

368. When assessing the question whether there is a sufficient interest, it must be assessed, among other things, whether there is a real threat of an unlawful act by RDS towards each of the individual claimants.

369. Milieudefensie et al. argue that individual claimants are unable to evade the direct and indirect consequences of climate change (para. 305 of the Summons). However, they do not explain exactly what those direct and indirect consequences are for each of the individual claimants (including in para. 496 of the Summons) and why RDS, in light of those alleged consequences, is allegedly acting unlawfully towards each of those individual claimants. The individual claimants live all across the Netherlands. This fact alone – among the many differences in individual circumstances – indicates that no direct or indirect consequence of climate change is the same for all of them and that they are not affected equally and in a legally relevant manner. Consequently, it has not been demonstrated that the individual claimants run any (legally relevant) risk

causing them to have a sufficient interest in their claims, let alone that it has been demonstrated that and why those claims can be awarded. For that reason, too, the individual claimants must be denied a cause of action for their claims.

4.4 Conclusion

370. RDS concludes that the NGOs should be denied a cause of action because the interests they represent are not sufficiently similar. If the District Court nevertheless were to find that the NGOs' claims are admissible, the individual claimants will lose the interest in their claims as a result. In that case, RDS moves that the individual claimants be denied a cause of action for their claims.

5 THE CLAIMS ARE UNCLEAR AND INCOMPATIBLE WITH THE SUBSTANTIATION GIVEN IN THE SUMMONS; MILIEUDEFENSIE ET AL. HAVE THUS FAILED TO MEET THEIR OBLIGATION TO FURNISH FACTS

371. Milieudefensie et al.'s claims are aimed at achieving a reduction of CO_2 emissions from RDS. Relief is not being sought per the date of the Summons, but rather in a decade or more: per 2030, 2040 and 2050. It is, therefore, a claim premised on potential future unlawful conduct.

372. Contrary to what Milieudefensie et al. argue, the actions targeted by them are not unlawful. This will be explained below in Chapters 6 and 7.

373. This chapter deals with other flaws inherent in the claim. Milieudefensie et al.'s argument in the Summons is incompatible with the claims presented by them. The relief sought by Milieudefensie et al. is so unclear that it cannot be awarded for that reason alone. Moreover, Milieudefensie et al. fail to address crucial elements of the relief sought; in any event, the substantiation provided by Milieudefensie et al. is incompatible with the relief sought as presented by them. For this reason, too, Milieudefensie et al. have failed to meet their obligation to furnish facts.

374. Parts 1 and 2 are the essence of the relief sought by Milieudefensie et al. They discuss the actions of "*Shell*" (defined as RDS in Summons, para. 4) regarding "*all CO_2 emissions associated with its business activities and fossil fuel products*", for which they seek a "*(net)*" reduction "*compared to 2010 levels*".

375. Milieudefensie et al. have an obligation to furnish sufficient facts to make *that* relief sought eligible for award (Article 24 of the Dutch Code of Civil Procedure).[510] It wrongly failed to do so.

376. First of all, parts 1 and 2 of the relief sought are based on the CO_2 emissions associated with the business activities and fossil fuel products of "*Shell*". Shell has been defined solely as the summoned company (Summons, para. 4). While the basis for the claims put forward by Milieudefensie et al. focuses on the emissions attributable to the entire group of Shell companies[511], this is clearly not the case for the relief sought. In other words, the relief sought is not in line with Milieudefensie et al.'s

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[510] Article 24 of the Dutch Code of Civil Procedure and, in that regard, e.g. Asser Procesrecht / Van Schaick 2 (2016), no. 94.

[511] The fact that this basis for the claims is incorrect and cannot lead to the award of any claim has been explained elsewhere in this Statement.

assertions. Milieudefensie et al. do not assert that the CO_2 emissions of RDS itself are relevant, or that RDS offers fossil fuel products (*quod non*). The claims as included in the relief sought should be dismissed for that reason.

377. Second, parts 1 and 2 of the relief sought concern reductions of "*net*" CO_2 emissions. However, Milieudefensie et al. fail to explain what they mean by that. Since they do not explain what, exactly, they are after by using the word "*net*", RDS can do no more than guess at what Milieudefensie et al. have in mind and what RDS is supposed to defend itself against. Perhaps Milieudefensie et al. are referring to emissions that might remain after accounting for the effect of the methods for capturing and storing CO_2 and removing CO_2 from the atmosphere by means of carbon sinks and the like. Whatever the case may be, Milieudefensie et al. have not explained what they mean and Milieudefensie et al. largely focus their substantiation on the explanation that, in their view, the use of fossil fuels should come to a halt.[512] Nor do Milieudefensie et al. explain what they consider to be the benchmark for their claims. Although they hold RDS responsible for emissions caused by end users' combustion of Shell's fossil fuel products,[513] they utterly fail to explain how efforts on the part of those end users or others to capture and store or otherwise offset those emissions are subsequently deducted from RDS's alleged responsibility. Thus, it is not clear what exactly is the substance of their key point in the relief sought: "*(net)*" emission reductions. Nor do they in any way explain how, in their view, those "*net*" emissions should be determined. Milieudefensie et al. have therefore failed to furnish sufficient facts to substantiate the relief sought.

378. Third, the same is true for the "*2010 levels*" baseline, which serves as the benchmark for the reductions sought by Milieudefensie et al. Milieudefensie et al. have not stated what they believe are the specific emissions they have in mind. Accordingly, they have not furnished sufficient facts on this point, either. For that reason (too), the relief sought is so unclear that this, too, precludes the order they are seeking.

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512 E.g. in the Summons, para. 780, "*moving away from fossil fuels is possible and also necessary*" and the heading of Chapter VIII.2.1.3.d, to the effect that fossil fuels "*need to remain in the ground*". In Chapter XI.2.3, Milieudefensie et al. even discuss their own hesitations regarding negative emissions technologies, by which they mean (according to para. 765) that this technology will not be necessary if Shell achieves what Milieudefensie et al. are seeking. It therefore remains far from clear what Milieudefensie et al. have in mind with their addition of the word "*net*" in the relief sought.

513 The inaccuracy of this is explained elsewhere in this Statement of Defence.

379. Fourth, Milieudefensie et al. apply a reduction rate to RDS that concerns global CO_2 emissions, without giving any explanation. The fact that Milieudefensie et al. aim the relief sought at "*all*" CO_2 emissions associated with business activities and fossil fuel products and want to reduce those "*compared to 2010 levels*" implies that Milieudefensie et al. focus on absolute emissions. If that is correct, then Milieudefensie et al. have not furnished sufficient facts to substantiate that claim. When looking in the Summons at what substantiation Milieudefensie et al. have presented for the 2010 baseline, you will find only an IPCC publication about all global CO_2 emissions. In addition, Milieudefensie et al., without giving any further explanation, subsequently conclude that the same should be applied to RDS (Summons, para. 754). This bare assertion is of course insufficient for leading to award of the claim. Milieudefensie et al. do not explain why the claim should focus on the volume of emissions in 2010. Moreover, Milieudefensie et al.'s position presumes a static system in which Shell, and all other actors, will continue to play the same role regarding each other, and that the global reduction envisaged by Milieudefensie et al. will be achieved as every party reduces CO_2 emissions in the same proportions. However, Milieudefensie et al. do not put forward any arguments to corroborate that idea. Accordingly, they do not explain why Shell should lower absolute emissions by the percentages mentioned, either.[514] The following is a greatly simplified example. There are two suppliers operating in a market, each of whom produces 50 kilograms of waste, i.e. a total of 100 kilograms. If the total amount of waste is to be reduced to 90 kilograms within five years, this does not mean that neither party can grow. After all, one of the suppliers may cease to exist. The remaining supplier can perform activities to fill the gap left by the other supplier and produce 40 kilograms more waste, while still achieving the goal of a total maximum of 90 kilograms. Intermediate versions are also conceivable. If, for example, competitive relations shift in such a way that a particular supplier gains a market share of 2/3 instead of 50% of the market, it would not make sense for that supplier to still have to reduce its waste by 5 kilograms in total. Milieudefensie et al. do not explain at all why RDS can be required to reduce "*all*" emissions "*compared to 2010 levels*", regardless of developments in the market in which Shell operates. That is why Milieudefensie et al. have not furnished sufficient facts.

514 The matters discussed by Milieudefensie et al. in Chapter XI.4 of the Summons do not answer the point highlighted here. In the argument they make there, Milieudefensie et al. do not in any way discuss Shell's relative market position and how its market share relates to that of others.

380. Fifth, which follows on from the previous point, Milieudefensie et al. also did not furnish (sufficient) facts to support their claim that an award of the relief sought will result in the result apparently envisaged by them – an actual reduction of CO_2 emissions worldwide. This point is dealt with in substantive terms in Subsection 2.2.4 and further in Subsection 7.2.2, for example.

381. In short, the relief sought is not consistent with the substantiation provided by Milieudefensie et al. Milieudefensie et al. do not discuss what they mean by key elements in the relief sought, and they do not explain why they believe Shell can be required to take the measures specifically desired in the relief sought. Their failure to do so has harmed RDS's defence in a procedurally impermissible manner. For that reason alone, the claims should be dismissed.

382. In the following parts of this Statement, RDS will respond to the substantiation that Milieudefensie et al. did present (but which is incompatible with the relief sought). Although RDS will not persist in reiterating the above defences in what follows, it nonetheless adheres to them in full.

6 THE CLAIMS ARE SO FAR-REACHING THAT THEY CANNOT BE ELIGIBLE FOR AWARD

6.1 Introduction

383. The substantiation presented by Milieudefensie et al. for their claims shows that they have claims in mind that are very far-reaching. They are so far-reaching that they cannot be eligible for award. This will be explained in more detail in this chapter.

384. To begin with, Milieudefensie et al. are trying to impose a degree of regulation on a private party that does not ensue from the law and that is, moreover, ahead of complex political decisions concerning the energy system that are currently being taken by political bodies across the world. The claims concern matters for which civil courts are not well-equipped. The claims exceed the boundaries of the civil courts' role in the development of law, since they involve political decisions which will need to be taken based on specific circumstances of the case that are as yet (partially) unforeseeable. This is all the more true because the interests of foreign States are involved. This is explained in Section 6.2.

385. The claims are also quite far-reaching in the sense that the substantiation given in the Summons proceeds from the notion that RDS bears legal responsibility for emissions produced by other Shell companies, and even for emissions produced by the end users of fossil fuels around the world.[515] Milieudefensie et al. base their claims on the general assertion that, put briefly, RDS is responsible for major CO_2 emissions. Milieudefensie et al. ignore both the fact that the vast majority of emissions (approximately 85%) are caused by the use of fossil fuels by end users and that such emissions are not attributable to Shell but to end users. This is explained in Subsection 6.3.2. Milieudefensie et al. moreover ignore the fact that those emissions by other Shell companies cannot be attributed to RDS (see Subsection 6.3.3).

386. The claims are also very far-reaching from a temporal point of view. Even if it were assumed that, under certain circumstances, the situations pointed out by Milieudefensie et al. could be deemed unlawful – which is not the case – this would still be insufficient to award (any part of) the claims. After all, the claims would then encompass conduct that will not be, or will not necessarily be, unlawful in 2030, 2040 or 2050. This is a result of the fact

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515 As explained in Chapter 5, the more limited relief sought is incompatible with that substantiation, because the relief sought only focuses on business activities and products of RDS.

that Milieudefensie et al.'s claims apply to the future and are very broad in scope. Milieudefensie et al. thus lack a cause of action. This is explained in Section 6.4.

6.2 Milieudefensie et al.'s claims concern issues of national and international policy, which requires restraint from the civil courts

6.2.1 Introduction

387. RDS would like to start by noting that the civil court – including in the present case – renders judgment in disputes between one or more claimants and one or more defendants. In doing so, the court must bear in mind that the decision to be rendered in proceedings (a) may depend on, or may affect, factors outside of the litigating parties concerned and their dispute, especially if those factors are still in flux, making them difficult to interpret, and (b) may involve third-party interests. The more the relevant legal issues concern issues of policy or legal politics of a more general nature or third-party interests, thus exceeding the interests of the case at hand, the less suitable the debate between the parties in civil proceedings is to supply the court with sufficient information to make an adequate decision. After all, the court may only decide on the dispute as submitted to it by the parties, unless the law provides otherwise (cf. Article 24 of the Dutch Code of Civil Procedure).

388. The issues raised by Milieudefensie et al. in these proceedings concern issues of policy and legal politics that exceed the interests of this case. Unlike the relief sought – which is restricted in scope to RDS – the claims are substantiated with very far-reaching opinions on what can be expected of RDS in terms of the business activities and fossil fuel products of the entire Shell group. As a result, the case also directly and indirectly affects the interests of a wide range of third parties. These include the Shell companies and persons and businesses dependent on them, including both the Dutch State and foreign States and their inhabitants. In the current case, Milieudefensie et al. are asking the court (1) to engage in matters that are the preserve of (Dutch) political and democratic institutions and (2) to interfere in matters of national and cross-border policy in a way that is incompatible with the restraint expected of the court in such policy matters (as evidenced by the judgments referred to below). The District Court is therefore not the proper forum for Milieudefensie et al. to enforce the measures they would like RDS to take. That means that Milieudefensie et al.'s claims should be denied or, at any rate, that Milieudefensie et al. should be denied a cause of action for its claims.

6.2.2 The decision requested by Milieudefensie et al. from the civil court exceeds its role in the development of law and bars awarding Milieudefensie et al.'s claims

The court's role in the development of law

389. The Supreme Court acknowledged the court's role in the development of civil law in the 1959 *Quint/Te Poel* judgment. That case addressed the question of whether civil law provided a basis for a claim arising from unjustified enrichment. At the time, the Dutch Civil Code did not yet include any rules on unjustified enrichment, and its Article 1269 (old) provided that all obligations "*arise either from contract or from the law*". The Court of Appeal had based its opinion on Article 11 of the General Provisions (Kingdom Legislation) Act (*Wet algemene bepalingen*), which provided that the court must dispense justice in accordance with the law. From this, the Court of Appeal inferred that the court was not free to create obligations under civil law which were not created and regulated by law. On that basis, the Court of Appeal concluded that Article 1269 of the Dutch Civil Code (old) prescribed exhaustively how obligations could arise and that, in short, non-contractual obligations could only arise as provided by law.

390. The Supreme Court arrived at a different finding, elucidating the conditions that would allow the court to fill legal gaps:[516]

> *"[...] that, after all, these words [Article 1269 (old) of the Dutch Civil Code] do not by any means require that every obligation be based on a statutory provision of some sort, but merely justify the conclusion that, in cases not specifically regulated by law, the acceptable solution is one that is compatible with the legal system and matches the cases that* have *been regulated by law."*
> [emphasis added by attorneys]

391. This finding also shows that, according to the Supreme Court, the court's role in the development of law is not unlimited in scope. Law development is only permitted if the solution proposed by the court is compatible with the legal system and corresponds to cases that *have* been regulated by law.

392. Since *Quint/Te Poel*, the case law of the Supreme Court has given further pointers regarding the scope of the court's role in the development of law.

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516 Supreme Court, 30 January 1959, ECLI:NL:HR:1959:AI1600 (*Quint/Te Poel*).

393. In *Arbeidskostenforfait* – a tax case involving the right to equal treatment as laid down in Article 26 of the ICCPR – the Supreme Court provided a clear explanation of which interests the court needs to balance, and how:[517]

> *"[...] In such situations, two interests need to be balanced, with due observance of the nature of the legal area in which the question arises. The court's ability to immediately provide effective protection to the interested party would plead in favour of the court addressing this legal defect, but pleading against this is the propriety, under the given constitutional relationships, of the court adopting a reticent attitude when thus intervening in statutory regulations.*
> *In general, this balancing will lead to the court itself immediately addressing the legal defect if the system of the law, the cases regulated therein and the underlying principles, or the legislative history, sufficiently clearly indicate how this must be done. [...] [I]n cases where several solutions are conceivable and the choice between those solutions partly depends on general governmental policy considerations, or if important choices of a legal-political nature must be made, it is recommended that the court leave the choice to the legislature for the time being, both in connection with the [...] judicial restraint preferred by constitutional law and because of the court's limited options in this area."* [emphasis added by attorneys]

394. The court must therefore exercise restraint where several solutions present themselves and the choice from those solutions depends on choices of government policy or legal politics, which is why making that choice should be left to the legislature.

395. The Supreme Court's opinion in *Taxibus* confirms the course embarked upon by the Supreme Court in *Arbeidskostenforfait*. Regarding the question of whether, besides Article 6:106 of the Dutch Civil Code, there was any latitude to compensate non-economic damage, the Supreme Court held as follows:[518]

> *"[...] It cannot be ruled out that the legal system insufficiently meets the public's need for some form of redress to be given to those who in their lives have to suffer the serious consequences of the death of any person with whom they – as here – had an affective relationship. However, offering compensation in this respect without question and at variance with the legal system would exceed the court's role in the development of law. After all, in the first place the pros and cons of the current system would have to be rebalanced, which is the preserve of the legislature. Further, any modification of the current system would require delineating the cases in which compensation is deemed appropriate and specifically identifying the*

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517 Supreme Court 12 May 1999, ECLI:NL:HR:1999:AA2756 (*Arbeidskostenforfait*) paras. 3.14-3.15.

518 Supreme Court 22 February 2002, ECLI:NL:HR:2002:AD5356 *(Taxibus)*, para. 4.2.

> *persons entitled to such compensation. Finally, it is also for the legislature to decide whether and, if so, to what extent, financial limits should be set on the award of such compensation, in connection with the consequences this may entail."* [emphasis added by attorneys]

396. Other illustrative examples are the opinions rendered by the Supreme Court with regard to the scope of employer liability as laid down in Article 7:658 of the Dutch Civil Code. The Supreme Court thus held in *TNT/Weijenberg*:[519]

> *"[...]In principle, there are good arguments for offering employees more far-reaching, general protection against the risk of accident in connection with their work as compared to the protections now offered by Art. 7:658, but it is for the legislature to draft the corresponding rules; such general rules exceed the court's role in the development of law."* [emphasis added by attorneys]

397. In *Rooyse Wissel/Hagens*, the Supreme Court held as follows:[520]

> *"Even though any delineation will be to some degree arbitrary, it should be borne in mind here that the industrial accident suffered by Hagens did not occur in a place where De Rooyse Wissel exercised only limited control and influence as an employer – on the contrary, it occurred in the workplace itself. In that situation, acceptance of an insurance obligation for the employer, ensuing from good employer practices, would too drastically impair the legal system of employer's liability, which is based on a duty of care to prevent damage (and the employer failing in that duty of care). Moreover, this would cause a high degree of legal uncertainty, since the matter cannot be clearly separated from (other) industrial accidents where the employer is not subject to any insurance obligation."* [emphasis added by attorneys]

398. In tax cases, the Supreme Court held as follows this year:[521]

> *"Such a breach at the system level is accompanied by a legal defect that cannot be addressed without making choices at the system level. These choices cannot be inferred sufficiently clearly from the system of the law [...]. Then the court will exercise restraint in respect of the legislature when addressing such a legal defect at the system level. In principle, court intervention would be inappropriate, unless an individual tax subject is faced with an individual, excessive burden in violation of Article 1 of the First Protocol [...]."* [emphasis added by attorneys]

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519 Supreme Court 11 November 2011, ECLI:NL:HR:2011:BR5215 (*TNT/Weijenberg*), para. 3.5.

520 Supreme Court 11 November 2011, ECLI:NL:PHR:2011:BR5223 (*Rooyse Wissel/Hagens*), para. 5.4.

521 Supreme Court 14 June 2019, ECLI:NL:HR:2019:816, para. 2.10.3; See also Supreme Court 14 June 2019, ECLI:NL:HR:2019:911, para. 2.4; Supreme Court 14 June 2019, ECLI:NL:HR:2019:912, para. 2.4; Supreme Court 14 June 2019, ECLI:NL:HR:2019:817, paras. 4.3.3-4.2.4; Supreme Court 14 June 2019, ECLI:NL:HR:2019:948, para. 3.2; and Supreme Court 14 June 2019, ECLI:NL:HR:2019:949, para. 3.2.

399. The following factors determining how far the court's role in the development of law extends can be distilled from the case law cited above:

- The solution to the legal defect must 'sufficiently clearly' ensue from the system of the law, the cases regulated therein and the underlying principles or the legislative history (*Quint/Te Poel*, *Arbeidskostenforfait* and judgments in tax cases).

- The development of law may not impair the underlying legal system (at least not too drastically) (*Rooyse Wissel/Hagens*); the fact that the legal system does not meet a public need does not mean that the court may deviate from that legal system (*Taxibus*).

- If several solutions are conceivable and the choice for a particular solution is dependent on government policy considerations or legal-political choices, there is less latitude for judicial intervention; the same applies to considerations at the system level (*Arbeidskostenforfait*, *Taxibus,* and judgments in tax cases).

- The court's role in the development of law does not allow the formulation of general rules (*TNT/Weijenberg*).

- The development of law may not create any (major degree of) legal uncertainty due to an inability to clearly separate a case from (other) similar cases (*Rooyse Wissel/Hagens*).

400. In these proceedings, Milieudefensie et al. are seeking an order for RDS to reduce CO_2 emissions step by step to ultimately net zero by 2050. They argue that this reduction is necessary to achieve the Paris Agreement target of limiting the rise in temperatures to well below 2ºC and preferably to 1.5ºC. Milieudefensie et al. have based the steps for RDS to achieve that reduction on one of the IPCC Special Report's global CO_2 emissions reduction scenarios, which has a 2050 net zero timeline (Summons, para. 850). RDS already explained in Section 2.5 that the way in which Milieudefensie et al. present the IPCC's findings does not correspond with what can actually be concluded from the Special Report. Milieudefensie et al. are effectively asking the court to elevate that hypothetical IPCC scenario – as interpreted by Milieudefensie et al. – to a general global norm that can be applied to an individual party on a one to one basis – RDS, in this case – despite the absence of any legal basis to do so.

401. Given the views of the Supreme Court outlined above regarding the court's role in the development of law, Milieudefensie et al.'s claims would require the court to intervene in a way that goes beyond what is permitted in this role.

402. In their claims, Milieudefensie et al. require the court to fill an alleged gap in national and international law by determining how much CO_2 may be emitted at particular points in time. In doing so, Milieudefensie et al. ignore the fact that there is already legislation in place that explicitly sets the limits for CO_2 emissions in different contexts. Milieudefensie et al. fail to even mention in passing that the EU and the Netherlands have already had regulations in place for a considerable time that regulate – and in some sectors expressly permit – CO_2 emissions, in light of, among other things, the greenhouse effect. The most striking example of this is the ETS, which is applicable to all kinds of activities undertaken by Shell (see Subsections 2.7.1 and 2.7.2). Moreover, the political branch is very active at this very moment in further defining the regulatory frameworks in this area for the future. For example, the Dutch legislature has in the meantime adopted the Climate Act (*Klimaatwet*), in order, among other things, to implement the Paris Agreement and the *Urgenda* judgment. The Climate Act sets reduction targets for CO_2 emissions for the State but does not set specific reduction targets for private parties. It does, however, constitute a basis for a more detailed elaboration which is currently being prepared (see Subsection 2.7.2). In short, the claim interferes with both existing legislation and the further development of the regulatory framework that has been actively taken up by the political branch.

403. As RDS explained in Section 2.2, a range of diverse and sometimes conflicting interests need to be balanced in resolving the question of how to tackle the threat of climate change, and policy choices with potentially drastic and far-reaching consequences need to be made. Courts are insufficiently equipped to make that assessment and offer a specific solution in the context of civil proceedings between the private parties Milieudefensie et al. and RDS and should refrain from doing so. Energy system adjustments specifically require adjustments at the system level, in which the individual roles of countless national and international actors should be taken into account and fundamental issues, including economic issues, should be considered. A court assessment based on a debate between just the parties to the proceedings – and what is more: about the role of just the one actor against which the action was brought – is not suitable for that purpose. Only political institutions are capable of adequately balancing the various and conflicting interests involved in

climate change, making choices between the various problem-solving approaches possible and, on that basis, setting policies and general rules to be observed by every member of society (in the Netherlands or elsewhere). Milieudefensie et al. also appreciate that potentially drastic policy measures will be necessary, indicating that because of the scope of the global reduction task mentioned by them and the associated energy transition, ultimately "*everyone will be asked to make sacrifices*", which requires a balancing of various interests (Summons, para. 57). However, it is not for Milieudefensie et al., RDS or the court to decide in this case who in society – both in the Netherlands and abroad – will have to make what sacrifices and when. To illustrate this point further, RDS refers to the examples cited by it in Sections 2.2, 2.6, and 2.7, which showed that there is no crystal-clear answer to that question.

404. For the case at hand, the foregoing specifically means that the criteria from *Quint/Te Poel*, *Arbeidskostenforfait* and *Taxibus* – (1) the solution to the legal defect must ensue sufficiently from the system of the law and the cases that *have* been regulated therein and (2) effectively only one undisputable solution is possible – have not been met.

405. Regarding the second point, RDS also refers back to Subsection 2.2.3.4. RDS explained that the IPCC Special Report relied upon by Milieudefensie et al. outlines various possible scenarios to limit the global temperature rise. The scenario that Milieudefensie et al. believe RDS should pursue is therefore only one of many possible scenarios and does not present an undisputable problem-solving approach for the court to base its opinion on. In addition, the scenario cited by Milieudefensie et al. focuses on achieving net zero carbon emissions worldwide – therefore, for society as a whole – and does not address the question of which actors should contribute to reducing CO_2 emissions, in what form and when. Moreover, if society as a whole were to achieve net zero emissions, some players would have net negative emissions and others would have net positive emissions; achieving net zero should therefore be a system level issue and not something considered at the individual level. Milieudefensie et al. therefore wrongly imply that the scenario gives rise to a standard that can be directly applied to RDS. Even if that were correct, the CO_2 emissions reduction desired by Milieudefensie et al. could be achieved worldwide only if that alleged standard were applicable to everybody in the world who causes CO_2 emissions. Finally, the scenario and the standard it allegedly contains cannot be applied in this case, as the scenario focuses on a world with net zero CO_2 emissions, whereas Milieudefensie et al.'s claims basically seek an order for Shell (only) not to emit any (net) CO_2 at all by 2050.

406. If the District Court were to follow Milieudefensie et al.'s line of reasoning, ordering RDS to abide by the IPCC Special Report scenario cited by Milieudefensie et al., this would inevitably give rise to the question whether and to what extent this should equally be applied to other individuals and businesses emitting CO_2. After all, all sorts of activities worldwide produce CO_2 emissions to some extent, and such activities can often not be distinguished from the activities of Shell. Consequently, the requirement from *Rooyse Wissel/Hagens* – development of law may not create any (major degree of) legal uncertainty – has not been met either in this case due to an inability to clearly separate the activities concerned in this case from other (similar) activities that entail CO_2 emissions.

407. In short, in light of the Supreme Court's views on the court's role in the development of law, RDS concludes that the question of how great a level of CO_2 emissions Shell and the end users of its products should be allowed to emit in 2030, 2040, and 2050 cannot be answered by the court in the context of civil proceedings. Answering this question requires a balancing of interests that is the sole prerogative of the legislature. In consequence, the court will be obliged to refrain from giving an opinion in that matter in the current case. Milieudefensie et al. therefore have no cause of action for lack of sufficient interest, or at least their claims should be dismissed for that reason.

6.2.3 The courts' innate task within the state hierarchy calls for restraint on the part of the civil courts when they hear cases involving political considerations that are the preserve of Dutch political bodies; this is such a case

This case involves political considerations which require judicial restraint, and the reliance by Milieudefensie et al. on the *Urgenda* judgments to support their claims is misguided

408. Courts should exercise restraint if a case involves political considerations that need to be addressed by the legislature. Politics must be given leeway to take policy decisions which will, after all, affect situations that are largely unforeseeable in nature. The same applies if policy-related considerations of ranging interests which impact the structure or organisation of society are concerned. This will be explained in greater detail below to supplement RDS' previous comments on the division of tasks between the judiciary and the legislature.

