judgment

DISTRICT COURT OF THE HAGUE

Commercial team

Judgment dated 30 January 2013

in the matter with case number / docket number: C/09/337050 / HA ZA 09-1580 of:

1. **FRIDAY ALFRED AKPAN**,
   residing in Ikot Ada Udo, Akwa Ibom State, Nigeria,
2. the association with corporate personality **VERENIGING MILIEUDEFENSIE**,
   domiciled in Amsterdam, Netherlands,

plaintiffs in the main action,
attorney conducting the case: Ch. Samkalden, LL.M., of Amsterdam, Netherlands,
attorney of record: W.P. den Hertog, LL.M., of The Hague, Netherlands,

versus

1. the legal entity organized under foreign law **ROYAL DUTCH SHELL PLC**,
   having its registered office in London, United Kingdom, but its principal place of business in The Hague, Netherlands,
2. the legal entity organized under foreign law **SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LTD.**,
   having its registered office in Port Harcourt, Rivers State, Nigeria,

defendants in the main action,
attorney: J. de Bie Leuveling Tjeenk, LL.M., of Amsterdam, Netherlands.

In the following, the District Court will refer to the parties as “Akpan”, “Milieudefensie”, “RDS” and “SPDC”. Plaintiffs Akpan and Milieudefensie will collectively be referred to as “Milieudefensie et al.” and defendants RDS and SPDC will collectively be referred to as “Shell et al.”.

1. The proceedings

1.1. In rendering this judgment, the District Court has taken the following case documents into account. This list also appears from the course of the proceedings:
- the judgment in the jurisdiction motion of 24 February 2010 (published on www.rechtspraak.nl under number LJN BM1469), and all previous case documents with all exhibits mentioned in this judgment;

- the judgment in the *lis pendens* motion of 1 December 2010 (LJN BU3521) and all previous case documents with all exhibits mentioned in this judgment;
- the judgment in the motion to produce documents of 14 September 2011 (LJN BU3529) and all previous case documents with all exhibits mentioned in this judgment;
- the statement of reply, also containing a change of claim of 14 December 2011, with exhibits;
- the statement of rejoinder of 14 March 2012, with exhibits;
- Milieudefensie et al.'s two documents for submitting exhibits, also containing a change of claim of (in fact) 11 September 2012, with exhibits;
- Shell et al.'s document for submitting exhibits of (in fact) 11 September 2012, with exhibits;
- the written pleadings of attorney Samkalden of 11 October 2012;
- the written pleadings of attorney De Bie Leuveling Tjeenk of 11 October 2012.

1.2. On 11 October 2012, the closing arguments were delivered in this main action, together with the closing arguments in the four other related main actions. At the hearing of 11 October 2012, the District Court scheduled today as the date for rendering judgment in these five main actions that were dealt with simultaneously.

2. The facts

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

2.2. Defendants SPDC and RDS are legal entities that are part of the Shell Group. RDS is headquartered in The Hague (Netherlands); since 20 July 2005, it has been at the head of the Shell Group. Through subsidiaries, RDS holds all shares in its sub-subsidiary SPDC. SPDC is the Nigerian legal entity that conducts the oil production operations in Nigeria for the Shell Group.

2.3. Plaintiff Akpan is a Nigerian farmer and fisherman who lives in the village of Ikot Ada Udo in Akwa Ibom State in Nigeria. In 2006 and 2007, Akpan supported himself by exploiting land and fish ponds near Ikot Ada Udo. Plaintiff Milieudefensie is a Dutch

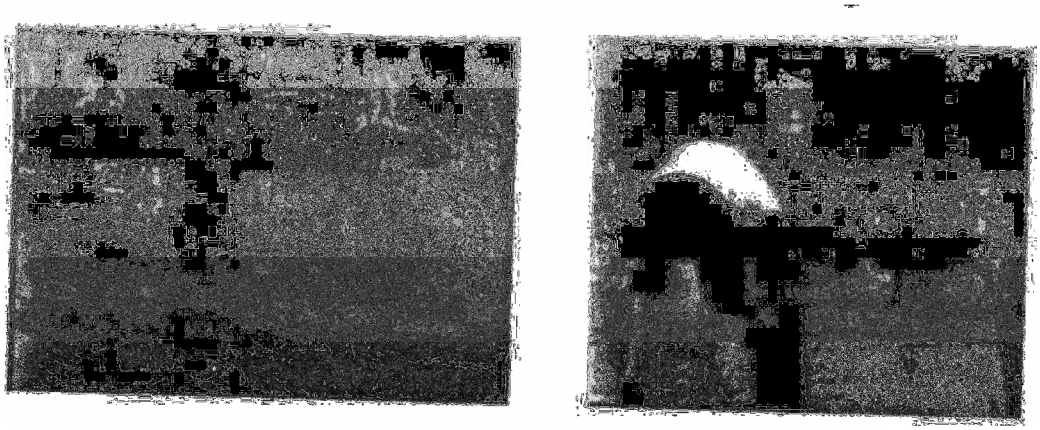
organization whose objective is the worldwide promotion of environmental care and who supports plaintiff Akpan in these proceedings.

2.4. In brief, these proceedings involve two specific oil spills in 2006 and 2007 from oil facilities of operator SPDC near the village of Ikot Ada Udo in Nigeria where Akpan lives. On 1 November 1959, SPDC's legal predecessor drilled an oil well here called the IBIBIO-I well. The wellhead of the IBIBIO-I well is capped aboveground by what is referred to as a Christmas tree. A Christmas tree is a massive steel structure with a number of hollow pipes that are closed and opened with steel slides (valves) used to regulate the outflow of oil and gas from the well, which seal off the oil well in the closed position. A Christmas tree has three valves: one master valve and two wing valves. The valves of a Christmas tree are opened and closed using a screw mechanism that can be operated by hand wheels (which can be removed) or a large monkey wrench.

2.5. After 1 November 1959, SPDC's legal predecessor decided not to use the IBIBIO-I well near Ikot Ada Udo to produce oil. Thus, the well did not become a production well and continued to be an exploratory well. Subsequently, SPDC and its legal predecessor abandoned the IBIBIO-I well with the wellhead and aboveground Christmas tree with closed valves and removed the hand wheels.

2.6. In August of 2006, a small volume of oil spilled from the IBIBIO-I well; approximately one barrel of oil was spilled. At the end of July or early August 2007, a larger volume of oil spilled from the IBIBIO-I well. On 10 August 2007, this second oil spill was reported to SPDC. Following this, on 3 and 4 September 2007, a Joint Investigation Team (hereinafter: the "JIT") – which was comprised of SPDC employees and representatives of Nigerian government agencies – tried to gain access to the IBIBIO-I well to investigate the cause of the reported spill and to stop the spill. However, at that time and for a long time thereafter, members of the local community of Ikot Ada Udo refused to grant the JIT access to the IBIBIO-I well.

2.7. Shortly after consent was finally obtained, an employee of SPDC stopped the oil spill on 7 November 2007 by closing the valves of the aboveground Christmas tree of the IBIBIO-I well with a few turns of a large monkey wrench. According to the JIT report of 7 November 2007, which is signed by employees of SPDC, by representatives of Nigerian government agencies and by the attorney of the local community, an estimated 629 barrels of oil had spilled from the IBIBIO-I well and the cause of the oil spill in 2007 was *tampering of wellhead*. By way of illustration, the District Court selected the following two stills of (stopping) the oil spill on 7 November 2007 from the aboveground Christmas tree of the wellhead near Ikot Ada Udo from the available video footage:



2.8. Following lengthy negotiations with the local community, at SPDC's expense, in the period August 2008 through March 2009, two Nigerian contractors performed the remediation work in the vicinity of Ikot Ada Udo using the RENA method ("*Remediation by Enhanced Natural Attenuation through land farming process*"); the remediation work was required as a result of the oil spill from 2007.

