Court of Appeal of The Hague

Case list date: 12 March 2019

STATEMENT OF APPEAL PHASE 2

	case no.	appellants		respondents	
a.	200.126.804	Fidelis Ayoro Oguru Alali Efanga Vereniging Milieudefensie attorney: Ch. Samkalden	versus	Shell Petroleum N.V. The 'Shell' Transport and Trading Company Ltd. attorney: J. de Bie Leuveling Tjeenk	ORUMA
b.	200.126.834	Fidelis Ayoro Oguru Alali Efanga Vereniging Milieudefensie attorney: Ch. Samkalden	versus	Royal Dutch Shell plc The Shell Petroleum Development Company of Nigeria Ltd. attorney: J. de Bie Leuveling Tjeenk	
c.	200.126.843	Eric Barizaa Dooh Vereniging Milieudefensie attorney: Ch. Samkalden	versus	Royal Dutch Shell plc The Shell Petroleum Development Company of Nigeria Ltd. attorney: J. de Bie Leuveling Tjeenk	GOI
d.	200.126.848	Eric Barizaa Dooh Vereniging Milieudefensie attorney: Ch. Samkalden	versus	Shell Petroleum N.V. The 'Shell' Transport and Trading Company Ltd. attorney: J. de Bie Leuveling Tjeenk	
e.	200.126.849	Vereniging Milieudefensie attorney: Ch. Samkalden	versus	Royal Dutch Shell plc The Shell Petroleum Development Company of Nigeria Ltd. attorney: J. de Bie Leuveling Tjeenk	IKOT ADA

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I. INTRODUCTION

1. In this second phase of the appeal, the grounds for appeal against the District Court's final judgments of 30 January 2013 in cases a - e are dealt with.

2. First of all, Milieudefensie et al. note that in the interlocutory ruling of 18 December 2015, the Court of Appeal already gave the litigating parties a number of 'tips' in respect of (further) information regarding the facts and applicable Nigerian law. Milieudefensie et al. comply with these tips in as far as this is their responsibility and under their control. In this context, Milieudefensie et al. assume that the Court of Appeal did not mean that in this phase, on the occasion of their grounds for appeal against the District Court's final judgment, Milieudefensie et al. should also anticipate any possible arguments and defences that Shell et al. may advance in the main action. Despite the fact that – as a result of the detailed pre-trial hearings on the personal appearance of the parties and the opportunity offered to advance the grounds for appeal in phases – the cases at issue may be called a-typical from the perspective of Dutch Civil Procedural law, due process prevents Milieudefensie et al. from including Shell et al.'s arguments and defences in the motions on appeal that the Court of Appeal has not (yet) ruled on in its Statement of Appeal in Phase 2, in anticipation of any argument that Shell et al. may advance in the defence in the main action. Moreover, in the Ikot Ada case, Milieudefensie et al.'s appeal is limited to rejection of Milieudefensie's claims (case e).

3. The common theme running through the discussion between the parties is that Milieudefensie et al. – rightfully – raise the question regarding the scope of Shell et al.'s legal obligations to prevent environmental damage from the oil spills in the Niger Delta, to stop any spills once these have occurred, to clean up the environmental damage caused by these spills, and to take concrete and effective measures to prevent any repetition. Shell wanted to limit the legal battle to the technical factual question regarding the – according to Shell et al.: unambiguous – cause of the oil spills at issue, not only in the first instance, but in the appeal, as well. Milieudefensie et al. believe that Shell et al.'s procedural strategy can be explained by the fact that above all, Shell et al. is the manager of the access to and control over the (reports on the) factual information of the pipelines where the oil spills at issue occurred.

4. The District Court begins its Final Judgment in context by finding (Final Judgment of the District Court of 30 January 2013, par. 2.1):

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

companies for the oil pollution in the form of cash or paid orders for the remediation work to be performed following an oil spill.

5. The District Court insufficiently included this context in forming its opinion. However, the context is extremely relevant, *inter alia* because Shell very frequently relies on the sabotage defence and apparently believes that the 'sabotage' answer to the question regarding the cause of the oil spill should put an end to the discussion. Where the District Court (wrongly) followed Shell et al. in emphasizing the alleged procedural obligations on the part of Milieudefensie et al., who allegedly should specify in concrete terms and substantiate with evidence that no sabotage was involved in the oil spills at issue, Shell et al.'s information edge had maximum effect.

6. In the first phase of the appeal, the Court of Appeal dealt with the cases differently, by at least granting Milieudefensie et al. access to specific documents. However, Shell et al.'s procedural strategy has remained unchanged. The conduct of events in the run-up to the expert report that the Court of Appeal ruled on in the decision dated 27 March 2018 illustrates this rather well. In their e-mail dated 2 August 2017 (Exhibit Q.21), the experts requested that Shell provide information regarding the pipelines, including the ILI inspections conducted of the pipelines, and information regarding cathodic protection. On 3 November 2017, Shell supplied the experts a document containing information, in which Shell also provided ILI reports of the pipeline at Oruma.[1] Because the information was incomplete and partially incorrect, on 22 November 2017, the appellants sent a letter from the experts to Shell et al., requesting that the information be supplemented.[2] Shell failed to do this. On 1 August 2018, with a copy to the Court of Appeal, the experts (again) requested Shell to provide information. It was clear from the experts' draft report, which was also shared with the Court of Appeal on 21 September 2018,[3] that the investigators attached consequences to the lack of information. Only after Shell et al. realized that this draft report would have an unfavourable impact for Shell, did it subsequently provide the additional information to the experts on 16 October 2018 (although at that time, despite the experts' request to this effect, Shell still failed to provide the complete ILI report).[4]

7. The evidence required to determine the cause of the oil spills, but also the material based on which it can be assessed whether Shell complied with its duty of care in preventing the oil spills, responding to the spills and in remediating the oil pollution fall within Shell's working and knowledge environment. The grounds for appeal to be discussed below clearly show that most of this material is absent, either because according to Shell it never existed, or because it is no longer available. In view of the enormous consequences of Shell's activities in the Niger Delta, the

[1] Exhibit Q 22, attachment to the e-mail from attorney De Bie Leuveling Tjeenk to the experts and attorney Samkalden dated 3 November 2017, p. 4.

[2] Letter regarding the expert investigation dated 22 November 2017, Exhibit Q.6.

[3] See the definitive Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, par. 5.

[4] In Chapter 3.8, the provision of information to the experts is discussed in more detail.

appellants believe that Shell should be expected to proceed more carefully in documenting those activities and keeping its documentation up-to-date.

8. Fourteen grounds for appeal are discussed below; the cases to which the individual grounds for appeal apply are indicated for each ground for appeal. The grounds for appeal build on the previous arguments advanced in the Statement of Appeal Phase 1 and in previous phases of the appeal and the proceedings in the first instance. The appellants maintain everything that they advanced in the first instance and the Statement of Defence on Appeal Phase 1; they request that their arguments be considered to be repeated and included here, unless they explicitly deviate from these arguments. This also pertains to the facts and grounds that the District Court did not (obviously) include in its assessment.