409. In the so-called nuclear weapons judgment[522], the Supreme Court examined a claim pertaining to an injunction, and a declaratory judgment, regarding the State's assistance in the actual use of nuclear weapons. In the present context, we will be looking at the court's finding regarding the relationship between the court on the one hand and political considerations on the other.[523] The Supreme Court expressly ruled that, precisely because politics must be allowed the latitude to make political decisions, it is not for the civil courts to take political considerations into account. The Supreme Court held as follows:[524]

> *"In connection with the question of whether and when the use of nuclear weapons, if this is contrary to the law of war, is impermissible, it should furthermore be noted that the claims lodged in the present case relate to questions of State policy in the areas of foreign politics and defence – policy which will to a major degree depend on political considerations reflecting the circumstances of the case. This means that the civil court will have to exhibit great restraint when examining claims, like those lodged in the present case, that serve to qualify acts implementing political decisions in the areas of foreign policy and defence, which could be performed in the future, as unlawful and therefore as already forbidden at this point in time. After all, it is not for the civil court to consider such matters of politics. In addition, the civil court should, from the outset, give the relevant State bodies responsible sufficient freedom to consider these matters of politics based on specific circumstances of the case that are as yet unforeseeable, and refrain as much as possible from imposing any prior injunctions which may limit this freedom yet leave no possibility to take account of these circumstances. This applies not only to the question of whether such claims are eligible for award but also, further to this and on the same grounds as those mentioned above at A, to the question of admissibility."* [emphasis added by attorneys]

410. This fundamental aspect was acknowledged in the judgments rendered in Urgenda. In that case, both the District Court and the Court of Appeal noted the fact that an opinion had been expressly withheld on which specific measures the State would need to take. The District Court expressed this as follows:[525]

> *"[...] It is an essential feature of the rule of law that the actions of (independent, democratic, legitimised and controlled) political bodies, such as the government and parliament can – and sometimes must – be assessed by an independent court. This constitutes a review of lawfulness. The court does not enter the*

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522 Supreme Court 21 December 2001, ECLI:NL:HR:2001:ZC3693 (*Kernwapens*).
523 Section 6.4 will address another aspect of the same judgment.
524 Supreme Court 21 December 2001, ECLI:NL:HR:2001:ZC3693 (*Kernwapens*), para. 3.3, at C.
525 District Court of The Hague 24 June 2015, ECLI:NL:RBDHA:2015:7145 (*Urgenda/Staat*), para. 4.95.

> *political domain in the course thereof, with the associated considerations and choices. Separate from any political agenda, the court has to limit itself to* its own *domain, which is the application of law. Depending on the issues and claims submitted to it, the court will review them with more or less caution. Great restraint or even abstinence is required when it concerns policy-related considerations of ranging interests which impact the structure or organisation of society. The court has to be aware that it only plays one of the roles in a legal dispute between two or more parties. Government authorities, such as the State (with bodies such as the government and the States General), have to make a general consideration, with due regard for possibly many more positions and interests."* [emphasis added by attorneys]

411. This is followed by an explanation of why, according to the District Court, intervention was nevertheless possible in that case. Yet the court exhibits restraint in that case as well because of the uncertain consequences of judicial intervention:[526]

> "*[…] Regardless, the requirement of restraint referred to above applies in full to judgments with unforeseeable or difficult to assess consequences for third parties.*
>
> *[…]*
>
> *[…] Here, too, the court should exercise restraint given the possibility that the consequences of the court's intervention might be difficult to assess.*
>
> *In this, it is relevant to note that the claim discussed here is not intended to order or prohibit the State from taking* certain *legislative measures or adopting a* certain *policy. If the claim is allowed, the State will retain full freedom, which is pre-eminently vested in it, to determine how to comply with the order concerned.*" [emphasis added by attorneys]

412. The Court of Appeal likewise held in that case that "*the order to reduce emissions gives the State sufficient room to decide how it can comply with the order*".[527]

413. While the District Court and the Court of Appeal in *Urgenda* found that they had some discretion to intervene, the above demonstrates that they were well aware of the fundamental point that they should exercise restraint in

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526 District Court of The Hague 24 June 2015, ECLI:NL:RBDHA:2015:7145 (*Urgenda/Staat*), paras. 4.98, 4.100 and 4.101.

527 Court of Appeal of The Hague, 9 October 2018, ECLI:NL:GHDHA:2018:2591, (*Urgenda/Staat*), para. 67.

respect of intervening in the policy considerations the State needs to address in deciding on particular measures.

The issue that is the subject of the claims in this case is particularly concerned with political questions

414. While the present claims are directed at a private company, i.e. RDS, the contents of those claims are nevertheless concerned with matters that are subject to political considerations. What Milieudefensie et al. are suggesting is a concrete measure (in short: a worldwide ban on Shell fossil fuels); this requires, above all, a weighing up of considerations that, in the words of the aforementioned judgments, will have to be made on the basis of "*specific circumstances of the case that are as yet unforeseeable*". In addition, "*policy-related considerations of ranging interests which impact the structure or organisation of society*" are concerned.

415. The considerations to be addressed are particularly political in nature. Milieudefensie et al.'s claims disregard these considerations entirely and go considerably further than the role of the courts permits. If awarded, they would – at least indirectly – interfere with the political freedom to strike a balance between the various interests involved and to make certain choices. Milieudefensie et al. thus effectively assign the role of policymaker to the civil court. In this context, however, that role does not belong to the court but is reserved to the political institutions. The court should therefore exercise restraint in this case. This is even more the case if, as here, the interests of foreign states are involved.

416. The many references to the *Urgenda* judgments by Milieudefensie et al. in support of their claims are therefore misguided. The *Urgenda* judgments simply do not provide the support for the claims that Milieudefensie et al. purport.

417. First, Milieudefensie et al. argue that the District Court – and the Court of Appeal – have formulated a "*legal standard of a general nature*" (Summons, paras. 514-515). That is, however, not true. The judgment was rendered in proceedings against the State alone. The District Court's decisions are based on substantive grounds that do not apply to RDS since they were rendered in proceedings against the State, such as the fact that:

(a) the State is able to regulate national emissions legislatively, but RDS is not;

(b) the State is bound by the Paris Agreement, but RDS is not; and

(c) the State is directly bound by Articles 2 and 8 of the ECHR, but RDS is not.

418. Second, the claim against the State pertained exclusively to CO_2 emissions in the Netherlands. Milieudefensie et al. go much further in the present proceedings, as they have made Shell's global activities part of the claim.

419. Third, the *Urgenda* judgment only confirmed a general reduction target for the State – thus for Dutch society as a whole. In the present case, Milieudefensie et al. are claiming that a specified reduction must be achieved in a single sector – by a single private party, no less – and assign all responsibility to the producer while ignoring the role played by end users and others.

420. Fourth, the *Urgenda* judgment was restricted to a specific, and limited, reduction by 2020. In the present case, Milieudefensie et al. are seeking far greater reductions at moments much farther in the future (2030, 2040 and 2050).

6.2.4 Such restraint is particularly important when the interests and policy of foreign States are involved; that is the case here

Introduction

421. Milieudefensie et al. argue that RDS must make sure to reduce the CO_2 emissions from its business activities and fossil fuel products. Although Milieudefensie et al.'s argument is not clear in this regard and somewhat inconsistent with the relief sought, they would seem to be claiming that RDS should thus also be required to ensure that other Shell companies reduce the (net) CO_2 emissions attributable to their activities and the use of their fossil fuel products by end users to zero by 2050 (with specific intermediate steps in 2030 and 2040).[528] Milieudefensie et al.'s claims thus directly touch on Shell's foreign activities. This raises political and policy issues for foreign States, also in light of the fact that oil and gas supplies and the exploitation thereof are of strategic interest to the States involved, not to mention the energy systems in those States.

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528 Merely as an aside, but if this is not Milieudefensie et al.'s intent and they are actually concerned solely with RDS, it should be noted that RDS itself produces almost no CO_2 emissions (see Subsection 6.3.4). The claims should therefore already fail because of inadmissibility on grounds of a lack of interest or be rejected on substantive grounds.

Restraint is particularly important when the interests and policy of foreign States are involved

422. Chapter 3 explained why Milieudefensie et al.'s claim is not exclusively governed by Dutch law. It was also noted there that, on the basis of Article 17 of the Rome II Regulation, among other things, "*account must be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability*". In this case, these would be the countries where Shell's activities as well as the end use of Shell products take place. The preamble leaves no doubt that this should be interpreted broadly: "[t]*he term 'rules of safety and conduct' should be interpreted as referring to all regulations having any relation to safety and conduct*" (recital 34).[529]

423. The interests and policy of the foreign States where Shell operates must also be taken into account within the confines of Dutch law. After all, if the Shell group can no longer conduct its business in the States concerned, those States will be affected as a result. The rules derived from the case law cited in Section 6.2 above apply *a fortiori* whenever a political decision reverberates beyond the Netherlands and affects political decisions made in countries across the globe. After all, the case law cited there illustrates that restraint should be exercised if the court is asked to issue an order touching upon the area of politics where considerations are to be based on "*specific circumstances of the case that are as yet unforeseeable*" and where "*policy-related considerations of ranging interests which impact the structure or organisation of society*" are concerned. The interests at stake increase, as does the unpredictability of circumstances, as the number of countries involved increases.

This case involves the interests and policies of foreign States

424. As explained above in Subsections 2.6.2 and 2.7.4, the Paris Agreement also expressly allows the various signatory States to flesh out policy in different ways, the basic premise being, after all, "*nationally determined contributions*" (Article 4(2); emphasis added by attorneys).

425. The interests and policies of foreign States, as well as those of the Netherlands, are diverse in nature. In Section 2.2, it was explained that the energy system and its reform are complex social issues – and this is no different in foreign States. With this in mind, "*differentiated responsibilities*" have been included in international regulations addressed to States.

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529 See also *Groene Serie Onrechtmatige daad*, Art. 17 Rome II, note 2 (F. Ibili) and Asser/Kramer & Verhagen 10-III (2015), no. 1118.

Specific mention was also made of the acknowledged importance of the energy supply in the UN's SDGs (Subsection 2.2.3.2). The exploitation of natural raw materials – ground-based fossil fuel reserves, in particular – is also of strategic importance to various producing States that – like the Netherlands, in terms of its North Sea gas reserves – would like to exploit those raw materials, e.g. to ensure their independence (see also Subsection 2.2.4 and Section 2.7). As the RDS annual report for 2018 shows, oil and gas concessions play a role in Shell's operations in no fewer than 42 countries. [530]

426. RDS would like to remind the court that the Paris Agreement leaves no doubt about the fact that the States are free to determine the specific measures to be taken. They need to adopt their own policy – especially considering the fact that there are so many options and no less so because policy can and should differ from one country to the next. To illustrate, RDS would like to point out that some countries, such as France, continue to focus on nuclear energy both as a means of meeting their energy needs and at the same time reducing CO_2 emissions. See, in this regard, Sections 2.2, 2.6 and 2.7. There, RDS discussed in detail the fundamental choices that States across the globe face when making decisions about their energy systems, the energy transition, and the role of fossil fuels therein.

6.3 The CO_2 emissions about which Milieudefensie et al. complain cannot be attributed to RDS

6.3.1 Milieudefensie et al. incorrectly substantiate their assertion that RDS accounts for about 1% of global CO_2 emissions by attributing to RDS those CO_2 emissions produced by (a) the end users of fossil fuel products and (b) other Shell group companies

427. To substantiate their claims, Milieudefensie et al. have attributed certain CO_2 emissions to RDS. They assert that RDS currently accounts for "*about 1%*" of global CO_2 emissions, "*more than twice as big as those of Dutch society*" (Summons, para. 6). In addition, Milieudefensie et al. attribute about 1.8% of historical global CO_2 emissions to Shell, citing research that allegedly shows that "*of total global emissions of anthropogenic emissions, a staggering 1.8% can be traced back to the operating activities of Shell*" (Summons, para. 5). By extension, Milieudefensie et al. contend that RDS is a party that has a "*substantial influence on that danger [of climate*

530 **Exhibit RO-31**, Annual Report 2018, p. 48.

change]" and provides "*a major contribution to the emissions*" (e.g. paras. 39, 44, 58 and 549-552 of the Summons).

428. Milieudefensie et al. arrive at these percentages by lumping together the CO_2 emissions from RDS itself with similar emissions produced by other Shell companies, and even with emissions caused by the use of Shell's fossil fuel products by end users. Milieudefensie et al. acquit themselves of that crucial step in a mere three sentences (Summons, para. 640). According to Milieudefensie et al., as RDS "has control over the emissions associated to its activities and products", those emissions should therefore be attributed to RDS. That is incorrect, as RDS will explain below.[531]

6.3.2 No attribution of CO_2 emissions produced by the end users of fossil products

429. Roughly 85% of the CO_2 emissions associated with fossil fuels arise from their combustion by end users.[532] Fossil products are used by governments, businesses and individuals worldwide.[533] They are often seen by governments as crucial to their national security interests.

430. Contrary to what Milieudefensie et al. suggest, Shell (let alone RDS) has no control over the use of fossil fuels by end users and the choices that end users make. In this context, Milieudefensie et al. have not demonstrated that, if Shell were to cease its supply, the demand from end users would not be met by other suppliers; and this is not very likely either. Reference is made to Subsection 2.2.4 in this regard.

431. There is no foundation whatsoever for attributing these emissions to RDS. End users are themselves responsible for emissions caused by the use of Shell's fossil fuel products. The Shell companies (let alone RDS) are therefore not the parties that cause these emissions. After all, the choice of using specific fossil fuels and the means of achieving economy of use, is the responsibility of the end users of such products.

432. As set out in Subsection 2.6.4, the notion that each end user is responsible for its own emissions is confirmed primarily by the way emissions are accounted for under the IPPC Guidelines in conjunction with the Paris

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531 The calculations made by Milieudefensie et al. are unreliable for other reasons, too, but because of the key point stated in the main text, it is not necessary to discuss them in detail at this stage.

532 A much smaller proportion arises from the preceding business processes, from extraction to processing, transport and sales.

533 This self-evident truth has already been acknowledged by Milieudefensie et al. in para. 1 of the Summons.

Agreement (i.e. not attributable to the country where the fuel production takes place but to the country where the emissions are produced) and the other reporting standards cited there.

433. This criterion is confirmed by the environment case law of the Administrative Jurisdiction Division of the Council of State. Pursuant to that case law, the traffic to and from a plant must not be attributed to a particular plant being operational if such traffic is at a distance from such plant or if such traffic is similar to other traffic.[534] This line of reasoning, albeit in a different context, also elucidates, in terms of the present case, the fact that Milieudefensie et al.'s position – i.e. that the emissions produced by end users in their day-to-day activities, which are often at a far remove from where Shell's operations are located, must nevertheless be ascribed to RDS – is untenable.

434. Milieudefensie et al. similarly fail to demonstrate why the burden of taking measures to prevent CO_2 emissions related to the end use of fossil fuels (for example, through CCS) or to compensate for them (for example, with naturally occurring carbon sinks, such as forests and swamps) should fall to RDS rather than to the end users of fossil fuels. Consequently, Milieudefensie et al. fundamentally disregard the role played, or that should be played, by end users, not to mention States.

435. The conclusion must be that there is no legal basis for Milieudefensie et al.'s assertion that emissions produced by end users should be attributed to other Shell group companies, let alone to RDS.

6.3.3 No attribution of CO_2 emissions of subsidiaries

436. As discussed in Sections 2.1 and 2.3, RDS is the sole defendant, engages in no business activities and produces a negligible amount of CO_2 emissions, if any. In addition, the Shell companies themselves determine how to implement policy, as explained at the beginning of Section 2.3.

6.3.4 Without that attribution, RDS itself has negligible CO_2 emissions, and even if emissions from Shell companies or end users are attributed to RDS, their levels have no significant impact on climate change, so that a court order against RDS would fail to achieve the desired effect

437. Inability to attribute would be a fatal flaw in Milieudefensie et al.'s position, based as it is on the premise that RDS is a major contributor to global CO_2

534 Council of State Administrative Jurisdiction Division, 17 April 2019, ECLI:NL:RVS:2019:1260 (*Erasmus MC*), paras. 4.2-4.3.

emissions. The amount of CO_2 that RDS itself emits is negligible (Sections 2.1 and 2.3 above).

438. Even the Shell group as a whole – if CO_2 emissions by end users are disregarded, as these amount to approximately 85% – has very limited CO_2 emissions in relative terms, especially when compared to global CO_2 emissions. In so far as the Shell group produces emissions, it is actively working to reduce those emissions, which are furthermore regulated in Europe by the ETS (see Section 2.3 and Subsections 2.7.1 and 2.7.2). Finally, even if the emissions produced by end users are attributed to Shell, Milieudefensie et al. will still have failed to demonstrate that those specific emissions have had a fundamental impact on climate change.

6.4 The claims should be denied in view of the uncertainty regarding future conduct, technology and social standard of care

6.4.1 Introduction

439. The claims pertain to conduct in the far future, i.e. 2030, 2040 and 2050. First of all, RDS's activities are not unlawful in any way, as is explained in other chapters.

440. However, this chapter is about something else: Milieudefensie et al.'s claims are formulated so broadly that they also include situations in which the acts attributed to RDS are not unlawful, at least not in every case. For that reason alone, Milieudefensie et al. have no cause of action, or, at any rate, their claims should be denied. This will be explained below.

6.4.2 A claim pertaining to future acts is never eligible for award if not all of the acts concerned are unlawful or if the acts are not unlawful under all circumstances

441. A claim concerning future conduct can only be awarded if the claimant formulates its claim in such a way that it pertains only to actions that must be considered unlawful under all circumstances.

442. In the so-called nuclear weapon judgment[535], the Supreme Court expressed its opinion on the question of when future acts can be regulated by means of civil proceedings. That case involved a claim pertaining to an injunction,

[535] Supreme Court 21 December 2001, ECLI:NL:HR:2001:ZC3693 (*Kernwapens*), para. 3.3.

and a declaratory judgment, regarding the State's assistance in the actual use of nuclear weapons. The Supreme Court held as follows:[536]

> *"The following must be noted first and foremost in the assessment of the grounds for cassation.*
>
> *VJV et al. based their claims on (the threat of) unlawful conduct by the State. As a result – and as is not otherwise in dispute in these proceedings – the civil court has jurisdiction to examine these claims (Article 112 of the Constitution).*
>
> *In addition, the following principles apply.*
>
> *A. The appeal in cassation is only concerned with the question of whether VJV et al. have a cause of action for their claims, which was answered in the negative by the Court of Appeal. The question of whether or not the actions defined in the claims should be regarded as unlawful is therefore not at issue as such. That said, aspects of unlawfulness can nevertheless play a role in the question of the extent to which VJV et al. have a cause of action for their claims. Particularly where the declaratory judgments sought in these proceedings are concerned – that actions not yet performed but that, according to VJV et al.'s assertions, could be performed by the State in the future should be considered unlawful – an assessment will have to be made to determine whether they have been formulated in such a way that all the cases covered by them involve unlawfulness. If it already transpires in advance that the actions which the court is asked to prohibit in these proceedings have been defined in such a way that not all of them are unlawful or they are not unlawful under all circumstances, and the question of whether or not they are unlawful, unlike in the case of actions performed in the past, cannot be assessed on the basis of the circumstances of the case either, the declaratory judgment has been defined insufficiently specifically. It is worth noting here that it is not the court's task to reformulate a claim in such a way that it pertains only to actions that must be considered unlawful under all circumstances. After all, in proceedings such as the present ones, this would mean that the civil court would be expected to give an answer in general terms to the question of under what circumstances the use of nuclear weapons is impermissible, a question which the International Court of Justice has not been able to answer conclusively either, as may be inferred from its Advisory Opinion of 8 July 1996.*
>
> *All of this means that a claim for a declaratory judgment that actions to be performed in the future like the ones at issue here are unlawful, can never be eligible for award if they have been defined insufficiently specifically in the sense referred to above, which entails that a claimant has insufficient interest in such a claim and*

[536] For the record: in the same judgment, the Supreme Court ruled that restraint is particularly to be observed where political considerations come into play. This was already discussed in Section 6.2 above.

> *must therefore be considered to have no cause of action. This holds equally true for the insufficiently specifically defined claims seeking an injunction banning those actions or an order to cease those actions."* [emphasis added by attorneys]

443. While the Supreme Court's finding is primarily concerned with sufficient interest (Article 3:303 of the Dutch Civil Code), the findings show that its findings touch both upon cause of action and upon the eligibility of the claim itself for award. An insufficiently specific claim is "*never eligible for award*" in this context, according to the Supreme Court.

444. In an entirely different context, the District Court of The Hague also denied a claim regarding future acts. That case involved a collective action seeking a declaratory judgment regarding the security risks of, and information about, software updates. The District Court held as follows:[537]

> *"It should be noted, first of all, that a declaratory judgment pertaining to actions that have not yet taken place should be formulated in such a way that all the cases covered by it involve unlawfulness. If it already transpires in advance that the actions that are the subject of the declaratory judgment being sought have been defined in such a way that not all of them are unlawful or they are not unlawful under all circumstances, and the question of whether they are not unlawful cannot be assessed on the basis of the circumstances of the case either, that declaratory judgment has been defined insufficiently specifically. In that case, it is never eligible for award. As a result, the claimant has insufficient interest in the claim to that end and must consequently be declared to have no cause of action. The award of an order regarding future actions furthermore requires the existence of a specific interest, in the sense that there is a real threat of unlawful conduct by Samsung compelling the imposition – to avert this threat – of the orders being sought (cf. Supreme Court 21 December 2001, ECLI:NL:HR:2001:ZC3693, NJ 2002, 217).*
> *In view of their wording, the claims at I and II also pertain to actions by Samsung that have not yet taken place. Because of technological advancements, these possible future actions will pertain to future versions of Android and of the smartphones marketed by Samsung and the software installed on them, and any vulnerabilities and risks that may occur in the future. Samsung therefore rightly argues that the assessment of the unlawfulness of future actions cannot be viewed here separately from specific (technical) circumstances of the case that are as yet unknown, including in respect of the nature and seriousness of specific vulnerabilities in (future versions of) Android and the type of Samsung smartphones that consumers will have at their disposal and the software installed on them. This has not been disputed by*

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[537] District Court of The Hague, 30 May 2018, ECLI:NL:RBDHA:2018:6310 (*Consumentenbond/Samsung*), paras. 4.5-4.6.

> *the Dutch Consumers' Association either. The Dutch Consumers' Association has not stated anything specific regarding these as yet unknown specific (technical) circumstances of the case either – apart from the undisputed fact that software may contain vulnerabilities that could create security risks for smartphones, including Samsung's. Because of these specific (technical) circumstances of the case that are as yet unknown, it is not possible to assess in advance whether Samsung's actions defined in the declaratory judgments sought at I and II will give rise to unlawfulness in all circumstances in the future. The mere fact that software may contain vulnerabilities that could create security risks for smartphones, including Samsung's, is insufficient in this context. As a result, those declaratory judgments, insofar as they pertain to the future, have been defined insufficiently specifically. Therefore, they cannot be eligible for award. The same applies as regards the claims at III and IV insofar as they relate to the future, since, further to the foregoing, it is not possible to establish whether there is any real threat of unlawful conduct by Samsung compelling the imposition – in order to avert it – of the orders being sought. As a result, the Dutch Consumers' Association has insufficient interest in its claims at I to IV inclusive insofar as they pertain to Samsung's future conduct. The Dutch Consumers' Association will be declared to have no cause of action in that regard."* [emphasis added by attorneys]

445. If the claims relating to future actions have not been defined insufficiently specifically in the sense that the actions to which they pertain are not unlawful under all circumstances, they will not be eligible for award. In that case, the claimant lacks sufficient interest in its claims and must be denied a cause of action for those claims. The Supreme Court says in so many words that such a claim "*is never eligible for award*".

6.4.3 Milieudefensie et al.'s claims are formulated so broadly that it is immediately clear that they also include situations in which the acts are not unlawful

446. Milieudefensie et al. have brought very far-reaching claims against RDS and, although the relief sought is not in line with it, its argument in fact means that Shell in time will have to abandon what is currently its core business, i.e. the production and sale of fossil fuels. They have brought an action against RDS, seeking an order for RDS to bring about a specific emissions reduction – ultimately 100% – in the future. Milieudefensie et al. are seeking an order and a declaratory judgment with regard to acts of RDS that lie far ahead in the future: 2030, 2040 and 2050.[538]

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[538] The uncertainties outlined here therefore extend far beyond the claim brought against the State in *Urgenda*, which pertained only to reductions by 2020.

447. The acts that Milieudefensie et al. would like to see prohibited will clearly not necessarily be unlawful in the future either. It is not up to RDS to elaborate exhaustively on those issues, as Milieudefensie et al. have failed to give any explanation at all. Nevertheless, two possible hypothetical situations will be highlighted as a means of illustration. First, if, in 2050, society takes all the measures that Milieudefensie et al. deem necessary to limit global warming, it is possible that – even then – certain industries might not be able to operate without fossil fuels. If that were the case, for example, for a particular segment of the cement industry, the authorities could conceivably permit that particular segment of the industry to continue using fossil fuels (without requiring capture or specific carbon offset measures). It is difficult to see how a delivery under those circumstances could be deemed unlawful, in spite of the fact that the situation in question would also fall under Milieudefensie et al.'s claims. Second, the legislature could conceivably seek to achieve a 95% reduction in CO_2 emissions produced by certain industries by 2050 by imposing obligations on those industries rather than on suppliers. A given Shell customer could thus fulfil its obligations in spite of using fossil fuels if it simultaneously manages to capture and store 95% of the CO_2 released by means of CCS. The customer would thus be in compliance with its legal obligations without having achieved a 100% reduction, none of which transpires, incidentally, at the premises of Shell itself. Here, too, it is impossible to see how RDS could be deemed to be acting unlawfully when it was a Shell company that supplied fossil fuel to the customer in question, even though that action, too, would fall under the relief sought. The relief sought thus covers all sorts of situations that are not necessarily unlawful.

448. Developments with such a long horizon are uncertain by definition. This is especially true given that the claims pertain to global activities that form part of the complex global energy system and the global economy and are influenced by innumerable factors.

449. Milieudefensie et al. appreciate that there is some uncertainty about the question of how and whether society as a whole will be willing and able to reduce emissions by the points in time specified. It is true there is uncertainty. In any case, it cannot be established at this time that RDS's future acts opposed by Milieudefensie et al. will be unlawful, let alone that this is so in all cases covered by the relief sought by Milieudefensie et al. Previous sections of this Statement of Defence have explained in detail the complexity and uncertainty of future developments, the fact that there are still various complicated aspects to consider and why RDS's activities and

position cannot be viewed in isolation from those future uncertain developments (see, for example, Sections 2.2, 2.6 and 2.7).

450. Below, RDS will provide three examples of why – even assuming, for the sake of argument, that RDS's future conduct could be unlawful in some cases – we cannot speculate that RDS will act unlawfully in all cases covered by the relief sought by Milieudefensie et al.

451. The first example is in response to the fact that Milieudefensie et al. have set specific net reduction targets to be met by specific years: 45% by 2030, 72% by 2040 and 100% by 2050 (compared to 2010 levels). In that respect, Milieudefensie et al. presume that RDS, a private party, should be required to contribute pro rata to the CO_2 emissions reduction envisaged for society as a whole.

452. However, Milieudefensie et al. already run off track by assuming that it is clear what reductions will be set in different countries for society as a whole; it is even less clear what reductions will be required from individual companies and persons.

453. First off, that uncertainty exists with regard to the implementation of the Paris Agreement by the countries that are parties to it.[539] Although a "net zero emissions" scenario has as such been provided for in many of the scenarios mentioned in Subsection 2.2.3.4, which outline how a temperature rise remaining below 2°C (the upper threshold according to the Paris Agreement) can be achieved, it is not certain that this will happen by 2050. Far from it: as explained in Sections 2.6 and 2.7, although national legal frameworks for climate change are being developed, many do not currently reflect a "*net zero*" ambition for 2050 or earlier as desired by Milieudefensie et al. As RDS already explained in Subsection 2.7.2, the Climate Act (*Klimaatwet*, adopted by the Dutch Senate on 28 May 2019[540]) does not include a net zero target by 2050 for the Netherlands, but a 95% reduction from 1990 levels. In other words, Milieudefensie et al. want a judgment ordering RDS to bring down its net CO_2 emissions compared to 2010 levels to zero by 2050, even though there is a fair chance that the plans of various States will entail more limited domestic reductions or defer reduction targets to later years, and that society will conform to that rather than to Milieudefensie et al.'s literal objective of net zero by 2050.

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539 To complicate matters further, unfortunately, not all countries have indicated that they intend to pay any regard to the Paris Agreement. The United States, for example, which currently has the highest CO_2 emissions, has indicated that it plans to withdraw from the agreement.

540 Bulletin of Acts and Decrees 2019, 253.

454. In other respects, too, the claims go even further than the Climate Act. For example, the Climate Act pertains exclusively to – briefly put – activities resulting in emissions in the Netherlands. Milieudefensie et al.'s claims mostly pertain to emissions outside the Netherlands.

455. There are all sorts of emissions that are not covered by the targets of the Climate Act, including, for example, emissions linked to fuel used by the aviation and maritime industries.[541] However, Milieudefensie et al.'s claims pertain to emissions linked to end users' use of all of Shell's fossil fuel products, including in these sectors. In this way, Milieudefensie et al. in fact hold Shell responsible for emissions in sectors in which it was not the intention of the parties to the Paris Agreement and the (Dutch) government to regulate emissions any further – at least for the time being.

456. What can be expected of RDS depends in part on the broader trends in politics, society and technology. Without knowing how things will develop, Milieudefensie et al. wrongly assume that it can already be established – now, decades in advance – that certain conduct by RDS will be unlawful, no matter what.