2.9. This remediation using the RENA method was reported in a document that was prepared on 25 June 2009 and signed by a *Clean Up Supervisor* of the Nigerian government. In as far as relevant, this certificate includes the following:

> *"1.0 date of inspection: 25 June 2009*
> *1.1 Location: IBIBIO WELL 1 at Ikot Ada Udo*
> *3.1 Date of Spill: 8 September 2007*
> *3.2 Cause of Spill: sabotage*
> *3.5 Clean-up Period: 26 August 2008 to 30 March 2009*
> *4.1 VISUAL OBSERVATIONS:*
> *(i) Any Oil Sheen on Water? NO*
> *(ii) Any Oil Stain on Vegetation? NO*
> *(iii) Is Soil Wet with Oil? NO*
> *(iv) Any Patches of Oil Impacted Area? NO*
> *(v) Any Oil Sheen when Soil Sediment is disturbed? NO*
> *(vi) Is Disposal Of Oil Debris Satisfactory? YES*
> *(vii) Was Dispersant Applied? No*
> *5.0 COMMENTS/DISCUSSION: Area overgrown with green vegetation.*
> *7.0 CONCLUSION: THE CLEAN-UP IS CERTIFIED AS SATISFACTORY"*

2.10. Following this, on 1 March 2010, another "*Clean-up and Remediation Certification Format*" was issued and signed by a representative of a Nigerian government agency. This certificate specifies a *Final TPH Level of 198.18 mg/kg* and confirms that the oil spill from 2007 was properly cleaned up in the vicinity of Ikot Ada Udo.

2.11. Thus, in 2010, following the commencement of the subject proceedings by virtue of a writ of summons dated 27 April 2009, SPDC further secured the IBIBIO-I well against sabotage by sealing off the wellhead from the oil reservoir by means of a concrete plug.

2.12. Sixteen chiefs of the Ikot Ada Udo community, including the *Village Head* and a number of *Family Heads*, signed the following statement dated 17 May 2012 on behalf of that community:

> *"The Ikot Ada Udo community hereby declares that the land and fish ponds subject of the suit in The Hague, the Netherlands, situated at Ndioho in Ikot Ada Udo Community, Ikot Abasi Local Government Area of Akwa Ibom State as shown in the google earth map annexed hereunto are owned and used by Friday Alfred Akpan, and that he has the right to do so."*

2.13. On 3 September 2012, Mr. Kuprewicz of Accufacts Inc. issued an investigation report by order of Milieudefensie et al.'s attorney. This report includes the following, in as far as relevant:

> *"In the Ikot Ada Udo release, the exploratory wellhead Christmas Tree installed in 1959 and obviously still under oil field pressure, was not properly "positively isolated" or secured. From the evidence, I cannot rule out the possibility of sabotage, but the fact remains that the wellhead has not been properly isolated, such as from blindings or bull plugging which is a responsibility of the well operator, Shell. Had Shell properly secured the wellhead, oil release would not have been possible."*

2.14. In an email dated 6 September 2012, Mr. Von Scheibler of BKK Bodemadvies B.V. wrote the following to Milieudefensie et al.'s attorney:

> *"The annex includes my comments regarding the documents dealing with Goi. The same reasoning and calculations could be applied by analogy to the other locations. Based on the documents, the following general points stood out in any event:*
> *Before and after remediation, Shell compares the TPH concentrations. This is the sum of the concentrations of very many oil components with different toxic properties. This means that nothing can be said regarding the highly toxic BETX concentrations, which may still be above the permissible limit values. By not making any distinction, at a minimum the clean-up reports are incomplete."*

3. The claims in the main action

3.1. Following a change of claim on the occasion of the pleadings, Milieudefensie et al. move that, in a judgment that is declared provisionally enforceable, the District Court:

I renders a declaratory judgment to the effect that based on the arguments in Milieudefensie et al.'s case documents, Shell et al. committed tort against Akpan and are jointly and severally liable towards Akpan for the damage that he suffered and will suffer in the future as a result of these torts on the part of Shell et al., which damage

is to be assessed by the court and to be settled in conformance with the law, all this plus the statutory interest from the date of the summons until the date of payment in full;

II renders a declaratory judgment to the effect that Shell et al. are liable for the infringement of Akpan's physical integrity by living in a contaminated living environment;

III renders a declaratory judgment to the effect that based on the arguments in Milieudefensie et al.'s case documents, Shell et al. committed tort against Milieudefensie and are jointly and severally liable for the damage to the environment near Ikot Ada Udo in Nigeria as a result of these torts on the part of Shell et al.;

IV orders Shell et al. to commence bringing the wellhead near Ikot Ada Udo in Nigeria in conformance with today's standards for wellheads within two months after the judgment is served, or at least within a term to be determined by the District Court, and to complete this work within three months after the commencement, or at least within a term to be determined by the District Court;

V orders Shell et al. to commence the clean-up of the pollution caused by the oil spills so that this will comply with the international and local environmental standards within two weeks after the judgment is served, and to complete this clean-up within one month after commencement, in evidence of which Shell et al. will present Milieudefensie et al. with a unanimous clean-up declaration – within one month after completion of the clean-up – to be prepared by a panel of three experts, who will be appointed within two weeks after the judgment and in which one expert will be appointed by Shell et al. collectively, one expert will be appointed by Milieudefensie et al. collectively and one expert will be appointed by the two experts appointed in this way, or at least within the terms to be determined by the District Court and providing evidence of the clean-up to be determined by the District Court;

VI orders Shell et al. to commence purification of the water sources in and near Ikot Ada Udo within two weeks after the judgment is rendered, and to complete this purification within one month after commencement, in evidence of which Shell et al. will present Milieudefensie et al. with a unanimous purification declaration – within one month after completion of the purification – to be prepared by a panel of three experts, who will be appointed within two weeks after the judgment and in which one expert will be appointed by Shell et al. collectively, one expert will be appointed by Milieudefensie et al. collectively and one expert will be appointed by the two experts appointed in this way, or at least within the terms to be determined by the District Court and providing evidence of the purification to be determined by the District Court;

VII orders Shell et al. to implement an adequate oil spill contingency plan in Nigeria and to ensure that all the conditions have been met for a timely and adequate response in the event that an oil spill near Ikot Ada Udo occurs again; Milieudefensie et al. in any case consider this to include making sufficient materials and resources available in

order to limit the damage of a potential oil spill to the extent possible – in evidence of which Shell et al. will provide overviews to Milieudefensie et al.;

VIII orders Shell et al. to pay Milieudefensie et al. a penalty of EUR 100,000.00 (or any other amount to be determined by the District Court in the proper administration of justice) for each instance in which Shell et al. individually or jointly, act in breach of (as the District Court understands) the orders referred to in paragraphs IV, V, VI and/or VII above;

IX orders Shell et al. jointly and severally to compensate the extrajudicial costs;

X orders Shell et al. to pay the costs of these proceedings, or at least orders each party to pay its own costs.

3.2. Following the provisional rulings and the other pre-trial directions in the interlocutory judgment of the District Court dated 14 September 2011, Milieudefensie et al. base these ten claims in the main action on the following, summarized in the rejoinder and during the pleadings in supplement to the summons. Milieudefensie et al. reproach SPDC for failing to comply with its duty of care to produce oil in a careful manner and prevent oil spills from occurring. According to Milieudefensie et al., SPDC should take more and better preventive measures to prevent oil spills from occurring, both oil spills caused directly by defective and/or obsolete material and oil spills caused directly by sabotage. In the case at issue, Milieudefensie et al. reproach SPDC for failing to ensure that the IBIBIO-I well complies with today's standards, failed to properly maintain the wellhead with the Christmas tree, and in 2006 and 2007 had insufficiently protected these facilities from oil spills caused by sabotage. As a result, the oil spills from the IBIBIO-I well of 2006 and 2007 were caused. In addition, SPDC failed to adequately respond to these oil spills and failed to clean up the oil pollution in time and completely. In view of this, Milieudefensie et al. are of the opinion that in the oil spills from the IBIBIO-I well of 2006 and 2007 near Ikot Ada Udo, under Nigerian law, SPDC committed tort of negligence, tort of nuisance, or tort of trespass to chattel against Milieudefensie et al., or is liable under Nigerian law for Milieudefensie et al.'s damages based on the rule in *Rylands v Fletcher*.

