Court of Appeal of The Hague
Case numbers: 200.126.834, 200.126.804,
200.126.843, 200.126.848,
200.126.849, 200.127.813

STATEMENT OF APPEAL REGARDING THE DISMISSAL OF THE MOTION TO PRODUCE DOCUMENTS BY VIRTUE OF SECTION 834A D C C P
(Interlocutory judgment District Court of The Hague 14-09-2011)

In the matter of: case number 200.126.834

1. **Fidelis Ayoro Oguru**,
2. **Alali Efanga**,

both residing in Oruma, Bayelsa State, Nigeria,

3. the association with corporate personality **Vereniging Milieudefensie**, established in Amsterdam,

appellants,
attorney: Ch. Samkalden, LL.M.

versus:

1. the legal entity organized under the laws of the United Kingdom **Royal Dutch Shell Plc**, with office in The Hague,
2. the legal entity organized under the laws of Nigeria **The Shell Petroleum Development Company of Nigeria Ltd**, established in Port Harcourt, Rivers State, Nigeria

respondents,
attorney: J. de Bie Leuveling Tjeenk, LL.M.

In the matter of: case number 200.126.804

1. **Fidelis Ayoro Oguru**,
2. **Alali Efanga**,

both residing in Oruma, Bayelsa State, Nigeria,

3. the association with corporate personality **Vereniging Milieudefensie**, established in Amsterdam,

appellants,
attorney: Ch. Samkalden, LL.M.

versus:

1. the company **Shell Petroleum N.V.**, established in The Hague,
2. the legal entity organized under the laws of the United Kingdom **The "Shell" Transport and Trading Company Ltd**, established in London, United Kingdom

respondents
attorney: J. de Bie Leuveling Tjeenk, LL.M.

In the matter of: case number 200.126.843

1. **Eric Barizaa Dooh,** residing in Goi, Rivers State, Nigeria,
2. the association with corporate personality **Vereniging Milieudefensie**, established in Amsterdam,

appellants,
attorney: Ch. Samkalden, LL.M.

versus:

1. the legal entity organized under the laws of the United Kingdom **Royal Dutch Shell Plc**, with office in The Hague,
2. the legal entity organized under the laws of Nigeria **The Shell Petroleum Development Company of Nigeria Ltd**, established in Port Harcourt, Rivers State, Nigeria,

respondents,
attorney: J. de Bie Leuveling Tjeenk, LL.M.

In the matter of: case number 200.126.848

1. **Eric Barizaa Dooh**, residing in Goi, Rivers State, Nigeria,

2. the association with corporate personality **Vereniging Milieudefensie**, established in Amsterdam,

appellants,
attorney: Ch. Samkalden, LL.M.

versus:

1. the public limited company **Shell Petroleum N.V.**, established in The Hague,
2. the legal entity organized under the laws of the United Kingdom **The "Shell" Transport and Trading Company Ltd**, established in London, United Kingdom

respondents,
attorney: J. de Bie Leuveling Tjeenk, LL.M.

In the matter of: case number 200.126.849

the association with corporate personality **Vereniging Milieudefensie**, established in Amsterdam,

appellant,
attorney: Ch. Samkalden, LL.M.

versus:

1. the legal entity organized under the laws of the United Kingdom **Royal Dutch Shell Plc**, with office in The Hague,
2. the legal entity organized under the laws of Nigeria **The Shell Petroleum Development Company of Nigeria Ltd**, establishe3d in Port Harcourt, Rivers State, Nigeria,

respondents,
attorney: J. de Bie Leuveling Tjeenk, LL.M.

In the matter of: case number 200.127.813

Friday Alfred Akpan, residing in Ikot Ada Udo, Akwa Ibom State, Nigeria,

appellant in the appeal in the motion, respondent in the main action,

attorney: Ch. Samkalden, LL.M.

versus

the legal entity organized under the laws of Nigeria **The Shell Petroleum Development Company of Nigeria Ltd**, established in Port Harcourt, Rivers State, Nigeria,

respondent in the appeal in the motion, appellant in the main action,
attorney: J. de Bie Leuveling Tjeenk, LL.M.

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1. INTRODUCTION

1. In the first five cases mentioned above, Eric Barizaa Dooh ('Dooh'), Fidelis Ayoro Oguru ('Oguru'), Alali Efanga ('Efanga') and Vereniging Milieudefensie ('Milieudefensie') lodged an appeal on 1 May 2013. In the case last mentioned, SPDC lodged an appeal against Friday Alfred Akpan ('Akpan'), also on 1 May 2013. In this statement on appeal, Dooh, Oguru, Efanga, Akpan and Milieudefensie direct their grounds for appeal (in the motion) against the interlocutory judgment of the District Court of The Hague dated 14 September 2011, in which their claim for access to documents was dismissed. In the scope of the appeal, Dooh, Oguru, Efanga and Milieudefensie also filed new claims for access by virtue of Section 843a DCCP.

2. In their motion to produce documents dated 10 September 2013, the appellants explained that the final judgment of the District Court of The Hague gave rise to a new situation, in which the appellants have a legitimate interest in access to specific documents. The evidentiary interest in the documents claimed in that new motion to produce documents followed from the findings and conclusions of the District Court in the judgment dated 30 January 2013. Moreover, new facts and information had become known in the interim, which prompted access to the documents. Milieudefensie et al. filed a new motion to produce documents because otherwise, the appellants would not have any possibility to include those documents in their grounds for appeal. By dealing with the grounds for appeal regarding the judgment in the motion to produce documents dated 14 September 2011 prior to the appeal in the main action, the Court of Appeal meets both this latter objection and Shell's point of view that a new motion to produce documents cannot be decided on as long as the appeal against the judgment dismissing the motion to produce documents in the first instance has not yet been dealt with.

3. In their new motion to produce documents, the appellants explained to the Court of Appeal the grounds based on which they feel they have a legitimate interest in access to specific documents by virtue of Section 843a DCCP. Part of the documents claimed in the new motion are new; part of these documents have been specified in greater detail in response to the submitted documents regarding Shell's work method. In addition, a number of documents from the motion in the first instance are no longer claimed in the new motion, because the judgment of the District Court of The Hague dated 30 January 2013 did not give any reason to do so. With the exception of the latter category, it is obvious that at this stage, the appellants change their claim on appeal such that this claim (partly) corresponds to the documents that are claimed in the new motion to produce documents. After all, the evidentiary interest in those documents has not changed. In addition, a few other documents are claimed, *inter alia* by Akpan in his (subject) appeal in the motion. The claim is set out and explained in Chapter 4.

4. In brief, the appellants' grounds for appeal are directed against the interpretation and application of Section 843a by the District Court of The Hague, as well as against the District Court's provisional finding that the oil spills were caused by sabotage.

Moreover, the appellants believe that the District Court applies a criterion for assessing whether Shell (may have) committed tort that is incorrect under Nigerian law.

5. This statement on appeal is arranged as follows. The next chapter sets out the legal framework, in as far as applicable to the claim for the production of documents. Attention is paid in particular to statutory liability and the duties of care of SPDC and the parent company, because these constitute the most important legal basis for the documents that are currently being claimed. The grounds for appeal are worked out in Chapter 3. Those grounds for appeal are supported by the arguments put forward in Chapters 2 and 4 of this statement on appeal; the changed claim by virtue of Section 843a DCCP is specified and explained in Chapter 4.

6. Chapters 2 and 4 are based on the new claim for the production of documents on appeal. The arrangement has been modified for the sake of legibility. In addition, the contents have been modified and supplemented, based in part on recent sources that shed a new light on the facts and Nigerian law.

7. First of all, this is the (interlocutory) judgment regarding questions of Nigerian law rendered by Justice Akenhead in the proceedings of the *Bodo Community and Others* against *SPDC* (**Exhibit O1**). In this judgment, the question regarding whether Article 11(5)(b) of the *Oil Pipelines Act* can also entail liability for damage by oil spills that were caused by sabotage is answered positively.

8. Moreover, important new, factual information became available with the *(Amended) Reply to the (Amended) Defence* van de *Bodo Community and others* that was received from the *High Court of Justice, Technology and Construction Court* in the same case (**Exhibit O2**). This case pertains to two oil spills that occurred between 2008 and 2009 from the *Bomu-Bonny 24" pipeline* near the village of Bodo. This is the same pipeline – and the same section – as the one from which the oil spill at issue near Goi occurred. In the English proceedings, as a result of the *disclosure* system used in those proceedings, Shell did have to provide information regarding the condition of the pipelines and the measures it had taken to prevent sabotage.

9. In the interim, Amnesty International published the report *Bad Information, Oil Spill Investigations in the Niger Delta* (**Exhibit O3**). This report is the result of an investigation into a few hundred oil spills and JIT reports from Nigeria.[1] In this context, Amnesty also visited and interviewed the oil companies that are active in Nigeria. The report concludes that the system that is used in Nigeria to investigate oil spills suffers from systematic defects; for this reason, the results of this system cannot be deemed to be credible. Amnesty International is especially critical in respect of Shell's role:

> With regard to Shell, reviewing all available data this report has built up a picture of a company whose claims about its environmental impact in the Niger Delta are frequently untrue. Shell has claimed that the oil spill investigations are sound when they are not, that sites are cleaned up when

[1] JIT or JIV reports are drawn up in the initial inspection of an oil spill; the Joint Investigation Team is comprised of representatives of the *operator*, local authorities and the *community*. To a significant extent, the District Court of The Hague based its finding that the oil spills had been caused by sabotage on the JIT reports.

they are not, and that the company is transparent when, in reality, it maintains very tight control over every piece of information – deciding what to disclose and what to withhold.[2]

10. For the sake of readability, names and terms are not continually further explained in this statement on appeal. The following terms are frequently used:

Appellants	Dooh, Oguru, Efanga, Milieudefensie and (the appellant in the motion) Akpan
SPDC	The Shell Petroleum Development Company of Nigeria Ltd (in the first instance also: 'Shell Nigeria')
RDS	Royal Dutch Shell Plc (in the first instance also: 'Shell Plc')
Shell Petroleum	Shell Petroleum N.V.
Shell T&T	The 'Shell' Transport and Trading Company Ltd
The parent company	RDS and/or Shell Petroleum and/or Shell T&T (in the first instance also: 'Shell Holding')
The pipeline near Goi	The Bomu-Bonny 24" *Trans Niger Pipeline* (approx. 30 km). In the event that the oil spill of 2003 is referred to, this may also regard the Bomu-Bonny 28" pipeline.
The pipeline near Oruma	The Kolo-creek-Rumuekpe 20" *Trunkline* (approx. 38 km)
The *wellhead* or *well* near Ikot Ada Udo	The Ibibio-I oil well
The English proceedings, or Bodo versus SPDC	The currently pending case between the Bodo Community and others versus SPDC before the High Court of Justice, Queen's Bench Division, Technology and Construction Court.
The new motion to produce documents on appeal	The claims for the production of documents filed with the Court of Appeal at the hearing of 10 September 2013
The judgment in the motion to produce documents	The interlocutory judgment of the District Court of The Hague dated 14 September 2011
The final judgment	The judgment of the District Court of The Hague

[2] Amnesty International, *Bad information: oil spill investigations in the Niger Delta* (2013) **(Exhibit O3)**.

	dated 30 January 2013
Sabotage	Damage that is inflicted on the pipelines by third parties. Sabotage can also entail illegal tapping of oil, but this is not at issue in these cases.
OPA	Oil Pipelines Act 1990
Dooh	Appellant Dooh. In references to documents and exhibits: the case of Dooh and Milieudefensie against Shell
Oguru	Appellant Oguru. In references to documents and exhibits: the case of Oguru, Efanga and Milieudefensie against Shell
Akpan	Appellant Akpan. In references to documents and exhibits: the case of Oguru, Efanga and Milieudefensie against Shell

11. In the event that case documents or judgments in the different related cases are (virtually) identical, only the documents or exhibits in one of the proceedings are referred to, namely: Dooh and Milieudefensie against RDS and SPDC. Where necessary, the corresponding passages in the other proceedings are specified.

12. In this statement on appeal, the appellants refer to case documents in the first instance and the new claim for the production of documents on appeal; they request that the Court of Appeal considers all the appellants' arguments from those previous case documents to be repeated and included here.

2. BASIS OF THE CLAIM IN THE MAIN ACTION

2.1 Introduction

13. The appellants base their claim in the main action on the right to a clean living environment, the statutory liability of SPDC, as well as liability based on *negligence*, *public and private nuisance*, the *Rule of Rylands v Fletcher* and *trespass to chattel*. The latter legal grounds from English *common law* do not have any separate consequences for the current claim for access to documents; therefore, these will not be discussed any further here.

14. To a significant extent, Nigerian law is based on English *common law*. Nigerian rulings frequently refer to rulings of the *House of Lords.* The latter rulings are also leading in Nigeria, unless dictated otherwise by Nigerian legislation or common law.

15. In this place, the appellants refer to the legal opinion of Robert Weir, which they submitted as Exhibit N2 (Dooh) in the motion to produce documents on appeal.

16. In recent years, various reports have been published in which the legal liability of oil companies under Nigerian law is examined. Two reports are submitted with this statement on appeal; in addition to the legal opinions submitted in the first instance, these reports offer a useful and clear explanation of applicable Nigerian law. The report of the University of Essex, *Corporate Liability in a New Setting – Shell and the Changing Legal Landscape for the Multinational Oil Industry in the Niger Delta* (**Exhibit O4**), pertains in particular to Shell and possible liability of both SPDC and the parent company under Nigerian law.[3]

17. The *Access to Justice: Human Rights Abuses Involving Corporations* report of the International Commission of Jurists (**Exhibit O6**) also contains a clear and extensive explanation of applicable Nigerian law, addressing both human law and civil standards and standards that are not enforceable in law.[4]

2.2 The right to a clean living environment

18. The appellants invoke their right to a clean living environment, as embedded in the Nigerian Constitution, the *African Charter on Human and Peoples' Rights* and fundamental international law rules.

19. In the case of *Gbemre versus SPDC*, the *Federal High Court of Nigeria* held that SPDC's *gas flaring* activities infringed the fundamental right to human dignity and the right to live.[5] According to the court, these rights – as contained in the Nigerian Constitution – must be deemed to include the right to a clean living environment. The court felt that Shell's *gas flaring* practices were in breach of these rights. Shell's failure to conduct an *Environmental Impact Assessment* in the community in question in order to investigate the effects of *gas flaring* also contributed to an infringement of the fundamental right to a clean living environment.[6] The court held that the Nigerian law by virtue of which *gas flaring* was permitted was null and void.

20. In addition, the right to a clean living environment is embedded in Article 24 of the *African Charter on Human and Peoples' Rights*, which is part of the Nigerian legal system through *The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act*.

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3 *Corporate Liability in a New Setting – Shell and the Changing Legal Landscape for the Multinational Oil Industry in the Niger Delta,* University of Essex, Business and Human Rights Project (2012) (**Exhibit O4**).

4 *Access to Justice: Human Rights Abuses involving Corporations – Nigeria, International Commission of Jurists,* 2012 (**Exhibit O5**).

5 *Gbemre v SPDC and others*, Federal High Court of Nigeria, 14 November 2005, submitted in the first instance as Exhibit J8 (Dooh).

6 In part in light of the latter conclusion, it is incomprehensible that in its final judgment of 30 January 2013, the District Court of The Hague concludes that under Nigerian law, negligent conduct in horizontal relationships cannot be considered to be an infringement of a human right. The question regarding whether under Nigerian law, liability for negligent conduct can exist only occurs in *tort law*. That doctrine is not at issue in the event of infringements of human rights, because the standard for this has already been established. In Nigeria – just as in the Netherlands – human rights can be invoked in both vertical and horizontal relationships.

21. The Fundamental Rights (Enforcement Procedure) Rules of Nigeria consider:

> The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*. In particular, human rights activists, advocates, or groups as well as any non-governmental organisations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:
>
> (i) Anyone acting in his own interest;
>
> (ii) Anyone acting on behalf of another person;
>
> (iii) Anyone acting as a member of, or in the interest of a group or class of persons;
>
> (iv) Anyone acting in the public interest, and
>
> (v) Association acting in the interest of its members or other individuals or groups.[7]

22. The appellants argue that due to the frequent exposure to oil pollution as a result of Shell's practices, their right to a clean living environment is being infringed.[8] They will further substantiate this with the grounds for appeal in the main action.

2.3 Statutory liability

2.3.1 Oil Pipelines Act

23. Article 11(5) of the *Oil Pipelines Act* stipulates the statutory liability of oil companies in the event of oil spills or other damage.

> The holder of a licence shall pay compensation-
>
> *(a)* to any person whose land or interest in land (whether or not it is land in respect of which the licence has been granted) is injuriously affected by the exercise of the right conferred by the licence, for any such injurious affection not otherwise made good; and
>
> *(b)* to any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work, structure or thing executed under the licence, for any such damage not otherwise made good; and
>
> *(c)* to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good and if the amount of such compensation is not agreed between any such person and the holder, it shall be fixed by a court in accordance with Part IV of this Act.

24. Article 11(5)(c) of the *Oil Pipelines Act* creates a *strict liability* regime (*risicoaansprakelijkheid*). The oil company is liable for damage as a result of a leak in its pipeline, unless this leak was caused by third parties. In that case, the company

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7 *Fundamental Rights (Enforcement Procedure) Rules*, 2009, preamble, Article 3(e).

8 In this context it is pointed out, as announced in the claim for the production of documents, Milieudefensie changes its claim in the main action in the sense that it moves for a declaratory judgment in part to the effect that RDS and SPDC committed tort against the victims of the oil spills.

invokes an exonerating defense, for which the company consequently bears the burden of proof.

25. Article 11(5)(b) of the *Oil Pipelines Act* codifies a *statutory duty*. Other than under *common law*, the existence of a duty of care is established in the event of a *statutory duty*. The remaining question in that case is the extent to which that statutory obligation also creates direct liability. This is manifestly the case in Article 11(5)(b), given that this article explicitly regards the liability of oil companies in respect of aggrieved parties.

26. The statutory duty of care of Article 11(5)(b) OPA comprises the obligation to protect, maintain and repair a pipeline or facility. Any failure to fulfil this duty of care results in liability to *any person suffering damage*. The only question remaining by virtue of Article 11(5)(b) is whether the statutory duty of care has been violated.[9]

27. The statutory duty of care to protect a pipeline can only be taken to mean that this also includes the obligation to protect the pipeline from attacks or damage by third parties.

28. Mr Justice Akenhead arrived at the same conclusion in the proceedings between *The Bodo Community and others v SPDC*. The question that had to be answered in the submitted judgment read:

> Whether SPDC can be liable under Section 11(5)(b) of the OPA 1990 to pay just compensation for damage caused by oil from its pipelines that has been released as the result of illegal bunkering and/or illegal refining?[10]

29. Akenhead J concludes:

> Short of a policing or paramilitary defence of the pipelines,[11] it is my judgment that the protection requirement within Section 11(5)(b) involves a general shielding and caring obligation. An example falling within this would be the receipt by the licencee of information that malicious third parties are planning to break into the pipeline at an approximately definable time and place; protection could well involve informing the police of this and possibly facilitating access for the police if requested. Other examples may also fall within the maintenance requirement such as renewing protective coatings on the pipelines or, with the advent of new and reliable technology, the provision of updated anti-tamper equipment which might give early and actionable warning of tampering with the pipeline.[12]

30. Thus, his answer to the question mentioned in paragraph 28 above is affirmative. This means that the judge rejected Shell's argument that the obligation to protect comprised no more than *"to ensure that any work structure or thing executed under the license is*

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[9] See also Weir, submitted in the first instance as Exhibit N2 (Dooh), par. 9 and following as well as Tony Weir, *An Introduction to Tort Law* (Clarendon Law Series: 2006), pp. 93 and following.

[10] *Bodo v SPDC*, (**Exhibit O1**), par. 9.

[11] See in this regard Akenhead J in par. 76-77: "I do not accept that the word "protect" can mean "police" or paramilitary defend because the licensee will not have and is not granted police power and (I assume) cannot legally or generally carry offensive weapons such as guns. One then turns to the authorities".

[12] *Bodo v SPDC*, (**Exhibit O1**), par. 92(g).

suitably protected against the inevitable wear and tear".[13] He further defined neglect as the "*failure to exercise reasonable care and skill*".[14]

31. In contrast to the strict liability of Article 11(5)(c) OPA, in which case the party sued can invoke the exonerating defense of sabotage, the cause of the oil spill is irrelevant in the statutory duty of care of Article 11(5)(b) OPA. To avert liability based on Article 11(5)(b) OPA, it must be established that the damage was not caused by *neglect* on the part of the party sued.

32. Based on the *res ipsa loquitur* doctrine, the burden of proof of this also falls on Shell. "The case is self-evident", is said under Nigerian (and English) law if a claim based on *negligence* satisfies two criteria:

> (a) The thing that inflicted the damage was under the sole management and control of the defendant or of someone for whom he is responsible or whom he has a right to control;
>
> (b) The occurrence is such that it would not have happened without negligence, i.e. in the ordinary course of events the injury should not have happen unless there was want of care.[15]

33. Oil facilities or oil pipelines are potentially extremely high-risk structures; the management and maintenance of such structures is reserved for the responsible oil company, which is moreover the only party that has the expertise for dealing with such structures. Thus, the *res ipsa loquitur* doctrine applies to *(statutory or common law) negligence* in the event of damage caused by oil spills.[16]

> Once substantial injury is done to the plaintiff, as usually the case in oil pollution cases, the plaintiff has the benefit of the doctrine of *res ipsa loquitor* where the burden of proof shifts to the defendant, thereby making the liability strict.[17]

34. See further Tobi, J.S.C. in the case of Shell Petroleum Company Nigeria Limited v Edamkue:

> The point is that if proper care is taken such a spillage would not have occurred. The onus was therefore on the appellant as defendant to prove that there was no negligence on its part.[18]

35. Concluding, the exonerating defense of sabotage cannot be invoked if Article 11(5)(b) OPA is applied (in contrast to Article 11(5)(c)). The defendant can invoke the

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13 *Bodo v SPDC*, (**Exhibit O1**), par. 72.

14 *Bodo v SPDC*, (**Exhibit O1**), par. 72.

15 *Miss Felicia Osagiede Ojo v. Dr. Gharoro and others* (2006) All FWLR 197, p. 200, r. 5; *Diamond Bank v. Partnership Investment and others* (2009) 12 (Pt.2) SCM, 10 at pp 13 & 14, rs. 3-5. Cited in: Oladiran Akinsola Ayodele, 'Civil Liability For Oil Pollution Under Nigerian Law', NIALS Journal of Law and Public Policy, p.312, accessible via: http://www.nials-nigeria.org/journals/Ayodele%20Oladiranlawp.pdf (most recently visited on 1 October 2014). See also: Emmeka Duruigbo, Exhibit M1 (Dooh), 48. See also Chapter 4.1.1.

16 The *Rule van Rylands v Fletcher* is related to the doctrine of *res ipsa loquitur* and based on the same idea.

17 Oladiran Akinsola Ayodele, 'Civil Liability For Oil Pollution Under Nigerian Law', NIALS Journal of Law and Public Policy. Cited in: Oladiran Akinsola Ayodele, Civil Liability For Oil Pollution Under Nigerian Law, NIALS Journal of Law and Public Policy, p.312, accessible via: http://www.nials-nigeria.org/journals/Ayodele%20Oladiranlawp.pdf (most recently visited on 5 October 2014), p.312; see also: Aliu *Bello and Others v. Attorney-General of Oyo State* (1986) 12 S. C. 1 at pp. 94-95.

18 *SPDC v. Edamkue & Ors*., (2009) 14 NWLR.

exonerating defense that he did not act negligently. In that case, it is up to the plaintiff to put forward a substantiated refutation of that defense.

36. These starting points are comparable to the principles of evidentiary rules embedded in the Netherlands. In this connection, reference is also made to what is put forward in section 3.2.3 below.

2.3.2 Other provisions of statutory liability

37. Article 36 of Part 1 of the *Petroleum Act* provides:

> The holder of an oil exploration licence, oil prospecting licence or oil mining lease shall, in addition to any liability for compensation to which he may be subject under any other provision of this Act, be liable to pay fair and adequate compensation for the disturbance of surface or other rights to any person who owns or is in lawful occupation of the licensed or leased lands.

38. The *Petroleum (Drilling and Production) Regulations* also create direct liability in Article 23:

> If the licensee of lessee exercises the rights conferred by his license or lease in such a manner as unreasonably to interfere with the exercise of any fishing rights, he shall pay adequate compensation there for to any person injured by the exercise of those first-mentioned rights.

39. Thus, the failure to fulfil the obligations embedded in the *Petroleum (Drilling and Production) Regulations* can lead to direct liability if this failure infringes *fishing rights.* By virtue of the *Petroleum (Drilling and Production) Regulations*, SPDC has a duty of care to prevent pollution, as well as to take adequate measures in the event that pollution occurs in order to control and end the pollution.[19] Because more than just *fishing rights* are violated in this context, these provisions are further discussed in Chapter 2.5.

40. Numerous statutory provisions include duties of care that are not immediately linked to a liability provision. Under Nigerian law, in such cases the judge will review whether it must have been the legislator's intention to also create direct liability in codifying that duty of care. If that is the case, the provision can be immediately invoked. If this is not the case, the statutory duty of care may serve to work out the standard of a duty of care under *common law*.

2.4 Common law negligence

41. In contrast to a *statutory duty*, in the event of a claim based on *common law negligence* it will have to be established whether under the circumstances specified, there was a duty of care that resulted in liability if violated. Whether a claim is based on statutory liability or *common law* primarily has consequences for determining the damage. That question is not yet at issue in relation to the currently claimed documents.

[19] See par. 53-54 below.

42. In his recent judgment in the English proceedings, Justice Akenhead concluded that a claim for damages cannot be based on both statutory liability and liability under *common law*.[20] This is currently not yet at issue, either.

43. The (English and) Nigerian case law demonstrates that tort and negligence on the part of oil companies can be based both on statutory liability and common law. The appellants believe that both bases lead to liability on Shell's part.

44. *Common law* is characterized by the absence of a statutory rule. The principles used by the court are worked out by the court. For that reason, more than in the event of interpreting the law, the *common law* system demands that the applicability of a legal rule is reassessed in each case. Under *common law*, case law does not replace the law but interprets applicable legal principles:

> Whereas in a Statute every word is law, the precise words of judges are not law at all, but merely an indication of it. […] In order to discover what a decision is an authority for, one must first understand the relevant facts, and analyse the decision in the light of those facts, ignoring asides (obiter dicta). The aim is to ascertain the rule (the *ratio decidendi*) that the judge must have had in mind in order to reach his decision. Then one must decide whether that rule is applicable to the case in hand, which depends on whether its facts are different enough to enable the prior decision to be 'distinguished'; if so, the judge may disregard the prior decision or, if he thinks it right, extend it to the case in hand.[21]

45. *Common law* and *common tort law* are constantly being developed. Tony Weir illustrates how, in addition to an expansion of statutory provisions, the case law demonstrates changed points of view regarding liability and legal protection:

> Sometimes […] the courts themselves have imposed liability where none had existed before. In 1789 they held that a liar was answerable for the harm caused by his deceit although he obtained nothing by his false pretences. In 1862 they held it is tortuous knowingly to persuade a person to break his contract with the plaintiff. In 1866 they held the occupier of premises liable for failing to make them reasonably safe for people who came there on business. In 1891 they allowed injured workmen to sue for breaches of safety legislation. In 1897 they held it tortuous to play a nasty practical joke which made the victim ill. In recent years the courts have increasingly held defendants liable for failing to protect people against third parties, or even themselves; this really started in 1940 when an occupier was held liable to his next door neighbour for not defusing a danger created on his property by a tresspasser, and it has since been expanded to many other cases where the defendant could and arguably should had prevented the occurrence of the harm, though he had done nothing to contribute to the danger.[22]

46. For a long time, the case of *Anns v Merton London Borough Council* has been a guiding principle in assessing the question regarding whether a duty of care that had not yet been recognized as such had to be assumed.[23] Later, the approach was specified in the

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20 *Bodo v SPDC*, (**Exhibit O1**), par. 21 and following.
21 Tony Weir, *An Introduction to Tort Law* (Clarendon Law Series: 2006), p. 8.
22 Tony Weir, *An Introduction to Tort Law* (Clarendon Law Series: 2006, pp. 3-4.
23 *Anns v Merton London Borough Council* [1977] UKHL 4.

