

Court of Appeal of The
Hague
Case numbers: 200.126.834
and 200.126.804
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:

in the case with number 200.126.834:

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.,

in the case with number 200.126.804:

1. the public limited company **SHELL PETROLEUM N.V.** ("SPNV"), with registered office in The Hague,
 2. the legal entity organized under the laws of the United Kingdom **THE 'SHELL' TRANSPORT AND TRADING COMPANY LTD.** ("Shell Transport"), with registered address in London, United Kingdom,
- respondents in the main action,
defendants in the motion,
attorney: J. de Bie Leuveling Tjeenk, LL.M.,

v e r s u s:

in both cases:

1. **FIDELIS AYORO OGURU** ("Oguru"),
residing in Oruma, Bayelsa State, Federal Republic of Nigeria;
 2. **ALALI EFANGA** ("Efanga"),
residing in Oruma, Bayelsa State, Federal Republic of Nigeria;
 3. the association with corporate personality
VERENIGING MILIEUDEFENSIE ("Milieudefensie"),
established in Amsterdam,
plaintiffs in the motion,
appellants,
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, Milieudéfensie et al. 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 Milieudéfensie et al. are inadmissible (see Chapter 2 below). In the first instance, Milieudéfensie et al. 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 Milieudéfensie et al.'s claims are inadmissible. Instead of initiating new claims to produce documents, Milieudéfensie et al. (if they wish to do so) must submit their 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 4);
 - (b) Milieudéfensie's claims by virtue of Section 3:305a DCC are inadmissible (see Chapter 5); and
 - (c) Oguru's and Efanga's right of action has not been proven (see Chapter 5).
4. Chapter 3 briefly sets out the legal basis of Milieudéfensie et al.'s claims in the main action. This is both relevant for assessing the question regarding whether the Dutch court has jurisdiction over SPDC, and for answering the question regarding the legitimate interest in the production of documents.
5. Shell has also conducted the defenses referred to in paragraphs (a) through (c) above in the first instance. The District Court has dismissed these defenses. In the event that the Court of Appeal rules that Milieudéfensie et al.'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, Milieudéfensie et al. could not be successful, because the District Court dismissed the (largely 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, the admissibility of Milieudéfensie's claims by virtue of Section 3:305a DCC and Oguru's and Efanga's right of action). 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

6. In addition to the "preliminary" defenses referred to above, in Chapters 6 through 8, Shell conducts a further substantive defense against the claims to produce documents.
7. In Chapter 9, 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.
8. 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 Milieudéfensie et al. submitted in the statement in the motion, unless this statement on appeal demonstrates that Shell acknowledges the accuracy of any argument of Milieudéfensie et al. Shell submits the complete case file of the first instance into the proceedings, both in the case against RDS and SPDC (case number 200.126.834), and in the case against Shell Transport and SPNV (case number 200.126.804). Overviews of the two case files are included on pages 105 - 106.
9. The following definitions are used in this statement on appeal:

Motion to produce documents on the part of Milieudéfensie et al. dated 13 September 2013 = 2013 Motion to produce documents

Milieudéfensie et al. = the appellants (Oguru, Efanga and Milieudéfensie)

Oguru = Fidelis Ayoro Oguru

Efanga = Alali Efanga

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

Milieudefensie = Vereniging Milieudefensie

Shell = the respondents (RDS, SPDC, SPNV and Shell Transport)

RDS = Royal Dutch Shell Plc.

SPDC = The Shell Petroleum Development Company of Nigeria Ltd.

Shell Transport = The 'Shell' Transport and Trading Company Ltd.

the Koninklijke = N.V. Koninklijke Nederlandsche Petroleum Maatschappij. The abbreviation "the Koninklijke" is used in this statement on appeal to refer to the substantive party to the proceedings (meaning the Koninklijke as the legal predecessor by universal title of SPNV).

SPNV = Shell Petroleum N.V. The abbreviation "SPNV" is used in this statement on appeal to refer to the formal party to the proceedings (meaning SPNV as the legal successor by universal title of the Koninklijke) on the one hand and, on the other, to refer to SPNV as *Group Holding Company* (see no. 180 below)

SPCo = Shell Petroleum Company Ltd.

2 CLAIMS IN THE MOTION TO PRODUCE DOCUMENTS ARE INADMISSIBLE

10. In the first instance, Milieudéfensie et al. 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, Milieudéfensie et al. (if they wish to do so) must submit their claims to produce documents to the Court of Appeal by means of grounds for appeal seeking to challenge that interlocutory judgment. In this motion, Milieudéfensie et al. largely claim access to the same documents to which they claimed access in the first instance (see nos. 207, 217, 225, 232, 241, 244 and 255 below). To the extent that on appeal, Milieudéfensie et al. are claiming documents other than the ones they claimed in the first instance, they can modify their claim to this end in the Statement of Appeal. Once again initiating claims to produce documents constitutes a disguised appeal against the interlocutory judgment in the motion to produce documents. Consequently, Milieudéfensie et al.'s subject claims to produce documents are inadmissible.
11. 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.
12. 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 Milieudéfensie et al. the opportunity to *again* initiate

their claims for the production of documents on appeal, outside the grounds for appeal.

13. 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 Milieudéfensie et al. have not directed any grounds for appeal against that judgment. This is also acknowledged by Milieudéfensie et al. themselves: "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, Milieudéfensie et al. wrongfully conclude based on this correct observation that they "in fact, do not have any option other than to once again file a motion." Milieudéfensie et al. fail 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.
14. What Milieudéfensie et al. essentially argue is that prior to submitting the grounds for appeal, they must be able to initiate a new motion by virtue of Section 843a DCCP, because without the documents they are allegedly unable to formulate any grounds for appeal. In so doing, they fail 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 Milieudéfensie et al. 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."

15. The "funnel-shaped model" mentioned in the passage cited above demands that on appeal, Milieudéfensie et al. further work out their arguments before they are entitled to any production of documents. They must do so in a

² 2013 Motion to produce documents, no. 18.

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

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, Milieudéfensie et al. have chosen a route that is inappropriate for appellate procedural law.

16. As stated before, in this case, no special circumstances are involved that justify Milieudéfensie et al. initiating this new motion. In the 2013 Motion to produce documents, Milieudéfensie et al. essentially do not advance anything new in relation to their arguments in the first instance. They submit the same – inadequate – basis for their claims and largely claim the same documents, for the same purpose as in the first instance. In contrast to what Milieudéfensie et al. argue,⁴ the fact that their claims were dismissed in the final judgment of 30 January 2013 does not mean that now they allegedly do have a legitimate interest in the claimed documents. The District Court found Milieudéfensie et al.'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.
17. Milieudéfensie et al. explicitly leave 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 Milieudéfensie et al.'s subject claims for the production of documents are held to be admissible, they 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 Milieudéfensie et al. are 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 Milieudéfensie et al. spreading their grounds for appeal over two or more different case documents.

⁴ See the 2013 Motion to produce documents, no. 16.

⁵ 2013 Motion to produce documents, no. 5.

18. In the 2013 Motion to produce documents, Milieudéfensie et al. themselves indicate that "they still want to be given the opportunity to set out their grounds for appeal against the final judgment".⁶ They also want to leave open the possibility to direct grounds for appeal against the interlocutory judgment of the District Court of 14 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.
19. 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 Milieudéfensie et al. – Milieudéfensie et al.'s claims in the motion are inadmissible. This applies in any event in as far as in this new motion, Milieudéfensie et al. claim the production of the same documents they claimed in the first instance.
20. In the event that the Court of Appeal rules that Milieudéfensie et al.'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, Milieudéfensie et al. could not be successful, because the District Court dismissed the (largely 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, the admissibility of Milieudéfensie's claims by virtue of Section 3:305a DCC and Oguru's and Efanga's right of action). 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

⁶ 2013 Motion to produce documents, no. 7.

⁷ 2013 Motion to produce documents, no. 5.

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

3 LEGAL BASES OF THE CLAIMS IN THE MAIN ACTION

21. This chapter briefly sets out the legal bases of Milieudefensie et al.'s claims in the main action. This is relevant both for assessing the question regarding whether the Dutch court has jurisdiction over SPDC and the question regarding the legitimate interest in the production of documents.
22. Milieudefensie et al. gradually developed the legal bases of their claims in the course of the proceedings in the first instance. In the Initiatory writs of summons, they argued that the cases were allegedly governed by Dutch law.⁹ After the District Court had ruled in the interlocutory judgment in the jurisdiction motion of 14 September 2011 that Milieudefensie et al.'s claims are governed by Nigerian law, in the Statement of Reply, Milieudefensie et al. tried to substantiate their claims according to Nigerian law. In that scope, they invoked four different common law torts: *negligence*, *nuisance*, *trespass to chattel* and the *Rule in Rylands v. Fletcher*. The legal opinions of Professor Duruigbo – submitted in the first instance on the occasion of the pleadings in the main action – also address Section 11(5)(a) to (c) of the Nigerian Oil Pipelines Act ("**OPA**"),¹⁰ but, as Milieudefensie et al. rightfully note: "The *statutory duties* have largely been disregarded during the proceedings in the first instance."¹¹ On appeal, in the 2013 Motion to produce documents, Milieudefensie et al. for the first time explicitly invoke Section 11(5)(a) to (c) OPA,¹² as well as duties of care that allegedly follow from *common law*.¹³ Milieudefensie et al. have apparently worked out the legal basis of their claims based on the District Court's final judgment, in which the District Court extensively discusses Section 11(5)(a) to (c) OPA.¹⁴
23. Of all these different bases, only Section 11(5)(c) OPA is specifically designed for the right to compensation due to an oil spill. This provision reads:

"The holder of a license shall pay compensation (...) to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good. If the amount of such compensation is not agreed between any such person and the holder, it shall be fixed by a court in accordance with Part iv of this Act."

⁹ Initiatory writs of summons, no. 19.

¹⁰ Exhibit M1 to the document of 11 September 2002, pp. 39-41.

¹¹ 2013 Motion to produce documents, no. 23.

¹² 2013 Motion to produce documents, nos. 29-35.

¹³ 2013 Motion to produce documents, nos. 36-64.

¹⁴ Grounds 4.43-4.45.

24. Section 11(5)(c) OPA comprises "strict liability" on the part of the license holder of the pipeline where the leak occurred, in the case at issue SPDC. Thus, the license holder's liability is not based on breach of a duty of care. Also according to Milieudefensie et al: "to assume *strict liability* there is no need to determine whether or not a duty of care has been breached".¹⁵ SPDC is liable by law, unless the oil spill is the result of the plaintiff's *own default*, or *a malicious act of a third party*. Thus, Milieudefensie et al.'s wish to use the claimed documents to demonstrate that SPDC had a duty of care and that SPDC breached its duty of care cannot constitute a legitimate interest in the production of documents.
25. One example of a liberating circumstance is sabotage. The burden of proof that the oil spill was caused by a liberating circumstance such as sabotage falls on the license holder. The District Court rightfully concluded that it had been proven that the oil spill at issue was caused by sabotage.¹⁶ For the sole reason that the liability based on Section 11(5)(c) OPA involves strict liability, it is not obvious that if the invocation of Section 11(5)(c) OPA is unsuccessful, Milieudefensie et al. could be successful with one of the other bases. Milieudefensie et al. apparently believe that SPDC might be liable on another basis, even if it is established that the oil spill was caused by sabotage. In other words, Milieudefensie et al. advance these other bases to circumvent SPDC's sabotage defense. For example, Milieudefensie et al. also base their claims on the fact that SPDC allegedly has a duty of care to prevent sabotage and that SPDC allegedly breached that duty of care.
26. As Milieudefensie et al. rightfully acknowledge,¹⁷ the decision of whether SPDC's statutory obligation to protect its pipelines (see Section 11(5)(b) OPA), also comprises the obligation to take measures against sabotage will only be taken in the main action. This question can be left aside in this motion. It is pointed out that in this scope, Milieudefensie et al. wrongfully argue that it is up to "Shell" to prove that it took sufficient measures to protect the pipeline near Oruma. It is not clear that in the scope of Section 11(5)(b) OPA, the burden of proof falls on the defendant, even apart from the fact that this provision does not entail any duty of care to protect the pipeline from sabotage. Where Section 11(5)(c) OPA provides explicit liability on the part of the license holder for oil spills in which sabotage is a liberating defense, this liberating defense cannot be undermined by reading a duty of care to prevent sabotage in Section 11(5)(b) OPA.
27. In the main action, Shell will argue that under Nigerian law, SPDC's liability to pay compensation on account of the oil spill from the pipeline near Oruma must

¹⁵ 2013 Motion to produce documents, no. 120.

¹⁶ Final judgment, ground 4.27.

¹⁷ 2013 Motion to produce documents, no. 34.

be exclusively assessed based on Section 11(5)(c) OPA. These are exhaustive provisions regulating the liability regime for damage caused by oil spills and does not leave any room to find that SPDC is liable to pay compensation based on one of the common law torts, such as *negligence*, *nuisance*, *trespass to chattel* or the *rule in Rylands v. Fletcher*.

28. In addition, in the main action Shell will argue that the District Court rightly ruled that SPDC did not have any duty of care on account of *negligence* to prevent sabotage.¹⁸ Sabotage is a "complete defense", irrespective of the basis that Milieudefensie et al. rely on.¹⁹
29. The claims against RDS, the Koninklijke and Shell Transport as "parent companies" of SPDC cannot be based on Section 11(5)(c) OPA. These companies are not license holders and by virtue of Section 11(5)(c) OPA they cannot be liable for damage caused by the oil spill near Oruma. Milieudefensie et al. nevertheless believe that RDS, the Koninklijke and Shell Transport are liable for the damage that was allegedly caused by that oil spill based on an "independent tort",²⁰ i.e. the *common law tort of negligence*.
30. In the next chapter (nos. 51-67), the fact that the claims against RDS, the Koninklijke and Shell Transport are certain to fail in the absence of a statutory basis or precedent from Nigerian case law (and for the rest also in the absence of a precedent from any other common law jurisdiction) will be discussed at length.

¹⁸ Final judgment, ground 4.52.

¹⁹ See the Third Supplementary Opinion of Professor Fidelis Oditah QC, SAN of 13 March 2012 (Exhibit 23 of Shell with the Rejoinder), no. 17: "sabotage is recognized under Nigerian law as a complete defense to the civil liability of an operator for pollution. Both at common law and under applicable legislation, the operator is exempted from liability if it can establish that the spillage was as a result of sabotage."

²⁰ Written pleadings of Milieudefensie et al. dated 11 October 2012, no. 163.

4 NO INTERNATIONAL JURISDICTION IN RESPECT OF SPDC

4.1 Introduction

31. The claim of lack of jurisdiction of the Dutch court is only an issue in the case with number 200.126.834 against RDS and SPDC. Thus, the case against the Koninklijke and Shell Transport is not discussed in this chapter.
32. In the interlocutory judgment in the jurisdiction motion of 30 December 2009 and in the final judgment, the District Court found that international jurisdiction exists based on Section 7 (1) DCCP.
33. 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.²¹ In this motion, to substantiate that the Dutch court allegedly has international jurisdiction over SPDC, Milieudefensie et al. only argue (2013 Motion to produce documents, no. 19) that Section 843a DCCP also applies to foreign legal relationships or proceedings. To this end, they refer to the ruling HR 8 June 2012, *NJ* 2013, 286.
34. 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 et al.'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.
35. 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.
36. 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

²¹ 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."

one hand, and interests of the parties to the proceedings, on the other".²² If these points of view are not taken into account, the jurisdiction rules of Section 7 (1) DCCP would become too broad. In this scope, Strikwerda notes the following:²³

"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."

37. In this respect, the interest of the state has three aspects:²⁴
 - (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.
38. The interest of the parties to the proceedings has two aspects:²⁵
 - (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

²² Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht* (Introduction to Dutch international private law), 10th edition, Deventer 2012, p. 213.

²³ Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht*, 2012, p. 214.

²⁴ Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht*, 2012, p. 213.

²⁵ Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht*, 2012, pp. 213-214.

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..

39. 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 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.
40. 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*.²⁶ 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 5.2 below).
41. 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 et al. base 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. 58-63 below, the Dutch court will have to adopt a reticent

²⁶ See also the legal opinion of Professor F. Oditah QC, Supplementary Opinion dated 21 February 2011 (Exhibit 24 with the Defense in the Motion of RDS and SPDC in the case against Akpan and Milieudefensie dated 23 February 2011 (docket number 2009/1580, currently case number 200.126.849)), nos. 22-31.

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 et al.'s perspective.

42. 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 domicile.²⁷ 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:²⁸

"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."

43. 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.
44. 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.

4.2 Section 7 (1) DCCP

45. In a recent decision regarding the jurisdiction ground of Section 7 (1) DCCP, the District Court of Amsterdam found as follows:²⁹

"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,

²⁷ Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht*, 2012, p. 215.

²⁸ Parliamentary History of the Code of Civil Procedure, Van Mierlo/Bart, p. 79.

²⁹ District Court of Amsterdam 23 October 2013, ECLI:NL:RBAMS:2013:7936, ground 4.2.

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 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."