In addition to SPDC, under Nigerian law, RDS also committed tort of negligence against Milieudefensie et al. in these oil spills in 2006 and 2007. After all, parent company RDS in The Hague failed to comply with its duty to induce its (sub-)subsidiary SPDC to prevent these oil spills near Ikot Ada Udo in 2006 and 2007, to adequately respond to these oil spills and to adequately clean up the oil pollution by issuing guidelines and ensuring compliance with these guidelines, and to ensure that SPDC had sufficient financial resources and technical expertise to adequately perform these activities, all this according to Milieudefensie et al.

By virtue of Section 3:305a DCC, Milieudefensie et al. has an independent interest in the District Court finding that RDS' and SPDC's acts and omissions are wrongful. Section 3:305a DCC creates the legal fiction that the damage to the environment near

Ikot Ada Udo is Milieudefensie's damage. In preparing for these proceedings, Milieudefensie et al. incurred extrajudicial costs in the sense of Section 6:96 (2)b DCC, according to Milieudefensie.

3.3. Shell et al. have conducted a substantiated defense against the claims. In as far as relevant, the District Court will address these defenses below.

4. The assessment

International jurisdiction of the District Court of The Hague

4.1. In the interlocutory judgment in the jurisdiction motion of 24 February 2010 (LJN BM1469), the District Court ruled – summarized – that by virtue of Section 7 DCCP, it has jurisdiction in these proceedings, not only over the claims initiated against RDS, but over the claims against SPDC, as well. The reason is because there is such a connection between the claims initiated against RDS, on the one hand, and the claims initiated against SPDC, on the other, that reasons of efficiency justify a joint hearing, and because at that time, it had been insufficiently submitted or demonstrated that abuse of procedural law was allegedly involved.

4.2. In the rejoinder and during the pleadings, Shell et al. concluded that the District Court will have to reconsider its decision in the interlocutory judgment to the effect that it has jurisdiction over the claims against SPDC. However, in the interlocutory judgment, the District Court rendered a binding final decision on this point, unless the *lis pendens* motion would result in the District Court declaring that it has no jurisdiction; however, this was not done in the judgment in the *lis pendens* motion (see LJN BU3521). For this reason, the District Court can only reconsider its final decision that it has jurisdiction over the claims against SPDC if it is demonstrated that this binding final decision was rendered on an incorrect legal or factual basis (see HR 25 April 2008, *NJ* 2008, 553).

4.3. Shell et al. argued that the decision regarding jurisdiction of the Dutch court over the claims against SPDC was rendered on an incorrect legal basis. To this end, they first of all contend that following the interlocutory judgment in the motion to produce documents and in the main action of 14 September 2011 (LJN BU3529), it was demonstrated that under Nigerian law, the claims against RDS were clearly certain to fail beforehand and that Milieudefensie et al. knew this or should have realized this. For this reason, Shell et al. are of the opinion that Milieudefensie et al. most certainly abused procedural law by initiating these claims against RDS and SPDC collectively and by accordingly – via the summoned legal entity RDS in The Hague and via Section 7 DCCP – creating jurisdiction for the District Court in The Hague in respect

of the claims initiated against the Nigerian legal entity SPDC, as well. The District Court dismisses this argument. In these proceedings, the claims against RDS could not be designated as clearly certain to fail beforehand, because 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. After all, this is demonstrated by the decision in *Chandler v. Cape* still to be discussed below. Thus, in the case at issue, the District Court is of the opinion that no abuse of procedural law by Milieudefensie et al. was and is involved.

4.4. Secondly, during the pleadings Shell et al. invoked the *Painer* ruling of the European Court of Justice ("**ECJ**") of 1 December 2011, no. C-145/10. In paragraph 81 of the *Painer* ruling, the ECJ found that in the event of a difference in the basis of claims initiated against various defendants, in and of itself this fact does not preclude application of Article 6(1) of the Brussels Regulation, provided that the defendants could foresee that they might be sued in the Member State where at least one of them was domiciled. According to Shell et al., this rule of law from the *Painer* ruling can be applied by analogy to Section 7 (1) DCCP. Shell et al. argue that the Nigerian SPDC could not foresee that it would be summoned in the Netherlands with regard to the oil spills at issue and that it also follows from this that the Dutch court has no jurisdiction over the claims initiated against SPDC.

4.5. The District Court does not follow Shell et al. in this argument. First of all, the claims against RDS and SPDC do not have a different legal basis; rather they have (in part) the same legal basis, i.e. tort of negligence under Nigerian law. Secondly, for quite some time (see Enneking in NJB 2010, pp. 400-406) 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. This means that the District Court is of the opinion – including in the sense of the *Painer* ruling that was only rendered after the summons – that it was "foreseeable" for SPDC that it might be summoned in the Netherlands together with RDS in connection with the alleged liability for the oil spills near Ikot Ada Udo. For this reason, it can be left aside whether or not the rule of law from the *Painer* ruling can be applied fully by analogy to Section 7 DCCP and to the facts in these proceedings before the District Court of The Hague.

4.6. In the event that the District Court were to dismiss the claims against RDS in The Hague in a final judgment, this gives rise in advance to the question regarding whether subsequently, the Dutch court should possibly leave the assessment of the claims against SPDC up to the Nigerian court. After all, Akpan and SPDC are

Nigerian parties that are litigating under Nigerian law on damage caused by two oil spills in 2006 and 2007 on Nigerian territory. However, the *forum non conveniens* restriction no longer plays any role in today's international private law. The District Court is of the opinion that the jurisdiction of the Dutch court in the matter against SPDC based on Section 7 DCCP does not cease to exist in the event that the claims against RDS were to be dismissed, not even if subsequently, in fact, no connection or hardly any connection would remain with Dutch jurisdiction.

4.7. The conclusion is that the District Court will not reconsider its binding final decision that by virtue of Section 7 DCCP, it has jurisdiction over the claims initiated in the subject proceedings, not only against the legal entity RDS in The Hague, but also against the Nigerian legal entity SPDC.

Applicable law

4.8. The claims involve two specific oil spills that occurred in 2006 and 2007 near Ikot Ada Udo in Akwa Ibom State in Nigeria; according to Milieudefensie et al., Shell et al. are liable based on tort for the damage caused by these oil spills. The alleged harmful events occurred before 11 January 2009; this means that the case falls outside the temporal scope of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II). Please refer to Articles 31 and 32 of Rome II and to the ECJ's ruling dated 17 November 2011, *NJ* 2012, 109.
For this reason, the Dutch Torts (Conflict of Laws) Act (*Wet Conflictenrecht Onrechtmatige Daad* ("**WCOD**") applies to the question regarding under which law the District Court must substantively assess the initiated claims.

4.9. In the event of a tort that has been committed by SPDC, this tort occurred on the territory of Nigeria. In the event that RDS allegedly committed tort with regard to the occurrence of these two oil spills, this tort by RDS had harmful effects in Nigeria. Therefore, the District Court is of the opinion that based on Section 3 (1) and (2) WCOD, the claims in the main action must be substantively assessed under Nigerian law, more in particular the law that applies in Akwa Ibom State, where these two oil spills occurred. Thus, the District Court maintains this provisional opinion from the interlocutory judgment of 14 September 2011. Based on the Dutch conflict of law rules, the following exceptions apply. Nigerian law is not applied if the application of this law in this specific case would be manifestly incompatible with Dutch public order in the sense of Section 10:6 DCC or in the event that priority rules of Dutch law apply in the sense of Section 10:7 DCC. After all, retroactive effect can be given to the sections of Title 1 of Book 10 DCC, which came into effect on 1 January 2012, because they codify the unwritten rules that applied until 1 January 2012 (Explanatory

Memorandum 32 137, no. 3, p. 95). However, it has been insufficiently submitted or demonstrated that those exceptions occur in the case at issue.

4.10. To apply Nigerian law, the District Court first of all examined the legal opinions of Professor Oditah furnished by Shell et al., on the one hand, and the opinion of the International Legal Institute (IJI) and the legal opinions of Professor Ladan and Dr. Ako and of Professor Duruigbo furnished by Milieudefensie et al., on the other hand. In addition, in its conclusion of Nigerian law, the District Court consulted English common law literature, including handbooks regarding the specific torts alleged by Milieudefensie et al. After all, Nigerian law is a common law system that is based on English law.