Caparo test. According to this test, to assess the question regarding whether a party is under a duty of care, three criteria must be assessed:

a. There must be *foreseeability* for the defendant that the plaintiff would suffer damage;

b. There must be *proximity* between the plaintiff and the defendant;

c. It must be *fair, just and reasonable* to assume that a *duty of care* exists in a specific situation.[24]

47. The District Court of The Hague also followed this approach in its final judgment. In so doing, the District Court found that in the event that an oil spill occurs from an oil pipeline or facility of SPDC, it is in any event foreseeable that this has harmful consequences for the people living in the environment of the location where the oil spill originates and farming or fishing at that location.[25]

48. The requirement of *proximity* in answering the question regarding whether anyone can be held liable for *negligence* was already deeply embedded in *common law*. In the *Donoghue v. Stevenson* case, Lord Atkin specified this *neighbourhood principle* for the first time:[26]

> At present I content myself with pointing out that in English law there must be and is some general conception of relations, giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[27]

49. A special category is formed by negligence as a result of which others inflict damage on third parties. In the *Smith v Littlewoods* case, Lord Goff found that special circumstances can be a reason for assuming *proximity* in that situation, as well.[28] He identifies three situations in which this is the case according to the case law that prevailed at that time. First of all, the case in which there were special ties between the defendant and the aggrieved party, as a result of which the party first mentioned had

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24 *Caparo Industries plc* v. *Dickman* [1990] UKHL 2, AC 605.

25 Final judgment District Court of The Hague, 30 January 2013, ground 4.47 (Dooh); 4.47 (Oguru); 4.42 (Akpan).

26 *Donoghue v Stevenson* [1932] AC 562.

27 *Donoghue* v. *Stevenson* [1932] UKHL 100, AC 562.

28 *Smith* v. *Littlewoods Organisation Ltd* [1987] UKHL 3, AC 241.

special responsibility in respect of the party last mentioned.[29] The ties between the defendant and the third party may also be such that the defendant exercises control over that third party and is therefore under a duty of care.[30] In addition, a land owner may be liable based on *nuisance* if he permits third parties to enter his land and damage the adjacent plot (or fails to prevent third parties from entering and causing damage).[31]

50. In *Smith v Littlewood*s, Lord Goff adds a fourth category to this: if the defendant causes or permits a source of danger and it is reasonably foreseeable that third parties may interfere with that source, as a result of which the danger materializes, causing damage that the defendant is under a duty of care to prevent.

> These are all special cases.[32] But there is a more general circumstance in which a defender may be held liable in negligence to the pursuer, although the immediate cause of the damage suffered by the pursuer is the deliberate wrongdoing of another. This may occur where the defender negligently causes or permits to be created a source of danger, and it is reasonably foreseeable that third parties may interfere with it and, sparking off the danger, thereby cause damage to persons in the position of the pursuer.[33]

2.5. SPDC's *common law* duty of care

51. SPDC was under a *common law* duty of care to:

i. properly maintain its pipelines, wells and facilities;

ii. protect its pipelines, wells and facilities from interference by third parties;

iii. in case of oil spills: take adequate measures to prevent any further damage;

iv. properly and quickly clean up any polluted soil following an oil spill.

52. SPDC's duty of care to prevent pollution can also be derived from Nigerian laws and regulations.

53. The *Petroleum (Drilling and Production) Regulations* stipulate in Article 25 that oil companies have a duty of care to prevent pollution and, if pollution occurs, to take adequate measures in order to control and end the pollution:

> The licensee or lessee shall adopt all practicable precautions, including the provision of up-to-date equipment approved by the Director of Petroleum Resources, to **prevent the pollution** of inland waters, rivers, watercourses, the territorial waters of Nigeria or the high seas by oil, mud or other fluids or substances which might contaminate the water, banks or shoreline or which might cause harm or destruction to fresh water or marine life, and where any such pollution occurs or has

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29 *Smith v. Littlewoods Organisation Ltd* [1987] UKHL 3, AC 241; *Stansbie v Troman* [1948] 2 K.B. 48.

30 *Smith v. Littlewoods Organisation Ltd* [1987] UKHL 3, AC 241; *Dorset Yacht Co Ltd v Home Office* [1970] UKHL 2.

31 *Smith v. Littlewoods Organisation Ltd* [1987] UKHL 3, AC 241.

32 Lord Goff is referring here to the three circumstances mentioned above.

33 *Smith v. Littlewoods Organisation Ltd* [1987] UKHL 3, AC 241.

> occurred, shall **take prompt steps to control and, if possible, end it.** (emphasis added by attorney)

54. Article 37 of the Petroleum (Drilling and Production) Regulations further requires that:

> The licensee or lessee shall maintain all apparatus and appliances in use in his operations, and all boreholes and wells capable of producing petroleum, **in good repair and condition**, and shall carry out all **his operations in a proper and workmanlike manner** in accordance with these and other relevant regulations and methods and practices accepted by the Director of Petroleum Resources as **good oilfield practice**; and without prejudice to the generality of the foregoing he shall, in accordance with those practices, **take all steps practicable**
>
> (a) to **control the flow and to prevent the escape** or avoidable waste of petroleum discovered in or obtained from the relevant area;
>
> […]
>
> (d) to **prevent the escape of petroleum** into any water, well, spring, stream, river, lake, reservoir, estuary or harbour; and
>
> (e) to **cause as little damage as possible** to the surface of the relevant area and to the trees, crops, buildings, structures and other property thereon. (emphasis added by attorney)

55. The Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) confirm that:

> License holders for exploration, prospecting, exploitation, hydrocarbon processing, transportating, marketing etc. of Petroleum Resources are required by legislation to take/adapt Practical Precautions and/or all steps Practicable to prevent pollution.[34] (underlining present in the EGASPIN)

56. The obligation set out in Article 37 to act in accordance with *good oilfield practice* is also comprised in other Nigerian rules.[35] According to those rules, this must in any event be deemed to comprise the standards of the *Institute of Petroleum Safety*, the *American Petroleum Institute* and the *American Society of Mechanical Engineers*.[36]

> Except as otherwise provided in these Regulations, every drilling, production and other operation which is necessary for the protection and subsequent handling of crude oil and natural gas shall conform with **good oil field practice** which, for the purpose of these Regulations, shall be considered to be adequate if it conforms with the appropriate **current Institute of Petroleum Safety Codes, the American Petroleum Institute Codes, the American Society of Mechanical Engineers Codes, or any other internationally recognised and accepted system**. (emphasis added by attorney)

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34 EGASPIN, submitted in the first instance as Exhibit G1 (Dooh) p. 145, Part VIII, section B1.1.1.

35 Article 9 (k) Oil and Gas Pipelines Regulations 1995; article 2.4.8 Guidelines and Procedure for the Construction, Operation and Maintenance of Oil and Gas Pipelines and their Ancillary; article 7 Oil Minerals (Safety) Regulations.

36 *Idem*.

2.5.1 Maintenance

57. It is obvious that under common law, Shell has a duty of care to install and maintain its pipelines, wells and facilities such that these do not inflict any damage on the living environment and/or the possessions of people living in the vicinity. Weir concludes the same in his opinion submitted with the claim for the production of documents on appeal.

> In the event that section 11(5) OPA was deemed not to be relevant, English law would impose a common law duty of care on the operator of a pipe which, through its negligence in failing to use suitable materials and/or maintain the pipe, disgorged its contents into the local environment to those whose person or property were affected by the spill. This would involve a straightforward application of the neighbour principle established in the seminal case of *Donoghue v Stevenson* [1933] AC 562.[37]

58. The international standards stipulate numerous norms regarding the maintenance of pipelines. Please refer in particular to API Standard 1160 (*Managing System Integrity for Hazardous Liquid Pipelines* (1st edition 2001); API *Security Guidelines for Liquid Petroleum Pipelines* 2003 and ASME B31.4 (*Pipeline Transportation Systems for Liquid Hydrocarbons and other Liquids*).[38]

59. For the time being, SPDC's obligation to maintain its pipelines, wells and facilities is not in dispute. It is concluded here that to this end, in addition to the *strict liability* of Article 11(5)(c), a *common law* duty of care exists, as well.

2.5.2 Protection

60. In addition to a *statutory duty* to protect its pipelines, wells and facilities, SPDC also has a duty of care that is based on *common law*. This latter duty of care results from the ruling in *Smith v Littlewood* mentioned above.[39] Lord Goff referred to the *general circumstance* in which a defendant may be held liable, even though a third party was responsible for the direct cause of the damage. He believes this is the case if the defendant:

(i) acts negligently

(ii) causes or permits to be created a source of danger, and it is

(iii) reasonably foreseeable that third parties may interfere with it and, sparking off the danger,

(iv) thereby cause damage to persons in the position of the pursuer.

61. A pipeline or oil well is a source of danger that can cause considerable damage if not handled carefully. In addition, it was foreseeable – and Shell did foresee – that third

[37] Robert Weir, Exhibit N2 (Dooh), par. 33.

[38] For a more detailed discussion of the applicable standards, also see the *Reply to the Defence* (**Exhibit O2**), par. 7-14.

[39] Par 2.4.1; *Smith v. Littlewoods Organisation Ltd* [1987] UKHL 3, AC 241.

parties could damage its pipelines and wells.[40] In the interim, it is common knowledge that Shell considers sabotage in the Niger Delta to be a colossal problem.

62. The situation in Ogoniland (Goi) is even more significant, because Shell pulled out of this area in 1993.

> While SPDC acknowledges that spills are a problem elsewhere in the Nigerdelta, Ogoniland poses unique challenges and is not typical of oil and gas operations in Nigeria. SPDC has not produced oil and gas in Ogoniland since 1993 after withdrawing staff and stopping production in the face of violence and attacks on staff. Since then access to maintain its dormant facilities and respond to oil spills – mainly caused by sabotage and theft - has been difficult.[41]

63. In contrast to what the District Court finds in the final judgment, it is irrelevant whether the risk of sabotage in, for example, Goi or Oruma was larger or smaller than elsewhere in the Niger Delta.[42] The question is whether the risk existed at the location at issue or whether Shell could have foreseen this, and whether Shell's negligence resulted in any damage.[43] In its final judgment, the District Court also confuses the (non-) existence of a duty of care and the possible violation of this duty (or having a *duty of care* and the establishment of liability based on *negligence*).[44] The appellants will further substantiate these arguments with the grounds for appeal in the main action.

64. The conclusion must be that Shell is liable if the first criterion is also satisfied, meaning: if Shell was negligent in this regard.[45] Weir also concludes:

> I should emphasize that there is no difficulty, in principle, with a court finding that the risk of sabotage was sufficiently great that oil operators generally owed duties to protect those living near to pipelines in Nigeria from damage caused by sabotage.[46]

65. Moreover, this duty of care is embedded in Nigerian regulations. The *Oil and Gas Pipelines Regulations* stipulate that a pipeline must be patrolled to detect any irregularities at the earliest possible stage:

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40 Similarly: Final judgment of the District Court of The Hague, 30 January 2013, ground 2.1: "For years, there have been significant problems in Nigeria for people and the environment in the oil production operations of oil companies. The Shell Group, a multinational headquartered in The Hague (Netherlands), is one of the oil companies that have been active in Nigeria for years. Each year, many oil spills occur in Nigeria from oil pipelines and oil facilities. Oil spills may be caused by defective and/or obsolete materials used by the oil companies or by sabotage in combination with, in fact, inadequate security measures. Sabotage is often committed to steal oil or to receive compensation from oil companies for the oil pollution in the form of cash or paid orders for the remediation work to be performed following an oil spill".

41 http://www.shell.com.ng/environment-society/our-response/unep-response.html (most recently visited on 5 October 2014).

42 Robert Weir, Exhibit N2 (Dooh), par. 25; otherwise: Final judgment District Court of The Hague, 30 January 2013, ground 4.48 (Dooh); 4.50 (Oguru).

43 Robert Weir, Exhibit N2 (Dooh), par. 25-27.

44 Final judgment District Court of The Hague, 30 January 2013, grounds 4.48 – 4.50; grounds 4.50 – 4.52 (Oguru); grounds 4.43-4.45 (Akpan). In the latter case, the District Court finds that SPDC was under a duty of care because it had made it easy for saboteurs to commit sabotage. In this regard also: Weir, Exhibit N2 (Dooh), par. 31.

45 See also University of Essex, *Corporate Liability in a New Setting: Shell and the Changing Landscape for the multinational Oil Industry in the Niger Delta*, (**Exhibit O4**), p. 16.

46 Robert Weir, Exhibit N2 (Dooh), par. 19.

> 9 (h) the right of way shall be **regularly patrolled** for prompt detection of any linebreak, encroachment or any other **situation that may endanger the safety of the pipeline**. (emphasis added by attorney)

66. The *Oil Minerals (Safety) Regulations* stipulate that access to wells must be closed off:

> 20. Restricted areas
>
> (1) **All wells**, block stations, pump-stations, tank farms and similar installations shall constitute a **restricted area**, the boundaries of which shall be clearly defined. (emphasis added by attorney)

2.5.3 Adequate response

67. In addition to a *statutory duty* to repair its pipeline, SPDC has a *common law* duty of care to take adequate measures following an oil spill in order to limit the damage.[47] Thus, repairing damaged pipelines is *good oil field practice*. Weir contends:

> I consider it clear that an operator of a pipe which is damaged (through no fault of its own) will owe a duty to repair its pipe and to stop the leak once it is or ought to be on notice of the leak. A passerby can watch a house burning and lawfully do nothing under English law. The owner of the house, on the other hand, returning to discover that his home is on fire through no fault of his own, is, I think, obliged to take steps to stop the fire and so prevent or limit damage to others. This fits into category (iv) of Lord Goff's analysis in Smith v Littlewoods but it barely requires legal authority to support such an obvious statement. The duty would not arise simply because there is a leak – it arises when the operator is (or should be) on notice that the leak has occurred. The duty is, in substance, codified in section 11(5) OPA.[48]

68. Provisions from the *Petroleum (Drilling and Production) Regulations* demonstrating the obligation of oil companies to adequately respond following an oil spill have already been mentioned above.[49]

69. This duty of care is also explicitly stipulated in the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN):

> An operator shall be responsible for the containment and recovery of **any Spill** discovered within his operational area, whether or not its source is known. The operator shall take **prompt and adequate steps** to contain, remove and dispose of the Spill.[50] (emphasis added by attorney)

70. In addition, in supplement to the *Oil Pipelines Act*, the *Oil and Pipeline Regulations* stipulate that a license holder must prepare a *written emergency plan* "for implementing in the event of systems failure, accidents or other emergencies":

> 9 (b) An ***emergency plan*** [...] shall include procedures for prompt and expedient action for-
>
> (i) the safety of the personnel of the operating company and the public;
>
> (ii) the protection of property and the environment;

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47 Incomprehensibly to the contrary: final judgment District Court of The Hague dated 30 January 2013, ground 4.51 (Dooh); 4.53 (Oguru); 4.47 (Akpan).

48 Robert Weir, Exhibit N2 (Dooh), par. 39.

49 *Petroleum (Drilling and Production) Regulations*, Articles 25 and 37, see 2.5 above.

50 EGASPIN, submitted in the first instance as Exhibit G1 (Dooh), p. 152, section 4.1.

(iii) the control of accidental discharge for the handling of emergencies;

(iv) the adequate training of personnel for the handling of emergencies.[51]

[…]

(g) clear access shall be maintained to valves locations, and ditches shall be protected against washout of the pipeline;

(h) the right of way shall be **regularly patrolled for prompt detection** of any linebreak, encroachment or any other situation that may endanger the safety of the pipeline.

(i) any line-break, encroachment or dangerous situation detected under sub- paragraph (h) of this paragraph shall be **promptly reported** to the Department;

(k) any repair to the pipeline shall be carried out in accordance with-

(i) good pipeline practice; an

(ii) the safety provisions contained in the standards API RP 1107 and API RP 1111 or their recognised equivalent standards.[52] (emphasis added by attorney)

71. An SDPC report from 2004 regarding the pipeline near Oruma contained the following recommendations, demonstrating that SPDC knew which measures had to be taken to comply with its duty of care:

SPDC shall:

• Ensure pigging wastes are sent to Bonny Terminal for treatment in the thermal desorption unit

• Oil spill response **equipment is stored** at flowstations

• Ensure that **immediate repairs** are done for corroded/sabotaged sections and there is clean-up of contaminated sites.[53] (emphasis added by attorney)

72. Moreover, **within 48 hours** after an oil spill occurred, operators must issue a preliminary report to the *Department of Petroleum Resources* in Nigeria, *inter alia* specifying the *suspected cause of accident,* the *Estimated loss associated with the accident, Emergency remediation response effected on discovery* and a *Plan for restoration of pipeline operations to its licensed conditions.*[54]

2.5.4 Proper clean-up

73. SPDC also has a *common law* duty of care to properly clean up oil pollution caused by oil spills from its pipelines. Just as with adequate remediation, this duty of care results from the nature of the issue involved: in this case, oil pollution is caused by SPDC's oil. In

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51 *Oil and Pipeline Regulations* (1995), sections 9(a) en 9(b).

52 See also Article 2.4.8 of the *Guidelines and Procedure for the Construction, Operation and Maintenance of Oil and Gas Pipelines and their Ancillary.*

53 *Environmental Impact Assessment of the 20" x 37 km Kolo Creek – Rumuekpe Trunkline Replacement Project* (SPDC 2004), submitted in the first instance as Exhibit M3 (Dooh), p. 24.

54 *Guidelines and Procedures for the Design, Construction Operation and Maintenance of Oil and Gas Pipelines in Nigeria,* Article 8.1.

this connection, the *Petroleum (Drilling and Production) Regulations* also describe general duties of care that result from the operations of oil companies.[55]

74. This duty of care further results from the *Environmental Guidelines and Standards for the Petroleum Industry in Nigeria* (EGASPIN). The EGASPIN describe in detail how operators should proceed in this regard:

> VIII.B. (Contingency planning for the prevention, control and combating of oil and hazardous substances spills.)
>
> 2.6.2 For containment on land, the spill may be prevented from spreading by containment ditches. **Due consideration should be given to prevent groundwater contamination.** This is particularly necessary in areas where groundwater table is close to the surface. In a situation where a spill occurs adjacent to water courses and drainage systems, a high priority shall be given to containment procedures to prevent its spread into these areas.
>
> 2.6.3 Clean-up of spills in contaminated environments shall be conducted in such a manner as not to cause additional damages to the already impacted environment. It is therefore required that an **operator adopts an approved method that would suit the environment within which the spill occurred**. Clean-up shall commence within 24 hours of the occurrence of the spill.
>
> (i) For inland waters/wetland, the lone option for cleaning spills shall be complete containment and mechanical/manual removal. It shall be required that these clean-up methods be adopted until there shall be no more visible sheen of oil on the water. The use of any dispensing/gelling/biological agents in the clean-up operations is prohibited in inland waters.
>
> 2.6.5 Mangrove/other wetland, Clean-ups shall be based on a s**tudy and evaluation of the socio-economic and ecological sensitivity** of such swamps. Such methods to be adopted may include gentle flushing, ditch digging and manual recovery.
>
> VIII.B. 2.11 (Remediation/Rehabilitation of Affected Area)
>
> 2.11.1 It shall be the responsibility of a spiller to **restore** to as much as possible the original state of any impacted environment. The process of restoration shall vary from one environment type to another.(See PART VIII F).
>
> 2.11.2 Any restorative process to be embarked upon shall **adequately evaluate** the biological sensitivities of the impacted environment. In a situation where a sensitive environment is impacted, it shall be required that a post spill impact assessment study be conducted to determine the extent of damage and the estimated duration for complete recovery of such an environment.
>
> 2.11.3 Any operator or owner of a facility that is responsible for a spill that results to impact of the environment shall be required to **monitor the impacted environment** alongside the restorative activities. The restorative process shall attempt to achieve acceptable minimum oil content and other target values (quality levels ultimately aimed for) for BTEX, metals and polycyclic aromatic hydrocarbon (PAHS) in the impacted environment .(Also see PART VIII F).
>
> (i) For all waters, there shall be no visible oil sheen after the first 30 days of the occurrence of the spill no matter the extent of the spill.

[55] *Petroleum (Drilling and Production) Regulations*, Articles 25 and 37, see 2.5 above.

(ii) For swamp areas, there shall not be any sign of oil stain within the first 60 days of occurrence of the incident.

(iii) For land/sediment, the quality levels ultimately aimed for (target value), is 50mg/kg, of oil content. (See PART VIII F)

VIII.B.7.0 Condition For Environmental Evaluation Studies

7.1 An operator responsible for a spill shall be required to conduct an **Environmental Evaluation (Post Impact) Study** of any adversely impacted environment, in accordance with Article 2.0 of the Environmental Impact Assessment Process guidelines (see PART VIII-A). (emphasis added by attorney)

2.6 Violation of SPDC's duty of care

75. Between 1998 and 2007, an average of 272 oil spills occurred each year in Nigeria from Shell's oil pipelines and facilities.[56] According to Shell's own figures, on average 55% of these oil spills were caused by sabotage.[57] The number of oil spills caused by sabotage increased each year; according to Shell, in the period 2007-2011 this amounted to some 75% of the oil spills.[58]

76. The total number of oil spills from the pipeline near Goi in 2006-2010 was 344 times the European average for those years. Moreover, this number was still 78 times the average number in Europe in the *1970s*.[59]

77. In 2011, the *United Nations Environment Program (UNEP)* published its findings following an extensive investigation of the situation in Ogoniland.[60]

> The study concludes that the control, maintenance and decommissioning of oilfield infrastructure in Ogoniland are inadequate. Industry best practices and SPDC's own procedures have not been applied, creating public safety issues.[61]
>
> UNEP's field observations and scientific investigations found that oil contamination in Ogoniland is widespread and severely impacting many components of the environment. Even though the oil industry is no longer active in Ogoniland, oil spills continue to occur with alarming regularity. The Ogoni people live with this pollution every day.[62]

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56 See the table based on annual reports of Shell, included in the initiatory writ of summons in *Dooh & Milieudefensie versus RDS & SPDC*, par. 47.

57 *Idem*.

58 'Nigeria: Potential, growth and challenges', available via Shell's website http://www.shell.com/home/content/environment_society/society/nigeria/spills/ (most recently visited on 5 October 2014).

59 Reply to the Defence, (**Exhibit O2)** par. 5.1 and 5.2.

60 UNEP, *Environmental Assessment of Ogoniland* (2011), submitted in the first instance as Exhibit L7 (Dooh).

61 UNEP, *Environmental Assessment of Ogoniland* (2011), submitted in the first instance as Exhibit L7 (Dooh), p. 12.

62 UNEP, *Environmental Assessment of Ogoniland* (2011), submitted in the first instance as Exhibit L7 (Dooh), p. 9.

> The study concludes that the environmental restoration of Ogoniland is possible but may take 25 to 30 years.[63]

78. Ogoniland distinguishes itself from other areas in the Niger Delta (where Oruma and Ikot Ada Udo are located), because Shell pulled out of Ogoniland in 1993 for safety reasons and is thus no longer able to perform regular maintenance and other work in this region. Apart from that circumstance, there are no major differences between Goi in Ogoniland, on the one hand, and Oruma or Ikot Ada Udo, on the other. All communities have to contend with serious pollution as a result of the operations that SPDC develops in the Niger Delta.

79. In its oil production and processing operations in the Niger Delta, SPDC exercised insufficient due care to prevent pollution.[64] As a result, the appellants, other people living in the vicinity and the environment suffered damage.

80. The question regarding if and to what extent Shell breached its duties of care will be addressed in more detail with the grounds for appeal in the main action. Because all this is also related to the documents claimed by virtue of Section 843a DCCP, a number of main points are discussed below.

2.6.1 Maintenance

81. SPDC failed to properly maintain the pipelines near Oruma and Goi, as well as the well near Ikot Ada Udo. With regard to both the pipelines and the well, SPDC was aware of the fact that special measures were required to prevent spills, but failed to take those measures.

82. With regard to the pipeline near **Oruma**, a number of years before the oil spill of 2005, a committee within Shell had considered that there was a very high risk of leakage as a result of the serious corrosion:

> "Considering the rate of corrosion observed in the old pipelines proposed for replacement, if the replacement is not carried out, then there would be a **very high risk of leakage** which will result in oil spill and consequent contamination of the environmental resources."[65] (emphasis added by attorney)

83. Nevertheless, the pipeline was not replaced, despite the fact that the risks of doing nothing were very clearly described in the report:

> Option 1: do-nothing option
>
> A no-project scenario where the pipeline is used under its current status without the replacement of the line would result in the following

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63 UNEP, *Environmental Assessment of Ogoniland* (2011), submitted in the first instance as Exhibit L7 (Dooh), p. 12

64 See section 2.5 above.

65 *Environmental Impact Assessment of the 20" x 37 km Kolo Creek – Rumuekpe Trunkline Replacement Project* (SPDC 2004), submitted in the first instance as Exhibit M3 (Dooh). The report was already extensively discussed during the pleadings in the first instance and in the Motion to Produce Documents of 10 September 2013 (Oguru).

- Extensive and severe corrosion at a rate of approx 0.6 mm/yr
- Increased rate of crude leakage into the environment
- Contamination of the environment with crude leading to degradation
- Loss of revenue to the federal government from further de-rating of the line and crude spillage into the environment
- Increase community unrest due to crude contamination of their environment
- Increase in compensation payments and clean-up due to crude spillage
- Continuous repairs to the line which in the long run would not be cost effective

The list is not exhaustive as constant spillage could spiral into areas not mentioned.

For these reasons listed a no-project option is **Not Recommended** (emphasis appears in the report)[66]

84. The pipeline in **Goi** was also in very poor condition, and should have been replaced long ago. A committee of SPDC and *Shell Global Solutions* concluded in 2000 that the pipeline had to be replaced as soon as possible:

> The remaining life of most of the SPDC Oil Trunklines is more or less non-existent or short, while some sections contain **major risk and hazard**. […] **Outright replacement is necessary** because extensive corrosion and pressure derating has resulted in system capacity constraints and the inability to guarantee evacuation of future increases in throughputs from the various fields, particularly the production forecast peaks in years 2006-2008.[67] (emphasis added by attorney)

85. In 2002, an SPDC *Project Report* concluded once again that SPDC had to "*initiate an immediate replacement of this line*".[68]

86. An internal e-mail from SPDC dated 10 December 2008 demonstrates that SPDC was aware of the fact that it was defaulting on careful maintenance:

> (we are also corporately exposed the pp lines in Ogoni have not been maintained properly or integrity assessed in over 15 yrs) we have depended on ensuring high CP availability over this same period.[69]

87. It has further been demonstrated that the weld seams of the pipeline near Goi is defective. According to international standards, the weld seams of oil pipelines must have a concave profile. However, the pipeline near Goi has a convex profile, in breach of the directives of ASME B31.3.[70] Defective weld seams can weaken the pipeline and cause corrosion. The large oil spill near Bodo in 2008 was caused by a welding defect.[71]

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66 *Environmental Impact Assessment of the 20" x 37 km Kolo Creek – Rumuekpe Trunkline Replacement Project* (SPDC 2004), submitted in the first instance as Exhibit M3 (Dooh), par. 2.3.3.1 (p. 2-41).

67 Reply to the Defence **(Exhibit O2)**, par. 18.5. The oil spill at issue in the English proceedings occurred from the same pipeline, a few kilometers further.

68 Reply to the Defence **(Exhibit O2)**, par. 102.7.2.

69 Reply to the Defence **(Exhibit O2)**, par. 102.7.3. The quote has been adopted verbatim.

70 Reply to the Defence **(Exhibit O2)**, par. 18.8.

71 Reply to the Defence **(Exhibit O2)**, par. 48.3.

88. Despite the fact that Shell was aware of the defects in the pipeline, Shell failed to properly monitor and maintain the pipeline. Inspections were only performed *ad hoc* on the occasion of *Joint Investigation Visits* following oil spills.[72] These investigations were limited exclusively to the location in the pipeline where the oil spill had occurred.[73] In the period from 2000, SPDC also failed to conduct regular *intelligent pig* runs through the pipeline; these runs provide details regarding pipeline wall thickness.[74] Nor did SPDC perform any other maintenance activities such as replacing valves and checking the manifolds.[75]

89. In addition, the pipeline near Goi did not satisfy the international standards regarding cathodic protection, or at least the system installed was not functional.[76] With cathodic protection, the pipeline is subjected to a low voltage to prevent corrosion. The requisite electrical cable characteristic for this procedure was absent in the pipeline near Goi.[77]

> The pipeline at Bomu does not appear to be fitted with the required electrical insulating joint (characterized by its bulbous shape and size which should be visible in aereal photographs), nor do the manifolds at Bomu or Bodo appear to have a cathodic rectifier box/testing station allowing operators to test voltage (which should equally be visible in aerial photographs).
>
> In the alternative, on SPDC's own case, SPDC failed to carry out six monthly cathodic protection surveys of all sections of the pipeline in Bodo between 2000 and 2009 (Bodo individual RRFIs Question 6.2). Further, on SPDC's own case, the cathodic protection system, if it existed which is disputed, was inoperative on sections of the TNP near the Bomu manifold as the power source at Bomu was not functioning (Bodo Individual RRFIs Question 8.1), which was expressly contrary to ASMI B31.4 Code at 461.3(a) set out in Appendix A to this Reply.[78]

90. The well in **Ikot Ada Udo** was drilled in 1959 as an exploratory well. The well was never put into production, but was not abandoned, either.[79] The oil spill could occur because the *wellhead* was still under pressure.[80]

91. As a result, oil spills from the wellhead occurred more often in the subsequent years, *inter alia* in 1997. At that time, Shell remedied the spill, but did not take any measures to prevent a repetition of the problem.[81]

92. A well that is no longer in use must be isolated and abandoned to prevent any oil from spilling from that well. This can be done, for example, by dismantling the well or by installing a bull plug or concrete plug in the well.[82]

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72 Reply to the Defence **(Exhibit O2**), par. 18.1.