457. A second example pertains to Milieudefensie et al.'s notion that RDS would be acting unlawfully under all circumstances in the event that the CO_2 emissions linked to the use by end users of Shell's products do not decrease sufficiently and in a timely fashion. RDS currently does not have that responsibility; nor is there sufficient reason to assume that it will in future.[542] In all likelihood, the government will opt for (and will continue to opt for) other measures regulating the CO_2 emissions of end users (meaning that RDS has no obligation to achieve said reduction in end users' CO_2 emissions by the years mentioned). That is also the current method in the ETS, for example (see Subsections 2.6.4, 2.7.1 and 2.7.2). The government could also decide to regulate the emissions linked to the Shell's energy products by imposing measures to limit or offset those emissions on end users. Power producers that generate power using gas supplied by Shell could be required to capture CO_2, for example. In addition, taxes and excise duties might be imposed to steer the use by end users. All such similar circumstances serve to emphasise that it is not RDS (or Shell) but the end users who are responsible for emissions reductions; it

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541 Article 2. See also Parliamentary Documents II 34 534, no. 3 (Explanatory Memorandum), p. 21.

542 This responsibility does not fall to RDS, however – not only for the reasons mentioned here, but also because the emissions from other Shell companies, and *a fortiori* also the emissions from end users of products of those other Shell companies, cannot be attributed to RDS. See Section 6.3.

would not make much sense to say that RDS is acting unlawfully if end users fail to reduce their emissions to a sufficient degree. In their argument, Milieudefensie et al. themselves also mention end users who wish to reduce their own net emissions.[543]

458. A third example is that the claims extend to Shell's activities around the world. It is uncertain whether a reduction in CO_2 emissions will be required in all the countries concerned in the order of magnitude assumed by the relief sought. As noted above, for example, many of the countries involved in the Paris Agreement have not yet legislated a net zero target for 2050. The increasing demand for energy and the balance that will need to be struck between energy requirements, costs, and CO_2 reductions – in less prosperous countries in particular – have already been pointed out above (Sections 2.2 and 2.6). Against this backdrop, too, CO_2 emissions exceeding the caps mentioned in the relief sought in 2030, 2040 and 2050 cannot be anticipated to be unlawful regardless of the circumstances.

459. The above are just three examples. The broader point is that Milieudefensie et al. fail to appreciate that the question of whether, in 2030, 2040 and 2050, certain CO_2 emissions linked to Shell's business activities and fossil products will constitute an unlawful act on the part of RDS may also depend on political, social and technological developments that are as yet unknown. What the emissions levels will be at those times and how they will compare to other parties' emissions are factors that are as yet unknown. Milieudefensie et al. do not even assert that those developments will induce society to adopt the reductions now being demanded from RDS by Milieudefensie et al. or that by 2030, 2040 and 2050 regulations will have been developed preventing the emissions that Milieudefensie et al. would like to see prohibited; it remains entirely possible that those emissions will continue to be permitted, given the essential role of fossil fuels.

6.4.4 Milieudefensie et al. appreciate the uncertainties yet brush them aside, whereas it is up to Milieudefensie et al. alone to accurately delineate the claim

460. Such uncertainties are brushed aside by Milieudefensie et al. Briefly put, they argue that any uncertainty should be at the expense of RDS and that the court order (and the declaratory judgment) can and should be imposed regardless of those uncertainties.

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543 Summons, para. 779, final parts.

461. The burden of demonstrating that there are sufficient grounds to allow the claims is borne by Milieudefensie et al. Milieudefensie et al. have submitted very broad claims, apparently assuming that it will be up to either RDS as defendant or the District Court to examine whether any part of the claims can be allowed (which is not the case) and, if so, whether the claims can be circumscribed accordingly. However, that assumption is incorrect. After all, in the finding cited above in Subsection 6.4.2, the Supreme Court expressly held "*that it is not the court's task to reformulate a claim in such a way that it pertains only to actions that must be considered unlawful under all circumstances*". Milieudefensie et al. failed to do that, and the Supreme Court is clear: the claims must be denied. Milieudefensie et al.'s claims must be dismissed, failing which the claimants should be denied a cause of action.

7 THERE IS NO LEGAL BASIS FOR ALLOWING THE CLAIMS OF MILIEUDEFENSIE ET AL.

7.1 Introduction

462. Milieudefensie et al.'s arguments (in contrast to the relief sought) are aimed at a reduction of CO_2 emissions related to the activities and fossil fuel products of all Shell companies. Relief is not being sought per the date of the Summons, but rather in a decade or more: per 2030, 2040 and 2050. It is, therefore, a claim premised on potential future unlawful conduct. Although the claims are generally couched in terms of (net) zero CO_2 emissions, it is clear from the substantiation provided in the Summons that the claims actually aim to eradicate the provision of fossil fuel products by 2050.

463. There is no rule which says that RDS would be in violation of an unwritten standard of care if it failed to comply with the emissions caps sought by Milieudefensie et al. per 2030, 2040 and 2050. This will be explained in Section 7.2, noting, *inter alia*, that permits are required for the CO_2 emissions Shell produces in the course of all sorts of activities; those permits are, of course, obtained and complied with, which means that the conduct is expressly authorised. It will also be noted in that section that Milieudefensie et al.'s argument would have the undesirable result of opening the door to claims, "from all, against all".

464. The *Kelderluik* criteria do nothing to alter this (Section 7.3). Further, there is neither a causal link nor relativity (Sections 7.4 and 7.5). Finally, reliance on neither the human rights convention, which is addressed to States, nor soft law will compel the claims to nevertheless be awarded (Section 7.6).

7.2 RDS is not acting in conflict with a standard of care

7.2.1 Milieudefensie et al. do not allege that RDS is acting in breach of a statutory duty

465. Milieudefensie et al. do not base their claim on any statutory legal obligation allegedly weighing on RDS. They rightly acknowledge that the written legal sources to which they refer, namely the Paris Agreement and Articles 2 and 8 of the ECHR, in any case do not directly impose a legal obligation on RDS.[544]

7.2.2 There is no legal standard which says that RDS would be acting in conflict with an unwritten standard of care if it failed to comply with the emissions caps sought by Milieudefensie et al. per 2030, 2040 and 2050

466. Instead, Milieudefensie et al. base their claims on the view that RDS is acting in conflict with "*what is generally accepted according to unwritten law (Article 6:162 of the Dutch Civil Code) and, therefore,* […] *what is also referred to as the social standard of care or the social duty of care*" (Summons, para. 504). Milieudefensie et al. evidently refer here to what will be generally accepted according to unwritten law in 2030, 2040 and 2050, as their claims pertain to CO_2 emissions at those times.

467. Article 6:162(2) of the Dutch Civil Code provides that:

> "*The violation of a right and an act or omission in conflict with a legal obligation or with what is generally accepted according to unwritten law are deemed to be unlawful acts, except where there are grounds for justification.*"

468. "*An act or omission in conflict with* […] *what is generally accepted according to unwritten law*" can only be said to exist in the case of a rule of unwritten law. These must be standards that are generally accepted as legal standards.[545] The argument that other conduct would be desirable (or more desirable) does not suffice here. The question is whether they are "*standards to be observed not only according to conscience, but also according to the law*".[546] Thus, a distinction must be made between

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544 See, for example, Summons, paras. 411 and 667.

545 *Groene Serie Onrechtmatige daad*, Article 6:162 of the Dutch Civil Code, note 6.1.1.

546 This emerges from the parliamentary history of Article 6:162(2) of the Dutch Civil Code: *"Existing law also assumes that 'good morals' only include those moral standards that are generally accepted as legal standards, in other words as standards to be complied with not only according to one's conscience but also by law; and that any breach of a standard of professional ethics recognised within a particular group only constitutes an unlawful act if the*

desirable conduct and conduct that is in conflict with a rule of unwritten law. The fact that a certain type conduct is considered desirable does not necessarily mean that other types of conduct are automatically in conflict with an unwritten standard of care.[547]

469. A higher threshold applies categorically when attempting to qualify a standard as an unwritten legal standard of care, as opposed to, for example, a standard of decency or whatever Milieudefensie et al. might deem desirable. For example, a prevailing interpretation of the law is not necessarily an unwritten standard of care within the meaning of Article 6:162(2) of the Dutch Civil Code. The Supreme Court found in that respect:[548]

> *"that, in general, the principle that all conduct in conflict with the 'prevailing interpretation of the law' constitutes an unlawful act is not correct […]."*

470. Standards of care must furthermore be determined on a case-by-case basis, according to the specific circumstances of the case and a balancing of the interests involved in that case.[549] The competing *legitimate expectations* of the various litigants are accorded particular importance in the balancing of interests.[550]

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standard can also be considered a rule of unwritten law." See Parliamentary History of the Dutch Civil Code, Book 6, p. 616.

547 See, for example, in a completely different context, i.e. marital fidelity: Arnhem District Court 15 April 2009, ECLI:NL:RBARN:2009:BI2224, paras. 3.4-3.5. See also Arnhem Court of Appeal, 5 February 2011, ECLI:NL:GHARN:2011:BP6211, in which this judgment was upheld.

548 Supreme Court 11 January 1991, ECLI:NL:HR:1991:ZC0110 (*St. Joseph*), para. 3.4.1.

549 Regarding the context-specific nature of standards of care, see, for example, J. Spier et al. (eds.), *Verbintenissen uit de wet en Schadevergoeding*, Deventer: Kluwer 2015, no. 42 (G.E. van Maanen/S.D. Lindenbergh); K.J.O. Jansen, *Informatieplichten* (*R&P* no. CA5) (diss. Leiden) 2012, para. 4.2.10, Deventer: Kluwer 2012; and T. Hartlief, *Zorgplichten in het onrechtmatigedaadsrecht*, in: S.C.J.J. Kortmann et al. (eds.), *Onderneming en 10 jaar Nieuw Burgerlijk Recht*, Deventer: Kluwer 2002, p. 490. This always involves a balancing of interests. See K.J.O. Jansen, *Groene Serie Onrechtmatige daad*, Article 6:162 of the Dutch Civil Code, note 6.1.4.2 ("*The context-specific nature of standards of care is more specifically reflected in the balancing of interests that they call for. The application of social standards of care always involves a balancing of, on the one hand, the perpetrator's interest in freely pursuing its own interests and, on the other, the victim's interest in not having to suffer unlawfully inflicted damage"*).

550 Asser/Hartkamp & Sieburgh, 6-IV 2015, 56 (*"Being part of society, man has a certain degree of responsibility for the interests of his fellow human beings when exercising his freedom to act. This does not go so far as requiring him to neglect his own interests and to observe the most extreme prudence conceivable in all his actions concerning another person's person or property. He must balance his own interests against those of others and be guided in that by what people in society can reasonably expect of each other"*). Also Asser/Hartkamp & Sieburgh, 6-IV 2015, 75. See also K.J.O. Jansen, *Groene Serie Onrechtmatige daad*, Article 6:162 of the Dutch Civil Code, note *6.3.6 ("The standard of unlawful endangerment just discussed can be regarded as a product of the legitimate expectations that are decisive in questions of the social standard of care"*). In the same vein: T. Hartlief, 'Kelderluik revisited. De kracht van een waarschuwing', *AA* 2004, p. 870 and Hartlief in his opinion in Supreme Court 7 October 2016, ECLI:NL:2015:2283 (*Vennemans/gemeente Nijmegen*).

471. In this regard, the mere fact that an act (allegedly) creates a danger does not make that act unlawful. Not every form of endangerment is unlawful, as will be explained in detail in Section 7.3.[551] Under current law, there is no unwritten legal standard by which RDS would be acting unlawfully if it failed to observe the emissions caps sought by Milieudefensie et al. per 2030, 2040 and 2050.

472. RDS's activities are legal, as are the activities of all other Shell companies. It complies with all obligations imposed by the government (see also Section 2.7). Governments also invite Shell group companies to extract fossil fuels in their countries. The relationship between the combustion of fossil fuels, CO_2 emissions, and global warming outlined by Milieudefensie et. al. is widely known and generally accepted, as demonstrated by the common use thereof by end users. Demand for those products is high, and energy demand in general is only set to increase in the future; that demand will, incidentally, be met by a larger proportion than at present of energy derived from sources that emit no or less CO_2. These products are, at present, indispensable to the functioning of society; according to the International Energy Agency, among others, they will remain so until well past 2050. Energy also plays a major role in continued economic prosperity and stability. In developing countries now attempting to eliminate poverty, demand for energy will increase on a grand scale, as anticipated by the Paris Agreement with its concept of *differentiated responsibilities*.

473. Nonetheless, fossil fuels continue to play a significant role in all scenarios that limit global warming to 1.5°C (see Subsection 2.2.3.4). Not even a world with net zero emissions would require that all parties – e.g. private companies – have (net) zero CO_2 emissions. Net zero means that, on net balance, no CO_2 is added to the atmosphere. There are many ways of achieving that. It is thus conceivable that, even in a net zero world, Shell will continue to produce and sell fossil fuels to meet legitimate demand for those fuels (due to the fact that alternatives to fossil fuels simply do not exist in certain sectors), with this being offset by other means.

474. Global society has not yet made the transition to a lower-carbon energy system. The way in which this will take place, and the timeframe involved, are also uncertain. This is partly because the policies and legislation in this area are still being developed (Sections 2.6 and 2.7).

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551 Asser/Hartkamp & Sieburgh 6-IV 2015/58; J. Spier et al. (eds.), *Verbintenissen uit de wet en Schadevergoeding*, Deventer: Kluwer 2015, no. 47 (G.E. van Maanen/S.D. Lindenbergh); and C.H.M. Jansen, *Onrechtmatige daad: algemene bepalingen* (*Mon. BW* no. B45) 2009/21, Deventer: Kluwer 2009.

475. Society as a whole faces the challenge of tackling climate change, yet other relevant interests may not be disregarded in the process. While Milieudefensie et al. explain that they believe it would be desirable for Shell to emit net zero CO_2 by 2050 (along with the intermediate steps sought by Milieudefensie et al. in 2030 and 2040), and for the CO_2 emissions associated with Shell's fossil products to be limited to the same extent, they have clearly failed to demonstrate that this is prescribed by an unwritten legal standard of any kind. Indeed, the above shows that if authoritative projections of *possible* scenarios in which the targets included in the Paris Agreement *are* achieved, the production and use of fossil fuels are still accounted for. Milieudefensie et al. have therefore failed to demonstrate that what will generally be accepted according to unwritten law in 2030, 2040 and 2050 calls for the reductions by RDS (let alone: Shell).

476. This is all the more true because Milieudefensie et al. fail to appreciate that, if the targets of the Paris Agreement are to be achieved, various governments will have to intervene in order to clearly define the individual obligations to be borne by each party (see Sections 2.6 and 2.7). For example, Milieudefensie et al. wrongly attribute all emissions created by end users through their use of Shell's fossil fuel products to RDS (see Subsection 6.3.2). Similarly, Milieudefensie et al. are evidently counting on the prospect of obligations to capture (or otherwise set off) those emissions being borne by RDS rather than by end users in the event a legal obligation is introduced limiting all CO_2 emissions to the levels required by Milieudefensie et al. It is wrong to make that assumption. On the contrary, it is obvious that end users whose use of fossil fuels causes CO_2 emissions are in control of that end use and thus in a position to limit those emissions.

477. RDS has also explained above that it is unlikely that CO_2 emissions would fall if Shell ceased supplying. In other cases, too, it has been observed that if supply decreases to some extent (which is what would happen if Shell were to cease its activities without selling them to another company), other suppliers of fossil fuels would step in to fill that gap (Subsection 2.2.4). If Shell were to divest itself of any of its activities, it would furthermore be plausible to surmise that those activities would continue, albeit with a different owner, just as happened with Ørsted.

478. Moreover, as explained above, Shell is playing an active role in the energy transition although it is under no obligation to do so. In Section 2.3, RDS explained in detail the initiatives Shell is taking to make the transition to a lower-carbon energy system. The aim of Shell's NCF ambition is to reduce the net carbon intensity of its energy products by around 50 % by 2050 and

to achieve an interim reduction of approximately 20% by 2035, in line with the rest of society. In addition, Shell has introduced short-term targets, linked to the remuneration of senior management.[552] It was the first international oil and gas company to announce such an ambition, and did so voluntarily, thus setting an important example and publicly demonstrating that it is actively engaged in its energy transition role. There is no legal standard requiring Shell to have ambitions regarding the net carbon intensity of its products, to do more than it is already doing to reduce it, or to take any steps whatsoever in connection with end users' emissions.

479. The direction in which society's energy transition efforts will proceed through 2030, 2040, and 2050 is uncertain in many respects (see also Subsection 6.4.3). That is the case, for example, with regard to potential measures, when those measures will be implemented, and whether they will prove up to the job of achieving the targets set by the Paris Agreement. Consequently, the same applies to the question of who, exactly, will be saddled with the obligation to achieve this, and what that obligation will entail. This is also true, if not more so, when viewed from a global perspective, considering that Milieudefensie et al.'s claims pertain to all of Shell's global activities. Milieudefensie et al. are clinging to the untenable assertion that a determination can be made of which rules of unwritten law will apply to RDS in 2030, 2040 and 2050 in proceedings held today. In all likelihood, written legal standards will be introduced at some point to regulate this. (This is, after all, a duty imposed on governments by the Paris Agreement, Sections 2.6 and 2.7). RDS notes, for example, that the Climate Act, which sets a reduction objective of 95%, was passed subsequent to the Summons being served. That is reason enough to deny the claims, which proceed from the notion that it is certain at present that there will be (unwritten) law in 2030, 2040 and 2050 requiring RDS to ensure that the stated emissions caps are achieved. Moreover, it would be inappropriate for the courts to intervene, given the substantial uncertainty surrounding the circumstances and societal norms that could emerge between now and 2050. Instead, dealing with such uncertainties is something that should be accomplished in the political domain, as more fully explained in Sections 6.2 and 6.4.

480. In short, there is no reason to assume under these circumstances that RDS would be acting in conflict with an unwritten standard of care if it failed to comply with the emissions caps sought by Milieudefensie et al. per 2030,

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552 These measures were announced in December 2018, see **Exhibit RO-88**, Joint Statement RDS and Climate Action 100+, 3 December 2018, pp. 2-3, and implemented earlier than foreseen in 2019, see **Exhibit RO-31**, RDS, Annual Report 2018, p. 9.

2040, and 2050. Milieudefensie et al. have furthermore failed to demonstrate that any such legal standard even exists. This will be explained later in this chapter. Milieudefensie et al.'s claims only pertain to future conduct – specifically CO_2 emissions – from 2030 onwards. RDS would like to point out, perhaps superfluously, that this chapter also serves to demonstrate that, also at present, RDS is not acting in violation of any societal standard of care.

7.2.3 Permits confer the right to emit CO_2 and this means that such emissions are not unlawful

481. Activities of Shell resulting in CO_2 emissions are, at present, expressly allowed.

482. The Emissions Trading Scheme described in Subsections 2.7.1-2.7.2 is specifically designed to cap CO_2 emissions for particular activities at the EU and national levels and distribute allowances to that effect. The system applies to many of Shell's activities; among other things, it stipulates that a permit is required to run specific installations that emit CO_2 and regulates the number of allowances available to emit a tonne of CO_2 equivalent. It remains to be seen how this system will be applied in 2030, 2040, and 2050. In any case, the fact that specific legal instruments apply to the effect that CO_2 emissions are permitted, is an important factor in determining that the activities so regulated, and that Milieudefensie et al. seek to enjoin, are in fact lawful. The Supreme Court has held on numerous occasions that a permit is capable of precluding civil liability. Specifically, the Supreme Court has held that the answer to the question of whether and to what extent a permit issued by the government can influence a determination of liability arising from an unlawful act on the part of an individual who acts in compliance with such a permit yet inflicts harm on a third party in the course of doing so, depends on the nature of the permit and the interests served by the legislation pursuant to which the permit was granted in conjunction with the circumstances of the case.[553] The Emissions Trading Scheme, by its very nature, grants the right to emit CO_2. By regulating the distribution of emissions allowances, the system serves the interest of combating climate change in accordance with the UNFCCC, the Kyoto Protocol, and other instruments aimed at promoting the general good. The notion expressly underlying this system is that CO_2 emissions must be reduced for the general good. However, the claims that essentially aim to put a halt to CO_2 emissions altogether are incompatible with the permits

553 Supreme Court 10 March 1972, ECLI:NL:HR:1972:AC1311 (*Vermeulen/Lekkerkerker*); Supreme Court 21 October 2005, ECLI:NL:HR:2005:AT8823, para. 3.5.1.

expressly granted by the authorities on the basis of that notion. As the Supreme Court has also held, the holder of a permit is in general entitled to trust in the fact that its permit was lawfully issued, and that the issuing authority has fully and correctly balanced all the interests it is legally obliged to take into account.[554]

483. Shell's activities and facilities in other countries are also subject to regulation, as explained in Section 2.7.

484. This is all the more reason to conclude that RDS does not and will not act unlawfully.

7.2.4 Allowing these unprecedented claims would open the floodgates for claims by all members of global society against each other

485. In effect, Milieudefensie et al. argue that creating CO_2 emissions is unlawful and that anyone can claim to end such emissions. In reality, the combustion of fossil fuel by end users is an everyday practice. Countless people use the car every day. Many of them, including millions of Dutch people, fly across the globe to their holiday or business destinations each year. Other activities such as producing concrete for building coastal defences, offices and homes, producing steel for use in everyday products, agriculture, land use and development, and deforestation also create CO_2 emissions. Production of electricity often takes place using coal or, with significantly less CO_2 emissions, natural gas. That electricity is used for a wide range of activities on a daily basis – from running factories and driving electric cars to switching on the light at home each evening. Every person creates significant greenhouse gas emissions, including CO_2, in their daily lives.

486. The end result of Milieudefensie et al.'s argument would therefore be that – even without clear regulations on the obligations to reduce CO_2 emissions – anyone would have a claim based on unlawful act against every company, and every individual, that contributes to the larger whole of CO_2 emissions, such as all airlines for instance. In theory, Milieudefensie et al.'s position would result in everyone having a claim based on unlawful act against anyone else, even private individuals, to stop creating CO_2 emissions. That is an untenable position.

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554 Supreme Court 28 February 1975, ECLI:NL:HR:1975:AB6210; Supreme Court 21 October 2005, ECLI:NL:HR:2005:AT8823, para. 3.5.1.

7.2.5 No unlawful act by RDS on other grounds either

487. In the remainder of this chapter, RDS will further explain that Milieudefensie et al.'s claims lack a legal basis.

7.3 No unlawful endangerment by RDS

7.3.1 Introduction

488. In Section 7.2, RDS explained that there is no rule saying that RDS would be acting in conflict with an unwritten standard of care if it were not to comply with the emissions caps sought by Milieudefensie et al. per 2030, 2040, and 2050.

489. Milieudefensie et al. disagree, and to this end, they argue that there is unlawful endangerment by RDS. In that respect, Milieudefensie et al. rely on the *Kelderluik* criteria.[555] RDS will explain below why no unlawful endangerment is involved.

7.3.2 The *Kelderluik* criteria are not decisive in establishing unlawful endangerment

490. Milieudefensie et al. take the position that RDS is acting unlawfully based on the *Kelderluik* criteria. This position is incorrect. For a start, Milieudefensie et al. fail to appreciate that the *Kelderluik* criteria cannot be viewed independently but are merely a tool to determine in an individual case, based on the specific circumstances of the situation, whether there is unlawful endangerment. The *Kelderluik* criteria are neither intended nor suitable for a case such as the current one, which requires a balancing of general interests in a climate-change-related application for a court order whereby that climate change is intrinsically the result of innumerable factors and circumstances (on that balancing of interests in a societal context, see Sections 2.2, 2.6, 2.7 and 6.2). The climate problem is a global problem that is caused by the actions of *everyone* who takes part in activities that generate greenhouse gas emissions; the potential consequences vary from person to person. The *Kelderluik* criteria are unsuitable for such a complex balancing of interests.

491. The present proceedings are, in fact, about how and by whom certain problems in society can and should be regulated. Milieudefensie et al. are insisting on regulation by the court in these proceedings. An action is being

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555 Supreme Court 5 November 1965, ECLI:NL:HR:1965:AB7079 (*Kelderluik*). Summons, Chapter VIII.2.

brought here against a sole private party, i.e. RDS, based on the presumption that certain climate targets desired by Milieudefensie et al. will not be achieved. Aside from Milieudefensie et al.'s interests, many other interests also play a role in this balancing of interests, such as the fight against poverty and the development of emerging countries.

492. The complexity and comprehensiveness of those interests cannot be captured in a balancing of interests based on the *Kelderluik* criteria in proceedings between just RDS and Milieudefensie et al. In short, Milieudefensie et al.'s representation of the facts is far too simple. See also Schutgens in the context of *Urgenda* on the application of the endangerment doctrine in climate matters:[556]

> "*It is a fresh fact that the civil court is using the Kelderluik balancing in a case about the public interest, thus balancing a number of far-reaching general provisions that affect everyone. In my view, the civil court should exercise great restraint when applying the social standard of care in public interest actions. I would advise it not to balance different, very abstract, general interests in such matters.*"

493. It has also been established that the *Kelderluik* criteria as such are not necessarily decisive in answering the question of whether there is any question of unlawful endangerment. All the circumstances of the case need to be considered. The Kelderluik criteria provide angles for assessing potential unlawfulness in an endangerment situation, but not for balancing the various interests at play in the context of climate change. According to the Supreme Court, these are circumstances that should be taken into account when answering the question of whether the injuring party can be expected to take certain precautionary measures in view of the lack of attention paid by potential victims. The *Kelderluik* criteria are neither necessary nor sufficient conditions for unlawfulness. They are subordinate to the overall context of the dangerous behaviour, which is decisive for establishing the details of the applicable standard of care.[557] Against this

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556 R. Schutgens, Enkele staatsrechtelijke kanttekeningen bij het geruchtmakende klimaatvonnis van de Haagse rechter, *NJB* 2015/1675. In a similar sense: T.R. Bleeker, Aansprakelijkheid voor klimaatschade: een driekoppige draak, *NTBR* 2018/2 and T.G. Oztürk and G.A. van der Veen, Onrechtmatige daad en gevaarzetting: reflexwerking en zorgplicht bij milieukwesties, *O&A* 2015/58.

557 K.J.O. Jansen, *Groene Serie Onrechtmatige daad*, Article 6:162 of the Dutch Civil Code, note 6.3.9.5. In that sense, see also, for example, T. Hartlief, *Kelderluik revisited. De kracht van een waarschuwing*, *AA* 2004, p. 868; and K.J.O. Jansen, *Informatieplichten* (*R&P* no. CA5) (diss. Leiden) 2012, paras. 4.1.3 and 4.3.5, Deventer: Kluwer 2012. Cf. also J.P. Quist, *Gezichtspunten in het privaatrecht* (diss. EUR), The Hague: *BJU* 2014, p. 63.

backdrop, a "*mechanical application*" of the *Kelderluik* criteria should be avoided. See Advocate General Spier:[558]

> *"[…] I should like to point out here that, in theory, the indiscriminate application of the Kelderluik criteria could mean that nuclear power plants may no longer be tolerated by the government, given the potentially catastrophic damage if something goes seriously wrong. But I think that this point of view will quite generally be assumed to be incorrect – or even incapable of being correct – if only because nuclear energy is regarded, in political terms, as a useful source of energy by many countries (and quite rightly so, in certain respects), in spite of the fact that it is often located just over the border, meaning that we run a risk no matter what.*
> *Accordingly, one should take heed not to mechanically apply the magical Kelderluik formula, regardless of the circumstances of the case."*

7.3.3 The application of the *Kelderluik* criteria results in rejection of Milieudefensie et al.'s claims

Introduction

494. Even if the *Kelderluik* criteria are considered in isolation, there is no question of unlawful endangerment on the part of RDS. It is well known that, according to the *Kelderluik* criteria, the following elements play a role in answering the question of whether unlawful endangerment is involved: 1) the likelihood of harm, 2) the nature and seriousness of the potential harm, 3) the nature of the conduct (including the utility of the activity or the objective pursued by it) and 4) the onerousness and commonness of taking precautionary measures.[559]

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558 See Advocate General Spier in his opinion in Supreme Court 9 July 2010, ECLI:NL:HR:2010:BL3262, (*Enschedese vuurwerkramp*), nos. 9.10.1-9.10.2.

559 Supreme Court 7 April 2006, ECLI:NL:HR:2006:AU6934 (*Bildtpollen/Miedema*), para. 3.3. Recent example: Supreme Court 14 July 2017, ECLI:NL:HR:2017:1345 (*JMV/Zürich*), para. 3.3.2. On the utility of the activity, see, inter alia, Supreme Court 23 September 1988, ECLI:NL:HR:1988:AD5713 (*Kalimijnen*), para. 3.3.2, in which the Supreme Court considered that, in answering the question of whether a certain activity is unlawful, the nature and weight of the interests served by the activity should also be taken into account. However, Milieudefensie et al. do not explain their claim on the basis of the aforementioned and quite well-known *Kelderluik* criteria. They take the position that the criteria applicable in this case are those used by the District Court of The Hague in *Urgenda*. This position is incorrect. As stated above, a case against the State (which, unlike RDS, can set the level of emissions permitted within the Netherlands and is party to the Paris Agreement and the ECHR) is very different from the case Milieudefensie et al. are making here against a private party (see Subsection 6.2.3, end). The State, unlike RDS, is responsible for this balancing of interests and has committed itself directly to the Paris Agreement. RDS notes that in *Urgenda*, too, the Court of Appeal, contrary to the District Court, did not base the State's duty of care on the *Kelderluik* criteria, but on Articles 2 and 8 of the ECHR (these articles only impose obligations on States and not on private parties such as RDS, see Section 7.6).