46. 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.
47. 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:³⁰

"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

³⁰ Parliamentary History of the Code of Civil Procedure, Van Mierlo/Bart, p. 108.

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.³¹

48. 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, 77:³²

"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."

49. 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

³¹ T&C Burgerlijke Rechtsvordering, 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 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."

³² 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."

judgment of 30 December 2009 (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 4.6) 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*.

50. 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 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.³³

4.3 Basis of the claims against RDS is obviously insufficient

51. At the time of the jurisdiction motion, the District Court should already have concluded that in light of the facts that Milieudéfensie et al. 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. Milieudéfensie et al. invoke *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 Milieudéfensie et al. themselves, 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).
52. In the substantive assessment of the claims against RDS, based on an assessment of the facts contended by Milieudéfensie et al. 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

³³ M.V. Polak, *Ars Aequi* 56 (2007) 12, pp. 994-995.

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 4.32-4.39 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 4.40). However, prior to these findings, the District Court ruled (ground 4.4) 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 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.

53. 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. This general notion is without prejudice to the fact that Milieudefensie et al.'s claims are most certainly 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.
54. 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.³⁴ 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.³⁵ This applies both when the shareholder is a natural person and when the shareholder is a legal entity.³⁶

³⁴ 'Companies and Allied Matters Act 1990' ("CAMA"), Section 37 (Exhibit 1.N of RDS and SPDC And Exhibit 3.N of SPNV and Shell Transport); *FDB Financial Services v. Adesola* (2000) 8 NWLR (Pt 668) 170 (Exhibit 1.H with the Defense of RDS and SPDC and 3.H with the Defense of SPNV and Shell Transport), p. 183H; *Vibelko (Nigeria) Ltd v. NDIC* (2006) 12 NWLR (Pt 994) 280 (Exhibit 1.L with the Defense of RDS and SPDC and Exhibit 3.L with the Defense of SPNV and Shell Transport), p. 295F-296B.

³⁵ CAMA, Section 21(1)(a) (Exhibit 1.N with the Defense of RDS and SPDC and Exhibit 3.N with the Defense of SPNV and Shell Transport).

³⁶ *Union Beverages Ltd v. Pepsicola Int Ltd* (1993) 3 NWLR (Pt 330) 1, p. 16C-E (Exhibit 1.B with the Defense of RDS and SPDC and Exhibit 3.B with the Defense of SPNV and Shell Transport).

55. 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’;³⁷
 - the company in question is no more than a façade;³⁸
 - the company in question is an ‘agent’ of the company against which the ‘piercing the corporate veil’ action is directed.³⁹
56. None of the ‘piercing the corporate veil’ situations mentioned above occurs in the case at issue, nor do Milieudefensie et al. submit that one of those situations occurs. With this state of affairs, Milieudefensie et al.’s claims against RDS are certain to fail.
57. 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.⁴⁰ In this connection, Milieudefensie et al. themselves only invoke 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.

³⁷ *FDB Financial Services v. Adesola* (2000) 8 NWLR (Pt 668) 170, p. 183H (Exhibit 1.H with the Defense of RDS and SPDC and Exhibit 3.H with the Defense of SPNV and Shell Transport).

³⁸ *Adeyemi v Lan & Baker (Nig) Ltd* (2000) 7 NWLR (Pt 663) 33, p. 51A-F; *Vibelko (Nigeria) Ltd v. NDIC* (2006) 12 NWLR (Pt 994) 280, p. 295G-H (Exhibit 1.G with the Defense of RDS and SPDC and Exhibit 3.G with the Defense of SPNV and Shell Transport).

³⁹ *Union Beverages Ltd v. Pepsicola Int Ltd* (1993) 3 NWLR (Pt 330) 1, p. 16D-E (Exhibit 1.B with the Defense of RDS and SPDC and Exhibit 3.B with the Defense of SPNV and Shell Transport).

⁴⁰ See the Corporate Law Opinion of Professor Oditah of 24 March 2011 (Exhibit 14 of RDS and SPDC and Exhibit 19 of SPNV and Shell Transport), no. 21: "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. 28: "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."

58. 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.⁴¹ See also in this connection the National Committee for International Private Law:⁴²

"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."

59. See also Kusters-Dubbink:⁴³

"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."

60. If the further development of the foreign law is involved, the Dutch court should take a reticent stance. See Jessurun d'Oliveira:⁴⁴

⁴¹ Dutch Lower House 2009-2010, 32 137, no. 3, p. 9.

⁴² 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.

⁴³ J. Kusters and C.W. Dubbink, *Algemeen deel van het Nederlandse internationaal privaatrecht*, 1962, p. 738.

⁴⁴ H.U. Jessurun d'Oliveira, *De antikiesregel. Een paar aspecten van de behandeling van buitenlands recht in het burgerlijk proces*, dissertation 1971, p. 123.

"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."

61. See also Van Hoek in her *Ars Aequi* annotation to the judgments of the District Court.⁴⁵

"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."

62. See also Paul Scholten in his – still current – General Part.⁴⁶

"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

⁴⁵ A.A.H. van Hoek, *Ars Aequi* June 2013, pp. 488-489.

⁴⁶ Asser/Scholten, *Algemeen deel**, third edition 1974, pp. 167-168.

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 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."

63. 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.
64. In the Initiatory summons, Milieudefensie et al. 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.⁴⁷ In the continuation of the proceedings in the first instance, Milieudefensie et al. 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 et al. base RDS' liability on that case. Based on an assessment of the facts contended by Milieudefensie et al. 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

⁴⁷ Motion for the court to decline jurisdiction and transfer the case, also including conditional statement of defense in the main action, nos. 141-146.

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."

65. 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:

"44. 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."

66. 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 et al. ask 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.
67. 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".
68. In the final judgment (ground 4.7), 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.

69. 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 et al. claim 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 et al. are also unable to designate that basis, the production of the documents claimed by Milieudefensie et al. and the Statement of Appeal still to be filed will not alter that situation.
70. Superfluously, in section 4.5 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.

4.4 Article 6 (1) of the Brussels Convention

71. Subject to the starting point mentioned in nos. 49-50 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.
72. In a recent ruling, the District Court of Rotterdam summarized ECJ case law regarding Article 6 (1) of the Brussels Convention as follows:⁴⁸

"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

⁴⁸ District Court of Rotterdam 17 July 2013, ECLI:NL:RBROT:2013:5504, NJF 2013, 414, ground 5.8.

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 (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*)."

73. 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.⁴⁹ 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.⁵⁰

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

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

75. The same applies in the scope of Section 7 (1) DCCP. See the District Court of Amsterdam in its judgment cited in no. 45 above.

76. 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.

77. 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.

⁴⁹ ECJ 1 December 2011, *NJ* 2013, 66 (*Painer*), paragraph 81.

⁵⁰ ECJ 1 December 2011, *NJ* 2013, 66 (*Painer*), paragraph 83.

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."

78. 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 4.6), 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.⁵¹ 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.⁵² In its decision cited in no. 45 above, the District Court of Amsterdam also starts from a "generally applicable" requirement of foreseeability in the scope of Section 7 (1) DCCP.

79. 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 list⁵³):

"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,

⁵¹ 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.

⁵² ECJ 1 March 2005, *NJ* 2007, 369 (*Owusu*), paragraph 40.

⁵³ See paragraph 99 of the opinion.

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)⁵⁴ 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 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

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"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)

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."

80. Thus, in the assessment of both the factual and the legal connection, the requirement of foreseeability plays a decisive role.
81. 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.
82. In the interlocutory judgment in the jurisdiction motion of 30 December 2009 (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.
83. Although Milieudefensie et al. hold 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.
84. 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. 77 above).

4.5 Insufficient factual and legal connection

85. That there is insufficient factual connection in the case at issue already follows from the fact that at the time that RDS was placed at the head of the Royal Dutch Shell Group, the events surrounding the oil spill at issue, i.e. the cause of this oil spill (sabotage), closing the leak, and taking measures to prevent the spilled oil from spreading, had already occurred a long time ago.⁵⁵ Thus, it goes without saying that Milieudefensie et al.'s arguments regarding facts and circumstances that occurred in the period during which RDS was not yet at the head of the Royal Dutch Shell Group are irrelevant in assessing Milieudefensie et al.'s claims against RDS. Thus, the complex of facts in Nigeria that is relevant in assessing the cause of the oil spill at issue and SPDC's response to the oil spill cannot be relevant in assessing the claims against RDS.
86. For this reason alone, the requirement of connection of Section 7 DCCP has not been satisfied. After all, the main point of the case is the alleged liability of RDS and SPDC for the oil spill itself, because this caused the damage that was allegedly suffered. Although Milieudefensie et al. argue that the area of impact was allegedly not adequately cleaned up and remediated, but that is not true and in any event, this does not constitute an independent cause of the damage. The damage that was caused by the oil spill cannot have been caused "again" by an alleged failure in the remediation.⁵⁶ Moreover, RDS was not involved in that clean-up and remediation work in any way whatsoever. RDS was not even informed of the oil spill at issue or the clean-up and remediation of the consequences of the oil spill. Cleaning up the oil spill at issue is an operational affair that does not and did not involve RDS. RDS itself does not conduct any operational activities, including not in Nigeria. The Royal Dutch Shell Group is so large that it is unrealistic to assume that RDS could be involved in cleaning up the oil spill at issue. Thus, RDS cannot be blamed for failing to do something in this connection, either. Nor can sufficient connection be construed by the injunctions that Milieudefensie et al. claimed in respect of both RDS and SPDC (relief sought in the Initiatory summons, paragraphs III through VIII). Those claimed injunctions pertain to operational work regarding the pipeline near Oruma and cleaning up the affected area. It is obvious that these claimed injunctions cannot be awarded in respect of RDS, because RDS is not directly involved in SPDC's operations in Nigeria.⁵⁷

⁵⁵ See the Motion for the court to decline jurisdiction and transfer the case, also containing conditional statement of defense in the main action, nos. 16 and 71.

⁵⁶ See the Third Supplementary Opinion of Prof. Oditah dated 13 March 2012 (Exhibit 23 of Shell), nos. 51 and 56.

⁵⁷ Defense, no. 152.

87. Nor are the claims against RDS, on the one hand, and those against SPDC, on the other, based on the same complex of facts to be assessed otherwise, either. This already follows from Milieudéfensie et al.'s arguments in the Initiatory summons, no. 17:

"Where the plaintiffs reproach Shell plc for having taken insufficient measures to prevent 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 the pipelines operator for not preventing the spills near Oruma and for not containing and cleaning up the damage."

Milieudéfensie et al. base the claims against SPDC on the complex of facts regarding the oil spill near Oruma of 26 June 2005. The claims against RDS are not based on that complex of facts, given that the complex of facts on which Milieudéfensie et al. base their claims against RDS is the situation in the Niger Delta *in general*.

88. To the extent that Milieudéfensie et al.'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. Milieudéfensie et al. did not contest this (of course). Milieudéfensie et al. even argue that it is irrelevant whether RDS (prior to the subject proceedings) was aware of the oil spill at issue. On the contrary, they take that fact into account in their arguments regarding RDS' liability:⁵⁸

"Moreover, whether or not the parent company was aware of the specific circumstances surrounding this oil spill near Oruma is not a decisive factor in answering the question regarding whether the parent company had a duty of care;..."

And:⁵⁹

"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

⁵⁸ 2013 Motion to produce documents, no. 116.

⁵⁹ Written pleadings of Milieudéfensie et al. dated 11 October 2012, no. 174.

fulfilled its duty of care at that time, the damage in Goi, in Oruma and in Ikot Ada Udo would not have occurred."

In their argument regarding RDS, Milieudefensie et al. abstract 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.

89. Nor can sufficient factual connection be derived from Milieudefensie et al.'s argument cited above to the effect that if RDS had fulfilled its duty of care, the damage in Oruma would not have occurred. In the interim, the 2013 Motion to produce documents has demonstrated that Milieudefensie et al. feel that this is not required for the claims against RDS to be awarded:⁶⁰

"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 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 et al., 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.

90. Nor can connection be derived from Milieudefensie et al.'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. 84 above). In this context, it should be borne in mind that RDS is reproached for a pure failure. Milieudefensie et al. do 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. 37-46 and nos. 186-204 below.
91. 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

⁶⁰ 2013 Motion to produce documents, no. 80.

indicate sufficient legal (and factual) connection.⁶¹ As stated before (see nos. 83-84 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.

92. 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 4.6 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 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.
93. Nor is there any overlap in respect of the alleged content of the duty of care that was allegedly breached. With regard to RDS, Milieudéfensie et al.'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 pipeline near Oruma better, should have taken more preventive measures against sabotage and should have stopped and cleaned up the oil spill both better and more rapidly.
94. Milieudéfensie et al. themselves emphasize 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:⁶²

"As the Court rightfully found in the judgment in the jurisdiction motion, Oguru 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

⁶¹ 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."

⁶² Reply in the Motion to produce documents in the case Milieudéfensie et al./RDS and SPDC, no. 33.

Shell Nigeria's (environmental) policy to prevent Shell Nigeria from inflicting the damage at issue on people and the environment to the extent possible. Shell's argument that Shell Plc can only have committed tort if Shell Nigeria *also* committed tort is therefore incorrect."

And:⁶³

"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:⁶⁴

"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."

95. The claims against RDS are based on an "independent tort" of RDS, which according to Milieudéfensie et al. 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.
96. 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 Oruma on 26 June 2005. However, this is irrelevant for assessing the jurisdiction by virtue of Section 7 (1) DCCP. It is up to Milieudéfensie et al. to contend (and if necessary prove) that there is sufficient connection. Milieudéfensie et al. argue 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

⁶³ Written pleadings of Milieudéfensie et al. dated 11 October 2012, no. 163.

⁶⁴ Written pleadings of Milieudéfensie et al. dated 11 October 2012, no. 198.

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.

97. 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 Oruma of 26 June 2005. 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 et al.'s notices of liability, RDS had to check with SPDC regarding what this was about.⁶⁵
98. 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 relevant whether or not the defendants acted independently of one another.⁶⁶ 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. As stated before, prior to these proceedings RDS was not even aware of these oil spills.
99. 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 Oruma of 26 June 2005. 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?

⁶⁵ See, for example, Exhibit A-2 of Milieudefensie et al. (letter from RDS dated 20 June 2008 in response to the notice of liability of 8 May 2008).

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

100. 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:⁶⁷ "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 jurisdiction rule that is similar to Article 6 (1) of the Brussels Regulation or Section 7 (1) DCCP.
101. 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. 92-93 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. 78 above). In the case at issue, this requirement has not been satisfied.

4.6 Abuse

102. 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.⁶⁸
103. 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 et al. are abusing Section 7 (1) DCCP by summoning SPDC to appear before the

⁶⁷ L.F.H. Enneking, Aansprakelijkheid via 'foreign direct liability claims', NJB 2010/7, p. 404.

⁶⁸ See Advocate General Strikwerda's opinion, no. 18, for HR 23 February 1996, NJ 1997, 276 (*Blue Aegean*).

Dutch court based on a writ of summons with claims against RDS that are certain to fail.

104. In the event that under the circumstances of this case, no basis for the claims of Milieudefensie et al. 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 et al. 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 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."

105. Thus, it is irrelevant whether or not Milieudefensie et al. sought to hold RDS liable for the oil spill near Oruma of 26 June 2005. 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 et al. are abusing the jurisdiction basis of Section 7 (1) DCCP.

106. 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 4.4 of the final judgment).
107. (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.
108. 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.⁶⁹ The latter is the case here.
109. 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 Ogura and Efanga and the other alleged victims of the oil spill (whose interests Milieudefensie claims to represent) being denied access to the court. The

⁶⁹ 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.

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.

110. Shell is not interested in a finding that Milieudefensie et al. 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.
111. 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.

5 MILIEUDEFENSIE'S CLAIMS ARE INADMISSIBLE AND OGURU AND EFANGA DID NOT PROVE THEIR RIGHT OF ACTION

5.1 Introduction

112. In section 5.2 it is argued that Milieudéfensie'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, Milieudéfensie 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 Milieudéfensie (cf. ground 4.42 of the District Court's final judgment).⁷⁰
113. Section 5.3 explains that Oguru and Efanga must prove that they have a right of action in the main action. In the absence of such right of action, Oguru and Efanga do not have any legitimate interest in their claims for the production of documents.
114. The 305a defense that Shell puts forward against Milieudéfensie 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 Milieudéfensie et al.'s claim in the motion. The following is further pointed out regarding these defenses.
115. In this motion, Milieudéfensie, Oguru and Efanga will first have to explain that in the main action, they are each entitled to a right of action regarding the alleged tort committed by Shell. The party who fails to do so 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 the party in question is a party to the legal relationship to which the claim by virtue of Section 843a DCCP pertains is not satisfied, or at least he or she lacks the required legitimate interest to invoke Section 843a DCCP.
116. In addition, the dismissal of the claim for the production of documents of one of the plaintiffs means that the claim(s) for the production of documents of the other plaintiff(s) must also be dismissed. This follows from the fact that the plaintiffs elected to be represented by the same attorney. If Milieudéfensie is not entitled to access to documents, but Oguru's and Efanga's claim for the production of documents is awarded, Milieudéfensie would nevertheless obtain

⁷⁰ For this defense, see the documents of the proceedings in the first instance: Defense in the Motion to produce documents of RDS and SPDC, nos. 2-46; Rejoinder in the Motion to produce documents of RDS and SPDC, nos. 82-85; Defense in the Motion to produce documents of SPNV and Shell Transport, nos. 91-95; Rejoinder in the Motion to produce documents of SPNV and Shell Transport, nos. 111-115.

access to documents "by the backdoor". Given that Milieudéfensie, Oguru and Efanga are represented by the same attorney, inspection by (the attorney of) Oguru and Efanga of documents to which access is granted will automatically lead to inspection by (the attorney of) Milieudéfensie. That is unacceptable if the Court of Appeal rules that Milieudéfensie is not entitled to access to documents. The same is true if Oguru's and Efanga's claims for the production of documents are inadmissible, of course. In that case, Oguru and Efanga should not obtain access to documents because Milieudéfensie's claim for the production of documents is awarded.