73 Reply to the Defence **(Exhibit O2**), par. 18.2. The UT measurements performed in these investigations can only provide clarity regarding a specific type of corrosion at that specific location, *idem*, par. 18.2.

74 Statement of defense on appeal in the motion by virtue of Section 843a DCCP, also containing a motion for the court to decline jurisdiction and transfer the case, Dooh et al. versus Shell, par. 294; Reply to the Defence **(Exhibit O2**), par. 18.3.

75 Reply to the Defence **(Exhibit O2**), par. 18.3.

76 Reply to the Defence **(Exhibit O2**) par. 17.1.

77 *Idem*.

78 Reply to the Defence (**Exhibit O2**) par. 17.1, 17.2.

79 In the interim, Shell has installed a concrete plug in the wellhead.

80 See also the *Accufacts* report, submitted in the first instance as Exhibit M2 (Dooh), p. 8.

81 See also the initiatory writ of summons in Akpan (first instance), Chapter 6.1.

82 *Accufacts* report, submitted in the first instance as Exhibit M2 (Dooh), p. 9.

93. SPDC's negligence in properly sealing off its abandoned wells is also described in the UNEP report and in the article *Abandonment of Wells in Shell Nigeria Operations* that was submitted in the first instance.[83]

94. By failing to isolate or abandon the wellhead, Shell did not act in conformance with *good oil field practice*. In particular, Shell acted in breach of the international standard set forth in API RP 57 for *Offshore Well Completion, Servicing, Workover, And Abandonement Operation*, as well as the EGASPIN standards:

> VIII.G.
>
> A 2.1 Decommissioning activities (for facilities completely shut down and/or abandoned) shall commence at least one year after abandonment and be completed within six months.
>
> B.2.1 Well abandonment
>
> Licensee/operator shall:
>
> (i) obtain appropriate permit from the department of Petroleum Resources;
>
> (ii) isolate well from surface;
>
> (iii) plug and abandon downhole according to permit criteria;
>
> (iv) place surface cement plug below cellar, to allow removal of surface components, the process of removal should avoid any significant adverse effect on the environment;
>
> (v) isolate production interval to prevent communication between aquifers of different nature.
>
> (vi) Close pit appropriately.
>
> (vii) Satisfy other conditions as in API RP 57.[84]

2.6.2 Protection from sabotage

95. If Shell had properly maintained its pipelines, wells and facilities, it would have considerably limited the risk of damage from external forces or by third parties. Frequent inspections; proper coating, proper valves: each of these is an example of measures that benefit both the maintenance and the protection of the well or pipeline.

96. With regard to **Goi**, it can be determined that Shell did not take any of the technical measures that Justice Akenhead mentioned in this context ("*renewing protective coatings on the pipelines or, with the advent of new and reliable technology, the provision of updated anti-tamper equipment which might give early and actionable warning of tampering with the pipeline"*).[85]

97. Nor did Shell take the measures that led the District Court to find that Shell did not have a duty of care to prevent sabotage, or that it had not violated that duty of care. In contrast

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[83] UNEP, *Environmental Assessment of Ogoniland* (2011), submitted in the first instance as Exhibit L7 (Dooh), p. 101; Oditah et al., *Abandonment of Wells in Shell Nigeria Operations*, submitted in the first instance as Exhibit M12 (Akpan).

[84] *Idem*.

[85] *Bodo v Shell* **(Exhibit O1**), par. 92 (g).

to what Shell contended and the District Court assumed, the pipeline near Goi did not have a system that measured the pressure.[86]

98. According to the video submitted by SPDC, the pipeline near Goi was not buried any deeper than approximately 60 centimeters.[87] According to the District Court, this is "relatively deep", but cannot be considered to be a measure to prevent sabotage.[88] According to API 1160, par. 10.1.4, for this purpose the pipeline must be dug in 1.5 to 2 meters deep.[89]

99. Moreover, Shell used an inadequate surveillance system. This has also been demonstrated in the English proceedings, in which Shell had to submit the information regarding that system. There were (i) insufficient surveillance guards; (ii) the surveillance guards who were there were insufficiently trained and (iii) they were not adequately fitted out.[90] In addition (iv) there was no supervision of their work.[91] SPDC appointed contractors for surveillance work, but was not aware of the number of surveillance guards who actually worked around Bodo in the period 2000-2009.[92] No reports or hardly any reports were made to SPDC regarding the work of the surveillance guards.[93] It has recently been demonstrated that hired surveillance contractors also sabotage pipelines.[94] The limited reliability (and effectiveness) of the surveillance contractors is further also demonstrated by the fact that (v) Shell contends that it must first verify their reports of oil spills before it takes any measures to limit the damage.[95] No regular surveillance rounds by helicopter have been demonstrated at Goi.

100. Given that the information regarding **Goi** that Shell provided is demonstrated to be incorrect, the accuracy of these arguments regarding **Oruma** can *ipso facto* no longer be started from.

101. Thus, Shell acted negligently in taking even the most elementary measures to prevent sabotage of its pipelines. More advanced measures that could be expected from an oil company acting with *reasonable care and skill* under the circumstances of the Niger Delta were not even considered.

102. In contrast to what the District Court assumed in the final judgment, the oil industry has several other possibilities for this.[96] These are *inter alia* described by Richard Steiner in

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86 See further below, section 2.6.3; for the *Leak Detection System*, also see: section 4.3.12.

87 Video *Joint Investigation Visit*, Exhibit 14 of Shell (Dooh); see also the *Accufacts* report, submitted in the first instance as Exhibit M2 (Dooh) p. 9.

88 Final judgment District Court of The Hague 30 January 2013, grounds 4.48, 4.49 (Dooh).

89 API 1160, *Management System integrity for Hazardous Liquid Pipelines*, 10.1.4, *Increased Depth of Cover*.

90 Reply to the Defence **(Exhibit O2)**, par. 23, 24.

91 Reply to the Defence **(Exhibit O2)**, par. 25.

92 Reply to the Defence **(Exhibit O2)**, par. 25.1.

93 Reply to the Defence **(Exhibit O2)**, par. 25.2, 25.3.

94 See also the news report dated 24 June 2013 at http://www.stakeholderdemocracy.org/cgblog/535/89/Serious-questions-following-Trans-Nigerian-Pipeline-explosion-at-Bodo.html: "Just how limited Shell's oversight is was highlighted at the weekend when it was revealed that its own contractors working on the most recent spill had been arrested by a military joint task force on suspicion of oil theft." (most recently visited on 3 October 2014).

95 Statement of Rejoinder of Shell (Dooh), par. 18.

96 Final judgment District Court of The Hague dated 30 January 2013, ground 4.49 (Dooh).

his report: *Double Standards? International standards to prevent and Control Pipeline Oil Spills, compared with Shell practices in Nigeria*.[97]

103. International standards are a decisive factor in Nigeria, as well, for working out the obligation of oil companies to operate in conformance with *good oil field practice*.[98] In this connection, API 1160 *inter alia* refers to the possibility of *Optical or Ground Intrusion Electronic Detection*:

> These systems include a fiber optic or metallic cable, usually installed twelve to twenty-four in. above the pipeline that are continuously monitored by optical or metallic instruments. Should the cable become damaged or severed, the monitoring device(s), which are integrated into the pipeline programmable logic controllers (PLCs) and supervisory control and data acquisition (SCADA) system, issue an alarm and identify the location of the cable damage.
>
> Optical or electronic ground intrusion detection systems, may reduce the consequences of third-party intrusion in three ways:
>
> 1. *Damage prevention* - The system may reduce the frequency of third-party incidents by alerting the operator of the location of potential third-party intrusions before the pipeline is damaged.
>
> 2. *Prevention of unintended releases* - A system alarm may reduce the likelihood of a leak in the event the pipeline is damaged, but not ruptured by third parties. This allows the operator to respond and perform an immediate inspection and/or repair, at the location the damage occurred.
>
> 3. *Spill minimization* - In the event third-party intrusion results in an immediate rupture, the intrusion alarm, coupled with a release alarm, will allow response to occur more quickly, and potentially reducing the volume released significantly.

104. Nor were any measures taken in **Ikot Ada Udo** to prevent third parties from inflicting damage by interfering with the well. The well was not dismantled, sealed off or rendered inaccessible to the public in any way. Thus, the District Court rightly held that in so doing, Shell violated its duty of care.

2.6.3 Adequate response

105. In fact, Shell was unable to adequately respond after an oil spill. First of all, the technology used did not allow oil spills to be detected and remedied in a timely fashion.

106. In the English proceedings it has become clear that in contrast to what Shell contended in these proceedings and what the District Court of The Hague assumed in the final judgment in the cases at issue, no system for measuring the pressure had been installed for the pipeline near **Goi**.[99] Without such a system, leaks cannot be quickly detected; consequently, no adequate action can be taken, either. According to international

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97 Richard Steiner, *Double Standards? International standards to prevent and Control Pipeline Oil Spills, compared with Shell practices in Nigeria*, University of Alaska, 2008, submitted in the first instance as Exhibit B1 (Dooh), p. 31.

98 See section 2.5 above.

99 Reply to the Defence **(Exhibit O2**), par. 16.1: "SPDC has admitted that there was no LDS operating on the Bomu-Bonny section of the TNP (Bodo Individual RRFIs Question 9.1)".

standards, pipelines must have been fitted with a properly functioning *Leak Detection System* (LDS).[100]

107. In breach of international standards, the *flow stations* and manifolds of the 24'' pipeline near Goi had not been fitted with manometers.[101] Nor were the manifolds fitted with a – entirely customary – measurement system to determine the throughput.[102] Accordingly, it was not possible to detect whether the throughput at the beginning of the pipeline differed from the one at the end of the pipeline. Such difference is a clear indication that oil is flowing away and that there must be a leak. In the absence of such equipment, it is moreover impossible to determine whether a pipeline has been effectively isolated for the purpose of repairs following an oil spill.[103]

108. In addition, in breach of industry standard practice and the *Oil Pipeline Regulations*,[104] the valves at the manifolds of the pipeline near Goi could not be remotely controlled and were difficult to access.[105] The valves had to be closed by hand on site if a section of the pipeline had to be isolated following a spill. Nor was there a functioning *Supervisory Control and Data Acquisition* (SCADA) system that collects data and automatically forwards these data to the control center, so that adjustments can be adequately made if this is shown to be required.[106] Finally, it has been demonstrated that as a result of problems with the valves at the Bonny Terminal, effectively shutting down the oil flow frequently caused problems.[107]

109. The valves near **Oruma** could not be remotely adjusted, either, as demonstrated by Shell's arguments regarding its response to the oil spill. Thus, to isolate the pipe, the valves had to be closed by hand. In Goi this was only done two days after the oil spill occurred; according to Shell's arguments, this took three days in Oruma. Had Shell complied with the *industry practice*, it could have shut down the oil flow immediately, regardless of the circumstances alleged by Shell (which will be contested with the grounds for appeal in the main action). Shell frequently invokes access problems to explain the long duration before a leak could be remedied – Shell also invokes this in each of the cases at issue. Had Shell acted with *reasonable skill and care*, it would have fitted its pipelines with valves that could be remotely controlled, especially in the Niger Delta.

110. In **Ikot Ada Udo** it was more than a year before Shell repaired the leaking *wellhead* 'simply by closing the valves',[108] according to Shell (but contested by the appellants) because it was not given the opportunity to do so.

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100 See also section 4.3.12 below.

101 Reply to the Defence **(Exhibit O2**), par. 18.7.1.

102 Reply to the Defence **(Exhibit O2**), par. 16.2: "[T]he TNP manifolds are not equipped with flow rate meters, as admitted by SPDC (Bodo Individual RRFIs Question 6.2 and 9.1).

103 Reply to the Defence **(Exhibit O2**), par. 18.7.2.

104 *Oil Pipeline Regulations*, Article 9(g): "clear access shall be maintained to valves locations".

105 Reply to the Defence **(Exhibit O2**), par. 18.6.

106 Reply to the Defence **(Exhibit O2**), par. 18.7.4.

107 Reply to the Defence **(Exhibit O2**), par. 52.2., 53.3.

108 Statement of Rejoinder of Shell (Akpan), 14.

111. The (i) alleged need to first verify the oil spill on site before taking any measures to limit the damage, (ii) equipment that was inadequate in technical terms; (iii) a shortage of manpower and equipment in the immediate vicinity in order to quickly stop the spill and (iv) insufficient attention for the special problems with local communities all contribute to the fact that it takes days and sometimes inordinately longer before a spill can be stopped.[109]

112. The fact that Shell did not or could not adequately respond to the oil spills is demonstrated by the bare facts. According to the District Court's findings, repairing the leak in Goi took three days; during that time, at least 24,000 liters of oil had spilled.[110] Even more destructive was the oil fire that occurred in the interim, which spread over the entire area. In Oruma, it took eleven days in all before the leak was repaired; in the interim, more than 64,000 liters of oil had spilled.[111] In Ikot Ada Udo, by the time Shell ultimately stopped the leak on 7 November 2007, at least 100,000 liters of oil had spilled.[112]

2.6.4 Proper clean-up

113. Shell did not properly clean up after the oil spills. In Goi, Oruma and Ikot Ada Udo considerable oil pollution was left behind after the end of the clean-up work.

114. The details of the clean-up in the various locations will not be addressed here. However, it will be substantiated in the following that (a) the documents submitted by Shell cannot demonstrate that Shell conducted a proper clean-up and (b) Shell's failure to properly clean up is a structural problem in the Niger Delta.

115. To support its argument that it did properly clean up the oil pollution after the oil spills, Shell submitted *clean-up and remediation certification formats*.[113] The latter forms contain a total *TPH* value based on which Shell claims that the entire area has been cleaned up.

116. A soil survey is required to establish whether a clean-up was properly conducted. In a soil survey, the polluted area is charted first using measurements of pollution in various indicated locations; the groundwater must also be examined in this survey. The clean-up

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109 Moreover, SPDC apparently changed its policy regarding oil spills. In the first instance, SPDC still argued that the oil spills had to be verified, because reports – irrespective of whether these came from communities or surveillance contractors that SPDC had hired – were often unreliable, its website meanwhile states: "Any reports, either by community surveillance teams under contract to SPDC or by the public, are responded to immediately. SPDC first shuts down the flow of oil to the leak before steps are taken to verify other details about the incident in preparation for the response, which starts with containment. By immediately shutting down pipelines or flowlines that are damaged and containing the spills, we minimize the damage to the environment" http://www.shell.com.ng/environment-society/environment-tpkg/oil-spills.html (most recently visited on 5 October 2014).

110 Final judgment District Court of The Hague dated 30 January 2013, ground 4.51 (Dooh). The figures regarding the volume of spilled oil near Goi, Oruma and Ikot Ada Udo will be contested with the grounds for appeal. The actual scope of the spilled oil is considerably larger.

111 Final judgment District Court of The Hague dated 30 January 2013, ground 4.53 (Oguru).

112 Final judgment District Court of The Hague dated 30 January 2013, ground 2.7 (Akpan).

113 Exhibits 12-13 of Shell (Dooh); Exhibit A6 of Oguru; Exhibit 18 of Shell (Akpan).

is verified by again taking soil samples in different locations, measuring the groundwater and charting the results. Shell's reports do not satisfy basic requirements:

- A soil survey and map are missing entirely.
- The forms specifying a single total TPH value fail to explain how and where the soil sample was taken and whether this was done professionally.[114]
- Nor is it clear how the sample results compare to the larger polluted area.
- The reports do not demonstrate the values of different oil components with toxic properties.
- The pollution of groundwater and surface water has not been measured.

117. Not only is the result not indicative; it cannot be verified, either. Even more problematic, the clean-up work is performed and verified exclusively by Shell. Such a lack of independent verification is in breach of international standards, nor is this permitted under Dutch law.[115]

118. The *EGASPIN* also stipulates a more precise investigation. The *Clean-up Certification Format A* in part VIII-B3 of those guidelines is considerably more precise than the *Clean-up* certificates that Shell submitted.

119. Those guidelines also confirm that the groundwater and surface water must be measured, as well.[116] It is a law of nature that oil sinks and as a rule reaches the groundwater.[117] The longer it takes to commence the clean-up, the deeper the oil pollution will have sunk. In those deeper layers, oil will only break down naturally if there are sufficient nutrients and oxygen for this. This is confirmed by the *International Union for Conservation of Nature*, which examined SPDC's clean-up methods at SPDC's request:

> The speed of response is critical in handling new spills since one of the complications of delayed response is the formation of more complex hydrocarbons that are more difficult to degrade. (…) Historically, delayed response encouraged a time lag that allowed spills and plumes to spread and/or seep deep into groundwater levels in certain soil types". [118]

120. The absence of verifiable information in the reports that Shell submitted must be considered in light of the criticism of Shell's clean-up methods in the Niger Delta by international organizations. The *United Nations Environmental Panel (UNEP)* concluded in 2011:

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114 For example, the standard is that soil samples are cooled when transported, because oil evaporates; otherwise, the soil samples – in the Netherlands, but certainly in a warm climate like Nigeria – may not be representative. Nor can it be ruled out that the samples have been taken selectively.

115 See also in this connection the International Union for Conservation of Nature, *Sustainable Remediation And Rehabilitation Of Biodiversity And Habitats Of Oil Spill Sites In The Niger Delta* (2013) (**Exhibit O6**), recommendation 4.1.2: "SPDC should introduce independent monitoring teams comprised of professionals from relevant backgrounds…".

116 Also: *EGASPIN,* submitted in the first instance as Exhibit G1 (Dooh).

117 See also Von Scheibler's report, submitted in the first instance as Exhibit M5 (Dooh).

118 International Union for Conservation of Nature, *Sustainable Remediation and Rehabilitation of Biodiversity and Habitats of Oil Spill Sites in the Niger Delta* (2013) **(Exhibit O6)**, p. 134. See also: UNEP, *Environmental Assessment of Ogoniland* (2011), submitted in the first instance as Exhibit L7 (Dooh), p. 145.

> It is evident from the UNEP field assessment that SPDC's post-oil spill clean-up of contamination **does not achieve environmental standards** according with Nigerian legislation, or indeed with SPDCS's own standards. […] Some of these locations had actually been documented by the operator as assessed and cleaned up, while others were still to be cleaned up. **The difference between a cleaned-up site and a site awaiting clean-up was not always obvious.**[119] (emphasis added by attorney)
>
> Remediation by enhanced natural attenuation (RENA) – so far the only remediation method observed by UNEP in Ogoniland – **has not proven to be effective**. Currently, SPDC applies this technique on the land surface layer only, based on the assumption that given the nature of the oil, temperature and an underlying layer of clay, hydrocarbons will not move deeper. However, this basic premise is not sustainable as observations made by UNEP show that contamination can often penetrate deeper than 5 m and has reached the groundwater in many locations. **Ten out of the 15 investigated sites which SPDC records show as having completed remediation, still have pollution exceeding the SPDC (and government) remediation closure values. The study found that the contamination at eight of these sites has migrated to the groundwater.**[120] (emphasis added by attorney)

121. SPDC instructed the *International Union for Conservation of Nature* to examine the *remediation* and *rehabilitation* procedures. The report from 2013 states:

> Based on the observations by the Panel, the current remediation practices in oil-impacted areas in the Niger Delta do not visibly support the needs of biodiversity rehabilitation. This is due to **inadequate benchmarks** for target values of pollutants' residues in the environment and the fact that regulators, oil companies and communities have **not taken concerted action to implement oil spill responses and remediation in a timely manner**. The methods and regulatory **standards for biodiversity and habitat rehabilitation have also not been adequately established**.[121] (emphasis added by attorney)

122. In the *natural attenuation* clean-up method used by Shell, part of the polluted oil is removed; the soil below is mixed with oxygen and sometimes nutrients, so that recovery can take place naturally. According to scientists, in and of itself, *natural attenuation* is a sound remediation method, provided that the soil has certain properties under which this natural degradation can occur. Those properties must be investigated before it can be determined whether RENA is a suitable method; following this, the progress and course must be carefully monitored for a longer period of time.[122]

123. Shell's documents do not demonstrate that proper analyses were made before, during and after the clean-up. This is in breach of international standards, as well as Part VIII-F of the EGASPIN. In *Gbemre* the court found that Shell's *failure to carry out impact*

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119 UNEP, *Environmental Assessment of Ogoniland* (2011), submitted in the first instance as Exhibit L7 (Dooh), p. 150.

120 UNEP, *Environmental Assessment of Ogoniland* (2011), submitted in the first instance as Exhibit L7 (Dooh), p. 12.

121 International Union for Conservation of Nature, *Sustainable Remediation and Rehabilitation of Biodiversity and Habitats of Oil Spill Sites in the Niger Delta* (2013) **(Exhibit O6)**, p. 14.

122 See also the International Union for Conservation of Nature, *Sustainable Remediation and Rehabilitation of Biodiversity and Habitats of Oil Spill Sites in the Niger Delta* (2013) **(Exhibit O6**), p. 39.

assessments contributed to the infringement of the fundamental right to a clean living environment.[123]

124. The information that can be inferred from Shell's clean-up reports is that the clean-up was not conducted properly. This is *inter alia* demonstrated by the following facts.

- The soil in the polluted areas has only been dug down to a depth of 30 centimeters, even though there was quite a long period between the oil spills and the clean-up work. During all that time, the oil has sunk deeper into the soil.
- Shell did not examine the groundwater, even though following spills – especially as more time is lost – oil almost always reaches the groundwater.[124] Once in the groundwater, the pollution will spread further in the area.
- According to the reports of the clean-up work in Goi, the *nutrient* oclansorb was used in the clean-up. Oclansorb is not as nutrient, but an *absorbent*; according to the manufacturer's information, the product must be removed and destroyed after use. For example, Oclansorb is the perfect choice for binding and removing oil that has spilled on a concrete floor; in that case, the remnants are taken to a tip or burned in a controlled fire.
- The course of the natural degradation was not properly monitored, especially in light of the circumstances mentioned above.

2.7 The duty of care of the parent company

2.7.1 Introduction

125. The parent company had a *common law* duty of care to take measures to prevent damage as a result of the oil spills.

126. The same legal framework set out under 2.4 above applies to this. Thus, the claim is not based on piercing the corporate veil, but on *direct* liability.

127. Under common law, there is nothing that prevents assuming that a parent company may be liable for its own acts and omissions in respect of a country where its subsidiary is primarily active. First of all, this follows from the criteria that have been developed in the case law for assessing whether a *duty of care* must be assumed in a new situation. The Caparo test applies here, as well.[125]

128. In addition, it has already been stipulated in the case law that under certain circumstances, a parent company may be liable. The *Chandler v Cape* case is further discussed in the following.[126] The basis for the liability in the *Chandler* case is formed

[123] *Gbemre v SPDC and others*, Federal High Court of Nigeria, 14 November 2005, submitted in the first instance as Exhibit J8 (Dooh).

[124] See par. 119.

[125] Cf. Robert Weir, Exhibit N2 (Dooh), par. 42. Further *Corporate Liability in a New Setting – Shell and the Changing Legal Landscape for the Multinational Oil Industry in the Niger Delta*, University of Essex, Business and Human Rights Project (2012) (**Exhibit O4**).

[126] *Chandler* v. *Cape plc* [2012] EWCA Civ 525.

by the case law already discussed, first of all the *Caparo* test. Thus, a new legal framework for assessing liability of a parent company was not developed in the *Chandler* case.

129. In this connection, reference is also made to the decision of the *Ontario Superior Court of Justice* in *Choc v. Hudbay Minerals Inc*.[127] This case occurs under the *common law* system of Canada, which is largely based on English law; here, too, the Canadian court frequently refers to starting points that have been developed in English case law. Hudbay Minerals Inc was summoned together with its subsidiary from Guatemala on account of *negligence*, because it allegedly failed to intervene, even though it was aware of the fact that rights were being violated by the activities of its subsidiary. In response, Hudbay Minerals moved that the case would be struck off the list, because the claim against the parent company allegedly lacked a sound basis. The court ruled that this was not the case. The court referred to the English case *Anns v Merton London Borough Council,* in which the test for determining the existence of a duty of care was developed.[128]

130. Not only relevant *common law* case law, but *soft law* developments, as well, give rise to assuming a duty of care on the part of the parent company, or at least not ruling out such a duty of care beforehand. Please refer to *inter alia* the *OECD Guidelines for Multinational Enterprises* en de *United Nations Guiding Principles on Business and Human Rights:*

> The responsibility to respect human rights requires that business enterprises:
>
> (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
>
> (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.[129]

131. In assessing the question regarding whether the parent company can be held liable, the District Court refers to *Chandler v Cape*.[130] The District Court finds – in and of itself correctly – that Shell's situation is not a one-to-one reflection of that of *Cape*. However, that does not mean that the case cannot serve as a good example for the situation in which a duty of care of the parent company can be assumed. The District Court's line of reasoning that a duty of care is less likely to exist because the current situation fundamentally differs from the one in *Chandler* in a number of respects is incorrect in that light.[131]

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[127] *Choc v. Hudbay Minerals Inc*. [2013] ONSC 1414 (**Exhibit O7**).

[128] Choc v. Hudbay Minerals Inc. [2013] ONSC 1414 (Exhibit O7).

[129] United Nations Guiding Principles on Business and Human Rights, 2011, http://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_en.pdf.

[130] *Chandler* v. *Cape plc* [2012] EWCA Civ 525.

[131] Final judgment District Court of The Hague, 30 January 2013, ground 4.34 (Dooh). The District Court's finding that the businesses of the parent company and SPDC 'are not essentially the same' is also incorrect. Both companies are involved in the production and distribution of oil. The criterion in *Chandler* is whether the businesses are '*in a relevant aspect the same'*. That is the case. See in this context also: Weir, par. 53.

> The fact that this case can be distinguished from the Chandler decision is not, therefore, a bar to the finding that there was a duty of care imposed upon RDS. The case of Chandler is not to be understood as the last word on the imposition of a duty of care on a parent company. It is a case involving the imposition of a duty of care on a parent company in the context of a claim by an employee of a subsidiary. On that factual premise, a duty of care is capable of being owed. It would be wrong to construe from this decision that it is necessarily harder to establish a duty of care in a different factual matrix involving damage to those living near a plant operated by a subsidiary and subject to sabotage.[132]

132. In such cases, the *common law* court uses an *incremental approach*.[133] In applying *Chandler v Cape* to the case at issue, the criteria of *Chandler* should not be taken literally and individually, but should be assessed within the broader framework of the case law regarding the establishment of a duty of care. Similarly Lady Justice Arden in *Chandler v Cape*:

> The development of the law of negligence has to be incremental and the judge was in my judgment correct to hold that the analogous line of cases in negligence to the instant case is the line of authority on the duty of a person to intervene to prevent damage to another.[134]

133. In *Chandler v Cape* the court assumed that the parent company was liable on account of its *assumption of responsibility*. Thus, this regards the third category that Lord Goff mentioned in *Smith v Littlewoods*, in which the *proximity* is determined by the relationship between the defendant and the third party that inflicted the damage.[135] Based on the case law that prevailed at that time, Lord Goff concluded that the defendant may be under a duty of care because it exercises a degree of control over that third party.[136]

134. Arden LJ concluded in *Chandler v Cape* that under certain circumstances, a parent company may also have a duty of care. The circumstances that led her to this conclusion in *Chandler v Cape* were as follows.

> In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies

132 Robert Weir, Exhibit N2 (Dooh), par. 46.
133 Robert Weir, Exhibit N2 (Dooh), par. 42 and following.
134 *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 63.
135 See 2.4 above.
136 *Smith v. Littlewoods Organisation Ltd* [1987] UKHL 3, AC 241. It will be explained in more detail with the grounds for appeal in the main action that in its final judgment dated 30 January 2013, the District Court of The Hague wrongly assumes that the proximity (exclusively) regards the ties between RDS and the people living in the vicinity of the pipelines/well (ground 4.34, Dooh). The District Court of The Hague also wrongly assumes that a duty of care will be less likely the larger the group of potential victims becomes (*idem*).