9. With regard to the oil spill at Ikot Ada Udo, Vereniging Milieudefensie is the only (principal) appellant. Naturally, its grounds for appeal are closely associated with Akpan's case, who will initiate a cross-appeal against the same findings – depending on Shell's appeal. References to the interests of 'the appellants' or "Milieudefensie et al." must be taken to include the individual interested parties/aggrieved parties whose interests are represented by Milieudefensie, as well. In addition, "Appellants", "Milieudefensie et al.", "Milieudefensie" as well as "Shell et al." and "Shell" are used interchangeably; this usually refers to all appellants or respondents, unless the context shows otherwise. Finally, "parent company" and "parent companies" are used interchangeably, referring to both RDS and SPNV and Shell T&T, unless indicated otherwise.

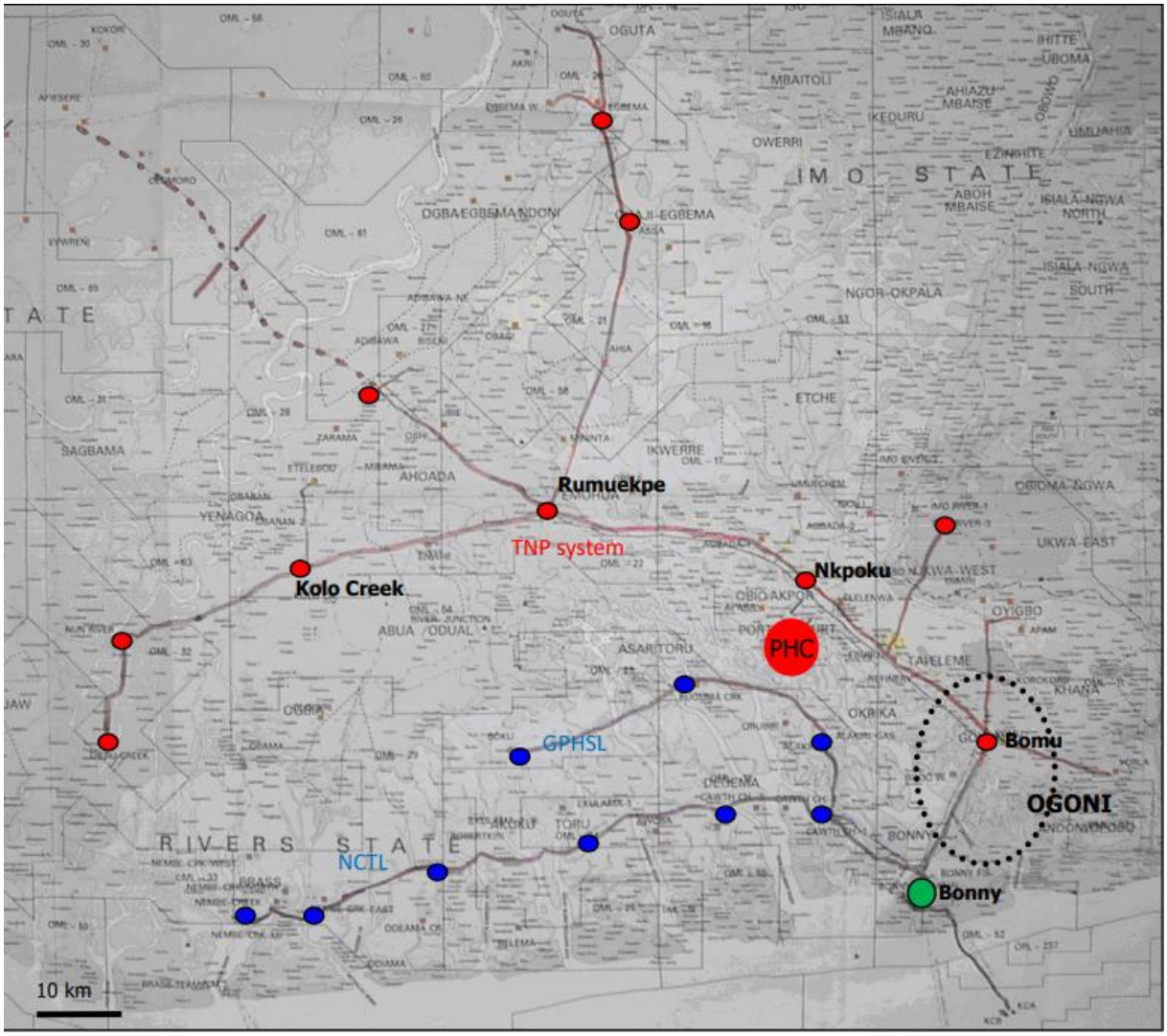
10. In contrast to what the appellants previously announced, this statement on appeal does not contain an individual ground for appeal directed against the District Court's findings regarding the volumes of spilled oil at the individual locations. However, the appellants believe – as they also argued in the first instance – that the volumes of 140, 400 and 629 barrels of oil in Goi, Oruma and Ikot Ada Udo that the District Court mentioned are obviously incorrect.[5] However, the District Court's finding that these volumes are specified in the JIT reports is correct. Nor did the volume of spilled oil play any role in the rejection of the plaintiffs' claim in the first instance. However, in the context of the other grounds for appeal, the fact that Shell's estimate of the oil spill volume is defective and that the JIT reports are not a reliable source of information will be addressed.

11. In response to the Court of Appeal's interlocutory ruling dated 18 December 2015, Shell made [redacted] available for inspection at the civil law notary. These documents are frequently referred to in the discussion of the grounds for appeal. Due to the limitations stipulated for inspecting the documents, the appellants had to base their quotes and references on hand-written notes. Page