117. Given that Milieudéfensie, Oguru and Efanga are represented by the same attorney, the above means that their claims for the production of documents can only be awarded if each of the plaintiffs can derive a right to the production of documents from Section 843a DCCP. If every plaintiff is not entitled to access to documents, the claim of all plaintiffs must be dismissed.
118. The same applies *mutatis mutandis* with respect to Dooh (the appellant in the cases with numbers 200.126.843 and 200.126.848), as well as Akpan (the respondent in the appeal with case number 200127813-0 initiated by Shell against the District Court's final judgment), who are all also represented by the same attorney. This even constitutes an independent reason to dismiss Milieudéfensie et al.'s claims for the production of documents in all cases. If the claims would be awarded, documents would 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 in parallel appeal proceedings, he is represented by the same attorney as Milieudéfensie et al. means that if it were to be found in this motion that Milieudéfensie et al. are entitled to access to specific documents, Akpan will also get access to those documents "by the backdoor". Akpan could use that knowledge in his defense against Shell's appeal, or possibly for a cross appeal. However, Akpan did not initiate a motion to produce documents; thus, the Court of Appeal cannot establish in respect of Akpan whether he has a legitimate interest in access to documents. Under those circumstances, it is unacceptable that he nevertheless should become aware of documents via (the attorney of) Milieudéfensie et al. to which Milieudéfensie et al. claim access in this motion. For that reason alone, Milieudéfensie et al.'s claims for the production of documents must be dismissed in full.

5.2 Milieudéfensie's claims by virtue of Section 3:305a DCC are inadmissible

119. Milieudéfensie's claims are based on Section 3:305a DCC, both in the main action and in this motion. However, Milieudéfensie's claims in this motion (and in the main action) are inadmissible, because Section 3:305a DCC does not

apply, or because Milieudéfensie 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 Milieudéfensie

120. In the first instance, Shell argued that Milieudéfensie's claims by virtue of Section 3:305a DCC are inadmissible, because this section does not apply in the case at issue. Milieudéfensie'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 Milieudéfensie in these proceedings.⁷¹ Thus, Milieudéfensie's claims are inadmissible. The District Court failed to recognize this by ruling in the interlocutory judgment of 14 September 2011 (ground 4.4) and the final judgment (ground 4.12) 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 4.4 of the interlocutory judgment of 14 September 2011. The 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.⁷²
121. Even if the Court of Appeal were to assume that Section 3:305a DCC is a rule of Dutch procedural law, Milieudéfensie 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 Milieudéfensie, as the District Court rightly found in the final judgment.⁷³ For this reason alone, Milieudéfensie is not entitled to the production of documents (see no. 112 above).

⁷¹ See the Defense of RDS and SPDC, nos. 91-92; Defense in the Motion to produce documents of RDS and SPDC, no. 37 (with Exhibit 9, legal opinion of Professor F. Oditah QC dated 14 June 2010, nos. 36-48); Rejoinder in the Motion to produce documents of RDS and SPDC, no. 53; Defense of SPNV and Shell Transport, nos. 124-126; Rejoinder in the Motion to produce documents of SPNV and Shell Transport, no. 84; Written pleadings of Shell dated 19 May 2011, no. 50.

⁷² Defense of RDS and SPDC, nos. 86-90; Defense in the Motion to produce documents of RDS and SPDC, no. 36; Rejoinder in the Motion to produce documents of RDS and SPDC, nos. 53-62; Defense of SPNV and Shell Transport, nos. 120-123; Defense in the Motion to produce documents of SPNV and Shell Transport, nos. 71-80; Rejoinder in the Motion to produce documents of SPNV and Shell Transport, nos. 85-90; Rejoinder, no. 50.

⁷³ Final judgment, ground 4.42.

Effective legal protection is not served by Milieudefensie's action

122. 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:⁷⁴

"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."

123. This has been explicitly confirmed in the Parliamentary History to the recent modification of Section 3:305a DCCW:⁷⁵

"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 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."

124. 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 initiated by one or more representatives of the Oruma 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 Oruma community could act on

⁷⁴ 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.

⁷⁵ Dutch Lower House 2011-2012, 33 126, no. 3, pp. 6-7. The modified Section 3:305a DCC took effect on 1 July 2013.

behalf of the community by means of documents appointing a representative *ad litem*.

125. Accordingly, the interests of the Oruma 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 Milieudéfensie should represent the role that (representatives of) the Oruma community could have played. Let alone that this could achieve more effective legal protection than if one or more members of the Oruma community would do so. The members of the Oruma community themselves must be deemed to be able to represent their interests better than Milieudéfensie. The fact that the largest part of Oguru's and Efanga's claims also regard the general interest of the Oruma community and the fact that Oguru and Efanga act as plaintiffs in these proceedings demonstrates that individual members of the Oruma community are most certainly capable, not only of representing their own interests, but also of representing those of the Oruma community in general in proceedings like the ones at issue. This means that Milieudéfensie being a party to these proceedings does not offer any advantage over litigating in the name of Oguru and Efanga and possibly a number of other individual members of the Oruma community and does not result in more effective legal protection. With this state of affairs, there is no room for a claim of Milieudéfensie by virtue of Section 3:305a DCC and the District Court's decision on this point cannot be maintained.
126. In the final judgment, the District Court found as follows in this regard:⁷⁶

"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 Milieudéfensie fails to specify the interests of what specific other people it is representing and because Milieudéfensie allegedly has insufficient knowledge of the extremely complex situation in Nigeria. The District Court also ignores this argument. Milieudéfensie moves that Shell et al. are ordered to take a number of measures to reduce the risk of oil spills near Oruma 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."
127. The finding that Milieudéfensie's claims are admissible because it is not clear how Milieudéfensie's claims could contravene the interests of Nigerian citizens who may be affected by oil spills, is incorrect. Firstly, as set out in no. 122

⁷⁶ Final judgment, ground 4.14

above, Milieudéfensie being a party to these proceedings must lead to *more effective protection* of the interests of the people affected by the oil spill at issue in these proceedings. The admissibility of Milieudéfensie's claims must be assessed based on that criterion, not based on the – much less stringent – criterion of whether Milieudéfensie being a party to these proceedings *contravenes* the interests of the people whose interests Milieudéfensie 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 Oruma in June 2005. 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 is incorrect. After all, in these proceedings Milieudéfensie claims that it represents the interests of people who were affected by the oil spill near Oruma in June 2005.

128. Not only does Milieudéfensie's action fail to result in more effective legal protection of the interests of the people who Milieudéfensie claims to represent, it is even extremely doubtful whether their interests are sufficiently safeguarded by Milieudéfensie'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:⁷⁷

"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

⁷⁷ Dutch Lower House 2011–2012, 33 126, no. 3, pp. 12-13.

initiated against a foreign defendant, it is very important whether a judgment in favor of the plaintiff can actually be enforced."

129. Reviewed based on the circumstances of the case at issue, the conclusion is that the interests Milieudéfensie claims to represent are insufficiently safeguarded with this action. As stated before, Oguru, Efanga and the members of the Oruma community know perfectly well what their interests are and how they can best defend those interests. In any event, Oguru, Efanga and the Oruma community must be deemed to be better able to do so than Milieudéfensie. 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 Milieudéfensie. Milieudéfensie 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, Milieudéfensie has never taken any action to look after the interests of Nigerians in the vicinity of Oruma. Moreover, to Shell's knowledge, not a single Nigerian in the vicinity of Oruma is a member of Milieudéfensie. In as far as any Nigerians in the vicinity of Oruma are members of Milieudéfensie, 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 Milieudéfensie, all the more so given that Nigeria has a sister organization of Milieudéfensie: ERA. If any interest group could represent the interests of the Oruma community, it is far more obvious that ERA rather than Milieudéfensie 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 Oruma in particular.
130. In addition, in respect of Milieudéfensie's claims against SPDC: ultimately, the people whose interests Milieudéfensie claims to represent will not benefit from any declaratory judgment to be obtained by Milieudéfensie 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. 128 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."
131. The declaratory judgment that Milieudéfensie claimed in respect of SPDC cannot form any basis in the Netherlands for actions for damages by individual members of the Oruma 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 Oruma community.

132. Moreover, in the interim, the claims for damages following the oil spill near Oruma in June 2005 have become time-barred. Under Nigerian law (the law that applies to those claims), the statute of limitations for such claims is five or six years (depending on the laws of the State that apply). This period expired a long time ago. 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.
133. 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 Oruma 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 Oruma on 26 June 2005. 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.
134. 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.⁷⁸

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

⁷⁸ 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. 121 above.

135. The interest that Milieudéfensie 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 Oruma, 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 Milieudéfensie should nevertheless be able to represent those interests in Dutch proceedings. Thus, the finding of the District Court that there are insufficient reasons to assume that local environmental damage abroad allegedly falls outside the scope of Section 3:305a DCC⁷⁹ is incorrect.

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

136. Milieudéfensie's claims are also inadmissible in these proceedings because Milieudéfensie does not represent the interest it claims to represent in these proceedings by virtue of its charter. The description of Milieudéfensie's objective in its charter is not only insufficiently specific on this point; Milieudéfensie does not develop any actual work regarding the environment near Oruma or the Niger Delta in general, either. This means that the requirements stipulated by Section 3:305a DCC in this regard are not satisfied.
137. The description of Milieudéfensie's objective in its charter reads:⁸⁰

"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."

138. This description of the objective is insufficiently distinctive to hold on that basis that protecting the environment near Oruma falls within this description. The description of the objective does not say anything regarding acting against environmental pollution in or near Oruma. The description of the objective does not even say that Milieudéfensie's objective includes fighting environmental pollution in the Niger Delta or even in Nigeria in general. The description of Milieudéfensie's objective ("*solving and preventing environmental problems at a*

⁷⁹ Final judgment, ground 4.13.

⁸⁰ See Exhibit F.1 of Milieudéfensie et al.

global level") is so broad that it qualifies as insufficiently specific. See in this connection Frenk:⁸¹

"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."

139. Thus, the District Court's finding in the final judgment (ground 4.13) 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."

140. 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 Oruma, this would render the requirement of the objective in charters a mere formality.

141. 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 Oruma or to represent the people who may have been affected by oil spills near Oruma.

142. The District Court wrongfully ignored the arguments that Shell put forward in respect of this point in the first instance. The District Court found:⁸²

"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."

⁸¹ Frenk, *Kollektieve akties in het privaatrecht*, 1994, p. 126.

⁸² Final judgment, ground 4.13.

143. With this finding, firstly, the District Court once again fails to recognize (see no. 127 above) that according to its own arguments, in these proceedings Milieudéfensie represents the environmental interests of people that were violated as a result of environmental pollution caused by the oil spill near Oruma,⁸³ and (thus) not the much broader interest of "*the environmental interests in Nigeria*". This means that the District Court's finding in this respect is incorrect. Given that Milieudéfensie represents the environmental interests of people that were violated as a result of environmental pollution caused by the oil spill near Oruma on 26 June 2005, if it seeks admissibility of its claims by virtue of Section 3:305a DCC, Milieudéfensie must demonstrate that it developed activities that specifically pertain to the representation of those interests. Milieudéfensie did not do so. On the contrary, at best, Milieudéfensie undertook activities that regard environmental problems in Nigeria in general. This is hardly surprising in view of the fact that Milieudéfensie does not have the interest of the people who Milieudéfensie 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 Milieudéfensie's claims that pertain to environmental interests of people that were violated as a result of the oil spill near Oruma in June 2005 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.
144. Moreover, Milieudéfensie's arguments in the first instance cannot support the District Court's conclusion that Milieudéfensie conducted "*campaigns aimed at stopping environmental pollution in the production of oil in Nigeria*"⁸⁴, and that this constitutes sufficient actual work to hold that its claims by virtue of Section 3:305 DCC are admissible. The activities that Milieudéfensie advanced in this scope⁸⁵ do not qualify as such. The activities advanced are only protests and the conduct of legal proceedings. In the first instance⁸⁶, Shell set out extensively why those protests do not qualify as sufficient actual work.

⁸³ See the Reply in the Motion to produce documents in the case Milieudéfensie/RDS and SPDC, no. 130.

⁸⁴ Final judgment of 31 January 2013, ground 4.13.

⁸⁵ Reply in the Motion to produce documents in the case Milieudéfensie/RDS and SPDC, no. 148.

⁸⁶ See the Rejoinder in the Motion to produce documents of RDS and SPDC, nos. 76 - 81.

145. The actions advanced by Milieudedefensie can be broken down into three categories: Milieudedefensie 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 Milieudedefensie, these all regard proceedings in Nigeria, in which Milieudedefensie is not even a party. Milieudedefensie cannot invoke work of other parties to demonstrate that it performed actual work that pertains to the interest that Milieudedefensie claims to represent in these proceedings, of course. The work of other parties is not work of Milieudedefensie. In addition, merely conducting legal proceedings does not qualify as actual work.⁸⁷ 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 Milieudedefensie 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.⁸⁸ 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.
146. With regard to the reports referred to by Milieudedefensie⁸⁹ 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 Oruma. 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 Milieudedefensie, but by another organization.⁹⁰ As stated before, work performed

⁸⁷ See also the Defense in the Motion to produce documents of RDS and SPDC, no. 39 and the case law mentioned in that paragraph.

⁸⁸ 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

⁸⁹ This involves the reports "Use your profit to clean up your mess" and "Lessons Not Learned. The Other Shell Report."

⁹⁰ Again, Milieudedefensie has to face the consequences of the fact that it completely fails to distinguish between different (legal) entities. Just as Milieudedefensie 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, Milieudedefensie does so (fails to do so) because it is convenient, but lumping (the conduct of) various entities together is inappropriate, of course.

by other parties does not qualify as work by Milieudedefensie, of course, let alone as sufficient actual work that justifies the admission of Milieudedefensie's claims in these proceedings by virtue of Section 3:305a DCC. To the extent that Milieudedefensie 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 Oruma of 26 June 2005. In the campaigns mentioned by Milieudedefensie, 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 Oruma, the issue in these proceedings. This means that it is clear that Milieudedefensie 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 Milieudedefensie's claims should still be declared inadmissible.

147. Milieudedefensie 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.⁹¹ This argument also fails, if only because Milieudedefensie fails to clarify the consultations it is referring to in any way. No such dialogue took place between Shell and Milieudedefensie. 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 Milieudedefensie 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 Oruma on 26 June 2005, has not been satisfied.

5.3 Oguru and Efanga have no right of action

148. In the initiatory writs of summons, Oguru and Efanga based their claims on the argument that they are allegedly the (exclusive) owners of lands, plants and trees, and fish ponds that were allegedly damaged by the oil spill of 26 June 2005.⁹² The adoption of this position gave Shell a reason to take the position that Oguru and Efanga must prove their right of action.⁹³ In Nigeria, as a rule,

⁹¹ Reply in the Motion to produce documents in the case Milieudedefensie et al./RDS and SPDC, no. 148.

⁹² Initiatory summons in the case Milieudedefensie et al./SPDC and RDS, nos. 8 and 337 and the Initiatory summons in the case Milieudedefensie et al./SPNV and Shell Transport, nos. 8 and 337.

⁹³ Defense of RDS and SPDC, nos. 99-102, Defense in the Motion to produce documents of RDS and SPDC, nos. 29-33, Rejoinder in the Motion to produce documents of RDS and

land - and plants and trees, and fish ponds on this land – is owned⁹⁴ by the community in question ('community') or the clan in question ('family').⁹⁵ Thus, a claim based on that ownership must be initiated by the community (i.e. all members of the community). In practice, such a claim is usually initiated on behalf of the community by the "family head" or the "communal head" in a *representative action*. See also the legal opinion of Professor F. Oditah QC, Supplementary Opinion dated 21 February 2011.⁹⁶

"26. Where the parties' title is joint, as is the case with family or communal property prior to partition, proceedings to vindicate that title or protect jointly owned property **must** be representative. This is not a mere matter of case management convenience. It is more deeply based. By definition no member of the family or community has a several or divisible interest in family or communal property capable of being protected or vindicated in a personal action. Therefore, the only way in which damage to community or family property can be vindicated is by representative rather than personal proceedings."