Likelihood of harm resulting from carelessness and imprudence

495. The way in which the Supreme Court introduced the likelihood of harm as an angle in *Kelderluik* shows that it would be inappropriate to apply those factors in the present case and, in any case, gives no indication that RDS's behaviour is unlawful.

496. After all, the Supreme Court held that "*it is only in light of the circumstances of a particular case that it is possible to assess whether and to what extent it can be required of a person who brings about a situation that is dangerous to others in the event that the latter fail to observe the necessary care and prudence, to take account of the possibility that such care and prudence might not be observed and to take certain precautionary measures to that effect*" and "*in doing so, attention must be paid not only to the degree of probability with which the failure to observe the necessary care and prudence can be expected, but also to the magnitude of the likelihood of accidents occurring as a result thereof […]*".[560] [emphasis added by the attorneys]

497. The following rule of thumb applies in respect of this, the first of the *Kelderluik* criteria: the more likely it is that potential victims will be less careful and less prudent, the greater the duty of care that should be observed. However, no determination of a failure to observe a duty of care can be made if the carelessness or lack of prudence is of such a magnitude that it could not have been reasonably anticipated by the injuring party in the circumstances of the particular case.

498. In the present case, there is no question whatsoever of a concrete situation in which individuals need to be protected from the likelihood of a specific risk materialising due to the possibility that they might not be aware of that risk and (therefore) fail to observe the necessary care and prudence. There is no question of a particular party bringing about a risk and thus bearing responsibility to take appropriate measures. This is, rather, a risk brought about by virtually everyone, thus requiring a broad, society-based solution.

499. In this case, it is common knowledge that CO_2 emissions contribute to the risk of climate change. Everyone in global society (states, citizens, businesses – and thus the people who Milieudefensie et al. claim to represent, as well) contributes, to a lesser or greater extent, to the emission of CO_2 that creates the risk of climate change. The production and use of fossil fuels is only one of many activities that cause CO_2 emissions.

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560 Supreme Court 5 November 1965, ECLI:NL:HR:1965:AB7079 (*Kelderluik*).

Nevertheless, society's energy demand is increasing and thus far it has, among other things, consciously continued its use of fossil fuels to meet this increasing demand.

500. This means that, in the present case, there is no (degree of) carelessness and imprudence present in society with regard to the danger climate change that would require RDS to observe a duty of care to protect society from it. The *Kelderluik* criteria do not go so far as to require that the potential injuring party must take measures that cover *any* degree of carelessness or imprudence whatsoever on the part of the potential victim. In other words: the potential injuring party's responsibility ends where the potential victim's responsibility begins, thus when the potential victim cannot (or can no longer) reasonably expect the potential injuring party to protect it from danger resulting from its own – careless or imprudent – behaviour.

501. Milieudefensie et al. are in effect requiring RDS to take specific steps that society as a whole has not yet taken. Total worldwide CO_2 emissions increased in 2018, and it is common knowledge that this has contributed to the risk of climate change. Given that society continues to use fossil fuels and has not yet made any choices regarding the way and timeframe in which it is prepared to change its own behaviour, the *Kelderluik* criteria cannot be invoked to determine that carelessness and imprudence on the part of potential victims must result in a duty for RDS to limit CO_2 emissions in the manner required by Milieudefensie et al. Milieudefensie et al. might very well look askance at this lack of engagement on the part of society. Against that backdrop, however, it is simply not possible to conclude, on the basis of the *Kelderluik* criteria, that there is any (degree of) carelessness or imprudence on the part of third parties which RDS has to take into account and which could impose on RDS a duty of care to protect society from a risk that society itself has accepted. This is particularly true given that the production and use of fossil fuels is allowed – and that demand for them continues unabated – and that national governments are still in the process of deciding which measures to take to prevent or at least limit the risk of climate change.

502. Since it is common knowledge that CO_2 emissions contribute to the risk of climate change, the issue of "necessary care and prudence" in any case does not weigh against RDS. In the present case there is, after all, no question of a specific situation in which individuals need to be protected against the likelihood of a specific risk materialising due to the possibility that they might fail to observe the necessary care and prudence.

503. RDS will elaborate on the likelihood of damage in the next section. RDS does, however, point out here that in the context of the *Kelderluik* criteria it necessarily comes down to the likelihood that damage will occur *as a result of RDS's acts or omissions*.

Nature and extent of the damage

504. RDS recognizes that mitigating climate change is a major societal challenge and potentially has major consequences.

505. However, Milieudefensie et al. make false representations of the facts on essential points.

506. First of all, Milieudefensie et al. allege that RDS "*has been one of the biggest individual polluters and producers of CO_2 emissions linked to the production and sale of fossil fuels*" and that about 1% of current emissions can be traced back to RDS (inter alia Summons, para. 641).

507. Milieudefensie et al. base – not to mention substantiate – their entire claim on that assumption, including their line of reasoning in respect of the *Kelderluik* factor that RDS comments on here.

508. Milieudefensie et al.'s second assumption is that the rest of the world will follow suit provided the claims against RDS are awarded. They argue that this is precisely the reason why RDS would be acting unlawfully if it failed to reduce CO_2 emissions in accordance with their claim, even though they acknowledge, at the same time, that the CO_2 emissions they attribute to RDS "*are, indeed, not all-decisive in the cause of the climate issue*" (Summons, para. 644). In other words: the nature and extent of the damage are not solely attributable to the actions of RDS.

509. However, Milieudefensie et al. do not provide any sound arguments in support of this assumption, and in any case, this cannot be a basis for imposing a duty of care on RDS, let alone for assuming that RDS has failed to comply with such a duty of care.

510. Third, Milieudefensie et al. allege that there is a "major risk" of damage, in particular of reaching "tipping points" (Summons, para. 13), pointing to "the catastrophic danger" (Summons, para. 28). In addition, Milieudefensie et al. have misrepresented the scientific evidence on which they allegedly base their claim.

511. RDS will address each of these points below.

512. The argument of Milieudefensie et al. must be rejected, first of all because the argument is based in its entirety on an unfounded assumption with regard to RDS's emissions.

- Milieudefensie et al. argue that RDS is one of the largest producers of CO_2 emissions because they attribute emissions caused by the burning of fossil fuels by end users to RDS. As explained above in Subsection 6.3.2, the argument of Milieudefensie et al., i.e. that RDS makes a very large contribution to global CO_2 emissions, is based on the unfounded assertion that CO_2 emissions from end users who burn fossil fuels are attributable to RDS and/or that RDS is responsible for such. Moreover, even if emissions produced by end users are attributed to RDS, Milieudefensie et al. have failed to demonstrate that those specific emissions have had a fundamental impact on climate change.

- RDS's own CO_2 emissions are negligible. Contrary to what Milieudefensie et al. allege, there is no legal basis for holding RDS responsible for CO_2 emissions originating from other Shell companies (see Subsection 6.3.3 above). In addition, the local legislation and regulations applicable to those companies allow emissions to be produced.

- Milieudefensie et al. – correctly – stop short of asserting that the emissions produced by RDS or even the emissions produced by other Shell companies (other than those produced by end users) have any significant influence on the climate change effects they outline. On the contrary: as RDS has already emphasised, Milieudefensie et al. acknowledge that the emissions produced by the Shell group do not, in and of themselves, cause climate change. Accordingly, there is no link between the alleged danger on the one hand and the conduct of Shell, in particular, on the other that allows the conclusion that the *Kelderluik* criteria work out to Shell's disadvantage. The assertion that Shell – being but one of a great many actors in the global energy system – contributes to a much larger whole does not lead to the conclusion, as Milieudefensie et al. would have us believe, that they can only compel intervention by RDS, whereas the solution can only come from a societal transition and regulation of the larger whole of the energy system.

- Shell does take measures to control greenhouse gas emissions, including CO_2 emissions. This was explained in Section 2.3. Here, too, Milieudefensie et al. stop short of arguing otherwise.

- Shell is for the most part subject to specific rules in terms of its own CO_2 emissions – the emissions trading scheme, in particular – and adheres to those rules. See Section 2.7 in this regard.

513. Consequently, Milieudefensie et al. have not substantiated or even made a plausible case for the notion that the emissions produced by RDS and other Shell companies impose a threat whose nature and seriousness require that RDS, in particular, must change its conduct.

514. Even notwithstanding the foregoing, the argument made by Milieudefensie et al. is untenable. In fact, Milieudefensie et al. have acknowledged that RDS's conduct is not particularly relevant; the change in conduct demanded by Milieudefensie et al. will not, as such, eliminate the danger. They try to evade this conundrum by making the – unsubstantiated and very much disputed – allegation that, if the claims are awarded, this will send a signal that will change society as a whole (see Summons, paras. 648-650). However, that is neither a relevant point of consideration in the application of the *Kelderluik* criteria, nor in the broader assessment of whether RDS is acting unlawfully. RDS explained above why the reasoning that forms the basis for the argument of Milieudefensie et al. is not realistic. In other cases, too, it has been observed that if supply decreases to some extent (which is what would happen if Shell were to cease its activities without selling them to another company), other suppliers of fossil fuels would step in to fill that gap (Subsection 2.2.4). Moreover, if Shell were to divest any of its activities, it is plausible that those activities would be continued but by a different owner, just as happened with Ørsted. RDS will make a related point below when RDS discusses the onerousness of taking precautionary measures.

515. Furthermore, Milieudefensie et al. generally misrepresent the nature and extent of the damage caused by climate change, inter alia in respect of the following points.

- First of all, their argument largely proceeds from the assumption that a limit of 430 ppm must be observed to limit global warming to 1.5 °C because otherwise there is a risk of "catastrophic" danger. In adopting that baseline scenario, Milieudefensie et al. are requiring RDS to comply with a stricter standard than the standard States are

held to by the Paris Agreement. After all, in the Paris Agreement the threshold is not set at 1.5°C but at less than 2°C (see Subsection 2.6.3).[561] This makes the claims somewhat problematic, in that Milieudefensie et al. cannot demonstrate that States – let alone RDS, albeit indirectly - have a 1.5°C obligation based on the Paris Agreement. Regardless of whether the threshold is 2°C or 1.5°C, Milieudefensie et al. do not argue – and have not demonstrated – that even without RDS's activities, that threshold will not be exceeded.

- Second, in respect of the nature and the extent of the damage, Milieudefensie et al. put particular emphasis on tipping points, i.e. events which have irreversible effects. In doing so, however, they misrepresent the current scientific views on climate change weighed and described by the IPCC, which has, for example, recounted significant uncertainties. Milieudefensie et al. are simply careless in terms of providing a scientific basis for their position. See in detail Subsection 2.5.1.

516. In conclusion, Milieudefensie et al. have not demonstrated that RDS's conduct could result in damage whose nature and magnitude would necessitate, pursuant to the *Kelderluik* criteria, the imposition of a duty of care on RDS that would oblige it to take the measures demanded by Milieudefensie et al. to prevent such damage. Energy is moreover indispensable to the needs of all of society. Against this backdrop, parties such as the International Energy Agency do not expect that society will have abandoned its use of fossil fuels by the dates specified by Milieudefensie et al. (see Subsection 2.2.3).

517. RDS also refers to Section 7.4 below, in which a related point is set out in greater detail.

Nature of the conduct and the usefulness of the activity or the objective pursued by it

518. The more useful an activity is, the less likely it is to give rise to unlawful endangerment.[562]

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561 The claims of Milieudefensie et al. also extend beyond the ambitions set in, for example, the Climate Act. See Subsection 2.7.2.

562 K.J.O. Jansen, *Groene Serie Onrechtmatige daad*, Article 6:162 of the Dutch Civil Code, note 6.4.8.1.

519. As a starting point, and as stated in Subsections 2.7.1 - 2.7.2 and 7.2.3, the Emissions Trading Scheme and the Dutch implementation thereof explicitly provide that, for various Shell activities, CO_2 emissions are explicitly permitted and that they are subject to allowances. As stated there, this makes it difficult to conclude that those activities are unlawful. The same applies to the extent that (1) permission or other authorisation is granted for such activities in the future and (2) the activities of Shell outside the EU are authorised or permitted under the regulations that apply there, now or in the future (see also Section 3.4 on applicable law with reference to Article 17 of the Regulation).

520. It cannot be reasonably contested that the energy supply from fossil fuels is very useful to society as a whole, as well as to Milieudefensie et al. and the people they represent. Moreover, the demand for energy is increasing. Fossil fuels are expected to remain necessary even in 2050.

521. Against this backdrop, Van Dijk notes the following:[563]

> *"A court will not readily assume that the negative impact of emissions is foreseeable for a particular polluter to such an extent that it will have to refrain from that conduct, in part because many (major) polluters, such as power plants and also car manufacturers, are recognised to fulfil a useful function in society."* [emphasis added by attorneys]

522. In paras. 611 and 612 of the Summons, Milieudefensie et al. state that the District Court ruled in *Urgenda* that the State has the power to exert regulatory control over the collective emissions levels in the Netherlands. As mentioned in Subsection 6.2.3, end, that is a significant difference with the present case. Because the State has the potential to exert regulatory control, we can demand a high level of care from it, say Milieudefensie et al. Milieudefensie et al. are of the opinion that a similar conclusion should be drawn for RDS. RDS's position cannot, however, be compared to that of the State. As the State is authorised to create rules that everyone must comply with, it can exert control over the collective emissions levels in the Netherlands.

523. None of the above applies to RDS. The *Urgenda* standard adduced here by Milieudefensie et al., if it is even correct, therefore does not apply by analogy to RDS. The fact that Shell, by virtue of its NCF ambitions, is voluntarily endeavouring to control its emissions and reduce the net carbon

563 Chr. H. van Dijk, 'Privaatrechtelijke aansprakelijkheid voor opwarming van de aarde', *NJB* 2007/45-46, p. 2868.

intensity of the products it sells does not mean that it has the same ability to exert control or enforce responsibility as does the State.

524. Accordingly, the nature of the conduct and the usefulness of the activity or the objective pursued by it do not indicate unlawful endangerment by RDS.

The onerousness and commonness of taking precautionary measures; the measure sought by Milieudefensie et al. is not effective, in part because others will step in to meet demand

525. Another factor relevant to the assessment of whether there is unlawful endangerment, according to the Supreme Court, is "*the onerousness and commonness of taking precautionary measures*" [emphasis added by attorneys].[564]

526. First and foremost, restraint should be exercised in establishing unlawful endangerment on account of a lack of (sufficient) precautionary measures. The mere fact that (additional) safety measures are possible, common and/or not onerous is not sufficient to conclude that these measures should therefore be taken, on pain of liability for unlawful endangerment.[565] If those measures are disproportionately onerous, then there is even less reason to consider the conduct unlawful.[566] Even more so if the measure sought is not even effective.

527. According to their summons, the precautionary measure that Milieudefensie et al. are expecting RDS to take is "*to change*", specifically "*to follow a correct climate policy*" (Summons, para. 620). This evidently pertains to what is being sought: net zero CO_2 emissions (although, as noted above, the relief sought makes no mention of emissions produced by other Shell companies or emissions produced by the end users of their fossil products, RDS will address these points below in response to Milieudefensie et al.'s arguments in the rest of the Summons).

528. First of all, RDS would reiterate here that, as explained in Subsection 2.2.4 and elsewhere, the measure sought by Milieudefensie et al. will not be effective. The emissions produced by RDS are so small as to be negligible.

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564 Supreme Court 14 July 2017, ECLI:NL:HR:2017:1345 (*JMV/Zürich*), para. 3.3.2, referring to Supreme Court 7 April 2006, ECLI:NL:HR:2006:AU6934 (*Bildtpollen/Miedema*), para. 3.3.

565 K.J.O. Jansen, *Groene Serie Onrechtmatige daad*, Article 6:162 of the Dutch Civil Code, note 6.4.4.9.

566 K.J.O. Jansen, *Groene Serie Onrechtmatige daad*, Article 6:162 of the Dutch Civil Code, note 6.4.4.3. Also Arnhem District Court 4 November 2009, ECLI:NL:RBARN:2009:BK3988 (*Plakoksel*), para. 2.6; Supreme Court 9 January 1942, *NJ* 1942/295 (*Wegdek Ferwerderadeel*) and Supreme Court 9 October 1981, *NJ* 1982/332, annotated by C.J.H. Brunner (*Waterschap Bargerbeek*).

Moreover, any court order that prevented Shell from producing CO_2 emitting fossil fuels and energy products would be ineffective as others would step in to meet demand.

529. RDS can be brief about the element of "commonness". The precautionary measure that Milieudefensie et al. are expecting RDS to take is unusual at best. As explained in Section 2.3, Shell is already taking measures in response to climate change in anticipation of the transition. Nor is society as a whole on track to limit emissions to the extent desired by Milieudefensie et al. or to achieve the goals of the Paris Agreement. The demand for fossil fuels is expected to remain substantial until well after 2050 (see Subsection 2.2.3). It remains to be seen which measures will be imposed on end users in 2030, 2040, and 2050 in respect of the CO_2 emissions they produce when burning fossil fuels. Let alone the fact that it would be highly unusual for producers to take measures aimed at limiting the CO_2 emissions produced by end users to (net) zero. The measures that Milieudefensie et al. expect Shell to take are far from usual at present and – more importantly – they are not expected to be common (to the extent this can be predicted) in 2030, 2040, and 2050.

530. The element of "onerousness" requires a more lengthy explanation. The onerousness of the measures envisaged by Milieudefensie et al. weighs not only on RDS but also on the other Shell companies, their customers, and society as a whole. Milieudefensie et al. turn a blind eye to the major interests involved in the activities that are the subject of the court order. RDS will explain those different elements below.

531. RDS finds the requested measures to be onerous. That much is clear, and seems to have been acknowledged by Milieudefensie et al. (para. 620 et seq., in particular 622 (end), of the Summons). If RDS were actually forced to take these measures and required to commit to them to the extent desired by Milieudefensie et al., RDS would in effect be jumping the gun – on command, as it were. We do not know for certain whether society as a whole will in fact go through with the energy transition so as to achieve the targets of the Paris Agreement. And if it does, we still do not know how, or the timeframe in which, it will take place. It goes without saying that if an individual company were to be bound, amidst such uncertainty, by far-reaching measures such as those demanded by Milieudefensie et al., it would no longer be able to respond adequately and with enough flexibility to any developments that might unfold. This is especially true for RDS; Shell is, after all, a group of companies with significant fossil fuel activities. Being

bound by such measures, amidst uncertainty in the rest of society about which measures should be taken, is thus *a fortiori* onerous for RDS.

532. The following should be noted specifically with regard to RDS's competitive position. RDS is the only private party named in the Summons issued by Milieudefensie et al. If Shell – through RDS – were the only company forced to meet Milieudefensie et al.'s demands, its competitive position would be disproportionately and unjustifiably harmed. After all, it would then be forced to take measures of all sorts and be subject to various restrictions, none of which would apply to its competitors, thus disrupting the level playing field. It should be kept in mind, in that regard, that Milieudefensie et al. have set these demands for RDS at a time when the legislature is still at work translating the Paris Agreement into concrete measures and obligations for various parties to combat climate change, not to mention the fact that emissions are already regulated by means of the Emissions Trading System.[567] Moreover, Shell's competitors will fill the gap and take over the activities that Shell can no longer perform. The aspects included in this paragraph are also true, of course, for each of the Shell companies.[568]

533. The measures would also prove onerous to all sorts of other interested parties. People whose jobs depend on Shell's continued operation is but one example of this. Section 2.2 explains, in broader terms, why society is dependent on fossil fuel energy sources. Various industries depend on fossil fuel sources that are incapable of being replaced for the foreseeable future. The demonstrable need for energy and the fact that energy is essential for the fulfilment of basic human needs have also been recognised in, for example, the UN's Sustainable Development Goals (SDGs). The use of certain fossil fuels, such as natural gas, produces significantly less CO_2 emissions than other fossil fuels, such as coal (Subsection 2.2.3.3). The continued use of fossil fuels is a given in nearly all the scenarios in which the objectives of the Paris Agreement are achieved. As RDS has already explained elsewhere, some activities will continue to require the use of fossil fuels in the future. The fact that the

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567 That system and the operation thereof are discussed in Subsections 2.7.1-2.7.2.

568 The previous point does, however, proceed from the assumption that the other Shell companies will abide by any court order imposed on RDS. That is not a given, because only RDS is a party to the present proceedings. However, various other Shell companies are responsible for the Shell group's CO_2 emissions and sale of fossil products. The boards of other Shell companies have their own unique roles and responsibilities. Not using a concession for oil or gas field exploration is not a very likely scenario, in part because the issuing authorities would not allow it. It is also possible that certain companies will no longer be (direct or indirect) RDS subsidiaries in the future. However, these reservations mainly show why the claim, as submitted, makes little sense.

interests and policies of foreign States and their inhabitants would also be affected if claims like this one were to be granted, has been demonstrated by RDS in Subsection 6.2.4 above.

534. The measures that Milieudefensie et al. expect RDS to take are onerous for yet another reason (this is not only relevant in relation to the *Kelderluik* criteria, cf. Article 6:168 of the Dutch Civil Code). If Milieudefensie et al.'s claims were to be awarded, this could ultimately result in higher global CO_2 emissions. If RDS is indeed forced to take these measures, it will likely have to abandon certain Shell activities, for instance by selling them off. However, this does not mean, or does not necessarily mean, that those activities will not continue to be operated by other companies. If a Shell company were, for example, to relinquish a particular concession for the exploitation of a particular oil or gas field, or leave it unused, that concession would in all likelihood be offered to another party. This would also impose limitations on a country's freedom to exploit its natural resources (or to allow them to be exploited) as it sees fit: it could no longer opt to exploit its natural resources in conjunction with, or have them exploited by, companies from the Shell group, even if it was their preference to do so. The potential sale by RDS of certain of its subsidiaries will have a similar effect. It is by no means certain that the world would be a better place if the claims were indeed awarded and RDS were forced to consider taking such steps into consideration. Notably, Milieudefensie et al. make no such assertion. Shell is already taking measures in anticipation of the transition. This was explained in Section 2.3. Consequently, if RDS were to actually take the measures desired by Milieudefensie et al., this could potentially undermine Milieudefensie et al.'s ultimate goals. The same would be true if Shell's operations were to come to a standstill; other sources of energy would have to be used and this could result in resorting to sources which produce more CO_2 emissions. Milieudefensie et al. are completely oblivious to such considerations, all of which are explained by RDS in greater detail in Subsection 2.2.4 above.

535. One profound difference between the present case and the asbestos issues with which Milieudefensie et al. draw a parallel (Summons, para. 632) is society's oft-cited dependency on fossil fuels, also in the somewhat longer term. Asbestos is material not without risk. On the one hand, though, relatively simple protective measures can be taken to alleviate that risk; on the other, alternatives are available. The same does not apply to the present case. Ergo, the comparison fails.

536. It is then striking, in this regard, that Milieudefensie et al. took the trouble to devote a chapter of the Summons to explaining why RDS "*can and must change*" (XI.5). There, Milieudefensie et al. outline two scenarios for parties such as RDS. Section 2.3 above clearly showed that RDS is pursuing a strategy that indeed takes account of the need to contribute to the energy transition and will respond to, and take part in, developments in that area (which cannot yet be accurately predicted at present). Specifically, Milieudefensie et al. mention former Danish Oil and Natural Gas Energy (DONG, now Ørsted), which completely phased out its oil and gas investments and has started investing in renewable energy.[569] That might sound good, but the reality is that DONG sold the entirety of its upstream oil and gas extraction activities to Ineos in 2017. In other words, those activities were simply continued, just not at DONG (see Subsection 2.2.4).

537. In the final analysis, the precautionary measures demanded by Milieudefensie et al. are not commonplace. Moreover, they would be onerous for RDS and other Shell companies. Lastly, those measures would not be not effective.

7.4 A causal link is missing and for this reason, too, Milieudefensie et al.'s claims cannot be allowed or, at any rate, Milieudefensie et al. should be denied a cause of action for its claims

7.4.1 Introduction

538. The actions of RDS, which Milieudefensie et al. claim result in violation of a duty of care, lack sufficient causal link to the issue of global climate change and the consequences thereof as described in the Summons. That lack of a requisite causal link means that Milieudefensie et al.'s claims must be denied, or, at any rate, that the claimants should be denied a cause of action due to a lack of sufficient interest in lodging the claims.

539. It will first be demonstrated, in Subsection 7.4.2 below, that RDS's to CO_2 emissions is not such that a sufficient causal link can be assumed to exist between the actions of RDS on the one hand and the danger of climate change and the harmful effects thereof on the other. Subsection 7.4.3 comments on the fact that merely making a contribution is not enough for RDS to incur liability and that the *Kalimijnen*[570] judgment, which Milieudefensie et al. rely on in this context, cannot be applied analogously. Subsection 7.4.4 then goes on to explain that, contrary to what

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569 For the record, DONG is considerably less substantial than the Shell group.
570 Supreme Court 23 September 1988, ECLI:NL:HR:1988:AD5713 (*Kalimijnen*).

Milieudefensie et al. assert in the Summons, the lack of causal link does indeed play a role in assessing Milieudefensie et al.'s claims.

7.4.2 The risk of climate change and the – potential – consequences thereof are caused by total aggregate emissions at the global level and not by the actions of RDS or the Shell companies alone

540. The causal link required to establish liability and upon which Milieudefensie et al. base their claims – i.e. between RDS's actions and the 'general' risk of climate change and the consequences thereof – is lacking. RDS does not dispute that the aggregate volume of natural and man-made GHG emissions has an impact on the climate, as described by the IPCC, among others.

541. Individual CO_2 emissions, however, are not, on their own, what causes climate change; it is, rather, precisely the result of the total *aggregate* emissions of greenhouse gases at the global level. Although RDS does not deny that Shell companies have had a part in those aggregate emissions, it would like to point out that such Shell company emissions could not possibly be the *sole* cause of*global* climate change referred to above. Milieudefensie et al. themselves acknowledge this several times in the Summons, incidentally.[571]

542. It is also worth noting here that not only can the emissions produced by the end users of fossil products not be attributed to RDS – as explained above – but also that they are only very indirectly related to RDS's activities. RDS does not, after all, produce those products itself. And the Shell companies themselves are not the end users of those products; nor do they have any say in how efficiently those products are used or whether end users take measures to capture or offset emissions. In addition, end users can also purchase those products from other manufacturers. A causal link, if any, is thus indirect at best.

543. The alleged harmful effects as a result of climate change can also not be causally linked to RDS's actions or to those of Shell companies. Milieudefensie et al. limit their discussion of these effects, however, to damage that could occur in a general sense as a result of climate change and the likelihood that such damage will manifest itself now and in the future.[572] Nor do Milieudefensie et al. argue that such harmful effects are the result of specific actions by RDS or by Shell companies. It should be

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571 For instance, see Summons, paras. 509, 529 and 644.
572 Chapter VIII.2.1.1 Summons.

noted here that it is also not possible to establish a sufficient link between the harmful effects of climate change in general and specific actions by RDS or by Shell companies. It is not only unclear when and how, exactly, this damage manifests itself, but also whether Shell's emissions are actually the cause thereof.

544. According to Milieudefensie et al., for RDS to be liable, it suffices that its CO_2 emissions "*contribute to dangerous climate change*" and that seriously deleterious effects could arise as a result thereof. It was just discussed that no causal link whatsoever can be established between RDS's emissions and *dangerous* climate change, even if the emissions produced by Shell companies or end users were to be attributed to RDS. The assertion that it suffices for such emissions merely to contribute to (dangerous) climate change will be refuted below.

7.4.3 Shell's emissions are negligible; there is also no place for awarding the claims on grounds of partial liability

545. Although Milieudefensie et al. do admit that Shell's CO_2 emissions could not on their own result in "*the danger described*", they do believe that RDS nonetheless bears "*partial responsibility*" because, with an alleged (but disputed, see Subsection 2.6.4) share of 1.8% in historical global emissions (and about 1% of current emissions), it has reportedly made a "*not negligible and even substantial*" contribution to the increase in CO_2 levels in the atmosphere. Despite the fact that – as Milieudefensie et al. themselves acknowledge – Shell's alleged emissions (even including those of end users) cannot, in and of themselves, cause the general danger of climate change and the effects thereof, and a causal link is missing in this sense, Milieudefensie et al. assert that Shell's relatively small volume of emissions does not preclude liability.

546. Milieudefensie et al. base that assertion on the Supreme Court's judgment in *Kalimijnen*, in which Dutch farmers who drew water from the Rhine had suffered damage as a result of various parties dumping salt 'upriver'. The salt dumping, in combination with natural phenomena, resulted in higher salt concentrations in the waters of the river. Damage was incurred by farmers who, after watering their crops with water drawn from the Rhine, saw a decline in yield. Those farmers sued only one of the parties (French potash mines, or *Franse Kalijmijnen*) responsible for the salt dumping.