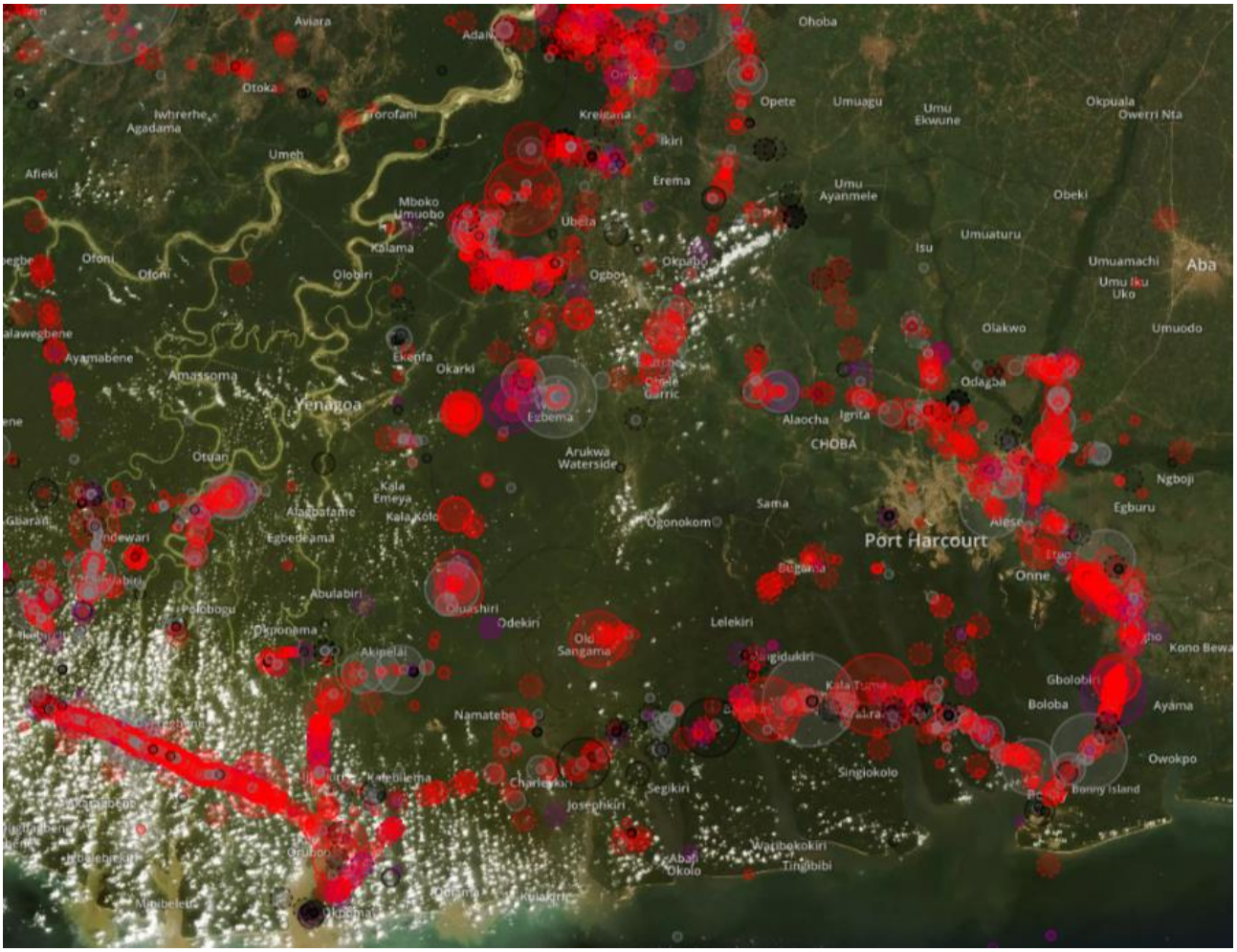
[5] To this end, reference is made to the Amnesty International report submitted with this statement on appeal as **Exhibit Q.28**: "*Negligence in the Niger Delta*", and the [redacted] report – that Shell made available for inspection by virtue of the Court of Appeal's interlocutory ruling – [redacted] examined [redacted] and concluded that: [redacted]

numbers were sometimes lost in doing this; a number of references may also be incomplete or suggest a different verbal image. The appellants have requested Shell et al. to file a copy of the documents with the Court of Appeal's registry office.

1.1 SPDC Trunklines



1.2 SPDC Trunkline spills[6]



[6] Source: http://www.oilspillmonitor.ng

GROUND FOR APPEAL I (GOI): THE DISTRICT COURT WRONGLY DISREGARDED THE OIL SPILL OF 2003

1.3 The judgment

12. The District Court wrongly found as follows:

> 2.5: In brief, these two proceedings involve one specific oil spill from the underground oil pipeline of which SPDC is the operator that occurred on 10 October 2004 near the village of Goi in Ogoniland, Rivers State in Nigeria where Dooh lived at the time. It was demonstrated that the oil was leaking from an almost 46-centimeter long narrow opening in the steel pipeline wall. The leak was provisionally closed on 12 October 2004 and definitively repaired on 13 October 2004. At that time, according to the JIT report to be mentioned below, an estimated 150 barrels of oil had spilled from the oil pipeline near Goi. Shortly after this oil spill occurred, there was also an oil fire near Goi."

> 4.16. 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 two 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 two proceedings, the District Court may and will only rule on the specific claims lodged by Milieudefensie et al. in response to this specific oil spill in 2004 near Goi and Shell et al.'s defenses against these claims."

1.4 The oil spill(s) of 2003

13. The land and fish ponds of Barizaa Dooh were already affected by oil pollution in 2003.

14. Barizaa Dooh verbally informed the *Community Relations Officer* of SPDC at that time in the Gokana area of the pollution. In response, this officer sized up the situation on site. If necessary, Eric Dooh, who was present during the visit, can testify regarding this. In letters dated 25 August and 2 September 2003, Barizaa Dooh also informed SPDC of the fact that his land had been polluted by oil.[7]

15. In video footage made on 11 September 2003, which was submitted with the summons in the first instance, Barizaa Dooh is interviewed regarding this oil spill.[8] The video footage very clearly

[7] Exhibits A.11 and A.12 (cases c + d).

[8] Exhibit A.8 (cases c + d).

shows the oil pollution at this location. Shell et al. have not expressed any doubts regarding the authenticity of this video footage. Barizaa said the following regarding the oil pollution: *"All living things have perished. I don't know when it started, but the first time I saw it was on the 25th [of August]*" and "*it comes from the Bomu location"*. [9]

16. The documentation demonstrates that in 2003, at least two oil spills occurred at the village of Kegbara Dere (where the Bomu manifold is located): one in January and one in October 2003.[10] Goi was affected by both oil spills. In addition, an oil spill occurred on 29 August 2003, some four kilometres from Bomu.[11]

17. Several news media reported on the oil pollution and spill(s) in 2003. A news report by the *Daily Independent Online* of 10 October 2003 is submitted as **Exhibit Q.9**: *"Oil spill sacks 2000 Ogoni in Rivers"*:

> More than 2000 kinsmen of the late Ogoni, Rivers State leader and environmentalist, Mr. Ken Saro-Wiwa, are said to have been 'divorced' from their traditional means of livelihood, following a recent oil spill in the area. The Niger Delta Project for Environment, Human Rights and Development (NDPEHRD), an affiliate of the United States Action Project, claimed that the development was a fall-out from the August 25 oil spillage in Rivers State.
>
> Feelers from Bera, Mogho, Goi, Bara-Nwezor, Bodo, Gbe, and K-dere communities in Gokana Local Government in Rivers State, indicate that the Ogoni were still counting their losses as a result of the spills.
>
> Daily Independent gathered that the spill occurred from a pipeline belonging to Shell Petroleum Development Company (SPDC) in K-Dere community.[12]

18. The article also demonstrates that Shell was aware of the oil spill and had visited the affected communities, including Goi:

> However, Shell claimed that a delegation from its Ogoni Project, led by Mr. Soala Robinson, visited the affected communities to redress the situation. He however ruled out compensation for members of the affected communities, claiming that the incident was caused by sabotage or third party interference.[13]

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[9] Exhibit A.8 (cases c + d), 0:20. The reference to Bomu is not included in the summary of the interview that was submitted; if desired, it can be submitted into the proceedings.

[10] See also the United Nations Environment Programme report, *Environmental Assessment of Ogoniland* (2011), Exhibit L.7 (cases a - e); Statement of Appeal Phase 1 of Milieudefensie et al., no. 232; Statement of Defence, no. 33 (case c).

[11] Statement of Defence, no. 32 (case c).