149. The above does not apply, of course, if in deviation of the starting point that land is owned by the community in question, an individual member of that community exclusively owns or exclusively possesses a certain portion of land. However, in that case, the person in question must prove how he acquired the (exclusive) title to that land. The ruling of the 'Supreme Court of Nigeria' in *Ewo v. Ani* contains the following finding:⁹⁷

SPDC, nos. 42-50, Defense of SPNV and Shell Transport, nos. 138-142, Defense in the Motion to produce documents of SPN and Shell Transport, nos. 64-68, Rejoinder in the Motion to produce documents of SPNV and Shell Transport, nos. 74-83, Rejoinder, nos. 57-70, Written pleadings of Shell dated 11 October 2012, nos. 111-128.

⁹⁴ Strictly speaking, the land is owned by the Governor of the state in question (Bayelsa State in the case at issue). This is a technical aspect of Nigerian property law, which is irrelevant for the question regarding the right of action. See the Rejoinder, no. 69.

⁹⁵ Defense of RDS and SPDC, no. 100, Defense in the Motion to produce documents of RDS and SPDC, no. 30, Rejoinder in the Motion to produce documents of RDS and SPDC, no. 76, Defense of SPNV and Shell Transport, no. 139, Defense in the Motion to produce documents of SPNV and Shell Transport, no. 65, Rejoinder in the Motion to produce documents of SPNV and Shell Transport, no. 76, Rejoinder, no. 59, Written pleadings of Shell dated 11 October 2012, no. 112.

⁹⁶ Exhibit 24 with the Defense in the Motion to produce documents of RDS and SPDC in the case against Akpan and Milieudefensie dated 23 February 2011 (docket number 2009/1580, currently case number 200.126.849).

⁹⁷ *Ewo v. Ani* (2004) 3 NWLR (Pt 861) 611, p. 629H-630A (Exhibit 1.J with the Defense of RDS and SPDC and Exhibit 3.J with the Defense of SPNV and Shell Transport).

"If a member of a family claims ownership of family land he or she, the *claimant*, must prove how he or she came to own family land to the exclusion of other members of the family."

150. In view of the above, in the interlocutory judgment of 14 September 2011, the District Court rightly decided that Oguru and Efanga had to "substantiate that and why Oguru and Efanga qualify as (exclusive) owner".⁹⁸ However, in the case documents following this interlocutory judgment, Oguru and Efanga principally argued that they "use and occupy" those lands, plants and trees, and fish ponds.⁹⁹ Only in as far as required to demonstrate their right of action, Oguru and Efanga contended that they were the (exclusive) owner.
151. In the final judgment (ground 4.18), the District Court wrongly found that it has been sufficiently established that "Oguru and Efanga are the possessors of the land and fish ponds contaminated by this oil spill and thus have a right of action".¹⁰⁰ With this finding, the District Court fails to recognize that Oguru and Efanga initiated their claims *pro se* and not as a member of the Oruma community, in part on behalf of the other members of the community. Had Oguru and Efanga wanted to initiate a claim on behalf of the community, the initiatory summons should have demonstrated this. The question to be answered in connection with Oguru's and Efanga's right of action is not whether as members of the community, they were entitled to the land or fish ponds that were contaminated by the oil spill of 26 June 2005; the question to be answered is whether at the time they initiated their claims, Oguru and Efanga were the exclusive owners or had exclusive possession of what they continuously refer to as "their" land and fish ponds. The reasons for this are as follows.
152. The District Court failed to recognize that in Nigeria, in principle, the fact that land and plants and trees and fish ponds on that land are owned by the relevant community or clan (*'family'*), demonstrates that the mere circumstance that a member of that community or clan "occupies and uses" part of that land does not mean that he acquires the exclusive title or possession in respect of the community. The fact that the District Court failed to recognize this is demonstrated by its findings in ground 4.18:

"Oguru en Efanga submitted that they came in possession of the land and fish ponds by using and cultivating them. Under Nigerian common law, this can lead to possession of the land and fish ponds, as *inter alia* follows

⁹⁸ Interlocutory judgment dated 14 September 2011, ground 5.4.

⁹⁹ Reply in the Motion to produce documents in the case Milieudefensie et al./RDS and SPDC, nos. 107-108, Reply in the case Milieudefensie et al./RDS and SPDC, nos. 55 and following, Written pleadings of Milieudefensie et al. dated 11 October 2012, nos. 32-52.

¹⁰⁰ Final judgment dated 30 January 2013, ground 4.18.

from *Mogaji & Ors. v. Cadbury Fry Export Ltd.* (1972), given that in that matter, the Nigerian court found that if a person demonstrates that he cultivates agricultural land, this constitutes sufficient evidence to determine that he is in possession of that land. The same will apply for the fish ponds on the land. In addition, after the interlocutory judgment of 14 September 2011, Milieudefensie et al. furnished the statements described in grounds 2.11 and 2.12 above by the Oruma community, from which the District Court understands that according to the local community, Oguru and Efanga in any event had and have the required possession of the contaminated land and fish ponds at issue. Shell et al. failed to submit any concrete facts and circumstances indicating that Oguru and Efanga should not be considered to be possessors."

153. In contrast to what the District Court apparently assumes, the *Mogaji* case did not deal with the question at issue here, namely how a member of a community can obtain exclusive possession of part of the land of the community (meaning to the exclusion of possession by the other members of the community). The fact that as member of the Oruma community, Oguru and Efanga may use part of the land does not mean that they have become the exclusive possessors of the land:¹⁰¹

"proof of user does not necessarily prove exclusive possession for the simple reason that the communal ownership entitles every member of the community to use the land, though quite often the head of the family or community allocates portions of the land to individual members for their use."

154. Oguru and Efanga have still not contended anything demonstrating that they qualify as the exclusive owners or possessors of the lands, plants and trees and/or fish ponds contaminated by the oil spill of 26 June 2005. In the first instance, Milieudefensie et al. did no more on this point than submit two statements dated 15 May 2012 by members of the Oruma community at the very last moment,¹⁰² which include the following:

"The Oruma community hereby declares that the land and fish ponds subject of the suit in The Hague, The Netherlands, situated at Olumogbo-bara in Oruma Community, Ogbia Local Government Area of Bayelsa State as shown in the google earth map annexed hereunto are owned and

¹⁰¹ *Ojibah v. Ojibah* (1991) 5 NWLR (pt 191) 296, p. 315-B. See the Supplementary Opinion of Professor F. Oditah QC, SAN of 19 October 2010 (Exhibit 11 with the Rejoinder in the Motion to produce documents of RDS and SPDC), no. 4. This ruling has been submitted as Exhibit 26 with this opinion.

¹⁰² Exhibit M.4 of Milieudefensie et al.

used by [Oguru and Efanga, respectively; added by attorney], and that he has the right to do so."

155. These statements do not demonstrate on what basis Oguru and/or Efanga allegedly acquired exclusive ownership or exclusive possession of the lands and fish ponds in question. Nor is it clear what is meant with the term "owned" in the statements. After all, Oguru and Efanga are members of the Oruma community and to this extent, the lands and fish ponds were also co-owned by them. However, this co-ownership does not entitle them to any right of action, unless Oguru and Efanga act in part on behalf of the other members of the community. However, it has not been demonstrated that Oguru and Efanga initiated their claims on behalf of the other members of the community, as well. Thus, Oguru and Efanga exclusively initiated their claims *pro se*. Oguru and Efanga would only have a *pro se* right of action if they acquired exclusive ownership (or possession) in respect of the community. The fact that the latter occurred cannot be inferred from the statements by the members of the Oruma community, let alone can it be inferred when and how this occurred.
156. In addition, Oguru and Efanga have still not explained exactly where the lands and fish ponds they allegedly own or possess are located. The maps that are attached to the statements of 15 May 2012 referred to above are prints of Google maps on which the alleged location of the fish ponds and the land is indicated using large circles.¹⁰³ Based on those maps, it is utterly impossible to determine the exact location of the land and the fish ponds Oguru and Efanga claim they (exclusively) own or possess. Moreover, the District Court's opinion in ground 4.18 of the final judgment that "[t]he fact that Shell et al. argue that SPDC had the land and fish ponds cleaned demonstrates that Shell et al. sufficiently understand which contaminated land and fish ponds near Oruma Milieudefensie et al. are referring to in these two proceedings" is incorrect. After all, with this finding, the District Court fails to recognize that the fact that SPDC cleaned land and fish ponds near Oruma does not mean that it also knows where the lands and fish ponds of Oguru and Efanga, respectively are located (or whether those lands and fish ponds are even part of the lands and fish ponds near Oruma affected by the oil spill at issue and subsequently cleaned up by SPDC). Thus, on this point, as well, Oguru and Efanga (still) have not satisfied their duties to contend facts and circumstances and furnish evidence.
157. In view of the above, Shell concludes that Oguru and Efanga do not have any legitimate interest in their claims to produce documents. Oguru and Efanga must first (i) demonstrate that they exclusively own or exclusively possess any of the lands and fish ponds that were contaminated as a result of the oil spill of 26 June 2005 near Oruma (and which have been cleaned up in the interim) and

¹⁰³ See Exhibit M.4 of Milieudefensie et al.

(ii) sufficiently clarify *which* specific lands and fish ponds they exclusively own or exclusively possess. Failing this, they are not entitled to any right of action against Shell and are thus not entitled to the production of documents, either.

6 LEGAL FRAMEWORK OF SECTION 843a DCCP

158. 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:¹⁰⁴

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 sufficient¹⁰⁵;
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.

159. 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*.

160. In ground 4.6 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

¹⁰⁴ 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 4.6, cited in no. 160 below.

¹⁰⁵ 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."

161. In sections 6.1 and 6.2 below, the requirements of a legitimate interest and the definition of the claimed documents in particular are discussed in more detail. In section 6.3, a few general comments will be made regarding serious reasons as a ground for dismissal.

6.1 Legitimate interest

162. In the first instance, the District Court dismissed Milieudefensie et al.'s claims to produce documents for lack of a legitimate interest in the sense of an evidentiary interest.¹⁰⁶ According to the District Court, in the case at issue, this evidentiary interest is absent, because Milieudefensie et al. insufficiently substantiated their arguments (as regards the facts or in legal terms). For example, according to the District Court, Milieudefensie et al. do not have a legitimate interest in access to documents that shed light on the (maintenance) condition of the pipeline in question, because Milieudefensie et al. advanced an insufficiently substantiated refutation against Shell's substantiated defense that the oil spill was caused by sabotage.¹⁰⁷ The District Court also held that Milieudefensie et al. *inter alia* do not have a legitimate interest in access to documents that could be used to substantiate the argument that RDS, the Koninklijke and/or Shell Transport had influence on and control over SPDC's allegedly failing environmental policy, because Milieudefensie et al. did not

¹⁰⁶ Interlocutory judgment of 14 September 2011, grounds 4.6, 4.8-4.10, 4.14-4.15.

¹⁰⁷ See the interlocutory judgment of 14 September 2011, grounds 4.9-4.10.

offer sufficiently concrete reasons for the fact that under Nigerian law, this argument could lead to liability on the part of RDS, the Koninklijke and Shell Transport.¹⁰⁸

163. According to Milieudefensie et al., 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 et al., the circumstances may compel the arguments to be structured in part based on the documentary evidence.¹⁰⁹
164. Milieudefensie et al.'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.¹¹⁰ 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.¹¹¹ 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.
165. Section 843a DCCP does not offer the possibility to request access to documents that the party claiming the production of documents merely

¹⁰⁸ See the interlocutory judgment of 14 September 2011, grounds 4.14-4.15.

¹⁰⁹ 2013 Motion to produce documents, no. 15.

¹¹⁰ Defense in the Motion to produce documents, nos. 9-10; 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.

¹¹¹ 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)

suspects could support his arguments. The plaintiff must demonstrate that he needs the documents to prove an argument from which the possibility of liability may be inferred based on normal empirical rules.¹¹²

166. According to Milieudefensie et al.'s arguments mentioned in no. 163 above, a *fishing expedition* is involved in the case at issue: Milieudefensie et al. want access to documents in order to "structure" their arguments based on those documents. In other words, after examining the claimed documents, Milieudefensie et al. want to determine the arguments that they will submit. In so doing, Milieudefensie et al. fail to recognize that – as stated before – they only have a legitimate interest in access to documents after they have satisfied their duty to contend facts and circumstances.
167. Milieudefensie et al. further submit that they have 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 the plaintiffs failed to demonstrate that SPDC allegedly breached a duty of care in the occurrence and remediation of the oil spills, as well as in cleaning up the pollution" and that "the plaintiffs failed to demonstrate that the special circumstances under which a duty of care may fall on RDS according to Nigerian law indeed occurred".¹¹³ According to Milieudefensie et al., this establishes that they have a legitimate interest in access to documents that will enable them to prove the relevant circumstances.
168. This argument of Milieudefensie et al. also fails. The mere fact that Milieudefensie et al.'s claims have been dismissed does not mean that they allegedly now have a legitimate interest in access to documents, of course. Milieudefensie et al. wrongfully suggest that the District Court dismissed Milieudefensie et al.'s claims, because they were unable to *prove* ("aantonen") their claims. The District Court dismissed their claims because Milieudefensie et al. failed to satisfy their duty to contend facts and circumstances.

¹¹² 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.

¹¹³ 2013 Motion to produce documents, no. 16.

Milieudefensie et al. will first have to satisfy their duty to contend facts and circumstances before they are entitled to the production of documents.

169. In concrete terms, this means that Milieudefensie et al. will first have to indicate what specific arguments they want to use as the basis for challenging the District Court's judgments. As stated before, Shell believes that this must be done by formulating grounds for appeal against the interlocutory judgment in the 2010 Motion to produce documents and the final judgment of the District Court (see nos. 10-19 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 et al. 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.

6.2 Sufficiently specific documents

170. 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.¹¹⁴ The plaintiff in the motion to produce documents must indicate why he expects that the documents are relevant for the dispute that has arisen.¹¹⁵ 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.
171. As stated before, with regard to the alleged knowledge of and guidance by "the parent company", in the subject motion, Milieudefensie et al. claim access to documents that they also claimed in the first instance (see nos. 208, 218, 226, 233, 242 and 245 below). The difference with the motion to produce documents in the first instance is that this time, Milieudefensie et al. use different designations for the claimed documents and no longer claim access to specific categories of documents. In the 2013 Motion to produce documents, Milieudefensie et al. indicate the claimed documents with English terms that they apparently found in Shell documents or on Shell's website.¹¹⁶ However, this does not satisfy the requirement that the documents to which access is

¹¹⁴ 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.

¹¹⁵ Dutch Lower House 2011-2012, 33 079, no. 3, p. 10.

¹¹⁶ Cf. the 2013 Motion to produce documents, no. 135.

being claimed this time have been "sufficiently specified" or that this time a legitimate interest in the production of those documents exists.

172. In nos. 73 and following of the 2013 Motion to produce documents, Milieudefensie et al. explain 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 et al. submit that "*[t]he whole system is designed for 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*".¹¹⁷ Milieudefensie et al. wrongfully create the picture that as listed holding companies, RDS, the Koninklijke and Shell Transport allegedly determine everything and are even aware of every detail of and exercise control over the operational activities of their group companies. This picture does not correspond to reality. Milieudefensie et al. ignore the distinction between the various Shell companies. None of the documents that Milieudefensie et al. believe imply that "the parent company" has specific knowledge originate from RDS, the Koninklijke or Shell Transport.
173. The result is that a number of the documents to which Milieudefensie et al. are 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.

6.3 Serious reasons: confidential documents

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

¹¹⁷ 2013 Motion to produce documents, no. 76.

7 CLAIMED DOCUMENTS REGARDING THE PARENT COMPANY'S DUTY OF CARE

7.1 General defenses against categories a. through f.

176. Milieudefensie et al. primarily claim the documents mentioned in paragraphs a. to f. in view of their claims against RDS, the Koninklijke and Shell Transport. They want to use those documents to demonstrate "that the parent company assumed responsibility and that this means that it had a duty of care".¹¹⁸ However, Milieudefensie et al. have no legitimate interest in the production of documents in view of their claims against RDS, the Koninklijke and Shell Transport.
177. Firstly, the claims against RDS, the Koninklijke and Shell Transport are certain to fail due to the absence of a legal basis in Nigerian law (see nos. 51-61 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, the Koninklijke and Shell Transport. 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. To the extent that the claim for access to documents is made in view of the claims against RDS, the Koninklijke and Shell Transport, it must be dismissed for that reason alone.
178. Secondly, Milieudefensie et al. wrongfully do not distinguish between the various companies. Milieudefensie et al. consistently refer to "the parent company" or the "parent" and submit that this "parent company" is liable, because it allegedly failed to intervene in the situation in Nigeria. Milieudefensie et al. fail to recognize that instead of a single "parent company" there are three different companies: RDS, the Koninklijke and Shell Transport. Milieudefensie et al. fail to specify the basis on which they want to hold which of these three companies liable for what, even though such specification is required, of course.
179. RDS was only placed at the head of the group on 20 July 2005 at the earliest. Of the documents claimed in paragraphs a. to f. that pertain to the period before 20 July 2005, it is not clear how they can be relevant for the alleged knowledge of or interference by RDS regarding the situation in Nigeria. Thus, the legitimate interest in access to documents from the period 2002 to 20 July 2005 is absent to the extent that Milieudefensie et al. want to examine those documents in view of their claims against RDS.

