Court of Appeal of The Hague
Case number: 200.126.849
Date: 7 January 2014

STATEMENT OF DEFENSE IN THE MOTION BY VIRTUE OF SECTION 843a DCCP, ALSO CONTAINING MOTION FOR THE COURT TO DECLINE JURISDICTION AND TRANSFER THE CASE

i n t h e m a t t e r o f:

1. the legal entity organized under the laws of the United Kingdom **ROYAL DUTCH SHELL PLC** ("**RDS**"),
with "registered address" in London, United Kingdom,
with office in The Hague,
2. the legal entity organized under the laws of the Federal Republic of Nigeria **THE SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LTD.** ("**SPDC**"),
established in Port Harcourt, Rivers State, Federal Republic of Nigeria,
respondents in the main action,
defendants in the motion,
attorney: J. de Bie Leuveling Tjeenk, LL.M.

v e r s u s:

VERENIGING MILIEUDEFENSIE ("**Milieudefensie**"),
established in Amsterdam,
plaintiff in the motion,
appellant,
attorney conducting the case: Ch. Samkalden, LL.M.
attorney of record: W.P. den Hertog, LL.M.

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1 INTRODUCTION

1. Before filing a statement of appeal, Milieudefensie initiated a new motion by virtue of Section 843a DCCP. The Court of Appeal has given Shell the opportunity to file a defense in this motion.

2. Shell's initial defense against the claims in this new motion to produce documents is that these claims of Milieudefensie are inadmissible (see Chapter 2 below). In the first instance, Milieudefensie also initiated claims to produce documents. The District Court dismissed those claims to produce documents in the interlocutory judgment dated 14 September 2011. Until a decision regarding the grounds for appeal is handed down, the Court of Appeal is bound by the decisions of the District Court in the interlocutory judgment and initiating new claims to produce documents is pointless. Thus, this new motion to produce documents can only be taken to be a disguised appeal, in which Milieudefensie's claims are inadmissible. Instead of initiating new claims to produce documents, Milieudefensie (if it wishes to do so) must submit its claims to produce documents to the Court of Appeal by means of grounds for appeal directed against that interlocutory judgment.

3. Should the Court of Appeal dismiss this inadmissibility defense, Shell also conducts other defenses against the claims to produce documents in this motion. Shell will put forward a number of these other defenses in the main action, as well. This is without prejudice to the fact that the Court of Appeal must already assess these defenses in the scope of this motion, because the success of one or more of these defenses (wholly or partially) precludes awarding the claims to produce documents. This applies to the following defenses:

   (a) the Dutch court does not have jurisdiction over SPDC in this motion (see Chapter 3); and

   (b) Milieudefensie's claims by virtue of Section 3:305a DCC are inadmissible (see Chapter 4).

4. Shell has also conducted the defenses referred to in paragraphs (a) and (b) above in the first instance. The District Court has dismissed these defenses. In the event that the Court of Appeal rules that Milieudefensie's claims in the motion to produce documents are admissible, it is pointed out that the Court of Appeal is not bound by the findings of the District Court. Were this otherwise, Milieudefensie could not be successful, because the District Court dismissed the (identical) claims to produce documents in the first instance. In that case, Shell's defense against the claims to produce documents would also be limited in an unacceptable manner, because the Court of Appeal would be bound by

the District Court's decisions that were to the detriment of Shell (such as the international jurisdiction over SPDC and the admissibility of Milieudefensie's claims by virtue of Section 3:305a DCC). Moreover, with regard to the international jurisdiction, the Court of Appeal must also assess this issue *ex officio* in the scope of this motion.[1]

5. In addition to the "preliminary" defenses referred to above, in Chapters 5 and 6, Shell conducts a further substantive defense against the claims to produce documents.

6. In Chapter 7, Shell requests that the Court of Appeal allows an interim appeal in cassation in the event that any part of the claims to produce documents may be awarded and that the Court of Appeal not declare the awarding of any claim provisionally enforceable.

7. Shell requests that the Court of Appeal considers all Shell's arguments and defenses in the case documents in the first instance to be repeated and included here. Shell further contests everything that Milieudefensie submitted in the statement in the motion, unless this statement on appeal demonstrates that Shell acknowledges the accuracy of any argument of Milieudefensie. Shell submits the complete case file of the first instance into the proceedings. An overview of the case file is included on pages 79 - 80.

8. The following definitions are used in this statement on appeal:

   Motion to produce documents on the part of Milieudefensie dated 13 September 2013 = 2013 Motion to produce documents

   Akpan = Friday Alfred Akpan (the plaintiff in the first instance)

   Milieudefensie = Vereniging Milieudefensie

   Shell = the respondents (RDS and SPDC)

   RDS = Royal Dutch Shell Plc.

   SPDC = The Shell Petroleum Development Company of Nigeria Ltd.

[1] See HR 18 February 2011, *NJ* 2012, 333.

2 CLAIMS IN THE MOTION TO PRODUCE DOCUMENTS ARE INADMISSIBLE

9. In the first instance, Milieudefensie also initiated claims to produce documents. The District Court dismissed those claims to produce documents in the interlocutory judgment dated 14 September 2011. Instead of initiating new claims to produce documents, Milieudefensie (if it wishes to do so) must submit its claims to produce documents to the Court of Appeal by means of grounds for appeal seeking to challenge that interlocutory judgment. In this motion, Milieudefensie claims access to the same documents to which it claimed access in the first instance (see nos. 179, 189, 196, 204, 213 and 216 below). Once again initiating claims to produce documents constitutes a disguised appeal against the interlocutory judgment in the motion to produce documents. Consequently, Milieudefensie's subject claims to produce documents are inadmissible.

10. In its ruling of 29 October 2013, ECLI:NL:GHDHA:2013:3941, the Court of Appeal of The Hague ruled in respect of a similar defense by a respondent that this defense failed in this latter case, given that in principle, it is possible to initiate the same claim again, even if the claim was previously dismissed; the claim in the motion by virtue of Section 843a DCCP can be initiated at every stage of the proceedings. Moreover, the Court of Appeal found that the claim to produce documents on appeal deviated from the motion in the first instance, because the documents on appeal were claimed for a different purpose than in the first instance. On appeal, the issue was to substantiate the claimed copyright infringement; in the first instance, the issue was to identify other infringing parties.

11. Shell believes that this opinion of the Court of Appeal should not be followed in the case at issue. The fact that a motion by virtue of Section 843a DCCP can be initiated at every stage of the proceedings does not mean that this motion can be initiated *again* at every stage of the proceedings. In principle, there is no room to once again initiate a claim to produce documents that has already been dismissed. This might be different in special cases. Such a special case may occur if the reason for the initial dismissal is that for the present, there is no legitimate interest because the production of documents is claimed in view of furnishing evidence in respect of a point in dispute that is not yet at issue. In that case, the situation can change so much as the proceedings progress that at some point, a legitimate interest does occur in the production of documents. The same claim to produce documents may also be initiated for a different purpose, as was obviously the case in the ruling dated 29 October 2013 mentioned above. Neither situation occurs here. Nor is there any other reason in the case at issue to offer Milieudefensie the opportunity to *again* initiate its claims for the production of documents on appeal, outside the grounds for appeal.

12. The Court of Appeal is bound by the decisions of the District Court in the interlocutory judgment in the motion to produce documents as long as Milieudefensie has not directed any grounds for appeal against that judgment. This is also acknowledged by Milieudefensie itself: "In the final judgment dated 30 January 2013, the District Court did not come back to the criteria regarding the evidentiary interest stipulated in the interlocutory judgment. Until a decision regarding the grounds for appeal has been handed down, those judgments should be started from".[2] However, Milieudefensie wrongfully concludes based on this correct observation that it "in fact, does not have any option other than to once again file a motion." Milieudefensie fails to recognize that until a decision regarding the grounds for appeal is handed down, the binding force of the interlocutory judgment in the motion to produce documents cannot be circumvented by initiating a new motion.

13. What Milieudefensie essentially argues is that prior to submitting the grounds for appeal, it must be able to initiate a new motion by virtue of Section 843a DCCP, because without the documents it is allegedly unable to formulate any grounds for appeal. In so doing, it fails to recognize that where the District Court did not see any reason to order the production of documents, there can be no reason for the Court of Appeal to do so, either, other than in the scope of a decision regarding the grounds for appeal still to be formulated. After all, compared to the situation in the first instance, on appeal, the requirements to be stipulated for the duty to contend facts and circumstances of Milieudefensie will be more rather than less stringent. See the following passage from the Explanatory Memorandum to the legislative bill to amend Section 843a DCC:[3]

> "Dutch procedural law is characterized by what is referred to as a funnel-shaped model. As the proceedings progress, the funnel-shaped model demarcates the relevant factual basis that is (still) in dispute in increasingly greater detail and more and more accurately. Thus, it is obvious that as the proceedings progress, the substantive conditions attached to the ability to invoke the right to a copy of documents can and may be interpreted more and more stringently."

14. The "funnel-shaped model" mentioned in the passage cited above demands that on appeal, Milieudefensie further works out its arguments before it is entitled to any production of documents. It must do so in a statement of appeal, since that is the document to be used to explain in what respect the District Court applied incorrect legal frameworks to assess their claims. This is also the document to further work out factual arguments. In initiating the subject motion,

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2 2013 Motion to produce documents, no. 20.

3 Dutch Lower House 2011–2012, 33 079, no. 3, p. 4.

Milieudefensie has chosen a route that is inappropriate for appellate procedural law.

15. As stated before, in this case, no special circumstances are involved that justify Milieudefensie initiating this new motion. In the 2013 Motion to produce documents, Milieudefensie essentially does not advance anything new in relation to its arguments in the first instance. It submits the same – inadequate – basis for its claims and claims the same documents, for the same purpose as in the first instance. In contrast to what Milieudefensie argues,[4] the fact that its claims were dismissed in the final judgment of 30 January 2013 does not mean that now it allegedly does have a legitimate interest in the claimed documents. The District Court found Milieudefensie's arguments wanting, both in the scope of the motion to produce documents and in the main action. With this state of affairs, outside the grounds for appeal still to be put forward, the Court of Appeal cannot arrive at a different opinion than the District Court, including not in respect of the right to the production of documents.

16. Milieudefensie explicitly leaves open the possibility to also claim the documents claimed in the first instance – most of which are claimed again in this motion – in the Statement of Appeal.[5] It is unacceptable that if Milieudefensie's subject claims for the production of documents are held to be admissible, it would, in fact, be able to appeal twice against the interlocutory judgment of 14 September 2011. It is either one or the other: either the objections formulated against the interlocutory judgment of 14 September 2011 in the 2013 Motion to produce documents are designated as grounds for appeal, but in that case Milieudefensie is not free to put forward new grounds for appeal in any subsequent case document (including not against the final judgment), or the previously mentioned objections are not deemed to be grounds for appeal, but in that case the Court of Appeal must disregard those objections at the current stage of the proceedings. After all, in view of the "one statement" rule (Section 347 (1) DCCP), an appellant is not permitted to spread his grounds for appeal over two or more different case documents. This is only different to the extent that the other party unequivocally consents to this. Shell does not consent to Milieudefensie spreading its grounds for appeal over two or more different case documents.

17. In the 2013 Motion to produce documents, Milieudefensie itself indicates that "it still wants to be given the opportunity to set out its grounds for appeal against the final judgment".[6] It also wants to leave open the possibility to direct grounds for appeal against the interlocutory judgment of the District Court of 14

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4 See the 2013 Motion to produce documents, no. 24.

5 2013 Motion to produce documents, no. 5.

6 2013 Motion to produce documents, no. 7.

September 2011 in a further case document.[7] In view of the "one statement" rule, this means that the 2013 Motion to produce documents does not yet put forward any grounds for appeal against the interlocutory judgment of 14 September 2011 and that for the time being, the decisions that the District Court handed down in that interlocutory judgment qualify as unchallenged.

18. Given that the Court of Appeal is bound by the decisions of the District Court until a decision has been rendered on the grounds for appeal – as also recognized by Milieudefensie – Milieudefensie's claims in the motion are inadmissible. This applies in any event in as far as in this new motion, Milieudefensie claims the production of the same documents it claimed in the first instance.

19. In the event that the Court of Appeal rules that Milieudefensie's claims in this motion to produce documents are admissible, it is pointed out that the Court of Appeal is not bound by the findings of the District Court. Were this otherwise, Milieudefensie could not be successful, because the District Court dismissed the (identical) claims to produce documents in the first instance. In that case, Shell's defense against the claims to produce documents would also be limited in an unacceptable manner, because the Court of Appeal would be bound by the District Court's decisions that were to the detriment of Shell (such as the international jurisdiction over SPDC and the admissibility of Milieudefensie's claims by virtue of Section 3:305a DCC). Moreover, with regard to the international jurisdiction, the Court of Appeal must also assess this issue *ex officio* in the scope of this motion.[8]

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7 2013 Motion to produce documents, no. 5.

8 See HR 18 February 2011, *NJ* 2012, 333.

3 NO INTERNATIONAL JURISDICTION IN RESPECT OF SPDC

3.1 Introduction

20. In the interlocutory judgment in the jurisdiction motion of 24 February 2010 and in the final judgment, the District Court found that international jurisdiction exists based on Section 7 (1) DCCP.

21. The Court of Appeal can only conduct a substantive assessment of the claims to produce documents against SPDC if the Dutch court has international jurisdiction over SPDC.[9] In this motion, to substantiate that the Dutch court allegedly has international jurisdiction over SPDC, Milieudefensie only argues (2013 Motion to produce documents, no. 21) that Section 843a DCCP also applies to foreign legal relationships or proceedings. To this end, it refers to the ruling HR 8 June 2012, *NJ* 2013, 286.

22. This argument fails. As stated before, Section 843a DCCP only applies in respect of SPDC if the Dutch court has international jurisdiction over SPDC. Milieudefensie's reference to the ruling HR 8 June 2012, *NJ* 2013, 286, does not hold. This latter case involved a claim for the production of documents that had been initiated against a Dutch defendant. In that case, the jurisdiction of the Dutch court resulted from Article 2 of the Brussels Convention.

23. The Court of Appeal cannot take cognizance of the claims for the production of documents against SPDC, because the Dutch court does not have any jurisdiction over SPDC, including not based on Section 7 (1) DCCP. SPDC's ties with Dutch national jurisdiction are allegedly formed by the claims against RDS. However, those claims lack a sound basis under the applicable Nigerian law. Otherwise, there is no sufficient connection between the claims against RDS and those against SPDC to justify jurisdiction based on the *forum connexitatis*, either.

24. Like the other elements of the Dutch jurisdiction rules, Section 7 (1) DCCP is based on concrete "points of view" that regard "interests of the state, on the one hand, and interests of the parties to the proceedings, on the other".[10] If these points of view are not taken into account, the jurisdiction rules of Section

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[9] See the opinion of Advocate General Vlas, footnote 13, for HR 8 June 2012, LJN BV8510, *NJ* 2013, 286: "In international cases, there must be jurisdiction, of course, in order to take cognizance of the claim by virtue of Section 843a DCCP. In the case at issue, the Court of Appeal has jurisdiction to take cognizance of the claim based on Article 2 of the Brussels Regulation, because the defendant is domiciled in the Netherlands."

[10] L. Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht* (Introduction to Dutch international private law), 10th edition, Deventer 2012, p. 213.

7 (1) DCCP would become too broad. In this scope, Strikwerda notes the following:[11]

> "International jurisdiction rules that are too broad result in overlap and in turn plurality of competent forums. In general, this is felt to be undesirable, not only because this may give rise to positive international competence conflicts, but also because this may encourage 'forum shopping' or 'forum tourism': the plaintiff unilaterally chooses the forum that he expects will render the ruling that will be most favorable for him."

25. In this respect, the interest of the state has three aspects:[12]

(a) the Netherlands cannot close its doors to international disputes; on its own territory, the state must maintain order and peace by resolving disputes that have close ties with the forum country; for international disputes, the state must also contribute to the international administration of justice;
(b) the Netherlands cannot open its doors too wide; the limited capacity of the judicial system – which is financed by public funds – will become overloaded if the Netherlands becomes the forum for all private law disputes that do not have any relevant ties with the forum country;
(c) the Netherlands should not open its doors too wide; too extensive an assumption of jurisdiction will lead to legal political objections from countries that have closer ties with the dispute.

26. The interest of the parties to the proceedings has two aspects:[13]

(a) the right to access to the court; the parties must always be able to find a court that has international jurisdiction for their international dispute, and a jurisdiction vacuum (or 'negative international competence conflict') must be prevented; and

(b) the advantage of litigating before the most suitable forum; from the point of view of legal costs, judicial efficiency, or quality of the administration of justice, it is self-evident to litigate in the country where most of the evidence is, where the objects to be recovered are or whose legal system applies.

27. Applied to the case at issue, this presents the following picture. The Dutch state does not have any interest in contributing to the administration of justice for an internal Nigerian dispute in which SPDC is a defendant. The state does have an interest in (a) limiting the use of the judicial system that is financed from public

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11 Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht*, 2012, p. 214.

12 Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht*, 2012, p. 213.

13 Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht*, 2012, pp. 213-214.

funds (and which is already overloaded) and (b) preventing possible legal political objections from – in this case – Nigeria to the Dutch court exercising jurisdiction in purely internal Nigerian disputes.

28. With regard to the parties to the proceedings, the following can be noted. The right to access to the court is not at issue here. After all, the Nigerian court has jurisdiction over the case against SPDC. This is not changed because Milieudefensie is unable to initiate a class action by virtue of Section 3:305a DCC before the Nigerian court, as that is the result of a difference between Dutch and Nigerian law regarding the class action right. This does not comprise any legally relevant limitation of the right to access to the court, given that Nigerian law does recognize a class action right. The interests of the parties that Milieudefensie claims to represent can be represented in law by one or more of those parties, also on behalf of all others, by means of a *representative action*.[14] This is just as well a form of a class action right, which in the case at issue even offers more effective legal protection than Milieudefensie's acting in law (see section 4.2 below).

29. The facts regarding the clean-up and remediation of the consequences of the oil spill at issue exclusively occurred in Nigeria. Having the Dutch court determine those facts and furnishing evidence in that scope is highly inefficient. In addition, Milieudefensie bases the claims against SPDC on legal arguments that have never been put forward against SPDC (or other oil companies) in legal proceedings in Nigeria; in any event, these arguments have never been accepted and resulted in liability on the part of an 'operator'. For example, this is true for the argument that SPDC allegedly has a duty of care to prevent sabotage. This also applies to the argument that SPDC could be liable for failing to clean up the consequences of an oil spill that was caused by sabotage and for which SPDC is thus not liable. Accordingly, SPDC's liability must be assessed by a court that is not familiar with the rules it has to apply and who cannot find any support in existing case law, either. As will be further explained in nos. 46-51 below, the Dutch court will have to adopt a reticent stance in this context. It is not up to the Dutch court to usher in new development of law under Nigerian law. This means that it is not efficient to have the Dutch court assess the case against SPDC, not even viewed from Milieudefensie's perspective.

30. The inefficiency also exists from SPDC's perspective. The rationale of the *forum rei* can be found in protection of the defendant: given that the plaintiff initiates the proceedings and it has not been established that his claim is valid, the defendant may not be forced to litigate before the court in the plaintiff's

[14] See also the legal opinion of Professor F. Oditah QC, Supplementary Opinion dated 21 February 2011 (Exhibit 24 with the Defense in the Motion to produce documents), nos. 22-31.

domicile.[15] In the subject proceedings, SPDC is faced with a foreign procedural language, foreign (procedural) law and a legal culture that is foreign to SPDC. Both in practical terms and as regards the costs, the briefing of the case will produce a multitude of problems compared to litigating before one's own court. See the parliamentary history:[16]

> "On the other hand, it is *inter alia* important for jurisdiction rules that it may sometimes be extremely burdensome if a party is forced to litigate abroad on account of the costs, distance, language problems, lack of familiarity with local substantive law and procedural law, etc."

31. In the case at issue, Nigerian law applies. This does not reduce the practical problems for SPDC; on the contrary. SPDC must defend itself before the Dutch court, which is not familiar with Nigerian law. Moreover, the possibility of submitting legal points in dispute to a highest court is absent, given that it is not possible to complain about any breach of Nigerian law in an appeal to the Netherlands Supreme Court, nor can the case be submitted to the Nigerian Supreme Court.

32. All this means that it is highly objectionable for SPDC to subject itself to these proceedings before the Dutch court, especially in the case at issue, in which the distance between Nigeria and the Netherlands is substantial, not only in geographical terms, but in a cultural respect, as well.

3.2 Section 7 (1) DCCP

33. In a recent decision regarding the jurisdiction ground of Section 7 (1) DCCP, the District Court of Amsterdam found as follows:[17]

> "By virtue of Section 7 (1) DCCP, in the event that there are several defendants and the Dutch court has jurisdiction in respect of one of them, the Dutch court also has jurisdiction in respect of the other defendants, provided that the claims against the individual defendants are so connected that reasons of procedural efficiency justify that the claims are collectively tried. The District Court found first and foremost that Section 7 (1) DCCP must be restrictively applied as an exception to the main rule. This is related to the starting point that rules regarding national jurisdiction must be highly predictable. It is not in the interest of legal certainty if it is not possible in advance to reasonably estimate the jurisdictions in which one might be summoned in connection with a specific act. In answering the question regarding whether the claims are so connected that reasons

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15 Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht*, 2012, p. 215.