> of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.[137]

135. The quote above is a summary that Arden LJ gives to conclude her judgment. The various parts must be viewed in the context of the factual circumstances and legal findings described in the judgment. As also demonstrated by the wording *('In appropriate circumstances the law may impose on a parent company responsibility… those circumstances include a situation where, as in the present case')*, this involves a list of the circumstances relevant in that case; this is not a cumulative list of conditions.

136. The *Chandler v Cape* case was brought by a former employee of Cape Products, who had developed asbestosis as a result of exposure to asbestos during his work. Chandler himself did not work in asbestos processing, but for a brick-making plant that was affiliated to Cape Products. His work consisted of loading bricks outside, at the site where Cape Products' asbestos processing plant also stood. This latter plant was open on one side, as a result of which the asbestos could spread outdoors. At the time that Chandler became sick years later, Cape Products no longer existed. He sued the parent company, not as shareholder or successor in title, but based on direct liability on account of *assumption of responsibility*.

137. Arden LJ felt that the following factual circumstances were relevant for assessing the case.

- Both Cape and Cape Products were involved in the processing of asbestos.[138] After Cape had acquired Cape Products, Cape Products increasingly became part of an integrated group of companies that were involved in asbestos processing, headed up by Cape.[139] Arden LJ noted:

  > Where the grant of a licence affected the interest of the Group, Cape products was making corporate decisions with regard to those interests, as well as those of itself as a separate legal entity. It was acting as a company which had been integrated into a larger group of companies.[140]

- In so doing, Cape was in the position to render technical assistance to Cape Products. Arden LJ finds:

  > It would have been very surprising if Cape did not make technical know-how available to Cape Products in view of its long experience in the asbestos industry. There is evidence that it was indeed shared.[141]

- Cape was also involved in the *product development* of Cape Products. A chemist working for Cape became *Group chief chemist*. There was also a *Group laboratory*.[142]

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137 *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 80.
138 *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 7, 8.
139 *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 10.
140 *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 12.
141 *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 14.
142 *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 15-16.

- Health and safety issues were addressed both within *Cape Products* itself and at the level of the parent company.[143] Cape appointed a *Group medical adviser*, who conducted further studies into the risks of asbestos.[144]
- Cape also kept a record of the number of employees who fell ill.[145] Moreover, there was a *group manual* that provided for regular medical checkups of employees who frequently came into contact with asbestos.[146]
- It had been established that a *Group medical adviser* who had been hired by Cape was or could have been aware of the fact that the development of asbestosis was possibly related to the exposure to asbestos.[147] It had not been established that he performed his research of the risks of asbestos for or on behalf of Cape.[148]
- LJ Arden further found that minutes of the board meetings of Cape had demonstrated that at the level of Cape, decisions were taken regarding the expansion of *Cape Products*.[149]

138. In light of these circumstances, LJ Arden found that the parent company had a duty of care in respect of the employees of Cape Products. Cape failed to advise Cape Products regarding precautionary measures to be taken, even though Cape or at least its *Group medical adviser* was conducting research into the causes of asbestosis and this research had *not* demonstrated that asbestosis was *not* caused by exposure to asbestos.[150]

139. In the 1950s and 1960s, research into asbestos was still in its infancy; Cape probably was not aware of the risks to which it was exposing its employees. The judgment does not offer any clarity in this regard, given that Cape Products no longer existed. The fact that a doctor associated with Cape, whether or not in his capacity as Cape employee, should have been able to estimate those risks means that Cape had a duty of care.

140. In this place it is further noted that it had not been demonstrated or required that Cape was specifically aware of the occasion on which Chandler was exposed to the asbestos during his work. The issue was that Cape was aware of the *"systematic failure"* of Cape Products and therefore was also responsible to Chandler:

> Cape therefore knew that the Uxbridge asbestos business was carried on in a way which risked the health and safety of others at Uxbridge, most particularly the employees engaged in the brick making business.[151]

141. The appellants believe that the principles expressed in *Chandler v Cape* also apply to Shell. They hold the parent company liable because it (i) was aware of the systematic failure of SPDC, as a result of which (ii) irresponsible risks were taken with regard to the environment and the people living in the vicinity; moreover, it (iii) had the know-

143 *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 18.
144 *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 20.
145 *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 22.
146 *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 12.
147 *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 27.
148 *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 76.
149 *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 28.
150 *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 79.
151 *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 77.

how required to contend with those risks and (iv) had demonstrated that it had intervened in SPDC's activities on other occasions, but (v) nevertheless failed to intervene, as a result of which (vi) the damage near Goi, Oruma and Ikot Ada Udo occurred.

142. In the proceedings in the first instance, the foundations of the parent company's duty of care have been explained at length. Whereas in the summons this was still done based on principles of Dutch law, in the interim it can be concluded that the same principles for liability – awareness, knowledge, control – are expressed in Nigerian law and English law. Thus, please refer to what has already been noted in previous case documents.

143. In the motion to produce documents on appeal, in response to the Shell *standards* and *manuals* available at that time, it was explained in more concrete terms how the parent company conducts its supervision and how specific the control is. For the sake of readability, all this will not be repeated and included here, but this should be considered to have been repeated and included here.

2.7.2 'The parent company'

144. In contrast to Cape, Shell is a multinational organization with a complex organizational structure. Until 2005, Shell T&T and Shell Petroleum were at the head of the Shell Group. From 2005, that position was formally acquired by RDS. How the various companies are related in terms of shares is not a decisive factor, given that the appellants do not invoke any piercing of the corporate veil, but *direct negligence*.

145. For assuming liability based on *direct negligence*, the formal position of a company in the group is not relevant, but rather the facts based on which a duty of care may possibly be assumed. The parent company was in a position in which it was aware of the structural problem in the Niger Delta, on the one hand, and was in a position to provide guidance and advice to SPDC in this regard, on the other. The parent company was or should have been aware of the problems that resulted in the oil spills and damage in Goi, Oruma and Ikot Ada Udo. It was the parent company's responsibility to take measures to prevent that damage.

146. The parent company was in that position because it provided policy and financial guidance and kept itself informed of important risks and developments. Before 2005, this was done by the *Committee of Managing Directors (CMD).* A member of the CMD was a member of the board of Shell T&T or Shell Petroleum and of the Executive Boards of the Group Holding Companies.[152] The CMD consisted of 5 *managing directors,* each responsible for a different business. Important decisions for the Shell Group and its businesses were taken by the *Committee of Managing Directors*.[153]

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[152] Statement of Rejoinder of Shell, par. 33 (Dooh).

[153] In the case documents in the first instance, the control structure was already addressed at length. Shell submitted that the CMD was not instituted by Shell Petroleum and Shell T&T. It is a fact that the members of the CMD were at the head of the business lines and that they were members of the boards of the parent companies. Even before the lead position was formally taken by RDS in 2005, this structure was continued in the new *Executive Committee*.

147. After 2005, this position was taken by the RDS *Executive Committee*. Each of the members of the *Executive Committee* is responsible for a specific business. Direct information regarding SPDC reaches the *Executive Committee* via two of its members: the *Director* of the *'Upstream'* business (formerly '*Exploration and Production'*) and the *Chief Financial Officer*. One member of the Executive Committee is the director responsible for *Projects & Technology*, the Shell division that is *inter alia* involved in *safety and environment* and in *global technical expertise*, which it utilizes for the operating companies. [154]

148. Thus, each of the directors heads one of the company's businesses (*Upstream, Downstream, Finance, Technology*); in turn, other companies have been placed in the business. The *influence* of the parent company does not run via that legal structure, but via the management line. This is aptly illustrated by the letter in which, in 2004, Shell explained to the *UN High Commissioner for Human Rights* how as a multinational, it viewed responsibility for human rights:

> Our issues identification and management system identifies and addresses the social, environmental and ethical risks facing Shell's businesses across the Shell Group. The process operates on a bottom-up basis, with processes at local facilities through to a Shell group process. A seven stage process starts with monitoring of the external environment and identifying potential risks, analyses these risks and prioritises them based on a relative assessment of the impact upon Shell's license to operate in that environment. An owner for each risk is identified and has responsibility for developing the approach to mitigating the impact of a negative risk, or maximising the potential opportunity that early identification of risks can provide. the issues process is complementary to the Risk and Control Internal Control Policy and is reviewed on a quarterly basis by the relevant management team. For the Shell Group, this means by the Committee of Managing Directors.[155]

2.7.3 Guidance

149. In *Chandler v Cape*, Arden LJ found:

> In the present case, Cape was clearly in the practice of issuing instructions about the products of the company, for instance, about product mixes. We know that Cape Products could not incur capital expenditure without parent company approval. Cape's board minutes show that Cape approved the separate administration of Cape Products' operations "in accordance with company policy" of Cape. There is nothing wrong in that but it suggests that the company policy of Cape on subsidiaries was that there were certain matters in respect of which they were subject to parent company direction.
>
> I accept Mr Stuart-Smith's submission that Cape was not responsible for the actual implementation of health and safety measures at Cape Products. However, as Mr Weir points out, the problem in the present case was not due to non-compliance with recognised extraction procedures. […] As the judge observed, the problem was systemic.[156]

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[154] http://www.shell.nl/nld/aboutshell/who-we-are/locations/rijswijk.html (visited on 5 September 2013).
[155] Letter from Shell to OHCHR dated 24 September 2004, http://www2.ohchr.org/english/issues/globalization/business/docs/shell.pdf (most recently visited on 4 October 2014).
[156] *Chandler v Cape*, par. 73, 74.

150. For Arden LJ, whether Cape determined the health and safety policy and whether it sometimes intervened at Cape Products in that area was not a decisive factor; the issue for her was that Cape acted as head of the group and – in a completely different area, namely the composition of *product mixes* – had demonstrated that it had the *possibility* to direct Cape Products.

151. Shell's parent company does explicitly determine group policy for safety and the environment. In addition, the parent company also directly intervenes in operating companies like SPDC in other respects, as well.

152. Just as in *Chandler v Cape*, from a legal point of view, the parent company and SPDC are independent companies. Shell contends that SPDC 'voluntarily' implements group policy. In reality, there is a (voluntary) dependency relationship between the two companies in which SPDC is deemed to comply with group policy and is also assessed on this basis. This is *inter alia* demonstrated by the following circumstances.

- The parent company approves the annual business plans and determines the budgets that are linked to those plans. The business plans contain SPDC's *Key Performance Indicators* regarding specific policy areas, such as production, maintenance, the environment and safety. The business plans contain *Key Performance Indicators*; these have to be reported on to the *Business* on a monthly basis. At the head of that Business is a member of the *Executive Committee*, formerly the *Committee of Managing Directors*, which bears the responsibility for this within the parent company. In addition, the *Key Performance Indicators* and compliance are checked by the parent company via the *Finance directors* of the Business, who in turn are accountable to the *Chief Financial Officer*, who also bears the responsibility for this within the parent company. If the performances are sub-standard, measures are taken.[157]
- The head office is constantly informed in detail of the progress made in the area of the environment and safety. Important affairs are discussed at the highest level; important decisions are not taken without the parent company. This applies in particular to Shell's decision to largely withdraw from Nigeria, of course (and for example could have applied to a decision to conduct a large-scale clean-up action in the Niger Delta).
- The parent company sets out the group policy, *inter alia* regarding the environment and safety. The general environmental policy is based on the *Global Environmental Standards* that prescribe *compliance* with the Shell policy.[158] More specific standards are stipulated in the *Shell EP HSE Manuals EP2005* and *95000*. The HSE Manuals are prepared by *Shell Exploration and Production (SIEP*), under the responsibility of the relevant member of the *Executive Committee*, formerly the CMD. Shell HSE *Manuals* prescribe

[157] See also: Paddy Briggs, "*Where the Buck stops in a Multinational Corporation*", Blogger News Network, 3 September 2012, submitted in the first instance as Exhibit M7 (Dooh).

[158] Submitted in the first instance as Exhibit E4 (Dooh).

precisely how the operating companies must structure their risk management systems,[159] what they must document to this end, how they must weigh specific risks and in which cases they must report risks and incidents to the parent company.[160] In addition, the HSE manuals record quality standards, for example, regarding soil and groundwater and guidelines for the response following oil spills.[161] For an extensive overview of policy rules, please refer to the new claim for the production of documents on appeal.

- Detailed technical standards are managed by the *Technical Standards Group* under the supervision of *Shell Global Solutions*.[162] The latter also falls under the responsibility of the *Projects & Technology director* in the *Executive Committee,* formerly the CMD. SPDC is expected to comply with the standards and manuals to guarantee group policy. EP95-100 stipulates:

  > Shell design and engineering practices (DEP) or equivalent company standards shall be consistently applied and variances shall be subject to a control mechanism.[163]

- The parent company requires that operating companies such as SPDC indicate each year in *Assurance letters* that and how they complied with the safety and environmental policy (HSE) and the related standards of the Group. The *Assurance letters* are directly addressed to the Shell Group Executive.[164]
- Operating companies must draw up an annual *Assurance Plan*: an *"outline of the various forms of appraisal [...] to provide assurance regarding the effectiveness of a risk based control framework"*.[165] These *Assurance Plans* and the consequences they entail are monitored, as well.[166]
- Operating companies are frequently audited on various elements of the HSE policy. Results of those audits are shared at the business and group level; *corrective actions* are determined.[167]

153. Essex University concludes:

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159 For example EP 95-0100, Exhibit N8 (Dooh) regarding *Health, Safety and Environmental Management Systems.*

160 For example EP 95-0300, Exhibit N9 (Dooh) regarding *Overview Hazards and Effects Management Process*, Exhibit N9 (Dooh)*;* EP 95-0352 regarding *Quantitative Risk Assessment*.

161 For example the *Environmental Quality Standards* regarding *air* (EP 95-0375), *water* (0380) and *soil and groundwater* (0385), Group MOSAG 'Guidelines for Shell Companies on Preparedness, Response and Compensation for Oil and Chemical Spills.

162 For the contents and scope of those standards, please refer to the new claim for the production of documents on appeal, par. 87-105 (Dooh) and Exhibit N3 (Dooh).

163 EP95-100, Exhibit N8 (Dooh), *Planning and Procedures*, 5.3.

164 HSSE Auditing Standard; see also EP 950100, Exhibit N8 (Dooh): "*it is now a requirement that operating units and joint ventures submit an annual letter of HSE assurance, confirming compliance with the group HSE Commitment, Policy and Procedure for an HSE MS*". See also *De Volkskrant*, 3 March 1997 (Exhibit M.10): "Hekströtter: This is quite something [...], I believe that as a manager, you are in a cold sweat".

165 EP 2005-0180, Exhibit N10 (Dooh), *HSSE Auditing,* Appendix 1.

166 EP 2005-0180, Exhibit N10 (Dooh), *Follow-up HSSE Audit Findings*, p. 9.

167 See sections 2.7.4 and 4.3.2 below.

> Throughout its Sustainability Report, its SEC Form 20-F filing, and the Shell website, RDS represent that it stands in ultimate control of a well-disciplined environmental policy throughout the Shell Group.[168]

2.7.4 Awareness

154. LJ Arden finds in *Chandler v Cape:*

> Cape concedes that the system of work at Cape Products was defective. The judge inevitably found as a fact -and there is no appeal from this – that Cape was fully aware of the "systemic failure" which resulted from the escape of dust from a factory with no sides. Cape therefore knew that the Uxbridge asbestos business was carried on in a way which risked the health and safety of others at Uxbridge, most particularly the employees engaged in the brick making business.[169]

155. Shell's parent company is not reproached for failing to monitor compliance with specific procedures, but rather that it watched an environmental disaster taking place in the Niger Delta as a result of the many oil spills and defective clean-up work by SPDC and failed to induce SPDC to do anything about this.

156. The fact that a *systemic failure* was involved that resulted in damage for the appellants and the environment may be demonstrated by Chapter 2.6 and by the many reports that have been published regarding the serious nature of the pollution in the Niger Delta and SPDC's role – or failures – in this regard.[170]

157. It is clear and undisputed that the parent company was aware of the influences to which SPDC was exposed in Nigeria; the parent company was aware of the difficulties in the Niger Delta, especially in Ogoniland, and the problems of sabotage and *bunkering*; the parent company was also aware that the problems caused by overdue maintenance were extensive. The parent company frequently discussed these matters in the press. Moreover, the parent company was undoubtedly aware of the fact that many wells and other facilities were no longer in use, had not been (sufficiently) dismantled and therefore were extremely susceptible to damage as a result of corrosion or sabotage.

158. Shell is aware of SPDC's activities through monthly budget meetings and reports regarding *Key Performance Indicators*, through reports of (potentially) high-risk incidents and through the results of frequent *audits*. The manner in which the parent company keeps itself informed is discussed extensively in the new claim for the production of documents on appeal. For an explanation to the main points below based on the Shell standards and *manuals*, please refer to this.

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168 *Corporate Liability in a New Setting – Shell and the Changing Legal Landscape for the Multinational Oil Industry in the Niger Delta*, University of Essex, Business and Human Rights Project (2012) (**Exhibit O4**), p. 20.

169 *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 77.

170 See inter alia *Amnesty International, Bad information: oil spill investigations in the Niger Delta* (2013) (**Exhibit O3**) ; *Corporate Liability in a New Setting – Shell and the Changing Legal Landscape for the Multinational Oil Industry in the Niger Delta*, University of Essex, Business and Human Rights Project (2012) (**Exhibit O4**); International Commission of Jurists, *Access to Justice: Human Rights Abuses involving Corporations – Nigeria* (2012) (**Exhibit O5**); UNEP, *Environmental Assessment of Ogoniland* (2011), submitted in the first instance as Exhibit L7 (Dooh); Platform: *Counting the Cost, Corporations and human rights abuses in the Niger Delta*, 2011, http://platformlondon.org/nigeria/Counting_the_Cost.pdf.

- Annual business plans are collectively determined and budgets are set by the parent company. The progress of *Key Performance Indicators* must be reported every month to the *Business*. Via the *Business Directors* and the *Financial Officers*, the parent company is kept abreast of the developments.
- Subsidiaries and businesses are frequently audited within Shell for *compliance* with the Shell HSE policy, for example regarding environmental care, HSE policy, *Well engineering* and HSSE *Assurance Products*, including *Emergency and Oil Spill Response*.[171] The *EP Global Assurance Leader* is closely involved in the performance and monitoring of the audits. He reports to the *EP Business Assurance Committee (BAC)*; the *Group HSSE Risk & Assurance Committee* is also informed of the results.[172] The guidelines clearly stipulate that audits must be followed up on and that *corrective actions* must be determined. Audit results must be stored in a web-based EP HSE *Tracking System* "*for recording audit reports, findings and recommendations and for monitoring the approval and closeout of actions*".[173] The *Business Assurance Committee* monitors the progress and must approve the results.[174]
- The risk management system that all companies within Shell must use provides that the parent company is informed of relevant risks that may entail financial or reputation damage. The HSE standards and guidelines contain extensive documentation regarding the manner in which operating companies must assess risks and how they must document and report those risks.[175] A central computer system, *Fountain*, has been used for this since at least 2005; however, before 2005 a uniform system was used, as well. Different manuals provide further guidelines for risk assessment.[176] To this end, Shell uses a risk assessment matrix, that must be used by all members of the group:

171 An overview is given in EP 2005-0180, *HSSE Auditing*, Exhibit N10 (Dooh), p. 11. See further the new claim for the production of documents on appeal.
172 EP 2005-0180, *HSSE Auditing*, Exhibit N10 (Dooh), *Manage the HSSE Audit Process*, p. 2.
173 EP 2005-0180, *HSSE Auditing*, Exhibit N10 (Dooh), *HSSE Auditing*, p. 4.
174 EP 2005-0180, *HSSE Auditing*, Exhibit N10 (Dooh), *Follow-up HSSE Audit Findings*, p. 2.
175 See *inter alia* EP95-0300, Exhibit N9 (Dooh), *Overview Hazards and Effects Management Process*.
176 For example EP 94-0101 and EP 94-0102, *ASPIN version 1.1 Pipeline Failure Risk Assessment*, Dec. 1993.

Prakken

Risk Assessment Matrix

CONSEQUENCE					INCREASING LIKELIHOOD >>				
SEVERITY >>	PEOPLE	ASSETS	ENVIRONMENT	REPUTATION	A	B	C	D	E
					Never heard of in the industry	Heard of in the industry	Has happened in the organization or more than once per year in the industry	Has happened at the location or more than once per year in the organization	Has happened more than once per year in the location
0	No injury or health effect	No damage	No effect	No impact					
1	Slight injury or health effect	Slight damage	Slight effect	Slight impact					
2	Minor injury or health effect	Minor damage	Minor effect	Minor impact					
3	Major injury or health effect	Moderate damage	Moderate impact	Moderate impact					
4	Permanent Total Disability (PTD) or up to 3 fatalities	Major damage	Major effect	Major impact					
5	More than 3 fatalities	Massive damage	Massive effect	Massive impact					

INCREASING RISK

For definitions of industry, organization and location, refer to the RAM Yellow Guide

159. Incidents with *actual consequences* 4 and 5 are *Significant Incidents*; incidents and *near misses* in the red zone are *High Potential Incidents*. A combination score is determined for these *high potential incidents* based on probability and possible effect. According to the guidelines, all *significant incidents* must be reported to the *Business Head, senior Business Leader, Business HSSE VP and Group HSSE VP* within 24 hours; *High Potential Incidents* with a *Ram Risk Rating* of C5, D5 or E5 must be reported to the *Regional or Class of Business Executive VP* and the *Business HSSE VP*.[177] The new claim for the production of documents on appeal and Chapter 4.3.5 below explains that the Shell standards imply that this also applied for the oil spills at issue.

160. As a result of the *business reports, audit reports* and *risk assessments* – not even mentioning the publicity and political aspects of Shell's work in Nigeria – the parent company is (or was) undoubtedly aware of the systemic failures in Nigeria. The parent company was aware of the fact that SPDC was unable to contend with those problems. In those circumstances, the parent company was or should have been aware of the fact that there was a disproportionately large risk of damage as a result of oil spills due to (i) the fact that the pipeline near Goi was extremely obsolete and could not be properly maintained; (ii) the pipeline near Oruma was seriously corroded and had to be replaced and (iii) even though for a long time, the IBIBIO I well had not been used, this well had still not been abandoned. The parent company was aware of the fact (iv) that equipment that had not been *decommissioned* and *abandoned* constituted a structural problem for SPDC. In addition, the parent company was or should have been aware of the fact that (v) the risk of damage as a result of sabotage to the pipelines in the Niger Delta and in Goi, Ogoniland, in particular, was very high. Finally, the parent company was or should

[177] *HSSE Management System Manual*, Exhibit N11 (Dooh), *Incident Investigation and Learning*, Table 1: *Timelines for Notification, Investigation, and Review of Significant Incidents and High Potential Incident*, p. 5.

have been aware of the fact that (vi) the methods utilized to limit and clean up the pollution were defective.

2.7.4 Knowledge

161. In Chandler v Cape, Arden LJ finds:

> Whether or not [Dr Smither] was formally appointed group medical adviser in the relevant period, it is clear that he was engaged on research, based on empirical research done at Cape and its asbestos-producing subsidiaries, about the relationship between asbestos production and asbestosis. […]. Dr Smither must have known about the risks during some part or all of the relevant period.[178]
>
> Given Capes state of knowledge about the Cowley Works, and its superior knowledge about the nature and management of asbestos risks, I have no doubt that in this case it is appropriate to find that Cape assumed a duty of care either to advise Cape Products on what steps it had to take in the light of knowledge then available to provide those employees with a safe system of work or to ensure that those steps were taken. The scope of the duty can be defined in either way. Whichever way it is formulated, the injury to Mr Chandler was the result.[179]

162. Based on the specific knowledge of this Dr Smither, whether or not he was employed by the Cape Group, Arden LJ subsequently refers to Cape's *"superior knowledge about the nature and management of asbestos risks"*.[180]

163. In *Chandler v Cape*, Arden LJ assumed that the research and knowledge of Dr Smither was intended to benefit Cape. Thus, the board of Cape was not required to have this knowledge or even to be sufficiently skilled to advise Cape Products regarding the risks of asbestos. The issue was that Cape was developing knowledge at the group level (or: had this done) regarding the possible consequences that the work of its subsidiaries had for the health of employees.

164. It has been explained above and in the previous case documents that Shell publicly attaches importance to the environmental policy at the group level. In addition, under the ultimate responsibility of the parent company, Shell has knowledge developed at the group level in the area of environmental management and technology. It is obvious – especially for the largest multinational in the world – that the parent company or the members of its board do not personally have this superior knowledge. The parent company – and the member of the *Executive Committee* (formerly the CMD) that heads *Projects & Technology* in particular – is responsible for the development of know-how that is conducted at the group level for subsidiaries.

165. Arden LJ assumed that as a result of Dr Smither's special knowledge, Cape was aware of the possible health risks that the employees of Cape Products encountered. This knowledge was *superior*: there was not yet much known regarding asbestos; thus, Cape Products may not have been aware of the risks to which it exposed its employees.

[178] *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 76.
[179] *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 78. "Cowley Works" was de Cape Products location.
[180] *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 78.

Because Cape did know and was moreover in the position to advise Cape Products, Cape was under a duty of care. It is not said that Cape would not be under a duty of care if not only Cape, but Cape Products, as well, had been aware of the fact that the circumstances in its plant could lead to asbestosis. The latter was simply not in dispute. To this extent, the expression '*superior knowledge'* should be considered to be a factual establishment rather than a criterion for liability.

166. Arden LJ establishes a direct link between the knowledge available at the parent company, its awareness of the circumstances at Cape Products, and its possibility to advise Cape Products or to ensure that measures were taken. The relationships were such that Cape Products relied on the principles that were set out by the parent company.[181]

167. SPDC also relies and relied on the superior knowledge of the parent company. It has already been mentioned that under the responsibility of the parent company, specific guidelines are issued by *Shell Exploration and Production* in the area of the environment and safety, and by *Shell Global Solutions* in the area of technology. The new claim for the production of documents on appeal offers an overview.[182]

168. The knowledge that the parent company has *inter alia* includes:[183]

- Material selection, also including the *Selection of Materials for Life Cycle Performance (Upstream facilities*) (DEP 39.01.10.11[184])
- Corrosion management, also in the scope of the *Corrosion Management Framework* ('CMF'). This for example includes *Operational Pigging for Corrosion Control* (Appendix 4 to EP 2000 5712)*, Pig Selection and Use* (EP 95 2580) and *Planning and application of pigging operations* (EP 97 6059), *Carbon steel corrosion engineering* (DEP 30.10.02.14 Gen.[185]) , *Automated Ultrasonic Inspection* ('AUT') (DEP 37.81.40.32) and the related qualification and field operations (DEP 37.81.42.35)
- Protection systems for pipelines, including cathodic protection (DEP 30.10.73.10 Gen., DEP 30.10.73.31 Gen. and DEP 30.10.73.33 Gen.)
- Detection systems for leaks, including the *Leak Detection System* ('LDS') (DEP 31.40.60.11 Gen.[186])
- *Wellhead* and *Christmas Tree* equipment, including the modification or abandonment of this equipment (EP 39.01.30.30; ISO 10423)
- Integrity and repairs of pipelines, usually in the form of *Run & Maintenance Practice* standards ('RMP-Gs.'), for example regarding *Pipeline Integrity* (RMP 31.40.00.51 Gen.) and *Pipeline Repairs* (RMP 31.40.60.50 Gen.)
- Specific environmental issues, such as *Environmental Assessment* (EP-0370); *Drinking Water Guidelines* (EP-0330) and *Environmental Quality Standards* regarding *air (*EP 95-0375), *water (*0380*)* and *soil and groundwater (*0385); monitoring the air quality (EP 95-0376); the water quality (EP 95-0381) and soil and groundwater (EP 95-0386)

[181] *Chandler v. Cape plc* [2012] EWCA Civ 525, par. 80. See also Weir, Exhibit N2 (Dooh), par. 58-59.
[182] See also [Exhibit M-x overview DEPS].
[183] For an explanation, please refer to the new claim for the production of documents on appeal.
[184] Exhibit N4 (Dooh).
[185] Exhibit N5 (Dooh).
[186] Exhibit N6 (Dooh).