¹¹⁸ 2013 Motion to produce documents, no. 139.

180. Before RDS was placed at the head of the group in the scope of the *unification*, the Koninklijke and Shell Transport were the listed parent companies of the Koninklijke/Shell Group ('*Group Parent Companies*'). The Koninklijke and Shell Transport were not part of the Koninklijke/Shell Group. They held the shares in the Group's Holding Companies (the '*Group Holding Companies*'), SPNV and SPCo. Thus, SPNV and SPCo were the top holding companies *within* the group. In turn, they directly or indirectly held the shares in the group companies, including *operating companies* such as SPDC. The shares in SPDC were held by SPCo as Group Holding Company (3.7 billion shares). Because Nigerian law stipulates the requirement that a company has several shareholders, one share was held by SPNV. To the extent that any exercise of influence on SPDC's policy by a "parent company" was involved by means of exercising the rights attached to the shares in SPDC, this guidance was thus conducted by SPCo as Group Holding Company and not by the Koninklijke and Shell Transport as Group Parent Companies (nor by SPNV, which only held one share in SPDC).
181. For this reason alone, the Koninklijke and Shell Transport did not fulfil the role that Milieudéfensie et al. ascribes to them. Shell explained all this extensively in the first instance.¹¹⁹ Shell also indicated that all this was known from public sources; moreover, this also follows from the Group Governance Guide, which Milieudéfensie et al. themselves have submitted into the proceedings.¹²⁰ In this light, Milieudéfensie et al. could have been and can be expected to further substantiate the basis of the alleged liability of the Koninklijke and Shell Transport, in any event in the scope of this new request for the production of documents. They fail to do so. To the extent that the claim for access to documents is made in view of the claims against the Koninklijke and Shell Transport, it must be dismissed due to lack of a legitimate interest for this reason, as well.
182. Moreover, Milieudéfensie et al. claim the production of a large number of documents without explaining which documents they are claiming from which company. They must do so to substantiate the legitimate interest. To the extent that Milieudéfensie et al. claim the production of documents in view of their claims against RDS, the Koninklijke and Shell Transport, at a minimum they must explain why they have a legitimate interest in access to documents that are solely held by SPDC. Milieudéfensie et al. act as if every document somewhere in the Royal Dutch Shell Group may be relevant to substantiate

¹¹⁹ See the Defense of SPNV and Shell Transport, nos. 31-47 and 156; and the Rejoinder, nos. 23-49.

¹²⁰ See the Defense of SPNV and Shell Transport, no. 39.

their claims against RDS, the Koninklijke and Shell Transport. That is not true, of course.

183. Thirdly, Milieudéfensie et al.'s submissions in the 2013 Motion to produce documents regarding the duty of care of the "parent company" cannot lead to the conclusion that they have a legitimate interest in the production of documents in view of their claims against RDS, the Koninklijke and Shell Transport otherwise, either.
184. Milieudéfensie et al. claim that they have a legitimate interest in the production of the documents in paragraphs a. to f. because they want to demonstrate that the "parent company" had knowledge in the area of pipeline management, 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".¹²¹ Milieudéfensie et al. also submit 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 Oruma."¹²²
185. Milieudéfensie et al. insufficiently substantiated these arguments. This means that they do not have a legitimate interest in the production of documents. Their wish to further substantiate these arguments by receiving a large number of internal documents is insufficient in law to justify the production of documents. Milieudéfensie et al.'s argument set out in no. 184 above can be broken down into three parts: knowledge, awareness and interference. Shell will briefly address these subjects below.

Knowledge

186. Milieudéfensie et al. submit that they want to use the claimed documents to demonstrate that "RDS had superior knowledge of relevant aspects of pipeline management, safety and the environment", so that RDS also had a duty of care.¹²³ Milieudéfensie et al. derive the term "superior knowledge" from the ruling of the English Court of Appeal in *Chandler v. Cape*. As at issue in *Chandler v. Cape*, they are referring to "superior knowledge" compared to the subsidiary in question, in this case SPDC.¹²⁴

¹²¹ 2013 Motion to produce documents, no. 139 (f).

¹²² 2013 Motion to produce documents, no. 139 (a) and (e), respectively.

¹²³ 2013 Motion to produce documents, no. 17. According to no. 20 of the 2013 Motion to produce documents, RDS as used in this connection is the "parent company", the generic designation that Milieudéfensie et al. use for RDS, the Koninklijke and Shell Transport.

¹²⁴ See the 2013 Motion to produce documents, nos. 69 and 99.

187. Milieudefensie et al. fail to provide any well-reasoned substantiation whatsoever for their argument that compared to SPDC, RDS, the Koninklijke and/or Shell Transport had "superior knowledge" of pipeline management, 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 industry in Nigeria than SPDC itself.¹²⁵ Milieudefensie et al. do not counter this with any concrete argument in the 2013 Motion to produce documents.
188. In the 2013 Motion to produce documents, Milieudefensie et al. explain 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."¹²⁶ To this end, they quote extensively from "*standards and manuals*" that they believe 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".¹²⁷ Milieudefensie et al. add 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".¹²⁸ According to Milieudefensie et al., the issue is that the *manuals* demonstrate that the relevant knowledge in the area of pipeline management, safety and the environment was available at the parent company."¹²⁹
189. This argument already fails to hold because, as Milieudefensie et al. themselves recognize, the "*standards and manuals*" they invoke to substantiate the alleged "knowledge of the parent company" do not originate from RDS, the Koninklijke or Shell Transport.¹³⁰ Milieudefensie et al. write:¹³¹

¹²⁵ Ground 4.38.

¹²⁶ 2013 Motion to produce documents, no. 72.

¹²⁷ 2013 Motion to produce documents, no. 69.

¹²⁸ 2013 Motion to produce documents, no. 99.

¹²⁹ *Idem*.

¹³⁰ Milieudefensie et al. cite a large number of DEPs and HSE Manuals and submit part of these documents. It is not clear to Shell how Milieudefensie et al. 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 et al. 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, Shell Transport or the Koninklijke.

¹³¹ 2013 Motion to produce documents, no. 93.

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

190. Milieudefensie et al. apparently feel that all the knowledge present within the group can be attributed to RDS, the Koninklijke and Shell Transport. Otherwise, it is incomprehensible why they offer an extensive explanation based on *Design and Engineering Practices* ("DEPs"), even though they recognize that those documents do not originate from RDS, the Koninklijke or Shell Transport, 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 et al. rightfully recognize that the DEPs do not imply any duty of care for Shell Global Solutions B.V. This applies *a fortiori* for RDS, the Koninklijke and Shell Transport. The same is true for the HSE Manuals that Milieudefensie et al. invoke, of course.¹³² These HSE Manuals have been drawn up by SIEP. What Milieudefensie et al. mean 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, the Koninklijke and Shell Transport.
191. 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, Shell Transport or the Koninklijke. As stated before, as Milieudefensie et al. also recognize, DEPs and HSE Manuals are not and were not drawn up by the listed parent companies, 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 companies, let alone do they imply that RDS, the Koninklijke and Shell

¹³²

2013 Motion to produce documents, no. 96, with Exhibits N8 and N9.

Transport had "superior knowledge" compared to SPDC of pipeline management, 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."¹³³ In the case at issue, the group's "parent company" does not have any "superior knowledge" compared to SPDC of pipeline management, safety and the environment in Nigeria.

192. 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 pipeline management, safety and the environment in Nigeria. Milieudefensie et al. wrongfully assume 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 130). Whatever can be said of this, the DEPs and HSE Manuals that Milieudefensie et al. cite 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."¹³⁴

193. 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 Oruma of 26 June 2005. Milieudefensie et al. argue 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

¹³³ *Chandler v. Cape* [2011] EWHC 951 (QB), per Arden, LJ, para. 75.

¹³⁴ See p. 2 of Exhibits N3 through N6.

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.

194. As Milieudéfensie et al. acknowledge according to their arguments,¹³⁵ 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 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, Milieudéfensie et al.'s argument that the "margin for discretion" of operating companies "is very precisely defined by the central guidelines"¹³⁶ 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, Milieudéfensie et al. – rightfully – do 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, the Koninklijke and Shell Transport.
195. The above means that Milieudéfensie et al. 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."¹³⁷ This is not what SPDC did. Nor was this required, because it is not the "parent company", but SPDC itself that has "*superior knowledge*". Milieudéfensie et al. apparently take this position to focus their argument on the criteria developed by the English Court of Appeal in *Chandler v. Cape*. Milieudéfensie et al. fail to recognize that the case at issue is incomparable to *Chandler v. Cape*.

Awareness

196. Milieudéfensie et al. submit that they want to use the claimed documents to demonstrate that "RDS was aware or should have been aware of the

¹³⁵ 2013 Motion to produce documents, no. 75.

¹³⁶ 2013 Motion to produce documents, no. 75.

¹³⁷ 2013 Motion to produce documents, no. 118.

circumstances in Nigeria, so that RDS was also under a duty of care".¹³⁸ They also submit that "the parent company was aware or could be aware of the conditions near Oruma."¹³⁹ It is pointed out that Milieudéfensie et al. believe that the fact that the "parent company" was aware of the "specific circumstances of this oil spill near Oruma" is not a decisive factor.¹⁴⁰ Milieudéfensie et al. blame the "parent company" for failing to intervene, even though it was aware of the systematic failures of SPDC. According to Milieudéfensie et al., oil spills with the magnitude of the oil spill near Oruma are "centrally monitored" and the "parent company" was thus aware of the special risks that were being taken in the Niger Delta.¹⁴¹

197. This position by Milieudéfensie et al. also fails. RDS, the Koninklijke and Shell Transport have never been informed of the oil spill near Oruma of 26 June 2005. Shell explained this repeatedly in the first instance.¹⁴² Milieudéfensie et al. have never submitted any concrete argument to counter this. They also fail to do so in their 2013 Motion to produce documents. Apparently for this reason, Milieudéfensie et al. fall back on the argument that oil spills with the magnitude of the oil spill near Oruma are "centrally monitored" and that the "parent company" was thus aware of the special risks that were being taken in the Niger Delta.¹⁴³
198. As the District Court rightfully held first in all its judgments, these two proceedings deal with the oil spill near Oruma of 26 June 2005.¹⁴⁴ They do not deal with the situation in the Niger Delta in general:¹⁴⁵ "However, in these two proceedings, the Dutch court cannot and will not render an opinion regarding the discussion between Milieudéfensie et al. and Shell et al. regarding Shell et al.'s general policy in its oil production operations in Nigeria. In these two proceedings, the District Court may and will only rule on the specific claims

¹³⁸ 2013 Motion to produce documents, no. 27. According to no. 20 of the 2013 Motion to produce documents, RDS as used in this connection refers to the "parent company", the generic designation that Milieudéfensie et al. use for RDS, the Koninklijke and Shell Transport.

¹³⁹ 2013 Motion to produce documents, no. 139 (e).

¹⁴⁰ 2013 Motion to produce documents, no. 116.

¹⁴¹ Idem.

¹⁴² See, *inter alia*: the Defense in the case Milieudéfensie et al./RDS and SPDC, no. 72; the Defense in the case Milieudéfensie et al./SPNV and Shell Transport, no. 106; the Rejoinder, no. 34.

¹⁴³ 2013 Motion to produce documents, no. 116.

¹⁴⁴ Judgment in the jurisdiction motion of 24 February 2010, ground 2.2; judgment in the 2010 Motion to produce documents of 14 September 2011, ground 4.3; final judgment, ground 4.16.

¹⁴⁵ Final judgment, ground 4.16.

lodged by Milieudefensie et al. in response to this specific oil spill in 2005 near Oruma."

199. Already against this background it is not clear that Milieudefensie et al. have a legitimate interest in the production of documents they want 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, the Koninklijke or Shell Transport are liable for the damage suffered as a result of the oil spill of 26 June 2005 near Oruma. 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 et al. fail 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 of 26 June 2005 near Oruma. In addition, Shell contests that any "systematic" failure by SPDC is involved.
200. Milieudefensie et al. do not advance any concrete argument regarding the fact that "the parent company was aware" of the circumstances of the oil spill at issue. Milieudefensie et al. get no further than the general submission that the "parent company should have known that the risk of damage as the result of sabotage of the pipelines 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."¹⁴⁶ As stated before, that is insufficient. This is not changed by Milieudefensie et al.'s argument that is allegedly "not required to demonstrate that Shell directly contributed to the damage due to its central policy."¹⁴⁷ This argument is simply incorrect. To assume any liability on the part of RDS, the Koninklijke or Shell Transport in any event also requires that the challenged "central policy" resulted in the alleged damage.
201. The District Court rightfully found that the businesses of RDS, the Koninklijke and Shell Transport, 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".¹⁴⁸ In the 2013 Motion to produce documents, Milieudefensie et al. contest this finding to no avail by referring to Weir's opinion.¹⁴⁹

¹⁴⁶ 2013 Motion to produce documents, no. 117.

¹⁴⁷ 2013 Motion to produce documents, no. 80.

¹⁴⁸ Ground 4.38.

¹⁴⁹ 2013 Motion to produce documents, no. 70.

Milieudefensie et al. and Weir fail to recognize that RDS, the Koninklijke and Shell Transport themselves did not and do not have any operational activities.¹⁵⁰

Involvement

202. Finally, Milieudefensie et al. also create an incorrect picture regarding the involvement of RDS, the Koninklijke and Shell Transport in respect of pipeline maintenance, safety measures and clean-up work. They argue 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 et al., these plans "stipulate in detail how the operating companies will operate."¹⁵¹ They also argue that: "Important choices regarding the problems in the Niger Delta, measures against the unsafe situation in Ogoniland, including measures against sabotage and *bunkering*, and the question regarding if and at the expense of how much effort and means attempts would have to be made to clean up 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."¹⁵²
203. This argument is also incorrect and lacks adequate substantiation. As Shell already explained in the first instance, RDS, the Koninklijke and Shell Transport are not and were not involved in the details of the operations of SPDC.¹⁵³ These proceedings involve the question regarding whether the oil spill near Oruma was caused by sabotage or corrosion, and whether SPDC responded adequately to the oil spill and remediated the affected area. Milieudefensie et al. wrongfully assume that there are business plans and budgets of SPDC that have been "approved" by RDS, the Koninklijke or Shell Transport, which are so detailed that these plans and budgets contain information that may be helpful in answering these questions. Milieudefensie et al. likewise wrongfully assume that RDS, the Koninklijke and Shell Transport were involved in SPDC's "choice" to take measures against sabotage and *bunkering*, let alone in the decision regarding whether or not to make efforts or make means available to clean up the contamination caused by the oil spill at issue. The argument that a "dependency relationship" is involved within which SPDC "hardly had any room" to make an "independent consideration" is incorrect. Nor do Milieudefensie et al. explain what "consideration" they have in mind here. To the extent that

¹⁵⁰ See the Rejoinder, nos. 40-46.

¹⁵¹ 2013 Motion to produce documents, no. 75.

¹⁵² 2013 Motion to produce documents, no. 118.

¹⁵³ Rejoinder, nos. 37-46.

Milieudefensie et al. want to suggest that RDS, the Koninklijke or Shell Transport prevented SPDC from doing what it had to do in any respect, that suggestion lacks each and every ground.

Conclusion

204. What it comes down to is that based on DEPs and HSE Manuals, Milieudefensie et al. give a detailed explanation regarding "superior knowledge", "being aware of the circumstances near Oruma", or at least "in the Niger Delta" and SPDC's assumed "dependency relationship" with the "parent company", but they fail to indicate what specific knowledge and awareness of RDS, the Koninklijke and Shell Transport were, in fact, involved that are relevant to the case at issue. Apparently, they hope to discover this with the aid of documents they claim access to. However, the right to the production of documents is not intended for this purpose. Milieudefensie et al.'s motion to produce documents comprises an inadmissible *fishing expedition*.
205. Superfluously it is noted that Milieudefensie et al.'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.¹⁵⁴ 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.
206. Shell notes the following in response to the individual documents.

7.2 a. Business plans and reports (2002-2005)

207. In paragraph a., Milieudefensie et al. claim access to "the annual business plans and monthly business reports in respect of maintenance, the environment and safety regarding Oruma and the entire pipeline near Oruma for the three years prior to the oil spill of 2005". By way of explanation, Milieudefensie et al. submit 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 et al. submit 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.¹⁵⁵

¹⁵⁴ See, for example, the 2013 Motion to produce documents, no. 71.

¹⁵⁵ 2013 Motion to produce documents, no. 139 (a), p. 49.

Documents were already claimed in the first instance; Milieudéfensie et al. must first put forward grounds for appeal against the District Court's decision dismissing their claim

208. This part of the claim already fails based on the fact that in the first instance, Milieudéfensie et al. 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 subsidiaries¹⁵⁶ and the District Court dismissed that claim.¹⁵⁷ Milieudéfensie et al. fail 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. Milieudéfensie et al. cannot simply initiate the same claim again, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 10-19 above).