[12] Daily Independent Online, 10 October 2003: "*Oil spill sacks 2000 Ogoni in Rivers*", via http://news/biafranigeriaworld.com/archive/2003/oct/10/230.html, **Exhibit Q.9** (cases a - e).

[13] Daily Independent Online, 20 October 2003: "*Oil spill sacks 2000 Ogoni in Rivers*", via http://news/biafranigeriaworld.com/archive/2003/oct/10/30.html, Exhibit Q.9 (cases a - e).

19. The Nigerian website *This Day Online* wrote the following on 2 November 2003 (**Exhibit Q.10**):

> The inhabitants of the Ogoni villages of Bodo, Gbe, Mogho and Goi were still wrestling with crude oil emitting from the oils company's facilities in nearby K-Dere town last week [...]
>
> The spill, resulting from an old manifold that cracked in late August, had an immediate and vestating impact on the lives of people, polluting drinking water sources and farmlands. Shell officials claimed locals had deliberately sabotaged its facilities. The villagers countered that this has always been the company's standard response whenever its facilities, the bulk of them well past their use-by-date, collapse due to age and lack of proper maintenance.[14]

20. The *Environmental site assessment of a crude oil spill site in Goi, Gokana* (**Exhibit Q.11**) describes the following:

> Goi is a community in Goakana Local Government has no oil facility/installation and does not host any pipeline. However, the people of this community have suffered the consequences of spills that occurred at different times in nearby communities that spread to their community through river courses that terminate in Goi as outlined below.
>
> | s/n | Date | Spill site |
> |---|---|---|
> | 1 | 1988/89 | Bodo West oil spill |
> | 2 | 3/9/2003 | Bomu oil spill |
> | 3 | 11/11/2004 | TNP Spill, Behind Gitto Construction Company |
> | 4 | 18/06/2008 | Crude oil spill from Well 18 |
> | 5 | October 2008 | Bodo West Crude oil spill |
>
> Apart from the 2004 incident, there has not been any comprehensive remedial action on subsequent spills.[15]

21. A 2004 report of the Niger Delta Project for Environment, Human Rights and Development (**Exhibit Q.12**) notes the following:

> On August 25, 2003 some littoral Ogoni communities in Gokana Local Government area experienced tremendous oil spillage for no less than a week.

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[14] This Day Online, 2 November 2003: "*His Soul is Still Marching On*", via http://www.thisdayonline.com/archive/2003/11/02/20031102sxt01.html, **Exhibit Q.10** (cases a - e).

[15] *Environmental site assessment of a crude oil spill site in Goi, Gokana*, (March 2011), **Exhibit Q.11** (cases a - e), p. 2.

> Barely one year and a month later, these same areas suffered another crude oil pollution (spillage) which is highly devastating in scope.[16]

22. The UNEP study from 2011 refers to two oil spills at K-Dere in 2003, in January and October.[17] The *Site Specific Fact Sheet* of Nweekol-Kegbara Dere (**Exhibit Q.13**) clearly states that between 1990 and 2003, Shell reported eight oil spills at that location, two in 2003 on 28 January and 15 October, respectively:

> Spills reported by SPDC
>
> | Incident Number | Incident Date |
> |---|---|
> | 2003_00013 | 20030128 |
> | 2003_00197 | 20031015[18] |

23. The contractors' reports of Shell's remediation work in Goi are entitled: "*Close-out report for remediation of 24 inch Ebubu-Bomu T/L @ Goi 2003/2004 spill*" (emphasis added by attorney).[19] The introduction notes: "*Goi Pond 1-3 Oil spill occurred in 2003/2004*".

24. Thus, even though there is a lack of clarity regarding the exact date of the oil spill, it is clear that in 2003, in any event two oil spills occurred at Kegbara Dere from which Goi and Dooh suffered and of which Shell was most certainly aware.

25. Dooh noted the pollution on his land and fish ponds in August 2003. This is also the date that is mentioned in the NDPEHRD report. The fact that Dooh did not have any exact knowledge regarding the precise location and date of the oil spill that inflicted damage on his land and fish ponds cannot be held against him, given that the oil spill occurred at Shell's facilities.

1.5 Shell cannot rely on ignorance

26. Shell's argument that it allegedly did not know what oil spill in 2003 polluted Dooh's land and fish ponds is extremely implausible in light of the above. Even in as far as this argument is correct, Shell cannot rely on its ignorance.

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[16] Niger Delta Project for Environment, Human Rights and Development: 'Shell's Shell in Ogoniland; Killing the Environment and Impoverishing the People' (2004), **Exhibit Q.12** (cases a - e).

[17] United Nations Environment Programme report, *Environmental Assessment of Ogoniland* (2011), Exhibit L.7 (cases a - e), p. 116: Case Study: SPDC suspended facilities – Bomu Manifold, K-Dere, Gokana LGA, *"Other spills in the manifold occurred in October 1990 (twice), February and March 2001 and January and October 2003."*

[18] United Nations Development Programme, *Site Specific Fact Sheet Nweekol-Kegbara Dere* (July 2011), **Exhibit Q.13** (cases a - e).

[19] Exhibits 5 and 6 of Shell (cases c + d).

27. If an oil spill occurs, Shell has an obligation to stop the oil spill and clean up the spilled oil as quickly as possible.[20] In light of this obligation, Shell itself stated that it always verifies reports of oil spills.[21] Based on *good oil field practice*, as well, Shell was required to verify the report and keep a record of this.[22] In addition, it has been argued that the obligation of proper remediation also includes the obligation to carefully chart the polluted area.[23]

28. Dooh already reported pollution on his land as a result of oil spills in 2003, both verbally and in writing.[24] Even if Shell did not know what oil spill was involved, it was Shell's responsibility to verify on site and/or with Dooh whether any oil pollution was indeed involved and where this oil came from. Given that according to its arguments, Shell failed to do so, it cannot rely on its ignorance.

29. In light of the above, in order to be able to challenge the breach of its duty of care, it is up to Shell to prove that it adequately examined Dooh's report at the time and to show what the results of this examination were.

30. Given that Shell was required to chart the polluted area following oil spills, its documentation regarding the other oil spills should further demonstrate that and to what extent Dooh's land had been polluted as a result of one of the three oil spills mentioned above.

31. Everything that is discussed in the following grounds for appeal, including in as far as the oil spill of 2004 is referred to, applies *mutatis mutandis* to the oil spill of 2003.

[20] See also chapters 7 and 8 below; see further EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, and the Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.52 (cases c + d).

[21] See *inter alia* the Statement of Defence, no. 37 (case c), no. 65 (case d).

[22] See chapter 7 below.

[23] See chapter 8.2.3 below.

[24] See *inter alia* Exhibits A.11 and A.12 with the summons (cases c + d).