Admissibility of Milieudefensie's claims

4.11. Shell et al. submitted that Milieudefensie's claims in the main action are inadmissible. To this end, they *inter alia* argued that Section 3:305a DCC is part of substantive Dutch law because it is included in the Dutch Civil Code, whereas applicable substantive Nigerian law does not recognize any (similar) law governing class actions. However, in the interlocutory judgment of 14 September 2011, the District Court already definitively ruled that and why Section 3:305a DCC is a rule of Dutch procedural law. It has not been submitted or demonstrated that this binding final decision has an incorrect basis. In addition, in that interlocutory judgment, the District Court held the provisional opinion that Milieudefensie's claims are admissible, because – in contrast to what Shell et al. argue – the requirements stipulated by Section 3:305a DCC have been satisfied in the case at issue.

4.12. The District Court now also definitively dismisses Shell et al.'s argument in the statement of defense that Milieudefensie's claims are inadmissible. According to Shell et al., a purely individual representation of interests is involved, this class action does not offer any advantage over litigating in the name of the interested parties themselves, Milieudefensie does not develop sufficient actual activities for the environment in Nigeria and/or these proceedings involve a purely local interest. However, the District Court maintains that a number of Milieudefensie et al.'s claims clearly rise above the individual interest of (only) Akpan, because remediating the soil, cleaning up the fish ponds, purifying the water sources and preparing an adequate contingency plan for future responses to oil spills – if ordered – will benefit not only Akpan, but the rest of the community and the environment in the vicinity of Ikot Ada Udo, as well. Given that many people may be involved, litigating in the name of the interested parties may most certainly be objectionable. 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. Finally, the description of Milieudefensie's objective in its articles of association 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 effect of Section 3:305a DCC.

4.13. In the statement of rejoinder and during the pleadings, Shell et al. pointed out that there is no room for a class action if the interests of the persons who are represented in the class action are not sufficiently safeguarded. According to Shell et al., this situation occurs because Milieudefensie fails to specify the interests of what specific other people it is representing and because Milieudefensie allegedly has insufficient knowledge of the extremely complex situation in Nigeria. The District Court also ignores this argument. Milieudefensie moves that Shell et al. are ordered to take a number of measures to reduce the risk of oil spills near Ikot Ada Udo in Nigeria and to minimize the results of oil spills. The District Court fails to see that this could contravene the interests of the Nigerian citizens who may be affected by oil spills. The statement cited in ground 2.12 above further demonstrates that the community of Ikot Ada Udo has no objection to Milieudefensie being a party to these proceedings, so that it cannot be held based on Section 3:305a (4) DCC that Milieudefensie's claims are inadmissible.

4.14. The above leads the District Court definitively to the opinion that Miliedefensie's claims are admissible.

Substantive assessment

4.15. The District Court puts the following first in the substantive assessment of the claims. Many oil spills occur each year in Nigeria. This has far-reaching consequences for the local population and for the environment. It is an established fact that part of these oil spills occur from oil pipelines and oil facilities of SPDC. Milieudefensie et al. submit that these oil spills (too) frequently result from defective maintenance of oil pipelines and oil facilities and of Shell et al.'s defective policy. According to Shell et al., the oil spills are usually caused by sabotage and SPDC makes every reasonable effort to prevent and clean-up oil pollution in Nigeria. However, in these proceedings, the Dutch court cannot and will not render an opinion regarding the discussion between Milieudefensie et al. and Shell et al. regarding Shell et al.'s general policy in its oil production operations in Nigeria. In these proceedings, the District Court may and will only rule on the specific claims initiated by Milieudefensie et al. in response to these two specific oil spills in 2006 and 2007 near Ikot Ada Udo and Shell et al.'s defenses against these claims.

Right of action of Akpan

4.16. The litigants disagree regarding the question of whether under Nigerian law, Akpan is entitled to initiate a claim for compensation of his damage. In the summons, Milieudefensie et al. submitted that Akpan is the owner of (land and) fish ponds that have been contaminated by these two oil spills and that as a result, Akpan suffered loss of income, among other things. In the defense, Shell et al. put forward a substantiated challenge of the fact that Akpan exclusively owns (the land and) fish ponds with the argument that under Nigerian common law, in principle, land and the fish ponds on this land in non-urban areas are jointly owned by the local community. In the interlocutory judgment of 14 September 2011, the District Court also assumed that the existence of the alleged ownership right of Akpan was relevant for his right of action. However, it has subsequently become clear that this is not the case. After all, in the rejoinder, Shell et al. submit that Akpan can also initiate a claim for compensation in the event that he does not own but is only in possession of the land and fish ponds at issue; in that case, this is something that Akpan must first prove according to Shell et al. Shell et al. also believe that the exact locations of the land and fish ponds that are exploited by Akpan and which have been allegedly contaminated by these two oil spills must be specified.

4.17. Akpan submitted that he came in possession of the land and the fish ponds by using and cultivating them. Under Nigerian common law, this can lead to possession of land and fish ponds, as *inter alia* follows 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 statement described in ground 2.12 above by sixteen chiefs of the Ikot Ada Udo community, from which the District Court understands that according to the local community, Akpan in any event had and has 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 Akpan should not be considered to be the possessor. In the opinion of the District Court, this sufficiently establishes that Akpan is the possessor of the land and fish ponds contaminated by the oil spills and that he thus has a right of action. The community's statement also specifies the locations of the contaminated land and fish ponds in sufficient detail, so that – in contrast to what Shell et al. believe – this is no longer unclear. Moreover, the 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 Ikot Ada Udo Milieudefensie et al. are referring to in these proceedings.

Cause of the two oil spills in 2006 and 2007 near Ikot Ada Udo

4.18. It follows from grounds 4.6 – 4.8 of the interlocutory judgment of 14 September 2011 that under applicable Nigerian law, the actual cause of an oil spill is relevant for assessing the claims. After all, in contrast to the event of defective material or defective maintenance, in the event of sabotage, under Nigerian law the main rule is that an operator like SPDC is not liable for the damage caused by an oil spill. In part in view of that main rule of Nigerian law and the request of both attorneys for pre-trial directions by the District Court for the further course of the proceedings in the main action (see ground 5.1 of that interlocutory judgment), in its interlocutory judgment, the District Court held the provisional opinion that in this position of the discussion between the parties, these specific oil spills of 2006 and 2007 near Ikot Ada Udo for the time being appeared to have been caused by sabotage. To this end, the District Court found as follows: *Shell et al. submit that the two oil spills from the IBIBIO-I well were caused by sabotage, in the sense that the valves of the wellhead had been opened by unknown third parties. According to Shell et al., the outflow of oil was stopped simply by closing these valves. Shell et al. supported this substantiated defense with video footage from November 2007, which indeed shows that the oil flow is stopped by closing the valves of the wellhead with a few turns of a wrench. In no. 104 of the statement of defense in the motion by virtue of Section 843a DCCP, Shell et al. further submitted – to date unchallenged – that it would, in fact, have been impossible to simply stop and definitively remedy the oil spill in 2007 this way if the oil spills in 2006 and 2007 had been caused by defects in the material or by defective maintenance of the wellhead.*

4.19. In view of this, in its interlocutory judgment of 14 September 2011, the District Court ruled *[that Milieudefensie et al.] for the time being advanced an insufficiently substantiated refutation of Shell et al.'s argument that these two oil spills were caused by sabotage, which means that for the present, this argument of Shell et al. in these proceedings must be deemed to be correct.* As a result, after the interlocutory judgment of 14 September 2011, it was up to Milieudefensie et al. to still advance a substantiated refutation in the reply – properly substantiated and as specific as possible – of Shell's factual defense that sabotage was involved in 2006 and 2007 near Ikot Ada Udo.