Documents have not been sufficiently concretely described

209. 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 "Oruma and the entire pipeline near Oruma", 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 Milieudéfensie et al. assume that these documents exist. The term "business plan" is mentioned in nos. 75, 77 and 101 of the 2013 Motion to produce documents, but it is not explained anywhere what specific documents Milieudéfensie et al. are referring to or based on which they assume that business plans or monthly business reports exist specifically with respect to the vicinity of Oruma or the pipeline near Oruma.

No legitimate interest

¹⁵⁶ See the Motion to produce documents in the case Milieudéfensie et al./RDS and SPDC, no. 21 (xv), p. 10, where access is claimed to "documents regarding the years 2000-2008 and containing the annual work programs, the maintenance plans and the related budgets of the Joint Venture" and no. 21 (xvii), on p. 10, where access is claimed to "the communication regarding the (contents of the) documents specified in par. xv 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". See also the Motion to produce documents in the case Milieudéfensie et al./SPNV and Shell Transport, (xiii) and (xv), respectively, p. 15.

¹⁵⁷ See the interlocutory judgment of 14 September 2011, grounds 4.13 (a) and (b), 4.14 and 4.15.

210. Moreover, Milieudefensie et al. lack a legitimate interest in access to the documents claimed in paragraph a. The reasons for this are as follows.
211. Milieudefensie et al. submit 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.
212. As stated before (see nos. 202-203 above), Milieudefensie et al. incorrectly represent the involvement by RDS, the Koninklijke and Shell Transport in respect of pipeline maintenance, safety measures and clean-up work regarding the oil spill near Oruma of 26 June 2005. Moreover, they fail to specify which "goals" they believe were set "in consultation with the parent company" and which "budgetary measures" by the "parent company" they have in mind. What it comes down to is that Milieudefensie et al. advance the unfounded submission that there are business plans and reports of SPDC that have been drawn up in consultation with RDS, the Koninklijke or Shell Transport, 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, the Koninklijke or Shell Transport 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.
213. 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 et al.'s argument in respect of the awareness on the part of RDS, Shell Transport and the Koninklijke regarding the conditions in Nigeria in general is insufficient to substantiate the legitimate interest in the production of these documents, see nos. 194-200 above. In view of the contents of the dispute between the parties, Milieudefensie et al. have no legitimate interest in documents that deal with subjects other than the oil spill at issue near Oruma in June 2005.
214. Moreover, Milieudefensie et al. fail to explain why they allegedly have a legitimate interest in documents claimed here for "the three years prior to the oil spill of 2005". 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*.
215. The argument in respect of the alleged "superior knowledge" and awareness on the part of RDS, the Koninklijke and/or Shell Transport 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. 183-205 above.

Confidentiality

216. Finally, this part of the claim to produce documents fails based on the confidential nature of business plans and monthly reports (see nos. 174-175 above).

7.3 b. Audit reports and follow-up

217. In paragraph b., Milieudefensie et al. claim access to the "most recent audit report at the time of the oil spill regarding maintenance (*asset integrity*) of SPDC, in particular for the pipeline near Oruma, 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 et al., these documents show that "the parent company is extensively informed of the activities of its subsidiaries". With these documents, Milieudefensie et al. want 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". In addition, Milieudefensie et al. want to use these documents to demonstrate that SPDC breached its duties of care.¹⁵⁸

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

218. The claim already fails based on the fact that in the first instance, Milieudefensie et al. already claimed the production of "all (management) reports and other communication between Shell Nigeria or 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 2000-2008 and regarding the oil spill near Oruma in June 2005 in particular"¹⁵⁹ and the District Court dismissed that claim.¹⁶⁰ Milieudefensie et al. fail 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

¹⁵⁸ 2013 Motion to produce documents, no. 144 (b), p. 49.

¹⁵⁹ See the Motion to produce documents in the case Milieudefensie et al./RDS and SPDC, no. 21 (xiii), p. 10. See also the Motion to produce documents in the case of Milieudefensie et al./SPNV and Shell Transport, (xvi), p. 16.

¹⁶⁰ See the interlocutory judgment of 14 September 2011, grounds 4.13 (a) and (b), 4.14 and 4.15.

were claimed in the first instance. Milieudéfensie et al. cannot simply initiate the same claim again, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 10-19 above).

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

219. In addition, there are no "audit reports" that satisfy the description in paragraph b. In nos. 102 and following of the 2013 Motion to produce documents, Milieudéfensie et al. refer to "audits" that are conducted "at several levels". They infer this from the "Standard: HSSE Auditing" document that they submitted as Exhibit N-10. 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,¹⁶¹ but this does not mean that there allegedly is an audit report regarding the "pipeline near Oruma" or regarding the *Emergency and Oil Spill response*, including *findings and recommendations, approval and closeout* of the oil spill at issue near Oruma. Moreover, the fact that Milieudéfensie et al. claim the "most recent audit report at the time of the oil spill (...)" already demonstrates that they do not know the specific report to which they are claiming access. In this respect, as well, the request to produce documents constitutes an unacceptable *fishing expedition*.

No legitimate interest

220. Moreover, there is no legitimate interest in this part of the claim, as well. Milieudéfensie et al. do not establish any concrete relationship between the alleged contents of the claimed documents and their argument regarding the liability of Shell for the oil spill at issue, let alone do Milieudéfensie et al. substantiate that and how the claimed documents might contain evidence of an argument they must prove in order to see their claims against Shell regarding the oil spill at issue awarded.
221. To the extent that the documents claimed in paragraph b are claimed in view of the claims in the main action against RDS, the Koninklijke and Shell Transport, Milieudéfensie et al.'s argument regarding awareness on the part of RDS, Shell Transport and the Koninklijke of the conditions in Nigeria in general is insufficient to substantiate the legitimate interest in the production of these documents, see nos. 196-201 above.
222. With regard to the alleged legitimate interest in substantiating the alleged breach of the duty of care by SPDC, Milieudéfensie et al. fail to explain in what respect SPDC allegedly breached its duty of care according to the documents

¹⁶¹ See the Rejoinder, no. 43.

claimed in paragraph b. Moreover, Milieudéfensie et al. fail to recognize that, as stated before, Section 11(5)(c) OPA provides for strict liability on the part of SPDC. To answer the question regarding whether SPDC is liable, it is irrelevant whether it was under a duty of care and whether it breached this duty of care. Milieudéfensie et al.'s wish to use the claimed documents to demonstrate that SPDC was under a duty of care and that SPDC breached its duty of care cannot constitute any legitimate interest in the production of documents, either (see no. 24 above).

223. In view of the contents of the dispute between the parties, Milieudéfensie et al. have no legitimate interest in documents that deal with subjects other than the oil spill at issue near Oruma in June 2005.

Confidentiality

224. 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.

7.4 c. Assurance letters (2002-2005)

225. In paragraph c., Milieudéfensie et al. claim access to "the assurance letters from the three years prior to the oil spill of 2004 [Shell understands: the oil spill of 2005]". According to Milieudéfensie et al., the operating companies must indicate in these *assurance letters* "that and how they complied with the Group's health, safety and environmental (HSE) policy". Milieudéfensie et al. submit that the *assurance letters* show that "the parent company was aware of the conditions in Nigeria and SPDC's health, safety and environmental management". Milieudéfensie et al. believe that these documents can be used to demonstrate that "the parent company" had a duty of care.¹⁶²

Documents were already claimed in the first instance; Milieudéfensie et al. must first put forward grounds for appeal against the District Court's decision dismissing their claim

226. The claim already fails based on the fact that in the first instance, Milieudéfensie et al. already claimed the production of these documents¹⁶³ and

¹⁶² 2013 Motion to produce documents, no. 139 (c), p. 49.

¹⁶³ See the Motion to produce documents in the case Milieudéfensie et al./RDS and SPDC, no. 21 (xxi), p. 11, claiming access to "the assurance letters from Shell Nigeria to the Executive Committee for the period 2000-2008". See also the Motion to produce documents in the case Milieudéfensie et al./SPNV and Shell Transport, (xviii), p. 17.

the District Court dismissed that claim.¹⁶⁴ Milieudefensie et al. cannot simply initiate the same claim again, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 10-19 above).

No legitimate interest

227. 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.
228. RDS, Shell Transport and the Koninklijke were not aware of the condition of the pipeline near Oruma, the oil spill that occurred at that location in 2005 or cleaning up and remediating the consequences of this oil spill. Milieudefensie et al.'s argument in respect of awareness of RDS, Shell Transport and the Koninklijke regarding the conditions in Nigeria in general is insufficient to substantiate the legitimate interest in the production of these documents, see nos. 196-201 above. In view of the contents of the dispute between the parties, Milieudefensie et al. have no legitimate interest in documents that deal with oil spills or issues other than the oil spill at issue near Oruma in June 2005.
229. Moreover, there is no legitimate interest in this part of the claim, either, because Milieudefensie et al. fail to establish a concrete relationship between the alleged contents of the claimed documents and their arguments regarding the liability of RDS, Shell Transport and the Koninklijke for the oil spill at issue, let alone do Milieudefensie et al. substantiate that and how the claimed documents might contain evidence of an argument they must prove in order to see their claims against RDS, Shell Transport and the Koninklijke regarding the oil spill at issue awarded.
230. Finally, once again, Milieudefensie et al. fail to explain why they allegedly have a legitimate interest in assurance letters "from the three years prior to the oil spill of 2004 (Shell understands: the oil spill of 2005)". 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

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

¹⁶⁴ See the interlocutory judgment of 14 September 2011, grounds 4.13 (b), 4.14 and 4.15.

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

232. In paragraph d., Milieudéfensie et al. claim access to "the *Significant Incidents* and *High Potential Incidents* reported by SPDC regarding Oruma and the entire pipeline near Oruma for the three years prior to the oil spill until 2009 [Shell understands: the oil spill in 2005]". Milieudéfensie et al. are 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". Milieudéfensie et al. want to use these reports to demonstrate that SPDC had a duty of care, because "there was a significant risk of damage as a result of oil spills from the pipeline near Oruma". In addition, according to Milieudéfensie et al. these documents show that the parent company was aware of these risks, so that it also had a duty of care.¹⁶⁵

Documents were already claimed in the first instance; Milieudéfensie et al. must first put forward grounds for appeal against the District Court's decision dismissing their claim

233. The claim already fails based on the fact that in the first instance, Milieudéfensie et al. already claimed access to "all (management) reports and other communication between Shell Nigeria or 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 2000-2008 and regarding the oil spill near Oruma in June 2005 in particular"¹⁶⁶ and the District Court dismissed that claim.¹⁶⁷ Milieudéfensie et al. fail to explain that the currently claimed "*Significant Incidents* and *High Potential Incidents* reported by SPDC regarding Oruma and the entire pipeline near Oruma for the three years prior to the oil spill until 2009 [Shell understands: the oil spill in 2005]" allegedly do not fall into this category of documents that were claimed in the first instance. Milieudéfensie et al. cannot simply initiate the same claim again, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 10-19 above).

No legitimate interest

¹⁶⁵ 2013 Motion to produce documents, no. 139 (d), p. 50.

¹⁶⁶ See the Motion to produce documents in the case Milieudéfensie et al./RDS and SPDC, no. 21 (xviii), p. 10. See also the Motion to produce documents in the case of Milieudéfensie et al./SPNV and Shell Transport, (xvi), p. 16.

¹⁶⁷ See the interlocutory judgment of 14 September 2011, grounds 4.13 (a) and (b), 4.14 and 4.15.

234. 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 et al.'s argument regarding awareness on the part of RDS, Shell Transport and the Koninklijke of the conditions in Nigeria in general is insufficient to substantiate the legitimate interest in the production of these documents, see nos. 196-201 above. In view of the contents of the dispute between the parties, Milieudefensie et al. have no legitimate interest in documents that deal with oil spills other than the oil spill at issue near Oruma in June 2005.
235. Moreover, there is no legitimate interest in this part of the claim, as well, because Milieudefensie et al. fail to establish a concrete relationship between the alleged contents of the claimed documents and their arguments regarding the liability of RDS, Shell Transport and the Koninklijke for the oil spill at issue, let alone do Milieudefensie et al. substantiate that and how the claimed documents might contain evidence of an argument they must prove in order to see their claims against RDS, Shell Transport and the Koninklijke regarding the oil spill at issue awarded.
236. To the extent that Milieudefensie et al. seek 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 et al. obviously have in mind. In view of the relatively minor scope of the oil spill of 26 June 2005 (400 barrels), RDS, the Koninklijke and/or Shell Transport were not informed of this oil spill. In accordance with the prevailing guidelines, the volume of oil that was spilled in the leak of 26 June 2005 was included in an aggregated quarterly report, which was sent to the HSE team of Shell International Exploration and Production B.V. The oil spill at issue is not individually included as such in this report. Shell submitted and substantiated this in the first instance.¹⁶⁸ Milieudefensie et al. have not advanced a (substantiated) challenge against these arguments.
237. Moreover, Milieudefensie et al.'s arguments in the 2013 Motion to produce documents regarding reporting oil spills to "the parent company" are incorrect. In no. 113 of the 2013 Motion to produce documents, a table is cited from an *HSE Manual* from October 1995 (Exhibit N9), from which they infer that in view of its scope (400 barrels or approximately 64,000 liters), the subject oil spill allegedly qualifies as a *severity 5* incident with a "*massive environmental effect*". According to Milieudefensie et al., "the guideline" – they are apparently

¹⁶⁸ See, *inter alia*: the Defense in the case Milieudefensie et al./RDS and SPDC, no. 72; the Defense in the case Milieudefensie et al./SPNV and Shell Transport, no. 106; the Rejoinder, no. 34.

referring to the "*Incident Investigation and Learning*" document from March 2009 that has been submitted as Exhibit N11 – demonstrates that such an incident must be reported within 24 hours as a "*significant incident*", *inter alia* to the Group HSSE VP.

238. Milieudéfensie et al.'s interpretation of the parts of Exhibits N9 and N11 cited by them is incorrect. First of all, Milieudéfensie et al. wrongfully fail to recognize that Exhibit N9 dates from 1995, whereas Exhibit N11 dates from 2009. Secondly, Milieudéfensie et al. fail to recognize that the table they cited from Appendix V of Exhibit N9 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 N9: "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 Oruma 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*".
239. To the extent that Milieudéfensie et al. want to examine documents to substantiate their argument that SPDC breached its duty of care, they fail to recognize that, as stated before, Section 11(5)(c) OPA provides for strict liability on the part of SPDC. To answer the question regarding whether SPDC is liable, it is irrelevant whether it was under a duty of care and whether it breached this duty of care. Milieudéfensie et al.'s wish to use the claimed documents to demonstrate that SPDC was under a duty of care and that SPDC breached its duty of care cannot constitute any legitimate interest in the production of documents, either (see no. 24 above). Moreover, the documents claimed here will be unable offer any insight into the condition of the pipeline near Oruma at the location of the leak (see nos. 254, 263 and 264 below). For that reason, as well, there is no legitimate interest in access.
240. Again, Milieudéfensie et al. fail to explain why they allegedly have a legitimate interest in documents as claimed here "from the three years prior to the oil spill until 2009 [Shell understands: the oil spill of 2005]". 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*.

7.6 e. Incident report, investigation report and review

241. In paragraph e., Milieudefensie et al. claim access to "the incident report regarding the oil spill in 2004 [Shell understands: the oil spill in 2005] prepared based on the guideline mentioned above, as well as the *investigation report* and *review*". Milieudefensie et al. are obviously referring to the report that was allegedly prepared because the oil spill at issue falls within the "incidents with serious consequences" category (see no. 232 above).

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

242. The claim already fails based on the fact that in the first instance, Milieudefensie et al. already claimed access to "all (management) reports and other communication between Shell Nigeria or 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 2000-2008 and regarding the oil spill near Oruma in June 2005 in particular"¹⁶⁹ and the District Court dismissed that claim.¹⁷⁰ Milieudefensie et al. fail to explain that the currently claimed "*incident report* regarding the oil spill in 2004 [Shell understands: the oil spill in 2005], 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 et al. cannot simply initiate the same claim again, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 10-19 above).

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

243. In addition, the subject part of the claim cannot be awarded because – as stated before – Milieudefensie et al. wrongfully assume that the oil spill at issue falls into the "incidents with serious consequences" category (see no. 236 above). Thus, the reports that Milieudefensie et al. obviously have in mind in this part of the claim do not exist.

¹⁶⁹ See the Motion to produce documents in the case Milieudefensie et al./RDS and SPDC, no. 21 (xviii), p. 10. See also the Motion to produce documents in the case of Milieudefensie et al./SPNV and Shell Transport, (xvi), p. 16.

¹⁷⁰ See the interlocutory judgment of 14 September 2011, grounds 4.13 (a) and (b), 4.14 and 4.15.

7.7 f. Minutes

244. In paragraph f., Milieudefensie et al. claim 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 et al., these documents show "that the parent company had knowledge of the high-risk conditions in Nigeria and sometimes actively interfered in its subsidiary". Milieudefensie et al. want to use these documents to demonstrate that "the parent company" had a duty of care.