2 GROUND FOR APPEAL 2 (ALL CASES): THE DISTRICT COURT WRONGLY FOUND THAT THE OIL SPILLS WERE CAUSED BY R SABOTAGE

2.1 The judgment

32. In par. 4.20-4.25 and 4.35 (cases c + d), the District Court wrongly found as follows regarding **Goi**:

> 4.20. It follows from grounds 4.7 – 4.9 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 actions (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, this specific oil spill of 2004 near Goi for the time being appeared to have been caused by sabotage. To this end, the District Court found as follows: *Shell et al. submitted that the oil was spilling from a 46 centimeter long saw cut in the oil pipeline, which had been made using a (serrated) hacksaw. Shell et al. supported this substantiated defense with video footage, which shows that the oil spilled from a diagonal line with jagged edges across the pipe. Milieudefensie et al. only submitted that this could also involve a cracked weld seam or that the line could have occurred in attempts to close the leak*.
>
> 4.21. In its interlocutory judgment of 14 September 2011, the District Court further found that *(to date,) Milieudefensie et al. failed to substantiate that there was a weld seam on the (damaged) location, which does not stand to reason, either, because as a rule, weld seams do not run diagonally. Nor is it likely that a weld seam would burst open with jagged edges or that attempts to close the leak would create an opening with jagged edges.* In view of this, in its interlocutory judgment the District Court ruled that *Milieudefensie et al. for the time being have failed to advance a sufficiently substantiated refutation of Shell et al.'s argument that this oil spill was caused by sabotage, which means that with the current position of the discussion, this argument by Shell et al. must be deemed to be correct for the time being.* As a result, after the interlocutory judgment of 14 September 2011, in these two proceedings 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 2004 near Goi.
>
> 4.22. The District Court now further finds that upon further reflection, the video footage that the District Court already assessed in the interlocutory judgment shows a saw cut made more or less directly perpendicular to the oil pipeline rather than a saw cut made "diagonally" across the pipeline, as still found in the interlocutory judgment. However, this video footage was made during the investigation that resulted in the JIT report on this oil spill described in ground 2.6 above. The conclusion in that JIT report is that no corrosion was involved, but instead that traces of recent digging and of a saw cut – and thus sabotage – were

involved. Shell et al. based their factual defense on the facts established in this JIT report and the video made during the JIT investigation on 13 October 2004 (to this end, also see the illustrations in ground 2.7).

4.23. The District Court is of the opinion that after its interlocutory judgment dated 14 September 2011, in the further course of the proceedings, Milieudefensie 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 Goi in 2004 was, in fact, caused by sabotage by means of the saw cut with jagged edges visible on the video footage must be deemed to be factually correct in these two proceedings. To this end, the District Court finds as follows.

4.24. In this connection, after the interlocutory judgment of 14 September 2011, Milieudefensie et al. (not in the reply but only during the pleadings) specifically invoked the Accufacts report partially cited by the District Court in ground 2.14. Those quotations from Accufacts merely create general doubts. However, the Accufacts report does not contain sufficient concrete indications that can lead to the conclusion that the subject oil spill was caused by anything other than sabotage. During the pleadings, Shell et al. rightfully pointed out in this connection that saboteurs are usually in a hurry, which means that it is quite understandable that (in contrast to what Accufacts suggests) the saboteurs did not make a neat, smooth saw cut but a saw cut with jagged edges, using a saw (not necessarily a hack saw) or other, similar tool. The Accufacts report does not contain any concrete indications that there was a cracked well seam or corrosion crack at this location rather than a saw cut, nor is this visible on the available video footage.

4.25. For these reasons, the District Court maintains its provisional opinion from the interlocutory judgment of 14 September 2011 and taking everything into consideration, now definitively rules that this oil spill in October 2004 near Goi was, in fact, caused by sabotage.

[…]

4.35. 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, the parent companies RDS, Shell Petroleum and Shell T&T can be blamed for failing to induce and/or failing to enable their (sub-) subsidiary SPDC to prevent and limit any damage caused to people living in the vicinity by sabotage. This situation fundamentally differs from the one in *Chandler v Cape*.

33. With regard to **Oruma** (cases a + b), the District Court wrongly found:

4.19. It follows from grounds 4.7 – 4.10 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 actions (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, this specific oil spill of 2005 near Oruma for the time being appeared to have been caused by sabotage. To this end, the District Court found as follows: *Shell et al. submitted that the oil was spilling from a small hole with a diameter of 8 mm, round and with smooth edges, similar to a drilling hole, that the surface of the pipeline around the hole was smooth and did not show any signs of pitting or corrosion, and that the thickness of the pipeline wall at that location was normal. Shell et al. refer to the video footage that Milieudefensie et al. submitted into the proceedings, which shows the leak being repaired and measurements of the wall thickness being taken. In addition, Shell et al.'s argument is supported by a report submitted by the Joint Investigation Team (the JIT) that investigated the oil spill. This report is also signed by representatives of the ministries of Environmental Affairs of both the federal government and Bayelsa State. Shell et al. further submitted data from a study of the wall thickness of the pipeline in question by means of an intelligent pig run by SPDC from December 2004. An intelligent pig is a type of robot that measures the pipeline wall thickness on the inside, as this robot is guided through the pipeline. No decreased wall thickness was measured at the location of the leak. According to Shell et al., these circumstances demonstrate that the oil spill was most likely caused by sabotage; it does not stand to reason that the damage of the pipeline is the result of a poor condition of the pipeline and/or corrosion*.

4.20. In its interlocutory judgment of 14 September 2011, the District Court further found that *to date, Milieudefensie et al. failed to sufficiently substantiate that despite all of the above, this oil spill in June 2005 nevertheless may have been caused by corrosion or by any other defective condition of the pipeline, or that the JIT report signed by the state and federal authorities is unreliable.* In view of this, in its interlocutory judgment the District Court ruled that *Milieudefensie et al. for the time being have failed to advance a sufficiently substantiated refutation of Shell et al.'s argument that this oil spill was caused by sabotage, which means that with the current position of the discussion, this argument by Shell et al. must be deemed to be correct for the time being.* As a result, after the interlocutory judgment of 14 September 2011, in these two proceedings 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 2005 near Oruma.

4.21. The District Court now further finds that the video footage that the District Court already assessed in the interlocutory judgment was made during the JIT report regarding this oil spill described in ground 2.6 above. The conclusion in that JIT report is that no corrosion was involved, but instead that traces of recent digging and of a drilling hole – and thus sabotage – were involved. Shell et al. based their factual defense on the facts established in this JIT report and the video made during the JIT investigation on 7 July 2005 (to this end, also see the illustrations in ground 2.7).

4.22. The District Court is of the opinion that after its interlocutory judgment dated 14 September 2011, in the further course of the proceedings, Milieudefensie 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 by means of the drilling hole visible on the video footage must be deemed to be factually correct in these two proceedings. To this end, the District Court finds as follows.

4.23. In this connection, after the interlocutory judgment of 14 September 2011, Milieudefensie et al. (not in the reply but only during the pleadings) firstly invoked the Accufacts report partially cited by the District Court in ground 2.13. Those quotations from Accufacts merely create general doubts. However, the Accufacts report does not contain sufficient concrete indications – nor are these visible on the available video footage – that can lead to the conclusion that the subject oil spill was caused by anything other than sabotage, such as – for example – the corrosion hole suggested by Accufacts.