16 Parliamentary History of the Code of Civil Procedure, Van Mierlo/Bart, p. 79.

17 District Court of Amsterdam 23 October 2013, ECLI:NL:RBAMS:2013:7936, ground 4.2.

> of procedural efficiency justify that these claims are collectively tried, all circumstances of the case must be considered – not just the factual situation, but also the situation in law. Moreover, it is up to the party that invokes Section 7 (...) to contend and – if a sufficiently substantiated challenge is put forward – prove the circumstances justifying a collective hearing. Finally, it can be inferred from the parliamentary history (Dutch Lower House, session year 1999-2000, 26 855, no. 3, p. 37) that Section 7 (1) DCC (in part) seeks to avoid irreconcilable decisions on the same subject."

34. Shell believes that with this finding, the District Court of Amsterdam correctly set out the review framework of Section 7 (1) DCCP. Briefly summarized:

- Section 7 (1) DCCP must be applied restrictively, because it is an exception to the main rule of the *forum rei*;
- all circumstances of the case must be taken into account;
- it must have been reasonably foreseeable for the foreign co-defendant that he could be summoned to appear before the Dutch court;
- sufficient connection must be involved, both factually and legally;
- it is up to the plaintiff to contend – and if necessary prove – circumstances that justify a collective hearing.

35. All these points of view also occur in ECJ case law regarding Article 6 (1) of the Brussels Convention. That case law is relevant in the interpretation of Section 7 (1) DCCP. This follows from the parliamentary history:[18]

> "Proposed for the first sub-section of Section 7 (1.1.6) for the sake of judicial efficiency; compare the current Section 126, seventh sub-section, DCCP, as well as Article 6, part 1 of the Brussels/Lugano Conventions. However, the wording of Section 7 (1.1.6) is more limited (see the end), because jurisdiction based on the ground that other defendants are also included in the proceedings would be exorbitant in the event that there is no connection between the claims against the different defendants. In this respect, case law of the European Court of Justice has been incorporated in the proposed text (ECJ 27 September 1988, *NJ* 1990, 425), so that no deviation from Article 6, part 1 of the Brussels Convention is involved."

ECJ case law that was rendered after the ruling ECJ 27 September 1988, *NJ* 1990, 425 (*Kalfelis*) is also relevant in the interpretation of Section 7 DCCP.[19]

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[18] Parliamentary History of the Code of Civil Procedure, Van Mierlo/Bart, p. 108.

[19] T&C Code of Civil Procedure, comments to Section 7 DCCP, Polak/Zilinsky, note 2; M.V. Polak, *Ars Aequi 56* (2007) 12, p. 994; P. Vlas, note, no. 3, to ECJ 13 July 2006, *NJ* 2008, 76 (*Roche/Primus*): "Section 7 DCCP includes a jurisdiction rule that has been derived from

36. In view of the reference in the parliamentary history to the ECJ case law, Section 7 (1) DCCP stipulates more stringent requirements for the required connection than Section 126 (7) DCCP (old). See Advocate General Langemeijer in his opinion for HR 30 November 2007, *NJ* 2008, 77:[20]

> "2.8 The new Section 7 DCCP contains a first sub-section that – even though it has been derived from Section 126 DCCP (old) – only allows legal entities/natural persons who are established or domiciled abroad to be co-summoned to a limited extent (…). According to the parliamentary history of this provision, the legislator felt that establishing jurisdiction solely on the ground that other defendants are also included in the proceedings is exorbitant if there is no connection between the claims against the different defendants. With the new Section 7, the legislator sought to tie in with the criterion of Article 6, part 1, of the Brussels/Lugano Conventions and with relevant ECJ case law."

37. Shell believes that in the scope of the interpretation of Section 7 (1) DCCP, the criteria developed in the ECJ case law regarding Article 6 (1) of the Brussels Convention are considered to be minimum requirements. In the interlocutory judgment of 24 February 2010 (ground 3.7), the District Court wrongfully held that the ECJ case law regarding Article 6 (1) of the Brussels Convention was not decisive and in the final judgment (ground 4.5) wrongfully left the applicability of that case law aside. These findings are incorrect, as well. To find that jurisdiction exists by virtue of Section 7 (1) DCCP, the requirements of Article 6 (1) of the Brussels Convention must have been satisfied *at a minimum*.

38. However, the observation that the requirements of Article 6 (1) of the Brussels Convention have been satisfied does not automatically mean that jurisdiction by virtue of Section 7 (1) DCCP can be assumed. For example, in one important

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Article 6 (1) of the Brussels Convention in the event of plurality of defendants. Section 7 DCCP stipulates that 'the claims against the individual defendants must be so connected that reasons of procedural efficiency justify that the claims are collectively tried'. According to the Explanatory Memorandum, the *Kalfelis/Schröder* ruling of the ECJ was taken into account and Section 7 DCCP does not deviate from Article 6 (1) of the Brussels Convention (*Parliamentary History of the Code of Civil Procedure*, Van Mierlo/Bart, p. 108). For that reason, it can be defended that in interpreting Section 7 DCCP, the interpretation of Article 6 (1) of the Brussels Convention and currently of Article 6 (1) of the Brussels Regulation is followed to the extent possible."

[20] See also the relevant finding of the Netherlands Supreme Court in the ruling 30 November 2007, *NJ* 2008, 77, ground 2.5.2: "The requirement of connection formulated by the European Court of Justice for Article 6 (1) of the Brussels Convention and Article 6 (1) of the Lugano Convention does not apply to Section 126 (7) DCCP (old) that still applies to this case."

respect, Section 7 (1) DCCP deviates from Article 6 (1) of the Brussels Convention. Section 7 (1) DCCP does not stipulate the requirement that one of the defendants must be domiciled in the Netherlands. Irrespective of the jurisdiction ground based on which the Dutch court assumes jurisdiction in respect of one of the defendants, it can assume jurisdiction in respect of the co-defendant(s), provided that the connection requirement has been satisfied, of course. Thus, Section 7 (1) DCCP potentially has a broader scope than Article 6 (1) of the Brussels Convention. Polak argued that for this reason, the need for an anti-abuse rule for Section 7 (1) DCCP is greater than if Article 6 (1) of the Brussels Convention is applied.[21]

3.3 Basis of the claims against RDS is obviously insufficient

39. At the time of the jurisdiction motion, the District Court should already have concluded that in light of the facts that Milieudefensie contended in the initiatory writ of summons and the applicable Nigerian law, the claims against RDS do not have any basis in law (as the District Court ultimately also ruled in the final judgment). After all, Nigerian law does not have any examples of liability of a parent company under similar circumstances. English law does not have any relevant precedent, either. Milieudefensie invokes *Chandler v. Cape* – it is pointed out that they did not already do so in the Initiatory writ of summons, because at that time, no ruling had yet been rendered in that case – but both the District Court and Robert Weir QC, engaged by Milieudefensie itself, are rightfully of the opinion that the circumstances in *Chandler v. Cape* are not similar to those in the case at issue. The further course of the proceedings in the first instance could no longer change this absence of a legal basis in Nigerian law, of course (nor did it do so).

40. In the substantive assessment of the claims against RDS, based on an assessment of the facts contended by Milieudefensie in light of the decision in *Chandler v. Cape*, the District Court rightfully held that the special circumstances based on which the parent company was held liable in this latter case are not so similar to those in the case at issue that on this ground, a duty of care allegedly falls on RDS in respect of the people living in the vicinity of SPDC's oil pipelines and oil facilities (grounds 4.26-4.32 of the final judgment). Nor are there any other grounds to assume such a duty of care, according to the District Court's rightful opinion (ground 4.33). However, prior to these findings, the District Court ruled (ground 4.3) that the claims against RDS could not be deemed to be certain to fail beforehand. The decision in *Chandler v. Cape* allegedly demonstrates that beforehand it could be defended that under certain circumstances, based on Nigerian law, the parent company of a

[21] M.V. Polak, *Ars Aequi 56* (2007) 12, pp. 994-995.

subsidiary may be liable based on the tort of negligence against people who suffered damage as a result of the activities of that (sub-) subsidiary.

41. The District Court handed down a completely correct opinion regarding RDS' liability, but wrongfully ruled that the claims against RDS were not certain to fail beforehand. This finding by the District Court is based on the fact that under certain circumstances, a parent company may be liable in respect of persons who suffered damage as a result of the activities of its (sub-) subsidiary. However, this general notion is insufficient to find that Milieudefensie's claims are not certain to fail. In answering the question regarding international jurisdiction of the Dutch court, the District Court wrongfully failed to assess whether it is likely that *in the case at issue*, circumstances occur that may lead to liability of the parent company under Nigerian law. If the District Court had done so, it should have concluded that the claims against RDS are most certainly certain to fail.

42. Nigerian law does not offer any basis for the claims against RDS. Nigerian corporate law is based on the '*separate entity doctrine*': upon incorporation, the company becomes a separate legal entity, which is separated from its shareholders.[22] Closely related to the '*separate entity doctrine*' is the limited liability doctrine: the shareholders are indemnified against any liability for the company's obligations in the event that they have fully paid up their shares.[23] This applies both when the shareholder is a natural person and when the shareholder is a legal entity.[24]

43. There are – rare – cases in which under Nigerian law there may be room '*to lift the corporate veil*'. RDS could be liable to the victims of the oil spill at issue if one of those cases occurs. Under specific circumstances, piercing the corporate veil is deemed possible under Nigerian law in the following events:

- the legal personality of the company in question is used to masque '*fraud*' or '*illegality*';[25]
- the company in question is no more than a façade;[26]

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22 '*Companies and Allied Matters Act 1990*' ("CAMA"), Section 37 (Exhibit 1 N of Shell); *FDB Financial Services* v. *Adesola* (2000) 8 NWLR (Pt 668) 170, p. 183H (Exhibit 1 H of Shell); *Vibelko (Nigeria) Ltd* v. *NDIC* (2006) 12 NWLR (Pt 994) 280, p. 295F-296B (see Exhibit 1 L with the Defense of Shell).

23 CAMA, Section 21(1)(a) (Exhibit 1 N with the Defense of Shell).

24 *Union Beverages Ltd* v. *Pepsicola Int Ltd* (1993) 3 NWLR (Pt 330) 1, p. 16C-E (Exhibit 1 B with the Defense of Shell).

25 *FDB Financial Services* v. *Adesola* (2000) 8 NWLR (Pt 668) 170, p. 183H (Exhibit 1 H with the Defense of Shell).

- the company in question is an '*agent*' of the company against which the 'piercing the corporate veil' action is directed.[27]

44. None of the 'piercing the corporate veil' situations mentioned above occurs in the case at issue, nor does Milieudefensie submit that one of those situations occurs. With this state of affairs, Milieudefensie's claims against RDS are certain to fail.

45. The argument that RDS allegedly has a duty of care to the victims of the oil spill at issue is not supported by any ruling from a Nigerian court.[28] In this connection, Milieudefensie itself only invokes court decisions from the United States and England. With this state of affairs, the current position of Nigerian law is that only the cases indicated above (*fraud, illegality, façade* or *agency*) – which has been established do not occur here – might allow room for liability of RDS for the oil spill at issue. In applying Nigerian law, the Dutch court must concur with the existing interpretations of the law in Nigeria.

46. The Explanatory Memorandum to Section 10:2 DCC sets out that the foreign law must be applied in the same way as it is in the country in question, meaning including, for example, case law and literature, and including the opinions prevailing in that country regarding questions such as the manner of interpreting the law.[29] See also in this connection the National Committee for International Private Law:[30]

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26 *Adeyemi v Lan & Baker (Nig) Ltd* (2000) 7 NWLR (Pt 663) 33, p. 51A-F (Exhibit 1 G with the Defense of Shell); *Vibelko (Nigeria) Ltd* v. *NDIC* (2006) 12 NWLR (Pt 994) 280, p. 295G-H (Exhibit 1 L with the Defense of Shell).

27 *Union Beverages Ltd* v. *Pepsicola Int Ltd* (1993) 3 NWLR (Pt 330) 1, p. 16D-E (Exhibit 1 B with the Defense of Shell).

28 See the Corporate Law Opinion of Professor Oditah of 21 February 2011, no. 54 (Exhibit 24 with the Defense in the Motion to produce documents of Shell): "I am not aware of any reported Nigerian case that could support the idea that a parent company such as RDS could possibly owe a duty of care to the creditors of its subsidiary outside the rare and limited circumstances where a Nigerian court would be prepared to lift the corporate veil, namely fraud, illegality, agency or façade." See also no. 60: "As I said above, I am not aware of any reported Nigerian case that could possibly support the claim brought against RDS for the loss allegedly arising from the oil spill merely because it is alleged that it should have used its control and influence over SPDC to ensure that the policy was implemented and that SPDC traded in an environmentally responsible manner."

29 Dutch Lower House 2009-2010, 32 137, no. 3, p. 9.

30 National Committee for International Private Law, Report to the Minister of Justice on the general provisions of the Dutch International Private Law Act, 1 June 2002, pp. 19-20.

> "In addition, the National Committee notes that unwritten Dutch international private law assumes that the interpretation of the foreign law must be in accordance with the opinions and methods used in the country in question. If the foreign law recognizes several opinions regarding a specific point, the Dutch party applying the law will have to find a solution in the spirit of the relevant system – not one based on objectives of an interpretation of his own law. What applies in the country in question regarding, for example, the relationship between written and unwritten law or regarding the interpretation and supplementation of the law must be followed in the Netherlands. The limit in this is public order. The National Committee concurs with the usual opinion that the foreign law must be applied in the same way in the country in question to the extent possible. However, the National Committee is of the opinion that there is no need to draw up a statutory provision for this."

47. See also Kosters-Dubbink:[31]

> "The foreign law must be treated in accordance with the opinions and methods that are actually used in the foreign country's legal practice; the prevailing case law in that country is especially important here. What applies in the foreign country regarding the doctrine of legal sources, the relationship of written and unwritten law, the possibility that practice sets aside the law, the interpretation and supplementation of laws, the position taken by science, etc.; all this must be followed in our country, even if it is incompatible with the prevailing insights in one's own country and even if the latter is preferred."

48. If the further development of the foreign law is involved, the Dutch court should take a reticent stance. See Jessurun d'Oliveira:[32]

> "By necessity, the share of the Dutch court in the development of the foreign law is somewhat more restricted than in respect of its own law. The Dutch court will have to seek to concur with the status quo as closely as possible and is bound by the foreign opinions regarding the hierarchy of legal sources. If English law applies, the Dutch court is just as bound by the doctrine of precedents as the English court. Usually, this difference will not be felt very strongly; nevertheless, it is present. The foreign law is relatively less incomplete than Dutch law, as it were."

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31 J. Kosters and C.W. Dubbink, *Algemeen deel van het Nederlandse internationaal privaatrecht*, 1962, p. 738.

32 H.U. Jessurun d'Oliveira, *De antikiesregel. Een paar aspekten van de behandeling van buitenlands recht in het burgerlijk proces*, dissertation 1971, p. 123.

49. See also Van Hoek in her *Ars Aequi* annotation to the judgments of the District Court:[33]

> "Moreover, the role of the Dutch court in respect of foreign law is limited to applying the usual interpretation. Given that the Dutch court is not part of the Nigerian legal system, it cannot be expected to make an innovative contribution to Nigerian law. Thus, ideally, the Dutch court will correctly apply the foreign law; further developments of that law cannot be expected from the Dutch court. This Dutch annotator cannot determine whether the District Court of The Hague correctly applied Nigerian law in the case at issue."

50. See also Paul Scholten in his – still current – General Part:[34]

> "Finally, a few words regarding the question of *how* the court must enforce the foreign law after it has concluded that this law applies. The answer will be: as if it is the court's own law. However, that is not entirely correct. Certainly, the court that applies foreign law will have to examine the authoritative factors in that country and take its decision on that basis, exactly as it does in purely national cases; however, there is a difference. We said that every decision comprises knowledge, intellectual work and assessment. That assessment is pushed back here. The court takes a different view of the foreign law than it does of its own law, in which the court itself is a body and which the court in part develops. Acting independently, using a new analogy, stipulating a new rule by means of a new combination of rules, developing law based on efficiency considerations – there is little or no room for all this for the court that applies foreign law. Regardless of how strange a Dutch court that must apply French law may feel the interpretation of French law in French case law and doctrines is, it must nevertheless accept this interpretation – it is not this court's task to improve this interpretation. The court is a stranger to that law. The result is that the court regards that law from a historical sociological point of view rather than from a legal point of view. What is, in fact, being followed is especially important here, the case law has a great deal of authority. Finally, if the court is again unable to accept any result it feels is obviously unfair, it is its own system based on the public order principle rather than its interpretation of the foreign law that causes the court to reject the conclusions it makes based on the foreign information for the case it is to try.
> It is not only its relationship to the foreign law that imposes this self-limitation. The court can hardly do anything else. The assessment can only

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33 A.A.H. van Hoek, *Ars Aequi* June 2013, pp. 488-489.

34 Asser/Scholten, *Algemeen deel**, third edition 1974, pp. 167-168.

> be made by the party that is itself *in* the legal community on which it rules. An outsider never completely understands the foreign law. It is part of a spiritual life; in the end, this continues to be foreign to the foreign court. The application of foreign law is defective by its very nature. If this is compelled by the international relationship, the court is well advised to follow what the country's own court would have decided as closely as possible."

51. In the application of Nigerian law, the Dutch court will have to use existing case law as the basis in order to follow what the Nigerian court would have decided. The Dutch court may not allow itself to be tempted to let its own sense of justice take its course.

52. In the Initiatory summons, Milieudefensie sought support in court decisions from the United States and England for the claims against RDS. In its defense, Shell explained that the decisions in question do not offer any support for the argument that RDS allegedly has a duty of care.[35] In the continuation of the proceedings in the first instance, Milieudefensie exclusively started from the decisions that first the English High Court and then the Court of Appeal rendered in the case *Chandler v Cape*. In the 2013 Motion to produce documents, as well, Milieudefensie bases RDS' liability on that case. Based on an assessment of the facts contended by Milieudefensie viewed in light of the decision in *Chandler v. Cape*, the District Court rightly held that the special circumstances by virtue of which the parent company in that case was held liable are not so similar to those in the case at issue that on this ground, a duty of care allegedly falls on RDS in respect of the people living in the vicinity of SPDC's oil pipelines and oil facilities. Weir also recognizes that *Chandler v. Cape* cannot be directly applied to the case at issue:

> "43. The decision in *Chandler v Cape plc* is not on all fours with the facts of this case. That much is clear. For instance, as the court in the January 2013 judgment points out at 4.34, in *Chandler* the claimant was an employee of the defendant parents' subsidiary company whereas here the Claimants are people living in the vicinity of a pipeline operated by the subsidiary."

53. Weir acknowledges that *Chandler v. Cape* is not a precedent for assuming a duty of care in the case at issue. *Chandler v. Cape* deals with liability of the parent company to an employee of the subsidiary; the case at issue does not involve this. Weir also believes that *Chandler v. Cape* cannot be directly applied in the case at issue:

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[35] Motion for the court to decline jurisdiction and transfer the case, also including conditional statement of defense in the main action, nos. 150-155.

> "The Claimant's case does not, therefore, involve the direct application of the principles set out by Arden LJ at para 80 *Chandler v Cape* and set out at 4.33 of the January 2013 judgment. The relevance of the *Chandler* decision is that it provides a good example, which is not that far removed from the facts of this case (and so relevant when adopting an incremental approach), of the imposition of a duty of care in a novel situation."

54. Weir writes in so many words that the case at issue involves the question regarding a duty of care on the part of RDS in a *novel situation*. In other words: Milieudefensie asks the Dutch court to assume a duty of care in a case in which the Nigerian court and even the English court have never done so.

55. With this state of affairs, the conclusion must be that the factual and legal basis of the claims against RDS is obviously insufficient. In the absence of any precedent of a Nigerian court that can support the argument that RDS has a duty of care to the victims of the oil spill at issue, the Dutch court must find that the claims against RDS are certain to fail. After all, if those claims would be awarded, this means that a duty of care is assumed in a case in which this has never been assumed before. This would be in breach of the starting point that in applying foreign law – in the words of Jessurun d'Oliveira – the Dutch court must follow the "status quo".