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

245. The claim already fails based on the fact that in the first instance, Milieudefensie et al. already claimed access to these minutes.¹⁷¹ To the extent that the claim pertains to minutes regarding the *asset integrity* audit report claimed in paragraph b., the claim corresponds to part (xvii) of the claim that was initiated in the first instance.¹⁷² In the first instance, Milieudefensie et al. 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 et al. wanted to use these documents to demonstrate that RDS or the Koninklijke and Shell Transport have or had knowledge of and control over SPDC's activities in respect of oil spills in the Niger Delta (specifically near Oruma in June 2005). Given that the similar claim in the first instance was dismissed,¹⁷³ Milieudefensie et al. cannot

¹⁷¹ See the Motion to produce documents in the case Milieudefensie et al./RDS and SPDC, no. 21 (xvi), p. 10. See also the Motion to produce documents in the case Milieudefensie et al./SPNV and Shell Transport, (xv), pp. 15-16.

¹⁷² See the Motion to produce documents in the case Milieudefensie et al./RDS and SPDC, no. 21 (xvii), p. 10, where access was claimed to "the communication regarding the (contents of the) documents specified in par. xv 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". See also the Motion to produce documents in the case Milieudefensie et al./SPNV and Shell Transport, (xv), pp. 15-16.

¹⁷³ See the interlocutory judgment of 14 September 2011, grounds 4.13 (a) and (b), 4.14 and 4.15.

simply initiate the same claim again, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 10-19 above).

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

246. 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 or the pipeline near Oruma. As already explained, the oil spill near Oruma of 26 June 2005 was not reported to the "parent company" (see nos. 236 and 242 above); nor are there any audit reports that pertain to this oil spill or the pipeline near Oruma (see no. 219 above).

No legitimate interest

247. To the extent that Milieudefensie et al. want 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 et al.'s argument in respect of awareness of RDS, Shell Transport and the Koninklijke regarding the conditions in Nigeria in general is insufficient to substantiate any legitimate interest in the production of documents, see nos. 196-201 above. In view of the contents of the dispute between the parties, Milieudefensie et al. have no legitimate interest in documents that deal with oil spills or issues other than the oil spill at issue near Oruma in June 2005.
248. Moreover, there is no legitimate interest in this part of the claim, either, because Milieudefensie et al. fail to establish a concrete relationship between the alleged contents of the claimed documents and their arguments regarding the liability of RDS, Shell Transport and the Koninklijke for the oil spill at issue, let alone do Milieudefensie et al. substantiate that and how the claimed documents might contain evidence of an argument they must prove in order to see their claims against RDS, Shell Transport and the Koninklijke regarding the oil spill at issue awarded.
249. Milieudefensie et al. further lack the requisite legitimate interest because they fail to focus their arguments on the structure of the group in the period prior to the time at which RDS was placed at the head of the group (see nos. 180-181 above). The same occurs in paragraph f. of the claim, which refers to "minutes of the (*Executive Committee*, formerly called the *Committee of Managing Directors* and/or the *Board of Directors* of the) parent company". Milieudefensie et al. fail to recognize that at the time of the oil spill at issue, RDS had not yet been placed at the head of the group and that Shell Transport and the Koninklijke were (and are) two different legal entities, each with its own

corporate bodies. They wrongfully equate the *Committee of Managing Directors* to a board of directors. Moreover, they fail to recognize that the *Committee of Managing Directors* was not instituted by the Koninklijke and Shell Transport, but by the boards of directors of the '*Group Holding Companies*'. They also fail to recognize that in SPDC's case, decisions regarding exercising shareholders' rights were taken by the Board of Directors of SPCo and not by the board of Shell Transport, the Koninklijke or SPNV, nor by the *Committee of Managing Directors*.¹⁷⁴ For this reason, as well, Milieudefensie et al. do not have any legitimate interest in production of the documents mentioned in paragraph f.

250. Again, Milieudefensie et al. fail to explain why they allegedly have a legitimate interest in documents as claimed here "from the three years prior to the oil spill of 2004 [Shell understands: the oil spill of 2005]". 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

251. Finally, by their nature, the minutes that Milieudefensie et al. have in mind here contain confidential business information. Minutes of the "board of the parent company" (in Milieudefensie et al.'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 et al. fail to specify the information that they believe they will find in the minutes in question to substantiate their claims against RDS, the Koninklijke and Shell Transport, 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.

¹⁷⁴ See the Defense of SPNV and Shell Transport, nos. 39-40 and 156.

8 CLAIMED DOCUMENTS REGARDING SPDC'S DUTY OF CARE

8.1 Introduction

252. In paragraphs g. to m., Milieudéfensie et al. claim access to the documents mentioned, in particular in view of their claims against SPDC. They submit that they want to use these documents to demonstrate "that the pipeline near Oruma showed serious defective maintenance, as well as that Shell took insufficient measures to prevent sabotage or to limit contamination".¹⁷⁵
253. To the extent that Milieudéfensie et al. want access to documents to substantiate their argument that SPDC breached its duty of care, they fail to recognize that as stated before, Section 11(5)(c) OPA provides for strict liability on the part of SPDC. In answering the question regarding whether SPDC is liable, it is irrelevant whether it has a duty of care and whether it breached this duty of care. Thus, Milieudéfensie et al.'s wish to use the claimed documents to demonstrate that SPDC had a duty of care and that SPDC breached its duty of care cannot constitute a legitimate interest in the production of documents (see no. 24 above).
254. To the extent that Milieudéfensie et al. want access to documents to substantiate their argument that "the pipeline near Oruma showed serious defective maintenance" - in other words: the oil spill of 26 June 2005 was caused by defective maintenance - they have no legitimate interest in this claim, because they failed to satisfy their duty to contend facts and circumstances regarding this point (see no. 169 above). The District Court dismissed the access to documents regarding the maintenance condition of the pipeline claimed by Milieudéfensie et al. in the first instance, because "for the present, Shell et al.'s argument that this oil spill was caused by sabotage (...) must be deemed to be correct", because Milieudéfensie et al. had advanced an insufficiently substantiated refutation against that argument.¹⁷⁶ Even after they could have done so in the statement of reply and on the occasion of the pleadings, Milieudéfensie et al. failed to satisfy their duty to contend facts and circumstances regarding the cause of the oil spill alleged by them. Thus, in the final judgment, the District Court ruled that Milieudéfensie et al. "have not advanced a sufficiently concrete and/or substantiated challenge of the fact that Shell et al.'s argument that this oil spill near Oruma in 2005 was, in fact, caused by sabotage (...) must be deemed to be factually correct".¹⁷⁷ In the 2013 Motion to produce documents, Milieudéfensie et al. have not advanced a single concrete argument based on which they want to challenge the decision that the

¹⁷⁵ 2013 Motion to produce documents, no. 140.

¹⁷⁶ Interlocutory judgment of 14 September 2011, ground 4.10.

¹⁷⁷ Final judgment, ground 4.22.

oil spill was caused by sabotage on appeal. As will be explained in more detail in nos. 256-265 below, Milieudefensie et al. fail to explain what the documents they claim allegedly demonstrate regarding the condition of the pipeline at the location of the leak. Against that background, there is no legitimate interest in access to documents that pertain to the (maintenance) condition of the pipeline near Oruma.

8.2 g. Corrosion Management Framework (2002-2005)

255. In paragraph g., Milieudefensie et al. claim access to "documents from the *Corrosion management Framework* regarding the pipeline near Oruma in the three years prior to the oil spill of 2005". According to Milieudefensie et al., these documents show "the gravity of the corrosion, the risks foreseen in this connection as well as that inadequate action was taken in response, so that it can be demonstrated that SPDC breached its duty of care." Milieudefensie et al. also want to use these documents to demonstrate that "the parent company" had a duty of care, because the documents allegedly demonstrate that "the parent company must have been aware of the serious nature of the situation."

Shell has already submitted the documents claimed under g (ii)

256. In paragraph g (ii), Milieudefensie et al. claim access to "*inspection plans* and *pigging program* of the pipeline and weld seams, as well as the *inspection* and *pigging results*". In the first instance, Shell already submitted measurement results of the '*Intelligent Pig run*' that was performed in December of 2004.¹⁷⁸ Thus, Milieudefensie et al. do not have a legitimate interest in access to the documents claimed in paragraph g (ii), given that they already received these documents in the proceedings in the first instance. The fact that Milieudefensie et al. apparently fail to recognize that with this part of the documents claimed, they are demanding documents that have already been submitted into the proceedings once again emphasizes that their request for the production of documents constitutes a *fishing expedition*.
257. To the extent that Milieudefensie et al. have documents other than the *pigging results* already submitted in mind with their claim in paragraph g (ii), they fail to

¹⁷⁸ Exhibit 11 of Shell in the case Milieudefensie et al./SPNV and Shell Transport and Exhibits 12 and 13 of Shell in the case Milieudefensie et al./RDS and SPDC. See also the Defense in the Motion to produce documents in the case Milieudefensie et al./SPNV and Shell Transport, nos. 93 and following; the Defense in the case Milieudefensie et al./SPNV and Shell Transport, nos. 128 and following; the Rejoinder in the Motion to produce documents in the case Milieudefensie et al./SPNV and Shell Transport, no. 141; and the Rejoinder in the Motion to produce documents in the case Milieudefensie et al./RDS and SPDC, nos. 102 and following.

explain what documents are involved. In that case, the documents claimed in paragraph g (ii) do not satisfy the definition requirement stipulated in Section 843a DCCP.

Documents claimed in paragraph g (ii) were already claimed in the first instance; Milieudefensie et al. must first put forward grounds for appeal against the District Court's decision dismissing their claim

258. To the extent that Milieudefensie et al. have documents other than the *pigging results* that have already been submitted in mind with the documents claimed in paragraph g (ii), it is further pointed out that they already claimed these documents in the first instance, namely as part of the claim for access to "documents showing the inspections of the pipeline(s) near Oruma that have been conducted following the Asset Integrity Review in 2003".¹⁷⁹ The District Court has dismissed that claim.¹⁸⁰ Milieudefensie et al. fail to explain that the currently claimed "*inspection and pigging results*" do not fall into this category of documents that were claimed in the first instance. Given that the similar claim in the first instance was dismissed, Milieudefensie et al. cannot once again initiate the same claim on appeal, but must challenge the dismissal by the District Court in a statement of appeal (see nos. 10-19 above). For this reason, as well, this part of the claim cannot be awarded.

No legitimate interest

259. Milieudefensie et al. apparently want to use the documents claimed in paragraph g. to further substantiate that the leak was caused by corrosion rather than by sabotage. However, all the evidence that has been furnished into the proceedings to date indicates that the leak was caused by sabotage. For example, the JIT report – which Milieudefensie et al. submitted with the initiatory writ of summons – records the following observations of the *Joint Investigation Team*:¹⁸¹
- The soil at the site of the oil spill showed signs of prior digging and was much looser than the soil around it;
 - The *coalton-enamel coating* was properly adhering to the pipeline and the external surface of the pipeline was smooth and did not show any sign of pitting or corrosion, which makes external corrosion as the cause

¹⁷⁹ See the Motion to produce documents in the case Milieudefensie et al./RDS and SPDC, no. 21 (iii), p. 6. See also the Motion to produce documents in the case Milieudefensie et al./SPNV and Shell Transport, (iii), p. 10.

¹⁸⁰ See the interlocutory judgment of 14 September 2011, grounds 4.8-4.10.

¹⁸¹ Exhibits A.4 and A.5 of Milieudefensie et al.

of the spill highly unlikely. Moreover, the quite localized damage to the coating surrounding the hole observed by the Joint Investigation Team indicates sabotage;

- The Joint Investigation Team observed that the leak consisted of a small hole in the pipeline with a diameter of 8 mm, that the small hole was round and had smooth edges, similar to a drilling hole, and that the small hole was at the position of 8.30 hours on the pipeline. This also indicates sabotage as the cause of the spill;
- The Joint Investigation Team observed by means of UT measurements that the thickness of the pipeline wall around the leak was not significantly thinner than the original thickness, which rules out internal corrosion of the pipe as the cause of the spill. These measurement results indicate that the thickness of the pipeline wall around the leak had not or hardly decreased compared to the original wall thickness. Given that a hole caused by corrosion always includes wall loss around the hole, these measuring results rule out corrosion as the cause of the leak.

260. The video footage of the inspection by the *Joint Investigation Team* that Milieudefensie et al. submitted with the summons in the first instance also indicates that the oil spill of 26 June 2005 was caused by sabotage.¹⁸² After all, this video footage shows a round hole that indicates sabotage using a drill or similar tool rather than a corrosion hole.

261. Finally, Shell's arguments regarding the cause of the oil spill at issue are also confirmed by the measurement results of the '*Intelligent Pig run*' that Shell already submitted into the proceedings in the first instance (see also no. 256 above).¹⁸³ This '*Intelligent Pig run*' was performed in December of 2004, i.e. some six months before the oil spill at issue. The measurement results of the '*Intelligent Pig run*' that pertain to the location of the leak endorse the measurement results recorded in the JIT report in respect of the pipeline's wall thickness; these results render it extremely unlikely that the spill – which occurred some six months after this measurement – was caused by anything other than sabotage.

¹⁸² Exhibit A.7 of Milieudefensie et al.

¹⁸³ Exhibit 11 of SPNV and Shell Transport and Exhibits 12 and 13 of RDS and SPDC. See also the Defense of SPNV and Shell Transport, nos. 92 and following; the Defense in the Motion to produce documents of SPNV and Shell Transport, nos. 128 and following; the Rejoinder in the Motion to produce documents of SPNV and Shell Transport, no. 141; and the Rejoinder of Shell, nos. 9 and following.

262. As the District Court found in grounds 4.9 and 4.10 of the interlocutory judgment of 14 September 2011 and grounds 4.19 to 4.26 of the final judgment, in the face of this evidence, Milieudefensie et al. have not advanced any concrete refutation. Milieudefensie et al. did no more than advance general arguments regarding possible alternative causes of the oil spill, without presenting any facts actually demonstrating a cause of the subject oil spill other than sabotage. As the District Court found, the Accufacts report¹⁸⁴ that Milieudefensie et al. submitted on the occasion of the pleadings in the first instance does not contain any concrete indications that could lead to the conclusion that the subject oil spill has any cause other than sabotage, either.¹⁸⁵ For all these reasons, in its final judgment the District Court definitively ruled that the oil spill of 26 June 2005 near Oruma was, in fact, caused by sabotage.¹⁸⁶
263. In light of the above and the concrete information regarding the oil spill that is demonstrated by the JIT report, the video footage and the measurement results of the *'Intelligent Pig run'*, Milieudefensie et al. do not have a legitimate interest in the documents claimed in paragraph g., because they fail to indicate what the claimed documents allegedly demonstrate regarding the condition of the pipeline at the location of and immediately surrounding the leak. Milieudefensie et al. apparently assume that these documents demonstrate "the extent of the corrosion problems of the pipeline near Oruma and what measures were taken in this regard."¹⁸⁷ Even if the claimed documents could demonstrate this for the pipeline near Oruma in general, in light of the already furnished evidence, this does not say anything regarding corrosion *at the location of the leak*, let alone that those documents demonstrate that *the subject oil spill* was caused by corrosion.
264. The JIT report, the video footage that Milieudefensie et al. themselves submitted into the proceedings and the measurement results of the *'Intelligent Pig run'* provide a detailed definitive answer regarding the condition of the pipeline *at the location of and immediately surrounding the leak*. Against this background, it is not clear that and how the documents claimed by Milieudefensie et al. could help them 'structure' their grounds for appeal regarding this point, refute the available evidence that the oil spill was caused by sabotage and challenge the District Court's opinion on this point with any chance of success.

¹⁸⁴ Exhibit M-2 of Milieudefensie et al.

¹⁸⁵ Final judgment, grounds 4.23-4.24.

¹⁸⁶ Final judgment, ground 4.27.

¹⁸⁷ 2013 Motion to produce documents, no. 123.

265. Shell is not familiar with any document that can provide a better insight into the question regarding whether the leak in the pipeline near Oruma was caused by sabotage or corrosion than the documents and video footage that have already been submitted into the proceedings. Apparently, Milieudéfensie et al. are not familiar with any such document, either. It is true that they argue that they want to demonstrate that "the state of repair of the pipeline near Oruma was simply defective at the time of the oil spill by means of reports on the conditions of the pipeline and inspection reports",¹⁸⁸ but this argument is insufficient to substantiate the legitimate interest. In this connection, the issue is not to determine the overall "state of repair" of the pipeline in which the leak occurred. The only issue is the condition of the pipeline *at the location of the leak*. The "reports" that Milieudéfensie et al. want to examine do not offer any decisive answer regarding this. Nor does the SPDC report from October 2004 cited by Milieudéfensie et al. provide any decisive answer regarding the state of repair of the pipeline at the location of the leak.¹⁸⁹

The District Court also found in respect of this report that it "does not believe that internal corrosion – regarding which the report from 2004 contains a general warning – is a realistic alternative cause for the subject oil spill near Oruma". It should also be pointed out that the pipeline is still in operation, alongside the new trunk line (see the Defense of RDS and SPDC, no. 22). The *Intelligent Pig run* conducted in December 2004 and an *Intelligent Pig run* conducted in 2011 demonstrated that the condition of the pipeline is much better than assumed at the time the report mentioned above was prepared. For this reason, as well, that report does not contain any indication that the leak at issue was allegedly caused by corrosion. Finally, it is noted in this context that the report mentioned is not an "internal" report. The report is what is called an "Environmental Impact Assessment" that must be drawn up by SPDC as licensee in the scope of the installation of a new pipeline.¹⁹⁰

266. The UT measurements performed at the time the leak was closed do provide a decisive answer regarding the condition of the pipeline *at the location of the leak* (see no. 259, fourth dash, above). As stated before, the UT measurements are also confirmed by the measurement results of the *Intelligent Pig run* that was performed in December 2004. Moreover, Shell contests that the overall state of repair of the pipeline near Oruma was "simply defective" at the time of the oil spill; however as stated before, this is not the issue here.