547. The Supreme Court held in *Kalimijnen* that, although each of the various instances of salt dumping by parties upriver had caused the damage, in part, this did not stand in the way of an individual party being held liable.

Although the share of the total salt load attributable to the French potash mines was relatively small, according to the Supreme Court, it was not negligible.[573] It was important that there was a linear correlation between the rise in the salt concentration and the damage caused as a result thereof, and that the extent to which an individual party had contributed to that increase could also be determined. It was therefore possible to determine what part of the damage had been caused by an individual party. The French potash mines, which were responsible for approximately 40% of the salt dumping, could therefore be sued for a corresponding portion of the damage.[574] Incidentally, as far as CO_2 emissions are concerned, CO_2 molecules are indistinguishable from each other and it is not possible to determine who emitted certain CO_2 emissions at what point in time.

548. Milieudefensie et al. believe that, on the grounds of the *Kalimijnen* judgment, RDS cannot defend itself by referring to its negligible share in total global CO_2 emissions. The *Kalimijnen* judgment cannot, however, be applied by analogy to RDS's alleged share in the total aggregate emissions. There are several reasons for this:

- As already discussed, Milieudefensie et al. base their claims on incorrect basic premises in relation to RDS's emissions. It was demonstrated in Subsection 2.6.4 and Section 6.3 that Milieudefensie et al. wrongly attribute the CO_2 emissions of end users to RDS (Scope 3 emissions). The emissions of the Shell companies themselves are much lower, and those of RDS are negligible. Even Shell's alleged (but disputed) historical 1.8% contribution to global CO_2 emissions differs starkly from the approximately 40% share in the *Kalimijnen* judgment. Milieudefensie et al. have, incidentally, neither asserted nor substantiated that the emissions of Shell itself, without the incorrect attribution of the emissions of end users of its products, also result in a "*not negligible and even substantial*" contribution.[575]

- Another difference is that *Kalimijnen* pertained to a claim for damages, i.e. it had already been established that the salt dumping constituted the unlawful act of nuisance vis-à-vis the downstream users of the river. In the sense that a specific event had resulted in specific damage, there was also a more direct causal link. Although the individual instances of salt dumping had each caused only part

573 Supreme Court 23 September 1988, ECLI:NL:HR:1988:AD5713 (*Kalimijnen*), para. 3.1.
574 Supreme Court 23 September 1988, ECLI:NL:HR:1988:AD5713 (*Kalimijnen*), para. 3.5.1.
575 Incidentally, the total contribution of 1.8% is also disputed by RDS.

of the overall damage, the share of the damage they caused could indeed be determined based on the linear correlation. This also meant that a party responsible for salt dumping was only liable for that portion of the damage which it could be determined to have caused.[576] The is different for an application for a court order, due to its 'all or nothing' character. Milieudefensie et al. are attempting to skirt the issue when they imply that RDS' share can be set, based on the Paris Agreement, at a net zero reduction obligation. As demonstrated above, Milieudefensie et al. however fail to recognise that the Paris Agreement's objectives are stated in very general terms, and no concrete allocation formula is given for achieving those objectives. RDS would also like to reiterate that the Paris Agreement does not impose obligations on private parties.

7.4.4 The requirement of causality also plays an important role in applications for court orders

549. To be awarded, Milieudefensie et al.'s applications for court orders require an unlawful act against the party lodging the claim or the *real threat* thereof. The claimant must also have a demonstrable concrete interest in the claim. As explained below, the lack of a causal link between the alleged unlawful act and the ensuing (potential) damage that the court order is meant to obviate means that those requirements cannot be met. As explained in Subsection 2.2.4 above, Milieudefensie et al. have failed to demonstrate that aggregate CO_2 emissions would go down if the order were granted.[577] In fact, the opposite could result.

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576 Supreme Court 23 September 1988, ECLI:NL:HR:1988:AD5713 (*Kalimijnen*), para. 3.5.1.

577 In para. 646 et seq. of the Summons, Milieudefensie et al. invoke the ruling of the US Supreme Court in *Massachusetts v. EPA*. However wrongly, they see that case as supporting the contention that RDS could certainly be held liable for its (alleged) share in the CO_2 emissions. There, Massachusetts claimed that the Environmental Protection Agency (EPA) should prescribe stringent emission reductions for the automotive sector. Massachusetts was thus attempting to force the EPA to take certain actions. The US Supreme Court considered the question of whether Massachusetts had standing under the US Constitution to file such a claim against the EPA. The Supreme Court's ruling therefore only concerned the application of US constitutional and administrative law, in particular the constitutional requirements that need to be met to initiate court proceedings to force an American government agency to take action. The ruling thus cannot be applied to the present case, as it does not address the causality of unlawful conduct: neither in general terms nor in terms of this case. In the passage quoted by Milieudefensie et al., the US Supreme Court addresses nothing more than whether (or not) the potential consequences of agency action should be subject to a *de minimis* requirement when determining the jurisdiction of a US court to review the EPA's execution of its statutory obligations.

The lack of a causal link means that there is no question of endangerment and consequently no unlawful act or *real threat* thereof

550. Awarding the requested declaratory judgments and applications for court orders thus firstly requires that there be an unlawful act, or at least a real threat that an unlawful act will occur.[578]

551. This means that it must first be established that conduct has transpired that can be qualified as unlawful, or that there is a real threat of such unlawful conduct taking place. Section 7.2 comments on the fact that there is no unwritten standard of care that RDS violates by failing to satisfy the claimed emissions caps and Section 7.3 goes on to explain that the endangerment doctrine likewise provides no support for Milieudefensie et al.'s assertion in that regard. As such it has already been established that there is no situation of unlawful act (or the realistic threat thereof) by RDS.

552. The lack of a causal link between RDS's actions and the harmful effects of the danger of climate change outlined by Milieudefensie et al. features strongly elsewhere in this Statement of Defence. The alleged unlawfulness of RDS's actions in the context of the endangerment doctrine cannot, after all, be regarded as separate from the question of whether these actions result in harmful effects. After all, endangerment revolves around the question of whether the likelihood of damage as the result of 'dangerous behaviour' is so great that the party involved should have refrained from that behaviour according to standards of care. In the context of the case at hand, this means that the opinion on the unlawfulness of RDS's actions, or on whether or not the emissions caps sought have been satisfied or not, is inextricably connected with the likelihood that damage is caused by *these very* actions, as well as the nature and size of *this particular* damage.

553. As explained earlier in this Section and in the discussion of the *Kelderluik* criteria in Subsection 7.3.3, there is a lack of any such causal link. The emissions produced by Shell companies alone are not the sole cause of climate change; as such, they cannot engender any independent risk thereof, even if the emissions of the Shell companies – not to mention those of end users – were attributed to RDS. Moreover, the general harmful effects of climate change outlined by Milieudefensie et al. cannot be causally linked to RDS's actions either. Added to this is the fact that Milieudefensie et al. do not assert, let alone substantiate, in what specific damage the specific actions by RDS reportedly resulted. Finally, even if the

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578 T.E. Deurvorst, in: *Groene Serie Onrechtmatige daad,* II.2.1.2.1. See also Supreme Court 21 December 2001, ECLI:NL:HR:2001:ZC3693, (*Kernwapens*), para. 3.3 at D and para. 3.5.1.

emissions produced by end users are attributed to Shell, Milieudefensie et al. will still have failed to demonstrate that those specific emissions have had a fundamental impact on climate change.

554. The absence of causality therefore entirely rules out a finding of unlawful conduct, let alone any real threat of unlawful conduct.

The lack of a causal link likewise means that the claimants lack a sufficiently specific interest in seeing the claims awarded

555. The lack of causal link must likewise result in the claims being dismissed due to a lack of any specific interest in seeing them awarded or, at any rate, in Milieudefensie et al. being denied a cause of action for their claims due to a lack of sufficient interest within the meaning of Article 3:303 of the Dutch Civil Code.

556. If the claims were, after all, to be awarded, this would not result in the realisation of the effects posited or "*hoped for*" by Milieudefensie et al. In that sense, Milieudefensie et al. can be agreed with to the extent that the specific reduction in RDS's CO_2 emissions will not be effective. As commented on earlier, the absence of a causal link between RDS's actions and the risk of climate change and the harmful effects thereof implies that – given the alleged yet disputed allegation that 1.8% of total historical emissions could be attributed to Shell – the award of the claim would have little, if any, impact in terms of reducing the total aggregate emissions worldwide that are causing (allegedly dangerous) climate change.

557. Award of the claim will also not be effective because other suppliers of fossil fuels will fill the 'gap' left behind by Shell.[579] As explained in Section 2.2, energy demand is growing rapidly and demand for fossil fuels will thus remain high for the foreseeable future.

558. RDS notes in this regard that Milieudefensie et al. are twisting things around when they assert that the claims must be awarded because otherwise "*an effective remedy against the biggest conceivable danger would be lacking*." In addition to the fact that RDS has just demonstrated that awarding the claims would not in fact be effective, this is not a valid criterion for causality.

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579 See, *inter alia*, Subsections 2.2.4 and 6.3.4.

7.5 The relativity requirement has not been met

7.5.1 Introduction

559. Lack of relativity is another reason why RDS cannot be found to have violated any unwritten standard of care, or why the orders sought by Milieudefensie et al. cannot be awarded. This applies to the tort analysis in general, whether inspired by unlawful endangerment or human rights.

560. The special nature of these proceedings makes it necessary to devote separate attention to this requirement. After all, Milieudefensie et al.'s claim is characterised by the fact that a global problem caused by everyone's CO_2 emissions is now being presented as a claim against RDS alone.

7.5.2 The requirement of relativity in connection with both the unlawfulness of the acts and the eligibility for award of an application for a court order

561. One of the requirements for unlawful act is that the requirement of relativity is satisfied. This relativity requirement is expressed both in Article 6:162(1) and Article 6:163 of the Dutch Civil Code. On grounds of Article 6:162(1) of the Dutch Civil Code, unlawful act requires, after all, that the conduct in question is unlawful "*against another*". Article 6:163 of the Dutch Civil Code adds that there is no obligation to compensate damage if the standard breached "*does not serve to protect against damage such as that suffered by the person suffering the loss*".[580]

562. The relativity requirement must also be met if the claims instituted do not pertain to damages, but to a declaratory judgment or an application for a court order.[581] For an application for a court order – and likewise for an application for an injunction – the court can, on the grounds of Article 3:296(1) of the Dutch Civil Code, only pronounce an order or injunction in response to a claim from the person "*to whom the person being sued is obliged to give, do or not do something*". For Milieudefensie et al.'s claims to be awarded, therefore, it must be established that the conduct of RDS

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580 According to established case law, it must be investigated in that context, with reference to the purpose and purport of the standard breached, to (i) which persons, (ii) what damage and (iii) what ways in which the damage arises the protection envisioned with the standard extends. Supreme Court 7 May 2004, ECLI:NL:HR:2004:AO012 (*Duwbak Linda*), para. 3.4.1.

581 See, for example, *Groene Serie Onrechtmatige daad*, Article 6:163 of the Dutch Civil Code, note 1.7 (K.J.O. Jansen) *("The main effect of the consistent application of the relativity requirement in title 6.3 of the Dutch Civil Code is that in principle, only the person against whom someone has acted unlawfully can claim damages from the perpetrator. Likewise it is only this person who can apply for a court order or injunction, as emerges from the words 'against another' in Article 3:296 of the Dutch Civil Code.").*

that is the basis of those claims is also unlawful against the individuals whose interests are represented by the NGOs and the individual co-claimants.

563. The rationale behind the relativity requirement is to prevent liability that is too far-reaching from arising and to prevent the stretching of standards rendering them unusable.[582]

564. The relativity requirement also applies to unwritten standards of care.[583] Unwritten standards can only protect others' interests which people had to be aware of.[584] The opinion on relativity is, as it were, 'woven into' or 'incorporated'[585] in the opinion as to whether the acts were unlawful because the standard of care relates to:[586]

> *"[...] the care that must be observed in a particular relationship towards one or more specific other people and is therefore by its nature not a standard that serves to protect the interests of all persons who suffer damage as a result of the fact that the requisite care was not observed towards those others."*

565. By law, an act can only be unlawful *in relation to* specific persons, therefore. The question as to whether a certain act is unlawful is, in other words, always a relative question, specifically a question as to whether a particular act is unlawful with respect to one or more specific persons. Moreover, because of the standard's object to provide protection, it is not only important what kind of damage is involved, but also *how the damage arose*, or at least how the injured party suffered the damage.

566. As will be demonstrated below, this kind of relativity cannot be assumed in this case. In this respect, RDS invokes, in particular, the fact that the claimants also engage in conduct that contributes to CO_2 emissions (also referred to in literature as the "*in pari delicto*" defence), which must be regarded as a consequence of the relativity requirement enshrined in Article 6:163 of the Dutch Civil Code.[587] This defence can, incidentally, also be lodged even if it cannot be deemed a consequence of the relativity requirement.

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582 Verheij, *Monografieën Privaatrecht nr. 4*, Deventer: Kluwer 2015, 14.
583 Asser/Hartkamp & Sieburgh 6-IV 2015/135. See also Supreme Court 10 November 2006, ECLI:NL:HR:2006:AY9317 (*Astrazeneca e.a/Menzis*), para. 3.3.5.
584 Supreme Court 30 September 1994, ECLI:NL:HR:1994:ZC1464 (*Staat/Shell*), para. 3.8.4.
585 See Spier et al., *Verbintenissen uit de wet en Schadevergoeding*, Deventer: Kluwer 2015, no. 65.
586 Supreme Court 2 September 1994, ECLI:NL:HR:1994:ZC1564 (*Poot/ABP*), para. 3.4.3. See also PG Book 6, p. 616.
587 *Groene Serie. Onrechtmatige daad. Art. 6:162 BW,* note 7.3.4.2.

7.5.3 The relativity requirement has not been met because climate change is caused by *everyone* and it cannot be said, therefore, that RDS is acting unlawfully *against* Milieudefensie et al. and the people they represent

567. Milieudefensie et al. assert in these proceedings that the NGOs stand up for the interests of present and future generations "*both in the Netherlands and abroad*" in preventing "*the dangers of climate change*". In other words, basically everyone on the planet.

568. The Shell group's products are combusted by the end users thereof, and thus not by Shell itself. Roughly 85% of CO_2 emissions can be attributed to end use. The NGO community thus contributes to CO_2 emissions.

569. The individual co-claimants also contribute to CO_2 emissions. As Milieudefensie et al. have failed to address the situation of the individual claimants, RDS is forced to be brief in this respect.

(a) The claimants are Dutch. The Netherlands has a relatively high level of CO_2 emissions per resident. According to Statistics Netherlands (CBS), these emissions amounted to 15.8 tonnes of CO_2 equivalent in 2018 (due in part to the consumption of products produced in the Netherlands and in part due to the consumption of products produced abroad).[588]

(b) Air travel is an activity that causes significant CO_2 emissions. The number of flight movements to and from Schiphol Airport is currently just under 500,000 per year. 2018 saw a total of 79.6 million passengers arriving at and departing from Dutch airports. This was a 4.5% increase compared to 2017 and a 37% increase compared to 2013.[589]

(c) Car travel is also an extremely common activity. On 1 January 2019, 8.5 million cars were registered in the Netherlands alone. This was a 1.9% increase compared to the previous year and a

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588 **Exhibit RO-244**, Statistics Netherlands (CBS), *Milieuvoetafdruk van Nederlander licht toegenomen*, 15 May 2019. The environmental footprint used by Statistics Netherlands reflects the impact of spending, by Dutch citizens, on the environment, regardless of whether the production of goods and services takes place in the Netherlands or abroad.

589 See **Exhibit RO-245**, Statistics Netherlands (CBS), *Luchtverkeer* (website page 8 November 2019).

13% increase compared to 2009.[590] The lion's share of the Dutch fleet is powered by fossil fuel. According to Statistics Netherlands, 80% of all passenger cars run on petrol and 15% on diesel. The number of electric and hybrid cars is increasing. There were almost 315,000 electric and hybrid cars at the beginning of 2019, a 16% increase since January 2018. At almost 4%, their share in the total fleet is still relatively modest. It has recently been reported that CO_2 emissions attributable to road travel are on the rise because Dutch consumers are choosing *en masse* for relatively large cars (SUVs).

(d) Many other daily activities also have a significant impact on CO_2 levels. Meat consumption, land use and so-called "*fast fashion*" for example have recently caught the public's attention.[591]

570. When it comes to countermeasures, as well, it is all too easy for the claimants to set their sights on RDS. On that point it must, after all, be noted that the energy transition has proven a difficult task in the Netherlands as well. What becomes particularly clear in that regard is that the efforts required to tackle problems such as energy transition and climate change are so tremendous that there is no other option than a collective response. Quite frequently, it is not possible to garner the support necessary. The following serves to illustrate this:

(a) Various initiatives for carbon storage in the Netherlands have encountered fierce opposition, including from a number of claimants, such as Greenpeace. RDS refers to the government's plan to build a carbon storage facility in Barendrecht. The government abandoned the plan after it had come to the conclusion that the plan could not count on regional support.[592]

(b) The construction of onshore wind farms – likewise – has been met with fierce opposition. RDS refers to the protests against the construction of two wind farms in the Province of Groningen.[593]

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590 See **Exhibit RO-246**, Statistics Netherlands (CBS), *Personenauto's* (website page 8 November 2019).

591 See, on the impact of the clothing industry, e.g.: **Exhibit RO-247**, NRC, *Fast fashion maakt de wereld kapot*, 16 October 2019 and **Exhibit RO-248**, UN Environment Programme, Putting the brakes on fast fashion (website page 8 November 2019). And for the impact of agriculture and the meat industry, see the European Environment Agency: **Exhibit RO-249**, European Environment Agency, Agriculture and Climate Change, 11 June 2019.

592 Letter from the Minister of Economic Affairs to the Dutch House of Representatives of 4 November 2010, *Parliamentary Documents II*, 2010-2011, 28982, no. 113.

593 **Exhibit RO-250**, NOS, *Drie mannen opgepakt wegens bedreigingen bij windparken Groningen*, 19 June 2019.

(c) A more radical alternative, nuclear energy, has been categorically dismissed by, among others, Milieudefensie and Greenpeace. It is logical that a substantial number of the private individuals represented by Milieudefensie share this view.

(d) Examples can also be found abroad, e.g. the French *gilets jaunes* who protested against a relatively minor increase in the price of fossil fuels.

571. This list of examples, too, could be widely expanded and supplemented. The point is that the lack of progress observed by Milieudefensie et al. can in part be explained by the fact that changing the energy systems of all actors requires a change of choice, including the choices made by the claimants and citizens of the Netherlands and other countries.

572. The transition that Milieudefensie et al. wish to support with these proceedings is a shared responsibility. It is not fitting to blame RDS for failing to take adequate steps even though the challenges facing RDS are such that it is simply, just like those represented by the NGOs and the individual co-claimants, part of a society in which complex considerations play a role, in which there is still demand for fossil fuels, and in which countermeasures fail to move forward because they come up against opposition from local interests, not least in the Netherlands. As such, Milieudefensie et al., those represented by them, and the individual claimants are part of a group which can be accused of the same conduct for which the claimants are blaming RDS alone. For this reason, the claimants are not entitled to any protection because relativity is lacking if – briefly stated – the claimants themselves participate in the challenged conduct.[594]

573. Application of the relativity requirement in this sense also serves to show that by lodging this case against RDS, Milieudefensie et al. are, at a more fundamental level, misrepresenting the climate problem. This misrepresentation consists of the fact that Milieudefensie et al. are trying to shift responsibility for (the consequences of) climate change onto RDS. That is simply not correct. As stated, climate change is a problem created by global society in its entirety, now and in the past. *Everyone* contributes to the emission of CO_2 to some extent.

574. Although Milieudefensie et al. themselves say that RDS "*shares the responsibility*" or has a "*shared responsibility*",[595] it would be more fitting to

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[594] *Groene Serie. Onrechtmatige daad. Art. 6:162 BW*, note 7.3.4.2.
[595] Para. 509 of the Summons.

talk of *joint* responsibility. As discussed in Section 2.3, RDS is already taking major steps in the transition to a lower-carbon energy system. As also discussed there, RDS plans to continue in this direction in step with society, but above all *together with* society as a whole.

7.6 Invoking human rights does not support the claims

7.6.1 Introduction

575. In Chapter X of the Summons, Milieudefensie et al. invoke human rights, and specifically Articles 2 and 8 of the ECHR. This appeal, however, fails to back up the claims lodged by Milieudefensie et al.

576. In this section, RDS will first demonstrate that these articles do not bind RDS (Subsection 7.6.2). RDS will then comment on the fact that, under Articles 2 and 8 ECHR, States have wide discretion to determine which measures to take and courts must not pre-empt that prerogative in the adjudication of the present dispute (Subsection 7.6.3). Moreover, the grounds on which Milieudefensie et al. base their claims are so general in nature that the case cannot fall within the scope of Articles 2 and 8 of the ECHR (Subsection 7.6.4). Even if none of this were true, indirect application would result in nothing more than the interests mentioned by Milieudefensie et al. being taken into account in the civil-law assessment, which, as explained above, would necessitate rejection of the claims (Subsection 7.6.5). Finally, RDS comments on the fact that the precautionary principle and the non-legally binding guidelines referred to by Milieudefensie et al. do nothing to change this (Subsections 7.6.6 - 7.6.7).

7.6.2 Articles 2 and 8 of the ECHR do not bind RDS and thus provide no basis for the claims

577. As stated, Milieudefensie et al. take the position that RDS is acting in conflict with Articles 2 and 8 of the ECHR. The ECHR, and thus these Articles, do not bind RDS.

578. These provisions are simply not intended to bind individual parties and thus do not have direct effect as provided in Article 93 of the Dutch Constitution. The provisions impose obligations on States. As general guarantees of the freedom of citizens, fundamental rights create a barrier to government oppression.[596] The ECHR contains two kinds of obligations for governments: Firstly, it imposes the obligation to refrain, in principle, from

[596] R. Nehmelman and C.W. Noorlander, *Horizontale werking van grondrechten*, Deventer: Kluwer 2013, par. 2.7.

actions harming the interests protected by the ECHR. And secondly, it imposes the obligation for governments to proactively protect and ensure those interests. The purpose and purport of the ECHR rights are to safeguard a civil environment free from government infringement. Governments may not infringe these freedoms, unless this infringement is justified by a special clause in the ECHR and meets the conditions applicable (RDS will discuss the special clauses for States, which also come into play when addressing the global climate problem, in more detail). As the ECtHR has not assigned any direct horizontal effect to the rights regulated in the ECHR,[597] these rights do not apply directly in private party relationships.

579. The articles thus fail to provide a basis for the claims against RDS. This is a key difference between the present case and *Urgenda*, which was lodged against the State (see Subsection 6.2.3, end).

580. Milieudefensie et al. also recognise that by invoking Articles 2 and 8 of the ECHR even though those Articles apply only to States, they undermine their invocation of those articles. They essentially have a single argument as to why this should nevertheless be possible: they are implying that RDS can be equated with a State for the purposes of human rights provisions (see paras. 668, 669, 670, 672 second sentence, 690). That is not true. RDS is not a State. As a result, RDS falls outside the scope of the provisions. Nor can those provisions subsequently be made applicable by equating RDS with a State. That argument is also flawed in terms of facts. As has been explained in detail above, the energy transition is an issue that affects society as a whole, and the obligations it entails for the various private actors at system level must be regulated by political considerations; the Paris Agreement also provides for each State to make its own nationally determined contribution in this respect. Neither RDS, nor Shell as a whole, has a similar position in which it can determine the energy transition at system level. As RDS has already explained, this is also why an order against RDS will fail to contribute to the realisation of the situation desired by Milieudefensie et al. and will thus also fail to protect the interests mentioned by them in their human rights argument (see Subsection 2.2.4).

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597 Asser/Hartkamp 3-I 2018/226 (*Nederlandse rechtspraak: indirecte horizontale werking*).

7.6.3 Under Articles 2 and 8 ECHR, States have wide discretion to determine which measures to take, and courts must not pre-empt that prerogative when adjudicating the present dispute

581. If a State's position in the protection of human rights is to be considered as well (which is not the case, for the various reasons mentioned elsewhere in this Section 7.6), what is most striking is that the State has discretion in such cases to determine what measures are to be taken. Here, too, Milieudefensie et al. wrongly disregard the larger whole of society's energy system, as well as the regulatory energy and climate policy frameworks that are in place and that are also shaped by current political developments. The fundamentally one-sided approach by Milieudefensie et al., which effectively entails that if Articles 2 and 8 of the ECHR are involved the claims must be awarded, also fails for that reason.

582. Particularly in situations such as the one at hand, involving many interests and conflicting fundamental rights, States enjoy a wide margin of appreciation.

583. Paras. 33-34 of the Guide on Article 2 of the European Convention on Human Rights serve to illustrate this:[598]

> *"As to the choice of particular practical measures, the Court has consistently held that where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means. In this respect an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources; this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres […].*
>
> *[…]*
>
> *In assessing whether the respondent State had complied with the positive obligation, the Court must consider the particular circumstances of the case, regard being had, among other elements, to the domestic legality of the authorities' acts or omissions, […] the domestic decision-making process, including the appropriate investigations and studies, and the complexity of the*

[598] See https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf (version updated 30 April 2019). See also ECtHR 20 March 2008, nos. 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, ECLI:NL:XX:2008:BD9179 (*Budayeva and Others v. Russia*), paras. 135-136.

issue, especially where conflicting Convention interests are involved […]."

584. Similarly, the Guide on Article 8 of the European Convention on Human Rights[599] states:

> *"For instance, pursuant to Article 8, domestic authorities must strike a fair balance between the economic interest of a municipality in maintaining the activities of its main job-provider – a factory discharging dangerous chemical substances into the atmosphere – and the residents' interest in protecting their homes (Băcilă v. Romania, § 66-72, violation)."*

585. The discretion allowed to States emerges from several steps in the analysis. Contrary to what Milieudefensie et al. would have the court believe, not even the rights laid down in the ECHR are set in stone. First, determining the positive obligations arising from the ECHR always involves a balancing of interests.[600] Second, the articles of the ECHR itself offer States the possibility to make exceptions to the infringement prohibition.[601] Lastly, in the event of conflicting fundamental rights, States are allowed to strike a balance between the interests involved.[602] The way in which

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599 See https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf (version updated 30 April 2019), p. 84.

600 See, e.g., A.D. Belinfante and J.L. de Reede, *Beginselen van het Nederlandse staatsrecht*, Deventer: Kluwer 2015, p. 258. See also ECtHR 8 July 2004, *ECHR 2004/7* (*Ilaşcu and Others v. Moldova and Russia*) ("*In determining the scope of a State's positive obligations, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must these obligations be interpreted in such a way as to impose an impossible or disproportionate burden."*). See also ECtHR 20 March 2008, *appl. no. 15339/02* (*Budayeva and Others v. Russia*) *("[…] an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to operational choices which they must make in terms of priorities and resources […] this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres […]. This consideration must be afforded even greater weight in the sphere of emergency relief in relation to a meteorological event, which is as such beyond human control, than in the sphere of dangerous activities of a man-made nature";* [emphasis added by attorneys].

601 For example, the second paragraph of Article 8 of the ECHR allows States to infringe the rights referred to in the first paragraph if this is necessary in a democratic society on the basis of other, possibly conflicting, interests. In determining whether an infringement can be justified based on the second paragraph, the margin of appreciation plays an important role. Environmental interests carry no special weight in this context. See ECtHR 8 July 2003, no. 36022/97 (*Hatton v. UK*), para. 123. Regarding the necessity of the restriction, the ECtHR held in that judgment that the State must "*in principle be left a choice between different ways and means*". On that point, Reed has also noted: "*In practice, the margin of appreciation operates as a means of leaving a state freedom of manoeuvre in assessing what society needs, and the best way of achieving those needs and the timing of policies. There is not only one way of protecting children from abuse, or of fighting drug trafficking."* (K. Reid, *A practitioner's guide to the European Convention on Human Rights*, London: Sweet & Maxwell 2015, p. 67.

602 In cases of conflicting fundamental rights, States have a wide margin of appreciation. Given the complex nature of such an assessment, it is primarily for the States themselves to balance the interests involved in the choice between conflicting fundamental rights, according to the ECtHR. In that context, States enjoy considerable freedom in searching for a "*fair balance*" between conflicting rights and interests. Dutch courts also give the government a wide margin

Milieudefensie et al. are trying to corroborate their claims by reliance on human rights is therefore incorrect. Here, too, Milieudefensie et al. wrongly ignore the fact that various interests, including fundamental rights, must be balanced within the energy system, and that this is no easy task.

586. Climate change is certainly one of the greatest challenges of our time. Society as a whole faces the challenge of tackling climate change, yet other relevant interests may not be disregarded in the process. States have already drawn up legislation aimed at regulating this – e.g. in the Netherlands, the Climate Act and the implementation of the EU ETS system – and are currently in the process of drawing up the laws and regulations additionally necessary to this end and, within that framework, determining the individual responsibilities of the various actors and balancing the various interests (see Sections 2.2, 2.6, 2.7 and 6.2). It is not for the courts to pre-empt the States' considerations in that regard by imposing specific measures in the context of a private law litigation such as in the case at hand. Although governments are actively considering the matter, it is currently unknown what plans they have. It follows from what has been explained above, that it cannot be said that the only way States can meet that obligation is to impose an order like the one being sought by Milieudefensie et al. on a private party like RDS.