56. In the final judgment (ground 4.6), the District Court found that according to the Dutch legislator's intention, the jurisdiction of the Dutch court in the case against SPDC based on Section 7 DCCP does not cease to exist if the claims against RDS are dismissed in the final judgment, not even if there is subsequently no connection or hardly any connection with Dutch jurisdiction. This finding is incorrect. If there is no connection between the claims against SPDC and Dutch jurisdiction, the Dutch court does not have jurisdiction over those claims. The fact that the District Court found that the claims against RDS are unfounded should have led the District Court to conclude that the Dutch court cannot base its jurisdiction in the case against SPDC on Section 7 (1) DCCP. If at some point in the course of the proceedings, the judge concludes that there is no foundation for the claims against the Dutch defendant, he has no jurisdiction over the claims against the foreign defendant. After all, in that case there is no connection. Nor is it efficient in that case that the Dutch court renders a ruling regarding the merits of the case against the foreign defendant. If the claims against the Dutch defendant must be dismissed, the case does not have any connection with Dutch jurisdiction; in that case, reasons of efficiency demand that the foreign court conducts the substantive assessment.

57. In the motion at issue, the Court of Appeal can conclude what the District Court should have concluded, namely that there is no connection between the case against SPDC and Dutch jurisdiction. In this motion, Milieudefensie claims the

production of documents in order to further substantiate in the statement of appeal that RDS most certainly did have a duty of care. This is without prejudice to the fact that currently it must be established that the claims against RDS are certain to fail. If Nigerian law does not offer any basis for the claims against RDS and Milieudefensie is also unable to designate that basis, the production of the documents claimed by Milieudefensie and the Statement of Appeal still to be filed will not alter that situation.

58. Superfluously, in section 3.5 below, Shell will explain that for the rest, the requirement of sufficient connection has not been satisfied, either. This is preceded by a brief summary of what can be inferred from the current ECJ case law in respect of the connection requirement by virtue of Article 6 (1) of the Brussels Convention.

3.4 Article 6 (1) of the Brussels Convention

59. Subject to the starting point mentioned in nos. 37-38 above to the effect that the connection required in the scope of Article 6 (1) of the Brussels Convention is only a *minimum standard* in the application of Section 7 (1) DCCP, Shell notes the following regarding the ECJ's interpretation of Article 6 (1) of the Brussels Convention.

60. In a recent ruling, the District Court of Rotterdam summarized ECJ case law regarding Article 6 (1) of the Brussels Convention as follows:[36]

> "The general principle is jurisdiction of the courts of the Member State in whose territory the 'defendant' is domiciled and only by way of exception to this principle does the Brussels Regulation provide for special jurisdiction rules for cases that have been fully listed, in which the 'defendant' – depending on the case – can or must be sued in the courts of another Member State. The special jurisdiction rules must be given a restricted/strict/limited interpretation. The jurisdiction rules must be highly predictable.
> With regard to its purpose, in accordance with recitals 12 and 15, the jurisdiction rule of Article 6, preamble and (1) of the Brussels Regulation first of all seeks to facilitate the sound administration of justice, minimize the possibility of concurrent proceedings and prevent decisions from being given that would be irreconcilable if the cases would be tried separately (ECJ 1 December 2011, *NJ* 2013, 66 (Painer)).
> In addition, the same rule cannot be applied such that the plaintiff can initiate a claim against several 'defendants' for the sole purpose of ousting the jurisdiction of the courts of the State where this defendant is domiciled

[36] District Court of Rotterdam 17 July 2013, ECLI:NL:RBROT:2013:5504, NJF 2013, 414, ground 5.8.

(see, most recently, ECJ 1 December 2011, *NJ* 2013, 66 (*Painer*)). Compare ECJ 11 October 2007, *NJ* 2008, 80 (*Freeport*). One requisite condition for jurisdiction based on Article 6, preamble and (1) of the Brussels Regulation is that there is a risk of irreconcilable judgments in the event that the cases are tried separately. It is up to the national court to assess whether this is involved. In this context, all required elements from the file must be taken into account; as the occasion arises, even if this is not required for the assessment, including the legal basis of the claims initiated with this national court (ECJ 11 October 2007, *NJ* 2008, 80 (*Freeport*); ECJ 1 December 2011, *NJ* 2013, 66 (*Painer*)). Decisions cannot already be regarded as irreconcilable based on a divergence in the outcome of the dispute. To regard decisions to be irreconcilable, that divergence must also arise in the context of the same situation of law and facts (ECJ 13 July 2006, *NJ* 2008, 76 (*Roche/Primus*); ECJ 11 October 2007, *NJ* 2008, 80 (*Freeport*); ECJ 12 July 2012, *NJ* 2013, 67 (*Solvay*)). The fact that claims directed against several 'defendants' have a different legal basis does not necessarily preclude the application of Article 6, preamble and (1) of the Brussels Regulation, provided that it was foreseeable for the defendants that they might be sued in the Member State where a co-defendant was domiciled. This is all the more convincing in cases in which the national provisions on which the claims filed against the various defendants are based are mainly identical. In assessing the risk of irreconcilable decisions if the cases are tried separately, it may be relevant whether the defendants acted independently of one another in the acts for which they are reproached. See, most recently, ECJ 1 December 2011, *NJ* 2013, 66 (*Painer*)."

61. Thus, sufficient connection is only involved in the event of "the same situation of law and facts". There must be both a sufficient factual connection and a sufficient legal connection between the claims against the different defendants. To satisfy the requirement of "the same situation of law and facts" the claims against the different defendants are not required to have an identical legal basis. It is required that it must have been foreseeable for the defendants that they might be sued in the Member State where one of them was domiciled.[37] In addition, in assessing the risk of irreconcilable decisions, it may be relevant whether the defendants acted independently of one another in the acts for which they are reproached.[38]

62. The plaintiff must contend and if necessary prove that the connection requirement is satisfied. See ECJ 13 July 2006, *NJ* 2008, 76 (*Roche/Primus*):

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[37] ECJ 1 December 2011, *NJ* 2013, 66 (*Painer*), paragraph 81.

[38] ECJ 1 December 2011, *NJ* 2013, 66 (*Painer*), paragraph 83.

> "39. It must be observed that the determination as to whether the criteria concerned are satisfied, which is for the applicant to prove,…"

63. The same applies in the scope of Section 7 (1) DCCP. See the District Court of Amsterdam in its judgment cited in no. 33 above.

64. This entails that in assessing its international jurisdiction, the court cannot exclusively rely on the arguments in the summons. The latter is almost self-evident. Were this to be otherwise, a plaintiff could create jurisdiction by virtue of Section 7 (1) DCCP (or Article 6 (1) of the Brussels Convention) in respect of a foreign defendant at his own discretion, merely by contending facts from which connection could arise, without worrying about whether these contended facts are correct. In assessing its international jurisdiction, the court must consider all circumstances of the case (or, in the words of the ECJ: all the necessary elements of the file). This also includes everything that the defendant advances in defense to the plaintiff's arguments.

65. In her opinion for ECJ 1 December 2011, case C-145/10, *NJ* 2013, 66 (*Painer*), Advocate General Trstenjak wrote the following regarding the required factual connection and foreseeability:

> "91. The first requirement for the existence of a connection between the anchor claim and another claim is that the claims arise in the context of a single factual situation. It should be borne in mind in this connection that Article 6(1) of the regulation must be highly predictable for the defendant. A minimum requirement for a single factual situation must therefore be that it is at least clear to a defendant that he may be sued, as the co-defendant of another defendant, under Article 6(1) of the regulation, at a court in the place where that anchor defendant is domiciled.
> 92. That minimum requirement is not satisfied where the facts on which the applicant bases its anchor claim and the other claim are such that the conduct of the anchor defendant and of the other defendant concerns the same or similar legal interests of the applicant and is similar in nature, but occurs independently and without knowledge of one another. In such a case of unconcerted parallel conduct, it is not sufficiently predictable for the other defendant that he can also be sued, under Article 6(1) of the regulation, at a court in the place where the anchor defendant is domiciled."

66. Advocate General Trstenjak rightfully places the requirement of foreseeability (in part) in the scope of the question regarding the factual relationship between the claim against the defendant who is domiciled in the country of the court to which application is made (also called the "anchor claim") and the other claim. In contrast to what the District Court started from in its final judgment (ground

4.5), the foreseeability review applies in general (and not only if the claims initiated against the different defendant have a different legal basis). The foreseeability requirement follows from recital 11 of the Brussels Regulation, which finds that the rules of jurisdiction must be highly predictable. It is not clear that this finding only applies if the claims initiated against the different defendants have a different legal basis.[39] On the contrary, the ECJ ruled that the principle of legal certainty inter alia requires that jurisdiction rules that deviate from the general rule of Article 2 of the Brussels Convention are interpreted such that on that basis, an average expert defendant can reasonably foresee in which other court he might be sued other than the court of the State where he is domiciled.[40] In its decision cited in no. 33 above, the District Court of Amsterdam also starts from a "generally applicable" requirement of foreseeability in the scope of Section 7 (1) DCCP.

67. In the opinion for the Painer ruling, Advocate General Trstenjak gives a number of examples of cases in which she believes there is sufficient legal connection (this is not an exhaustive list[41]):

> "83. (…) In a case of contingent liability (alternative liability) in which one of the defendants is liable only where the other defendant is not liable, there is, in my view, a clear interest that the case is decided by the same court in order to avoid the risk of irreconcilable judgments. (33)[42] In such a case, the legal connection between both claims is not dependent on whether the same law is applicable to both claims. (…)
> 95. The second requirement for a close connection for the purposes of Article 6(1) of the regulation is that a sufficient legal connection exists. Because a single factual situation does not appear to exist in the present case, I would like to comment briefly on the second requirement.
> 96. The theoretical starting point must be whether the two claims have such a close legal connection that the applicant could not be reasonably expected to seek to have the claims decided by two courts. It is clear from

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39 Possibly the District Court relied on the fact that in paragraph 81 of the *Painer* judgment, the ECJ specifically mentions the requirement of foreseeability in connection with the case in which the claims initiated against the different defendants have a different legal basis. In that case, this requirement plays an especially important role to conclude that there is sufficient connection, but this does not mean that the ECJ ruled that the requirement of foreseeability only applies in that case.

40 ECJ 1 March 2005, *NJ* 2007, 369 (*Owusu*), paragraph 40.

41 See paragraph 99 of the opinion.

42 "An irreconcilable outcome would exist, for example, if one court decides that the defendant who is the primary liable party is not liable, whilst the other court decides that the other defendant, who is the secondary liable party, is not liable because, in its view, the primary liable party should have been liable." (footnote 33 in the original text)

> the wording of Article 6(1) of the regulation that this may be the case in particular where the legal connection between two claims is so close that inconsistencies between them would not be acceptable. Some account can also be taken in this connection of considerations of procedural economy, although strict regard must be had to the defendant's interest in the predictability of jurisdiction.
> 97. Cases where the legal connection between two claims is so close that inconsistencies between the decisions would not be acceptable are, first and foremost, cases where the outcome of one claim is dependent on the outcome of the other claim. I refer in this respect to the example of contingent liability (alternative liability) given in point 83 of this Opinion. Furthermore, a sufficiently close legal connection exists in particular where the defendants are jointly and severally liable, co-owners or a community of rights.
> 98. In cases in which comparable claims are made and the requirements under the applicable law are essentially comparable, application of Article 6(1) of Regulation No 44/2001 is suggested, first of all, by the fact it is possible to avoid inconsistencies which could result from a different appraisal of the facts by two courts. In so far as common stipulations under Union law are concerned, this is also supported by the avoidance of legal inconsistencies. Considerations of procedural economy also indicate the existence of such a connection. However, in such cases the requirement that the anchor claim and the other claim arise in the context of a single factual situation is of crucial importance. The risk of a different appraisal of the facts and a different legal assessment can justify a transfer of jurisdiction under Article 6(1) of the regulation only where this is predictable for the defendant."

68. Thus, in the assessment of both the factual and the legal connection, the requirement of foreseeability plays a decisive role.

69. As an example of sufficient legal connection, Advocate General Trstenjak first of all (paragraph 83) mentions the situation in which the outcome in one of the cases depends on the outcome in the other case. In addition, she refers to the case in which the defendants are jointly and severally liable co-debtors, co-owners or (otherwise) partners in a community.

70. In the interlocutory judgment in the jurisdiction motion of 24 February 2010 (ground 3.6), the District Court found that RDS and SPDC are held liable for the same damage, which follows from the claim for a joint and several order for RDS and SPDC. According to the District Court, this means that the same complex of facts in Nigeria must be assessed in respect of the claims against both RDS and SPDC. The District Court is of the opinion that this means that

sufficient connection is involved in the sense of Section 7 DCCP. This is incorrect.

71. Although Milieudefensie holds RDS and SPDC jointly and severally liable, this does not mean that for this reason alone, a sufficient factual connection is involved. Nor is the joint and several liability of RDS and SPDC the type of several liability that Advocate General Trstenjak may have had in mind in her opinion cited above. Advocate General evidently refers to two debtors who bound themselves jointly and severally for the same debt ("joint and several co-debtors"). However, in the event of RDS and SPDC, the issue is several liability (allegedly) resulting from liability for the same damage. In and of itself, such several liability does not mean that sufficient legal connection is involved. After all, in and of itself, the mere fact that two parties are held liable for the same damage does not mean that it was foreseeable for one of the defendants that it would be sued together with the other defendant in the court of this other defendant's domicile.

72. In addition – as stated before – the mere fact that two defendants are held jointly and severally liable for the same damage does not mean that there is sufficient factual connection between the two claims. Although in that case, the claims regard the same "legal goods" of the plaintiff, this is without prejudice to the possibility that the accused conduct occurred independently of one another, without either of the defendants being aware of this, or: "unconcerted parallel conduct" (see paragraph 92 of Advocate General Trstenjak's opinion, cited in no. 65 above).

3.5 Insufficient factual and legal connection

73. The claims against RDS, on the one hand, and those against SPDC, on the other, are not based on the same complex of facts to be assessed. This already follows from Milieudefensie's arguments in the Initiatory summons, no. 18:

> "Where the plaintiffs reproach Shell plc for having taken insufficient measures to prevents its subsidiary Shell Nigeria from inflicting damage on people and the environment in the oil production in the Niger Delta and for having taken insufficient measures to ensure that Shell Nigeria fully cleans up the pollution caused by oil spills in a timely fashion, they blame Shell Nigeria as owner of the wellhead for not preventing the spill near Ikot Ada Udo, for not containing and for still not having cleaned up the oil."

Milieudefensie bases the claims against SPDC on the complex of facts regarding the oil spill from the IBIBIO 1 well near Ikot Ada Udo in 2006 and 2007. The claims against RDS are not based on that complex of facts, given that the complex of facts on which Milieudefensie bases its claims against RDS is the situation in the Niger Delta in general.

74. To the extent that Milieudefensie's argument must be taken to mean that the general situation in the Niger Delta also covers the oil spill at issue, the following is pointed out. RDS is not directly involved in SPDC's operational activities, let alone was RDS involved in SPDC's operations regarding the oil spill at issue. Milieudefensie did not contest this (of course). Milieudefensie even argues that it is irrelevant whether RDS (prior to the subject proceedings) was aware of the oil spill at issue. On the contrary, it takes that fact into account in its arguments regarding RDS' liability:[43]

> "Whether or not the parent company was aware of the specific circumstances surrounding this oil spill near Ikot Ada Udo is not a decisive factor in answering the question regarding whether the parent company had a duty of care;…"

And:[44]

> "Thus, the issue is not whether or not The Hague was aware of the specific conduct of events around the oil spills in Goi, in Ikot Ada Udo and in Oruma. The issue is that the head office should have taken measures, already at the end of the 1990s but certainly in the early 2000s, when it was confronted with the reports. At that time, it should have made sure that SPDC replaced the pipelines and tightened security. If Shell had fulfilled its duty of care at that time, the damage in Goi, in Oruma and in Ikot Ada Udo would not have occurred."

In its argument regarding RDS, Milieudefensie abstracts from the question regarding whether RDS was aware of the oil spill at issue. This means that there is insufficient factual connection with the claims against SPDC, which was, of course, aware of the oil spill at issue, closed the leak, cleaned up the spilled oil and remediated the affected area.

75. Nor can sufficient factual connection be derived from Milieudefensie's argument cited above to the effect that if RDS had fulfilled its duty of care, the damage in Ikot Ada Udo would not have occurred. In the interim, the 2013 Motion to produce documents has demonstrated that Milieudefensie feels that this is not required for the claims against RDS to be awarded:[45]

> "Nor is it required to demonstrate that Shell directly contributed to the damage due to its central policy. The issue is that the parent company had

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43 2013 Motion to produce documents, no. 80.

44 Written pleadings of Milieudefensie dated 11 October 2012, no. 174.

45 2013 Motion to produce documents, no. 48.

special know-how; knowledge of the general situation and risks in Nigeria, on the one hand, and failed to intervene, even though it had demonstrated that it could intervene, on the other."

Thus, according to Milieudefensie, to award the claims against RDS it is not required that the breach of the duty of care for which RDS is blamed resulted in the damage that was allegedly caused by the oil spill at issue.

76. Nor can connection be derived from Milieudefensie's argument that the conduct for which SPDC is reproached in respect of the oil spill at issue was determined by RDS' policy, given that this argument is incorrect. This has already been dealt with extensively in the first instance and is once again explained below. Shell explicitly refers to this. In this place it is sufficient to observe that the conduct for which RDS and SPDC, respectively, are blamed qualifies as unconcerted parallel conduct (see no. 72 above). In this context, it should be borne in mind that RDS is reproached for a pure failure. Milieudefensie does not substantiate that the specified failure of RDS influenced the acts (or omissions) of SPDC regarding the oil spill at issue. See more extensively: Rejoinder, nos. 32-42 and nos. 158-175 below.

77. It already follows from the above that no sufficient legal connection can be involved, either. In contrast to what the District Court found, the mere circumstance that RDS and SPDC are jointly and severally held liable does not indicate sufficient legal (and factual) connection.[46] As stated before (see nos. 71-72 above), this several liability results from (alleged) liability for the same damage. In and of itself, such several liability does not mean that sufficient connection is involved. After all, in and of itself, the mere fact that two parties are held liable for the same damage does not mean that one of the defendants could foresee that he would be sued together with the other defendant in the court of this other defendant's domicile.

78. Nor do the claims against RDS, on the one hand, and those against SPDC, on the other, have an identical legal basis. The District Court also failed to recognize this in ground 4.5 of the final judgment. Although *tort of negligence* is invoked both against RDS and against SPDC, this is where the similarity ends. At the center of the case against RDS is the question regarding whether RDS had a duty of care in respect of the victims of the oil spill. This is not a subject

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[46] See also the Court of Appeal of 's Hertogenbosch 26 November 2013, ECLI:NL:GHSHE:2013:5658, ground 4.4.3.: "although the appellant claims compensation of the same damage from Armas et al. and [the respondent], this is without prejudice to the fact that the Court of Appeal believes that in this case, the close connection between the claim initiated against [the respondent] and the claim against Armas et al. as required in Article 6 (1) of the Brussels Regulation is absent."

of discussion in the case against SPDC. None of the other specific torts (*nuisance, trespass to chattel*, and the *Rule in Rylands* v. *Fletcher*) have been invoked against RDS.

79. Nor is there any overlap in respect of the alleged content of the duty of care that was allegedly breached. With regard to RDS, Milieudefensie's argument is that RDS should have modified its environmental policy and its supervision of SPDC. On the other hand, the reproaches made of SPDC are that it should have maintained the IBIBIO 1 wellhead near Ikot Ada Udo better, should have taken more preventive measures against sabotage and should have stopped and cleaned up the oil spill both better and more rapidly.

80. Milieudefensie itself emphasizes that RDS is blamed for a different tort than SPDC and that awarding their claims against RDS does not depend on the question regarding whether SPDC committed a tort:[47]

> "Akpan et al.'s claims against Shell plc are based on tort committed by Shell plc itself, comprising – in the summary of the Court – breach of Shell plc's duty to exercise due care as the parent company of Shell Nigeria. After all, Shell plc should have exercised its influence on and control over Shell Nigeria's (environmental) policy to prevent Shell Nigeria from inflicting the damage at issue on people and the environment to the extent possible.[48] Even though Akpan et al.'s arguments naturally imply that they are of the opinion that Shell Nigeria is liable for the oil spills, a dismissal of their claims against Shell Nigeria does *not* (automatically) lead to a dismissal of the claims against Shell plc."

And: [49]

> "The responsibility of Shell's head office does not result from the mere fact that its subsidiary did or failed to do something. The plaintiffs hold The Hague liable for what it itself did, or: what it failed to do. I emphasize once again: this is not about piercing or lifting the corporate veil, this is about an independent unlawful act due to negligence on the part of Shell, the parent company."

And:[50]

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47 Reply in the Motion to produce documents, no. 126.

48 Akpan et al. explained these arguments at length in their summons and refer to these arguments.

49 Written pleadings of Milieudefensie dated 11 October 2012, no. 163.

50 Written pleadings of Milieudefensie dated 11 October 2012, no. 198.

> "Moreover, the ruling in *Chandler v. Cape* also demonstrates that and why liability on account of negligence on the part of the parent company may be involved, even without the subsidiary being liable. This concerns structural failure: in theory, it is possible that strictly speaking, SPDC satisfies Nigerian legislation; for this reason, it cannot be reproached at the operational level whereas The Hague knew or at least should have realized that structural failure and incalculable environmental damage were involved. Its liability results from this."