4.20. Milieudefensie et al. only countered this by submitting (not in the reply but only during the pleadings) that there are "possible causes other than sabotage", such as that the valves spontaneously started to leak after some time. However, there is no concrete indication of this. In addition, the sabotage alleged by Shell et al. as the cause of these two oil spills is also plausible, given the relative ease by which the valves of the Christmas tree could be opened and closed using a large monkey wrench, in view of

the JIT report signed by all parties involved in which sabotage by *tampering of wellhead* is indicated as the cause, and in view of the general sabotage practices in Nigeria described in ground 2.1 above. For this reason, the District Court feels that the alternative explanations pointed out by Milieudefensie et al. are implausible, and following the interlocutory judgment in any event insufficiently substantiated by concrete facts in these proceedings.

4.21. In view of this, the District Court maintains its provisional opinion from the interlocutory judgment of 14 September 2011 and is now definitively of the opinion that in these proceedings, Shell et al. have submitted and substantiated and that Milieudefensie et al. have submitted an insufficiently substantiated refutation of the fact that these two oil spills in 2006 and 2007 from the IBIBIO-I well near Ikot Ada Udo were, in fact, caused by sabotage; this means that in these proceedings, the factual sabotage alleged by Shell et al. must be deemed to be correct.

Non-contractual obligations for compensation under Nigerian law

4.22. The Nigerian legal system regarding non-contractual obligations for compensation is based on the common law legal system of England. The legal system based on common law is part of Nigeria's federal law and applies in all states of Nigeria. Formally, decisions of English courts that date from after Nigeria's independence in 1960 are not binding on the Nigerian court, but do have persuasive authority and are therefore frequently followed in Nigerian case law. Legal systems based on common law do not recognize an umbrella term of tort that is governed by law – as in the Dutch legal system. These systems do recognize a number of non-contractual obligations for compensation developed in the case law, referred to as specific torts, each with its own standards. Under Nigerian law, based on common law, the liability of operators such as SPDC for damage resulting from oil spills has further been partially codified in the Nigerian Oil Pipelines Act 1956 (hereinafter: "OPA").

Tort of negligence and duty of care

4.23. It can be inferred from the ruling of the English House of Lords in *Donoghue v. Stevenson (1932)* that tort of negligence is committed in the event that the defendant breached a duty of care that resulted in damage on the part of the plaintiff. Under Nigerian law, whether or not a defendant has a duty of care to the plaintiff is meanwhile determined based on three criteria that can be inferred from the English ruling in *Caparo Industries plc v Dickman (1990, House of Lords)*. These three criteria are:

(i) the foreseeability for the defendant that the plaintiff would suffer damage;
(ii) the proximity between the plaintiff and the defendant;

(iii) whether it is fair, just and reasonable to assume that a duty of care exists in a specific situation.

In Nigerian case law, as well, whether or not a party has a duty of care to another party is determined based on these three criteria. In addition, in Nigerian and English case law, whether or not a duty of care exists is determined on a case-by-case basis, in steps and by looking for parallels with similar, previous legal cases (precedents). This approach is called the incremental approach.

4.24. In legal systems based on common law, including Nigeria's system, there is no general duty of care to prevent other parties from suffering damage as a result of the practices of third parties. This follows from the English ruling in *Smith v Littlewoods (1987, House of Lords)*. The findings of Lord Goff in that ruling imply that under the following special circumstances, a plaintiff can successfully submit that the defendant had a duty of care to prevent a third party from inflicting damage on the plaintiff:

(i) a special relationship was created between the plaintiff and the defendant because the defendant assumed a duty of care towards the plaintiff;
(ii) there was a special relationship between the defendant and the third party based on which the defendant had to supervise the third party or had to exercise control over the third party;
(iii) the defendant created a dangerous situation that could be abused by a third party and this way result in damage;
(iv) the defendant knew that a third party had created a dangerous situation while that situation was under the influence of the defendant.

4.25. If one of these exceptional situations is involved, the requirements that proximity must exist between the plaintiff and the defendant and that it is fair, just and reasonable to impose a duty of care on the defendant to prevent a third party from inflicting damage on the plaintiff have been satisfied. The District Court assumes that under Nigerian law, as well, these exceptional situations constitute a reason to assume that a duty of care exists to prevent others from suffering damage as a result of the practices of third parties, to the extent that this damage of the plaintiff was foreseeable for the defendant. In his legal opinions on behalf of Shell et al., Professor Oditah called into question that Nigerian law recognizes the possibilities for the occurrence of a duty of care described by Lord Goff. However, those possibilities are part of the positive law under common law, so that the District Court considers those criteria applicable under Nigerian law, as well, in view of its findings in ground 4.22.

Tort of negligence of parent company RDS in The Hague?

4.26. The legal rule under Nigerian law that there is no general duty of care to prevent third parties from inflicting damage on others also implies that parent companies like RDS

in general have no obligation under Nigerian law to prevent their (sub-) subsidiaries such as SPDC from inflicting damage on others through their business operations. There is just one exception to this main rule in the event that one of the special circumstances mentioned by Lord Goff is involved (see ground 4.24 above).

4.27. Milieudefensie et al. submit that RDS is aware of the problematic situation of oil spills in Nigeria and that in many respects, RDS in The Hague interfered with and exercised influence on SPDC's activities in Nigeria. Moreover, parent company RDS made the prevention of environmental damage as a result of the activities of its operating companies – including SPDC in Nigeria – a key objective of its policy and also publicly invokes this policy. According to Milieudefensie et al., this can be taken to mean that RDS assumed a duty of care regarding the manner in which SPDC's oil operations in Nigeria are conducted. The described situation can be equated with the one in the English *Chandler v Cape PLC* case, all this still according to Milieudefensie et al.

4.28. The key question in *Chandler v Cape* was whether a parent company can have a duty of care in respect of the employees of a subsidiary with regard to the health and safety policy. This involved damage caused by exposure to asbestos dust. On appeal, the court ruled that this might be the case if the parent company assumed this duty of care. This is involved under the following special circumstances:

(i) the businesses of the parent company and of the subsidiary are essentially the same;
(ii) the parent company has more knowledge or should have more knowledge of a relevant aspect of health and safety in the industry than the subsidiary;
(iii) the parent company knew or should have realized that the working conditions at its subsidiary were unhealthy;
(iv) the parent company knew or should have foreseen that the subsidiary or its employees would rely on the fact that the parent company would use its superior knowledge to protect those employees.

In *Chandler v Cape*, the court further found that the condition under (iv) can be deemed to have been fulfilled in the event that it is clear that (v) the parent company had intervened before in the subsidiary's business operations.

4.29. The District Court finds that the special relation or proximity between a parent company and the employees of its subsidiary that operates in the same country cannot be unreservedly equated with the proximity between the parent company of an international group of oil companies and the people living in the vicinity of oil pipelines and oil facilities of its (sub-) subsidiaries in other countries. The District Court is of the opinion that this latter relationship is not nearly as close, so that the requirement of proximity will be fulfilled less readily. The duty of care of a parent company in respect

of the employees of a subsidiary that operates in the same country further only comprises a relatively limited group of people, whereas a possible duty of care of a parent company of an international group of oil companies in respect of the people living in the vicinity of oil pipelines and oil facilities of (sub-) subsidiaries would create a duty of care in respect of a virtually unlimited group of people in many countries. The District Court believes that in the case at issue, it is far less quickly fair, just and reasonable than it was in *Chandler v Cape* to assume that such a duty of care on the part of RDS exists.

4.30. At best, SPDC can be blamed for failing to prevent third parties from indirectly inflicting damage on people living in the vicinity by sabotage and that it insufficiently limited this damage, whereas in *Chandler v Cape*, the subsidiary itself directly inflicted damage on its employees by allowing them to work in an unhealthy work environment. Thus, at best, parent company RDS can be blamed for failing to induce and/or failing to enable its (sub-) subsidiary SPDC to prevent and limit any damage caused to people living in the vicinity by sabotage.

4.31. In addition, (not all of) the circumstances that can create a duty of care on the part of a parent company according to *Chandler v Cape* occur here. One identical circumstance is that RDS knew and knows that SPDC's business operations involve health risks for third parties. However, the businesses of RDS and SPDC are not essentially the same, because RDS formulates general policy lines from The Hague and is involved in worldwide strategy and risk management, whereas SPDC is involved in the production of oil in Nigeria. It is further not clear why RDS should have more knowledge of the specific risks of the industry in which SPDC operates in Nigeria than SPDC itself; thus, it is also unclear why people living in the vicinity like Akpan allegedly relied on the fact that RDS would use this superior specific know-how, if any, to protect the local community near Ikot Ada Udo.