- Dealing with contaminated soil and groundwater (EP 95-0387) and *Waste management* (EP 95-0390)
- *Disaster* management, such as *Emergency response* (EP 95-0316); *Fire plans and Fire Control* (EP 95-0350, 0351), *H2S in operations* (EP-0317), *Oil Spill Dispersants* (EP95-0397), etc. See in this connection also the EP *(Exploration and Production) Crisis Guide*.
- *Preparedness, Response and Compensation for Oil and Chemical Spills*[187]

169. Shell set up a worldwide *Shell Global Helpline* that is available 24 hours a day to ask advice regarding compliance with Shell standards or to report abuses.[188]

170. *Shell Global Solutions* is not only responsible for developing the DEPs, but also advises in concrete projects and circumstances. For example, the investigation of the pipeline near Goi was conducted in collaboration with *Shell Global Solutions*.[189]

171. Essex University notes:

> Management of SPDC does not simply *listen* to the views of the parent and the entities to which it assigns competence, such as Shell Global Solutions; it *partially relies* on those views for guidance about its appropriate responses. It also knows that if it does not rely on that guidance, sanctions may be incurred. [190]

3. OVERVIEW GROUNDS FOR APPEAL

172. Many objections of the appellants against the interlocutory judgment of the District Court of The Hague have already been addressed. The individual grounds for appeal follow below. These grounds for appeal must be read in relation to (and possibly supplemented by) everything that is discussed in the previous and next chapter.

173. The appellants seek to contest the judgment in the motion to produce documents in its entirety, meaning all findings of the District Court on which the dismissal of the claim for the production of documents is based.

174. With regard to the findings of the contested interlocutory judgment to be cited below, the judgment in Dooh et al. (Goi) is maintained, with reference to the relevant findings in the other cases; the same is true for references to the case documents and exhibits. In the event of relevant differences, this is noted in a footnote.

3.1 Ground for appeal 1: *The District Court wrongly provisionally assumed that the oil spills were caused by sabotage.*

175. In grounds for appeal (in the motion) against the decision of the District Court of The Hague dated 30 January 2013, the appellants will contest the District Court's conclusion

[187] Group MOSAG Guidelines for Shell Companies on
[188] http://www.shell.com/global/aboutshell/who-we-are/our-values/compliance-helpline.html.
[189] Reply to the Defence (Exhibit O2), par. 18.5.
[190] Corporate Liability in a New Setting – Shell and the Changing Legal Landscape for the Multinational Oil Industry in the Niger Delta, University of Essex, Business and Human Rights Project (2012) (Exhibit O4), p. 52.

that the oil spills were caused by sabotage. In the interlocutory judgment dated 14 September 2011, the District Court arrived at an identical provisional finding. This finding was (wrongfully) a decisive factor in the District Court's conclusion that the appellants were not entitled to access to documents regarding the condition and maintenance of the pipeline and *wellhead*. For that reason, the appellants' grounds for appeal are currently also – largely – directed at this provisional finding. The appellants wish to submit the final judgment of the District Court of The Hague for a full review to the Court of Appeal, of course, when they will formulate their grounds for appeal in the main action. In this connection, they refer to the Court of Appeal's promise that in both phases, the parties can contend what they deem relevant in the scope of the decisions to be taken in those phases, without relinquishing any right.[191]

176. The appellants believe that the District Court should not have arrived at its provisional findings, because Shell's evidence is insufficient for this. As demonstrated by Chapter 2, in the event of doubts regarding the cause of the oil spill, the risk of the evidence being rejected should have fallen on Shell.[192]

177. In all cases the District Court ascribed considerable meaning to the JIT reports. JIT reports cannot serve as evidence if they have not been properly arrived at and/or are not supported by other, convincing evidence.

178. For five years, Amnesty International examined investigation methods of oil companies in Nigeria.[193] The report concludes:

> [T]he JIV-process itself is deeply flawed, and Shell has claimed spills are duet to sabotage without evidence when they are not. The process is open to manipulation, and has been manipulated.
>
> Accufacts summed up its assessment:
>
> (…) 'The JIV Report forms are incomplete, appear to be subjective, not factual in nature, and fail to clearly identify that field observations serve only as preliminary observations. Clear technical, observable factual information that can be defended and proven repeatedly to any party who may challenge the finding needs to be incorporated in the JIV Report form.'[194]
>
> There are systemic flaws in the system for investigating oil spills in the Niger Delta. As a result, the outcome of these investigations lacks credibility (…) With regard to Shell, reviewing all available data this report has built up a picture of a company whose claims about its environmental impact on the Niger Delta are frequently untrue. Shell has claimed that the oil spill investigations are sound when they are not, that sites are cleaned up when they are not, and that the company is transparent when, in reality, it maintains very tight control over every piece of information - deciding what to disclose and what to withhold.[195]

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[191] Record of the Personal Appearance of the Parties held on 30 June 2014 in The Hague.

[192] See also 4.1.

[193] Amnesty International, *Bad information: oil spill investigations in the Niger Delta* (2013) (**Exhibit O3**). For the investigation methods and the material studied, see p. 8. The report was preceded by the memorandum that the appellants submitted in the first instance as Exhibit M6 (Dooh).

[194] Amnesty International, *Bad information: oil spill investigations in the Niger Delta* (2013) (**Exhibit O3**), p. 43 ('2.7 Conclusion on JIV Process').

[195] Amnesty International, *Bad information: oil spill investigations in the Niger Delta* (2013) (**Exhibit O3**), p. 64.

179. On 21 March 2013, the Dutch *National Contact Point for the OECD Guidelines for Multinational Enterprises* also found that Shell is too quick to invoke the sabotage defense.[196]

180. In the hearing of the main action, hopefully with the support of the documents currently demanded, the appellants will further explain why the finding that the oil spills were caused by sabotage is incorrect. Here they suffice with a brief representation of the evidence to this effect.

3.1.1 Goi

181. The District Court wrongly found:[197]

> With regard to the oil spill of 10 October 2004, Shell et al. submitted that the oil was spilling from a 46 centimeter long saw cut in the oil pipeline, which had been made using a (serrated) hacksaw. Shell et al. supported this substantiated defense with video footage, which shows that the oil spilled from a diagonal line with jagged edges across the pipe. [The plaintiff et al.] only submitted that this could also involve a cracked weld seam or that the line could have occurred in attempts to close the leak. The District Court finds that [the plaintiff et al.] failed to substantiate that there was a weld seam on the location, which does not stand to reason, either, because as a rule, weld seams do not run diagonally. Nor is it likely that a weld seam would burst open with jagged edges or that attempts to close the leak would have created an opening with jagged edges.[198]
>
> In view of this, [the plaintiffs et al.] for the time being have failed to advance a sufficiently substantiated refutation of Shell et al.'s argument that this oil spill was caused by sabotage, which means that with the current position of the discussion, this argument by Shell et al. must be deemed to be correct for the time being.[199]

182. The video footage cannot support this finding. First of all, the footage is of insufficient quality to assess the possible cause of the oil spill. This is also demonstrated by the Accufacts expert report submitted in the first instance:

> What is missing are close-ups, or better yet, still photos of the pipeline failure site, with and without the coating, to permit a proper and thorough visual evaluation of the failure site.
>
> While I cannot conclude with certainty what the failure cause was, it is clearly speculation that this failure was cause by a saw cut, as the limited video evidence does not substantiate this supposition.[200]

183. Nor is there any proper video evidence for the soil that was dug up according to the JIT report.

184. The UT measurement performed in the video footage is incomplete and cannot rule out all types of corrosion.[201]

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[196] NCP, Final Report, 21 March 2013, Exhibit N12.
[197] Interlocutory judgment District Court of The Hague dated 14 September (Dooh), grounds 4.8-4.9.
[198] Interlocutory judgment District Court of The Hague dated 14 September (Dooh), ground 4.8.
[199] Interlocutory judgment District Court of The Hague dated 14 September (Dooh), ground 4.9.
[200] *Accufacts* report, submitted in the first instance as Exhibit M2 (Dooh), p. 4.
[201] *Accufacts* report, submitted in the first instance as Exhibit M2 (Dooh), p. 5.

185. As also demonstrated by the *Accufacts* expert report, a jagged opening indicates that the case at issue does not involve a saw cut.[202] According to *Accufacts*, a jagged opening rather indicates a pipe fracture:

> The so-called 'saw cut' is not straight or smooth edged, but wavy and jagged edged which is more indicative of other pipe failure fracture mechanics such as previous flaws in the pipe either from manufacture or other damage such as from construction.[203]

186. In the event of a defective weld seam or other defects, a high-pressure pipeline can most certainly burst open. It has been demonstrated with regard to the pipeline near Goi that it suffered from defective weld seams.[204] The welding technique used did not comply with the industry standard.[205] For the rest, the condition of the pipeline was so poor that SPDC deemed it "very likely" that oil spills would occur as a result.[206]

187. The fact that weld seams 'as a rule do not run diagonally' and 'nor is it likely that a weld seam would burst open with jagged edges or that attempts to close the leak would have created an opening with jagged edges' are facts that can only be assessed by an expert; in the absence of arguments in this regard from Shell, the District Court could not assume these acts for the present. In the final judgment, the District Court came back to its finding that the video footage showed a "diagonal" saw cut.

188. Nor can the JIT report be used as evidence. Please refer to what is noted above regarding the establishment and authority of JIT reports.[207] In Mogho near Goi, the *Joint Investigation Team* failed to reach agreement regarding the cause of the oil spill. For that reason, the JIT report only contains half of the required signatures.[208] The representatives of the Nigerian authorities, the representatives of the Area team, the members of the DTE team and the representatives of the Mogho community did not sign the report.[209]

189. Corrosion is a considerably more likely cause of the oil spill, especially in light of the conclusion reached years before that the pipeline was extensively corroded and had to be replaced:

> The remaining life of most of the SPDC Oil Trunklines is more or less non-existent or short, while some sections contain major risk and hazard. […] Outright replacement is necessary because extensive corrosion and pressure derating has resulted in system capacity constraints and the inability to guarantee evacuation of future increases in throughputs from the various fields, particularly the production forecast peaks in years 2006-2008.[210] (emphasis added by attorney)

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202 *Accufacts* report, submitted in the first instance as Exhibit M2 (Dooh).
203 *Accufacts* report, submitted in the first instance as Exhibit M2 (Dooh) pp. 4, 5.
204 Reply to the Defence (**Exhibit O2**), par. 18.8.
205 Reply to the Defence (**Exhibit O2**), par. 18.8.
206 See section 2.5.1.
207 See section 3.1.
208 See the JIT form, submitted in the first instance as Exhibit 5 (Dooh).
209 See also the initiatory writ of summons in the first instance (Dooh), par. 282 and following.
210 Reply to Defence (**Exhibit O2**), par. 18.5. The oil spill at issue in the English proceedings occurred from the same pipeline, a few kilometers further.

3.1.2 Oruma

190. The District Court wrongly found:[211]

> With regard to this oil spill, Shell et al. submitted that the oil was spilling from a small hole with a diameter of 8 mm, round and with smooth edges, similar to a drilling hole, that the surface of the pipeline around the hole was smooth and did not show any signs of pitting or corrosion, and that the thickness of the pipeline wall at that location was normal. Shell et al. refer to the video footage that [the plaintiff et al.] submitted into the proceedings, which shows the leak being repaired and measurements of the wall thickness being taken. In addition, Shell et al.'s argument is supported by a report submitted by the Joint Investigation Team (the JIT) that investigated the oil spill. This report is also signed by representatives of the ministries of Environmental Affairs of both the federal government and Bayelsa State. Shell et al. further submitted data from a study of the wall thickness of the pipeline in question by means of an 'intelligent pig run' by SPDC from December 2004 2004. An intelligent pig is a type of robot that measures the pipeline wall thickness on the inside, as this robot is guided through the pipeline. No decreased wall thickness was measured at the location of the leak. According to Shell et al., these circumstances demonstrate that the oil spill was most likely caused by sabotage; it does not stand to reason that the damage of the pipeline is the result of a poor condition of the pipeline and/or corrosion.
>
> 4.9. To date, Oguro et al. failed to sufficiently substantiate that despite all of the above, this oil spill in June 2005 nevertheless may have been caused by corrosion or by any other defective condition of the pipeline, or that the JIT report signed by the state and federal authorities is unreliable.

191. The evidence that Shell furnished cannot support the conclusion that sabotage was involved. The quality of the video footage is insufficient to assess the cause of the oil spill. What can be seen is that grass is growing at the location where the JIT team is digging.

192. Without any proper visual evidence, following the substantiated challenge by Oguru et al., the District Court could not assume 'that the oil was spilling from a small hole with a diameter of 8 mm, round and with smooth edges, similar to a drilling hole, that the surface of the pipeline around the hole was smooth and did not show any signs of pitting or corrosion'.

193. The assumption that round holes rule out the formation of corrosion is incorrect.[212] The question regarding whether the hole in the pipeline was cylindrically shaped (indicating a drilling hole) or cone shaped (indicating a corrosion hole) cannot be answered based on the available material.

194. The hole is at the bottom of the pipeline. That does not indicate a drilling hole, but is the usual location for a corrosion hole.

195. The UT measurement was not properly performed and cannot rule out corrosion.[213]

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[211] Interlocutory judgment District Court of The Hague dated 14 September 2011(Oguru), ground 4.8.

[212] See also: *Accufacts* report, submitted in the first instance as Exhibit M2 (Dooh).

[213] *Accufacts* report, submitted in the first instance as Exhibit M2 (Dooh), p. 6.

196. The pipeline had been buried at least three meters.[214] The video of the *reclamping* that Shell submitted some time later shows the difficulty that the Shell employees had in tracing and digging up the pipeline. It is not obvious that saboteurs managed to do this in between the surveillance rounds alleged by Shell and subsequently managed to drill a hole in the *bottom* of the pipeline. Nor is it obvious that in contrast to the Shell employees, the saboteurs knew exactly where to dig such that they did not dig up any soil other than the hole they dug to reach the pipeline.

197. The video shows *coating damage* that does not indicate a drilling hole:

> Coating damage at the release site at approximately 8:00 position (toward the bottom of the pipe) is not indicative of drill damage.[215]

198. Nor can the JIT form be used as evidence. Please refer to what has already been noted above regarding the establishment and authority of JIT reports.[216] Moreover, in Oruma the *Joint Investigation Team* failed to reach agreement regarding the cause of the oil spill. The form has not been signed by representatives of the DPR or by representatives of the Oruma community.[217] According to Shell, the photographic evidence of the 'drilling hole' noted in the JIT report no longer exists.

199. The *Intelligent Pig Run* cannot exclude corrosion, certainly not without any further information. Specific forms of corrosion are not detected in the ILI inspections. What the results of an ILI test actually mean can only be assessed if one is familiar with the specifications of the ILI equipment used.

> All ILI pigs have limitations as to their threat identification capabilities, accuracy, and precision (…) No information has been provided with the ILI data indicating the type of smart pig that was run, and its related accuracy and precision. There are wide variations in the capabilities and abilities of corrosion detection ILI tools that have resulted in many pipeline failures from corrosion after an ILI. An important industry standard, API 1163, improving the application of inline inspection tools, was developed following several tragic and expensive pipeline failures in the U.S. that had previously been inspected via ILI. Without knowing the type of corrosion ILI tool that was run, its limitations and capabilities, and whether the tool was properly calibrated for the pipeline, it is all to [*sic*] easy to inappropriately dismiss corrosion as a viable threat on a pipeline. The ILI evidence provided is incomplete, and (…) very misleading as it relates to proper corrosion assessment methods and procedures for a pipeline failure evaluation.[218]

200. Corrosion is a significantly more likely cause of the oil spill, especially in light of the knowledge that the pipeline suffered from considerable corrosion and was *likely to leak before the year 2003/2004*.[219] The oil spill near Oruma occurred in 2005.

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214 *Accufacts* report, submitted in the first instance as Exhibit M2 (Dooh), p. 6.
215 *Accufacts* report, submitted in the first instance as Exhibit M2 (Dooh), p. 6.
216 Section 3.1.
217 See the JIT form, submitted in the first instance as Exhibit A4 (Oguru).
218 *Accufacts* report, submitted in the first instance as Exhibit M2 (Dooh), p. 3.
219 *Environmental Impact Assessment of the 20" x 37 km Kolo Creek – Rumuekpe Trunkline Replacement Project* (SPDC 2004), submitted in the first instance as Exhibit M3 (Dooh), pp. 2-17.

3.1.3 Ikot Ada Udo

201. The District Court wrongly found:

> Shell et al. submitted that the outflow of oil from the wellhead in that period was caused by sabotage, in the sense that the valves of the wellhead had been opened by unknown third parties. According to Shell et al., the outflow of oil was stopped simply by closing these valves. Shell et al. supported this substantiated defense with video footage from November 2007, which indeed shows that the oil flow is stopped by closing the valves of the wellhead with a few turns of a wrench. In no. 104 of the statement of defense in the motion by virtue of Section 843a DCCP, Shell et al. further submitted – to date unchallenged – that it would, in fact, have been impossible to simply stop and definitively remedy the oil spill in 2007 this way if the oil spills in 2006 and 2007 had been caused by defects in the material or by defective maintenance of the wellhead.
>
> In view of this, [the plaintiffs et al.] for the time being advanced an insufficiently substantiated refutation of Shell et al.'s argument that the two specified oil spills in 2006 and 2007 were caused by sabotage, which means that with the current position of the discussion, this argument by Shell et al. must be deemed to be correct for the time being.[220]

202. The fact that the oil spill could be stopped by closing the valve using a monkey wrench does not infer that the oil spill was caused by opening the valve by hand.

> While the Ikot Ada Udo release could be sabotage, the video evidence (…) does not rule out that the release could also be associated with wellhead valve inappropriate alignment/closure, deterioration over time of valve seals or sealing surfaces, or vibration that can crack open or unseal well head valves.[221]

203. In any event, the fact that the oil spill in 2007 could be stopped by closing the valve using a monkey wrench does not imply that the previous spill of 2006 was caused by sabotage.

204. Shell did not furnish any evidence demonstrating that the oil spill of 2006 was caused by sabotage. No video footage or a JIT report has been submitted.

205. The exploratory well near Ikot Ada Udo was not maintained. For decades, this well had been under pressure from the underlying oil field while Shell had not taken any safety measures. A *wellhead* is made for active use and maintenance, not to be used as a valve for closing the well for many years to come. It is specifically for this reason that special rules regarding isolation and *abandonment* apply when a well is left behind.

> There are many reasons why Christmas Tree Valves should not be relied upon to prevent long term wellhead pressure release.
>
> Valves, even multiple valves in series such as on a Christmas Tree, should never be used to serve as energy positive isolation to avoid a release. Even permanently closed valves on a Christmas Tree do not prevent leakage through the valves, even multiple valves in series.[222]

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220 Interlocutory judgment District Court of The Hague dated 14 September 2011 (Akpan), grounds 4.7-4.8.

221 *Accufacts* report, submitted in the first instance as Exhibit M2 (Dooh), p. 9.

222 *Accufacts* report, submitted in the first instance as Exhibit M2 (Dooh), pp. 8-9.

3.2 Ground for appeal **2:** ***The District Court's application of the term 'legitimate interest' is too narrow***

206. In grounds 4.6, 4.8, 4.9, 4.13, 4.14 and 4.15, the District Court uses too limited an interpretation of the term legitimate interest.

- Dooh: grounds 4.6, 4.8, 4.9, 4.13 and 4 .15
- Oruma: grounds 4.6. 4.8. 4.10. 4.15 and 4.16
- Akpan: grounds 4.5, 4.7, 4.10, 4.11 and 4.13

3.2.1 The District Court wrongly based the conclusion that the appellants do not have a legitimate interest in access to documents regarding the specifications and maintenance of the pipeline on its – incorrect – provisional finding regarding sabotage

207. The District Court wrongly found:

- Dooh: grounds 4.8 and 4.9
- Oruma: grounds 4.9 and 4.10
- Akpan: grounds 4.7 and 4.8

> 4.8 The fact that in the main actions, [the plaintiff et al.] have not yet been able to respond to this defense by Shell et al. does not mean that in assessing the legitimate interest of [the plaintiff et al.], the District Court should not be permitted to consider this. It was up to [the plaintiff et al.] to anticipate their reaction to that defense in the main action in order to substantiate their legitimate interest in these motions in their statements in the motion and/or on the occasion of the pleadings. After all, the legitimate interest in the production of documents is limited to the evidence that can contribute to substantiating and/or demonstrating possibly decisive arguments of [the plaintiff et al.] that are relevant for the claims to be assessed, which have been substantiated and contested in sufficiently concrete terms.
>
> 4.9 In view of this, for the time being [the plaintiff et al.] advanced an insufficiently substantiated refutation of Shell et al.'s argument that this oil spill [Akpan: "the alleged oil spills in 2006 and 2007"] was caused by sabotage, which means that with the current position of the discussion, this argument must be deemed to be correct for the time being. This leads to the conclusion that currently, [the plaintiff et al.] do not have a legitimate interest in documents that shed light on the (maintenance) condition of the pipeline in question [Akpan: wellhead in 2006 and 2007]. After all, for the present, the general condition of the pipelines [Oguru: pipeline; Akpan: wellhead] does not have a causal link with the two alleged oil spills [Oguru: oil spill] and thus not with the alleged damage, either. To the extent that [the plaintiff et al.] take the general position that it follows from the mere circumstance that the pipelines [Oguru: pipeline; Akpan: wellhead] are obsolete that Shell et al. were or are required in respect of [the plaintiff et al.] to replace or shut off these pipelines [Oguru: pipeline; Akpan: wellhead] [Akpan: to replace or seal off], irrespective of whether the two alleged oil spills in August 2003 and October 2004 [Oguru: oil spill; Akpan: 2006 and 2007] occurred, the District Court disregards that general argument, because to date, this argument has not been substantiated in any way according to applicable Nigerian law.

208. First of all, in as far as necessary, the appellants can only further substantiate that defective material rather than sabotage resulted in the oil spills based on the claimed documents. Please refer to what has been noted in this context above.

209. Secondly, the legitimate interest coincides with the consequences that the District Court attaches to its own provisional finding. In ground 4.7[223], with reference to Article 11 (5) (c) of the Oil Pipelines Act, the District Court notes:

> In view of this provision, the District Court provisionally finds that the cause of an (established) oil spill under Nigerian law is relevant for assessing the disputes in the main actions.

Particularly in view of the interest that the District Court attaches to the cause of the oil spill for any liability on the part of Shell and the appellants' argument that the oil spills were caused by defective material, the District Court should not have held based on its provisional finding that the appellants do not have a legitimate interest in access to documents that the appellants may use as evidence to substantiate that this finding is incorrect.

210. Thirdly, in the event of sabotage, as well, Shell is liable if it failed to take measures that could prevent that sabotage. The claimed documents in part serve to substantiate that Shell breached its duty of care to *protect* the pipelines. There is an overlap between these areas:

> Other examples may also fall within the maintenance requirement such as renewing protective coatings on the pipelines or, with the advent of new and reliable technology, the provision of updated anti-tamper equipment which might give early and actionable warning of tampering with the pipeline.[224]

211. A Corrosion Management Plan in part pertains to the (condition of the) coating and to this extent serves to demonstrate that Shell took insufficient technical measures that could prevent sabotage attempts. In the English proceedings, it has been demonstrated that this coating was defective and that the pipeline had not been fitted with a functioning cathodic protection system.[225] None of the pipelines or the wellhead had been fitted with any *"updated anti-tamper equipment which might give early and actionable warning of tampering with the pipeline"*.

3.2.2 The District Court wrongly concluded that the appellants insufficiently substantiated their legitimate interest in the claim under Nigerian law.

- Dooh: grounds 4.13-14
- Oruma: grounds 4.14-15
- Akpan: grounds 4.11-13

> 4.13 The question to be answered is whether the arguments mentioned in ground 4.12 are relevant – i.e. possibly decisive – for assessing the main actions. The District Court finds that for the present, [the plaintiff et al.] insufficiently demonstrated this. After all, to date [the plaintiff et al.] did not substantiate that under Nigerian law, a parent company commits tort if it is aware of, and has influence and control over a defective environmental policy of a subsidiary but fails to

[223] Interlocutory judgment District Court of The Hague dated 14 September 2011 (Oguru) ground 4.7 and (Akpan) ground 4.6.
[224] *Bodo v SPDC*, (**Exhibit O1**), par. 92.
[225] Reply to the Defence **(Exhibit O2)** par. 17.1.

> intervene (arguments a and b). In contrast to what [the plaintiff et al.] argue, the environmental policy of an oil company cannot offer a definite answer to the question regarding how tort was committed in respect of specific (alleged) oil spills. Nor has it been substantiated that under Nigerian law, a legal entity can be ordered to implement a different (environmental) policy, as [the plaintiff et al.] claimed in the main action under VII (c). Nor have [the plaintiff et al.] substantiated that under Nigerian law, an operator of an oil pipeline must arrange for the security of that pipeline or that under Nigerian law, the operator may be required to replace an oil pipeline with a sub-standard repair condition, irrespective of whether this defective condition resulted in oil spills (argument (d)).[only D: to date, [the plaintiff et al.] have also insufficiently substantiated that under Nigerian law, any shortcomings in the fulfilment of registration or reporting obligations regarding oil spills may constitute tort in respect of interest groups or private individuals. Moreover, there is no causal link between a possible shortcoming in this area and the alleged damage (argument (e)). Under Nigerian law, it has not been substantiated that an oil company may be required to stop its oil flow through pipelines in a poorly accessible area such as Ogoniland or that this oil company may be liable to pay compensation in the event that it fails to do so (argument (f).] Finally, [the plaintiff et al.] did not explain that under Nigerian law, the ownership and control relationships within the Joint Venture are relevant for the liability of the participating companies (argument (g)).
>
> 4.14 In view of this, to date, [the plaintiff et al.] have offered insufficiently concrete substantiation to substantiate that arguments (a) to (g) – viewed separately or in conjunction – allegedly entail that under Nigerian law, Shell et al. committed tort or that under Nigerian law, one of the other related main claims of [the plaintiff et al.] can be awarded. Nor has this been demonstrated in any other way. The above means that the District Court finds that the claims for the production of all these documents must currently be dismissed due to absence of a legitimate interest.

212. The appellants originally based their claim on Dutch law. In the summons, they extensively explained the circumstances that lead to liability. Although the summons is set up according to Dutch law, the principles of liability (such as the required awareness and knowledge of the parent company) essentially correspond to those in other legal systems, such as the Nigerian legal system.

213. In the decision dated 14 September 2011, the District Court established that Nigerian law is the applicable law. In that same judgment, the District Court further finds that the appellants insufficiently substantiated their claim under Nigerian law. The judgment also demonstrates that the District Court itself did not take the content of that law into account. The District Court should have conducted its own examination of the content of Nigerian law or should have offered the parties the opportunity to inform the District Court in this regard. The District Court wrongly concludes that the plaintiffs do not have a legitimate interest, because they allegedly insufficiently substantiated that specific acts or omissions constitute tort under Nigerian law. The *Ius curia novit* principle also pertains to foreign law.[226]

[226] HR 4 June 1915, *NJ* 1915, 865; HR 8 April 1927, *NJ* 1927, 1110; HR 6 April 2012, ECLI:NL:HR:2012:BV1522 (with the ruling last mentioned, also see the opinion of A.-G. Vlas: "The court must establish the content of the foreign law itself. The parties are not required to contend – and if this is contradicted: prove – the content of the foreign law").

214. On the occasion of the statement of reply, the pleadings, the claim for the production of documents on appeal and in Chapter 3 above, the torts underlying the claim for the production of documents under Nigerian law have been described at length. In discussing the documents a copy of which or access to which is requested in the next chapter, the evidentiary interest will be further addressed.

215. With regard to the District Court findings set out in ground 4.12, the appellants briefly note as follows. (In a number of respects, the appellants supplemented or changed their arguments; for that reason, the overview of their arguments that the District Court set out in ground 4.12 is not (or no longer) entirely adequate).

> After all, to date [the plaintiff et al.] did not substantiate that under Nigerian law, a parent company commits tort if it is aware of, and has influence and control over a defective environmental policy of a subsidiary but fails to intervene (arguments (a) and (b)).

216. First of all, Chapter 2 and the documents from the first instance demonstrate that under Nigerian law, a parent company may be liable if it is aware of the systemic failing environmental policy of a subsidiary but fails to intervene. The District Court also acknowledged this starting point in its judgment dated 30 January 2013.

> In contrast to what [the plaintiff et al.] argue, the environmental policy of an oil company cannot offer a definite answer to the question regarding how tort was committed in respect of specific (alleged) oil spills. Nor has it been substantiated that under Nigerian law, a legal entity can be ordered to implement a different (environmental) policy, as [the plaintiff et al.] claimed in the main action under VII (c).

217. Secondly, in contrast to what the District Court finds in 4.13, SPDC's environmental policy is most certainly relevant. After all, the appellants contend that SPDC coordinates its environmental policy with the parent company; SPDC's budget is in part modified on this basis and the environmental policy is also audited. The appellants contend that the parent company was aware of the fact that SPDC *systematically* failed in a manner that created a risk for the people living in the vicinity, but that it nevertheless failed to intervene. That circumstance is also relevant for assessing the breach of SDPC's duty of care. The question regarding whether under Nigerian law, a legal entity can be ordered to implement a different (environmental) policy as claimed in the main action is therefore not yet relevant for assessing the claim for *access* to documents that are to demonstrate the breach. In this connection it is noted that in the Gbemre case, SPDC was ordered to take the required measures in order to stop *the further flaring of gas*. Similarly, the appellants move in the main action that Shell takes all required measures to terminate their exposure to oil pollution.[227]

> Nor have [the plaintiff et al.] substantiated that under Nigerian law, an operator of an oil pipeline must arrange for the security of that pipeline or that under Nigerian law, the operator may be required to replace an oil pipeline with a sub-standard repair condition, irrespective of whether this defective condition resulted in oil spills (argument (d)).