587. It also follows from what has been noted in Sections 2.2 and 2.6 and Subsection 2.7.4 that fundamental interests are served by the fossil fuel activities undertaken by Shell, and States must be allowed to take that into account. Access to energy is important in almost every aspect of people's daily lives. Almost all activities undertaken in society are dependent on energy. As explained above, nations have a wide range of aspects to consider when approaching climate policy and energy transition. To ignore such considerations in connection with the use of Shell products, whose interest lies in the fact that they clearly serve to satisfy basic human needs, is to ignore the complexity of the energy system as a whole. Furthermore,

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of appreciation in the event of conflicting rights, including fundamental rights. Regarding all the above, see e.g.: ECtHR 10 April 2007, 6339/05 (*Evans v. the United Kingdom*); ECtHR 29 April 1999, nos. 25088/94, 28331/95, 28443/95 (*Chassagnou and Others v. France*), para. 113; A. Nieuwenhuis, 'Appreciatiemarge en botsing van grondrechten', *NJCM-bulletin* 2015/1, p. 20; J.H. Gerards, *EVRM. Algemene beginselen*, The Hague: Sdu 2011, pp. 181 and 215; and Dutch case law such as Council of State Administrative Jurisdiction Division 3 July 2019, ECLI:NL:RVS:2019:2217, paras. 8.2 and 17; Supreme Court 14 April 2006, ECLI:NL:HR:2006:AU9239, para. 3.5; Supreme Court 15 November 1996, ECLI:NL:HR:1996:ZC2200; Council of State Administrative Jurisdiction Division 20 July 2005, ECLI:NL:RBMID:2004:AS7329, para. 2.5; Council of State Administrative Jurisdiction Division 17 August 2005, ECLI:NL:RVS:2005:AU1108, para. 2.5.1; Council of State Administrative Jurisdiction Division 17 December 2004, *JV* 2005, 65, para. 2.2; Council of State Administrative Jurisdiction Division 9 November 2005, ECLI:NL:RVS:2005:AU5839, para. 2.5.4; and Central Appeals Tribunal 12 May 2005, ECLI:NL:CRVB:2005:AT6264.

energy is deemed by the UN, in its Sustainable Development Goals, to be necessary for access to clean water, sanitation, nutrition, health care and education (see Subsection 2.2.3.2), all of which are interests that must be duly taken into account, and several of which are also protected by international treaties.[603]

588. As explained above, award of Milieudefensie et al.'s claims could result in competitors taking over RDS's activities (so that CO_2 emissions would not, on balance, decrease) (see Subsection 2.2.4). In the hypothetical situation that competitors did not fill the gap left by RDS, the aforementioned interests would nonetheless be in jeopardy if Milieudefensie et al.'s claims were awarded. The reality of the matter is that this will hit people in developing countries the hardest.

589. Milieudefensie et al. make no effort whatsoever to mention – let alone to balance – these conflicting interests. They simply present a one-dimensional claim focusing exclusively on the risk of climate change. By doing so, they have failed to meet their obligation to furnish facts. In any case, the complexity of the decisions and the fact that conflicting fundamental rights are potentially involved make the case unsuitable for judgment in civil proceedings.

7.6.4 The grounds on which Milieudefensie et al. base their claims are too undefined and general in nature to fall within the scope of Articles 2 and 8 of the ECHR

Introduction

590. As stated, Milieudefensie et al. have substantiated their claims by relying on Article 2 (the right to life) and Article 8 (the right to family life). The scope of Articles 2 and 8 of the ECHR is not quite so broad as to encompass general climate change issues. Articles 2 and 8 of the ECHR do not in fact have the broad and general scope that Milieudefensie et al. attribute to them.[604]

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603 For example, the right to clean water, sanitation and nutrition is enshrined in Article 11 of the International Covenant on Economic, Social and Cultural Rights. The right to nutrition has also been included in Article 24 of the Convention on the Rights of the Child. The right to health care is included in Article 12 of the International Covenant on Economic, Social and Cultural Rights, as well as in Article 35 of the EU Charter and Article 22 of the Dutch Constitution. Understandably, the right to education is recognised in a great number of treaties: Article 2 of Protocol 1 to the ECHR, Article 14 of the EU Charter, Article 28 of the Convention on the Rights of the Child, and Article 23 of the Dutch Constitution.

604 As explained in other parts of this Section 7.6, even if the issue of climate change submitted by Milieudefensie et al. did, in principle, fall within the scope of those articles, the claims against RDS would still need to be rejected.

591. Milieudefensie et al.'s claims can hardly be said to involve a specific interest affected by a specific cause at a specific time. The claims, rather than take aim at consequences in the present, pertain instead to *applications for court orders effective in 2030, 2040 and 2050*. Milieudefensie et al. refer to the potential *global adverse effects of climate change*. They then go on to identify *emissions attributable to all people and all companies as the cause thereof*. They do, after all, describe CO_2 emissions as having a cumulative effect, meaning that although they target RDS in the present proceedings, the cause of the issues they describe is CO_2 emissions (and other GHG emissions) by billions of persons globally over the centuries. In the process of targeting RDS specifically, they (wrongly) attribute emissions produced by other Shell companies, and even those of the end users of Shell fossil products, to it. They argue that the rights of all people, and indeed all future generations, are at stake.

592. The ECHR is simply not intended to protect such generic interests, and the ECtHR has consistently rejected application of the ECHR in such a manner.

593. The ECHR does not protect general environmental interests.[605]

594. The ECtHR provides a certain degree of protection under Articles 2 and 8 of the ECHR, but only when clearly defined environmental incidents are involved. Contrary to the arguments made by Milieudefensie et al. in support of their claims, this must involve a situation that has a direct and specific impact on someone's private life. In such cases, the ECtHR offers specific, individual protection. The ECtHR has never allowed Articles 2 and 8 of the ECHR to be interpreted in the general and broad terms favoured by Milieudefensie et al.[606]

595. Below, RDS will explain this in more detail for Articles 2 and 8 of the ECHR separately.

Article 2 of the ECHR does not offer the protection asserted by Milieudefensie et al.

596. Regarding Article 2 of the ECHR, Milieudefensie et al. merely included a footnote reference to the *Öneryildiz v. Turkey* judgment (Summons, footnote 474 at para. 672). Their reliance on this judgment is of no avail to Milieudefensie et al. *Öneryildiz* concerns an incident involving a specific infringement of individually identifiable interests. The State is obliged to

605 ECtHR 22 May 2003, no. 41666/98 (*Kyrtatos v. Greece*), para. 52.
606 A.E.M. Leijten, 'De Urgenda-zaak als mensenrechtelijke proeftuin?', *AV&S* 2019/10.

defend these interests under Article 2 of the ECHR in the event of *a real and immediate risk* to life:[607]

> *"It follows that the Turkish authorities at several levels knew or ought to have known that there was a real and immediate risk to a number of persons living near the Ümraniye municipal rubbish tip […]."*

597. This situation is therefore different from Milieudefensie et al.'s general claims in the present case which concern the period starting in 2030. For this reason alone, there is no question of any *immediate risk,* as required by *Öneryildiz*. In *Öneryildiz*, the ECtHR held that a State is required to intervene if it knows (or should have known) that specific persons are faced by a *specific* and *present* risk. That is all the judgment says; accordingly, it cannot give rise to the far-reaching future obligations asserted by Milieudefensie et al.

Nor does Article 8 of the ECHR provide the protection asserted by Milieudefensie et al.

598. Article 8 of the ECHR also has a limited scope with regard to environmental cases. The ECtHR will only find a violation of Article 8 of the ECHR in the event of a specific instance of environmental deterioration in the applicant's immediate vicinity. The deterioration cannot be located too far from where the applicant lives. Moreover, it must actually affect the applicant's home or family life. The applicant must prove that there is a direct link between the environmental pollution and the specific interference with his home or family life. Thus, although the ECtHR has allowed Article 8 of the ECHR to be invoked in a number of environmental cases, it only does so when a case centres around a specific event and the applicant can demonstrate that said event has affected the applicant's home or family life directly. Milieudefensie et al.'s claims are too undefined and general in nature to fall under the protection of Article 8 of the ECHR. RDS will comment on this in more detail below.

599. The judgment in *Atanasov v. Bulgaria* clearly illustrates the restrictions imposed by the ECtHR on the applicability of Article 8 of the ECHR to environmental deterioration. There, the ECtHR emphasised the increasing importance of environmental protection but at the same time indicated that Article 8 of the ECHR does not always apply in the event of environmental pollution or a deterioration in environmental quality. In order for an obligation to arise on the part of the State under Article 8 of the ECHR,

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607 ECtHR 30 November 2004, *NJ* 2005/210 (*Öneryildiz v. Turkey*), para. 101.

there must be a direct and immediate link between the impugned situation and the applicant's home or private or family life:[608]

> *"[…] However, Article 8 is not engaged every time environmental deterioration occurs: no right to nature preservation is included as such among the rights and freedoms guaranteed by the Convention or its Protocols (see Kyrtatos v. Greece, no. 41666/98, § 52, ECHR 2003 VI; Hatton and Others v. the United Kingdom [GC], no. 36022/97, § 96 in limine, ECHR 2003 VIII; and Fadeyeva v. Russia, no. 55723/00, § 68, ECHR 2005 IV).*
>
> *[…]*
>
> *The State's obligations under Article 8 come into play in that context only if there is a direct and immediate link between the impugned situation and the applicant's home or private or family life (see, mutatis mutandis, Botta v. Italy, 24 February 1998, § 34 in limine, Reports of Judgments and Decisions 1998 I)."* [emphasis added by attorneys]

600. Atanasov had failed to demonstrate that specific harm actually existed for his home or family life:[609]

> *"[…] Indeed, the applicant conceded that he could not show any actual harm to his health or even a short term health risk, but merely feared negative consequences in the long term (see paragraph 62 above and contrast López Ostra and Fadeyeva, both cited above). Nor did the applicant provide particulars showing that the degree of disturbance in and around his home had been such as to considerably affect the quality of his private or family life (contrast, mutatis mutandis, Hatton and Others, cited above, § 118).*
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> *[…]*
>
> *he has not apparently suffered any actual harm to date. In the absence of proof of any direct impact of the impugned pollution on the applicant or his family, the Court is not persuaded that Article 8 is applicable on that ground either (contrast McGinley and Egan v. the United Kingdom, 9 June 1998, §§ 96 and 97, Reports 1998 III, which concerned direct exposure to radiation from a nuclear explosion, and Roche v. the United Kingdom [GC], no. 32555/96, §§ 155 and 156, ECHR 2005 X, which concerned direct exposure to mustard and nerve gas)."*

601. In *Atanasov*, the ECtHR reiterated that for Article 8 of the ECHR to apply the applicant must present evidence – "*beyond reasonable doubt*" – of the existence of an actual interference with his home and/or family life. Therefore, an individual who asserts a violation of an environmental interest

608 ECtHR 2 December 2010, no. 12853/03 (*Atanasov v. Bulgaria*), para. 66.
609 Ibid., paras. 76 and 78.

falling within the scope of Article 8 of the ECHR, in principle, also bears the burden of proof, according to the ECtHR:[610]

> *"The salient question is whether the applicant has been able to show to the Court's satisfaction that there has been an actual interference with his private sphere, and, secondly, that a minimum level of severity has been attained (see Fadeyeva, cited above, § 70 […])."*

602. In the ECtHR's case law on the applicability of Article 8 of the ECHR with regard to environmental pollution, the distance of the applicants' home to the incident plays an important role. If this distance is too great, this does not constitute a violation based on Article 8 of the ECHR, according to the ECtHR. In that case, the required *'immediate link'* between the environmental pollution and the alleged interference with the home and/or family life is lacking.[611] Also, the ECtHR only assumed the applicability of Article 8 of the ECHR if there were additional circumstances as well. In most cases, this involves the circumstance that statutory standards have been exceeded.[612]

603. Article 8 of the ECHR therefore does not provide the far-reaching protection asserted by Milieudefensie et al. In summary, environmental issues fall within the scope of Article 8 of the ECHR only if the case involves a specific, individual interference with the home and/or family life. There also needs to be a direct and immediate link between the environmental pollution and the interference with the home and/or family life. Moreover, the distance between the location at which the applicant's home or family life is centred and the source of the interference cannot be too great.[613]

604. It follows from the foregoing that Milieudefensie et al.'s claims do not fall within the scope of Article 8 of the ECHR. Accordingly, this article cannot be invoked in support of their claims. Milieudefensie et al. have not asserted or demonstrated any actual and specific impact on their homes and/or family lives. Moreover, it is impossible for any home and/or family life to be directly

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610 ECtHR 2 December 2010, *EHRC* 2011/34 (*Atanasov v. Bulgaria*), para. 75.

611 See e.g. ECtHR 9 December 1994, no. 16798/90 (*López Ostra v. Spain*), paras. 7, 49 and 50; ECtHR 18 February 1998, nos. 116/1996/735/932 (*Guerra and Others v. Italy*), paras. 12 and 57; ECtHR 2 November 2006, no. 59909/00 (*Giacomelli v. Italy*), paras. 11 and 96; and ECtHR 27 January 2009, no. 67021/01 (*Tătar v. Romania*), paras. 89 and 97.

612 ECtHR 9 December 1994, no. 16798/90 (*López Ostra v. Spain*), paras. 7, 49 and 50. Discussed in *Atanasov*, para. 67. Also ECtHR 26 October 2006, nos. 53157/99, 53247/99, 53695/00 and 56850/00 (*Ledyayeva and Others v. Russia*), paras. 96-100.

613 In *Cordella and Others v. Italy*, nineteen applicants who did not live in the area in question were also held to have no cause of action. See ECtHR 24 January 2010, nos. 54414/13 and 54264/15 (*Cordella and others v. Italy*).

and immediately affected, because Milieudefensie et al.'s claims pertain to the period from 2030 onwards.

605. It thus follows that Milieudefensie et al. have also failed to demonstrate that there is a *direct and immediate link* between a specific case of environmental pollution and an actual interference with the home and/or family life. Consequently, Milieudefensie et al.'s claims do not meet the threshold for finding a violation of Article 8 of the ECHR.

606. Milieudefensie et al.'s claims are too general, undefined, and similar in nature to fall within the scope of Article 8 of the ECHR. After all, the claims cover the entire world and both current and future generations. Neither Article 2 nor Article 8 of the ECHR pertains to such situations.

The cases cited by Milieudefensie et al. do not support a different outcome

607. The judgments cited by Milieudefensie et al. in paras. 675-690 of the Summons provide no grounds for a different conclusion. The conclusions that Milieudefensie et al. would like to see drawn cannot be elicited from the judgments they cite.

608. The relevant points of these cases are not comparable to those of the case that Milieudefensie et al. have brought against RDS. For a start, these judgments concern a determinable distance between the applicant's home or family life and the source of the interference. There is also a "*direct and immediate link*" between specific environmental pollution and the actual interference with the home or family life. Furthermore, all these cases involve a situation in which the law was being contravened, i.e. legal standards were exceeded, or a party was acting without a permit. That is not the situation in the case of RDS. Finally, Milieudefensie et al. present the facts and conclusions in a one-sided manner.

609. In paras. 676 and 677 of the Summons, Milieudefensie et al. comment on the judgment in *Fadeyeva v. Russia*[614], concluding that the State has a further-reaching duty to protect if the applicant has no realistic possibility of evading the interference. However, Milieudefensie et al. conveniently fail to mention that Fadeyeva lived in a state-designated zone in which industrial pollution levels exceeded statutory safety standards and in which legislation prohibited housing due to the lack of safety.[615] It is thus not the case that the alleged violation of Article 8 ECHR was (simply) due to the fact that

614 ECtHR 9 June 2005, appl. no. 55723/00 (*Fadeyeva v. Russia*).
615 ECtHR 9 June 2005, no. 55723/00 (*Fadeyeva v. Russia*), para. 119.

Fadeyeva "*had no other choice but to suffer the pollution*", as Milieudefensie et al. assert (para. 676 Summons).[616]

610. Nor can the judgment in *Di Sarno v. Italy* be read to allow the conclusion that Milieudefensie et al. wish to find there. That case concerned the garbage crisis in Naples. The applicants lived and worked in the affected region and the crisis caused direct interference with their living and work environment:[617]

> *"Tons of waste were left to pile up for weeks in the streets of Naples and other towns in the province, including those where the applicants lives* […]*."*

611. It is therefore a mystery to RDS how this judgment could possibly contribute to the conclusion drawn by Milieudefensie et al., i.e. that a violation of Article 8 of the ECHR does not have to be sufficiently traceable to individuals.

612. The judgment in *Okyay v. Turkey*[618] cited by Milieudefensie et al. concerns a violation of Article 6 of the ECHR. Article 8 of the ECHR has no bearing whatsoever on that case. The finding cited by Milieudefensie et al. thus also pertains exclusively to Article 6 of the ECHR – and not to Article 8 of the ECHR. This citation does not mean, therefore, that a general risk for public health would also fall within the scope of Article 8 of the ECHR, as Milieudefensie et al. suggest. Superfluously, RDS also points out that the pollution in *Okyay v. Turkey* did have a determinable, delineated scope, as Milieudefensie et al. also indicate. The mere fact that the zone was large does not support Milieudefensie et al.'s position.

613. That case is, incidentally, also incomparable with the present case in all remaining aspects. It involved heating plants which were operating without a permit, failing to abide by legislation, and inflicting serious pollution on the environment. The highest administrative court ruled that the authorities had acted unlawfully by not closing down the plants.[619] The ECtHR ultimately concluded that Article 6(1) of the ECHR had been violated because the authorities had failed to comply with the administrative court's judgment stating that the plants had to be put out of operation.

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616 ECtHR 9 June 2005, no. 55723/00 (*Fadeyeva v. Russia*), para. 132-134.
617 ECtHR 10 April 2012, no. 30765/08 (*Di Sarno v. Italy*), para. 36.
618 ECtHR 12 July 2005, no. 36220/97 *(Okyay and Others v. Turkey)*.
619 ECtHR 12 July 2005, no. 36220/97 *(Okyay and Others v. Turkey)*, para. 17.

614. In addition, Milieudefensie et al. invoke the *Taşkin v. Turkey* judgment.[620] This case concerned the use of cyanide in operating a gold mine. Various environmental impact reports had shown, on the one hand, that the use of cyanide could immediately pose potential environmental risks to the applicants and, on the other hand, that these potential risks could "*persist*" for twenty to fifty years.[621] According to Milieudefensie et al., the fact that it would take decades for the imminent danger to manifest itself was not a reason for the ECtHR to deny the invocation of Article 8 of the ECHR (Summons, para. 683, first sentence). This means that Milieudefensie et al. are reading too much into the text of the judgment, since that conclusion cannot be drawn based on the judgment.

615. In the ECtHR proceedings, Turkey argued, on a number of grounds, that Article 8 ECHR, which had been invoked by the applicants, was not *at all* applicable.[622] Turkey argued to that end (1) that the potential risks of the use of cyanide had not yet actually materialised[623] and (2) that those risks were "*hypothetical*" since they might only materialise after twenty to fifty years.[624]

616. The ECtHR rejected Turkey's argument in its entirety and held that Article 8 was in fact applicable because:[625]

> *"[…] the dangerous effects of an activity to which the individuals concerned are likely to be exposed have been determined as part of an environmental impact assessment procedure in such a way as to establish a sufficiently close link with private and family life for the purposes of Article 8 of the Convention."*

617. However, it cannot be inferred – based on the fact that the ECtHR had thus also rejected the argument that the risk was "*hypothetical*" since it might only manifest itself in the distant future, at the earliest – that Article 8 applies even "*when it is not possible to be absolutely certain about the damage because it may not be suffered until the distant future (after decades)*", as Milieudefensie et al. assert (Summons, para. 681). This was not what the ECtHR decided, nor can it be read into the judgment. This is

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620 ECtHR 10 November 2004, no. 46117/99 *(Taşkin and Others v. Turkey)*.

621 Id., paras. 48 and 104. See also the quote taken from the judgment of the Turkish Supreme Administrative Court in para. 26, in which the Turkish administrative court summarises the findings of the reports: "*[In addition,] the risk of seepage of materials into the groundwater may last twenty to fifty years […]*".

622 See also the heading above para. 111 in ECtHR 10 November 2004, no. 46117/99 *(Taşkin and Others v. Turkey)*: "*Applicability of Article 8*". The ECtHR's findings cited by Milieudefensie et al. therefore merely pertain to the question of whether Article 8 ECHR applied in that specific case, and not to the obligations ensuing from Article 8 ECHR.

623 Id., paras. 108-109.

624 Id., para. 107.

625 Id., paras. 111-114.

also explained by the fact that the environmental impact reports explicitly referred to by the ECtHR also indicated that the use of cyanide had created certain risks immediately upon the start of that use. Contrary to what Milieudefensie et al. assume, based on the environmental impact reports, there were thus no risks involved that might only manifest themselves in the future. Against this factual backdrop, the ECtHR, when it rejected Turkey's argument, was not specifically required to address Turkey's assertion that the only risks involved were ones that might only manifest themselves in the distant future. For that same reason, the ECtHR was thus also not required to address the matter of the extent to which Article 8 would apply in such a situation.

618. Consequently, the judgment does not support Milieudefensie et al.'s view that the ECtHR deems Article 8 to be applicable even if no more than "*a generally acknowledged and foreseen health risk*" is involved (Summons, para. 681) or if the case involves a situation similar to the one at issue in these proceedings.

619. Finally, the *Deés v. Hungary* judgment[626] is also of no benefit to Milieudefensie et al. According to Milieudefensie et al., it follows from this judgment that "*merely demonstrating that attempts were made to reduce the problem*" is not enough, but that the measures should actually "*result in the protection of human rights*" (Summons, para. 684). This does not follow from *Deés v. Hungary*, however. The circumstances played a major role in that case. Of decisive importance was the fact that despite the measures taken by the authorities, the legal noise standards were (still) exceeded.[627] For that reason, there was a disproportionate individual burden on the applicant.

620. Barkhuysen and Van Emmerik commented similarly in their annotation of this judgment:[628]

> *"Although an expert report said that in this case, the nuisance was not serious enough to cause damage to the house, it was determined that the noise values were significantly in excess (between 12% and 15% in May 2003) of the legal standards. For this reason, the Court of Appeal concluded there was a violation of Article 8 of the ECHR. The fact that the State had taken a number of measures to reduce the nuisance (encouraging toll reduction, speed limits, a driving ban on the heaviest freight lorries, stoplights and the construction of three other roads) does not detract from*

626 ECtHR 9 November 2010, no. 12853/03 [*sic: 2345/06*] (*Deés v. Hungary*).
627 Id., para. 24.
628 Case note T. Barkhuysen and M.L. van Emmerik for ECtHR 9 November 2010, no. 12853/03 [*sic: 2345/06*], *AB* 2012, 16 (*Deés v. Hungary*), no. 2.

that. It is the result that counts, therefore, whereby whether or not national noise standards are satisfied is an important indicator (in this sense, see also ECtHR 16 November 2004, AB 2005/453, annotated by Barkhuysen (Moreno Gómez t. Spain))."

621. That is not at issue in the case of RDS. After all, there is no question of statutory standards being exceeded (see Section 2.7). It has not even been asserted, let alone demonstrated, by Milieudefensie et al. that that is the case.

7.6.5 Even if Articles 2 and 8 of the ECHR were able to affect the assessment of RDS's standards of care indirectly, that would still fail to provide a basis for allowing the claims; Milieudefensie et al. also ignore the fact that other compelling interests are served by Shell's activities

Introduction

622. Milieudefensie et al. are furthermore attempting to create the impression that Articles 2 and 8 of the ECHR apply indirectly by implying that those Articles derive their effect from the basic rule of torts (Article 6:162 of the Dutch Civil Code) and, in effect, apply in full to their claims (Summons, X.3).

623. This view is incorrect. In horizontal relationships, the tort law rules expressed in Article 6:162 of the Dutch Civil Code are, and remain, decisive. As set out above in Sections 7.2 and 7.3, those rules dictate that Milieudefensie et al.'s claims must be denied. This is not changed by the ECHR.

624. Fundamental rights derived from the ECHR can, at most, play an indirect role in private party relationships, i.e. by helping interpret the open standards of private law.[629] However, even if one were to assume that the interests at stake did fall within the ambit of Articles 2 and 8 of the ECHR – which they do not, as has already been explained – that indirect effect would require taking heed of the fact that the provisions being indirectly applied are addressed to States. In practical terms, the first consequence of this is that the human rights in question, rather than being decisive, are but one of the factors to be taken into account. Second, this implies that other interests – and fundamental rights – are also at stake. That policy latitude at

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629 Asser/Hartkamp 3-I 2015/225 (*Invloed EVRM op privaatrechtelijke verhoudingen*); K.J.O. Jansen, *Groene Serie Onrechtmatige daad*, Article 6:162 of the Dutch Civil Code, note 4.2.3.2 (*doorwerking van grondrechten in horizontale verhoudingen*) and Spier et al. (eds.), *Verbintenissen uit de wet en Schadevergoeding* 2015/34, Deventer: Kluwer 2015 (Van Maanen/Lindenbergh).

the State level, which was explained in Subsection 7.6.3, cannot be ignored when applying the same provisions indirectly in a private law context.

Indirect effect must take into account that the provisions are intended to bind States

625. Milieudefensie et al. overlook the fact that the potential – if any – indirect effect that the ECHR can have on horizontal relationships must account for the fundamental difference between, on the one hand, a State being held liable by an individual (in which case the ECRM applies) and, on the other, individuals holding each other liable (in which case the effect is, at best, indirect). The interpretation of the meaning of these rights in, and their influence on, private relationships should reflect the fact that the provisions were not drafted with private-party relationships in mind. The influence accorded to fundamental rights in the relationship between citizens and the authorities could bring about unacceptable consequences if applied to horizontal relationships. Articles 2 and 8 of the ECHR, like many other fundamental rights provisions, were written with the vertical relationship between citizens and the government in mind. Hartkamp explains the consequences for private-party relationships as follows:[630]

> *"This means that the provisions, taken as a whole, are usually not suitable for application to relationships between citizens among themselves, as this would have unacceptable consequences. For example, if the claimant were to invoke the right to privacy laid down in Art. 10 of the Constitution – a right that can only be restricted by rules laid down by or pursuant to an Act of Parliament – that right would always prevail over any conduct on the part of the defendant that such a rule fails to condone, even if the conduct is not in conflict with the rules of social propriety. [...] This would restrict, to an unacceptable degree, the general freedom of citizens to act as they see fit."*

The interests protected by human rights are, in effect, only one of many factors affecting the private-law analysis

626. Reliance on fundamental rights in horizontal relationships should be based on an approach that, in essence, allows the court to factor in the interests protected by human rights – if any – into its private-law analysis, e.g. when

630 Asser/Hartkamp 3-I 2018/227-228. See also, for example, R. Nehmelman and C.W. Noorlander, *Horizontale werking van grondrechten*, Deventer: Kluwer 2013, par. 5.3.3 *("Not the fundamental right (afforded under public law) as such but a compelling interest equivalent to a fundamental right afforded under public law is invoked in the civil law relationship. The proper terminology in that sense is the (compelling) interest of religion rather than the fundamental right to freedom of religion."*).

determining what is generally accepted according to unwritten law.[631] Nehmelman and Noorlander phrase it as follows:[632]

> *"The indirect effect of fundamental rights, too, is ultimately purely a matter of private law: interests are balanced, not fundamental rights."*

627. For example, the Supreme Court held as follows regarding a restriction of Article 10(1) of the ECHR precipitated by rental regulations:[633]

> *"In its decision regarding the matter of dispute referred to above, the District Court rightly balanced the mutual interests […]."*

628. It is generally accepted that human rights protections, when applied indirectly to protect an interest in a civil case, are but one of the factors to consider along with the other interests at stake – whether or not they, too, are protected by human rights. Emaus' dissertation explains that, as is usually the case in private law, this involves a balancing of all the relevant interests and circumstances of the case.[634]

629. A fundamental right is accorded a weight no different – or greater – in this balancing of interests just because it is a fundamental right. A fundamental right can serve as a source of inspiration for the interpretation of the competing interests in a civil dispute. This is particularly true when conflicting fundamental rights are involved:[635]

> *"The answer to the question which of these two rights has more weight in the present case must be found by balancing all of the relevant circumstances of the case. As the Supreme Court held in para. 5.11 of the* Parool *judgment (Supreme Court 6 January 1995,* NJ *1995, 422), this balancing does not, in principle, grant priority to*

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631 Asser/Hartkamp 3-I 2018/230 (*Nederlandse rechtspraak: indirecte horizontale werking*). See also R. Nehmelman and C.W. Noorlander, *Horizontale werking van grondrechten*, Deventer: Kluwer 2013, par. 310 and Smits, *Constitutionalisering van het vermogensrecht,* Preadvies voor de Nederlandse Vereniging voor Rechtsvergelijking 2003.