81. The claims against RDS are based on an "independent tort" of RDS, which according to Milieudefensie does not depend on the answer to the question regarding whether SPDC can be blamed for anything, whether RDS was aware of the circumstances surrounding the oil spill at issue and whether the breach of the duty of care for which RDS is blamed resulted in the damage allegedly caused by the oil spill at issue.

82. It is obvious that this argument is not supported in Nigerian law (or in any law whatsoever). Liability on the part of RDS in any event requires that the alleged breach of a duty of care resulted in the oil spill near Ikot Ada Udo in 2006 and 2007. However, this is irrelevant for assessing the jurisdiction by virtue of Section 7 (1) DCCP. It is up to Milieudefensie to contend (and if necessary prove) that there is sufficient connection. Milieudefensie argues that RDS is liable on account of its know-how and knowledge of the situation in the Niger Delta in general, irrespective of whether RDS was also aware of the oil spill at issue, irrespective of whether SPDC committed a tort in this respect and irrespective whether RDS' breach of a duty of care resulted in the oil spill at issue. In view of those arguments, no sufficient connection is involved.

83. In addition, it was not foreseeable for SPDC that it would be summoned together with RDS to appear before the Dutch court in respect of this oil spill. As 'operating company', SPDC is responsible for operational affairs related to oil production and oil transport, including oil spills like the one near Ikot Ada Udo in 2006 and 2007. As stated before, RDS is not involved in this in any way whatsoever. Superfluously, this is also demonstrated by the fact that when RDS received Milieudefensie's notices of liability, RDS had to check with SPDC regarding what this was about.[51]

84. In this connection it is relevant that, as stated before, in the *Painer* ruling the ECJ found that in answering the question regarding whether the connection criterion of Article 6 (1) of the Brussels Regulation is satisfied, it may be

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[51] See, for example, Exhibit A-2 of Milieudefensie (letter from RDS dated 20 June 2008 in response to the notice of liability of 8 May 2008).

relevant whether or not the defendants acted independently of one another.[52] This finding is understandable. If two parties acted independently of one another, they will be unable to foresee that they will be summoned to appear before the same court for facts with which one of the parties was not even familiar. It may be clear from the above that where the case at issue involves three oil spills, SPDC acted independently of RDS.

85. Thus, SPDC could not and was not required to allow for the fact that it would be summoned to appear before the Dutch court. The District Court wrongfully assumed the contrary based on the finding that "for quite some time, there has been an international trend to hold parent companies of multinationals liable in their own country for the harmful practices of foreign (sub-) subsidiaries, in which the foreign (sub-) subsidiary involved was also summoned together with the parent company on several occasions" (ground 4.5 of the final judgment). The trend referred to by the District Court – assuming such a trend even exists – does not say anything about the question regarding whether it was foreseeable for SPDC that it would be summoned together with RDS to appear before the Dutch court in connection with the oil spill near Ikot Ada Udo in 2006 and 2007. This was not foreseeable for SPDC. As far as SPDC knows, RDS was not and is not involved in operational affairs such as this oil spill and that under the applicable Nigerian law, RDS is not liable for this oil spill. How could SPDC have foreseen that RDS would be held liable for this oil spill and in this connection that it would be co-summoned before the Dutch court?

86. Moreover, SPDC was and is not familiar with an international trend that based on a jurisdiction rule that is similar to Article 6 (1) of the Brussels Regulation or Section 7 (1) DCCP, the foreign (sub-) subsidiary in question is co-summoned to appear before the court of the country where the parent company is domiciled. The District Court also refers to an article by Enneking in NJB 2010, pp. 400 to 406, but this does not infer, either, that it was foreseeable for SPDC that it would be summoned together with RDS to appear before the Dutch court. In this regard, that article – which dates from a few years after the Initiatory summons – only says:[53] "The claims are principally directed against the parent company of the multinational, even though in most cases, in addition to the parent company, various other group companies are also sued." SPDC was unable to infer from that sentence that it should have allowed for the fact that it might be summoned to appear before the Dutch court, even apart from the fact that SPDC is not familiar with the contents of the NJB. Even apart from this, SPDC is not familiar with proceedings in which a foreign subsidiary has been summoned to appear before a court in a European country by virtue of a

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52 ECJ 1 December 2011, *NJ* 2013/66 (*Painer/Standard*), paragraph 83.

53 L.F.H. Enneking, Aansprakelijkheid via '*foreign direct liability claims*', NJB 2010/7, p. 404.

jurisdiction rule that is similar to Article 6 (1) of the Brussels Regulation or Section 7 (1) DCCP.

87. The District Court also finds that the claims against RDS and SPDC do not have a different legal basis, because the *tort of negligence* is invoked against them both. As stated before (see nos. 78-79 above), the legal basis is not identical in the case at issue. Apart from this, the requirement of foreseeability must always have been satisfied if the Dutch court is to have jurisdiction over SPDC by virtue of Article 7 (1) DCCP (see no. 66 above). In the case at issue, this requirement has not been satisfied.

3.6 Abuse

88. As is true for each (procedural) authority, the jurisdiction by virtue of Section 7 (1) DCCP can also be abused. Abuse of Section 7 (1) DCCP occurs if the claim against the anchor defendant (meaning the defendant who is domiciled in the Netherlands or over whom the Dutch court otherwise has jurisdiction) is initiated for the exclusive purpose of creating jurisdiction in respect of the co-defendant. This intention can *inter alia* be demonstrated if it is obvious that the claim against the anchor defendant is certain to fail.[54]

89. As stated before, it is obvious that the claims against RDS are certain to fail, because they have no basis in Nigerian law. This means that Milieudefensie is abusing Section 7 (1) DCCP by summoning SPDC to appear before the Dutch court based on a writ of summons with claims against RDS that are certain to fail.

90. In the event that under the circumstances of this case, no basis for the claims of Milieudefensie against RDS can be designated in Nigerian legislation or Nigerian case law, summoning SPDC before the Dutch court qualifies as abuse. This must be assessed according to the applicable Nigerian law, regardless of whether according to the Initiatory summons, Milieudefensie acknowledged which law applies. After all, an objective review is involved in this connection. See with regard to the anti-abuse provision of Article 6 (2) of the Brussels Convention: Advocate General Strikwerda's opinion, no. 17, for HR 20 September 2002, *NJ* 2005, 40:

> "The Court of Appeal correctly found that Instala's and/or Delbouw's intention to oust the jurisdiction of the competent court over Siplast must be demonstrated by objective circumstances. Apart from the difficulty in determining what occurred in the mind of the parties involved, a criterion stipulating that the actual intentions of the applicant and/or the defendant

[54] See Advocate General Strikwerda's opinion, no. 18, for HR 23 February 1996, *NJ* 1997, 276 (*Blue Aegean*).

in the anchor proceedings are determined is too uncertain to establish jurisdiction. Cf. the opinion of Advocate General Darmon, no. 7, for ECJ 27 September 1988, case 189/87 (*Kalfelis/Bank Schröder*), ECP 1988, p. 5565, *NJ* 1990, 425 with commentary from JCS, in connection with the (unwritten but in the *Kalfelis* ruling accepted) abuse exception to the jurisdiction rule of Article 6, preamble and (1):

> 'A subjective criterion, which would involve trying to decide whether or not the plaintiff was trying to deny any of the defendants the right to be sued in the court which would normally have jurisdiction, would be difficult to apply in practice. In any event, it must be possible to determine the jurisdiction based on objective rules. Legal certainty would be poorly served by an analysis, as delicate as it would be uncertain, of the plaintiff's intentions.'

It is required, but also sufficient, that the circumstances demonstrate that initiating the original claim can only have been done for the purpose of ousting jurisdiction of the court that according to the convention has jurisdiction over the party summoned in the third party proceedings."

91. Thus, it is irrelevant whether of nor Milieudefensie sought to hold RDS liable for the oil spill near Ikot Ada Udo in 2006 and 2007. Jurisdiction of the Dutch court does not depend on the plaintiff's subjective state of mind. The only issue is to determine that according to the filing of claims against RDS without a proper basis in the applicable law, assessed according to objective standards, Milieudefensie is abusing the jurisdiction basis of Section 7 (1) DCCP.

92. In ground 3.2 of the interlocutory judgment in the jurisdiction motion, the District Court found that first and foremost, abuse of procedural law can only be assumed very rarely, in particular if a claim is based on facts and circumstances that the plaintiffs knew or should have known were (obviously) incorrect or based on arguments that the plaintiffs should have realized in advance had no chance of success (whatsoever) and thus were completely unsound. In that connection, the District Court refers to the ruling HR 29 June 2007, *NJ* 2007, 353. According to the District Court, these requirements have not been satisfied, because SPDC acknowledged that the corporate veil may be pierced under specific circumstances and it has been insufficiently advanced or demonstrated that facts and circumstances are involved which the plaintiffs knew or should have known were obviously incorrect (ground 3.3; see also ground 4.3 of the final judgment).

93. (According to the ruling HR 29 June 2007, *NJ* 2007, 353 cited by the District Court), the criterion used by the District Court is the criterion that generally applies in the scope of answering the question of whether initiating proceedings

constitutes abuse of procedural law. The Supreme Court repeated that criterion in the ruling HR 6 April 2012, *NJ* 2012, 233, in which it found that in view of the right to access to the court that is, in part, safeguarded by Article 6 EHRC, the court should adopt a reticent stance in assuming abuse of procedural law or a tort by initiating proceedings. A decisive point of view in the reticent stance underlying the criterion formulated by the Supreme Court in the previously mentioned rulings of 2007 and 2012 is that in principle, the party involved may not be refused access to the court, not even if he presents a case that is very unlikely to succeed.

94. The criterion formulated by the Supreme Court does not apply in the case at issue. The previously mentioned principle of right of access to the court applies in the event that a defendant who invokes his interest is not unnecessarily harassed with proceedings that are certain to fail. In that case, the criterion formulated by the Supreme Court and applied by the District Court in the case at issue does indeed apply. However, this is not the case in the event that the defendant invokes abuse of procedural law in view of other interests.[55] The latter is the case here.

95. In the case at issue, the right to access to the court is not at issue. After all, if the invocation of abuse of procedural law is accepted, this will not result in Akpan and the other alleged victims of the oil spill (whose interests Milieudefensie claims to represent) being denied access to the court. The invocation of abuse of procedural law is only made in the scope of the question regarding the international jurisdiction of the Dutch court over SPDC. The only consequence of accepting the invocation of abuse of procedural law is that SPDC cannot be subjected to the opinion of the Dutch court, but can be subjected to the opinion of the Nigerian court, of course. Moreover, with regard to the claims against RDS, it is an established fact that the Dutch court has jurisdiction over those claims.

96. Shell is not interested in a finding that Milieudefensie committed tort in respect of RDS in order to claim compensation, for example in the form of an order to pay the realistic costs of the proceedings. It is sufficient to establish that as a result of the abuse of procedural law, the Dutch court has no jurisdiction over the claims against SPDC.

97. Thus, in assessing SPDC's invocation of abuse of Section 7 (1) DCCP, there is no reason to exercise the restraint that is appropriate in the situation in which access to the court is at issue.

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55 The fact that depending on the precise procedural context, in specific situations a less strict abuse of procedural law criterion may apply follows from the Opinion of A-G Huydecoper, no. 27, for the ruling HR 29 June 2007, *NJ* 2007, 353.

4 MILIEUDEFENSIE'S CLAIMS ARE INADMISSIBLE

4.1 Introduction

98. In section 4.2 it is argued that Milieudefensie's claims by virtue of Section 3:305a DCC in the main action are inadmissible. For that reason, its claims by virtue of Section 843a DCCP are inadmissible, as well. Moreover, Milieudefensie can only claim the production of documents regarding a legal relationship to which it is a party, while in any event no tort has been committed against Milieudefensie (cf. ground 4.35 of the District Court's final judgment).[56]

99. The 305a defense that Shell puts forward against Milieudefensie is an inadmissibility defense. The other defenses are defenses on the merits, with the proviso that those defenses can be assessed without any substantive examination of Milieudefensie's claim in the motion. The following is further pointed out regarding these defenses.

100. In this motion, Milieudefensie will first have to explain that in the main action, it is entitled to a right of action regarding the alleged tort committed by Shell. If Milieudefensie fails to do so, it is not entitled to the production of documents that are allegedly required to substantiate the claims in the main action, either. After all, in that case the requirement that Milieudefensie is a party to the legal relationship to which the claim by virtue of Section 843a DCCP pertains is not satisfied, or at least Milieudefensie lacks the required legitimate interest to invoke Section 843a DCCP.

101. In addition, Milieudefensie's claim to produce documents must be dismissed, because if the claim would be awarded, documents might become available to Akpan, even though it has not been established that he has a legitimate interest in access. Although Akpan is not a party to these proceedings, the fact that on appeal (as the respondent in the appeal with case number 200.127.813 that Shell initiated against the District Court's final judgment), Akpan is represented by the same attorney as Milieudefensie means that if it were to be found in this motion that Milieudefensie is entitled to access to specific documents, Akpan will also get access to those documents "by the backdoor". Inspection by (the attorney of) Milieudefensie of those documents will automatically lead to inspection by (the attorney of) Akpan. Akpan could use that knowledge in his defense against Shell's grounds for appeal, or for the grounds for appeal in a possible cross appeal. Given that Akpan did not initiate a motion to produce documents in the proceedings to which he is a party, the Court of Appeal cannot establish in respect of Akpan whether he has a legitimate interest in

[56] See for this defense the documents of the first instance: the Defense in the Motion to produce documents nos. 82-113; the Rejoinder in the Motion to produce documents nos. 151-155.

access to those documents. Under those circumstances, it is unacceptable that he nevertheless should become aware of documents via (the attorney of) Milieudefensie to which Milieudefensie claims access in this motion. For that reason alone, Milieudefensie's claim in the motion must be dismissed. This even constitutes an independent reason to dismiss Milieudefensie's claims for the production of documents in all proceedings.

102. The same applies *mutatis mutandis* with respect to Oguru and Efanga (the appellants in the cases with numbers 200.126.804 and 200.126.834), as well as Eric Dooh (the appellant in the cases with numbers 200.126.843 and 200.126.848), who are all also represented by the same attorney, should the Court of Appeal rule that they (or one of them) is not entitled to the production of documents.

4.2 Milieudefensie's claims by virtue of Section 3:305a DCC are inadmissible

103. Milieudefensie's claims are based on Section 3:305a DCC, both in the main action and in this motion. However, Milieudefensie's claims in this motion (and in the main action) are inadmissible, because Section 3:305a DCC does not apply, or because Milieudefensie does not satisfy the requirements of Section 3:305a DCC. Shell will explain this below.

Section 3:305a DCC does not apply; Nigerian law does not allocate any class action right to Milieudefensie

104. In the first instance, Shell argued that Milieudefensie's claims by virtue of Section 3:305a DCC are inadmissible, because this section does not apply in the case at issue. Milieudefensie's authority to initiate a class action is a substantive law question that must be assessed according to the *lex causae*, in this case Nigerian law. However, Nigerian law does not offer any basis for a class action for the interests of others like the one initiated by Milieudefensie in these proceedings.[57] Thus, Milieudefensie's claims are inadmissible. The District Court failed to recognize this by ruling in the interlocutory judgment of 14 September 2011 (ground 4.3) and the final judgment (ground 4.11) that Section 3:305a DCC is a rule of Dutch procedural law. To this end, the District Court *inter alia* finds that the parliamentary history of Section 3:305c DCC allegedly demonstrates that the legislator designates Section 3:305a DCC as a rule of Dutch procedural law. However, this is not demonstrated by that parliamentary history, including not at the location that the District Court refers to in ground 4.3 of the interlocutory judgment of 14 September 2011. The

[57] See the Defense, nos. 106-107; Defense in the Motion to produce documents, no. 63 (with Exhibit 24, legal opinion of Professor F. Oditah QC dated 14 June 2010, nos. 22-31); Rejoinder in the Motion to produce documents, no. 102; Written pleadings of Shell, no. 50.

District Court's finding is also otherwise incorrect for the reasons that Shell already put forward on this point in the first instance and to which it refers.[58]

105. Even if the Court of Appeal were to assume that Section 3:305a DCC is a rule of Dutch procedural law, Milieudefensie is still not a party to the legal relationship to which the claim by virtue of Section 843a DCCP pertains. After all, according to substantive Nigerian law, no tort has been committed against Milieudefensie, as the District Court rightly found in the final judgment.[59] For this reason alone, Milieudefensie is not entitled to the production of documents (see no. 98 above).

Effective legal protection is not served by Milieudefensie's action

106. The Parliamentary History of Section 3:305a DCC demonstrates that there is only room for an action by virtue of Section 3:305a DCC if this results in more effective legal protection:[60]

> "In Supreme Court case law, the question regarding whether more effective and/or efficient legal protection can be obtained by means of the class action plays an important role in the admissibility. I believe that this is the added value that this form of litigating offers compared to individual dispute resolution. If a class action does not offer any advantage over litigating in the name of the interested parties themselves in a concrete situation, preference should be given to the latter action. After all, this is a deviation from the normal rule of civil procedural law to the effect that you represent your own interests and that other parties cannot do so without your permission. In principle, the other party is entitled to be sued by the party whose interests are, in fact, at issue in the proceedings."

107. This has been explicitly confirmed in the Parliamentary History to the recent modification of Section 3:305a DCCW:[61]

> "In this connection, the parliamentary history to Section 3:305a DCC referred to the alternative character of the class action right. In the event that an individual action, whether or not by means of documents appointing a representative *ad litem*, can be easily realized, initiating a class action is not the obvious path. The explanatory memorandum

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58 See the Defense, nos. 101-105; Rejoinder in the Motion to produce documents, nos. 64-71; Rejoinder in the Motion to produce documents, nos. 101-111; Rejoinder, no. 43.

59 Final judgment, ground 4.35.

60 See the Explanatory Memorandum, Dutch Lower House 1991-1992, 22 486, no. 3, pp. 22-23. Cf. Dutch Upper House 1993-1994, 22 486, no. 103b, pp. 1 and 3.

61 Dutch Lower House 2011–2012, 33 126, no. 3, pp. 6-7. The modified Section 3:305a DCC took effect on 1 July 2013.

> emphasized that if a class action does not offer any advantage over litigating in the name of the interested parties themselves, there is no room for initiating a class action."

108. In this case, litigation by Milieudefensie offers no advantage whatsoever over litigation by the interested parties themselves; thus, this does not lead to more effective legal protection. All of Milieudefensie's claims (including the claimed declaratory judgment) could have been – and should have been – initiated by one or more representatives of the Ikot Ada Udo community on behalf of the entire community. Normally, in Nigeria, proceedings like the ones at issue are conducted by a number of members of the community in question, for themselves and on behalf of the other members of that community, by means of a *representative action.* Under Dutch law, as well, one or more members of the Ikot Ada Udo community could act on behalf of the community by means of documents appointing a representative *ad litem*.

109. Accordingly, the interests of the Ikot Ada Udo community could have been explicitly defended by (representatives of) the community itself. However, for reasons of their own, they failed to do so. It is not clear why in these proceedings Milieudefensie should represent the role that (representatives of) the Ikot Ada Udo community could have – and should have – played. Let alone that this could achieve more effective legal protection than if one or more members of the Ikot Ada Udo community would do so. The members of the Ikot Ada Udo community themselves must be deemed to be able to represent their interests better than Milieudefensie. The fact that the largest part of Akpan's claims also regard the general interest of the Ikot Ada Udo community and the fact that Akpan acts as plaintiff demonstrates that individual members of the Ikot Ada Udo community are most certainly capable, not only of representing their own interests, but also of representing those of the Ikot Ada Udo community in general in proceedings like the ones at issue. This means that Milieudefensie being a party to these proceedings does not offer any advantage over litigating in the name of Akpan and possibly a number of other individual members of the Ikot Ada Udo community and does not result in more effective legal protection. With this state of affairs, there is no room for a claim of Milieudefensie by virtue of Section 3:305a DCC and the District Court's decision on this point cannot be maintained. This is all the more convincing now that three members of the Ikot Ada Udo community have initiated proceedings regarding the oil spill at issue before the Nigerian court, also on behalf of the other members of the community.

110. In the final judgment, the District Court found as follows in this regard:[62]

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[62] Final judgment, ground 4.13

> "In the statement of rejoinder and during the pleadings, Shell et al. pointed out that there is no room for a class action if the interests of the persons who are represented in the class action are not sufficiently safeguarded. According to Shell et al., this situation occurs because Milieudefensie fails to specify the interests of what specific other people it is representing and because Milieudefensie allegedly has insufficient knowledge of the extremely complex situation in Nigeria. The District Court also ignores this argument. Milieudefensie moves that Shell et al. are ordered to take a number of measures to reduce the risk of oil spills near Ikot Ada Udo in Nigeria and to minimize the results of oil spills. The District Court fails to see that this could contravene the interests of Nigerian citizens who may be affected by oil spills."