[227] See section 2.2 above.

218. It has also been demonstrated that an operator has a duty of care to protect and maintain its pipelines. In the event of oil spills, in principle, strict liability falls on the operator. The burden of proof to demonstrate that this strict liability does not apply, because third parties caused the oil spill (and the operator did not act negligently in this regard) falls on Shell. Thus, it is not up to the appellants to prove that the maintenance defects were the underlying cause of the oil spill, but it may be up to the appellants to advance a substantiated challenge of the fact that the oil spill was caused by sabotage (and also to substantiate that the failure of the parent company constituted tort).

> To date, [the plaintiff et al.] have also insufficiently substantiated that under Nigerian law, any shortcomings in the fulfilment of registration or reporting obligations regarding oil spills may constitute tort in respect of interest groups or private individuals. Moreover, there is no causal link between a possible shortcoming in this area and the alleged damage (argument (e)).

219. The appellants' legitimate interest in access to the reports does not serve to demonstrate that Shell allegedly committed tort by failing to fulfil its reporting obligation, but serves to demonstrate that Shell violated its duty of care to adequately respond to oil spills.

> Under Nigerian law, it has not been substantiated that an oil company may be required to stop its oil flow through pipelines in a poorly accessible area such as Ogoniland or that this oil company may be liable to pay compensation in the event that it fails to do so (argument (f)).

220. Please refer to Chapter 2, where SPDC's duty of care and liability is worked out. The documents in question are currently no longer being demanded.

3.2.3 In assessing the claim, the District Court wrongly did not attach any weight to the principle of equality of arms or at least did not do so correctly

221. The District Court wrongly found:

- Dooh: ground 4.15
- Oruma: ground 4.16
- Akpan: ground 4.14

> On the occasion of the pleadings, [the plaintiff et al.] also invoked a right to access based on the principle of "equality of arms" resulting from Article 6 ECHR, separate from the access right of Section 843a DCCP. The District Court finds that Section 843a DCCP works out that principle. The limiting conditions that Section 843a DCCP attaches to the right to the production of documents, including the condition that a legitimate interest must exist, can be reconciled with Article 6 ECHR and the principle of "equality of arms", except (possibly) in the event of exceptional circumstances. It has been insufficiently contended or demonstrated that such exceptional circumstances are involved in the cases at issue. Thus, [the plaintiff et al.'s] invocation of this principle is not successful, either.

222. Even if Section 843a DCCP works out the principle of *equality of arms*, awarding claims that are based on that right may not be made dependent on the requirement that the applicant is assumed to be substantively right in advance.

223. The case law and literature demonstrate that in assessing a claim for access to or a copy of documents, the starting point must be that one of the parties is not unreasonably favored or prejudiced because a specific (evidentiary) document becomes available (or not) as evidence in the proceedings. The District Court should have attached weight to this principle of *equality of arms* in answering the question regarding whether Milieudefensie et al. have a legitimate interest in access.[228] In the explanatory memorandum to the draft legislative proposal to amend – in brief – the access right, the government considered:

> This amendment proposal further serves the 'equality of arms'. An information asymmetry is prevented because one party has information that is relevant for assessing the dispute while the other party does not. In so doing, the legislative proposal contributes to the principle of a "fair trial" expressed in Article 6 ECHR.[229]

224. In the case at issue, a clear asymmetry is involved, because Shell has information that is relevant for assessing the dispute that the appellants do not have. Due to the nature of its work in the Niger Delta and based on the duties of care that are ascribed to Shell under Nigerian law, Shell has documents regarding the condition of its pipelines and facilities, its work on its pipelines and facilities, incidents that occurred and the efforts that Shell made to prevent and remedy such incidents. People living in the vicinity who are confronted with the consequences of Shell's activities on site do not have such information, nor do they have the know-how or means to gather or process such information. This inequality can be compensated in the division of the burden of proof.[230] The application of Section 843a DCCP is also a way to compensate for such an unequal position (of furnishing evidence).[231]

225. The appellants base their claim in the main action on the argument that Shell breached its duties of care to protect and maintain its pipelines, as well as failed to respond adequately and clean up properly in the event of oil spills. In addition to witness statements, external expert reports and facts that were publicly available, to a significant

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228 See also HR 17 June 2014 (ECLI:NL:HR:2014:1448): "the principle of equality of arms" means that the parties in civil proceedings must be offered the opportunity to present their case – including the evidence – without one of the parties being in a significantly worse position than the other party; it is up to the national agencies to assure that the requirements of a "fair hearing" are satisfied."

229 See '*Aanpassing van het Wetboek van Burgerlijke Rechtsvordering in verband met de wijziging van het recht op inzage, afschrift of uittreksel van bescheiden*' (Modification of the Code of Civil Procedure in connection with the amendment of the right to access to, a copy of or extract from documents) (Explanatory Memorandum) 2K 33079, no. 3, p. 2. The legislative proposal is currently still in the Dutch Lower House. The Permanent Committee for Justice issued its report on 27 January 2012 (2K 33079, no. 6); it is currently up to the Minister of Justice to respond to this. However, in a letter dated 21 February 2014, the Minister informed the Dutch Lower House that he will postpone this until more clarity is obtained regarding the modernization of the laws of evidence, a subject that is currently also an issue. See in this regard 2K 33079, no. 6, p. 3.

230 This idea is *inter alia* worked out in the *res ipsa loquitur* doctrine.

231 See also Sijmonsma, *Het Inzagerecht: artikel 843a van het Wetboek van Burgerlijke Rechtsvordering* (The Access Right: Section 843a of the Dutch Code of Civil Procedure), doctoral thesis, Maastricht (Kluwer, Deventer, 2010), p. 107: "To date, this type of inequality in the possibilities to furnish evidence [..] is resolved by adjusting the parties' obligation to contend facts and circumstances, by assuming a judicial presumption or even by a genuine reversal of the burden of proof. I believe that there is nothing that stands in the way of adjusting these problems according to the key of Section 843a and in such cases assume that a right to access automatically exists".

extent their claim has been substantiated with documents that originate from Shell. For example, the *Environmental Impact Assessment* regarding the pipeline near Oruma has demonstrated that this pipeline had serious defects and had to be replaced immediately due to a very high risk of leaks. Owing to the documents disclosed in the English proceedings, we have learned in the interim that in respect of the pipeline near Goi, a working party of SPDC and Shell Global Solutions had warned Shell that this pipeline had exceeded its useful life and that it had to be replaced due to '*major risk and hazard'*. While the District Court found that in part due to the installation of a pressure measurement system, Shell had complied with its duty of care near Goi, other documents that Shell had to disclose in the English proceedings have meanwhile demonstrated that such a system was missing entirely. In addition, it has been demonstrated in the English proceedings that Shell also failed otherwise in taking measures to protect the pipeline near Goi. Finally, the prescribed *standards and manuals* demonstrate that central guidance and monitoring of the Shell subsidiaries is significantly more encompassing and specific than Shell led the parties to believe in these proceedings.

226. Even though each of these documents contains possibly decisive information that is relevant for the dispute, they became available more or less by accident. Thus, this clearly involves a – unequal – situation in which one of the parties does have relevant information and the other party does not. In addition, it has been demonstrated that Shell's arguments are generally not supported by the factual material – which is only available at Shell. This seriously compromises the principle of substantively arriving at the truth, one of the foundations of Section 843a DCCP.

3.2.4 The District Court wrongly found in Dooh et al. that there is no legitimate interest in access to documents regarding the pipeline from which the oil spill in 2003 occurred

227. The District Court wrongly found:

> Shell et al. contest that the specified oil spill of 23 August 2003 occurred. Thus, for the time being, the discussion between the parties does not focus at all on the question regarding the cause of this possible oil spill, so that for the present, Dooh does not have any interest in documents regarding the general condition of repair of the pipeline in question.[232]

228. In ground 3.1 under (I), the District Court wrongly refers to the claimed documents as "Documents pertaining to the 28-inch pipeline from which the oil spill on or around 23 August 2003 occurred". Near the village of Kegbara Dere (often referred to as K'dere), where this oil spill occurred, there are two pipelines: a 24-inch pipeline and a 28-inch pipeline. Dooh et al. failed to specify from which pipeline the oil spill of 2003 allegedly occurred, because they did not have this information. The documents claimed by Dooh in connection with this oil spill naturally pertain to the pipeline from which the spill occurred.

229. In the Statement of Defense, Shell contested that this oil spill occurred as follows:

[232] Interlocutory judgment District Court of The Hague dated 14 September 2011 (Dooh), ground 4.9.

> In the Initiatory writ of summons, nos. 25-26, Dooh et al. stated that on or around 23 August 2003 an oil spill allegedly occurred at the Bomu '*manifold*' near the village of Kegbara Dere. […] RDS and SPDC […] are not familiar with such an oil spill. Dooh et al. did not respond to this in the Summons. Based on Dooh et al.'s brief arguments in this regard in the Summons and related Exhibits A.11 and A.12 of Dooh et al., Shell is still not able to identify the alleged oil spill. [...] Based on the above, Shell contests that an oil spill occurred on or around 23 August 2003 as stated by Dooh et al.[233]

230. In a video that was recorded in 2003, which was submitted with the summons in the first instance, Barizaa Dooh is interviewed regarding this oil spill.[234] The oil pollution on site is very clearly visible on the footage.

231. In a letter dated 25 August 2003, Barizaa Dooh informed Shell Nigeria of his damage caused by this oil spill.[235] He did so after it had become clear to him that the oil spill originated from a pipeline in Kegbara dere that was being managed by SPDC. He had verbally informed Michael Fondi, SPDC's *Community Relations Officer* at that time in the area of Gokana, of the situation.[236] On 2 September 2003, Dooh's (then Nigerian) attorney once again informed SPDC in writing of the oil spill.[237]

232. In the interim it has become clear that the oil spill that polluted Dooh's land and ponds must have been the oil spill that occurred in January 2003 near the village of Kegbara Dere (or: 'K-Dere'). Shell is familiar with this oil spill and it is also mentioned in the UNEP report of 2011.[238] It is pointed out that Goi was affected once again by the oil spill that occurred in October 2003.

233. Land and ponds had been polluted for quite some time before Dooh wrote his letter to Shell. In 2003, Shell sized up the situation both in the village of Kegbara Dere and at Dooh's fish ponds in Goi. Eric Dooh was also present during this visit. Thus, the fact that Shell allegedly has no idea which oil spill is involved is extremely unlikely.

234. The contractor reports of the clean-up work in Goi are entitled: "*Close-out report for remediation of 24 inch Ebubu-Bomu T/L @ Goi 2003/2004 spill*" (emphasis added by attorney).[239] The introduction notes: "*Goi Pond 1-3 Oil spill occurred in 2003/2004*".

235. If it is true that following at least two written notifications, Shell failed to verify the location where the oil spill in question occurred, Shell violated its duty of care.[240]

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233 Statement of Defense of Shell, par. 31-34 (Dooh).
234 Exhibit A8 (Dooh).
235 Exhibit A11 (Dooh), submitted with the summons in the first instance.
236 The name may contain spelling errors.
237 Exhibit A12 (Dooh), submitted with the summons in the first instance.
238 UNEP, *Environmental Assessment of Ogoniland* (2011), submitted in the first instance as Exhibit L7 (Dooh) p. 116 (Case Study: SPDC suspended facilities – Bomu Manifold, K-Dere, Gokana LGA): "Other spills in the manifold occurred in October 1990 (twice), February and March 2001 and January and October 2003.".
239 Exhibits 5 and 6 of Shell (Dooh).
240 Section 2.5.3 above.

3.3 Ground for appeal 3: *The District Court wrongly dismissed the claim for the production of the Environmental Evaluation Report*

236. The District Court wrongly found:

- Goi: ground 4.11:
- Oruma: ground 4.11
- Ikot Ada Udo: ground 4.9

> Shell et al. advanced a substantiated challenge of the fact that they can dispose of such daily journals of the oil spill near Goi in 2004 up to and including the clean-up and remediation work, the "post impact assessment study" and/or the "Environmental Evaluation (post-impact) Report", the production of which is claimed by [the plaintiff et al.] under V and VIII. According to Shell et al., these documents have not been prepared, because this was not required based on the EGASPIN. Because [the plaintiff et al.] failed to demonstrate that Shell et al. nonetheless do have these documents, the claim for the production of these documents is dismissed.

237. The EGAPSIN stipulate that following an oil spill, an operator must prepare an *Environmental Evaluation (PostImpact) Study*, also called an *Environmental Evaluation Report* (EER).[241] According to VIII.A.2.2, an EER *inter alia* describes (the scope of) the affected area, the damage and methods to remedy or limit that damage.[242] An interdisciplinary team of employees of the operator and of the *Department of Petroleum Resources* determines the scope of the investigation.[243] Based on the EER, the remediation methods to be applied are subsequently determined.[244]

238. Preparing an EER is not voluntary. Article VIII.A.1.4.3 (ii) EGASPIN reads:

> The preparation of Environmental Evaluation and Environmental Impact Assessment Reports are hereby made mandatory and shall be adopted as additional enforcement tools.

239. Preparing an EER following an oil spill is *common practice*, as well. Companies that perform such assessments refer on their websites to a range of completed assignments to prepare an *Environmental Evaluation Reports* by oil companies that are active in the Niger Delta.[245]

240. One of those companies is Shell. For example, in March 2004, Shell did order Oasons Nigeria to prepare an EER regarding the Ibigwe field. [246] In 2001, SIL Ltd. completed an *Environmental Evaluation of the Kolo Creek field and Associated Facilities*.[247]

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241 EGASPIN, submitted in the first instance as Exhibit G1 (Dooh), Part VIII.

242 EGASPIN, submitted in the first instance as Exhibit G1 (Dooh), Article VIII.A.2.2.

243 EGASPIN, submitted in the first instance as Exhibit G1 (Dooh), Article VIII.A.2.1.

244 EGASPIN, submitted in the first instance as Exhibit G1 (Dooh), Article.A.2.1(iv).

245 For example MDS, http://www.multidevirons.com/theprojectsoilgas.html (most recently visited on 5 October 2014); Tomsey, http://www.tomsey.com.ng/index.php?option=com_content&view=article&id=32&Itemid=211 (most recently visited on 5 October 2014); Oasons Nigeria, http://www.oasonsnig.com/services.php (most recently visited on 5 October 2014);; SIL, http://www.scientificideasltd.com/services/e_projects.htm (most recently visited on 5 October 2014).

246 See Oasons Nigeria, http://www.oasonsnig.com/services.php, (most recently visited on 5 October 2014).

247 See SIL, http://www.scientificideasltd.com/services/e_projects.htm, (most recently visited on 5 October 2014).

241. On its website, Shell also demonstrates that it prepares *Environmental Evaluation Reports* and that (in the interim) it feels it is required to do so:

> [SPDC] has also applied to the Department of Petroleum Resources (DPR) for approval of the Terms of Reference of a planned Environmental Evaluation Report (EER) as required by EGASPIN (Part VIII).[248]

242. Shell's defense that it allegedly does not have an EER is therefore not convincing. It is irrelevant whether or not the EGASPIN are binding. Even if the EGASPIN do not stipulate that such a report be prepared, as Shell contends, it is inconceivable that following the oil spill and prior to the clean-up work, Shell did not analyze the damage and the affected area in view of the remediation work to be performed. Access to this analysis – regardless of what Shell calls this – is claimed.

243. The contractor reports state:

> [S&T Investment] carried out the remediation work on the contract designated area at Goi ponds according to the established recommended remediation and SPDC's general work instructions.

244. Thus, if Shell did not prepare such a report – as can be inferred from its defense, it ordered the contractors to clean up (part of) the oil pollution using the RENA method, without a further analysis of (a) the contamination, (b) the soil situation, and (c) the scope of the area to be cleaned up. In that case, Shell did not act as a prudent operator.

245. If the RENA method is an internationally accepted clean-up method, it is generally accepted in this regard that it will have to be investigated for each area whether the circumstances are suitable for applying that method.[249] If Shell failed to make this assessment, it did not act as a prudent operator should.

246. In the interim, the appellants assume that Shell did not keep daily journals of the clean-up work, even though Shell was required to do so by virtue of the EGASPIN and standards of due care.

3.4 Ground for appeal 4 (Oruma)

247. The District Court wrongly found in ground 4.12 (Oruma):

> With regard to the document that [the plaintiff et al.] demand is produced under XIX, Shell et al. contended that there is no report that specifically regards the oil spill in Oruma, Bayelsa State in Nigeria. There is allegedly only an aggregated report of oil spills in the Niger Delta, from which the oil spill near [place] cannot be individually inferred. [The plaintiff et al] did not advance a substantiated refutation against this. In this light, it has not been demonstrated that Shell et al. can dispose of the claimed document that (in part) specifically pertains to Oruma. For that reason, the claim for the production of this document cannot be awarded, either.

248. Shell's defense that allegedly there is no individual notification or report of the oil spill near Oruma is not convincing.

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248 http://www.shell.com.ng/environment-society/our-response/unep-july-2012.html.

249 See further section 2.6.4 above.

249. This claim is currently contained and discussed in section 4.3.4. Please refer to what is noted in that section.

4. DOCUMENTS

4.1 Burden of proof and evidentiary interest

250. Based on the *Oil Pipelines Act*:

- Risk liability falls on an operator in the event that damage occurs as a result of oil spills, unless the operator can prove that the oil spill was caused by sabotage;
- An operator has a statutory duty of care to maintain, protect and repair the pipelines and facilities;
- The duty of care also entails the obligation to limit the risks that others inflict damage on the pipelines and facilities, for example by using modern technical means.

Based on Nigerian *common law*:

- SPDC had a duty of care in respect of the people living in the vicinity of its pipelines to properly maintain its pipelines and keep its pipelines and facilities up-to-date;
- SPDC had a duty of care in respect of the people living in the vicinity of its pipelines and facilities to take measures to prevent third parties from inflicting damage on its pipelines and facilities;
- Following oil spills, SPDC had a duty of care to adequately respond and properly clean up;
- The parent company had a duty of care in respect of the people living in the vicinity of the SPDC pipelines and wells to ensure that SPDC properly maintained and protected its pipelines and wells and adequately responded to and cleaned up after oil spills.

251. The strict liability of Article 11(5)(c) *Oil Pipelines Act* is an expression of the *res ipsa loquitur* principle, or: the case is self-evident. The same principle is expressed in the *Rule van Rylands v Fletcher* and in case law regarding oil spills. The principle means that it follows from the nature of the case that the presumption of negligence falls on Shell, given that the oil leaked from pipelines or facilities that are managed by Shell. In that case, it is up to Shell to prove that the oil spills did not result from its negligence.[250] See, for example, the case *Mon v Shell-BP*:

> '[n]egligence on the part of the defendants has been pleaded and there is no evidence of it. None in fact is needed, for they must naturally be held responsible for the results arising from an escape of oil which they should have kept under control.[251]

[250] Under Dutch law, the burden of proof also falls on Shell, given that an exonerating defense is involved.
[251] *Mon v. Shell-BP* [1970-1972] 1 RSLR 71.

252. One of the ways that Shell can contest this liability is by proving that the oil spills were caused by third parties *and that Shell did not act negligently in this regard*. According to the appellants, it follows from the *res ipsa loquitur doctrine* that the burden of proof also falls on Shell if Article 11(5)(b) is applied.[252]

253. The District Court of The Hague appears to have started from a different division of the burden of proof when it found in its interlocutory judgment and later in its final judgment that Shell had complied with its duty to substantiate, while Milieudefensie et al. had offered an insufficiently concrete substantiation of the fact that Shell had violated its duty of care.

254. As victims of the oil spill – and certainly without information that is exclusively held by Shell – the appellants will never be able to furnish conclusive proof that the oil spill was not caused by sabotage or that the oil spill was caused by corrosion. In contrast to Shell, the appellants are not (and were not) in the position to isolate the section of the pipeline in question and examine this section, or – for example – to take high-resolution photographs of this section.

255. The appellants can demonstrate that the sabotage defense is insufficiently supported by the facts.[253] On the other hand, it is very likely that the oil spill was caused by a maintenance defect. At each of the locations, Shell had been (repeatedly) warned in advance internally that the risk of oil spills as a result of overdue maintenance was very high. Subsequently, in none of the locations did Shell take any action to prevent this risk from materializing. The documents to which access is claimed contribute to that evidence.

256. In the first instance, Shell argued that it took measures that allegedly limit (the risks of) sabotage. The District Court accepted that by means of surveillance rounds, monitoring by helicopter and 'a system to measure the pressure', Shell did everything it could reasonably be demanded to do to prevent sabotage.[254] The appellants contest that Shell (properly) took these measures. The performance, equipment and frequency of the surveillance rounds was sub-standard; monitoring by helicopter was not or was hardly involved; there was no system to measure the pressure – as has been demonstrated in Goi – or such a system was inadequate to prevent any damage caused by sabotage.[255] The appellants further contest that apart from closing off the pipelines there was no other adequate measure for preventing sabotage. The documents to which the appellants claim access contribute to the evidence that Shell breached its duty of care to protect its pipelines. The same applies *mutatis mutandis* for the documents based on which the appellants wish to demonstrate that Shell failed to adequately respond to the oil spills, and that no sound soil survey was conducted before and after the (defective) clean-up.

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[252] Section 2.3.1 above, further: Emeka Duruigbo, Exhibit M1 (Dooh).

[253] Inter alia: the *Accufacts* report, submitted in the first instance as Exhibit M2 (Dooh) regarding the evidence that Shell submitted and the report of Amnesty International regarding the limited evidentiary value of JIT reports, see Amnesty International, *Bad information: oil spill investigations in the Niger Delta* (2013) (**Exhibit O3**).

[254] Final judgment District Court of The Hague dated 30 January 2013, ground 4.49 (Dooh).

[255] Section 2.6 above.

257. In the new claim for the production of documents on appeal, the appellants submitted documents to support their argument that and how to a significant extent, the parent company kept itself informed of and intervened in SPDC's activities. The appellants can use the claimed documents to demonstrate that the parent company was aware of SPDC's structural failures to prevent and limit environmental pollution. Chapter 2.7 demonstrates that this does not require that the documents specifically pertain to the oil spills at issue. To assume a duty of care, it is already sufficient if it is demonstrated that the parent company was aware of the *systemic* problems surrounding SPDC's activities; to demonstrate the *breach* of that duty of care, it must be established that the parent company nevertheless failed to take measures, resulting in the damage at Goi, Oruma and Ikot Ada Udo.

4.2 Change in the claim

258. Following the judgment of the District Court of The Hague dated 30 January 2013 and new evidence in respect of the guidance by the parent company in particular, in the appeal the appellants initiated a new claim for the production of documents by virtue of Section 843a DCCP. This claim contains partially new, partially previously claimed and partially further specified documents in relation to the motion to produce documents in the first instance. In the same claim it has been explained extensively why the appellants have a legitimate interest in access to the documents mentioned in that claim. The claim for access to other documents was not maintained, because in light of the final judgment, there was no legitimate interest in this.

259. The appellants change their claim for access on appeal such that the new claim should be deemed to be the starting point. In addition, the appellants maintain their claim for access to a number of documents that fell outside the scope of the new claim for the production of documents on appeal, but in which they do have a legitimate interest. In respect of a few (categories of) documents, the appellants further specified their claim in relation to the new claim for the production of documents on appeal. Below, the complete (changed) claim in each case is explained first. Following this, the documents and the claimants' interest in access will be discussed.

*4.2.1 Appellants **Dooh and Milieudefensie** versus RDS and SPDC, as well as versus Shell Petroleum and Shell T&T:*

(Changed) claim, as also included in the new claim for the production of documents:

a. Targets and expenditures in the annual business plans in respect of maintenance, the environment and safety regarding Ogoniland and Goi from the Business Plans, as well as the monthly business reports in this regard for 2000-2004;

b. The most recent *Audit report* regarding *asset integrity* at the time of the oil spill as well as the audit report regarding environmental and safety policy, with the related *findings*, *recommendations* and *approval and closeout of actions*;

c. Assurance letters 2000-2004;

d. Reports of Significant Incidents and High Potential Incidents 2000-2004

e. Incident report, investigation report and review regarding the oil spills;

f. Minutes of the parent company regarding the documents mentioned in paragraphs b, d and e;

g. Documents from the *Corrosion Management Framework* 2001-2004;

h. The *HSE plan* that applied to Goi/ Ogoniland at the time of the oil spills*;*

i. The *Hazards and Effects Register* and the *HSE case* that applied to Ogoniland and the pipeline near Goi in 2004;

j. Surveillance contracts 2000-2004;

k. Helicopter logs 2000-2004

l. Documents regarding the *Leak Detection System for* the Bomu-Bonny Pipeline;

m. Accident Report.

Other documents claimed:

n. EER (post impact assessment)

o. The *Oil Spillage Reports,* part A, B and C, sent to the Director of the Department of Petroleum Resources within 24 hours, 2 weeks and 4 weeks.

4.2.2 Appellants ***Oguru, Efanga and Milieudefensie*** *versus RDS and SPDC, as well as versus Shell Petroleum and Shell T&T:*

(Changed) claim as also included in the new claim for the production of documents:

a. Targets and expenditures in the annual business plans in respect of maintenance, the environment and safety regarding Oruma and the entire pipeline near Oruma from the Business Plans as well as the monthly business reports in this regard for 2002-2005;

b. The most recent *Audit report* regarding *asset integrity* at the time of the oil spill as well as the audit report regarding environmental and safety policy, with the related *findings*, *recommendations* and *approval and closeout of actions*;

c. Assurance letters 2002-2005;

d. Reports of Significant Incidents and High Potential Incidents 2002-2005

e. Incident report, investigation report and review regarding the oil spill;

f. Minutes of the parent company regarding the documents mentioned in paragraphs b, d and e;

g. Documents from the *Corrosion Management Framework* 2002-2005;

h. The *HSE plan* that applied to the pipeline near Oruma at the time of the oil spills*;*

i. The *Hazards and Effects Register* and the *HSE case* that applied to the pipeline near Oruma in 2004;

j. Surveillance contracts 2002-2005;

k. Helicopter logs 2002-2005

l. Documents regarding the *Leak Detection System* of the pipeline near Oruma;

m. Accident Report.

Other documents claimed:

n. EER (post impact assessment)

o. The *Oil Spillage Reports,* part A, B and C, sent to the Director of the Department of Petroleum Resources within 24 hours, 2 weeks and 4 weeks.

4.2.3 ***Milieudefensie*** *versus RDS and SPDC:*

(Changed) claim as also included in the new claim for the production of documents:

a. Targets and expenditures in the annual business plans in respect of maintenance, the environment and safety regarding Ikot Ada Udo and regarding the *abandonment* of *wellheads* from the Business Plans, as well as the monthly business reports in this regard for 2003-2007;

b. The most recent *Audit report* regarding *asset integrity* at the time of the oil spill as well as the audit report regarding environmental and safety policy, with the related *findings*, *recommendations* and *approval and closeout of actions*;

c. Assurance letters 2003-2007;

d. Reports of Significant Incidents and High Potential Incidents 2003-2007

e. Incident report, investigation report and review regarding the oil spill;

f. Minutes of the parent company regarding the documents mentioned in paragraphs b, d and e.

Other documents claimed:

g. The *HSE plan* that applied to the wellhead near Ikot Ada Udo at the time of the oil spills*;*

h. The *Hazards and Effects Register* and the *HSE case* that applied to the wellhead near Ikot Ada Udo in 2006 and 2007;

i. Accident Report;

j. EER (post impact assessment);

k. The *Oil Spillage Reports,* part A, B and C, sent to the Director of the Department of Petroleum Resources within 24 hours, 2 weeks and 4 weeks.

4.2.4 ***Akpan versus SPDC*** *(Appeal in the motion)*

Akpan claims:

a. The *HSE plan* that applied to the wellhead near Ikot Ada Udo at the time of the oil spills*;*

b. The *Hazards and Effects Register* and the *HSE case* that applied to the wellhead near Ikot Ada Udo in 2006 and 2007;

c. Accident Report;

d. EER (post impact assessment);

e. The *Oil Spillage Reports,* part A, B and C, sent to the Director of the Department of Petroleum Resources within 24 hours, 2 weeks and 4 weeks.