4.32. The conclusion is that the special circumstances based on which the parent company was held liable in *Chandler v Cape* are not so similar to those in the subject case that on this ground alone it may be assumed that RDS has a duty of care in respect of Milieudefensie and Akpan. In other words: the District Court is of the opinion that *Chandler v Cape* does not create any precedent in the subject case.

4.33. In the circumstances of this case, it cannot be assumed on other grounds, either, that RDS in The Hague as parent company assumed the obligation to intervene in SPDC's policy regarding the prevention of and response to sabotage of oil pipelines and oil facilities in Nigeria. The District Court is of the opinion that the general fact that RDS made the prevention of environmental damage caused by operations of its (sub-) subsidiaries the main focus of its policy and that to some extent, RDS is involved in

SPDC's policy constitutes insufficient reason to rule that under Nigerian law, RDS assumed a duty of care in respect of the people living in the vicinity of the oil pipelines and oil facilities of SPDC. Those circumstances do not mean that any proximity was created between RDS in The Hague and those people living in the vicinity in Nigeria and that it would be fair, just and reasonable to assume that RDS had a specific duty of care in 2006 and 2007 near Ikot Ada Udo. Nor have any other circumstances been contended or demonstrated based on which the District Court can rule that these requirements of Nigerian law have been satisfied.

4.34. In view of all of the above, the District Court is of the opinion that under applicable Nigerian law, the parent company RDS in The Hague did not commit any tort of negligence against Milieudefensie and Akpan. For this reason, the District Court will dismiss all the claims initiated against RDS.

Tort of negligence of SPDC against Milieudefensie in Amsterdam?

4.35. Under III, Milieudefensie in Amsterdam moves for a declaratory judgment to the effect that SPDC committed tort against Milieudefensie. However, this claim cannot be allowed. Milieudefensie argues that Section 3:305a DCC creates the legal fiction that the interests of all parties who have been affected by the harmful practices are incorporated in Milieudefensie. However, this argument is not supported by Nigerian law; it is pointed out that the argument is not supported by Dutch law, either. The fact that by virtue of Section 3:305a DCC, Milieudefensie can protect the interests of third parties in law does not mean that any damage of those third parties can be considered to be damage of Milieudefensie itself. Thus, no damage occurred at Milieudefensie as a result of these two oil spills in 2006 and 2007 near Ikot Ada Udo, so that no tort of negligence of SPDC against Milieudefensie can be involved. The District Court further notes that under common law, there is no proximity between SPDC in Nigeria and Milieudefensie in Amsterdam, either, for any damage that occurred in Nigeria near Ikot Ada Udo. For this reason alone, Shell et al. have not violated any duty of care in respect of Milieudefensie. Thus, the District Court will dismiss the claims initiated under III by and for Milieudefensie.

Liability of SPDC to Akpan on account of the rule in Rylands v Fletcher?

4.36 Section 11 (5) (c) OPA stipulates the following: *"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 or leakage from the pipeline or an ancillary installation for any such damage not otherwise made good"*.

This Nigerian statutory provision codifies the liability of a license holder such as SPDC based on *the rule in Rylands v Fletcher*. The main rule that follows from this Nigerian statutory provision is that SPDC is liable for damage of Akpan caused by the oil spills in 2006 and 2007 near Ikot Ada Udo, unless those oil spills can be blamed on Akpan or sabotage by third parties. In ground 4.21 above, the District Court already ruled definitively that these two oil spills were caused by sabotage. For this reason, by virtue of Section 11 (4) (c) OPA or based on *the rule in Rylands v. Fletcher*, SPDC cannot be liable for damage caused by these two oil spills occurring. However, Milieudefensie et al. submit that SPDC can still be liable on this ground for the failure to respond adequately to the oil spills and for the failure to properly clean up the oil contamination. The District Court does not follow Milieudefensie in this argument, because this argument is incompatible with the text and purport of Section 11 (5) (c) OPA. After all, this Nigerian statutory provision does create liability for the consequences of the occurrence of an oil spill, but not for the consequences of inadequately responding to this oil spill or for the consequences of not properly cleaning up this oil spill.

Tort of nuisance of SPDC against Akpan?

4.37. The tort of nuisance alleged by Milieudefensie et al. – in this connection, the District Court takes this tort to be an infringement of a right of enjoyment or right of use to land and fish ponds on this land – has been codified for operators like SPDC in Section 11 (5) (a) OPA, which stipulates the following: *"[The operator shall pay compensation to any person whose land or interest in land (…) is injuriously affected by the exercise of the rights conferred by the license, for any such injurious affection not otherwise made good."*
The District Court is of the opinion that the failure to prevent sabotage cannot be designated as a tort of nuisance caused by exercising the license rights that the Nigerian government granted to SPDC. Nor can the failure to adequately respond to an oil spill or the failure to properly clean up such oil spill be designated as a tort of nuisance by exercising the license rights by SPDC. Under English law as well as under Nigerian common law, no tort of nuisance is involved if this infringement was caused by sabotage committed by a third party. Thus, by failing to prevent the sabotage, SPDC did not commit any tort of nuisance against Akpan.

Tort of negligence of SPDC against Akpan in the occurrence of the oil spills?

4.38. The next issue to be addressed is whether SPDC committed a tort of negligence against Akpan. The circumstances under which an operator like SPDC in Nigeria can commit a tort of negligence in connection with its business operations are codified in Section 11 (5) (b) OPA. This section stipulates the following:

"[The operator shall pay compensation] to any person suffering damage by reason of any neglect on the part of [the operator] or his agents, servants or workmen to protect, maintain or repair any work structure or thing executed under the license, for any such damage not otherwise made good."
The District Court assumes that in general, the case law on the tort of negligence also applies in the scope of interpreting this Nigerian statutory provision. In this connection, Milieudefensie et al. submit *inter alia* that SPDC had the obligation to Akpan to take additional and better measures to prevent sabotage.

4.39. According to Milieudefensie et al., sabotage of oil pipelines and oil facilities in Nigeria is foreseeable in each case, there is proximity between SPDC and the people living in the vicinity and it is fair, just and reasonable to impose a general duty of care on SPDC to prevent sabotage. In Milieudefensie et al.'s view, by installing oil pipelines and oil facilities and keeping these in operation, SPDC created a dangerous situation for the people living in the vicinity of these pipelines and facilities, which can be exploited by third parties. For this reason, according to Milieudefensie et al., SPDC has a general duty of care in respect of people living in the vicinity such as Akpan to prevent sabotage of its oil pipelines and oil facilities by taking additional and better preventive measures. Shell et al. contest this.

4.40. To date, Nigerian case law has no precedent in which an operator like SPDC was held liable for damage resulting from an oil spill based on a tort of negligence, because the operator had violated a general duty of care to prevent sabotage of its oil pipeline or oil facility by third parties. To date, in Nigerian rulings finding that sabotage was involved, the court consistently ruled that the operator was not liable. This clearly demonstrates that under Nigerian law, operators have no general duty of care in respect of the people living in the vicinity of their oil pipelines and oil facilities to prevent sabotage of these pipelines and facilities. Apparently, to date, Nigerian case law does not designate installing and keeping an oil pipeline or an oil facility in and of itself as creating or maintaining a dangerous situation that gives rise to a general duty of care, even though sabotage frequently occurs in Nigeria.

4.41. As all the professors consulted by the parties also recognize in their legal opinions, under Nigerian law it is not ruled out that in the event of sabotage, in a specific case an operator may have committed a tort of negligence because it failed to act sufficiently in a specific situation to limit the risk of sabotage of a specific oil pipeline or oil facility. This also follows from the Nigerian ruling in *Shell Petroleum Development Company (Nigeria) Limited v Otoko (1990)*. After all, this ruling held that *"where the immediate cause of the [oil spill] is [sabotage], the [operator] is not liable, unless [the operator] (…) should have foreseen the sabotage and should have taken measures against this."*

4.42. In the event that an oil spill occurs from an oil pipeline or facility of SPDC, it is in any event foreseeable that this has harmful consequences for the people living in the vicinity of the location where the oil spill originates and farming or fishing at that location. This means that the requirement of foreseeability described in ground 4.23 has been satisfied.