¹⁸⁸ 2013 Motion to produce documents, no. 49.

¹⁸⁹ Exhibit M.3 of Milieudéfensie et al.

¹⁹⁰ See the EGASPIN, paragraph 3.1.2, p. 114.

267. Milieudefensie et al.'s argument regarding awareness of RDS, Shell Transport and the Koninklijke is insufficient to substantiate a legitimate interest in the production of documents, see nos. 196-201 above. RDS, Shell Transport and the Koninklijke were not and are not informed of documents of the nature as claimed in paragraph g. The same is true for the "Environmental Impact Assessment". Milieudefensie et al. wrongfully assume that "the parent company" was aware of the contents of this report.¹⁹¹
268. Finally, once again, Milieudefensie et al. fail to explain why they allegedly have a legitimate interest in documents from the Corrosion Management Framework "in the three years prior to the oil spill of 2005". 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*.
269. Given this state of affairs, Milieudefensie et al. do not have a legitimate interest in access to the documents claimed in paragraph g.

8.3 h. HSE Plan and i. Hazards and Effects Register and HSE Case

270. In paragraph h., Milieudefensie et al. claim access to "the *HSE Plan* that applied to (the vicinity of) the entire pipeline near Oruma at the time of the oil spill of 2005" and in paragraph h. (i) the "*Hazards and Effects Register* and the *HSE Case* regarding the entire pipeline near Oruma at the time of the oil spill in 2005. According to Milieudefensie et al., these documents show "the risks that were foreseen in the area of health, safety and the environment",¹⁹² so that it can be demonstrated that SPDC had a duty of care and that SPDC breached its duty of care.

No legitimate interest

271. This claim fails based on a lack of legitimate interest. There is no specific *HSE Plan* for "(the vicinity of) the entire pipeline near Oruma at the time of the oil spill in 2005", or a "*Hazards and Effects Register* and the *HSE Case* regarding the entire pipeline near Oruma at the time of the oil spill in 2005". To the extent that with the documents claimed in paragraphs h. and i., Milieudefensie et al. have HSE plans, Hazards and Effects Registers and/or HSE cases regarding SPDC's operations in general in mind (assuming that such documents even exist), it is pointed out that Milieudefensie et al. fail to establish a concrete link between the alleged contents of the claimed documents and their arguments

¹⁹¹ 2013 Motion to produce documents, no. 115.

¹⁹² 2013 Motion to produce documents, no. 140 (i), p. 52.

regarding the alleged breach of SPDC's duty of care in the scope of the oil spill at issue, let alone do Milieudéfensie et al. substantiate that and how the claimed documents contain evidence of an argument they must prove in order to see their claims against SPDC regarding the oil spill at issue awarded. Milieudéfensie et al. argue that the claimed documents allegedly demonstrate "the risks that were foreseen in the area of health, safety and the environment", but fail to explain what those documents allegedly demonstrate in respect of the oil spill of 26 June 2005 near Oruma and the measures that SPDC took in that connection. After all, that oil spill is the subject of the dispute at issue, not the situation in Nigeria in general. Thus, in view of the contents of the dispute between the parties, Milieudéfensie et al. have no legitimate interest in documents that deal with subjects other than the oil spill at issue near Oruma in June 2005.

272. Moreover, to the extent that Milieudéfensie et al. want access to the documents claimed in paragraphs h. and i. to substantiate their argument that "the pipeline near Oruma showed serious defective maintenance",¹⁹³ the claim must be dismissed due to a lack of legitimate interest. The documents claimed here cannot offer any insight into the condition of the pipeline near Oruma at the location of the leak (see nos. 254, 263 and 264 above).

8.4 j. Surveillance contracts and k. Helicopter logs

273. In paragraph j., Milieudéfensie et al. claim access to "contracts with local surveillance contractors that were in force at the time of the oil spill near Oruma in 2004 [Shell understands: the oil spill in 2005] or other documents showing the obligations of local surveillance people, how frequently they were deemed to conduct surveillance rounds and the training and means that were available for them." In paragraph k., Milieudéfensie et al. claim access to "logs or other documents showing how frequently and how long helicopters conducted surveillance rounds near Oruma in the year prior to the oil spill in 2004 [Shell understands: the oil spill in 2005]." Milieudéfensie et al. submit that these documents show that SPDC breached its duty of care, because the surveillance contractors and helicopters did not constitute an adequate measure to prevent sabotage.

No legitimate interest

274. Milieudéfensie et al. also submit that in the main action, the question will have to be answered regarding whether SPDC's statutory obligation to protect its pipelines ("to protect", see Section 11(5)(b) OPA), includes the obligation to

¹⁹³ 2013 Motion to produce documents, no.140, p. 51.

take measures to prevent sabotage.¹⁹⁴ In this light, at this stage of the proceedings, Milieudéfensie et al. do not have any legitimate interest in access to documents they want to use to demonstrate that SPDC violated its alleged duty of care to take measures to prevent sabotage. After all, it must first be determined whether based on Section 11(5)(b) OPA, SPDC can be liable on account of the alleged failure to take measures to prevent sabotage (which is not the case, see no. 39 above).

Documents are no longer available

275. In addition, this claim cannot be awarded because SPDC no longer has such documents.

8.5 I. Leak Detection System (2002-2005)

276. In paragraph I., Milieudéfensie et al. claim access to "documents showing which *Leak Detection System (LDS)* was used for the pipeline near Oruma, how this system functioned and how the system was maintained." According to Milieudéfensie et al., these documents show that "no proper system was present in Oruma, or at least that the system did not function properly". According to their own statements, Milieudéfensie et al. seek to use these documents to demonstrate "that Shell breached its duty of care".¹⁹⁵

No legitimate interest

277. Milieudéfensie et al. do not have a legitimate interest in access to these documents. After all, even if the documents claimed in paragraph I. demonstrate "that no proper system was present in Oruma, or at least that the system did not function properly", it is not clear that and how this could be used "to demonstrate that Shell breached its duty of care". The following is pointed out in this connection.
278. Shell understands that – apparently in the scope of their argument that SPDC allegedly did not respond adequately to the oil spill of 26 June 2005 – Milieudéfensie et al. first of all want to use the documents claimed in paragraph I. "to again substantiate in the statement of appeal that SPDC's failures in the event of oil spills were structural".¹⁹⁶ "Even if there was a properly functioning Leak Detection System, the effectiveness of such a system is virtually zero", still according to Milieudéfensie et al.¹⁹⁷ However, with these arguments

¹⁹⁴ 2013 Motion to produce documents, no. 34.

¹⁹⁵ 2013 Motion to produce documents, no. 145 (I), p. 52.

¹⁹⁶ 2013 Motion to produce documents, no. 128.

¹⁹⁷ Idem.

Milieudefensie et al. fail to recognize that these proceedings do not involve the question of whether in general, SPDC "structurally" responds to oil spills adequately, but the question of whether *in the case at issue*, SPDC adequately responded to the oil spill of 26 June 2005 near Oruma. Whether or not the *Leak Detection System* is effective is irrelevant for that discussion.

279. *In the case at issue*, SPDC closed the leak on 7 July 2005, which was as quickly as reasonably possible. As Shell indicated in the first instance, in this regard it is relevant that employees of SPDC were already on site on 26 June 2005, but the Oruma community (headed by Oguru) only permitted them on 29 June 2005 to verify the leak, following which SPDC immediately stopped the oil flow through the pipeline. However, the Oruma community (headed by Oguru) did not permit the SPDC employees to perform any repairs. After 29 June 2005, SPDC continued to try to gain access to the location of the leak to perform repairs, but those attempts also failed due to resistance from the Oruma community.¹⁹⁸ As Shell indicated in the first instance,¹⁹⁹ at times, the resistance turned to aggression, during which at some point youngsters of the Oruma community even seized the vehicles of the SPDC team. It was not until 7 July 2005 that the Oruma community allowed the '*Joint Investigation Team*' organized by SPDC to perform repairs, after which the leak was repaired that same day.²⁰⁰ Subsequently, it took until 9 July 2005 before the Oruma community also allowed the SPDC employees to contain the spilled oil.²⁰¹
280. In view of the above, the District Court rightly ruled in its final judgment that "(in brief) in the case at issue, on 29 June and 7 July 2005 SPDC, in fact, stopped and remedied the oil spill as quickly as reasonably possible, so that it cannot be held that this response was inadequate".²⁰² In the 2013 Motion to produce documents, Milieudefensie et al. did not offer any concrete argument to the contrary. Nor did Milieudefensie et al. indicate what the documents claimed in paragraph I. allegedly demonstrate regarding this point. In this light, Milieudefensie et al. do not have a legitimate interest in access to the "documents showing which *Leak Detection System (LDS)* was used for the pipeline near Oruma, how this system functioned and how the system was maintained." claimed in paragraph I.
281. The same is true to the extent that Milieudefensie et al. want access to those documents to substantiate their argument that SPDC did not take sufficient measures to prevent sabotage, as seems to follow from footnote 149 of their

¹⁹⁸ Defense of RDS and SPDC, nos. 31-42, Rejoinder, nos. 14 and 18.

¹⁹⁹ Defense of RDS and SPDC, no. 40, Rejoinder, no. 14.

²⁰⁰ Defense of RDS and SPDC, nos. 42-49

²⁰¹ Defense of RDS and SPDC, no. 54.

²⁰² Final judgment, ground 4.51.

2013 Motion to produce documents. After all, Milieudéfensie et al. fail to explain how a *Leak Detection System* can prevent sabotage. In the absence of such an explanation, Milieudéfensie et al.'s position is incomprehensible regarding this point, as well: at best, a *Leak Detection System* can detect sabotage, but it cannot prevent it. Thus, in that light, as well, Milieudéfensie et al. do not have a legitimate interest in the documents claimed in paragraph l.

8.6 m. Accident Report

282. In paragraph m., Milieudéfensie et al. claim access to "the *Accident Report* as issued to the *Department of Petroleum Resources*" regarding the subject oil spill. Milieudéfensie et al. have SPDC's report in mind based on the obligation to the effect that "48 hours after an oil spill occurs, operators must submit a preliminary report to the *Department of Petroleum Resources* in Nigeria, *inter alia* reporting the *suspected cause of accident, the Estimated loss associated with the accident, Emergency remediation response effected on discovery and a Plan for restoration of pipeline operations to its licensed conditions.*"²⁰³ According to Milieudéfensie et al., these documents allegedly demonstrate "the estimate that SPDC made immediately after the oil spill and the measures that it took, so that it can be demonstrated that SPDC breached its duty of care." These documents also allegedly serve to "demonstrate the limited evidentiary value of JIT reports."

No legitimate interest

283. Milieudéfensie et al. have no legitimate interest in the production of these documents for the reasons mentioned in nos. 279-280 above. Briefly summarized, Milieudéfensie et al. insufficiently substantiated their argument regarding the measures that SPDC took after the oil spill was reported to SPDC to justify the production of documents.
284. To the extent that Milieudéfensie et al. want to examine documents to substantiate their argument that SPDC breached its duty of care, they fail to recognize that, as stated before, Section 11(5)(c) OPA provides for strict liability on the part of SPDC. To answer the question regarding whether SPDC is liable, it is irrelevant whether it has a duty of care and whether it breached this duty of care. Thus, Milieudéfensie et al.'s wish to use the claimed documents to demonstrate that SPDC had a duty of care and that SPDC breached its duty of care cannot produce any legitimate interest in the production of documents (see no. 24 above).

²⁰³ 2013 Motion to produce documents, no. 60.

285. Milieudefensie et al. argue that they can use these documents to demonstrate the "limited evidentiary value of JIT reports". They apparently mean the "limited evidentiary value" of the conclusions in the JIT report regarding the cause of the oil spill. To this extent they also lack a legitimate interest. Milieudefensie et al. claim access to the "preliminary report" that SPDC had to submit to the *Department of Petroleum Resources* within 48 hours after the oil spill occurred. At that moment, SPDC did not yet have access to the location of the oil spill (see no. 279 above); thus, it was unable to make an estimate of the "*suspected cause of accident*". This means that it is not clear that the claimed report can detract anything from the JIT report, which was prepared in response to the investigation conducted by the *Joint Investigation Team* on 7 July 2005 into the cause of the oil spill and the condition of the pipeline at the location of the leak; that is, when access to the location of the leak was finally obtained.

9 INTERIM APPEAL IN CASSATION; NO DECLARATION OF PROVISIONAL ENFORCEABILITY

286. Shell requests that the Court of Appeal allows an interim appeal in cassation in the – unlikely – event that any part of Milieudefensie et al.'s claims for the production of documents is awarded. To substantiate this request, Shell points out the following.
287. In the event that appeal in cassation against a ruling in favor of Milieudefensie et al. 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 et al. 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 et al. in this motion. This also prevents Shell from being placed in a relatively more unfavorable position in respect of the situation in which Milieudefensie et al. would have initiated the claim to produce documents in separate interlocutory proceedings.²⁰⁴ For that same reason, Shell requests that the Court of Appeal does not declare any ruling in favor of Milieudefensie et al. provisionally enforceable.

²⁰⁴ Cf. S.M. Kingma, TCR 2010/1, p. 3 and the Court of Appeal of Den Bosch 23 October 2007, LJN BB6845.

10 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:

In the case with number 200.126.834:

declares that the Dutch court has no jurisdiction over the claims in the motion against SPDC;

declares Milieudedefensie et al.'s claims in the motion inadmissible, or at least dismisses those claims;

In the case with number 200.126.804:

declares Milieudedefensie et al.'s claims in the motion inadmissible, or at least dismisses those claims;

In both cases:

orders Milieudedefensie et al. 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 Milieudedefensie et al. will be in default by operation of law.

Attorney

This case is handled by J. de Bie Leuveling Tjeenk, LL.M., of De Brauw Blackstone Westbroek N.V., P.O. Box 75084, 1070 AB Amsterdam, T +31 20 577 1661, F +31 20 577 1775, E jan.tjeenk@debrauw.com

**Overview of case documents in the proceedings of Oguru et al. / RDS and SPDC
in the first instance**

(currently case number: 200.126.834)

Case document	Date	Exhibits
Summons	7 November 2008	A.1 - J.10
Motion for the court to decline jurisdiction and transfer the case, also containing conditional defense in the main action	13 May 2009	1 - 8
Statement of defense in the jurisdiction motion	8 July 2009	-
Written pleadings of attorney J. de Bie Leuveling Tjeenk	3 December 2009	-
Written pleadings of attorney M. J. G. Uiterwaal	3 December 2009	-
Judgment of the District Court of The Hague	30 December 2009	-
Motion to produce documents	24 March 2010	-
Statement of defense in the motion by virtue of Section 843a DCCP	16 June 2010	-
Statement of reply in the motion to produce documents by virtue of Section 843a DCCP	8 September 2010	-
Statement of rejoinder in the motion by virtue of Section 843a DCCP	20 October 2010	10 - 13
Document for submitting exhibits	19 May 2011	14 and 15
Document for submitting exhibits	19 May 2011	B.12
Further document submitting exhibits	19 May 2011	16
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 of attorney J. de Bie Leuveling Tjeenk in the motions by virtue of Section 843a DCCP	19 May 2011	-
Interlocutory judgment	14 September 2011	-
Statement of reply	14 December 2011	L.1 - L.15
Statement of rejoinder	14 March 2012	22 - 24
Document for submitting exhibits	11 September 2012	M1 - M.12
Document for submitting exhibits	11 October 2012	25 and 26
Written pleadings of attorney J. de Bie Leuveling Tjeenk	11 October 2012	-
Written pleadings of attorney Ch.	11 October 2012	-

Samkalden		
Judgment	30 January 2013	-

Overview of case documents in the proceedings of Oguru et al. / SPNV en ST&T in the first instance

(currently case number: 200.126.804)

Case document	Date	Exhibits
Summons	21 April 2010	A.1 - K.2
Statement of defense	1 September 2010	1 - 14
Motion to produce documents	27 October 2010	-
Statement of defense in the motion by virtue of Section 843a DCCP	24 November 2010	15
Statement of reply in the motion to produce documents by virtue of Section 843a DCCP	2 February 2011	-
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