4.3 Explanation regarding the documents

4.3.1 Targets and expenditures for the annual business plans regarding maintenance, the environment and safety as well as the monthly business reports

260. The appellants claim access to or a copy of the targets and expenditures for the annual business plans in respect of maintenance, the environment and safety that pertain to the affected area, as well as the monthly business reports in this regard for the three years prior to the oil spills at issue. With regard to Ikot Ada Udo, the appellants further claim access to the targets and expenditures regarding *abandonment programs* for the three years prior to the oil spills of 2006 and 2007.

261. These targets demonstrate the *key performance indicators* that were agreed with SPDC regarding the maintenance of the pipelines, abandonment of wells and (other) measures to prevent damage to the environment. This also demonstrates the budgets that were made available for this. The business reports further demonstrate SPDC's performance based on these key performance indicators.

262. This claim is identical to but specified in more detail in relation to the claim in the motion to produce documents on appeal. The annual work programs, maintenance programs and budgets of the Joint Venture demanded in the first instance are no longer demanded.

263. Based on the targets, expenditures and reports regarding maintenance, abandonment, the environment and safety it can be demonstrated that the parent company was aware of the activities that SPDC developed in Nigeria and was or should have been aware of the risks that SPDC took in this regard. In setting and adjusting *key performance indicators* for maintenance and the environment as well as the related budgets, the parent company itself provided guidance for this. Based on the documents it can further be demonstrated that the parent company failed to use its influence to prevent damage.

264. Annual business plans contain the SPDC targets in respect of specific policy fields, such as production, maintenance, the environment and safety; these are directly linked to the budgets available for this. These plans are approved in advance by the parent company and monitored for *compliance* during their terms: the business plans specify *Key Performance Indicators* that are reported to the *Business* (Upstream) every month. The Business is headed by a member of the *Executive Committee*, formerly the *Committee of Managing Directors*, which in turn renders an account to the parent company. In addition, the targets and compliance are monitored by the parent company via the *Finance directors* of the Business, who in turn render an account to the *Chief Financial Officer*, who is also responsible for this within the parent company. If the performance is sub-standard, the parent company intervenes. Thus, the parent company is kept accurately informed, both via the Upstream Business and via Finance.

265. The appellants have been informed of this work method through sources that amassed broad experience with this within Shell. All this is confirmed in publicly accessible sources.[256]

266. The appellants contend that the parent company is liable, because it was aware of the fact that (i) *systemic* failures of SPDC were involved, as a result of which (ii) irresponsible risks were taken for the environment and the people living in the vicinity; moreover (iii) the parent company had the know-how to contend with those risks and (iv) had intervened in SPDC's activities before, but (v) nevertheless failed to intervene, as a result of which (vi) the damage near Goi, Oruma and Ikot Ada Udo occurred. Based on these circumstances mentioned under (i)-(v) above, the parent company had a duty of care. In order to substantiate this, the appellants claim access to documents based on which they can demonstrate that the parent company was aware of SPDC's systemic failures, which resulted in the damage in Goi, Oruma and Ikot Ada Udo. Thus, those documents do not necessarily exclusively pertain to the specific events in Goi, Oruma and Ikot Ada Udo that caused the damage.

267. The claimed documents pertain to the period of three years prior to the oil spills at issue. To assume that a duty of care exists, it must be demonstrated that the parent company was aware or at least could have been aware of the risks that SPDC structurally took; to demonstrate that this duty of care was breached, it must further be established that despite this, the parent company failed to take measures to prevent damage. The nature

[256] See, for example Kevin Dwyer at http://www.changefactory.com.au/articles/business-management/common-mistakes-with-kpis/ (most recently visited on 5 October 2014): "I counted that from the different divisions of Shell that had an influence over our planning we had over 100 KPIs upon which we had to report no less than monthly and two hundred more we were required to record as PIs but not report on."

of the case implies that SPDC's systemic failures regard a longer period. The Business Plans are adopted annually; by requesting the business plans of the three successive years prior to the oil spills, or for the period deemed advisable by the Court of Appeal, the appellants can demonstrate that this involved more than just an incidental problem.

4.3.2 The most recent Audit reports regarding asset integrity at the time of the oil spill as well as the audit report regarding the environmental and safety policy, with related findings, recommendations and approval and closeout of actions;

268. Access is claimed to the (parts of the) most recent EP HSE audits regarding:

- The most recent internal *Asset Integrity Audits* at the time of the oil spills, in which the *technical integrity* and – in as far as applicable – the *operational integrity* were assessed for the pipeline(s) near Goi and Oruma and for the *well(head)* near Ikot Ada Udo.
- The most recent internal *HSE audit* at the time of the oil spills, in which SPDC's *Emergency and Oil Spill Response* procedures were assessed that applied to the pipelines and vicinity of Goi and Oruma, as well as the *wellhead* and vicinity near Ikot Ada Udo.
- The audit results and remedial action plans documented in response to these audits ('findings, recommendations and approval and closeout of actions').

269. Subsidiaries and divisions are frequently audited within Shell.[257] Part of the responsibility for these audits falls on Shell International Exploration and Production ('SIEP'). The manuals and standards discussed before *inter alia* refer to audits regarding environmental care, HSE policy, *Well engineering* and HSSE *Assurance Products*, including *Emergency and Oil Spill Response*.[258] In Shell's folder regarding *Oil Spill Emergency Response*, Shell states:

> We regularly audit the emergency response readiness of our businesses as part of our Shell maritime business reviews and HSSE audits.[259]

270. Shell publicly refers to its audit system as the cornerstone of HSE management and ambitions. For example, a Shell Canada document from 2004 notes:

> Niglintgak will be scheduled in the regular internal HSE audit cycle for Shell, as these audits are valuable in providing input on key areas for improvement, leading to progressively better HSE management. A protocol exists within Shell for documenting audit results and remedial action plans that will be followed for Niglintgak.[260]

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257 See also section 2.7.4 above.

258 An overview of the different '*Audit packages'* is included in EP 2005-0180-ST, Exhibit N10 (Dooh), *Standard; HSSE Auditing*, pp. 11-12 (Appendix 3).

259 http://s01.static-shell.com/content/dam/shell/static/environment-society/downloads/safety/oil-spill-emergencyresponselr.pdf (most recently visited on 5 October 2014).

260 *Application for approval of the development plan for Niglintgak field project description*, Shell Canada Ltd, August 2004, http://www.mackenziegasproject.com/theProject/regulatoryProcess/applicationSubmission/Documents/MGP_Nig_DPA_Section_11.pdf (most recently visited on 5 October 2014).

271. The 'protocol' referred to pertains to the manner in which the findings are dealt with, improvement targets are set and monitored. Based on the terminology used in the Shell standards, the claim refers to this as *findings, recommendations* and *approval and closeout of actions.*

272. The EP audits are addressed at length in EP 2005-0180, which was already submitted on the occasion of the motion to produce documents on appeal.[261] The HSE auditing framework was drawn up in 2005; subsequently, elements were revised. These later revisions are described in the individual parts, where applicable. The objective of the EP audit is:

- Verification that structured risk assessment has been applied to the key HSE risk elements of the facility or activity
- Sample whether these risks have been appropriately assessed and the correct controls have been identified, and
- Sample whether these controls are adequately implemented and complied with.[262]

273. The EP Global Assurance Leader is closely involved in the performance and monitoring of the audits. He reports to the *EP Business Assurance Committee* ('BAC'); the *Group HSSE Risk & Assurance Committee* is also informed of the results.[263] The guidelines stipulate that audits must be followed up on and that *corrective actions* must be determined. *Best practices* and *key lessons learned* must be shared with the other Shell companies.[264] In so doing, all companies must use the same web-based EP HSE *Tracking System "for recording* ***audit reports, findings and recommendations*** *and for monitoring the* ***approval and closeout of actions***".[265] The *Business Assurance Committee* monitors the progress and must approve the results.[266]

274. For information purposes, an HSE audit format is submitted as **Exhibit O8**. Risks are categorized in a fixed manner.[267] *Serious* or *high* risks must always be submitted to the "*next level up BAC".*[268] This in any event regards findings *"likely to cause a significant undesirable effect on the entity's objectives and likely to have a notable impact on the HSSE Objectives of the Group, therefore warranting immediate reporting to senior*

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261 EP 2005-0180, Exhibit N10 (Dooh). This HSSE document consists of one standard document with three appendices (ST, '*HSSE Auditing'*), four procedure documents (PR-10, '*Manage the HSSE Audit Process'*; PR-20, '*Manage the HSE Audit Organisation'*; PR-30, '*Conducting HSE Audits'*, PR-40, '*Follow-up HSSE Audit Findings*') and three specification documents (SP-01, '*HSSE Audit Frequency and Duration'*; SP-02, '*Findings Assessment and Evaluation Criteria*'; SP-03, '*HSSE Auditor Competence Criteria'*).

262 With regard to the objective of the audits, see EP 2005-0180-ST, *Standard: HSSE Auditing*, Exhibit N10 (Dooh): "The purpose of HSE auditing is to verify the existence and effectiveness of internal controls intended to manage HSE risks and comply with the Group 'HSE Policy and Commitment' and HSE related standards identified in the Annual HSE Assurance Statements."

263 EP 2005-0180-ST, *Standard: HSSE Auditing*, Exhibit N10 (Dooh), p. 3, 'Manage the HSE Audit Organisation' (see also EP 2005-0180-PR-10).

264 EP 2005-0180-ST, *Standard: HSSE Auditing*, Exhibit N10 (Dooh), par. 4.5, 'Follow-up HSE Audit Findings (see also EP 2005-0180-PR40).

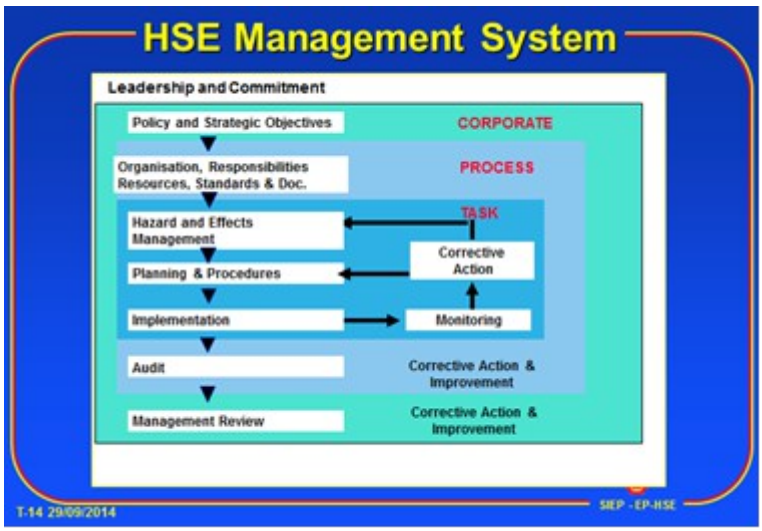
265 EP 2005-0180-ST, *Standard: HSSE Auditing*, Exhibit N10 (Dooh), *HSSE Auditing*, p. 4.

266 EP 2005-0180, *HSSE Auditing*, Exhibit N10 (Dooh), p. 4, 'Follow-up HSE Audit Findings' (see also EP 2005-0180- PR40).

267 EP 2005-0180-SP-02, *Specification: Findings Assessment and Evaluation Criteria*, Exhibit N10 (Dooh)

268 *Idem*, p. 8.

management".[269] In the event of a 'Serious' risk, this must immediately be reported to 'senior management', e.g. BU or Business Level. Shell's risk management system provides that serious risks are brought to the attention of the most senior management layers, and ultimately to the responsible business directors at the parent company. By means of adjustments in the targets and budgets, corrective action can subsequently be taken (*corrective action & improvement*).



(Slide from a Shell team briefing regarding auditing)

275. The claimed (parts of) audits will demonstrate the risks that SPDC took in the area of the safety and environmental policy. This can be used to demonstrate that SPDC violated its duty of care by virtue of Article 11(5)(b) as well as *common law* to protect, maintain and repair its pipelines and facilities. This can also be used to demonstrate that the parent company was aware of the risks that were caused by overdue maintenance, insufficient (technical and other) provisions for protecting the pipelines and facilities from external threats, as well as SPEC's defective *Emergency and Oil Spill Response*.

276. The appellants contend that the parent company is liable, because it was aware of the fact that (i) systemic failures on the part of SPDC were involved, as a result of which (ii) irresponsible risks were taken for the environment and the people living in the vicinity; moreover (iii) the parent company had the know-how to contend with those risks and (iv) had intervened in SPDC's activities before, but (v) nevertheless failed to intervene. Based on these circumstances set out under (i)-(v) above, the parent company had a duty of care. To substantiate this, the appellants claim access to documents based on which they can demonstrate SPDC's systemic failures and the fact that the parent company was aware of SPDC's systemic failures. Thus, those documents do not necessarily pertain (exclusively) to the specific events in Goi, Oruma and Ikot Ada Udo that caused the damage.

[269] EP 2005-0180-SP-02, *Specification: Findings Assessment and Evaluation Criteria*, p. 2 (Table 4.2).

4.3.3 Assurance letters

277. The appellants claim the *Assurance letters* from the three years prior to the events causing the damage (the oil spills). In these annual Assurance letters, the operating companies must indicate that and how they complied with the safety and environmental (HSE) policy and the related standards of the *Group*. The assurance letters are directly addressed to the *Shell Group Executive*.[270]

278. The Assurance letters demonstrate that the parent company had itself extensively informed of compliance with the obligatory HSE standards and related rules; thus, the parent company was aware of SPDC's systemic failures.

279. Chapter 2.7 above as well as the exhibits submitted with the Claim for the production of documents on appeal demonstrated the frequency and details of the instructions regarding the HSE policy to be conducted by the operating companies. By means of the Assurance letters, the parent company ensures that and how these instructions are followed.

280. The appellants contend that the parent company is liable because it was aware of the fact that (i) systemic failures on the part of SPDC were involved, as a result of which (ii) irresponsible risks were taken for the environment and the people living in the vicinity; moreover (iii) the parent company had the know-how to contend with those risks and (iv) had intervened in SPDC's activities before, but (v) nevertheless failed to intervene, as a result of which (vi) the damage near Goi, Oruma and Ikot Ada Udo occurred. Based on these circumstances set out under (i)-(v) above, the parent company had a duty of care. To substantiate this, the appellants claim access to documents based on which they can demonstrate SPDC's systemic failures and the fact that the parent company was aware of this. Thus, those documents do not necessarily pertain (exclusively) to the specific events in Goi, Oruma and Ikot Ada Udo that caused the damage.

281. The claimed Assurance Letters pertain to the period of three years prior to the oil spills at issue. To assume that a duty of care exists, it must be demonstrated that the parent company was aware or at least could have been aware of the risks that SPDC structurally took; to demonstrate that this duty of care was breached, it must further be established that despite this, the parent company failed to take measures to prevent damage. The nature of the case implies that SPDC's systemic failures regard a longer period. The Assurance Letters are sent annually; by requesting the assurance letters of the three successive years prior to the oil spills, or for the period deemed advisable by the Court of Appeal, the appellants can demonstrate that this involved more than just an incidental problem.

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[270] EP 2005-0180: HSSE Auditing (standard; procedures, specifications), Exhibit N10 (Dooh); see also EP 95-0100: *Health, Safety and Environmental Management Systems,* Exhibit N8 (Dooh): "it is now a requirement that operating units and joint ventures submit an annual letter of HSE assurance, confirming compliance with the group HSE Commitment, Policy and Procedure for an HSE MS".

4.3.4 Reports of Significant Incidents and High Potential Incidents

282. The appellants claim

- the *Significant Incidents* and *High Potential Incidents* reported by SPDC regarding (potential) oil spills and defects in the complete pipelines near Goi and Oruma from which the oil spills occurred, as well as regarding the well near Ikot Ada Udo in the three years prior to the oil spills;
- the *Significant Incidents* and *High Potential Incidents* reported regarding attempts to sabotage pipelines and wells in a radius of 100 km around Goi, Oruma and Ikot Ada Udo, respectively, in the three years prior to the oil spills.

283. By virtue of EP-95-300 and by virtue of the mandatory HSSE Management System Manual 'Incidents Investigation and Learning', SPDC was required to report incidents with serious consequences (severity 4 or 5) as well as incidents and near misses with a Shell Ram Risk Rating of C5, D5 or E5 to the Business Head, Business HSSE VP and the Group HSSE VP and to prepare a report on this.[271]

284. According to Table V.1 in Appendix V of EP 95-300, all oil spills of 10,000 liters or more are considered to be spills with a *'massive effect'*; thus, these had to be reported. By way of example, the table explains how to categorize risks for oil spills. In this context, a risk assessment must be made regarding: (i) people, (ii) equipment, (iii) the environment, and (iv) reputation. As soon as severity rating 4 or 5 is involved in one of these areas, the incident must be reported.[272] In the context of the standard, the 'example' of Table V.1 in Appendix V appears to indicate that the risk matrix must be applied differently in other areas, of course, not that it can be informally filled in differently:

> The above table is an example for crude oil contamination. For other chemical discharge criteria, environmental experts should be consulted.[273]

285. In all oil spills at issue, more than 10,000 liters of oil were spilled. In the main action, the appellants will direct grounds for appeal against the District Court's findings in this connection, but based on Shell's own figures, approximately 24,000 liters of oil (150 barrels) were spilled in the spill near Goi in 2004. In the oil spill near Oruma, approximately 64,000 liters of oil (400 barrels) were spilled; in the oil spill in Ikot Ada Udo, approximately 100,000 liters of oil (629 barrels)) were spilled. For that reason, according to the mandatory HSSE Management System Manual, the oil spills had to be reported within 24 hours to the *Business Head, senior Business Leader, Business HSSE VP and Group HSSE VP*. The latter manual dates from 2009; however, this is the third version of that Manual, which had thus been in use for a longer time.

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271 *HSSE Management System Manual: Incident Investigation and Learning*, Exhibit N11 (Dooh) and section 2.7.4 above.

272 In the Guidelines for Incidents Investigation and Reporting, significant incidents are defined as: *"Incidents with actual consequences that rate 4 or 5 on the RAM. (people, environment, damage or reputation)."*

273 EP 95-0300 *Overview Hazards and Effects Management Process*, Exhibit N9 (Dooh), Caption with Table V.1 in Appendix V.

286. For the sake of comparison: in the United States, 'significant incidents' that satisfy the following, even more stringent, criteria must be reported to the *Pipeline & Hazardous Materials Administration* of the *US Department of Transportation*:

> PHMSA defines Significant Incidents as those incidents reported by pipeline operators when any of the following specifically defined consequences occur:
>
> (1) fatality or injury requiring in-patient hospitalization
>
> (2) $50,000 or more in total costs, measured in 1984 dollars
>
> (3) highly volatile liquid releases of 5 barrels or more or other liquid releases of 50 barrels or more
>
> (4) liquid releases resulting in an unintentional fire or explosion.[274] [emphasis added by attorney]

287. In addition, a fire occurred in Goi [after the oil spill], which destroyed a large part of affected area.

288. Thus, the fact that the oil spills were allegedly not reported to the *Business Head, senior Business Leader, Business HSSE VP and Group HSSE VP* is not convincing. It was up to Shell to further substantiate its argument that such documents do not exist, despite the Shell documents that the appellants submitted.

289. Moreover, whether or not the oil spills in question were reported is not a decisive factor for the legitimate interest in the claimed documents. First of all, the appellants want to use these documents to demonstrate that the parent company was aware of the significant risks resulting from the condition of the pipelines, the well and the sabotage attempts.

290. Oil spills from the pipelines and the *wellhead* had occurred before. In the interim, it is known that in respect of the pipelines near Goi and Oruma, SPDC itself had concluded that these constituted serious *'potential consequences'*[275] and a *'major hazard'* [276] due to their poor condition. For that reason, it is obvious that there are previous reports of 'significant incidents' and 'high potential incidents'.

291. The appellants contend that the parent company is liable, because it knew that (i) *systemic* failures on the part of SPDC were involved, as a result of which (ii) irresponsible risks were taken for the environment and the people living in the vicinity; moreover (iii) the parent company had the know-how to contend with those risks and (iv) had intervened in SPDC's activities before, but (v) nevertheless failed to intervene, as a result of which (vi) the damage near Goi, Oruma and Ikot Ada Udo occurred. Based

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274 US Department of Transportation, Pipeline & Hazardous Materials Administration, http://primis.phmsa.dot.gov/comm/reports/safety/sigpsi.html?nocache=4440 (most recently visited on 1 October 2014).

275 Extensive and severe corrosion at a rate of approx 0.6 mm/yr; Increased rate of crude leakage into the environment; Contamination of the environment with crude leading to degradation; Loss of revenue to the federal government from further de-rating of the line and crude spillage into the environment; Increase community unrest due to crude contamination of their environment; Increase in compensation payments and clean-up due to crude spillage; Continuous repairs to the line which in the long run would not be cost effective. The list is not exhaustive as constant spillage could spiral into areas not mentioned. *Environmental Impact Assessment of the 20" x 37 km Kolo Creek – Rumuekpe Trunkline Replacement Project* (SPDC 2004), submitted in the first instance as Exhibit M3 (Dooh), section 2.3.3.1 (p. 2-41).

276 Reply to the Defence (**Exhibit O2**), par. 18.5.

on these circumstances mentioned under (i)-(v) above, the parent company had a duty of care. In order to substantiate this, the appellants claim access to documents based on which they can demonstrate the fact that the parent company was aware of SPDC's *systemic* failures. Thus, those documents do not necessarily exclusively pertain to the specific events in Goi, Oruma and Ikot Ada Udo that caused the damage. The claimed documents can be used to demonstrate that especially in Goi, Oruma and Ikot Ada Udo, the parent company was or could have been aware of the fact that there was a high risk of damage caused by oil spills due to defective material or sabotage, because quite a number of incidents had already occurred.

292. Moreover, the claimed documents can be used to demonstrate that SPDC violated the duty of care it had by virtue of Article 11(5)(b) as well as *common law* to protect, maintain and repair its pipelines and facilities, as well as its duty of care to take adequate action after the oil spills.

293. The claimed documents pertain to the period of three years prior to the oil spills at issue. To assume that a duty of care exists, it must be demonstrated that the parent company was aware or at least could have been aware of the risks that SPDC structurally took; to demonstrate that this duty of care was breached, it must further be established that despite this, the parent company failed to take measures to prevent damage. The nature of the case implies that SPDC's systemic failures regard a longer period. The Business Plans are adopted annually; by requesting the [business plans] of the three successive years prior to the oil spills, or for the period deemed advisable by the Court of Appeal, the appellants can demonstrate that this involved more than just an incidental problem.

4.3.5 Incident report, investigation report and review regarding the oil spills

294. The appellants claim access to the *incident report* regarding the oil spills prepared based on the guideline referred to above, as well as the *investigation report* and the *review* of the oil spills.

295. By virtue of EP-95-300 and the mandatory HSSE Management System Manual 'Incidents Investigation and Learning', SPDC had to report the oil spill near Goi to the Business Head, senior Business Leader, Business HSSE VP and Group HSSE VP ; SPDC also had to submit an investigation report on this oil spill to the Business Head for assessment.[277] Please refer to what is already noted in this regard in section 4.3.4 above.

296. These documents demonstrate that the parent company was or at least could have been aware of the specific circumstances surrounding the oil spills, so that it can be demonstrated that it was under an – increased – duty of care. In addition, these documents can be used to demonstrate that the parent company and SPDC violated their duty of care.

277 See par. 118 and following supra.

4.3.6 Minutes of the parent company regarding the documents mentioned in paragraphs b, d and e;

297. The appellants claim the relevant passages from the minutes of the (*Executive Committee*, formerly the *Committee of Managing Directors* and/or the *Board of Directors* of the) parent company regarding the categories described in sections 4.2.2 – 4.2.5 above.

298. With the exception of section 4.2.5 above, those documents do not (exclusively) pertain to the oil spills at issue. The appellants contend that the parent company is liable, because it was aware of the fact that (i) *systemic* failures of SPDC were involved, as a result of which (ii) irresponsible risks were taken for the environment and the people living in the vicinity; moreover (iii) the parent company had the know-how to contend with those risks and (iv) had intervened in SPDC's activities before, but (v) nevertheless failed to intervene, as a result of which (vi) the damage near Goi, Oruma and Ikot Ada Udo occurred. Based on these circumstances mentioned under (i)-(v) above, the parent company had a duty of care. In order to substantiate this, the appellants claim access to documents based on which they can demonstrate the fact that the parent company was aware of SPDC's systemic failures.

299. Please refer to what is noted in section 2.7.2 above regarding the parent companies.

300. The minutes demonstrate that the situation in Nigeria and the risks for safety and the environment were discussed at the level of the group company, as well as that important decisions regarding the course to be steered and the policy to be pursued were taken at this level. Accordingly, it can be demonstrated that the parent company was under a duty of care.

4.3.7 Documents from the Corrosion Management Framework

301. The appellants claim documents from the *Corrosion Management Framework* regarding the pipelines near Goi and Oruma in the three years prior to the oil spills, in any event including:

- The *Maintenance Reference Plan* that Shell had to draw up based on guidelines and Nigerian regulations;
- *Inspection plans* and *pigging program* of the pipeline and weld seams, as well as the inspection and pigging results;
- The Corrosion Management Manual;
- The *Risk Based Assessments* that had to be updated each year and after each *pig run;*[278]
- (other) information from the Populated Corrosion Management Database.

[278] DEP 30.10.02.14-*Gen, Carbon Steel Corrosion Engineering Manual for Upstream Facilities*, Exhibit N5 (Dooh), par. 3.3.

302. According *inter alia* to the *Manual on Selection of materials for life cycle performance*, the operating companies must keep plans and documentation regarding the manner in which they implement corrosion management. This is done in the *Corrosion Management Framework*.[279] This *inter alia* includes a risk and useful life assessment based on the materials used (in the *Corrosion Management Manual*);[280] a database (the *Populated Corrosion Management Database)*; a *Maintenance Reference Plan*[281] and *Inspection Plans*; *Risk Based Assessments*[282] and a *Pigging Program*. All data must be documented, including data regarding the frequency and locations of inspections and the type of instruments used.[283] According to the central manual, such *"data on operating conditions, corrosion and integrity related design information, criticality definitions for individual systems, and Corrosion Management Manuals*" must be made available in electronic form and preferably in an accessible database.[284]

303. The claimed documents demonstrate how serious the corrosion was, how this developed and how SPDC monitored all this. These documents can be used to demonstrate that SPDC violated the duty of care to protect, maintain and repair its pipelines and facilities that fell on SPDC by virtue of Article 11(5)(b) as well as *common law*. The documents can also be used to advance a substantiated refutation of the fact that the oil spills were caused by sabotage.

304. With regard to the pipeline near Oruma, according to the Environmental Impact Assessment submitted by the appellants, the corrosion was already deemed to be "*unmanageable*" in 1998.[285] According to the report, the pipeline was "*likely to leak before the year 2003/2004"*.[286] The claimed documents demonstrate how the corrosion of the pipeline – which was not replaced despite the recommendation in the report – subsequently developed, as well as how (carefully) SPDC monitored that situation. These documents also demonstrate the equipment that was used for the inspections and

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279 DEP 39.01.10.11-*Gen, Selection of Materials for Life Cycle Performance - Materials*, version June 2002, Exhibit N4 (Dooh).

280 DEP 39.01.10.11-*Gen, Selection of Materials for Life Cycle Performance - Materials*, Exhibit N4 (Dooh) A5.1: "A corrosion management manual should derive from an installation's design documentation a brief description of the operating envelope assumed for each corrosion circuit, of the corrosion and materials threat foreseen, and of the design approach adopted. In addition, it should define the operating, maintenance and inspection activities required by the chosen approach."

281 It is pointed out that according to the *Guidelines and Procedures for the Design, Construction, Operation and Maintenance of Oil and Gas Pipelines in Nigeria*, art 12.5, oil companies are also required to prepare such plans.

282 DEP 30.10.02.14-*Gen, Carbon Steel Corrosion Engineering Manual for Upstream Facilities*, Exhibit N5 (Dooh), par. 3.3.

283 DEP 39.01.10.11-*Gen, Selection of Materials for Life Cycle Performance - Materials*, Exhibit N4 (Dooh) notes in this regard: "The Corrosion Management Manual, Risk Based Assessment and Maintenance Reference Plan are live documents for the lifetime of the facility. These shall be updated when there are (approved) materials substitutions (e.g. during procurement and fabrication), changes to the corrosion control system, changes to the operation and process and as monitoring, inspection and maintenance data is collected during the life of the project."

284 DEP 39.01.10.11-*Gen, Selection of Materials for Life Cycle Performance - Materials*, version June 2002, Exhibit N4 (Dooh), par. 2.4.5.

285 *Environmental Impact Assessment of the 20" x 37 km Kolo Creek – Rumuekpe Trunkline Replacement Project* (SPDC 2004), submitted in the first instance as Exhibit M3 (Dooh), p. 2-25.