632 R. Nehmelman and C.W. Noorlander, *Horizontale werking van grondrechten*, Deventer: Kluwer 2013, par. 5.3.3.

633 Supreme Court 11 March 1989, ECLI:NL:HR:1989:AB8560 (*Prins e.a./St. Jospeph*), para. 3.1. Lower-court case law in the same vein: District Court of The Hague 15 January 2016, ECLI:NL:RBDHA:2016:330, para. 4.6.

634 J. *Emaus, Handhaving van EVRM-rechten via het aansprakelijkheidsrecht* (diss. Utrecht), Amsterdam: Boom juridische uitgevers 2013, p. 22.

635 Supreme Court 11 May 2012, ECLI:NL:HR:2012:BV1031 (*Vereniging tegen de kwakzalverij/Sickesz*), para. 10. In the same vein: Supreme Court 24 June 1983, ECLI:NL:HR:1983:AD2221 (*Immuniteit raadslid*), para. 3.4. Lower courts, too, engage in this balancing of interests: Emaus 2013, p. 25. Examples: Amsterdam District Court 8 February 1990, ECLI:NL:RBAMS:1990:AH3007, para. 7; Assen District Court 22 February 2000, ECLI:NL:RBARN:2005:AS8145, para. 5; Utrecht District Court 22 September 2005, ECLI:NL:RBUTR:2005:AU7471, para. 3.6; Amsterdam Court of Appeal 10 August 2006, ECLI:NL:GHAMS:2006:AZ3980, para. 4.5; Alkmaar District Court 25 June 2009, ECLI:NL:RBALK:2009:BI9969, para. 4.6; Dordrecht District Court 18 February 2010, ECLI:NL:RBDOR:2010:BL4339, para. 4.3.

> *the right to freedom of speech enshrined in Article 7 of the Constitution and Article 10 of the ECHR. The same goes for the rights protected by Article 8 of the ECHR."*

630. Brunner concludes as follows in his case note for Supreme Court 18 June 1993, (*Aidstest*):[636]

> *"Apparently, in principle, it matters not in the weighing of interests whether a fundamental right is balanced against another fundamental right or a fundamental right is balanced against a different type of ('ordinary') right or interest. In the relationship between private persons, the fundamental right – at least in the present case – does not inherently outweigh the other interests. In other words, in terms of horizontal effect, there is no fundamental distinction between fundamental rights and ordinary rights."*

631. Similarly, Nehmelman and Noorlander state:[637]

> "*Moreover, reliance on such an interest does not always mean that the relying party always has the advantage. Considering that it is an interest, an opposing interest – even if the latter is not derived from a fundamental right – can have the same weight as, or even outweigh, the interest derived from a fundamental right. A relevant example in this regard is the* Turkse werkneemster *judgment, in which the Supreme Court subtly balanced the competing interests of freedom of religion and the arrangements stipulated by the employment contract."*

632. Accordingly, the meaning of fundamental rights in private-law, horizontal relationships differs from that in the vertical relationship between citizens and the State. Consequently, they are subject to balancing against other fundamental rights, against principles not originating from fundamental rights, and against other any other concrete values and interests that might come up in court.[638]

633. Earlier in Chapter 7, it was explained that the private law analysis by which the interests invoked by Milieudefensie et al. are taken into account, must inevitably result in denial of their claims. Articles 2 and 8 of the ECHR do nothing to change this. In its deliberations, the court must consider all the circumstances detailed above, including the interests served by Shell's activities and the societal context thereof, and the margin of appreciation granted to states to weigh the various, competing interests when – as in the

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636 Brunner in his case note for Supreme Court 18 June 1993, ECLI:NL:HR:1993:ZC1002, *NJ* 1994, 347 (*Aidstest*), no. 1.
637 Nehmelman and Noorlander, 5.3.3.
638 L.F.M. Verhey, *Horizontale werking van grondrechten*, in particular the right to privacy (diss. 1992), p. 24.

current case – determining the manner in and the pace at which the energy transition will take place in the respective state.

7.6.6 The precautionary principle does not provide a basis for awarding Milieudefensie et al.'s claims either

634. Milieudefensie et al. refer to the precautionary principle a number of times, thus implying that RDS should automatically incur all kinds of obligations ensuing from it.[639] Milieudefensie et al. have, however, failed to substantiate or provide reasons why, in their opinion, far-reaching obligations for RDS should ensue from the precautionary principle. Their argument should be dismissed for that reason alone.

635. Their reliance on this point is also doomed to fail. Milieudefensie et al. wrongly claim that RDS must observe the precautionary principle in the context of Articles 2 and 8 of the ECHR (Summons, para. 674). For reasons that have already been discussed, there is no leeway to bestow horizontal effect on fundamental rights. Consequently, RDS is not bound to observe the precautionary principle as a component of Article 8 of the ECHR. Milieudefensie et al. therefore wrongly assert that the precautionary principle must serve as a guide for RDS (Summons, para. 674).

636. In a broader context, as well, the precautionary principle applies only to States.[640] States have a large degree of discretion in applying the precautionary principle. They can weigh the various interests to decide whether and if so, how, they should be allowed to affect a particular situation. The cost effectiveness of the measures is important in this regard; aspects other than the environment, e.g. the economy, can also play a role. The "Rio Declaration on Environment and Development" of 1992 was one of the first times that the precautionary principle was laid down internationally.[641] The Rio Declaration was signed by 170 countries and comprises 27 Principles that (seek to) achieve a balance between nature conservation and economic development.[642]

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639 See Summons, par. 665, 673, 674 and 684.

640 For example, see A. Trouwborst, *Precautionary Rights and Duties of States*, Leiden 2006 and Barkhuysen and Onrust, *De betekenis van het voorzorgsbeginsel voor de Nederlandse (milieurecht)praktijk*, 2010, p. 51. See also M. Haritz, *An Inconvenient Deliberation: The Precautionary Principle's Contribution to the Uncertainties Surrounding Climate Change Liability*, Kluwer 2011, p. 93-95.

641 Milieudefensie et al. also mention the Rio Declaration in this context in footnote 199, para. 295 of the Summons.

642 Sands and Peel, *Principles of International Environmental Law*, Cambridge University Press 2018, p. 41 *("The Rio Declaration represented a series of compromises between developed and developing countries and a balance between the objectives of environmental protection and economic development.").*

> ***"PRINCIPLE 15***
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> *In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."* [emphasis added by attorneys]

637. Another important source in which the precautionary principle is laid down for States is Article 3.3 of the UNFCCC.[643] It emerges from this convention, as well, that States must weigh the various interests and that socio-economic interests and the cost-effectiveness of proposed measures also play a role.

> *"The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties."* [emphasis added by attorneys]

638. This was commented upon in the run-up to Article 3.3 of the UNFCCC:[644]

> 6. The need to take, in the light of the best available scientific knowledge on climate change, realistic and feasible measures which are beneficial to the environment without prejudicing opportunities for economic development, and stressing that measures which are likely to have negative impacts upon or to cause damage to economic and other social activities of mankind should of necessity be taken on a sound and scientific basis.

639. Milieudefensie et al. therefore wrongly make it seem as if the precautionary principle entails an obligation for States to act – *always*[645] and regardless of whether any other interests are involved and whether the measures are indeed effective. They then go on to infer – wrongly – that it follows from this that a highly specific obligation should be imposed on a specific party

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643 United Nations Framework Convention on Climate Change. Milieudefensie et al. mention this article in paras. 374-375.

644 II.C.6., Explanatory note. Submitted by the Bureau of Working Group I, Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, Third session, Nairobi, 9-20 September 1991.

645 See also the communication from the Commission on the precautionary principle, Brussels, 2.2.2000, COM(2000) 1 final, p. 15, "*The decision to do nothing may be a response in its own right.*"

(which, as has already been explained at length, does not do justice to the systematic nature of the energy system and the choices to be made in terms of energy and climate policies). The precautionary principle entails no hard and fast rules:[646]

> *"But in determining whether and how far to apply 'precautionary measures', states have evidently taken account of their own capabilities, their economic and social priorities, the cost-effectiveness of preventive measures, and the nature and degree of the environmental risk."*[647]

640. Based on the precautionary principle, therefore, States at most have an obligation to take effective and proportionate measures.[648]

641. RDS would firstly like to contest Milieudefensie et al.'s assertion that the precautionary principle applies to it. And the following: As explained above, RDS plays an important role in the energy transition, without being under any obligation to do so. In Section 2.3, RDS provided several detailed examples of what it is doing to help society make the transition to a lower-carbon energy system. In implementing these measures, RDS is taking proportionate and effective action (as required by the precautionary principle, which, however, only applies to States). In view of the current state of society – i.e. the transition to a lower-carbon energy system is only just gaining momentum and is far from complete and there is no certainty as to how and within which timeframe said transition will take place (see Sections 2.6, 2.7 and 6.4) – it would be both disproportionate and discriminatory to require RDS to comply with Milieudefensie et al.'s claims. It would, in that case, be the only member of society required to take such extensive measures, in spite of the fact that Shell's activities are necessary to the functioning of global society (see Section 2.2). Moreover, the measures would not be effective: Shell's competitors would fill the gap and take over the activities that RDS can no longer perform (see Subsection 2.2.4). The precautionary principle thus also fails to provide grounds for RDS to be required to comply with Milieudefensie et al.'s far-reaching claims.

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646 Beanal v. Freeport-McMoran, 969 F Supp 362 at 384 (US District Court for Eastern District of Louisiana, 9 April 1997, "the principle does not constitute international tort for which there is universal consensus in the international community as to binding status and content (upheld by the US Court of Appeals for the Fifth Circuit, 29 November 1999, 197 F 3d 161).

647 Birnie & Boyle, *International Law and the Environment*, Oxford University Press 2009, p. 163.

648 See also the communication from the Commission on the precautionary principle, Brussels, 2.2.2000, COM(2000) 1 final, p. 22, "*A decision to invoke the precautionary principle does not mean that the measures will be adopted on an arbitrary or discriminatory basis.*"

642. Moreover, Milieudefensie et al. have substantively misinterpreted the meaning of the precautionary principle. They claim that the precautionary principle entails that measures should also be taken in the absence of scientific certainty as to the effectiveness of such measures (Summons, para. 665). In that regard, Milieudefensie et al. refer to paragraphs 63 and 73 of the judgment in the *Urgenda* case (see also Subsection 6.2.3 (end) on that judgment). By doing so, Milieudefensie et al. wrongly view the precautionary principle in light of the uncertainty of the effectiveness of the measures to be taken. The precautionary principle does, however, apply to the absence of certainty about whether environmental damage will actually occur, in light of the scientific and technical knowledge at a given point in time. Trouwborst gives the following generally accepted definition of the precautionary principle:[649]

> *"When, on the basis of the best information available, there are reasonable grounds for the fear that serious and/or irreversible environmental damage will occur, effective and proportionate action should be taken to prevent and/or counter the damage, including in situations of scientific uncertainty regarding the cause, extent and likelihood of the possible damage."* [emphasis added by attorneys]

643. See also the European Commission's explanation about the precautionary principle, which says that the precautionary principle applies in the event of "*a potential risk, even if this risk cannot be fully demonstrated or quantified or its effects determined because of the insufficiency or in[con]clusive nature of the scientific data*."[650] An obligation to take every conceivable measure – including those that are of limited usefulness, disproportionately onerous or discriminatory in nature – would clearly be counterintuitive,[651] if only for the fact that those measures must be cost effective, as pointed out above.

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649 A. Trouwborst, *Precautionary Rights and Duties of States*, Leiden 2006, pp. 354-355. Also Barkhuysen and Van Emmerik, in their annotation to *Tatar/Romania*, *AB* 2009, 285, para. 2. See also M. Haritz, *An Inconvenient Deliberation: The Precautionary Principle's Contribution to the Uncertainties Surrounding Climate Change Liability*, Kluwer 2011, p. 93-95.

650 See also the communication from the Commission on the precautionary principle, Brussels, 2.2.2000, COM(2000) 1 final, p.

651 Ladeur, The introduction of the precautionary principle into EU law: a pyrrhic victory for environmental and public health law? Decision-making under conditions of complexity in multi-level political systems, *Common Market Law Review*, 2003, p. 1472, *"Risks (below the level of the traditional danger to specific goods) can only be combated in a meaningful way if a comprehensive strategy which imposes certain priorities, cost-benefit relationships and other comparative approaches is chosen. It is not helpful, for example, to combat a risk related to a certain substance at a high cost and then be constrained to acknowledge that there are no more resources left for much more pressing problems."*

7.6.7 Reliance on the UN Guiding Principles on business and human rights, the UN Global Compact and the OECD Guidelines for Multinational Enterprises does not support Milieudefensie et al.'s claims either

Introduction

644. In X.5-X.8 of the Summons, Milieudefensie et al. discuss the UN Guiding Principles on business and human rights ("**UN Guiding Principles**"), the United Nations Global Compact ("**UN Global Compact**") and the OECD Guidelines for Multinational Enterprises ("**OECD Guidelines**"). The guidelines cited by Milieudefensie et al. do not corroborate their claims.

645. First of all, none of these guidelines are legally binding. Therefore, they cannot be invoked by third parties in liability proceedings.

646. Second, Milieudefensie et al. do not pinpoint any specific norm from these guidelines that RDS has allegedly failed to observe.

647. Third, and regardless of the foregoing, violations of the UN Guiding Principles – which have not been asserted – cannot lead to Milieudefensie et al.'s claims being awarded. The UN Guiding Principles change nothing about the outcome of the balancing of interests, which was discussed in Sections 6.1 and 7.3 and which must result in the rejection of Milieudefensie et al.'s claims. The interests expressed by the Principles, or the other guidelines, are already part of the aforementioned balancing of interests.

648. Section 2.3 above explained in detail that RDS is performing all sorts of activities to make a positive contribution to the energy transition, without being under any obligation to do so. RDS is acting in accordance with the UN Guiding Principles, the UN Global Compact and the OECD Guidelines. RDS aims to play a key role in the energy transition and is contributing in various ways to making the transition to a lower-carbon energy system. RDS's activities are legal and serve important purposes. Energy plays a major role in people's daily lives, inter alia by helping create and sustain economic prosperity and stability (see Section 2.2). Under these circumstances, RDS cannot be said to be acting in conflict with the aforementioned Guidelines. None of the sources mentioned by Milieudefensie et al. require RDS to step up its efforts. The guidelines mentioned by Milieudefensie et al. do not substantively alter the outcome of this balancing of interests. For the sake of brevity, RDS refers to its comments above.

The UN Guiding Principles, the UN Global Compact and the OECD Guidelines are not legally binding

649. The sources cited by Milieudefensie et al. are international frameworks that include non-binding guidelines aimed at businesses.[652] The guidelines are intended to provide governments and businesses with some guidance in how to deal with important societal issues. In that context, RDS respects these guidelines as well. However, these guidelines are generally considered to be "soft law" and thus incapable of being invoked (directly) by third parties (such as Milieudefensie et al.), least of all in court proceedings.[653] These guidelines therefore cannot serve as a source of liability in general or for holding RDS liable in these proceedings:[654]

> *"many companies have started to regulate their own behaviour by means of rules of conduct to which they consider themselves bound (...). In addition, international organisations, often in consultation with state authorities, companies, and human rights organisations, have developed guidelines for responsible business conduct. (...)*
>
> *Companies are bound by neither self-regulation nor soft law. This means that a victim cannot invoke a breach thereof in liability proceedings."*

And:[655]

> *"These rules are often called soft law because if a company does not comply with its responsibilities, a State cannot fine the company, and a victim suing the company cannot directly invoke these responsibilities in a court of law."*

650. Many of these guidelines expressly state that they are incapable of creating obligations. This is also true of the UN Guiding Principles, the UN Global Compact, and the OECD Guidelines. The fact that such soft law is not

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652 C.J.M. Arts and M.W. Scheltema, 'Territorialiteit te boven – Klimaatverandering en mensenrechten', in: *De grenzen voorbij – De actualiteit van territorialiteit en jurisdictie. Preadviezen* (Handelingen Nederlandse Juristen-Vereniging, 2019), Deventer: Wolters Kluwer 2019, p. 90.

653 L. Enneking et al., *Zorgplichten van Nederlandse ondernemingen inzake internationaal maatschappelijk verantwoord ondernemen. Een rechtsvergelijkend en empirisch onderzoek naar de stand van het Nederlandse recht in het licht van de UN Guiding Principles,* Deventer: Boom Juridisch 2016, p. 26; A.L. Vytopil, *Contractual Control in the Supply Chain. On Corporate Social Responsibility, Codes of Conduct, Contracts and (Avoiding) Liability* (diss. Utrecht), The Hague: Eleven 2015, pp. 72-73. See also M.J. van der Heijden, *Transnational Corporations and Human Rights Liabilities. Linking Standards of International Public Law to Dutch Civil Litigation Proceedings* (diss. Tilburg), Cambridge: Intersentia 2011, p. 195; A. Beckers, *Enforcing Corporate Social Responsibility Codes. On Global Self-Regulation and National Private Law,* Oxford: Hart Publishing 2015, p. 143.

654 C. van Dam, *Onderneming en mensenrechten – Zorgvuldigheidsnormen voor ondernemingen ter voorkoming van betrokkenheid bij schending van mensenrechten*, The Hague: Boom Juridisch 2008, p. 42 (selections and additions in square brackets – att.).

655 C. van Dam, *Enhancing Human Rights Protection. A Company Lawyer's Business* (Rotterdam inaugural lecture), Rotterdam: RSM 2015, p. 10. Van Dam refers here to the UNGP.

intended to create obligations is also evident from the wording of the *principles* stated in the guidelines. Rather than dictate firm and enforceable norms, they are more akin to corporate letters of intent to handle certain topics of social relevance, e.g. human rights, with due care. If the courts were then to intervene, turning those intentions into enforceable norm, companies would consequently be less open to such initiatives.

UN Guiding Principles

651. The preamble to the UN Guiding Principles states that these principles do not create new international law obligations:[656]

> *"Nothing in these Guiding Principles should be read as creating new international law obligations."*

652. The UN Guiding Principles are an elaboration of the UN "Protect, Respect and Remedy Framework" (the "**UN Framework**"), as Milieudefensie et al. also rightly note (Summons, para. 694). The UN Framework and the UN Guiding Principles were drawn up under the leadership of John Ruggie. RDS would like to note that the UN Guiding Principles do not discuss the environment in connection with respect to human rights – in fact, the environment is not mentioned at all and is not part of the Principles.

653. The UN Framework and the UN Guiding Principles rest on three pillars: the State duty to protect against human rights violations by third parties; the corporate responsibility to respect human rights; and the need for greater access to effective remedy.[657]

> *"**GENERAL PRINCIPLES***
> *These Guiding Principles are grounded in recognition of:*
>
> *(a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;*
>
> *(b)The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;*
>
> *(c) The need for rights and obligations to be matched to appropriate and effective remedies when breached."*

654. Based on the first pillar, States have primary responsibility to safeguard human rights: "*states have the primary role in preventing and addressing*

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656 United Nations Guiding Principles on Business and Human Rights, p. 1.
657 General Principles at (a), (b) and (c) of the UN Guiding Principles.

corporate-related human rights abuses."[658] And also: "*States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime*."[659]

655. Unlike State responsibility, corporate responsibility (the second pillar) only requires that business enterprises 'respect human rights'. The term 'respect' was a deliberate choice here, as it does not incur an international law obligation. As Ruggie puts it:[660]

> *"The corporate responsibility to respect human rights means acting with due diligence to avoid infringing on the rights of others, and addressing harms that do occur. The term 'responsibility' rather than 'duty' is meant to indicate that respecting rights is not currently an obligation that international human rights law generally imposes directly on companies, although elements of it may be reflected in domestic laws. It is a global standard of expected conduct acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and now affirmed by the Human Rights Council itself."*

656. In paras. 703-705 of the Summons, Milieudefensie et al. (once again) claim that RDS' anticipation of the expected lack of regulation will cause global warming to exceed 2°C. According to Milieudefensie et al., RDS's business model anticipates "*the failure of the international community to sufficiently regulate fossil fuels*" (Summons, para. 703). It is unclear to RDS why Milieudefensie et al. would make this argument in their discussion of the UN Guiding Principles. More importantly, Milieudefensie et al. also fail to indicate how anticipation of plausible future scenarios could result in RDS breaching a duty of care. RDS has already explained, inter alia in Section 6.4, why, as a commercial enterprise, RDS must have and maintain the freedom to respond to uncertain future developments by taking different scenarios into account. In paras. 706-707 of the Summons, Milieudefensie et al. reiterate that RDS – briefly put – is hampering the energy transition. RDS has already explained at length that this is incorrect, given that RDS is in fact playing an active role in the energy transition.

657. Milieudefensie et al. furthermore mention in para. 708 that States indicated in the Paris Agreement that they welcomed the efforts of private parties

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658 J. G. Ruggie, 'The UN "Protect, Respect and Remedy" Framework for Business and Human Rights', 2010, www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf.

659 Commentary to Article 4 of the UN Guiding Principles, p. 7.

660 Ruggie 2010; Report of the Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises (7 April 2008), *Protect, Respect and Remedy: a Framework for Business and Human Rights*, *UN Doc* A/HRC/8/5, paras. 56-59.

(Summons, para. 708). This does not support Milieudefensie et al.'s claims either. As stated, the Paris Agreement is only binding on States and not on private parties such as RDS. Moreover, the excerpt quoted by Milieudefensie et al. clearly shows that there is no question whatsoever of a private party obligation:

> *"134. Welcomes the efforts of all non-Party stakeholders to address and respond to climate change, including those of civil society, the private sector, financial institutions, cities and other subnational authorities;*
>
> *135. Invites the non-Party stakeholders referred to in paragraph 134 above to scale up their efforts and support actions to reduce emissions […]"* [emphasis added by attorneys]

UN Global Compact

658. The UN Global Compact, too, clearly does not give rise to any legally binding standards. An initiative of the UN Secretary-General, the UN Global Compact falls under the mandate of the UN General Assembly. This mandate reads as follows:[661]

> *"Recognizing the vital role that the United Nations Global Compact Office continues to play with regard to strengthening the capacity of the United Nations to partner strategically with the private sector, in accordance with its mandate from the General Assembly, to advance United Nations values and responsible business practices within the United Nations system and among the global business community, and in this regard noting the principles and initiatives of the United Nations Global Compact."* [emphasis added by attorneys]

659. The mandate is therefore to facilitate partnership between the UN and the private sector in order to advance UN values. The UN Global Compact thus sprang from the need to promote collaboration between the UN and relevant partners in the private sector.[662] The General Assembly further explained such partnerships in several Resolutions:

> *"[The General Assembly] stresses that partnerships are voluntary and collaborative relationships between various parties, both public and non-public, in which all participants agree to work together to achieve a common purpose or undertake a specific task and, as*

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661 Resolution 73/254 of the United Nations General Assembly (20 December 2018), *Towards global partnerships: a principle-based approach to enhanced cooperation between the United Nations and all relevant partners*, *UN Doc* A/RES/73/254. Cf. United Nations Global Compact, *Government Recognition*, www.unglobalcompact.org/about/government-recognition.

662 Resolution 55/215 of the United Nations General Assembly (21 December 2000), *Towards global partnerships*, *UN Doc* A/RES/55/215.

> *mutually agreed, to share risks and responsibilities, resources and benefits;*
>
> *Further stresses that partnerships should be consistent with national laws and national development strategies and plans, as well as the priorities of countries where they are implemented, bearing in mind the relevant guidance provided by Governments;*
>
> *Stresses that the principles and approaches that govern such partnerships and arrangements should be built on the firm foundation of United Nations purposes and principles, as set out in the Charter, and invites the United Nations system to continue to adhere to a common approach to partnership which, without imposing undue rigidity in partnership agreements;*[663]
>
> *Stresses the importance of the contribution of voluntary partnerships to the achievement of the internationally agreed development goals, […] while reiterating that they are a complement to but not intended to substitute for the commitments made by Governments with a view to achieving these goals."*[664]

660. This quote shows that collaboration is voluntary and not legally binding, and no rights can be derived from it. Nor is it the intention that such partnerships should assume government obligations pertaining to these (international) goals.

661. Contrary to what Milieudefensie et al. would have us believe in para. 716 of the Summons, the Foundation for the Global Compact is a foundation (under the laws of the State of New York) that is separate and distinct from the UN and the Global Compact Office.[665] The relationship between the UN and the Foundation is regulated in a Memorandum of Understanding which states that the Foundation is authorised to collect funds to support the UN Global Compact. The Foundation has no influence on the contents of the UN Global Compact.

The OECD Guidelines

662. The OECD Guidelines are an annex to the *OECD Declaration on International Investment and Multinational Enterprises*, which was initially drafted by the OECD Council and Member States (including the Netherlands) in 1976. The document was described as: "*A general framework of understanding or common approach as to how to assess the*

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663 Resolution 56/76 of the United Nations General Assembly (11 December 2001), *Towards global partnerships*, *UN Doc* A/RES/56/76. Similarly, Resolution 58/129 of the United Nations General Assembly (19 December 2003), *Towards global partnerships*, *UN Doc* A/RES/58/129.

664 Resolution 58/129 of the United Nations General Assembly (19 December 2003), *Towards global partnerships*, *UN Doc* A/RES/58/129.

665 Foundation for the Global Compact, *Relationship with the United Nations*, http://globalcompactfoundation.org/about.php.

problems and develop possible solutions, as well as international reference material."[666] This has been elaborated in the present OECD Guidelines as follows:[667]

> *"The OECD Guidelines for Multinational Enterprises (the Guidelines) are recommendations addressed by governments to multinational enterprises. […] The Guidelines provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards. However, the countries adhering to the Guidelines make a binding commitment to implement them in accordance with the Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises.*
>
> *[The Guidelines] provide principles and standards of good practice consistent with applicable laws and internationally recognised standards. Observance of the Guidelines by enterprises is voluntary and not legally enforceable. Nevertheless, some matters covered by the Guidelines may also be regulated by national law or international commitments.*
>
> *Obeying domestic laws is the first obligation of enterprises. The Guidelines are not a substitute for nor should they be considered to override domestic law and regulation. While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements."* [emphasis added by attorneys]

663. The OECD Guidelines are intergovernmental instruments by which Member States have agreed to a best-efforts obligation. In so far as business enterprises have committed themselves to the OECD Guidelines, the Guidelines themselves expressly state that observance thereof by enterprises is voluntary and not legally enforceable. The OECD Guidelines are unambiguous: these Guidelines are not binding on RDS.

666 The 1976 OECD Guidelines for Multinational Enterprises.
667 The 2011 OECD Guidelines for Multinational Enterprises.

8 OBLIGATION TO PROVIDE PROOF AND OFFER OF PROOF

664. RDS has the proof to corroborate its defence, which is submitted as exhibits with this Statement. An overview of these exhibits has been included at the end of this Statement. As noted in footnote 2, a distinction is made between those exhibits RDS considers most relevant to its defence (designated as RK-01 through RK-30) and other exhibits (designated as RO-01 through RO-250), for the sole purpose of facilitating the review thereof by the Court.

665. The foregoing must not be construed to mean that RDS has assumed a burden of proof that it is not legally required to bear.

666. RDS is of the opinion that the burden of proof in the current proceedings must be borne by Milieudefensie et al. The evidence furnished by RDS is thus decidedly submitted in rebuttal.

667. If and inasmuch as the District Court believes that the burden of proof for any assertion must be borne by RDS, RDS will furnish (additional) proof of such assertion by all legal means, in particular by the hearing of witnesses and by the submission of reports (to be) drawn up by relevant experts. This applies especially to:

(a) the assertion that the submitted claims ignore the complexity of the energy system and undermine the current and future policy-making of the Dutch government and foreign States (Sections 2.2, 2.7 and 6.2); and

(b) the lack of effectiveness of the claims, in particular the arguments put forward to that end in Subsection 2.2.4.

ON THESE GROUNDS, RDS MOVES AS FOLLOWS:

that the District Court, by immediately enforceable judgment in so far as legally possible:

(a) deny Milieudefensie et al. a cause of action for their claims or, at any rate, deny those claims;

(b) order Milieudefensie et al. to pay the costs of the proceedings as well as the usual subsequent costs (both with and without service), plus the statutory interest referred to in Article 6:119 of the Dutch Civil Code as from fourteen days after the date of the judgment.