111. The finding that Milieudefensie's claims are admissible because it is not clear how Milieudefensie's claims could contravene the interests of Nigerian citizens who may be affected by oil spills, is incorrect. Firstly, as set out in no. 106 above, Milieudefensie being a party to these proceedings must lead to more effective legal protection of the interests of the people affected by the oil spill at issue in these proceedings. The admissibility of Milieudefensie's claims must be assessed based on that criterion, not based on the – much less stringent – criterion of whether Milieudefensie being a party to these proceedings *contravenes* the interests of the people whose interests Milieudefensie claims to represent, as the District Court did. Secondly, the criterion used by the District Court is far too broad: these proceedings involve the interests of the people who were affected by the oil spill near Ikot Ada Udo in 2006 and 2007. In its finding on this point, the District Court incorrectly started from the interests of "the Nigerian citizens who may be affected by oil spills". However, that starting point is incorrect. After all, the issue in these proceedings is the oil spill from the IBIBIO 1 well near Ikot Ada Udo in 2006 and 2007 and the people who were affected by that oil spill or not. This is also what Milieudefensie consistently maintained in these proceedings.[63]

112. Not only does Milieudefensie's action fail to result in more effective legal protection of the interests of the people whose interests Milieudefensie claims to represent, it is even extremely doubtful whether their interests are sufficiently safeguarded by Milieudefensie's class action. According to the Explanatory Memorandum to the recent modification of Section 3:305a DCC, this is an important reason for not allowing a class action:[64]

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63 See, for example, the Reply in the 843a Motion for the Production of documents, nos. 58, 60, 63, 68 and 131.

64 Dutch Lower House 2011–2012, 33 126, no. 3, pp. 12-13.

> "The question regarding whether or not a class action sufficiently safeguards the interests of the persons involved can only be answered for each specific case. Two central questions that have to be answered in the event of a challenge are the extent to which the persons involved ultimately benefit from the class action if the claim is awarded and the extent to which the persons involved may rely on the fact that the claiming organization has sufficient know-how and skills to conduct the proceedings. In that scope, a number of factors can be mentioned that can generally play a role. For example, attention can be paid to the other work that the organization performed to promote the interests of aggrieved parties or the question regarding whether in the past, the organization has actually been shown to be capable of realizing its own objectives. Another indication may be the number of aggrieved parties that is affiliated with or a member of the organization and the question regarding the extent to which the aggrieved parties themselves support the class action. (…) With regard to an event that resulted in many duped parties, whether or not the organization that acted as a discussion partner not only represented the party (parties) responsible for the event but also, for example, the government may be an indication, as well. Acting as mouthpiece in the media may be another indication. In answering the question of the extent to which the persons involved ultimately benefited from the class action initiated against a foreign defendant, it is very important whether a judgment in favor of the plaintiff can actually be enforced."

113. Reviewed based on the circumstances of the case at issue, the conclusion is that the interests Milieudefensie claims to represent are insufficiently safeguarded with this action. As stated before, Akpan and the members of the Ikot Ada Udo community know perfectly well what their interests are and how they can best defend those interests. In any event, the Ikot Ada Udo community must be deemed to be better able to do so than Milieudefensie. Measured based on the standards referred to in the above quote from the Parliamentary History, it is also demonstrated that the interests of the people involved are insufficiently safeguarded at Milieudefensie. Milieudefensie is a Dutch environmental organization that does not have any knowledge of and experience with the (extremely complex) situation in Nigeria. In addition, apart from the subject proceedings, Milieudefensie has never taken any action to look after the interests of Nigerians in the vicinity of Ikot Ada Udo. Moreover, to Shell's knowledge, not a single Nigerian in the vicinity of Ikot Ada Udo is a member of Milieudefensie. In as far as any Nigerians in the vicinity of Ikot Ada Udo are members of Milieudefensie, this will undoubtedly have occurred in the scope of the lawsuit at issue. In general, it is hard to imagine that Nigerian citizens would become members of Milieudefensie, all the more so given that

Nigeria has a sister organization of Milieudefensie: ERA.[65] If any interest group could represent the interests of the Ikot Ada Udo community, it is far more obvious that ERA rather than Milieudefensie would do so; as a Nigerian organization, ERA must be deemed to have far more knowledge of the local situation in Nigeria in general and around Ikot Ada Udo in particular.

114. In addition, in respect of Milieudefensie's claims against SPDC: ultimately, the people whose interests Milieudefensie claims to represent will not benefit from any declaratory judgment to be obtained by Milieudefensie in these proceedings. In and of itself, this is sufficient reason for not allowing a class action. This is demonstrated by the Parliamentary History as set out in no. 112 above:

> "In answering the question of the extent to which the persons involved ultimately benefit from the class action initiated against a foreign defendant, it is very important whether a judgment in favor of the plaintiff can actually be enforced."

115. The declaratory judgment that Milieudefensie claimed in respect of SPDC cannot form any basis in the Netherlands for actions for damages by individual members of the Ikot Ada Udo community. After all, the Dutch court will not have jurisdiction in respect of an action by an individual interested party against SPDC in the Netherlands based on a possible declaratory judgment to be obtained by Milieudefensie to the effect that SPDC committed tort against members of the Ikot Ada Udo community.

116. Moreover, in the interim, the claims for damages following the oil spill near Ikot Ada Udo have become time-barred. Under Nigerian law (the law that applies to those claims), the statute of limitations for such claims is five years or six years (depending on the laws of the State that apply). This period has expired. The period was not interrupted. Although it is true that under Dutch law, proceedings by virtue of Section 3:305a DCC interrupt the limitation of the claims for damages (including) in respect of other interested parties, but in this case, Nigerian law applies to these claims – and to the limitation of those claims. Nigerian law does not recognize proceedings like the ones of Section 3:305a DCC and there is no rule that the limitation of claims for damages is interrupted by conducting such proceedings. No other act to interrupt the limitation was performed. To the extent that Milieudefensie takes the position that the proceedings pending in Nigeria regarding the oil spill near Ikot Ada Udo

[65] See the Defense, no. 104.

interrupted the limitation, Shell maintains its invocation of *lis pendens* as advanced in the first instance.[66]

117. All this means that in respect of the claimed declaratory judgment in respect of SPDC, even if this claim would be awarded, ultimately the members of the Ikot Ada Udo community will be unable to benefit from this. It will not be possible to litigate against SPDC in the Netherlands due to lack of jurisdiction of the Dutch court; moreover, the claims have become time-barred. With this state of affairs, Shell cannot help feeling that with its action by virtue of Section 3:305a DCC, Milieudefensie had a completely different goal in mind than representing the interests of people, which were violated as a result of environmental contamination caused by the oil spill near Ikot Ada Udo. Shell believes that the actual goal of Milieudefensie acting in these proceedings is to conduct a campaign against Shell and requesting attention for the situation in Nigeria. Milieudefensie is using these proceedings as an instrument for that campaign. However, Section 3:305a DCC is not designed for such a goal, of course; Section 3:305a DCC is not a campaign instrument, let alone for a campaign that has nothing whatsoever to do with Dutch jurisdiction. Milieudefensie's claims must be declared inadmissible; if not all its claims, than in any event its claims against SPDC.

118. With this state of affairs, there is no room for a class action by Milieudefensie. Shell's right to be sued by the party whose interests are actually at issue in these proceedings should prevail.[67]

Milieudefensie cannot use the class action of Section 3:305a DCC to represent a purely local Nigerian interest

119. The interest that Milieudefensie claims to represent in these proceedings is a purely local Nigerian interest that has no ties whatsoever with Dutch jurisdiction. The oil spill at issue in these proceedings only has consequences in the immediate vicinity of Ikot Ada Udo, Nigeria. Section 3:305a DCC is not intended to enable a Dutch interest group to request protection for such a purely local foreign interest, which – moreover – has no ties whatsoever with Dutch jurisdiction. All claims in these proceedings regard a limited geographical area in Nigeria and the people who might have an interest in these claims are residents of that area. This has nothing to do with Dutch jurisdiction. In that light, it is not clear why Milieudefensie should nevertheless be able to represent those interests in Dutch proceedings. Thus, the finding of the District Court that

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66 See the Defense, nos. 83-90 and the Reply in the *lis pendens* motion.

67 See the Explanatory Memorandum, Dutch Lower House 1991-1992, 22 486, no. 3, pp. 22-23. Cf. Dutch Upper House 1993-1994, 22 486, no. 103b, pp. 1 and 3, cited in no. 109 above.

there are insufficient reasons to assume that local environmental damage abroad allegedly falls outside the scope of Section 3:305a DCC[68] is incorrect.

Milieudefensie's charter is insufficiently specific and Milieudefensie develops insufficient actual work

120. Milieudefensie's claims are also inadmissible in these proceedings because Milieudefensie does not represent the interest it claims to represent in these proceedings by virtue of its charter. The description of Milieudefensie's objective in its charter is not only insufficiently specific on this point; Milieudefensie does not develop any actual work regarding the environment near Ikot Ada Udo or the Niger Delta in general, either. This means that the requirements stipulated by Section 3:305a DCC in this regard are not satisfied.

121. The description of Milieudefensie's objective in its charter reads:[69]

> "The objective of the association is to contribute to solving and preventing environmental problems and preserving cultural heritage, as well as to aim for a sustainable society, all this at a global, national, regional and local level, in the broadest sense and in the interest of the members of the association and in the interest of the environmental quality, nature and countryside in the broadest sense for current and future generations."

122. This description of the objective is insufficiently distinctive to hold on that basis that protecting the environment near Ikot Ada Udo falls within this description. The description of the objective does not say anything regarding acting against environmental pollution in or near Ikot Ada Udo. The description of the objective does not even say that Milieudefensie's objective includes fighting environmental pollution in the Niger Delta or even in Nigeria in general. The description of Milieudefensie's objective ("*solving and preventing environmental problems at a global level*") is so broad that it qualifies as insufficiently specific. See in this connection Frenk:[70]

> "Thus, the charter must describe the interests that the organization intends to take up, and it can only represent these interests in law. In my opinion, it should not be possible to easily circumvent this requirement by formulating the objective as broadly as possible. If an objective is not very specific so that it is, in fact, impossible to determine its contents, an organization's claims should be held inadmissible."

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68 Final judgment, ground 4.12.

69 See Exhibit F.1 of Milieudefensie.

70 Frenk, *Kollektieve akties in het privaatrecht*, p. 126.

123. Thus, the District Court's finding in the final judgment (ground 4.12) in this regard is incorrect. The District Court found:

> "Finally, the description of Milieudefensie's objective in its charter is to promote environmental protection worldwide. Although this is a comprehensive objective, this does not mean that it is insufficiently specific. Nor is there sufficient reason to assume that local environmental damage abroad allegedly falls outside that description of Milieudefensie's objective or outside the scope of Section 3:305a DCC."

124. With this finding, the District Court fails to recognize that an all-encompassing description of the objective, such as Milieudefensie's description of its objective, lacks specificity and is therefore insufficiently distinctive to lead to admissibility under Section 3:305a DCC. If it is held that Milieudefensie's description of its objective is sufficiently specific to act in law to protect the environment near Ikot Ada Udo, this would render the requirement of the objective in charters a mere formality.

125. Moreover, the requirement that Milieudefensie also developed sufficient actual work to represent these interests is not satisfied. Milieudefensie does not develop any actual work to protect the environment near Ikot Ada Udo or to represent the people who may have been affected by oil spills near Ikot Ada Udo.

126. The District Court wrongfully ignored the arguments that Shell put forward in respect of this point in the first instance. The District Court found:[71]

> "In addition, in contrast to Shell et al., the District Court considers conducting campaigns aimed at stopping environmental pollution in the production of oil in Nigeria as a factual activity that Milieudefensie developed to promote the environmental interests in Nigeria."

127. With this finding, firstly, the District Court once again fails to recognize (see no. 111 above) that in these proceedings Milieudefensie represents the environmental interests of people that were violated as a result of environmental pollution caused by an oil spill near Ikot Ada Udo.[72] Milieudefensie repeatedly contended this in the first instance[73] and in this motion, as well, argues that this case pertains to oil pollution near the village of Ikot Ada Udo.[74] (Thus,) Milieudefensie does not represent the much broader interest of "*the environmental interests in Nigeria*". This means that the District

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71 Final judgment, ground 4.12.

72 See the Reply in the Motion to produce documents, no. 131.

73 See, for example, the Reply in the Motion to produce documents, nos. 58, 60, 63, 68 and 131.

74 See the 2013 Motion to produce documents, no. 9.

Court's finding in this respect is incorrect. Although in this motion (see par. 9 of the 2013 Motion to produce documents), apparently for the purpose of linking up with the District Court's finding on this point, Milieudefensie argues that it represents the interest of a clean environment and the victims of oil spills in the Niger Delta, this argument is not very credible in light of the fact that in these proceedings, Milieudefensie consistently maintained that it (only) represented the interests of victims of oil spills near Ikot Ada Udo. In addition – N.B.: in the same paragraph of its 2013 Motion to produce documents – Milieudefensie acknowledges on the other hand that these proceedings pertain to oil pollution in and near Ikot Ada Udo and all Milieudefensie's arguments in these proceedings consistently pertain to the oil spill near Ikot Ada Udo and the interests of people who have been affected by that oil spill. If Milieudefensie seeks admissibility of its claims by virtue of Section 3:305a DCC, it must demonstrate that it developed activities that specifically pertain to the representation of those interests. Milieudefensie did not do so. On the contrary, at best, Milieudefensie undertook activities that regard environmental problems in Nigeria in general. This is hardly surprising in view of the fact that Milieudefensie does not have the interest of the people who Milieudefensie claims to represent in these proceedings in mind as much as conducting a campaign against Shell regarding Nigeria. However, protecting the environment in Nigeria in general is insufficiently specific to declare that Milieudefensie's claims that pertain to environmental interests of people that were violated as a result of an oil spill near Ikot Ada Udo are admissible. Nigeria is a large country: its surface area is over 20 times the size of the Netherlands. The Niger Delta alone is 1.5 times the size of the Netherlands. Campaigns directed against stopping environmental pollution in the production of oil in Nigeria in general cannot be considered to be an actual activity that entails the right to conduct an action by virtue of Section 3:305a DCC. Thus, the District Court's finding in this regard is incorrect.

128. Moreover, Milieudefensie's arguments in the first instance cannot support the District Court's conclusion that Milieudefensie conducted "*campaigns aimed at stopping environmental pollution in the production of oil in Nigeria*"[75], and that this constitutes sufficient actual work to hold that its claims by virtue of Section 3:305 DCC are admissible. The activities that Milieudefensie advanced in this scope[76] do not qualify as such. The activities advanced are only protests and the conduct of legal proceedings. In the first instance[77], Shell set out extensively why those protests do not qualify as sufficient actual work.

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75 Final judgment of 31 January 2013, ground 4.12.

76 Reply in the Motion to produce documents, no. 80.

77 Rejoinder in the Motion to produce documents, nos. 142-149.

129. The actions advanced by Milieudefensie can be broken down into three categories: Milieudefensie allegedly (i) conducted legal proceedings, (ii) published a report on the environmental pollution in the Niger Delta, and (iii) conducted protest campaigns. With regard to the legal proceedings contended by Milieudefensie, these all regard proceedings in Nigeria, in which Milieudefensie is not even a party. Milieudefensie cannot invoke work of other parties to demonstrate that it performed actual work that pertains to the interest that Milieudefensie claims to represent in these proceedings, of course. The work of other parties is not work of Milieudefensie. In addition, merely conducting legal proceedings does not qualify as actual work.[78] In this context, there is a connection with administrative law. The Dutch General Administrative Law Act (Awb - Section 1:2 (3)) stipulates that an interest group like Milieudefensie can challenge a legal decision in the event that the general or group interest it specifically represents according to the description of its objective in its charter and its actual work is involved in the decision in question. In that context, the Administrative Jurisdiction Division already ruled that initiating and participating in legal proceedings does not qualify as actual work in the sense of Section 1:2 (3) Awb.[79] It is not clear why the same should not apply in the scope of admissibility based on Section 3:305a DCC, as well, given that here, too (i) the issue is interest groups that represent a general or collective interest, and (ii) in the scope of admissibility based on Section 3:305a DCC, the requirement is stipulated that the interest group must represent the interests in question according to its charter and must perform actual work in this regard.

130. With regard to the reports referred to by Milieudefensie[80] these only regard Nigeria and the Niger Delta in general to a very limited extent. In any event, these reports do not specifically regard the situation around Ikot Ada Udo. In addition, the two reports are based on a single visit in April 2005 by Friends of the Earth England, Wales and Northern Ireland. Thus, this visit was not made by Milieudefensie, but by another organization.[81] As stated before, work performed by other parties does not qualify as work by Milieudefensie, of

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78 See also the Defense, no. 116 and the case law mentioned in that paragraph.

79 See ABRvS 1 October 2008, AB 2008, 348, with commentary from Michiels, and for a recent example, ABRvS 20 November 2013, ECLI:NL:RVS:2013:2033

80 This involves the reports "Use your profit to clean up your mess" and "Lessons Not Learned. The Other Shell Report."

81 Again, Milieudefensie has to face the consequences of the fact that it completely fails to distinguish between different (legal) entities. Just as Milieudefensie fails to distinguish between the actions of RDS and SPDC, it likewise fails to do so in respect of its own actions and the actions of other, affiliated organizations. Naturally, Milieudefensie does so (fails to do so) because it is convenient, but lumping (the conduct of) various entities together is inappropriate, of course.

course, let alone as sufficient actual work that justifies the admission of Milieudefensie's claims in these proceedings by virtue of Section 3:305a DCC. To the extent that Milieudefensie conducted protest campaigns, again, these do not pertain to the specific problems at issue in this case, namely the consequences of the oil spill near Ikot Ada Udo. In the campaigns mentioned by Milieudefensie, it only focused on gas flaring and oil pollution in the Niger Delta in general. That is insufficiently specific to qualify as relevant actual work. Nor does unilaterally adopting a position on this qualify as actual work that contributes to combating or preventing the consequences of the oil spill near Ikot Ada Udo, the issue in these proceedings. This means that it is clear that Milieudefensie did not perform (sufficient) actual work to represent the interests it claims to represent in these proceedings. Thus, the District Court's finding on this point cannot be maintained and Milieudefensie's claims should still be declared inadmissible.

131. Milieudefensie also contended that through consultations with Shell, it allegedly tried to get Shell to conduct its oil production operations in an environmentally-friendly manner, and that in and of themselves, those consultations already qualify as sufficient actual work.[82] This argument also fails, if only because Milieudefensie fails to clarify the consultations it is referring to in any way. No such dialogue took place between Shell and Milieudefensie. Merely listening to unilateral protest campaigns and points of view does not qualify as "consultations" and certainly does not qualify as actual work, of course. Moreover, the requirement that this actual work must pertain to the representation of the interests that Milieudefensie claims to represent in these proceedings, i.e. the interests of people that have been violated as a result of environmental pollution caused by the oil spill near Ikot Ada Udo in 2006 and 2007, has not been satisfied.

[82] Reply in the Motion to produce documents, no. 80.

5 LEGAL FRAMEWORK OF SECTION 843a DCCP

132. Section 843a DCCP offers a plaintiff the opportunity to obtain access to documents of the party who has these documents in his possession or custody. Section 843a DCCP stipulates six cumulative requirements that a claim for access to documents must satisfy:[83]

1. the plaintiff must have a legitimate interest in the access to the documents; if a party is just interested, this is in no event sufficient[84];
2. the claim must relate to specific documents;
3. the claim must relate to documents that the defendant actually has in his possession;
4. the claim must relate to documents regarding a legal relationship to which the plaintiff or his legal predecessors are a party.

Section 843a (4) DCCP further stipulates that access can be refused:

5. on account of serious reasons; and
6. in the event that the interest of a proper administration of justice is also safeguarded without access.

133. Dutch law does not recognize any general duty to produce documents in the sense that parties to legal proceedings can be required to provide one another all conceivable information and documents. Section 843a DCCP may not be used for *fishing expeditions*.

134. In ground 4.5 of the interlocutory judgment in the motion to produce documents of 14 September 2011, the District Court found as follows in this connection:

> "Section 843a DCCP regards a special duty to produce documents in and out of court. This duty to produce documents serves to ensure that specific supporting documents become available in the proceedings as evidence. In the Netherlands there is no general duty to produce documents for parties to legal proceedings in the sense that as a main rule, they can be required to provide one another all conceivable information and documents. In view of this and to prevent so-called fishing expeditions, allowing a claim based on Section 843a DCCP is bound by several limiting conditions in that section. Firstly, the plaintiff in the motion to produce

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83 For an explanation of these conditions, see the opinion of A-G Mr Wesseling-van Gent, nos. 2.21-2.25, for HR 29 January 2010, LJN BK 2007, RvdW 2010, 214, and also the District Court of The Hague 2 February 2011, LJN BP4605, ground 3.13. See also the interlocutory judgment of 14 September 2011 in the subject case, ground 4.5, cited in no. 134 below.