286 *Environmental Impact Assessment of the 20" x 37 km Kolo Creek – Rumuekpe Trunkline Replacement Project* (SPDC 2004), submitted in the first instance as Exhibit M3 (Dooh), p. 2-25.

the conclusions that therefore can be reasonably made based on the information in the database. The individual data provided by Shell do not have any value if they are not placed in the broader context of the various corrosion tests that were performed and the equipment that was used for these tests. Moreover, this is also demonstrated by Shell's own standards mentioned above.

305. In the first instance, Shell submitted the results of a *pig run* that allegedly demonstrates that no appreciable loss of wall thickness was involved at the place of the oil spill.[287] In a *pig run*, a device (a 'pig') is guided through the pipeline between two points in order to inspect the condition of the pipeline. The appellants submitted the printout of Shell for assessment to *Accufacts* and to a second pipeline expert. Both experts conclude that without any further information regarding the type of *pig*, the characteristics of the pig and the manner in which the pig run was conducted, it is impossible to interpret the submitted results.

> All ILI pigs have limitations as to their threat identification capabilities, accuracy, and precision. There is information missing about the ILI inspection in the Oruma release that does not inform the reader of the many limitations of the ILI pig that was run, and its ability to identify general forms of corrosion, as well as its failure to identify certain forms of corrosion that can cause pipe failure. No information has been provided with the ILI data indicating the type of smart pig that was run, and its related accuracy and precision. There are wide variations in the capabilities and abilities of corrosion detection ILI tools that have resulted in many pipeline failures from corrosion after an ILI. An important industry standard, API 1163, improving the application of inline inspection tools, was developed following several tragic and expensive pipeline failures in the U.S. that had previously been inspected via ILI. Without knowing the type of corrosion ILI tool that was run, its limitations and capabilities, and whether the tool was properly calibrated for the pipeline, it is all too easy to inappropriately dismiss corrosion as a viable threat on a pipeline.[288]

306. Nor is Shell's conclusion that corrosion must be excluded as the cause supported by the UT measurements that Shell allegedly conducted around the oil spills. UT measurements cannot rule out specific types of corrosion that could occur in the case at issue, as well. Moreover, the UT measurements were not performed correctly. Accufacts submits the following in this regard:

> [T]he inappropriate application of ultrasonic testing ("UT") in an attempt to remove corrosion as a possible cause of pipe failure is incomplete. The UT measurement approaches captured in the evidence do not realize the various mechanisms associated with the many forms of corrosion that can cause pipelines to fail. The video evidence shows only one approach, apparently to rule out one form or type of general corrosion. The procedure shown in the videos, however, does not indicate sufficient or proper UT readings at or near the failure sites to rule out other more specific, and often more aggressive forms of selective corrosion, that might have caused the pipelines to fail. The UT measurements are not proper or complete to rule out possible corrosion as a failure mechanism on the pipelines.[289]

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287 Statement of Rejoinder in the motion to produce documents (Dooh), par. 13.
288 *Accufacts* report, submitted in the first instance as Exhibit M2 (Dooh), p. 3.
289 *Accufacts* report, submitted in the first instance as Exhibit M2 (Dooh), p. 3.

In response to the video regarding the oil spill in Goi:

> The UT readings taken and reported at the failure site would tend to eliminate general corrosion as a threat at this site, but the methods and procedures shown in the video are not conducted properly and are incomplete. The UT readings fail to eliminate the possibility of more specialized corrosion at the failure site that could cause a pipeline release.[290]

And in response to the video regarding the oil spill in Oruma:

> The UT measurements and method performed in the video do not follow industry standards required to field measure actual corrosion loss or calibrate ILI runs to evaluate or eliminate corrosion as a possible cause of pipeline failure.[291]

307. Around Goi, SPDC completely failed to properly inspect its pipelines for corrosion and to maintain its pipelines. Shell contends that since 1993, SPDC has no longer been granted access to Ogoniland to have *pig runs* performed.[292] The Reply to the Defence in the English proceedings demonstrates that inspections of the pipeline near Goi were exclusively conducted *ad hoc* on the occasion of *Joint Investigation Visits* following oil spills.[293] These investigations were further limited to UT measurements at the location of the pipeline where the oil spill had occurred.[294] Nor did SPDC conduct any other maintenance activities, such as replacing vales or inspecting manifolds.[295]

308. The appellants can use the claimed documents to further substantiate that the oil spills were not caused by sabotage and that risk liability fell on SPDC for that reason. In addition, the appellants can demonstrate that SPDC violated its duty of care to protect, maintain and repair the pipelines. The documents can also demonstrate that the situation was so serious that the parent company must also have been aware of this, so that it can be demonstrated that the parent company also had a duty of care.

309. The claimed documents pertain to the period of three years prior to the oil spills at issue. After all, by definition SPDC's negligence regards a longer period. Moreover, in Oruma the documents can be used to demonstrate that in response to the findings regarding the serious nature and scope of the corrosion in the *Environmental Impact Assessment*, SPDC failed to take adequate measures; for this reason, the corrosion could further develop in the years up to the oil spill.

4.3.8 HSE plan

310. The appellants claim the relevant passages from the HSE Plan at the time of the oil spills regarding the pipelines near Goi and Oruma and the well near Ikot Ada Udo, as well as the specific risks and possible environmental damage foreseen in those areas in connection with Shell's activities. This is deemed to include passages regarding

290 *Accufacts* report, submitted in the first instance as Exhibit M2 (Dooh), p.4.
291 *Accufacts* report, submitted in the first instance as Exhibit M2 (Dooh), p.7.
292 Statement of defense on appeal in the motion by virtue of Section 843a DCCP, also containing motion for the court to decline jurisdiction and transfer the case in the motion (Dooh), par. 294.
293 Reply to the Defence (**Exhibit O2**), par. 18.1.
294 Reply to the Defence (**Exhibit O2**), para. 18.2.
295 Reply to the Defence (**Exhibit O2**), par. 18.3.

maintenance and the replacement of the relevant pipelines, abandoning the well, preventing sabotage and *emergency response* and *remediation*. The HSE plan also comprises the *HSE Objectives* and *Targets*.[296]

311. Based on Shell guidelines, SPDC had to prepare an annual environmental and safety plan regarding its business operations, facilities, etc., *inter alia* discussing risks and technological possibilities:

> Within its Business Planning Cycle, the company shall prepare an annual HSE Plan to meet the company policy and continuous improvement objectives, one and five year targets [...], as well as making good any deficiencies identified in the HSE MS. The plan shall clearly identify accountable parties and target completion dates, based on one and five year performance targets for continuous improvement [...]. The Plan shall be linked to the Business Plan.
>
> The HSE Plans [...] shall cover such activities as existing operations; modifications to existing facilities, acquisitions; new developments; abandonment programmes; geological surveys; exploration of development programmes.
>
> HSE Plans [...] shall take into account present and anticipated future legislative and regulatory requirements (identified in registers of legislation), intolerable hazards, effects and aspects [...], technological options, financial, operational and business requirements and views of stakeholders.[297]

312. The HSE plans in part regard the plans and objectives of SPDC to prevent environmental damage as a result of defects or sabotage of its pipelines and wells in the areas in question, and the risks foreseen in this regard.

313. The appellants contended and substantiated that in the area of maintenance, safety and the environment (*emergency response & remediation*), SPDC failed structurally, even though it knew that as a result, considerable damage could occur for the environment. The claimed documents demonstrate that SPDC was aware of the risks involved in the environmental and safety situation in Nigeria, on the one hand, and that in view of this, SPDC took insufficient action to deal with those risks in respect of the maintenance and protection of its pipelines in Goi and Oruma and its abandoned wellhead in Ikot Ada Udo, on the other.

314. In view of the risk approach of the HSE plan and the link to the Business Plan, it is obvious that the parent company is aware of aspects of the HSE plan. The appellants contend that the parent company is liable, because it was aware of the fact that (i) systemic failures of SPDC were involved, as a result of which (ii) irresponsible risks were taken for the environment and the people living in the vicinity; moreover (iii) the parent company had the know-how to contend with those risks and (iv) had intervened in SPDC's activities before, but (v) nevertheless failed to intervene, as a result of which (vi) the damage near Goi, Oruma and Ikot Ada Udo occurred. Based on these circumstances mentioned under (i)-(v) above, the parent company had a duty of care. In

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296 EP 95-0100: *Health, Safety and Environmental Management Systems,* Exhibit N8 (Dooh), par. 5.1: *Typical supporting documentation and procedures – Documentation/Records.*

297 EP 95-0100: *Health, Safety and Environmental Management Systems,* Exhibit N8 (Dooh) par. 5.1.

order to substantiate this, the appellants claim access to documents based on which they can demonstrate the systemic failures of SPDC and the fact that the parent company was aware of SPDC's systemic failures. Thus, those documents do not necessarily (exclusively) pertain to the specific events in Goi, Oruma and Ikot Ada Udo that caused the damage.

4.3.9 The Hazards and Effects Register and the HSE case

315. The appellants claim access to or a copy of the *Hazards and Effects Register* and the *HSE case* that apply to [the vicinity and the] pipelines and well near Goi, Oruma and Ikot Ada Udo.

316. Based on *inter alia* EP 95-0100, SPDC had to record and qualify threats and risks for the environment and safety as well as measures taken against this in a register. *Safety* and *environmental aspects* in particular are part of the register. [298]

> Risk is present in all human endeavours. The Group Risk Policy and Guidelines describes risk as it applies to the complete business. This chapter addresses the identification of HSE hazards and evaluation of HSE risks, for all activities, products and services, and development of measures to reduce those risks.
>
> Group HSE Procedure Requirement
>
> The process for those critical operations and installations shall include:
> - an inventory of the major hazards to the environment and to the health and safety of people of all the activities, materials , products and services
> - an assessment of the related risks, implementation of measures to control these risks and to recover in case of control failure
>
> Soil and groundwater contamination shall be assessed and, where required, control a and remediation shall be in-hand.
>
> 4.2. The company shall develop and maintain procedures to assess the HSE risks and significance of the identified 'hazard, effects and aspects' […] for all operations and assets, compliant with Shell Group HSE Guidelines, EP HSE Manual guidance and international standards e.g. should be proactive rather than reactive
>
> 4.4: Performance indicators [...] shall be in place for all HSE-critical activities [...]. These shall be documented in the specification of the activity together with parties responsible for each indicator. [...] Performance against each indicator shall be monitored and measured routinely. The results shall be trended and reviewed. [299]

317. That and how such a register is indeed kept is *inter alia* demonstrated by Shell Brunei's HSE Management Manual:

> Part 5: Corporate Hazards Register

[298] EP 95-0100: *Health, Safety and Environmental Management Systems,* Exhibit N8 (Dooh), Appendix I.

[299] See 2.7.3 supra, and EP 95-0100: *Health, Safety and Environmental Management Systems,* Exhibit N8 (Dooh), Chapter 4.

The corporate Hazards Register for BSP HSSE hazards has been developed in a separate document "BSP Corporate Hazard Inventory and Register-BSP-02-Register-013 (attached below). The Register is in compliance with EP standard Hazard Inventory EP2005-0300-SP-01, and supporting the implementation of EP Standard EP2005-0300 Hazard & Effects Management Process (HEMP). It provides:

- An Inventory of significant and major hazards found in BSP facilities and operations,
- An EP Hazard and Effects Register to support HSSE risk assessment in BSP and EP activities, processes and operations.

The register contains information collated from systematic studies and assessments at Corporate and Asset/ Project/Service Group levels.[300]

318. Activities and assets that are assessed to be high risk are further individually discussed in an *HSE Case.*

- The company shall identify and document those critical operations and installations, which require a fully documented demonstration that risks have been reduced to a level as low as reasonably practicable. […] HSE cases […] compliant with regulatory requirements […] and EP Guidelines shall be available for these operations and installations defined as critical. […]
- The HSE case should also accurately reflect current practice at the location or site and be reviewed as per described Case review cycles.[301]

319. According to EP 95-0100, a typical HSE case is comprised of the following seven elements:

1. Management Summary and Introduction (Case objectives, findings, risks, introduction)
2. HSE MS for facility or operation (directly applicable elements of the HSE Management System)
3. Activities Catalogue ("this is recorded at a level, which shows that the controls are in place, and that these are suitable and sufficient for the risks addressed")
4. Description of operation or asset ("this will include, for example, safeguarding systems and emergency response capabilities")
5. Hazards and Effects register ("a demonstration that all hazards and effects have been identified, and the necessary risk evaluation has been carried out and that necessary controls to manage the causes and consequences are in place for those risks identified as significant through a process of ranking").
6. Shortfalls ("any shortfalls identified, with a plan to resolve the findings and thereby improve the operation)".
7. Statement of Fitness ("The Statement of Fitness must affirm that conditions are satisfactory to continue the operation").[302]

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300 BSP HSE Management Manual, https://www.bsp.com.bn/main/Resources/HSE/Guidelines/BSP-02-Guideline-0367_HSE_MS%20_16%20Jan%202009_%20final.pdf (most recently visited on 5 October 2014).

301 EP 95-0100: *Health, Safety and Environmental Management Systems,* Exhibit N8 (Dooh), par. 3.8. See also EP 95-0310, Documenting and implementing an HSE Case and HSE MS (not in the appellants' possession).

302 EP 95-0100: *Health, Safety and Environmental Management Systems,* Exhibit N8 (Dooh) par. 3.8. In this regard also: EP 95-0310, *Documenting and implementing an HSE Case and HSE MS* (not in the

320. It is hard to imagine that the pipelines near Goi and Oruma, as well as the well near Ikot Ada Udo are allegedly not included in an *HSE case* and/or the *Hazards and Effects Register*.

- At Goi there was a high risk – including according to Shell's standards – due to the strongly obsolete pipeline and the safety problems, as a result of which Shell had pulled out.
- The corrosion of the pipeline near Oruma was "unmanageable" and the pipeline was "very likely to leak before the year 2003/2004".[303] According to the recommendations, the pipeline should have been replaced a long time ago.
- The well in Ikot Ada Udo was no longer in use, but freely accessible; in breach of *good oil practice*, the well had still not been isolated and abandoned.

321. Using the claimed documents, the appellants can demonstrate that (i) the risks and safety problems in the area were considerable, and (ii) damage in the event that those risks materialized was foreseen by SPDC (irrespective of whether this damage was caused by sabotage or defective materials), but (iii) SPDC nevertheless failed to take adequate measures against this and therefore accepted the risks.

4.3.10 Surveillance contracts

322. The appellants claim contracts with local surveillance contractors that were in force at the time of the oil spills, or other documents demonstrating the obligations of the local surveillance people, how often they were deemed to conduct surveillance rounds and the training and means that were available to them.

323. These documents demonstrate that the surveillance contractors were unable to conduct effective and frequent supervision and consequently did not constitute an adequate measure to prevent sabotage.

324. The Reply to the Defence in the English proceedings has meanwhile demonstrated that Shell used an inadequate surveillance system. There were (i) insufficient surveillance guards; (ii) the surveillance guards present were insufficiently trained and (iii) they were not adequately fitted out.[304] In addition, (iv) their work was not supervised.[305] SPDC hired contractors to perform surveillance work, but was not aware of the number of surveillance guards that actually worked around Bodo in the period 2000-2009.[306] Moreover, the work of the surveillance guards was not or hardly reported to SPDC.[307] It has recently been demonstrated that hired surveillance contractors also sabotage pipelines.[308] The limited reliability (and effectiveness) of the surveillance contractors is

appellants' possession).

303 *Environmental Impact Assessment of the 20" x 37 km Kolo Creek – Rumuekpe Trunkline Replacement Project* (SPDC 2004), submitted in the first instance as Exhibit M3 (Dooh).

304 Reply to the Defence (**Exhibit O2**), par. 23, 24.

305 Reply to the Defence (**Exhibit O2**), par. 25.

306 Reply to the Defence (**Exhibit O2**), par. 25.1.

307 Reply to the Defence (**Exhibit O2**), par. 25.2, 25.3.

also demonstrated by the fact that (v) Shell contends that it must first verify their reports of oil spills itself before it takes any measures to limit the damage.[309]

325. Accordingly, the claimed documents can be used to demonstrate that SPDC violated both its statutory law and common law duty of care *to protect*.

4.3.11 Helicopter logs

326. The appellants claim access to logs or other documents demonstrating how frequently and how long helicopters conducted surveillance rounds in the year prior to the oil spills at issue.

327. These documents demonstrate that at best, helicopters conducted surveillance rounds incidentally; thus, this was not an adequate measure for preventing sabotage.

328. Accordingly, the claimed documents can be used to demonstrate that SPDC violated both its statutory law and common law duty of care *to protect*.

4.3.12 Documents regarding the Leak Detection System of the pipelines

329. The appellants claim documents demonstrating what *Leak Detection System* (LDS) was used in the pipelines near Goi and Oruma, how this system functioned and how it was maintained.[310] The appellants also claim the measurement results of the pressure measurement system of the pipelines in the three weeks prior to the oil spills.

330. According to the appellants, these documents demonstrate that a sound system did not exist in Goi or in Oruma, or at least that the system did not function properly.

331. In its final judgment, the District Court noted that no special circumstances have been submitted and/or demonstrated that allegedly 'justify a specific *duty of care* of SPDC in respect of Dooh or Oguru et al.'.[311] To this end, the District Court *inter alia* finds that SPDC had already taken measures to prevent sabotage that can be deemed adequate, including burying the pipeline.

332. The appellants explained above that at best, this finding could have led to the conclusion that SPDC had not violated its duty of care. In any event, in part in view of this finding, the appellants have a legitimate interest in documents that they can use to demonstrate that the measures mentioned did not exist or at least did not help.

333. A properly functioning *Leak Detection System* is *good oil field practice*. A system that measures the pressure in the pipeline is only part of such a system. API 1130, which is

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[308] See also the news report dated 24 June 2013 at http://www.stakeholderdemocracy.org/cgblog/535/89/Serious-questions-following-Trans-Nigerian-Pipeline-explosion-at-Bodo.html: "Just how limited Shell's oversight is was highlighted at the weekend when it was revealed that its own contractors working on the most recent spill had been arrested by a military joint task force on suspicion of oil theft." (most recently visited on 5 October 2014).

[309] Statement of Rejoinder of Shell, par. 18 (Dooh).

[310] See par. 95 and following supra.

[311] Final judgment of the District Court of The Hague dated 30 January 2013, ground 4.48; in Oguru: ground 4.50.

also the standard in Nigeria,[312] is entitled *Computational Pipeline Monitoring for Liquid Pipelines*. The introduction states:

> Computational Pipeline Monitoring (CPM) is a term that was developed to refer to algorithmic monitoring tools that are used to enhance the abilities of a pipeline controller to recognize hydraulic anomalies that may be indicative of a pipeline leak or commodity release. In the past, these CPM systems have been generally called leak detection systems. However, pipeline leak detection can be accomplished by a variety of techniques such as: aerial/ground line patrol; third party reports; inspections by company staff; hydrocarbon detection sensors; SCADA monitoring of pipeline conditions by pipeline controllers; and software based monitoring. Consequently, the term CPM was developed to specifically cover leak detection algorithmic tools.[313] (emphasis added by attorney)

334. It may be clear that many measures for *detecting* an oil spill also serve to *prevent* oil spills. After all, in that case the risk can be assessed in time. Conversely, in the event of a *leak detection system* that does not function properly, there will be a greater risk that oil spills will occur, regardless of the cause.[314] Highly corroded pipelines must be intensively monitored; for this purpose, it is insufficient to conduct a *pig run* once every few months. In Goi, where Shell stated that it could not conduct any pig runs, it is certainly obvious to continue to properly monitor the pipelines using a *Leak Detection System* – which is remotely controlled via the SCADA system. Moreover, safety was a particular problem in that area and a great deal of sabotage occurred here. If Shell failed to take any provisions to respond to the oil spills in time and to nip them in the bud, Shell played into the hands of malicious third parties.

335. In a pressure measurement system, sensors are placed at various points on a pipeline. By means of a data system, the pressure is measured and those data are sent to a control center. To ensure that a pressure measurement system is effective, the results must be monitored at least once an hour.

336. If the pressure measurement system functioned properly, in Shell's scenario, a sudden pressure difference will have been measured after the pipelines had been sabotaged. On the other hand, if it is demonstrated that the pressure in the pipeline gradually decreased during the weeks prior to the oil spill, it is more likely that the oil spill was caused by corrosion.

337. In view of Shell's arguments and the District Court's finding, the appellants currently also claim the measurement results of the pressure measurement system in the pipelines near Goi and Oruma in the three weeks prior to the oil spills. The appellants wish to use these results to further substantiate that the oil spills were not caused by sabotage.

338. However, Shell will probably be unable to submit those data. It has been demonstrated in the English proceedings that the pipeline near Goi – in contrast to what Shell

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312 See par. 2.5 supra.

313 API 1130, *Computational Pipeline Monitoring for Liquid Pipelines.*

314 See in this connection also DEP 31.40.60.11-Gen, *Pipeline Leak Detection*, Exhibit N6 (Dooh).

contended in these proceedings and what the District Court of The Hague assumed in the final judgment – was not equipped with a system that measures the pressure.

> SPDC has admitted that there was no LDS operating on the Bomu-Bonny section of the TNP.[315]

339. The claimed documents can further be used to demonstrate that as a result of the absence of a properly functioning *Leak Detection System*, SPDC violated its Article 11(5)(b) and the *common law* duty of care to protect, maintain and repair its pipelines and facilities, as well as its duty of care to adequately respond following an oil spill.

4.3.13 Accident Report

340. The appellants claim the *Accident Report* of the oil spills near Goi, Oruma and Ikot Ada Udo, as issued to the *Department of Petroleum Resources.*

341. Based on the *Guidelines and Procedures for the Design, Construction Operation and Maintenance of Oil and Gas Pipelines in Nigeria,* SPDC must issue a provisional report regarding the oil spill, the estimated scope of the damage and the steps taken within 48 hours.[316]

> 8.1: accident reporting: within 48 hours report
>
> (v) emergency remediation response effected on discovery
>
> 8.2: non compliance with the provisions of this guideline shall be treated as an offence punishable under the penalties prescribed under the OPA [..] for the purposes of enhancing strict compliance with relevant pipeline legislation.

342. The accident report demonstrates the assessment of SPDC immediately after the oil spills and the measures that it took. This document can be used to demonstrate that SPDC violated its Article 11(5)(b) duty of care as well as its *common law* duty of care to protect, maintain and repair its pipelines, as well as its duty of care to adequately respond following an oil spill.

343. Moreover, it has been demonstrated that the reports that Shell prepares shortly after the oil spills may deviate from the conclusions in the JIT reports.[317] In view of the appellants' challenge of the contents of the JIT reports, they have a legitimate interest in the claimed documents.

4.3.14 Oil Spillage Reports A, B and C.

344. The appellants claim the *Oil Spillage Report* forms A, B, and C that are sent to the *Director of the Department of Petroleum Resources* by virtue of the EGASPIN within 24 hours, 2 weeks and 4 weeks after an oil spill.

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315 Reply to the Defence (**Exhibit O2**), par. 16.1: "SPDC has admitted that there was no LDS operating on the Bomu-Bonny section of the TNP (Bodo Individual RRFIs Question 9.1)".

316 Article 8.1, Guidelines and Procedures for the Design, Construction Operation and Maintenance of Oil and Gas Pipelines in Nigeria.

317 Amnesty International, *Bad information: oil spill investigations in the Niger Delta* (2013) (**Exhibit O3**).

345. Appendix VIII-B2 of the EGASPIN includes the formats of the forms that oil companies must submit after an oil spill.[318] Form A is the 'Oil Spillage/leakage notification report' that is used for the notification and an initial overview of the damage and measures. Form B must be sent within fourteen days after the oil spill occurred. This form must be used for a further description of the type of leak, the volume of spilled oil and the consequences for the environment. Finally, form C must be used to specify the steps that have been taken to clean up the pollution, the methods that are applied in this regard and the progress made with the clean-up.

346. The fact that it is not only a regulation within the EGASPIN but also *industry practice* in Nigeria to prepare such reports is also demonstrated by Amnesty International's *Oil Spill Investigations in the Niger Delta* report.[319]

347. The Amnesty International report mentioned above has also demonstrated that Shell's B forms can deviate from the conclusions in the JIT reports.[320] In view of the appellants' challenge of the contents of the JIT reports, they have a legitimate interest in access to the claimed documents.

348. The appellants can further use the claimed documents to demonstrate that SPDC violated its Article 11(5)(b) duty of care as well as its *common law* duty of care to repair its pipelines and facilities and to adequately respond following an oil spill.

4.3.13 EER (post impact assessment)

349. The appellants claim the *Environmental Evaluation Studies* (previously also called *Post Impact Assessment Studies*) that SPDC prepared after the oil spills in Goi, Oruma and Ikot Ada Udo.

350. The EGAPSIN stipulate that following an oil spill, an operator must prepare an *Environmental Evaluation (PostImpact) Study*, also called an *Environmental Evaluation Report* (EER).[321] According to VIII.A.2.2, an EER *inter alia* describes (the scope of) the affected area, the damage and methods for remedying or limiting that damage.[322] An interdisciplinary team of employees of the operator and of the *Department of Petroleum Resources* determines the scope of the investigation.[323] Based on the EER, the clean-up methods to be applied are subsequently determined.[324]

351. The appellants refer to what they noted regarding these reports in Chapter 3.3 above.

352. Shell's defense that it allegedly does not have an EER is not convincing. It is possible that Shell refers to the claimed documents by another name, in which case the

318 EGASPIN, submitted in the first instance as Exhibit G1 (Dooh), Appendix VIII-B2.
319 Amnesty International, *Bad information: oil spill investigations in the Niger Delta* (2013), (**Exhibit O3**), par. 2.4.
320 Amnesty International, *Bad information: oil spill investigations in the Niger Delta* (2013), (**Exhibit O3**).
321 EGASPIN, submitted in the first instance as Exhibit G1 (Dooh), Article XX.
322 EGASPIN, submitted in the first instance as Exhibit G1 (Dooh), Article VIII.A.2.2.
323 EGASPIN, submitted in the first instance as Exhibit G1 (Dooh), Article VIII.A.2.1.
324 EGASPIN, submitted in the first instance as Exhibit G1 (Dooh), Article VIII.A.2.1(iv).

documents to which the appellants are referring may be clear based on the explanation of those documents.

353. The appellants contest that after the oil spills occurred, Shell responded adequately and cleaned up the area properly. In this connection, they have *inter alia* contended and substantiated – and they will further substantiate with the grounds for appeal in the main action – that Shell exercises insufficient due care in selecting the suitable clean-up method and that Shell insufficiently monitors that clean-up as well as the course of the natural recovery of the affected natural environment. [325]

354. The appellants can use the claimed documents to demonstrate that SPDC violated both its statutory law duty of care and its common law duty of care to adequately act and properly clean up after an oil spill.

[325] See section 2.6.4 supra.

5. CONCLUSION

The appellants conclude that in a ruling, the Court of Appeal

sets aside the interlocutory judgments of the District Court of The Hague dated 14 September 2011, rendered between the parties under docket numbers 200.126.834, 200.126.804, 200.126.843, 200.126.848, 200.126.849, 200.127.813, in as far as these pertain to the claim for the production of documents by virtue of Section 843a DCCP, and, in a new ruling, awards the appellants' changed claim for the production of documents, ordering Shell to pay the costs of the proceedings of the motions in both instances, ruling that statutory interest will be payable on the orders to pay the costs of the proceedings as of fourteen days after the date of the ruling to be rendered in this matter,

and declares that the ruling will be provisionally enforceable.

Attorney

6. SUPPLEMENTAL EXHIBITS

O1. *High Court of Justice, Technology and Construction Court*, *Judgement dated of 20th June 2014* van de *Bodo Community and Others* versus *SPDC* (VK), [2014] EWHC 1973 (TCC)

O2. *High Court of Justice, Technology and Construction Court, (Amended) Reply to the (Amended) Defence* of the *Bodo Community and others* (VK)

O3. Amnesty International, *Bad information: oil spill investigations in the Niger Delta* (2013)

O4. *Corporate Liability in a New Setting – Shell and the Changing Legal Landscape for the Multinational Oil Industry in the Niger Delta,* University of Essex, Business and Human Rights Project (2012)

O5. International Commission of Jurists, *Access to Justice: Human Rights Abuses involving Corporations – Nigeria,* (2012)

O6. International Union for Conservation of Nature (IUCN), *Sustainable Remediation And Rehabilitation Of Biodiversity And Habitats Of Oil Spill Sites In The Niger Delta*, 2013

O7. *Choc v. Hudbay Minerals Inc.* [2013] ONSC 1414

O8. HSE Management System Audit Template (2001), SIEP EP-HSE