4.43. As described in ground 2.1 above, sabotage of oil pipelines and oil facilities frequently occurs in Nigeria. In the case at issue, the sabotage of the IBIBIO-I well was, in fact, extremely easy to carry out. It was unnecessary to first expose deeply dug-in oil pipelines by digging and subsequently sabotaging these pipelines with a drill or saw; all that was required was to open the aboveground valves of the Christmas tree with a few turns of a monkey wrench. In addition, since 1959 or 1960, the wellhead has been completely unprotected and freely accessible to saboteurs. In the opinion of the District Court, under these specific circumstances, SPDC should have realized that there was a very high risk that this aboveground Christmas tree would be sabotaged sooner or later. Accordingly, SPDC created a particularly dangerous situation at the IBIBIO-I well and allowed this situation to continue, which could be abused by a third party as referred to by Lord Goff (see ground 4.24 above). SPDC should have foreseen this obvious risk of sabotage and should have taken more and better preventive measures against this risk than simply removing the hand wheels normally used to operate the valves of a Christmas tree. In particular the people living in the vicinity who, like Akpan, generated income from land and fish ponds ran a significant risk of damage by sabotage of the aboveground Christmas tree – which was easy to commit. Thus, the District Court is of the opinion that under the special circumstances of this case, the requirement of proximity has been satisfied.

4.44. In addition, before 2006 and 2007, SPDC could have considerably reduced or ruled out the risk of damage by sabotage of the IBIBIO-I well that was easy to commit at relatively low cost by simply sealing off the wellhead using a concrete plug, as was done, in fact, in 2010 following the commencement of these proceedings. Nor did SPDC have insufficient interest in better securing this exploratory well – which had been abandoned since 1959 or 1960 – before 2006 using a concrete plug. This means that the District Court is of the opinion that it is also fair, just and reasonable to rule that in the case at issue, SPDC had a specific duty of care in respect of the people living in the vicinity of the IBIBIO-I well and especially fishermen and farmers like Akpan, to take security measures against sabotage that can be reasonably demanded.

4.45. It is an established fact that prior to the oil spills of 2006 and 2007, SPDC failed to properly secure the IBIBIO-I well. To the extent that SPDC submits that this was not

possible before 2006 on account of conflicts with the local population, it insufficiently substantiated this argument in these proceedings. In the opinion of the District Court, as an operator acting reasonably, SPDC should have properly secured the IBIBIO-I well, because it could and should have considerably limited or excluded such a large and obvious risk of sabotage – which was easy to commit – at relatively low cost. This leads to the conclusion that in this specific case, SPDC violated its duty of care in respect of Akpan. The parties do not disagree regarding the fact that the oil spills would not have occurred if the IBIBIO-I well simply had already been closed before 2006 or 2007 using a concrete plug; this also follows from the Accufacts report described in ground 2.13 above. Thus, there is a causal link between the violation of this specific duty of care by SPDC and the stated damage of Akpan. The above brings the District Court to the conclusion that SPDC committed a specific tort of negligence against Akpan by insufficiently securing the IBIBIO-I well to prevent the sabotage that was committed in a simple manner prior to the subject two oil spills, and that SPDC is liable for the damage that Akpan suffered as a result.

4.46. Under I, Milieudefensie et al. moved for a declaratory judgment to the effect that Shell et al. are liable for Akpan's damage, to be assessed by the court. Thus, strictly speaking, only a claim in the sense of Section 3:302 DCC is initiated. However, the District Court understands that Milieudefensie et al. envisaged claiming an *order to pay compensation, to be assessed by the court* in the sense of Section 612 DCCP. The District Court will take Milieudefensie et al.'s claim under I accordingly, also because Shell et al. did not make any objection on this formal point. This means that the District Court will render a declaratory judgment to the effect that prior to the two oil spills near Ikot Ada Udo in 2006 and 2007, SPDC committed a tort of negligence against Akpan by insufficiently securing the IBIBIO-I well to prevent the sabotage that was easily committed at that time, and will order SPDC to compensate the damage that Akpan suffered as a result – as the District Court deems likely – to be assessed by the court and to be settled in conformance with the law. The statutory interest that has already been claimed will only be assessed for each loss item in the follow-up proceedings for assessing the damage, if any, just as – by the nature of the case – the causal link between this specific tort and Akpan's concrete loss items to be put forward in the follow-up proceedings for assessing the damage, if any. Thus, in this manner, the District Court will allow the claims initiated against SPDC under I.

Tort of negligence of SPDC against Akpan in the response to the oil spills?

4.47. Milieudefensie et al. further argued that SPDC committed a tort of negligence against Akpan by failing to adequately respond to the oil spills from the IBIBIO-I well of 2006 and 2007. The District Court considers that – in as far as the District Court was able to verify – there is no prior Nigerian case law similar to this case, which means that

SPDC may have committed a tort of negligence by failing to adequately respond to an oil spill. The District Court further considers that the oil spill in 2006 was very small and that without any further explanation, which is absent, with regard to the larger oil spill in 2007 – in any event with regard to the period until 3 September 2007 – the District Court fails to see that as a result of the failure to respond to the two oil spills in time, Akpan could have suffered any additional damage in addition to the damage that occurred by SPDC's failure to adequately prevent the oil spills. Milieudefensie et al. also recognized this on the occasion of the pleadings. With regard to the period from 3 September 2007, SPDC repeatedly tried to gain access to the IBIBIO-I well, but the inhabitants of Ikot Ada Udo refused to grant SPDC access until (shortly before) 7 November 2007. For this reason, the District Court fails to see that in this period from 3 September to 7 November 2007, SPDC allegedly violated a duty of care to make sufficient efforts to respond to and remedy the oil spill. The conclusion is that on this point, SPDC did not commit any relevant tort against Akpan.

Tort of negligence against Akpan in the remediation of the oil contamination?

4.48. Given that SPDC committed a tort of negligence against Akpan with regard to the occurrence of these two oil spills in 2006 and 2007 from the IBIBIO-I well, for this reason alone SPDC could be expected to properly remediate the resulting contamination of the lands and fish ponds that are in Akpan's possession in accordance with Nigerian law standards. Shell et al. submit that this has already been done and that therefore, SPDC did not commit any tort of negligence against Akpan with regard to this point. To this end, Shell et al. submit that SPDC had the clean-up work performed according to the usual RENA method and that the Nigerian government approved the clean-up by SPDC near Ikot Ada Udo by issuing the signed certificates described in grounds 2.9 and 2.10.

4.49. Milieudefensie et al. contest that SPDC's remediation was sufficient. To this end, they first of all submit that the remediation method used, the RENA method, cannot have produced sufficient results. They base this on a report of the United Nations Environment Programme (UNEP) regarding the environmental pollution in Ogoniland ("Environmental Assessment of Ogoniland", 2011). This UNEP report concludes that under specific circumstances, the RENA method is not useful and in practice is not properly performed in some cases, either. However, Ikot Ada Udo is not in Ogoniland, which is in the Niger Delta, but to the east of the Niger Delta. However, Milieudefensie et al. have taken the general position that the circumstances that mean that the RENA method is ineffective in Ogoniland – according to the UNEP report – also apply to the subject oil contamination near Ikot Ada Udo. In this regard, they specifically point out the fact that more than a year expired between the oil spill and the clean-up near Ikot Ada Udo, so that exposure to the sun, air and rain occurred and oil was able to seep

into the groundwater. However, the District Court is of the opinion that Milieudefensie et al. failed to offer sufficient concrete substantiation that those general circumstances already rendered the RENA method unsuitable beforehand; they also failed to submit a concrete substantiation of the fact that all other objectionable circumstances for the RENA method mentioned in the UNEP report actually occurred at this location near Ikot Ada Udo in the period relevant for these proceedings. For this reason, the District Court dismisses Milieudefensie's point of view that the mere use of the RENA method already means that it can be concluded that this specific oil contamination near Ikot Ada Udo was insufficiently cleaned up by SPDC.