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9 LIST OF DEFINITIONS

Definition	Description
AR5	Fifth Assessment Report AR5 of September 2013 and October 2014
CCS	Carbon Capture and Storage
CCUS	Carbon Capture Utilization and Storage
Summons	Milieudefensie et al.'s Summons
ECtHR	European Court of Human Rights
EPA	Environmental Protection Agency
ETC	Energy Transitions Commission
ETS	European Emissions Trading Scheme
ECHR	European Convention on Human Rights
GHG Protocol	World Resources Institute Greenhouse Gas Protocol
GWPs	Global Warming Potentials
IEA	International Energy Agency
IPCC	Intergovernmental Panel on Climate Change
Kyoto Protocol	Kyoto Protocol
Milieudefensie et al.	The claimants in these proceedings, to wit, seven non-governmental organisations and 17,379 individual co-claimants
NCF	Net Carbon Footprint
NDCs	National Determined Contributions
NGOs	The seven non-governmental organisations mentioned as co-claimants 1-7 in the Summons

OECD Guidelines	OECD Guidelines for Multinational Enterprises
Paris Agreement	Agreement concluded at the 2015 United Nations Climate Change Conference
RDS	Royal Dutch Shell plc
SDGs	United Nations Sustainable Development Goals
SIR	Shell International Renewables
SR15	IPCC Special Report on Global Warming of 1.5°C SR15 of October 2018
SRCCL	Special Report on Climate Change and Land of August 2019
SROCCC	Special Report on the Ocean and Cryosphere in a Changing Climate of September 2019
TCFD	Task Force on Climate-related Financial Disclosures
UN Framework	Protect, Respect and Remedy Framework
UN Global Compact	United Nations Global Compact
UN Guiding Principles	UN Guiding Principles on business and human rights
UNEP	United Nations Environmental Programme
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
WCC	World Climate Conference
WRI	World Resources Institute

10 LIST OF EXHIBITS

	Exhibits
Exhibit RK-1	Paris Agreement (NL), 2015
Exhibit RK-2	Shell, Sky Report 2018
Exhibit RK-3	UN, Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 1992
Exhibit RK-4	IEA, World Energy Outlook 2018
Exhibit RK-5	OECD, Energy Report 2011
Exhibit RK-6	IEA, Perspectives for the Energy Transition 2017
Exhibit RK-7	Shell, Energy Transition Report 2018
Exhibit RK-8	Shell, Sky Report (Overview), 2018
Exhibit RK-9	Energy Transitions Commission, Mission Possible, 2018
Exhibit RK-10	IEA, Energy Technology Perspectives Report 2017
Exhibit RK-11	Shell, Mountains and Oceans Report, 2013
Exhibit RK-12	World Bank, Special Focus Report 2015
Exhibit RK-13	BP, Statistics Oil Production - Barrels (1989-1998)
Exhibit RK-14	BP, Statistical Review of World Energy, 2019
Exhibit RK-15	Greenhouse Gas Protocol, A Corporate Accounting and Reporting Standard 2015
Exhibit RK-16	Shell, Sustainability Report 2018
Exhibit RK-17	Shell, CDP Report 2019
Exhibit RK-18	Greenhouse Gas Protocol, Protocol Scope 2 Guidance 2015

Exhibit RK-19	Greenhouse Gas Protocol, Corporate Value Chain (Scope 3) Accounting and Reporting Standard 2011
Exhibit RK-20	RDS, Speeches Annual General Meeting 2019
Exhibit RK-21	Herkstroter, Reflections on Kyoto, 2 February 1998
Exhibit RK-22	STTC Annual Report 1997
Exhibit RK-23	Shell, The Three Cornered Challenge, 1992
Exhibit RK-24	Kyoto Protocol 1998
Exhibit RK-25	IEA, Outlook for Producer Economies 2018
Exhibit RK-26	UN, Sustainable Development Goals: Goal 13
Exhibit RK-27	UN, Sustainable Development Goals: Goal 7
Exhibit RK-28	IPCC, 2006 Guidelines for National Greenhouse Gas Inventories, Chapter 8: Reporting Guidance and Tables
Exhibit RK-29	IPCC, 2019 Refinement to the 2006 IPCC Guidelines
Exhibit RK-30	IPCC, 2006 Guidelines for National Greenhouse Gas Inventories, Chapter 1: Introduction
Exhibit RO-1	UNEP, The Emissions Gap Report 2014
Exhibit RO-2	IEA, Global energy demand rose by 2.3% in 2018, its fastest pace in the last decade, 26 March 2019
Exhibit RO-3	UN, World Population Prospects 2017 Revision
Exhibit RO-4	UN, Development Index (1990-2017)
Exhibit RO-5	UN, Energy - Sustainable Development Goals
Exhibit RO-6	Sorrell, Reducing energy demand: A review of issues, challenges and approaches, July 2015
Exhibit RO-7	EY, Why the environment is a consumer priority, but affordability is paramount, 15 July 2019

Exhibit RO-8	BBC, Smart power: Fresh winds are blowing, 27 February 2018
Exhibit RO-9	Mulder, Journal of Renewable and Sustainable Energy, 2014
Exhibit RO-10	Phys.org, Renewable energy sources can take up to 1000 times more space than fossil fuels, 28 August 2018
Exhibit RO-11	Energy Today, Barriers to Renewable Energy Technologies Development, 25 January 2018
Exhibit RO-12	Heinberg et al., Chapter 5 Other Uses of Fossil Fuels: The substitution Challenge Continues
Exhibit RO-13	Davis et al., Net-zero emissions energy systems, 29 June 2018
Exhibit RO-14	International Association of Oil & Gas Producers, Oil in Everyday Life
Exhibit RO-15	U.S. Energy Information Administration - FAQ (website page 29 August 2019)
Exhibit RO-16	Cicero, Shell in a low carbon world, 28 March 2018
Exhibit RO-17	Carbonbrief.org, In-depth: Is Shell's new climate scenario as 'radical' as it says?, 29 March 2018
Exhibit RO-18	Vox, Shell's vision of zero carbon world by 2017, explained, 30 March 2018
Exhibit RO-19	Nature Energy, A low energy demand scenario for meeting the 1.5°C target and sustainable development goals without negative emission technologies, June 2018
Exhibit RO-20	Deutsche Welle, Asia faces contradictions in dealing with climate change, 15 December 2018
Exhibit RO-21	Natural Resources Governance Institute, The National Oil Company Database, April 2019
Exhibit RO-22	Kennisbank, Focus: energie in beweging, 2018

Exhibit RO-23	INEOS, INEOS completes the acquisition of the entire Oil & Gas Business from DONG Energy A/S, 28 September 2017
Exhibit RO-24	Bloomberg, Coups, sanctions, tainted pipelines...and oil just keeps falling, 4 May 2019
Exhibit RO-25	Zacks Investment Research, Oil Hits $70 Barrel After Three Weeks: 5 Top-Ranked Picks, 31 July 2018
Exhibit RO-26	The East Bay Times, Angry Venezuelans wait hours for gas as shortages worsen, 18 May 2019
Exhibit RO-27	Energy Monitor Worldwide, Oil-rich Venezuela now experiencing fuel shortages, 27 March 2017
Exhibit RO-28	GEO ExPro, The Groningen Gas Field, April 2009
Exhibit RO-29	Van de Graaff et al., The termination of Groningen gas production - background and next steps, July 2018
Exhibit RO-30	Shell, Leading investors back Shell's climate targets, 3 December 2018
Exhibit RO-31	RDS, Annual Report 2018
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Exhibit RO-33	Shell, Reporting Standards and Guidelines (IPIECA, API, OGP Oil and Gas Industry Guidance) (website page 7 November 2019)
Exhibit RO-34	Shell, Sustainability Report 2018 (GRI Index)
Exhibit RO-35	Shell, Reporting Standards and Guidelines (UN Global Compact) (website page 7 November 2019)
Exhibit RO-36	Lloyd's Register, Assurance Statement related to the Royal Dutch Shell plc Greenhouse Gas Assertion for the Operational Control Greenhouse Gas Inventory for calendar year ended December 31, 2018, 26 February 2019

Exhibit RO-37	ISO 14064-3:2006: Greenhouse gases - Part 3: specification with guidance for the validation and verification of greenhouse gas assertions
Exhibit RO-38	Shell, Scope 3 Indirect GHG Emissions according to GHG Protocol Corporate Value Chain (Scope 3) Accounting and Reporting Standard, 2 August 2019
Exhibit RO-39	Shell, Shell's Net Carbon Footprint ambition: frequently asked questions
Exhibit RO-40	Shell, Sustainability Report 1998
Exhibit RO-41	Shell, This is Shell's New Energies business
Exhibit RO-42	Shell, Shell New Energies to add Hundreds of Jobs in the Netherlands; Shell to Invest More than $200 Million in New Shell Campus in The Hague, 10 September 2018
Exhibit RO-43	World Bank, New World Bank Fund to Support Climate-Smart Mining for Energy Transition, 1 May 2019
Exhibit RO-44	Maersk, Maersk partners with global companies to trial biofuel, 22 March 2019
Exhibit RO-45	Van Oord, Van Oord and Shell together in biofuel pilot for vessels, 19 September 2019
Exhibit RO-46	Shell, Shell Aviation and Skynrg agree to strategic collaboration to advance use of sustainable aviation fuel, 30 May 2018
Exhibit RO-47	Anglo American Platinum, Anglo American Platinum Invests in High-Yield Energy Technologies, 18 April 2018
Exhibit RO-48	Greenlots, Greenlots announces acquisition by Shell, one of the world's leading energy providers, 30 January 2019
Exhibit RO-49	Shell, Shell agrees to acquire Sonnen, expanding its offering of residential smart energy storage and energy services, 15 February 2019

Exhibit RO-50	Innowatts, Innowatts Raises $6 Million in Series A Round, 22 August 2017
Exhibit RO-51	Shell UK, Drivers Set to Go Carbon Neutral With Shell (website page 28 October 2019)
Exhibit RO-52	Shell, Energy Transition Report 2016
Exhibit RO-53	Benson et al., Carbon Capture and Storage, 2012, Chapter 13: Carbon Capture and Storage
Exhibit RO-54	IEA, Technology Roadmap: Carbon capture and storage 2013
Exhibit RO-55	Global CCS Institute, Status Report 2018
Exhibit RO-56	Shell, Sustainability Report 2017
Exhibit RO-57	Shell, Sustainability Report 2016
Exhibit RO-58	Shell, Sustainability Report 2015
Exhibit RO-59	Shell, Carbon Capture and Storage Projects (website page 29 August 2019)
Exhibit RO-60	Committee on Climate Change, Net Zero: the UK's contribution to stopping global warming, May 2019
Exhibit RO-61	HM, Future of carbon capture and storage in the UK, Second Report of Session 2015-16
Exhibit RO-62	Telegraph, UK scraps £1bn carbon capture and storage competition, 25 November 2015
Exhibit RO-63	Shell UK, Energy and Climate Change Committee Inquiry into the Future of CCS in the UK, 15 January 2016
Exhibit RO-64	Shell, Quest carbon capture and storage project reaches significant one-year milestone, 14 September 2016

Exhibit RO-65	Shell, Quest CCS Facility Reaches Major Milestone: Captures and Stores Four Million Tonnes of CO_2, 23 May 2019
Exhibit RO-66	EURACTIV, EU Clarifies funding scope for CO_2 capture technology, 10 July 2019
Exhibit RO-67	Griscom et al., Natural Climate Solutions, 31 October 2017
Exhibit RO-68	Shell, Shell invests in nature as part of broad drive to tackle CO_2 emissions, 8 April 2019
Exhibit RO-69	RDS, Management Day 2019
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Exhibit RO-72	Ruling UK Advertising Standards Authority, 7 November 2007
Exhibit RO-73	Dutch Advertising Code Committee (2011/00012), 7 March 2011
Exhibit RO-74	Dutch Advertising Code Committee (2011/00012A), 7 March 2011
Exhibit RO-75	RDS, Royal Dutch Shell plc 2017 Management Day: Shell updates company strategy and financial outlook, and outlines net carbon footprint ambition, 28 November 2017
Exhibit RO-76	CNBC, Shell activist investor withdraws resolution targeting climate policy, 8 April 2019
Exhibit RO-77	Bloomberg, Shell Activist Investor Withdraws Climate Resolution for 2019, 7 April 2019
Exhibit RO-78	Reuters, Activist group withdraws resolution challenging Shell climate policy, 8 April 2019

Exhibit RO-79	RDS, Notice of Annual General Meeting 2015
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Exhibit RO-84	RDS, Results of Annual General Meeting 2017
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Exhibit RO-86	RDS, Speeches Annual General Meeting 2018
Exhibit RO-87	UK Companies Act 2006 (Section 172)
Exhibit RO-88	Joint Statement RDS and Climate Action 100+, 3 December 2018
Exhibit RO-89	RDS, CEO Speech UK - Less aloof, more assertive, 12 February 2015
Exhibit RO-90	Shell, Industry Associations Climate Review 2019
Exhibit RO-91	RDS, CEO Speech (in Dutch) Non solus: new energy for the Netherlands (and the world), 19 March 2018
Exhibit RO-92	Shell Nederland, Letter to Ed Nijpels, 12 September 2019
Exhibit RO-93	Shell, Getting to net zero emissions, 9 July 2019
Exhibit RO-94	UN, Climate Ambition Alliance: Net Zero 2050, 2019
Exhibit RO-95	Shell, The road to decarbonisation, 3 July 2019
Exhibit RO-96	Hearing before the Subcommittee on Energy and Environment of the Committee on Energy and Commerce, House of Representatives, Statement of Graeme Martin, 5 March 2009

Exhibit RO-97	Hearing before the Subcommittee on Energy and Environment of the Committee on Energy and Commerce, House of Representatives, Statement of Marvin Odum, 15 June 2010
Exhibit RO-98	The Seattle Times, Shell CEO: Support a price on carbon - but not at any cost, 5 October 2018
Exhibit RO-99	Carbon Capture Coalition, Federal Policy Blueprint 2019
Exhibit RO-100	CEO Climate Dialogue, About (website page 28 October 2019)
Exhibit RO-101	Shell, Collaboration and vision: shaping the energy future, 9 January 2017
Exhibit RO-102	NPR, Energy Companies urge Trump To Remain In Paris Climate Agreement, 18 May 2017
Exhibit RO-103	Chicago Tribune, Trump's plan to cut basic energy research finds an unlikely opponent: oil executives, 8 June 2017
Exhibit RO-104	Climate Leadership Council, Mission (website page 28 October 2019)
Exhibit RO-105	Watkins, Shell supports the direct regulation of methane – here's why, 12 March 2019
Exhibit RO-106	Shell Oil Products US, Letter to EPA Docket Center, 24 October 2018
Exhibit RO-107	Energy Transitions Commission, Who we are (website page 28 October 2019)
Exhibit RO-108	Energy Transition Commission, Better Energy Greater Prosperity: Achievable pathways to low-carbon energy systems (Executive Summary), April 2017
Exhibit RO-109	World Business Council for Sustainable Development - About Us (website page 29 August 2019)
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Exhibit RO-111	Climate & Clean Air Coalition, Initiatives (website page 10 November 2019)
Exhibit RO-112	CCAC Oil & Gas Methane Partnership (website page 10 November 2019)
Exhibit RO-113	Shell, Shell Onshore Operating Principles in Action in North America: Methane Fact Sheet
Exhibit RO-114	CCAC Oil & Gas Partnership, Guiding Principles Methane, November 2017
Exhibit RO-115	RDS, Shell announces methane emissions intensity target for oil and gas assets, 17 September 2018
Exhibit RO-116	The World Bank, Countries and Oil Companies Agree to End Routine Gas Flaring, 17 April 2015
Exhibit RO-117	Business Europe, ASGroup - Our Partner Companies (website page 28 October 2019)
Exhibit RO-118	Shell Nederland, Twitter, 25 September 2019
Exhibit RO-119	Shell, Response regarding Influence Map report raising concerns about its alleged use of shareholder funds for misleading cilmate-related [sic] branding and lobbying, 10 May 2019
Exhibit RO-120	IETA, Effective Article 6 trading rules could save up to $250 billion/yr for climate action by 2030, study finds, 24 September 2019
Exhibit RO-121	Shell, Environmental Products (website page 10 November 2019)
Exhibit RO-122	RDS, Letter to the European Commission on 'DG Climate Action consultation on the report from the Commission to the European Parliament and the Council - The state of the European carbon market 2012', 28 February 2013

Exhibit RO-123	Carbon Pricing Leadership Coalition, Who We Are (website page 28 October 2019)
Exhibit RO-124	Carbon Pricing Leadership Coalition, Partners (website page 28 October 2019)
Exhibit RO-125	Carbon Pricing Leadership Coalition, Report 2016-2017
Exhibit RO-126	Shell, Twitter, 21 September 2019
Exhibit RO-127	Carbon Pricing Leadership Coalition, Report 2019
Exhibit RO-128	The American Clean Energy and Security Act of 2009, Hearings (extract)
Exhibit RO-129	USCAP, A Blueprint for Legislative Action, January 2009
Exhibit RO-130	New Yorker, As the World Burns: How the Senate and the White House missed their best chance to deal with climate change, 3 October 2010
Exhibit RO-131	Forbes, Why This 'Big Oil' CEO Believes In Applying A Price To Carbon, 23 September 2014
Exhibit RO-132	Stanhill, The Growth of Climate Change: A Scientometric Study, 2001
Exhibit RO-133	Fleming, The Callendar Effect, 2007
Exhibit RO-134	Weart, Bibliography of the Year: The Discovery of Global Warming (website page 20 September 2018)
Exhibit RO-135	Arrhenius, The Influence of Carbonic Acid in the Air upon the Temperature of the Ground, April 1986
Exhibit RO-136	Rodney and Otamatea Times, Waitemata and Kaipara Gazette, Coal Consumption Affecting Climate, 14 August 1912
Exhibit RO-137	Talman, Is our Climate Changing?, 1930
Exhibit RO-138	National Academy of Sciences, Carbon Dioxide and Climate: A Scientific Assessment, July 1979

Exhibit RO-139	The Conservation Foundation, Implications of Rising Carbon Dioxide Content of the Atmosphere, 1963
Exhibit RO-140	The White House, Restoring the Quality of Our Environment, November 1965
Exhibit RO-141	Hearings before Subcommittees of the Committee on Appropriations House of Representatives, Statement Revelle, 23 February 1956
Exhibit RO-142	Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, Statement of Revelle, 1 May 1957
Exhibit RO-143	National Science Foundation, Weather and Climate Modification Problems and Prospects, January 1966
Exhibit RO-144	Keeling, Rewards and Penalties of Monitoring the Earth, 1998
Exhibit RO-145	New York Times, The Weather Is Really Changing, 12 July 1953
Exhibit RO-146	TIME Magazine, Invisible Blanket, 25 May 1953
Exhibit RO-147	Neumann, The Neumann Compendium: Can We Survive Technology?, 1955
Exhibit RO-148	President Lyndon Baines Johnson, Special Message to the Congress on Conservation and Restoration of Natural Beauty, 8 February 1965
Exhibit RO-149	Hecht & Tirpak, Framework Agreement on Climate Change: A Scientific and Policy History, 1995
Exhibit RO-150	Hearings before the Subcommittee on Science, Technology, and Space of the Committee on Commerce, Science, and Transportation, United States Senate, Statement of Porter, 1977
Exhibit RO-151	Hearings before the Subcommittee on Science, Technology, and Space of the Committee on Commerce,

	Science and Transportation, United States Senate, Statement of Changnon, 1977
Exhibit RO-152	University of East Anglia Climatic Research Unit, Reports (1957-2009)
Exhibit RO-153	Science Council of Canada, Living with Climatic Change, 1976
Exhibit RO-154	Second Netherlands' National Communication on Climate Change Policies, 1997
Exhibit RO-155	New York Times, Losing Earth: The Decade We Almost Stopped Climate Change, 1 August 2018
Exhibit RO-156	EPA, Environmental Assessment of Coal Liquefaction Annual Report, 1978
Exhibit RO-157	Jason, The long term impact of atmospheric carbon dioxide on climate, 1979
Exhibit RO-158	Council on Environmental Quality, Annual Report 1980
Exhibit RO-159	World Bank, Energy Efficiency and Conservation in the Developing World: The World Bank's Role, 1993
Exhibit RO-160	World Conference on the Changing Atmosphere: Implications for Global Security, 1988
Exhibit RO-161	James Hansen-Transcript of Pivotal Climate Change Hearing, 1988
Exhibit RO-162	Business Monitor Online, Norway Oil & Gas Competitive Landscape, 1 October 2019
Exhibit RO-163	Andalou Agency, Norway awards record 75 oil exploration licenses, 17 January 2018
Exhibit RO-164	Oil Daily, UK Awards Offshore Blocks, 14 June 2017
Exhibit RO-165	UK Oil & Gas, License Data: Seaward Exploration Licenses (August 2019)

Exhibit RO-166	NLOG, Annual Reports: Exploration and production of hydrocarbons, 1 January 2019
Exhibit RO-167	Bodansky et al., International Climate Change Law, 2017 (pp. 96-103)
Exhibit RO-168	IPCC, History (website page 11 September 2019)
Exhibit RO-169	Thatcher, Speech to the Royal Society, 27 September 1988
Exhibit RO-170	IPCC 1990, AR1: Scientific Assessment of Climate Change, Working Group I, Summary for Policy Makers
Exhibit RO-171	IPCC 1995 Second Assessment Report, Working Group I, Summary for Policy Makers
Exhibit RO-172	IPCC 1995, Second Assessment Report, Working Group II, Summary for Policy Makers
Exhibit RO-173	IPCC 1995, Second Assessment Report, Working Group I, Synthesis
Exhibit RO-174	IPCC 2001, TAR: Climate Change 2001: The Scientific Basis, Working Group I, Summary for Policy Makers
Exhibit RO-175	IPCC 2007, AR4: Climate Change 2007: The Physical Science Basis, Working Group I, Summary for Policy Makers
Exhibit RO-176	University of East Anglia, History of the Climate Research Unit, 2012
Exhibit RO-177	MIT Joint Program, Sponsors (website page 10 November 2019)
Exhibit RO-178	NRC, Changing Climate: Report of the Carbon Dioxide Assessment Committee, 1983
Exhibit RO-179	STTC Annual Report 1991
Exhibit RO-180	IPCC, About (website page 9 November 2019)

Exhibit RO-181	IPCC, Factsheet: what literature does the IPCC assess?, 2013
Exhibit RO-182	IPCC, Preparing Reports (website page 29 August 2019)
Exhibit RO-183	IPCC, Appendix A to the Principles Governing IPCC Work
Exhibit RO-184	IPCC 2013, AR5: Climate Change 2013: The Physical Science Basis, Working Group I, Technical Summary
Exhibit RO-185	IPCC, Guidance Note for Lead Authors of the IPCC Fifth Assessment Report on Consistent Treatment of Uncertainties, 6-7 July 2010
Exhibit RO-186	IPCC 2019, Special Report on Climate Change and Land, Summary for Policy Makers
Exhibit RO-187	IPCC 2019, SR Oceans and Cryosphere, Chapter 4: Sea Level Rise and Implications for Low Lying Islands, Coasts and Communities
Exhibit RO-188	IPCC 2014, AR5: Climate Change 2014: Mitigating Climate Change, Working Group III, Chapter 5: Drivers, Trends and Mitigation
Exhibit RO-189	IPCC 2014, AR5: Climate Change 2014: Mitigating Climate Change, Working Group III, Chapter 10: Industry
Exhibit RO-190	IPCC 2014 AR5: Climate Change 2014: Mitigation of Climate Change, Working Group III, Chapter 9: Buildings
Exhibit RO-191	IPCC 2014, AR5: Climate Change 2014: Mitigating Climate Change, Working Group III, Chapter 8: Transport
Exhibit RO-192	IPCC 2013, AR5: Climate Change 2013: The Physical Science Basis, Working Group I, Chapter 6: Carbon and Other Biogeochemical Cycles
Exhibit RO-193	Weiner, Precaution and Climate Change, 2016, Chapter 8

Exhibit RO-194	Montreal Protocol 1987
Exhibit RO-195	Ministerial Declaration, Bergen Conference 1990
Exhibit RO-196	Dietz et al., The Struggle to Govern the Commons, 12 December 2003
Exhibit RO-197	Ostrom, A Polycentric Approach for Coping with Climate Change, October 2009
Exhibit RO-198	Ostrom, Nested externalities and polycentric institutions: must we wait for global solutions to climate change before taking actions at other scales?, 2012
Exhibit RO-199	Becker et al., On the Economics of Climate Policy, 2011
Exhibit RO-200	IPCC 2014, AR5: Climate Change 2014: Mitigating Climate Change, Working Group III, Foreword, Preface, Dedication and In Memoriam
Exhibit RO-201	Brownlie, Principles of Public International Law, 2012 (pp. 2-19)
Exhibit RO-202	Bodansky et al., International Climate Change Law, 2017 (pp. 34-39)
Exhibit RO-203	Brownlie, Principles of Public International Law, 2012 (pp. 115-127)
Exhibit RO-204	Bodansky et al., International Climate Change Law, 2017 (pp. 10-11)
Exhibit RO-205	Calkarne, Oxford Handbook on International Climate Change Law, 2014 (pp. 26-37)
Exhibit RO-206	Bodansky et al., International Climate Change Law, 2017 (pp. 26-31)
Exhibit RO-207	Falkner, The Paris Agreement and the new logic of international climate politics, 2016
Exhibit RO-208	Bodansky et al., International Climate Change Law, 2017 (pp. 68-71)

Exhibit RO-209	UNFCCC - Marrakech Partnership for Global Climate Action
Exhibit RO-210	UNFCCC - 2018 Talanoa Dialogue Platform
Exhibit RO-211	UNFCCC, Governments Meet in Bonn To Step Up Climate Action Critical to the Implementation of Paris Agreement, 28 April 2018
Exhibit RO-212	UNFCC, Overview of Inputs to the Talanoa Dialogue, 23 April 2018
Exhibit RO-213	Decision 1/CP.21, 29 January 2016
Exhibit RO-214	UNFCCC - The Katowice Climate Package: Making The Paris Agreement Work For All
Exhibit RO-215	Greenhouse Gas Protocol, Standards (website page 11 November 2019)
Exhibit RO-216	UNFCCC, International Financial Institution Framework for a Harmonised Approach to Greenhouse Gas Accounting, November 2015
Exhibit RO-217	Global Oil & Gas: Guide to oil and gas regulation in the UK, 2017
Exhibit RO-218	ICLG, Oil & Gas Regulation 2018
Exhibit RO-219	European Commission, EU Climate Action, 23 November 2016
Exhibit RO-220	European Commission, EU ETS, 23 November 2016
Exhibit RO-221	European Commission, EU ETS Factsheet
Exhibit RO-222	European Commission, Our Vision for a Clean Planet for All, November 2018
Exhibit RO-223	Bloomberg, EU Closer to Setting a Target Date for Net-Zero Carbon Emissions, 3 October 2019

Exhibit RO-224	Financial Times, EU 2050 climate target blocked by eastern nations, 20 June 2019
Exhibit RO-225	Shell Nederland, Shell Nederland steunt het Nederlandse Klimaatakkoord, 12 September 2019
Exhibit RO-226	Government of the Netherlands, Climate deal makes halving carbon emissions feasible and affordable, 28 June 2019
Exhibit RO-227	UK, Carbon Emissions Tax, 29 October 2018
Exhibit RO-228	UK, Technical Note - Carbon Emissions Tax, 3 September 2019
Exhibit RO-229	Committee on Climate Change, Reducing UK emissions: 2019 Progress Report to Parliament, July 2019
Exhibit RO-230	Climate Change Act 2008 (2050 Target Amendment) Order 2019
Exhibit RO-231	Shell UK, Our Response to Climate Change
Exhibit RO-232	World Bank, Country and Lending Groups Data (website page 29 August 2019)
Exhibit RO-233	ICLG - Overview of Trends in Environmental and Climate Change Law in Sub-Saharan Africa
Exhibit RO-234	Grantham Research Institute on Climate Change and the Environment - Nigeria (website page 18 October 2019)
Exhibit RO-235	Grantham Research Institute on Climate Change and the Environment – Uganda
Exhibit RO-236	Grantham Research Institute on Climate Change and the Environment - Tanzania (website page 29 October 2019)
Exhibit RO-237	Grantham Research Institute, Global trends in climate change legislation and litigation, 2017 Update
Exhibit RO-238	Grantham Research Institute on Climate Change and the Environment – India

Exhibit RO-239	India's Intended Nationally Determined Contribution
Exhibit RO-240	Economic and Policy Review Weekly, India's Domestic Climate Policy is Fragmented and Lacks Clarity, 16 February 2019
Exhibit RO-241	Sandalow, Guide to Chinese Climate Policy, 2018
Exhibit RO-242	China's Intended Nationally Determined Contribution, 30 June 2015
Exhibit RO-243	China, The 13th Five-Year Plan (2016-2020)
Exhibit RO-244	Statistics Netherlands (CBS), Milieuvoetafdruk van Nederlander licht toegenomen, 15 May 2019
Exhibit RO-245	Statistics Netherlands (CBS), Luchtverkeer (website page 8 November 2019)
Exhibit RO-246	Statistics Netherlands (CBS), Personenauto's (website page 8 November 2019)
Exhibit RO-247	NRC, Fast fashion maakt de wereld kapot, 16 October 2019
Exhibit RO-248	UN Environment Programme, Putting the brakes on fast fashion (website page 8 November 2019)
Exhibit RO-249	European Environment Agency, Agriculture and climate change, 11 June 2019
Exhibit RO-250	NOS, Drie mannen opgepakt wegens bedreigingen bij windparken Groningen, 19 June 2019