84 See the Parliamentary History of the Code of Civil Procedure, Van Mierlo/Bart, p. 553.

> documents must contend and have a *legitimate interest*, in which a legitimate interest must be interpreted as an *evidentiary interest*. An evidentiary interest exists in the event that a supporting document can contribute to substantiating and/or demonstrating a relevant argument that may be decisive for the claims to be assessed, which has been sufficiently specifically substantiated and sufficiently specifically contested. Secondly, the claims must regard "*specific documents*" that – thirdly – the *defendant actually has or can have in his possession*. Fourthly, the *plaintiff in the motion to produce documents must be a party to the legal relationship* to which the claimed specific documents pertain. This also includes the legal relationship that results from a tort. In the event that all these conditions are satisfied, there is nevertheless no requirement to produce any documents if – fifthly – *serious reasons* oppose this or in the event that – sixthly – it may be reasonably assumed that a *proper administration of justice* is also safeguarded without the provision of that information. In the event that a claim to produce documents is not refuted by the other party, Section 24 DCCP applies and the District Court is not authorized to *ex officio* present one or more defenses against this claim and on that basis dismiss the claim."

135. In sections 5.1 and 5.2 below, the requirements of a legitimate interest and the definition of the claimed documents in particular are discussed in more detail. In section 5.3, a few general comments will be made regarding serious reasons as a ground for dismissal.

5.1 Legitimate interest

136. In the first instance, the District Court dismissed Milieudefensie's claims to produce documents for lack of a legitimate interest in the sense of an evidentiary interest.[85] According to the District Court, in the case at issue, this evidentiary interest is absent, because Milieudefensie insufficiently substantiated its arguments (as regards the facts or in legal terms). For example, according to the District Court, Milieudefensie does not have a legitimate interest in access to documents that shed light on the (maintenance) condition of the wellhead in question, because Milieudefensie advanced an insufficiently substantiated refutation against Shell's substantiated defense that the oil spill was caused by sabotage.[86] The District Court also held that Milieudefensie *inter alia* does not have a legitimate interest in access to documents that could be used to substantiate the argument that RDS had influence on and control over SPDC's allegedly failing environmental policy, because Milieudefensie did not offer sufficiently concrete reasons for the fact

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85 Interlocutory judgment of 14 September 2011, grounds 4.8 and 4.13.

86 Interlocutory judgment of 14 September 2011, grounds 4.7-4.8.

that under Nigerian law, this argument could lead to liability on the part of RDS.[87]

137. According to Milieudefensie, the "definition" of evidentiary interest used by the District Court is too narrow, because the District Court allegedly requires that it be precisely determined how a specific item of evidence will contribute to substantiating a specific argument. However, according to Milieudefensie, the circumstances may compel the arguments to be structured in part based on the documentary evidence.[88]

138. Milieudefensie's argument fails. A plaintiff who claims the production of documents by virtue of Section 843a DCCP must sufficiently demonstrate that and how those documents can contribute to evidence of an argument that he must prove in order to see his claim in the main action awarded. In this scope, the District Court rightly uses the term "evidentiary interest" that is used in literature.[89] A plaintiff is only entitled to the production of documents if he satisfied his duty to contend facts and circumstances, meaning that he presented a sufficiently specific substantiation of the arguments to which the claimed documents pertain, both in legal terms and as regards the facts, in part in light of the defendant's challenge of those arguments.[90] A *legally relevant* argument of the plaintiff must be involved, meaning an argument that can support this plaintiff's claim in the main action. If the plaintiff contends insufficient facts and circumstances to ensure that his claims are awarded, there is no need to furnish evidence; thus, in that case there is no legitimate interest in the production of documents.

139. Section 843a DCCP does not offer the possibility to request access to documents that the party claiming the production of documents merely suspects could support his arguments. The plaintiff must demonstrate that he

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87 Interlocutory judgment of 14 September 2011, grounds 4.12-4.13.

88 2013 Motion to produce documents, no. 17.

89 Defense in the Motion to produce documents, nos. 19-20; see also J.M. Barendrecht and W.A.J.P. van den Reek, *Exhibitieplicht en bewijsbelang*, WPNR 1994 (6155), p. 741; T.S. Jansen, *"Art. 843a Rv in de ondernemingsrechtpraktijk"*, Tijdschrift voor de ondernemingsrechtpraktijk, 2009/3, pp. 89-91, and B.T.M. van der Wiel, *De rechtsverhouding tussen procespartijen*, dissertation Leiden 2004, p. 52.

90 See the Court of Appeal of The Hague 29 October 2013, ECLI:NL:GHDHA:2013:3941, ground 16, in a copyright infringement case: "The Court of Appeal finds that the claims can in any event be awarded if the plaintiff contended such concrete facts and circumstances that even **in view of the challenge by the other party** and the plaintiff's reaction to this, these may demonstrate a reasonable suspicion of (threatening) infringement, and that the documents to which access is claimed are relevant to (further) substantiate the specified (threatening) infringement and allowing an infringement claim based on this." (emphasis added by attorney)

needs the documents to prove an argument from which the possibility of liability may be inferred based on normal empirical rules.[91]

140. According to Milieudefensie's arguments mentioned in no. 137 above, a *fishing expedition* is involved in the case at issue: Milieudefensie wants access to documents in order to "structure" its arguments based on those documents. In other words, after examining the claimed documents, Milieudefensie wants to determine the arguments that it will submit. In so doing, Milieudefensie fails to recognize that – as stated before – it only have a legitimate interest in access to documents after it has satisfied its duty to contend facts and circumstances.

141. Milieudefensie further submits that it has a legitimate interest in the production of documents "*especially because in the judgment of 30 January 2013, the District Court in The Hague established that Akpan and Milieudefensie failed to demonstrate that the circumstances under which a duty of care may fall on RDS according to Nigerian law indeed occurred*".[92] According to Milieudefensie, this establishes that it has a legitimate interest in access to documents that will enable it to prove the relevant circumstances.

142. This argument of Milieudefensie also fails. The mere fact that Milieudefensie's claims have been dismissed does not mean that it allegedly now has a legitimate interest in access to documents, of course. Milieudefensie wrongfully suggests that the District Court dismissed Milieudefensie's claims, because it was unable to *prove* ("aantonen") its claims. The District Court dismissed its claims because Milieudefensie failed to satisfy its duty to contend facts and circumstances. Milieudefensie will first have to satisfy its duty to contend facts and circumstances before it is entitled to the production of documents.

143. In concrete terms, this means that Milieudefensie will first have to indicate what specific arguments it wants to use as the basis for challenging the District Court's judgments. As stated before, Shell believes that this must be done by

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91 See the recent ruling of the Court of Appeal of Arnhem-Leeuwarden 2 July 2013, ECLI:NL:GHARL:2013:4664, ground 2.5. See also the Court of Appeal of The Hague 29 October 2013, ECLI:NL:GHDHA:2013:3941, grounds 16-17, cited in the previous footnote. In this latter ruling, the Court of Appeal finds in ground 17: "Moreover, the Court of Appeal notes that, in view of Article 6 of the Enforcement Directive, the ruling of the Supreme Court dated 26 October 2012, LJN: BW9244 and its ruling (in response to preliminary questions regarding the seizure of evidence in non-IP cases referred to the Supreme Court) dated 13 September 2013, the bar may be lowered even further and it could be sufficient that the legal relationship has been contended and substantiated." Shell understands this finding to mean that a legal relationship that has been *sufficiently substantiated in concrete terms* must in any event be involved.

92 2013 Motion to produce documents, no. 18.

formulating grounds for appeal against the interlocutory judgment in the Motion to produce documents and the final judgment of the District Court (see nos. 9-19 above). In the unlikely event that the Court of Appeal holds a different opinion, it is pointed out that in the 2013 Motion to produce documents, as well, Milieudefensie contended insufficient facts and circumstances to be entitled to the production of documents. This is further worked out below in the discussion of the different categories of documents that are being claimed.

5.2 Sufficiently specific documents

144. By virtue of Section 843a DCCP, only specific, well-defined documents can be claimed. The documents must be indicated in concrete terms such that the documents that are being claimed are clear to everyone and a review can be conducted of whether the party claiming those documents also has a legitimate interest in this.[93] The plaintiff in the motion to produce documents must indicate why he expects that the documents are relevant for the dispute that has arisen.[94] Thus, he will have to demonstrate sufficiently that and how the documents to which access is being claimed can contribute to the evidence of an argument he must prove to see his claim awarded. It follows from this that Section 843a DCCP does not offer the possibility to request information.

145. As stated before, with regard to the alleged knowledge of and guidance by "the parent company", in the subject motion, Milieudefensie claims access to documents that it also claimed in the first instance (see nos. 179, 189, 196, 204, 213 and 216 below). The difference with the motion to produce documents in the first instance is that this time, Milieudefensie uses different designations for the claimed documents and no longer claims access to specific categories of documents. In the 2013 Motion to produce documents, Milieudefensie indicates the claimed documents with English terms that it apparently found in Shell documents or on Shell's website.[95] However, this does not satisfy the requirement that the documents to which access is being claimed this time have been "sufficiently specified" or that this time a legitimate interest in the production of those documents exists.

146. In nos. 40 and following of the 2013 Motion to produce documents, Milieudefensie explains extensively how the Shell Group is allegedly organized, the "*standards* and *manuals*" that are allegedly imposed on the operating companies and how and what must allegedly be reported to "the parent company". Milieudefensie submits that "*[t]he whole system is designed for*

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93 See in this regard also the Explanatory Memorandum to the bill to amend the right to access to, a copy of or extract from documents, Dutch Lower House 2011-2012, 33 079, no. 3, p. 6.

94 Dutch Lower House 2011-2012, 33 079, no. 3, p. 10.

95 Cf. the 2013 Motion to produce documents, no. 85.

centrally organizing know-how, on the one hand, and spotting deviations at the earliest possible stage in order to make adjustments in a timely fashion, on the other".[96] Milieudefensie wrongfully creates the picture that as listed holding company, RDS allegedly determines everything and is even aware of every detail of and exercises control over the operational activities of its group companies. This picture does not correspond to reality. Milieudefensie ignores the distinction between the various Shell companies. None of the documents that Milieudefensie believes imply that "the parent company" has specific knowledge originate from RDS.

147. The result is that a number of the documents to which Milieudefensie is now claiming access to do not exist; in other cases, the claimed documents have been insufficiently defined. This is also worked out in more detail below, in discussing the various categories of documents that are being claimed.

5.3 Serious reasons: confidential documents

148. A number of the claimed documents regards confidential business information, so that there are serious reasons preventing Milieudefensie from being granted access to those documents (Section 843a (4) DCCP).

149. In this connection, in the consideration of interests to be conducted by the Court of Appeal in this scope, Shell's interest in confidentiality must prevail, in view of the fact that the subject proceedings are part of the campaign that Milieudefensie has been conducting against Shell for quite some time and because it is likely that Milieudefensie will want to use the documents that do not specifically pertain to the oil spill at issue for additional campaigns or to initiate legal proceedings against Shell regarding subjects other than the subject oil spill. Not only is Section 843a DCCP not intended for this purpose; it also emphasizes the serious interest that Shell has in protecting the confidential nature of the documents referred to.

[96] 2013 Motion to produce documents, no. 43.

6 CLAIMED DOCUMENTS REGARDING RDS' DUTY OF CARE

6.1 General defenses against categories a. through f.

150. Milieudefensie claims the documents mentioned in paragraphs a. to f. in view of its claims against RDS. It wants to use those documents to demonstrate "*that the parent company assumed responsibility and that this means that it had a duty of care*".[97] However, Milieudefensie has no legitimate interest in the production of documents in view of its claims against RDS.

151. Firstly, the claims against RDS are certain to fail due to the absence of a legal basis in Nigerian law (see nos. 39-55 above). Briefly summarized: Nigerian case law does not include any case of liability of a parent company based on *negligence* that can offer support for the claims against RDS. Nor can any relevant precedent be found in English case law. The circumstances in *Chandler* v. *Cape* were incomparable to those in the case at issue, even apart from the fact regarding whether the Nigerian court would take that ruling into account. The claim for access to documents must be dismissed for that reason alone.

152. Secondly, Milieudefensie wrongfully does not distinguish between the various "parent companies" of the Shell Group during the period for which Milieudefensie is claiming access to documents. In paragraphs a. through f., Milieudefensie claims access to documents for the period 2004-2007, even though RDS was only placed at the head of the Shell Group on 20 July 2005 at the earliest.

153. RDS was only placed at the head of the group on 20 July 2005 at the earliest. Part of the documents claimed in paragraphs a. through f.[98] pertain to the period before 20 July 2005. It is not clear how these documents from the period 2004 up to 20 July 2005 can be relevant for the alleged knowledge of or interference by RDS regarding the situation in Nigeria.

154. Moreover, Milieudefensie claims the production of documents in view of its claims against RDS, but fails to explain why it has a legitimate interest in access to documents that are solely held by SPDC. Milieudefensie acts as if every document somewhere in the Royal Dutch Shell Group may be relevant to substantiate its claims against RDS. That is not true, of course.

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97 2013 Motion to produce documents, no. 89.

98 In categories a. and e., Milieudefensie refers to "the oil spill in 2004". 2007 is probably meant here.

155. Thirdly, Milieudefensie's submissions in the 2013 Motion to produce documents regarding the duty of care of the "parent company" cannot lead to the conclusion that it has a legitimate interest in the production of documents.

156. Milieudefensie claims that it has a legitimate interest in the production of the documents in paragraphs a. to f. because it wants to demonstrate that the "parent company" had knowledge in the area of well maintenance and abandonment, safety and the environment, and that the parent company was aware or should have been aware of the conditions and risks in Nigeria and SPDC's safety and environmental management, and that it "sometimes actively interfered in its subsidiary".[99] Milieudefensie also submits that SPDC "set goals in the area of maintenance and HSE in consultation with the parent company" and that "the parent company was or could have been aware of the conditions near Ikot Ada Udo."[100]

157. Milieudefensie insufficiently substantiated these arguments. This means that it does not have a legitimate interest in the production of documents. Its wish to further substantiate these arguments by receiving a large number of internal documents is insufficient in law to justify the production of documents. Milieudefensie's argument set out in no. 156 above can be broken down into three parts: knowledge, awareness and interference. Shell will briefly address these subjects below.

Knowledge

158. Milieudefensie submits that it wants to use the claimed documents to demonstrate that "RDS had superior knowledge of relevant aspects of well maintenance and abandonment, safety and the environment", so that RDS also had a duty of care.[101] Milieudefensie derives the term "superior knowledge" from the ruling of the English Court of Appeal in *Chandler v. Cape*. As at issue in *Chandler v. Cape*, it is referring to "superior knowledge" compared to the subsidiary in question, in this case SPDC.[102]

159. Milieudefensie fails to provide any well-reasoned substantiation whatsoever for its argument that compared to SPDC, RDS had "superior knowledge" of well maintenance and abandonment, safety and the environment in Nigeria. In the final judgment, the District Court rightly found that it is not clear why the parent companies allegedly have more knowledge of the specific risks of SPDC's

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99 2013 Motion to produce documents, no. 89.

100 2013 Motion to produce documents, no. 89, (a) and (e), respectively.

101 2013 Motion to produce documents, no. 19.

102 See the 2013 Motion to produce documents, nos. 36 and 63.

industry in Nigeria than SPDC itself.[103] Milieudefensie does not counter this with any concrete argument in the 2013 Motion to produce documents.

160. In the 2013 Motion to produce documents, Milieudefensie explains extensively how "know-how in the area of the production and distribution of oil is pre-eminently coordinated at the central level by the parent company, including with regard to the oil production in Nigeria."[104] To this end, it quotes extensively from "*standards* and *manuals*" that it believes prescribe the use of specific "technologies, materials and methods". The margin of discretion of the *operating companies* is allegedly "very precisely defined by the central guidelines".[105] Milieudefensie adds to this that to answer the question regarding whether "*superior knowledge*" as in *Chandler v. Cape* is involved, it is irrelevant whether or not "the *manuals* have a compulsory nature". According to Milieudefensie, the issue is that the *manuals* demonstrate that "specific relevant knowledge is centrally organized."[106]

161. This argument already fails to hold because, as Milieudefensie itself recognizes, the "*standards* and *manuals*" they invoke to substantiate the alleged "knowledge of the parent company" do not originate from RDS.[107] Milieudefensie writes:[108]

> "The technical standards are managed by the *Technical Standards Group* under the direction of *Shell Global Solutions*. With a company the size of Shell, it is obvious that this know-how development is performed by a separate company, under the overall guidance of the parent company. The development of that know-how does not result in any duty of care for *Shell Global Solutions*, of course. The issue – in *Chandler v. Cape*, as well – is that a parent company is aware of the special risks that a subsidiary runs in respect of a group of parties involved, on the one hand, while it has

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103 Ground 4.31.

104 2013 Motion to produce documents, no. 39.

105 2013 Motion to produce documents, no. 42.

106 2013 Motion to produce documents, no. 63.

107 Milieudefensie cites a large number of DEPs and HSE Manuals and submits part of these documents. It is not clear to Shell how Milieudefensie managed to get these documents; DEPs and HSE Manuals comprise confidential and sensitive business information. Shell did not examine whether the DEPs and HSE Manuals cited by Milieudefensie are authentic and whether these DEPs and HSE Manuals applied to SPDC at the time of the oil spill at issue. Nor was it necessary to examine this, because for the reasons mentioned in the body text, the DEPs and HSE Manuals do not constitute any evidence of the presence of specific knowledge at RDS.

108 2013 Motion to produce documents, no. 57.

special know-how that is required to combat those risks and nevertheless fails to intervene, on the other."

162. Milieudefensie apparently feels that all the knowledge present within the group can be attributed to RDS. Otherwise, it is incomprehensible why it offers an extensive explanation based on *Design and Engineering Practices* ("DEPs"), even though it recognizes that those documents do not originate from RDS, but from other group companies, such as Shell Global Solutions B.V., Shell International Exploration and Production B.V. ("SIEP") and Shell International Chemicals B.V. However, the applicable Nigerian law does not offer a legal basis for such attribution (nor does Dutch law). Milieudefensie rightfully recognizes that the DEPs do not imply any duty of care for Shell Global Solutions B.V. This applies *a fortiori* for RDS. The same is true for the HSE Manuals that Milieudefensie invokes, of course.[109] These HSE Manuals have been drawn up by SIEP. What Milieudefensie means in this connection by "overall guidance by the parent company" is not clear. In any event, this vague statement cannot be used to attribute all the knowledge present within the group to RDS.

163. The above does not mean that the knowledge present within the group is not shared between the group companies, of course. One example of this is knowledge in the area of building and maintaining pipelines and HSE management. This knowledge is indeed shared by means of DEPs and HSE Manuals. This means that the knowledge present within the Royal Dutch Shell Group was available to SPDC. However, this does not mean that this knowledge originates or originated from RDS. As stated before, as Milieudefensie also recognizes, DEPs and HSE Manuals are not and were not drawn up by the listed parent company, but by other group companies. Moreover, this involves knowledge that is pre-eminently relevant for *operating companies*, such as SPDC. Thus, the DEPs and HSE Manuals do not say anything about the knowledge of the parent company, let alone do they imply that RDS had "superior knowledge" compared to SPDC of well maintenance and abandonment, safety and the environment in Nigeria. In *Chandler v. Cape*, in order to assume that the parent company had a duty of care, it was not sufficient that the parent company had "knowledge" of a subject that was relevant for the occurrence of the damage. The issue in *Chandler v. Cape* was "*superior knowledge*". Cape plc., the parent company, "*had superior knowledge about the asbestos business*."[110] In the case at issue, the group's "parent company" does not have any "superior knowledge" compared to SPDC of well maintenance and abandonment, safety and the environment in Nigeria.

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109 2013 Motion to produce documents, no. 60, with Exhibits N7 and N8.

110 *Chandler* v. *Cape* [2011] EWHC 951 (QB), per Arden, LJ, para. 75.

164. Moreover, the DEPs and HSE Manuals do not infer, either, that compared to SPDC, the group companies that prepared these documents allegedly have "superior knowledge" of well maintenance and abandonment, safety and the environment in Nigeria. Milieudefensie wrongfully assumes that the DEPs and HSE Manuals specifically pertain to the challenges that SPDC faces in the scope of the production of oil in Nigeria. The DEPs and HSE Manuals that were submitted do not demonstrate whether SPDC used these documents at the time of the oil spill at issue (even apart from the question of whether these documents are authentic, see footnote 107). Whatever can be said of this, the DEPs and HSE Manuals that Milieudefensie cites have been prepared for use by *operating companies* worldwide. Thus, they are general. Each DEP includes the following on the cover page:

> "The information set forth in these publications is provided to Shell companies for their consideration and decision to implement. This is of particular importance where DEPs may not cover every requirement or diversity of condition at each locality. The system of DEPs is expected to be sufficiently flexible to allow individual Operating Units to adapt the information set forth in DEPs to their own environment and requirements."[111]

165. Thus, the DEPs and HSE Manuals contain guidelines and recommendations that the operating companies in question must work out and modify to the specific situation in which the operating company in question works. The cases at issue deal with a specific oil spill, namely the oil spill near Ikot Ada Udo in 2006 and 2007. Milieudefensie argues that the oil spill was caused by defective maintenance and that the consequences of the oil spill were allegedly inadequately addressed. Shell contests that argument. The discussion between the parties regarding these subjects focuses on details that occurred in the case at issue, such as the fact that this oil spill was caused by sabotage and, once the oil spill had been detected, the difficulties that SPDC encountered in obtaining permission from the local communities to access the site of the oil spill to close the leak and clean up and remediate the consequences of the oil spill. These problems do not occur elsewhere in the world, or only very incidentally. The DEPs and HSE Manuals do not contain any concrete recommendations or guidelines in this respect.