4.24. Although the quality of the video footage of the leak hole near Oruma of 7 July 2005 is not very good, the footage does sufficiently visibly demonstrates a more or less round hole that indicates sabotage with a drill or similar tool rather than a corrosion hole. The JIT report confirms that a (drilling) hole is involved following digging and not a corrosion hole. In addition, the UT measurements (*Ultrasonic Thickness*) of the thickness of the steel pipeline wall around the leak hole described in the JIT report demonstrate that at that time, the wall thickness was not significantly thinner than the original wall thickness. This means that, if those UT measurements are correct, a (drilling) hole made by saboteurs must be involved and that the oil spill cannot have been caused by corrosion. After all, the parties do not disagree regarding the fact that the wall thickness around the hole will not have decreased significantly in the event of a hole made by saboteurs, whereas a decrease in wall thickness around the hole will be involved in the event of corrosion. The measurement values recorded in the JIT report further correspond to the measurement values that the investigator in question calls out during his UT measurements on 7 July 2005; this is clearly audible on the video footage made at that time. The Accufacts report insufficiently explains in concrete terms what could have gone wrong in those UT measurements and how Accufacts observed this on the video footage. Thus, in this case there is not sufficient concrete reason to doubt the accuracy of the values of the UT measurements recorded in the JIT report (which was signed for approval by two Nigerian government agencies).

4.25. In addition, the fact that the underground oil pipeline near Oruma had been dug in relatively deeply does not rule out that sabotage was involved. If the employees of SPDC manage to expose the oil pipeline in a relatively short time, this must also be possible for a group of saboteurs. The fact that the leak hole is at the bottom of the pipeline wall rather than on the top does not mean that sabotage cannot be the obvious cause, either. After all, by drilling or making a hole in the bottom of the pipeline wall, the saboteurs prevent the crude oil from immediately spraying over them after they created the leak hole. Thus, the underside of the pipeline may very well be an obvious place for sabotage. Milieudefensie et al. point out that it is not very credible that saboteurs will find the right position of the underground pipeline in one go. However, there is nothing to demonstrate that the saboteurs did not dig in several places.

4.26. During the pleadings, Milieudefensie et al. secondly invoked that the internal report of SPDC from October 2004 described in ground 2.5 above, which according to Milieudefensie et al. demonstrates that the leak hole in June 2005 near Oruma can most certainly be the result of internal corrosion of the pipeline wall, so that sabotage has not been established. It is true that this internal SPDC report from October 2004

demonstrates that in 2005, the risk of oil spills caused by internal corrosion was high for this oil pipeline. However, taking everything into consideration, the District Court 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. The reason for this is that SPDC's report from 2004 describes that the entire oil pipeline that is many kilometers long is subject to serious corrosion. The cause of this problem was that the water cut of the crude that was being transported through this pipeline was higher than average. However, the oil pipeline at issue was, in fact, used until 2009. If the risk of corrosion that SPDC's internal report from 2004 warns about could have resulted in leak holes like the subject leak hole in June 2005 near Oruma, without any concrete explanation – which is absent – it is not clear why no similar oil spills from this obsolete and corrosion-sensitive oil pipeline have been reported and/or demonstrated near Oruma or elsewhere in the period from July 2005 until 2009. This also indicates that sabotage and not corrosion was involved in June 2005 near Oruma.

4.27. For these reasons, the District Court maintains its provisional opinion from the interlocutory judgment of 14 September 2011 and taking everything into consideration, now definitively rules that this oil spill in 2005 near Oruma was, in fact, caused by sabotage.

[…]

4.37. 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, the parent companies RDS, Shell Petroleum and Shell T&T can be blamed for failing to induce and/or failing to enable their (sub-) subsidiary SPDC to prevent and limit any damage caused to people living in the vicinity by sabotage. This situation fundamentally differs from the one in *Chandler v Cape*.

34. With regard to **Ikot Ada Udo** (case e), the District Court wrongly found:

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.

[…]

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.

2.2 Introduction

35. The District Court essentially found that it is up to Milieudefensie et al. to refute Shell's sabotage defence, "properly substantiated and as concretely as possible". Subsequently, the District Court based its opinion that the oil spills were, in fact, caused by sabotage on the JIT reports. However, the opinion that the District Court arrived at cannot be upheld, because the District Court failed to recognize both the threshold of proof and the allocation of burden of proof for this case, and wrongfully relied on the JIT reports, even though these are not a reliable source of information, ignoring the (many) counter indications for sabotage, or at least failing to sufficiently include these in its considerations. Against this background, the fact that in their report after phase 1 of the appeal, the experts were unable to arrive at a definitive conclusion regarding the cause of the oil spills should come at Shell's expense and risk.

36. In this chapter, the following will be explained:

    a. Under Nigerian law, as a rule, an operator is liable in the event of oil spills from its pipelines.

    b. Sabotage is a complete defence for strict liability for the occurrence of an oil spill. It is up to Shell to prove that the oil spills were caused by sabotage.

    c. Under Nigerian law, sabotage must be established '*beyond reasonable doubt*'.

    d. In light of the gravity and number of oil spills in Nigeria, the fact that according to Shell, those spills are primarily caused by sabotage, and the fact that as the operator, Shell exclusively has evidence of the cause of the spills, Shell could be expected to proceed with care in establishing the cause of those spills and the underlying documentation.

    e. Based on industry standards – and also based on its own standards – Shell could be expected to property document the (cause of the) oil spills.

    f. The JIT reports do not constitute a reliable source of information.

    g. Shell's provision of information to the experts is sub-standard.

    h. By seriously neglecting its pipelines and wellheads and thus violating the industry standard, but also its own standards, Shell accepted the risk of oil spills – irrespective of their cause.

    i. Doubt prevails in the expert report. According to the experts, proper documentation is absent and only a physical investigation can provide a definitive answer regarding the cause of the oil spills.

    j. Shell frustrated the possibility of physically examining the pipeline at Goi.

    k. In light of the foregoing, the risk of having its evidence rejected falls on Shell and sabotage cannot currently be started from.

2.3 Starting point: under Nigerian law, the operator is liable in the event of oil spills

37. Under Nigerian law, the starting point is that an operator is liable for damage that is caused by oil spills. This follows from Article 11(5) of the Oil Pipelines Act:

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

38. The statutory framework of liability under Nigerian law is further worked out in chapter 2.3 of the Statement of Appeal Phase 1. Reference is made to that explanation, which should be considered to be included and repeated here, and to the legal opinion by Emeka Duruigbo that has been submitted as Exhibit M.1. Summarized the following applies:

a. By virtue of Article 11(5)(c) of the Oil Pipelines Act, an operator is strictly liable for damage caused by an oil spill from its pipeline (*statutory strict liability*). This strict liability has an equivalent under common law in the rule in *Rylands v. Fletcher*.

b. By virtue of Article 11(5)(c) of the Oil Pipelines Act, an operator can evade this strict liability if the damage is the consequence of the aggrieved party's own act or a malicious act committed by a third party (*malicious act of a third person*).

c. By virtue of Article 11(5)(b), an operator has a statutory duty of care to protect, maintain and repair its pipelines and it must compensate any damage that occurs if it fails to do this (*statutory negligence*).

d. In addition, an operator may also be held liable under common law if damage occurs as a result of his negligence (*common law negligence*). The statutory duty of care of Article 11(5)(b) of the Oil Pipelines Act also exists under Nigerian common law if – in brief – *foreseeability, proximity* and *reasonableness* are involved.

e. By virtue of Article 11(5)(a), the party who owns, possesses or uses land is entitled to compensation if he suffers any nuisance as a result of the operator's work (*statutory nuisance*). This provision also has a common law equivalent.