4.50. Secondly, Milieudefensie et al. submit that in general, documents of the Nigerian government are not reliable, so that according to Milieudefensie et al., it is not possible to rely on the fact that the certificates of the Nigerian government regarding the clean-up near Ikot Ada Udo mentioned in grounds 2.9 and 2.10 above – and on which Shell et al. based their factual defense – are correct. The District Court does not follow Milieudefensie et al. in this argument, either, and finds the following to this end.

4.51. In this connection, Milieudefensie et al. firstly submit that the *Environmental Guidelines and Standards for the Petroleum Industry in Nigeria* (the EGASPIN) stipulate that in cleaning up oil contamination, an end result of 50 mg/kg of Total Petroleum Hydrocarbons (TPH) oil residue must be achieved, and that according to the certificate described in 2.10, in the case at issue an end result of only 198.18 mg/kg of TPH was achieved. In response, Shell et al. submitted that 50 mg/kg of TPH is only a target value and that the end result near Ikot Ada Udo is far below the intervention value of 5,000 mg/kg. Milieudefensie et al. did not refute this argument by Shell et al. or did so insufficiently, so that the District Court will assume that under Nigerian law, 50 mg/kg of TPH is only a target value. Thus, based on this argument of Milieudefensie et al. it cannot be assumed that despite the certificates issued by the Nigerian government, SPDC's clean-up was insufficient.

4.52. Secondly, Milieudefensie et al. invoke the email from Mr. Von Scheibler that they produced on the occasion of the pleadings (see ground 2.14 above). As Shell et al. rightfully submitted, this email only demonstrates that in general, the concentration of TPH is not a decisive factor in answering the question regarding whether the clean-up was sufficient. However, Von Scheibler's email does not demonstrate – or does not demonstrate sufficiently concretely – that the certificates issued by the Nigerian government for this specific clean-up near Ikot Ada Udo following this specific oil spill in 2007 are substantively incorrect or have otherwise been wrongfully issued.

4.53. Thirdly, in this connection Milieudefensie et al. referred to a report by Professor Udo entitled "*Environmental impacts of the oil spill at Ikot Ada Udo"* from May 2008 – which they submitted with the summons – which allegedly demonstrates that the oil spill was not properly cleaned up. This report cannot support Milieudefensie et al.'s argument that the clean-up was insufficient, if only because Shell et al. rightfully submit that the subject clean-up was only completed after this report from May 2008 and that the subject certificates of the Nigerian government date from 2009 and 2010.

4.54. All this leads the District Court to conclude that SPDC's tort of negligence alleged by Milieudefensie et al. but contested by Shell et al. – allegedly consisting of an insufficient remediation of the vicinity of Ikot Ada Udo – has not been established as regards the facts in these proceedings.

Tort of trespass to chattel against Akpan?

4.55. Milieudefensie et al. submit that SPDC also committed a tort of trespass to chattel against Akpan, which the District Court takes to be an infringement of movable goods. However, Akpan did not submit that – if it is held as in this case that SPDC committed a specific tort of negligence against him – that he has a separate interest in the opinion that a tort of trespass to chattel was also committed against him, in the sense that this would give rise to a right to additional compensation. For this reason, the District Court will not include this basis of Akpan's claims in its assessment.

Liability on account of infringement of Akpan's human rights?

4.56. Under II, Milieudefensie et al. moved for a declaratory judgment to the effect that SPDC is liable for affecting Akpan's physical integrity because he had to live in a contaminated living environment. To this end, Milieudefensie et al. refer to the ruling in the Nigerian lawsuit *Gbemre v. Shell Petroleum Development Company and others (2005)*. The District Court finds that a fundamental difference can be pointed out between that case and the subject issue. In *Gbemre v. Shell Petroleum Development Company and others*, the court ruled that SPDC had infringed a human right by its active conduct, namely by deliberately flaring gas during a long period. However, in the case at issue, SPDC cannot be blamed for any active conduct but for negligence. Although this is also reprehensible and constitutes a tort of negligence in this specific case, the District Court is of the opinion that in so-called horizontal relationships like the one at issue, this cannot be designated as an infringement of a human right. As far as the District Court was able to verify, to date there have been no Nigerian rulings in which a reprehensible failure in horizontal relationships such as the one at issue and in the event of sabotage by third parties is considered to be an infringement of a

human right. For this reason, the declaratory judgment demanded under II will be dismissed.

Conclusion of the District Court regarding the initiated main claims

4.57. All of the above means that the District Court will partially allow the declaratory judgment and order to pay compensation, to be assessed by the court claimed under I in the form as determined below under the decisions, but that the District Court will dismiss the other main claims initiated under I to III.

The initiated ancillary claims

4.58. Under IV through VII, Milieudefensie et al. also moved that the District Court orders SPDC to take several measures. These are ancillary claims for injunctions under Nigerian law. The District Court can only decide to order an injunction in the event that under Nigerian law, tort has been committed and if the District Court feels that an injunction is appropriate and in order in that connection. In that case, the District Court has broad discretionary power in ordering an injunction.

4.59. In 2010, the wellhead of the IBIBIO-I well was sealed off from the oil reservoir by means of a concrete plug. The District Court is of the opinion that in taking this measure, SPDC has complied with its obligation to take adequate security measures to prevent sabotage of the IBIBIO-I well that is easy to commit. Therefore, the ancillary claim under IV will be dismissed. The District Court is of the opinion that the injunction claimed under VII to implement an adequate contingency plan for future oil spills in Nigeria and/or near Nigeria is too far-reaching a general measure in the scope of the specific tort of negligence that SPDC committed against Akpan in the case at issue, which has also been sufficiently prevented for the future by installing the concrete plug in 2010. As found above, SPDC did not commit any tort of negligence against Akpan with regard to the remediation of the oil contamination, so that for this reason alone, the District Court will dismiss the ancillary claims initiated under V and VI.

4.60. Because the District Court will dismiss all claimed injunctions, it will also dismiss the penalties claimed under VIII. Given that the District Court is of the opinion that no tort was committed against Milieudefensie, it is not entitled to compensation of the extrajudicial costs it incurred and claimed under IX. Thus, those ancillary claims will also be dismissed.

The request to produce evidence

4.61. In the reply, Milieudefensie et al. submitted that they “maintain their request to order Shell et al. to furnish the relevant documents”. As the District Court – like Shell et al. – understands, Milieudefensie et al. request that at this stage of the proceedings, based on Section 22 DCCP, the District Court still orders Shell et al. to produce the evidence regarding which the District Court already ruled in its interlocutory judgment of 14 September 2011 that based on Section 843a DCCP, the relevant claims in the motion must be dismissed. In view of the contents of all previous findings of the District Court and in view of its discretionary power in the application of Section 22 DCCP, the District Court dismisses this request of Milieudefensie et al.

Costs of the proceedings and declaration of provisional enforceability

4.62. In the above, the District Court ruled against (the attorneys of) both litigants on points that are anything but minor. For this reason, taking everything into consideration, the District Court will order each of the parties to bear its own costs of the proceedings. The District Court feels that the principal nature of this dispute and the legal complexity of the points in dispute are sufficient grounds for not declaring the order to pay compensation to be assessed by the court to be rendered below provisionally enforceable.

5. The decisions

The District Court:

5.1. renders a declaratory judgment to the effect that under Nigerian law, SPDC committed a specific tort of negligence against Akpan by insufficiently securing the wellhead of the IBIBIO-I well prior to the two oil spills in 2006 and 2007 near Ikot Ada Udo in Nigeria at issue in these proceedings against the sabotage that was committed at that time in an easy manner, and orders SPDC to compensate Akpan for the damage he suffered as a result, to be assessed by the court and to be settled in conformance with the law;

5.2. orders each of the parties to bear its own costs of the proceedings;

5.3. dismisses all other claims that Milieudefensie et al. initiated against Shell et al.

This judgment was rendered by judges H. Wien, LL.M., M. Nijenhuis, LL.M. and F.M. Bus, LL.M., and declared in public on Wednesday 30 January 2013 in the presence of the court clerk, F.L.M. Munter, LL.M.