166. As Milieudefensie acknowledges according to its arguments,[112] the operating companies are not required in all cases to simply comply with the guidelines and recommendations in the DEPs and HSE Manuals. As stated before, the

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111 See p. 2 of Exhibits N3 - N5. The DEP submitted as Exhibit N4 is from a much earlier date (2002), but contains a similar text on page 4.

112 2013 Motion to produce documents, no. 42.

operating companies must work out and modify these guidelines and recommendations in concrete terms to the specific situation in which the operating company in question works. In light of this, Milieudefensie's argument that the "margin for discretion" of operating companies "is very precisely defined by the central guidelines"[113] is incorrect and otherwise also misses its mark. As stated before, not only do the operating companies most certainly have a "margin for discretion", namely in respect of the question regarding how the DEPs and HSE manuals must be applied in the specific circumstances in which the operating company in question works, but, moreover, Milieudefensie – rightfully – does not argue that the guidelines and recommendations are defective. The DEPs and HSE Manuals do not contain any recommendations for defective maintenance procedures or defective policy to tackle the consequences of oil spills. It is not clear that the DEPs and HSE Manuals nevertheless can be used to substantiate the liability of RDS.

167. The above means that Milieudefensie also insufficiently substantiated that the "parent company" could foresee that "SPDC would rely on the parent company for the manner in which it would have to deal with the challenges that it faced in the Niger Delta."[114] This is not what SPDC did. Nor was this required, because it is not the "parent company", but SPDC itself that has "*superior knowledge*". Milieudefensie apparently takes this position to focus its argument on the criteria developed by the English Court of Appeal in *Chandler v. Cape*. Milieudefensie fails to recognize that the case at issue is incomparable to *Chandler v. Cape*.

Awareness

168. Milieudefensie submits that it wants to use the claimed documents to demonstrate that "RDS was aware or should have been aware of the circumstances in Nigeria, so that RDS was also under a duty of care".[115] It also submits that "the parent company was aware or could be aware of the conditions near Ikot Ada Udo."[116] It is pointed out that Milieudefensie believes that the fact that the "parent company" was aware of the "specific circumstances of this oil spill near Ikot Ada Udo" is not a decisive factor.[117] Milieudefensie blames the "parent company" for failing to intervene, even though it was aware of the systematic failures of SPDC. According to Milieudefensie, oil spills with the magnitude of the oil spill near Ikot Ada Udo

113 2013 Motion to produce documents, no. 42.

114 2013 Motion to produce documents, no. 82.

115 2013 Motion to produce documents, no. 19.

116 2013 Motion to produce documents, no. 89 (e).

117 2013 Motion to produce documents, no. 80.

are "centrally monitored" and the "parent company" was thus aware of the special risks that were being taken in the Niger Delta.

169. This position by Milieudefensie also fails. The oil spill near Ikot Ada Udo was not reported to RDS as a "serious environmental incident". Shell explained this repeatedly in the first instance.[118] Milieudefensie has never submitted any concrete argument to counter this. It also fails to do so in its 2013 Motion to produce documents. Apparently for this reason, Milieudefensie falls back on the argument that oil spills with the magnitude of the oil spill near Ikot Ada Udo are "centrally monitored" and that the "parent company" was thus aware of the special risks that were being taken in the Niger Delta.[119]

170. As the District Court each time rightfully found first and foremost, these proceedings deal with the oil spill from the IBIBIO 1 well near Ikot Ada Udo in 2006 and 2007.[120] They do not deal with the situation in the Niger Delta in general:[121] "However, in these proceedings, the Dutch court cannot and will not render an opinion regarding the discussion between Milieudefensie and Shell et al. regarding Shell et al.'s general policy in its oil production operations in Nigeria. In these proceedings, the District Court may and will only rule on the specific claims lodged by Milieudefensie in response to these two specific oil spills in 2006 and 2007 near Ikot Ada Udo (…)."

171. Already against this background it is not clear that Milieudefensie has a legitimate interest in the production of documents it wants to use to demonstrate that the "parent company" was aware of the "special risks that were being taken in the Niger Delta". It is not clear that being aware of the situation in the Niger Delta in general might lead to the opinion that RDS is liable for the damage suffered as a result of the oil spill near Ikot Ada Udo in 2006 and 2007. If any "awareness" is relevant in this scope – Shell contests this – this must be awareness of a circumstance that is relevant in connection with the oil spill at issue. Milieudefensie fails to recognize that the question regarding whether SPDC in general fails "structurally" in connection with oil spills is not the issue in these proceedings; the issue here is whether *in the case at issue*, SPDC is liable in connection with the oil spill near Ikot Ada Udo in 2006 and 2007. In addition, Shell contests that any "systematic" failure by SPDC is involved.

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118 See, *inter alia*: the Defense, no. 74; the Rejoinder, no. 34. See also no. 208 below.

119 2013 Motion to produce documents, no. 80.

120 Judgment in the jurisdiction motion of 24 February 2010, ground 2.2; judgment in the Motion to produce documents of 14 September 2011, ground 4.2; final judgment, ground 4.15.

121 Final judgment, ground 4.15.

172. Milieudefensie gets no further than the general argument that RDS "knew that equipment that had not been properly *decommissioned* and *abandoned* was a structural problem of SPDC", that the "parent company should have known that the risk of damage as the result of sabotage in the Niger Delta was very high" and that "the methods that were used to contain the damage caused by the oil spills and remediate the contamination were defective."[122] As stated before, that is insufficient. This is not changed by Milieudefensie's argument that it is allegedly "not required to demonstrate that Shell directly contributed to the damage due to its central policy."[123] This argument is simply incorrect. To assume any liability on the part of RDS in any event also requires that the challenged "central policy" resulted in the alleged damage. Finally, Milieudefensie suggests that RDS "knew – or should have known – that there was a disproportionately large risk of damage as a result of oil spills due to the fact that the IBIBIO-I well had still not been abandoned, even though it had not been in use for years." However, Milieudefensie wrongfully assumes that RDS was aware of (or should have realized) the specific condition of the IBIBIO 1 well near Ikot Ada Udo. RDS was not aware of this and was not required to be aware of this, either. Moreover, Milieudefensie wrongfully suggests that SPDC was required to abandon the IBIBIO 1 well.[124]

173. The District Court rightfully found that the business of RDS, on the one hand, and the business of SPDC, on the other, are not essentially the same "because the parent companies formulate general policy lines from The Hague and/or London and are involved in worldwide strategy and risk management, whereas SPDC is involved in the production of oil in Nigeria".[125] In the 2013 Motion to produce documents, Milieudefensie contests this finding to no avail by referring to Weir's opinion.[126] Milieudefensie and Weir fail to recognize that RDS itself did not and does not have any operational activities.[127]

Involvement

174. Finally, Milieudefensie also creates an incorrect picture regarding the involvement of RDS in respect of wells and well abandonment, safety measures and clean-up work. It argues that "specific targets" are set in the "annual Business Plans and related budgets". These are allegedly "approved by the parent company and checked for compliance." According to Milieudefensie,

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122 2013 Motion to produce documents, no. 81.

123 2013 Motion to produce documents, no. 48.

124 See the Rejoinder, no. 108.

125 Ground 4.31.

126 2013 Motion to produce documents, no. 37.

127 See the Rejoinder, nos. 32-42.

these plans "stipulate in detail how the operating companies will operate."[128] It also argues that: "Important choices regarding the problems in the Niger Delta, measures against the unsafe situation in this area, including measures against sabotage and *bunkering,* and the question regarding the efforts that SPDC had to make to remediate the contamination in the Niger Delta, are all choices that could not be made without involving the parent company. Within this dependency relationship, SPDC hardly had any room to make an independent consideration, in particular regarding these important subjects."[129]

175. This argument is also incorrect and lacks adequate substantiation. As Shell already explained in the first instance, RDS is not and was not involved in the details of the operations of SPDC.[130] These proceedings involve the question regarding whether the oil spill near Ikot Ada Udo was caused by sabotage, and whether SPDC responded adequately to the oil spill and remediated the affected area. Milieudefensie wrongfully assumes that there are business plans and budgets of SPDC that have been "approved" by RDS, which are so detailed that these plans and budgets contain information that may be helpful in answering these questions. Milieudefensie likewise wrongfully assumes that RDS was involved in SPDC's "choice" of whether or not to take measures against sabotage and *bunkering*, let alone in the decision regarding whether or not to make efforts or make means available to combat the contamination in the Niger Delta. The argument that a "dependency relationship" is involved within which SPDC "hardly had any room" to make an "independent consideration" is incorrect. Nor does Milieudefensie explain what "consideration" it has in mind here. To the extent that Milieudefensie wants to suggest that RDS prevented SPDC from doing what it had to do in any respect, that suggestion lacks each and every ground. In addition, Milieudefensie again gets no further than generalities: it fails to recognize that the issue in these proceedings is the oil spill that occurred near Ikot Ada Udo in 2006 and 2007, and not "the problems in the Niger Delta" in general.

Conclusion

176. What it comes down to is that based on DEPs and HSE Manuals, Milieudefensie gives a detailed explanation regarding "superior knowledge", "being aware of the circumstances near Ikot Ada Udo", or at least "in the Niger Delta" and SPDC's assumed "dependency relationship" with the "parent company", but it fails to indicate what specific knowledge and awareness of RDS was, in fact, involved that is relevant to the case at issue. Apparently, it hopes to discover this with the aid of the documents it claims access to.

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128 2013 Motion to produce documents, no. 42.

129 2013 Motion to produce documents, no. 82.

130 Rejoinder, nos. 39-49.

However, the right to the production of documents is not intended for this purpose. Milieudefensie's motion to produce documents comprises an inadmissible *fishing expedition*.

177. Superfluously it is noted that Milieudefensie's invocation of Weir's opinion, where he writes in a number of places that the English judge would proceed with the furnishing of evidence, cannot serve to support a right to the production of documents by virtue of Section 843a DCCP, of course.[131] On this point (as well), Dutch law differs too much from English law to take this opinion of Weir into account, whatever can be said of the accuracy of this opinion under English law.

178. Shell notes the following in response to the individual documents.

6.2 a. Business plans and reports (2004-2007)

179. In paragraph a., Milieudefensie claims access to "the annual business plans and monthly business reports in respect of maintenance, the environment and safety regarding the vicinity of Ikot Ada Udo and regarding *abandonment programs* in the three years prior to the oil spill of 2007". By way of explanation to its claim for access to the business plans, Milieudefensie submits that these business plans allegedly demonstrate the goals that were set in the area of maintenance and HSE "in consultation with the parent company", if and how those goals were met and to what extent budgetary measures were taken. Milieudefensie submits that this will enable them to demonstrate that "the parent company" had or should have had knowledge of the conditions in Nigeria and that it had a duty of care.[132] No explanation whatsoever is offered for the reason why Milieudefensie wants access to *abandonment programs*.

Documents were already claimed in the first instance; Milieudefensie must first put forward grounds for appeal against the District Court's decision dismissing its claim

180. This part of the claim already fails based on the fact that in the first instance, Milieudefensie already claimed the production of "annual policy plans" and "maintenance plans" and the "communication" regarding (the contents of) these documents between SPDC and RDS or its subsidiaries[133] and the District Court

131 See, for example, the 2013 Motion to produce documents, no. 38.

132 2013 Motion to produce documents, no. 89 (a), p. 54.

133 See the Motion to produce documents, no. 65 (xviii), where access is claimed to "documents regarding the years 1996-2008 and containing the annual work programs or business plans, the maintenance plans and the related budgets of Shell Nigeria" and no. 65 (xix), where access is claimed to "the reports or minutes of the meetings (in any form whatsoever) of Shell Nigeria's or, alternatively, the Joint Venture's operating committee in which the proposals

dismissed that claim.[134] Milieudefensie fails to explain that the currently claimed "annual business plans and monthly business reports in respect of maintenance, the environment and safety" do not fall into this category of documents that were claimed in the first instance. Milieudefensie cannot simply initiate the same claim again, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 9-19 above).

Documents have not been sufficiently concretely described

181. In addition, the requirement that the claimed documents must have been sufficiently defined has not been satisfied. There are no annual business plans or monthly business reports in respect of maintenance, the environment and safety regarding the vicinity of Ikot Ada Udo, let alone do these documents describe the goals that were set in the area of maintenance and HSE "in consultation with the parent company", if and how those goals were met and to what extent budgetary measures were taken by "the parent company". Nor does the 2013 Motion to produce documents demonstrate on what basis Milieudefensie assumes that these documents exist. The term "business plan" is mentioned in nos. 42, 45 and 65 of the 2013 Motion to produce documents, but it is not explained anywhere what specific documents Milieudefensie is referring to or based on which it assumes that business plans or monthly business reports exist specifically with respect to the vicinity of Ikot Ada Udo. The same is true for the *abandonment programs* to which Milieudefensie claims access. Milieudefensie fails to explain the documents from the period 2004-2007 it is referring to and what it means with *abandonment programs* in that scope. Moreover, Milieudefensie also fails to explain why it wants to examine or what it hopes to demonstrate with *abandonment programs* from the period 2004-2007 – even assuming that such programs exist.

No legitimate interest

182. Moreover, Milieudefensie lacks a legitimate interest in access to the documents claimed in paragraph a. The reasons for this are as follows.

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mentioned in par. xviii above were discussed and of the meetings (in any form whatsoever) in which decisions were made regarding these proposals and in which the proposals were approved, adopted or rejected." and no. 67 (xx), where access is claimed to "the communication regarding the (contents of the) documents specified in par. xviii above between Shell Nigeria on the one hand, and Shell plc or its subsidiaries established in the Netherlands or the United Kingdom, on the other. They also claim access to minutes of the meetings of the Executive Committee and/or the Board of Directors in which this communication and/or these documents have been discussed."

134 See the interlocutory judgment of 14 September 2011, grounds 4.10 (d) and (e), 4.11 and 4.12.

183. Milieudefensie submits that the documents allegedly demonstrate the goals that were set in the area of maintenance and HSE "in consultation with the parent company", if and how those goals were met and to what extent budgetary measures were taken by "the parent company". This argument is insufficient to substantiate the legitimate interest.

184. As stated before (see nos. 174-175 above), Milieudefensie incorrectly represents the involvement by RDS in respect of well maintenance and abandonment, safety measures and clean-up work regarding the oil spill near Ikot Ada Udo in 2006 and 2007. Moreover, it fails to specify which "goals" it believes were set "in consultation with the parent company" and which "budgetary measures" by the "parent company" it has in mind. What it comes down to is that Milieudefensie advances the unfounded submission that there are business plans and reports of SPDC that have been drawn up in consultation with RDS, which contain relevant information regarding the occurrence and clean-up of the oil spill at issue. No such business plans and reports exist. The assumption that RDS allegedly took "budgetary measures" in a manner that is relevant for the dispute between the parties regarding the occurrence of and cleaning up the oil spill at issue is just as unfounded. In respect of the *abandonment programs* it is pointed out in particular that any explanation of what Milieudefensie takes *abandonment programs* to means and why Milieudefensie wants to examine those documents is absent. Moreover, information regarding wells in Nigeria and decommissioning wells in Nigeria pre-eminently constitutes operational information that is not shared with RDS. For these reasons, Milieudefensie lacks a legitimate interest in production of the claimed documents. The documents that are covered by the description in paragraph a. do not contain any information regarding the oil spill at issue; they do contain an abundance of information regarding other subjects. Milieudefensie's argument in respect of the awareness on the part of RDS regarding the conditions in Nigeria in general is insufficient to substantiate the legitimate interest in the production of these documents, see nos. 168-173 above. In view of the contents of the dispute between the parties, Milieudefensie has no legitimate interest in documents that deal with subjects other than the oil spill at issue near Ikot Ada Udo in 2006 and 2007.

185. With regard to the access that Milieudefensie claims to documents that pertain to the period before 20 July 2005, it is pointed out in particular that documents dating from before that time cannot contribute to evidence of the knowledge of or interference by RDS regarding the situation in Nigeria alleged by Milieudefensie, given that RDS was only placed at the head of the group on 20 July 2005 at the earliest (see no. 153 above). Thus, there is no legitimate interest in access to documents from the period 2004 up to 20 July 2005 and the claim for access to those documents must be dismissed for this reason alone.

186. Moreover, Milieudefensie fails to explain why it allegedly has a legitimate interest in documents claimed here for "the three years prior to the oil spill of 2007". The 2013 Motion to produce documents does not offer any explanation whatsoever for why this particular period is allegedly relevant. The period of three years prior to the oil spill is apparently an arbitrary choice. This demonstrates all the more that the request to produce documents constitutes an unacceptable *fishing expedition*.

187. The argument in respect of the alleged "superior knowledge" and awareness on the part of "the parent company" and a "dependency relationship of SPDC" is insufficient to substantiate a legitimate interest in the production of the documents claimed in paragraph a.; see nos. 158-178 above.

Confidentiality

188. Finally, this part of the claim to produce documents fails based on the confidential nature of business plans and monthly reports (see nos. 148-149 above).

6.3 b. *Audit reports* and *follow-up*

189. In paragraph b., Milieudefensie claims access to the "most recent audit report at the time of the oil spill regarding maintenance (*asset integrity*) of SPDC, in particular regarding *wells* and *well abandonment*, as well as regarding the health, safety and environmental policy (including *Emergency and Oil Spill response*), including *findings* and *recommendations, approval and closeout of actions*". According to Milieudefensie, these documents show that "the parent company is extensively informed of the activities of its subsidiaries". With these documents, Milieudefensie wants to demonstrate that the parent company "was aware or should have been aware of the conditions in Nigeria and that it had a duty of care".

Documents were already claimed in the first instance; Milieudefensie must first put forward grounds for appeal against the District Court's decision dismissing its claim

190. The claim already fails based on the fact that in the first instance, Milieudefensie already claimed the production of "all (management) reports and other communication between Shell Nigeria (alternatively the Joint Venture) on the one hand, and the Executive Committee and/or the Board of Directors and/or Shell International Exploration and Production B.V., on the other, regarding oil spills in the Niger Delta in the period 1996-2008 and regarding the oil spill from the wellhead near Ikot Ada Udo from 2006 in particular"[135] and the

[135] See the Motion to produce documents, no. 67 (xxi).

District Court dismissed that claim.[136] Milieudefensie fails to explain that the currently claimed "audit reports", including *findings* and *recommendations, approval and closeout of actions*" allegedly do not fall into this category of documents that were claimed in the first instance. Milieudefensie cannot simply initiate the same claim again, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 9-19 above).

Documents do not exist or do not pertain to the oil spill at issue

191. In addition, there are no "audit reports" that satisfy the description in paragraph b. In nos. 66 and following of the 2013 Motion to produce documents, Milieudefensie refers to "audits" that are conducted "at several levels". It infers this from the "Standard: HSSE Auditing" document that it submitted as Exhibit N9. The document in question dates from 2009 and for that reason alone, it is not clear what its relevance is for the case at issue. In and of itself it is correct that within the Royal Dutch Shell Group, compliance with the HSSE policy is monitored by means of audits,[137] but this does not mean that there allegedly is an audit report regarding "wells and well abandonment" or regarding the *Emergency and Oil Spill response*, including *findings* and *recommendations, approval and closeout* of the oil spill at issue near Ikot Ada Udo. Moreover, the fact that Milieudefensie claims the "most recent audit report at the time of the oil spill (…)" already demonstrates that it does not know the specific report to which it is claiming access. In this respect, as well, the request to produce documents constitutes an unacceptable *fishing expedition*.

No legitimate interest

192. Moreover, there is no legitimate interest in this part of the claim, as well. Milieudefensie does not establish any concrete relationship between the alleged contents of the claimed documents and their argument regarding the liability of RDS for the oil spill at issue, let alone does Milieudefensie substantiate that and how the claimed documents might contain evidence of an argument it must prove in order to see its claims against Shell regarding the oil spill at issue awarded.

193. To the extent that the documents claimed in paragraph b are claimed in view of the claims in the main action against RDS, Milieudefensie's argument regarding awareness on the part of RDS of the conditions in Nigeria in general is insufficient to substantiate the legitimate interest in the production of these documents, see nos. 168-173 above.

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136 See the interlocutory judgment of 14 September 2011, grounds 4.10 (d) and (e), 4.11 and 4.12.

137 See the Rejoinder, no. 45.

194. In view of the contents of the dispute between the parties, Milieudefensie has no legitimate interest in documents that deal with subjects other than the oil spill at issue near Ikot Ada Udo in 2006 and 2007.