2.4 The standard of proof for sabotage under Nigerian law

39. First and foremost, under Dutch private international law, the rules regarding statutory suspicions or regarding the allocation of the burden of proof in respect of a legal relationship or legal fact are governed by the law that governs that legal relationship or that legal fact (see Article 10:13 DCCP). As the District Court found,[25] retroactive effect can be given to the articles 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.[26] The parties agree that the claims are governed by Nigerian law.[27]

40. Shell bears the burden of proof of its argument that the oil spills at issue were caused by sabotage. Please refer to the legal opinion by Prof Duruigbo submitted as Exhibit M1 and his opinion regarding the sabotage defence under Nigerian law submitted as Exhibit Q1.

> Where the defendant raises a defense which requires affirmative proof by the defendant to defeat the plaintiffs claim, the burden of proof rests on the defendant.[28]

41. In his opinion, Duruigbo mentions several cases in which SPDC had advanced sabotage as a defence, but was unable to prove this, such as the case of *SPDC v. Ohaka*,[29] *SPDC v. Enoch*,[30] *SPDC v. Firibeb*,[31] *SPDC v. Edamkue*[32] and *Shell v. Isaiah*:[33]

> That it is the duty of the person asserting the defense of sabotage to produce evidence in order to prove it has been pronounced and amplified in a number of Nigerian cases. In *SPDC v. Ohaka*,[34] the plaintiff/respondent brought a lawsuit against the defendant/appellant, Shell Petroleum Development

[25] Final Judgment, par. 4.10 (cases c + d); par. 4.10 (cases a + b); par. 4.9 (case e).

[26] Explanatory Memorandum, *Parliamentary Papers II* 2009/10, 32137, no. 3, p. 95.

[27] Interlocutory ruling of the Court of Appeal of The Hague, 18 December 2015, par. 1.3 (cases a - d); par. 1.5 (case e).

[28] Prof Emeka Duruigbo's Legal Opinion, including Annexes A to G (cited cases), Exhibit Q.1 (cases a - e), no. 14.

[29] Prof Emeka Duruigbo's Legal Opinion, Exhibit Q.1 (cases a - e), no. 16, which refers to *SPDC v. Ohaka* (2008) 8 CLRN 94, Annex A with Exhibit Q.1.

[30] Prof Emeka Duruigbo's Legal Opinion, Exhibit Q.1 (cases a - e), no. 18, which refers to *SPDC v. Enoch* (1992) 8 NWLR (Pt. 259) 335, Annex B with Exhibit Q.1.

[31] Prof Emeka Duruigbo's Legal Opinion, Exhibit Q.1 (cases a - e), no. 22, which refers to *SPDC v. Firibeb*, Suit no. CA/PH/168/2007, Court of Appeal (Port Harcourt Judicial Division); Judgment delivered on December 7, 2011, Annex C with Exhibit Q.1.

[32] *SPDC v. Edamkue and others* (2009) 14 NWLR (Pt. 1160) 1; (2009) 6-7 S.C. 74, Annex 12 with Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1A (cases a - e); Prof Emeka Duruigbo's Legal Opinion, including Annexes A to G (cited cases), Exhibit Q.1 (cases a - e), no. 23.

[33] Prof Emeka Duruigbo's Legal Opinion, Exhibit Q.1 (cases a - e), no. 26, which refers to *SPDC v. Isaiah* [1997] 6 NWLR 236, Annex E with Exhibit Q.1.

[34] Prof Emeka Duruigbo's Legal Opinion, Exhibit Q.1 (cases a - e), which refers to *SPDC v. Ohaka* (2008) 8 CLRN 94, Annex A with Exhibit Q.1.

> Company of Nigeria, alleging damage to his two farms containing dozens of fish ponds as a result of escape of crude oil from Shell's installation of a trunkline. Shell denied liability for the damage, arguing that the escape of oil was as a result of sabotage by third parties. Rejecting the defense of sabotage, the Court of Appeal held that "the defence of act of third party has not been established."[35]

42. Duruigbo explains that the standard of proof of sabotage is high:

> Where a defendant resorts to the defense of sabotage, it bears the burden of proving that the damage to or destruction of the oil installations was a result of sabotage. This burden may be discharged under the high standard of proof beyond reasonable doubt.[36]

43. Under Nigerian law, sabotage is a criminal offence. Duruigbo explains that this means that the more severe standard of proof of '*beyond reasonable doubt*' must also be used under civil law.[37]

44. The fact that this also applies to sabotage cases follows *inter alia* from *SPDC v. Edamkue,*[38] *SPDC v. Ohaka*[39] and *SPDC v. Firibeb.*[40] The same starting point can be found, for example, in the handbook Compensation claims relating to crude oil spillage & land acquisitions for oil & gas fields in Nigeria (**Exhibit Q.14**):

> Ordinarily, where a criminal allegation forms part of a civil action, the standard of proof of that allegation is beyond reasonable doubt by virtue of section 138 (1) of the Evidence Act. Pipeline vandalism is a criminal offence by virtue of section 3 (7) (a) and (b) of the Special Tribunal (Miscellaneous) Act, 1984. It is therefore, submitted that companies alleging this criminality of sabotage must prove beyond reasonable doubt that the particular spillage

[35] Prof Emeka Duruigbo's Legal Opinion, including Annexes A to G (cited cases), Exhibit Q.1 (cases a - e), no. 16.

[36] Prof Emeka Duruigbo's Legal Opinion, including Annexes A to G (cited cases), Exhibit Q.1 (cases a - e), no. 11.

[37] Prof Emeka Duruigbo's Legal Opinion, including Annexes A to G (cited cases), Exhibit Q.1 (cases a - e), no. 20 and following.

[38] *SPDC v. Edamkue and others* (2009) 14 NWLR (Pt. 1160) 1; (2009) 6-7 S.C. 74, Annex 12 with Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1A (cases a - e); Prof Emeka Duruigbo's Legal Opinion, including Annexes A to G (cited cases), Exhibit Q.1 (cases a - e), no. 23.

[39] Prof Emeka Duruigbo's Legal Opinion, Exhibit Q.1 (cases a - e), no. 16, which refers to *SPDC v. Ohaka* (2008) 8 CLRN 94, Annex A with Exhibit Q.1.

[40] Prof Emeka Duruigbo's Legal Opinion, Exhibit Q.1 (cases a - e), no. 22, which refers to *SPDC v. Firibeb*, Suit no. CA/PH/168/2007, Court of Appeal (Port Harcourt Judicial Division); Judgment delivered on December 7, 2011, Annex C with Exhibit Q.1.