Confidentiality

195. Finally, the claim in paragraph b. fails based on Section 843a (4) DCCP, given that an audit report regarding *asset integrity* (in as far as such a report exists) contains confidential business information, in the sense that this information is not intended to become public.

6.4 c. *Assurance letters* (2004-2007)

196. In paragraph c., Milieudefensie claims access to the *assurance letters* from the three years prior to the oil spill of 2007. According to Milieudefensie, the operating companies must indicate in these *assurance letters* "that and how they complied with the Group's health, safety and environmental (HSE) policy". Milieudefensie submits that the *assurance letters* show that "the parent company was aware of the conditions in Nigeria and SPDC's health, safety and environmental management". Milieudefensie believes that these documents can be used to demonstrate that "the parent company" had a duty of care.[138]

Documents were already claimed in the first instance; Milieudefensie must first put forward grounds for appeal against the District Court's decision dismissing its claim

197. The claim already fails based on the fact that in the first instance, Milieudefensie already claimed the production of these documents[139] and the District Court dismissed that claim.[140] Milieudefensie cannot simply initiate the same claim again, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 9-19 above).

No legitimate interest

198. In addition, there is no legitimate interest in access to the *assurance letters*, given that the *assurance letters* pertain to compliance with the HSSE policy in general and do not regard specific oil spills.

199. RDS was not aware of the condition of the IBIBIO 1 well near Ikot Ada Udo, the oil spill that occurred at that location in 2006 and 2007 or cleaning up and

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138 2013 Motion to produce documents, no. 144 (c), p. 51.

139 See the Motion to produce documents, no. 77 (xxii), claiming access to "the assurance letters from Shell Nigeria to the Executive Committee for the period 1996-2008".

140 See the interlocutory judgment of 14 September 2011, grounds 4.10 (e), 4.11 and 4.12.

remediating the consequences of this oil spill. Milieudefensie's argument in respect of awareness of RDS regarding the conditions in Nigeria in general is insufficient to substantiate the legitimate interest in the production of these documents, see nos. 168-173 above. In view of the contents of the dispute between the parties, Milieudefensie has no legitimate interest in documents that deal with oil spills or issues other than the oil spill at issue near Ikot Ada Udo in 2006 and 2007.

200. Moreover, there is no legitimate interest in this part of the claim, either, because Milieudefensie fails to establish a concrete relationship between the alleged contents of the claimed documents and its arguments regarding the liability of RDS for the oil spill at issue, let alone does Milieudefensie substantiate that and how the claimed documents might contain evidence of an argument it must prove in order to see its claims against RDS regarding the oil spill at issue awarded.

201. With regard to the access that Milieudefensie claims to documents that pertain to the period before 20 July 2005, it is noted in particular that documents from before that time cannot contribute to evidence of the awareness of or interference by RDS regarding the situation in Nigeria alleged by Milieudefensie, given that RDS was only placed at the head of the group on 20 July 2005 at the earliest (see no. 153 above). Thus, there is no legitimate interest in access to documents from the period 2004 up to 20 July 2005 and the claim for access to those documents must be dismissed for this reason alone.

202. Finally, once again, Milieudefensie fails to explain why it allegedly has a legitimate interest in assurance letters "from the three years prior to the oil spill of 2004 [2007 is probably meant here]". The 2013 Motion to produce documents does not offer any explanation whatsoever for why this particular period is allegedly relevant. The period of three years prior to the oil spill is apparently an arbitrary choice. This demonstrates all the more that the request to produce documents constitutes an unacceptable *fishing expedition*.

Confidentiality

203. Finally, this part of the claim fails based on the fact that the assurance letters contain confidential business information.

6.5 d. *Reports of Significant Incidents and High Potential Incidents* (2004-2007)

204. In paragraph d., Milieudefensie claims access to "the *Significant Incidents* and *High Potential Incidents* reported by SPDC within a radius of 200 kilometers around Ikot Ada Udo as well as regarding abandoned wells in the Niger Delta in

the three years prior to the oil spill of 2007". Milieudefensie is referring to "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". According to Milieudefensie, these documents show that the parent company was aware of these special risks in Nigeria, so that it can be demonstrated that it had a duty of care.[141]

Documents were already claimed in the first instance; Milieudefensie must first put forward grounds for appeal against the District Court's decision dismissing its claim

205. The claim already fails based on the fact that in the first instance, Milieudefensie already claimed access to "all (management) reports and other communication between Shell Nigeria (alternatively the Joint Venture) on the one hand, and the Executive Committee and/or the Board of Directors and/or Shell International Exploration and Production B.V., on the other, regarding oil spills in the Niger Delta in the period 1996-2008 and regarding the oil spill from the wellhead near Ikot Ada Udo from 2006 in particular"[142] and the District Court dismissed that claim.[143] Milieudefensie fails to explain that the currently claimed "*Significant Incidents* and *High Potential Incidents* reported by SPDC within a radius of 200 kilometers around Ikot Ada Udo as well as regarding abandoned wells in the Niger Delta in the three years prior to the oil spill of 2007" allegedly do not fall into this category of documents that were claimed in the first instance. Milieudefensie cannot simply initiate the same claim again, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 9-19 above).

No legitimate interest

206. In addition, there is no legitimate interest in the documents claimed in paragraph d., because these do not regard the oil spill at issue, but do regard a number of other oil spills not at issue in these proceedings. Milieudefensie's argument regarding awareness on the part of RDS of the conditions in Nigeria in general is insufficient to substantiate the legitimate interest in the production of these documents, see nos. 168-173 above. In view of the contents of the dispute between the parties, Milieudefensie has no legitimate interest in documents that deal with oil spills other than the oil spill at issue from the IBIBIO 1 well near Ikot Ada Udo in 2006 and 2007. For this reason alone, the claim for access to reported incidents within "a radius of 200 kilometers around

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141 2013 Motion to produce documents, no. 89 (d).

142 See the Motion to produce documents, no. 67 (xxi).

143 See the interlocutory judgment of 14 September 2011, grounds 4.10 (d) and (e), 4.11 and 4.12.

Ikot Ada Udo", as well as "regarding abandoned wells in the Niger Delta" must be dismissed, apart from the fact that "the radius of 200 kilometers around Ikot Ada Udo" obviously is a random choice.

207. Moreover, there is no legitimate interest in this part of the claim, as well, because Milieudefensie fails to establish a concrete relationship between the alleged contents of the claimed documents and its arguments regarding the liability of RDS for the oil spill at issue, let alone does Milieudefensie substantiate that and how the claimed documents might contain evidence of an argument it must prove in order to see its claims against RDS regarding the oil spill at issue awarded.

208. To the extent that Milieudefensie seeks this broad description of documents to obtain documents in which the oil spill at issue is reported to the "parent company", it is pointed out that the oil spill at issue does not fall within the "incidents with serious consequences" category that Milieudefensie obviously has in mind. As Shell already explained in the first instance,[144] in view of the relatively minor scope, the oil spill of 2007 near Ikot Ada Udo was not reported to RDS and/or Malcom Brinded as a "serious environmental incident". Malcom Brinded was informed of the oil spill from 2007 in a completely different way and for a completely different purpose – i.e. only due to the possibility that on 7 November 2007, the international press would pay attention to a motion of the Nigerian Senate. The oil spill from the IBIBIO 1 well was too minor to justify any interference by RDS. In conformance with the guidelines in force, the volume of oil that flowed out of the IBIBIO 1 well as a result of the oil spill was included in an aggregated quarterly report, in which the oil spill from the IBIBIO 1 well cannot be identified as such. Shell contended and substantiated this in the first instance.[145] Milieudefensie did not advance a (substantiated) challenge against those arguments.

209. Moreover, Milieudefensie's arguments in the 2013 Motion to produce documents regarding reporting oil spills to "the parent company" are incorrect. In no. 78 of the 2013 Motion to produce documents, a table is cited from an *HSE Manual* from October 1995 (Exhibit N8), from which it infers that in view of its scope (629 barrels or approximately 24,000 liters), the subject oil spill allegedly qualifies as a *severity 5* incident with a "*massive environmental effect*". According to Milieudefensie, "the guideline" – it is apparently referring to the "*Incident Investigation and Learning*" document from March 2009 that has been submitted as Exhibit N10 – demonstrates that such an incident must be reported within 24 hours as a "*significant incident*", *inter alia* to the Group HSSE VP.

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144 See the Rejoinder, no. 34.

145 See, *inter alia*: the Rejoinder, no. 38.

210. Milieudefensie's interpretation of the parts of Exhibits N8 and N10 it cited is incorrect. First of all, Milieudefensie wrongfully fails to recognize that Exhibit N8 dates from 1995, whereas Exhibit N10 dates from 2009. Secondly, Milieudefensie fails to recognize that the table it cited from Appendix V of Exhibit N8 is only an "example of further definition of consequence – severity rating for risk matrix" (see the table's title). See also p. 22 of Exhibit N8: "The above matrix gives an indication of risk tolerability but this should relate to the operation under consideration. An example of how the matrix can be further defined for a particular operation is included in Appendix V." Thus, the values presented in the table have only been included by way of *example*. This is demonstrated by the fact that it is obvious that an oil spill of the magnitude as the one near Ikot Ada Udo does not satisfy the definition of a *severity 5* incident listed in the table, i.e. an incident with "*International public attention; extensive negative attention in international media and national/international politics; potential to harm access to new areas, grants of licenses and/or tax legislation; concerted pressure by action groups; adverse effects in Opcos [operating companies] in other countries*".

211. With regard to the access that Milieudefensie claims to documents that pertain to the period before 20 July 2005, it is noted in particular that documents dating from before that time cannot contribute to evidence of the awareness of or interference by RDS in respect of the situation in Nigeria alleged by Milieudefensie, given that RDS was only placed at the head of the group on 20 July 2005 at the earliest (see no. 153 above). Thus, there is no legitimate interest in access to documents from the period 2004 up to 20 July 2005 and the claim for access to those documents must be dismissed for this reason alone.

212. Again, Milieudefensie fails to explain why it allegedly has a legitimate interest in documents as claimed here "from the three years prior to the oil spill of 2007". The 2013 Motion to produce documents does not offer any explanation whatsoever for why this particular period is allegedly relevant. The period of three years prior to the oil spill is apparently an arbitrary choice. This demonstrates all the more that the request to produce documents constitutes an unacceptable *fishing expedition*.

6.6 e. *Incident report*, *investigation report* and *review*

213. In paragraph e., Milieudefensie claims access to "the incident report regarding the oil spill in 2004 prepared based on the guideline mentioned above, as well as the *investigation report* and *review*". Milieudefensie writes 2004, but is apparently referring to the oil spill in 2006 and 2007 here. With "the guideline mentioned above", Milieudefensie obviously refers to the report that was

allegedly prepared because the oil spill at issue falls within the "incidents with serious consequences" category (see no. 205 above).

Documents were already claimed in the first instance; Milieudefensie must first put forward grounds for appeal against the District Court's decision dismissing its claim

214. The claim already fails based on the fact that in the first instance, Milieudefensie already claimed access to "all (management) reports and other communication between Shell Nigeria (alternatively the Joint Venture) on the one hand, and the Executive Committee and/or the Board of Directors and/or Shell International Exploration and Production B.V., on the other, regarding oil spills in the Niger Delta in the period 1996-2008 and regarding the oil spill from the wellhead near Ikot Ada Udo from 2006 in particular"[146] and the District Court dismissed that claim.[147] Milieudefensie fails to explain that the currently claimed "*incident report* regarding the oil spill in 2004 [2007 is probably meant here], as well as the *investigation report* and the *review*" allegedly do not fall into this category of documents that were claimed in the first instance. Milieudefensie cannot simply initiate the same claim again, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 9-19 above).

Documents do not exist or do not pertain to the oil spill at issue

215. In addition, the subject part of the claim cannot be awarded because – as stated before – Milieudefensie wrongfully assumes that the oil spill at issue falls into the "incidents with serious consequences" category (see no. 209 above).

6.7 f. Minutes

216. In paragraph f., Milieudefensie claims access to "the minutes of the (*Executive Committee*, formerly called the *Committee of Managing Directors* and/or the *Board of Directors* of the) parent company regarding the categories mentioned under b, d and e", i.e. regarding, in brief, the audit reports (b), the reports of *significant incidents* and *high potential incidents* (d) and the *incident* and *investigation report* (e). According to Milieudefensie, these documents show "that the parent company had knowledge of the high-risk conditions in Nigeria and sometimes actively interfered in its subsidiary". Milieudefensie wants to use these documents to demonstrate that "the parent company" had a duty of care.

146 See the Motion to produce documents, no. 67 (xxi).

147 See the interlocutory judgment of 14 September 2011, grounds 4.10 (d) and (e), 4.11 and 4.12.

Documents were already claimed in the first instance; Milieudefensie must first put forward grounds for appeal against the District Court's decision dismissing its claim

217. The claim already fails based on the fact that in the first instance, Milieudefensie already claimed access to these minutes.[148] To the extent that the claim pertains to minutes regarding the *asset integrity* audit report claimed in paragraph b., the claim corresponds to part (xx) of the claim that was initiated in the first instance.[149] In the first instance, Milieudefensie claimed access to the minutes of meetings of, *inter alia*, the Executive Committee in which the work programs, maintenance programs and budgets of the Joint Venture were discussed. Milieudefensie wanted to use these documents to demonstrate that RDS has or had knowledge of and control over SPDC's activities in respect of oil spills in the Niger Delta (specifically near Ikot Ada Udo in 2006 and 2007). Given that the similar claim in the first instance was dismissed,[150] Milieudefensie cannot simply initiate the same claim again, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 9-19 above).

Documents do not exist or do not pertain to the oil spill at issue

218. This part of the claim for the production of documents further fails based on the fact that there are no minutes of the "parent company" regarding the documents mentioned in paragraphs b., d. and e. which contain anything regarding the oil spill at issue. As already explained, the oil spill near Ikot Ada Udo in 2006 and 2007 was not reported to the "parent company" (see nos. 205 and 214 above); nor are there any audit reports that pertain to this oil spill (see no. 191 above).

No legitimate interest

219. To the extent that Milieudefensie wants to use the claimed documents to demonstrate that "the parent company had knowledge of the high-risk conditions in Nigeria and sometimes actively interfered in its subsidiary", it is pointed out that Milieudefensie's argument in respect of awareness of RDS

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148 See the Motion to produce documents, no. 67 (xx).

149 See the Motion to produce documents, no. 67 (xx), where access was claimed to "the communication regarding the (contents of the) documents specified in par. xviii above [the annual work programs, the maintenance programs and the related budgets of the Joint Venture] between Shell Nigeria on the one hand, and Shell plc or its subsidiaries established in the Netherlands or the United Kingdom, on the other" and also to "minutes of the meetings of the Executive Committee and/or the Board of Directors in which this communication and/or these documents have been discussed".

150 See the interlocutory judgment of 14 September 2011, grounds 4.10 (d) and (e), 4.11 and 4.12.

regarding the conditions in Nigeria in general is insufficient to substantiate any legitimate interest in the production of documents, see nos. 168-173 above. In view of the contents of the dispute between the parties, Milieudefensie has no legitimate interest in documents that deal with oil spills or issues other than the oil spill at issue near Ikot Ada Udo in 2006 and 2007.

220. Moreover, there is no legitimate interest in this part of the claim, either, because Milieudefensie fails to establish a concrete relationship between the alleged contents of the claimed documents and their arguments regarding the liability of RDS for the oil spill at issue, let alone does Milieudefensie substantiate that and how the claimed documents might contain evidence of an argument it must prove in order to see its claims against RDS regarding the oil spill at issue awarded.

221. With regard to the access that Milieudefensie claims to documents that pertain to the period before 20 July 2005, it is noted in particular that documents dating from before that time cannot contribute to evidence of awareness of or interference by RDS regarding the situation in Nigeria as alleged by Milieudefensie, given that RDS was only placed at the head of the group on 20 July 2005 at the earliest (see no. 153 above). Thus, there is no legitimate interest in access to documents from the period 2004 up to 20 July 2005 and the claim for access to those documents must be dismissed for this reason alone.

222. Again, Milieudefensie fails to explain why it allegedly has a legitimate interest in documents as claimed here for the period "of the three years prior to the oil spill of 2007". The 2013 Motion to produce documents does not offer any explanation whatsoever for why this particular period is allegedly relevant. The period of three years prior to the oil spill is apparently an arbitrary choice. This demonstrates all the more that the request to produce documents constitutes an unacceptable *fishing expedition*.

Confidentiality

223. Finally, by their nature, the minutes that Milieudefensie has in mind here contain confidential business information. Minutes of the "board of the parent company" (in Milieudefensie's words) do not contain any information regarding the oil spill at issue; these minutes do contain – strictly confidential – information on subjects that have nothing whatsoever to do with the subject dispute. Against the background of the fact that Milieudefensie fails to specify the information that it believes it will find in the minutes in question to substantiate its claims against RDS, this confidentiality constitutes serious reasons in the sense of Section 843a (4) DCCP, based on which the claim for access to or submission of these documents must be dismissed.

7 INTERIM APPEAL IN CASSATION; NO DECLARATION OF PROVISIONAL ENFORCEABILITY

224. Shell requests that the Court of Appeal allows an interim appeal in cassation in the - unlikely - event that any part of Milieudefensie's claims for the production of documents is awarded. To substantiate this request, Shell points out the following.

225. In the event that appeal in cassation against a ruling in favor of Milieudefensie in this motion can only be initiated together with the final ruling (or a later interlocutory ruling that can be appealed in cassation), the cassation proceedings, in fact, no longer have any meaning, because in that case, Milieudefensie will already have obtained access to the relevant documents. For this reason, Shell believes that there is sufficient reason to allow an interim appeal in cassation to be initiated against a ruling in favor of Milieudefensie in this motion. This also prevents Shell from being placed in a relatively more unfavorable position in respect of the situation in which Milieudefensie would have initiated the claim to produce documents in separate interlocutory proceedings.[151] For that same reason, Shell requests that the Court of Appeal does not declare any ruling in favor of Milieudefensie provisionally enforceable.

[151] Cf. S.M. Kingma, TCR 2010/1, p. 3 and the Court of Appeal of Den Bosch 23 October 2007, LJN BB6845.

8 CONCLUSION

In view of the above, Shell moves that the Court of Appeal, in a ruling that is declared provisionally enforceable to the extent possible:

(i) declares that the Dutch court has no jurisdiction over the claims against SPDC;

(ii) declares Milieudefensie's claims in the motion inadmissible, or at least dismisses those claims;

(iii) orders Milieudefensie to pay the costs of the proceedings, stipulating that these costs must be paid within fourteen days after the ruling to be rendered in the case at issue, failing which Milieudefensie will be in default by operation of law.

Attorney

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Overview of case documents in the proceedings of Milieudefensie and Akpan / RDS and SPDC in the first instance
(currently case number: 200.126.849)

Case documents	Date	Exhibits
Summons	27 April 2009	A.1 - J.10
Motion for the court to decline jurisdiction and transfer the case and *lis pendens* motion, also conditional statement of defense in the main action	28 October 2009	1 - 19
Statement of defense in the jurisdiction motion and the *lis pendens* motion	25 November 2009	-
Statement of reply in the jurisdiction motion	13 January 2010	20 and 21
Statement of rejoinder in the jurisdiction motion	27 January 2010	-
Judgment of the District Court of The Hague in the jurisdiction motion	24 February 2010	-
Statement of reply in the *lis pendens* motion	8 September 2010	22
Statement of rejoinder in the *lis pendens* motion	20 October 2010	-
Judgment of the District Court of The Hague in the *lis pendens* motion	1 December 2010	-
Motion to produce documents	12 January 2011	-
Statement of defense in the motion by virtue of Section 843a DCCP	23 February 2011	23 - 26
Statement of reply in the motion to produce documents by virtue of Section 843a DCCP	23 March 2011	-
Statement of rejoinder in the motion by virtue of Section 843a DCCP	20 April 2011	27 - 29
Document for submitting exhibits	19 May 2011	30 and 31
Document for submitting exhibits in the motion to produce documents by virtue of Section 843a DCCP	19 May 2011	B.11
Further document submitting exhibit	19 May 2011	32
Written pleadings of attorneys M.J.G. Uiterwaal and Ch. Samkalden in the motion to produce documents by virtue of Section 843a DCCP	19 May 2011	-

Written pleadings in the motions by virtue of Section 843 DCCP of attorney J. de Bie Leuveling Tjeenk	19 May 2011	-
Judgment	14 September 2011	-
Statement of reply, also document containing a change of claim	14 December 2011	L.1 - L.11
Statement of rejoinder	14 March 2012	33 - 35
Document for submitting exhibits, also document containing a change of (the basis of the) claim	11 September 2012	M.1 - M.11
Document for submitting exhibit	12 September 2012	M.12
Document for submitting exhibits	11 October 2012	36
Written pleadings of Akpan	11 October 2012	-
Written pleadings of Shell	11 October 2012	-
Judgment	30 January 2013	-