> complained of was caused by the act of third parties and without their negligence.[41]

45. In *SPDC v. Edamkue*, the Supreme Court unanimously held the following:

> **Held** (unanimously dismissing the appeal):
>
> [...]
>
> **9.** On Onus of proof of allegation that a spillage was caused by hostile act of some people and effect of failure to so prove -
>
> The allegation that a spillage was caused by hostile act of some people is an allegation of a criminal act which needs to be proved beyond reasonable doubt by virtue of section 138(1) of the Evidence Act. The appellant failed to prove the criminal allegation and as such it failed to discharge the onus placed on it under the rule laid down in *Rylands v Fletcher* (1868) LR3HL 330 and the maxim *res ipsa loquitur*. [*Bakare v. State* (1987) 1 NWLR (Pt. 52) 579; *Ezike v. Ezeugwu* (1992) 4 NWLR (Pt. 236) 462 referred to] *(Pp. 40-41, paras. H-B).*[42]

46. Thus, the fact that in the same ruling, Ogbuagu J.S.C. noted in a general sense that "it is now firmly established in a line of decided authorities by this court firstly, that civil cases are proved by preponderance or weight of evidence" ,[43] does not detract from the conclusion that he also shared that – as already concluded in a previous instance – in the event of sabotage, the more severe burden of proof of 'beyond reasonable doubt' applies.[44]

47. In *SPDC v. Ohaka*, the Court of Appeal also found that Shell [was] "*failing to prove sabotage beyond a reasonable doubt as required by section 138 (1) of the Evidence Act*".[45] The Court of Appeal used a similar standard of proof in *SPDC v. Firibeb*, in which Shell had also argued that

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[41] I.T. Amachree, *Compensation claims relating to crude oil spillage & land acquisitions for oil & gas fields in Nigeria: a suggested practice guide* (Pearl Publishers, 2011), **Exhibit Q.14** (cases a - e), p. 315.

[42] *SPDC v. Edamkue and others* (2009) 14 NWLR (Pt. 1160) 1; (2009) 6-7 S.C. 74, Annex 12 with Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1A (cases a - e).

[43] *SPDC v. Edamkue and others* (2009) 14 NWLR (Pt. 1160) 1; (2009) 6-7 S.C. 74, Annex 12 with Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1A (cases a - e), p. 32.

[44] This is also demonstrated by his other findings: "*The duty of appraising evidence given in a trial is pre-eminently, that of the trial court. […] When there is evidence as in the instant case, to support the conclusion of a trial court/Judge either in granting or dismissing a claim or relief, a Court of Appeal will not interfere. […] I say so because the findings and holdings of the trial court are adequately in my respectful view, supported by the records.*" *SPDC v. Edamkue and others* (2009) 14 NWLR (Pt. 1160) 1; (2009) 6-7 S.C. 74, Annex 12 with Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1A (cases a - e), p. 32.

[45] Prof Emeka Duruigbo's Legal Opinion, including Annexes A to G (cited cases), Exhibit Q.1 (cases a - e), no. 16, which refers to *SPDC v. Ohaka* (2008) 8 CLRN 94, 35, Annex A with Exhibit Q.1.

the oil spill was the result of sabotage by Ogoni.[46] Again, the Court of Appeal confirmed the trial court's interpretation that:

> the standard of proof required for claims of vandalisation and acts of a third party are high. Vandalization and acts of a third party connontes [sic] criminality and the standard of proof required is beyond reasonable doubt.[47]

48. Thus, it must be accepted with Duruigbo:

> Thus, the defense of sabotage will not avail a defendant unless it can prove beyond reasonable doubt that the leakage, breakage or damage occurred as a result of sabotage. All the plaintiff needs to do to defeat the defense is to show that there is doubt that the damage occurred through sabotage because there are other valid, alternative explanations for it.[48]

49. Moreover, it is noted here that the appellants believe that in light of the expert report and the arguments below, sabotage cannot be determined as the cause of the oil spill according to the *'preponderance of weight'* criterion, either.

2.5 Burden of proof in light of the risk of sabotage and Shell's position

50. In light of the gravity and number of oil spills in Nigeria, the fact that according to Shell, those spills are primarily caused by sabotage, and the fact that as the operator, Shell exclusively has proof of the cause of the spills, Shell could be expected to proceed with care in establishing the cause of those spills and the underlying documentation.

51. According to Shell's figures, in the ten years around the oil spills at issue, an average of 211 oil spills occurred in the Niger Delta each year; thus: some 4 spills per week. According to these same figures, a volume of 174,000 barrels was spilled each year, i.e. 77 thousand litres of oil per day. According to Shell's figures, some two-thirds of these spills were caused by sabotage.[49] The

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[46] Prof Emeka Duruigbo's Legal Opinion, including Annexes A to G (cited cases), Exhibit Q.1 (cases a - e), no. 22, which refers to *SPDC v. Firibeb*, Suit no. CA/PH/168/2007, Court of Appeal (Port Harcourt Judicial Division); Judgment delivered on December 7, 2011, Annex C with Exhibit Q.1.

[47] *SPDC v. Firibeb*, Suit no. CA/PH/168/2007, Court of Appeal (Port Harcourt Judicial Division); Judgment delivered on December 7, 2011, Annex C with Exhibit Q.1, page 8.

[48] See also I.T. Amachree, *Compensation claims relating to crude oil spillage & land acquisitions for oil & gas fields in Nigeria: a suggested practice guide* (Pearl Publishers, 2011), Exhibit Q.14 (cases a - e), p. 315.
"*Ordinarily, where a criminal allegation forms part of a civil action, the standard of proof of that allegation is beyond reasonable doubt by virtue of section 138 (1) of the Evidence Act. Pipeline vandalism is a criminal offence by virtue of section 3 (7((a), and (b) of the Special Tribunal (Miscellaneous) Act, 1984. It is therefore, submitted that companies alleging this criminality of sabotage must prove beyond reasonable doubt that the particular spillage complained of was caused by the act of third parties and without their negligence.*"

[49] See *inter alia* the Summons (cases a - e), chapter 7.3.

disastrous consequences of this are generally known,[50] and have also been recognized by the District Court.[51]

52. By relying on the complete defence of sabotage, Shell not only attempts to evade its compensation obligation, but also its (moral) responsibility for these circumstances. In light of the gravity of the (number of) oil spills and their consequences for people and the environment, quite stringent requirements may be stipulated for Shell in the area of furnishing proof.

53. In addition, only Shell can have proof regarding the cause of the oil spill. After all, this involves pipelines that are managed by Shell, to which Shell has access by means of a *Right of Way*, and whose topographical and technical data Shell has. On account of its core business, Shell has the experts and instruments to establish the nature of the oil spills and to document and repair these spills. Those who are directly affected by oil spills in Nigeria do not have any of these means or possibilities. This means that stringent requirements must be stipulated for Shell's substantiation duty.

2.6 Burden of proof in light of industry practice regarding record-keeping and incident investigation

54. Based on industry standards, as well – which Shell also endorses – an oil company is required to minimize the risk of environmental and other damage as a result of oil spills. To this end, Shell could *inter alia* be expected to carefully chart those risks and properly document incidents.

55. Under ground for appeal 4, it will be further worked out that Shell had a duty of care to carefully chart possible risks in order to anticipate these risks and prevent damage to the environment (and other damage) as a result of an oil spill. As part of such a safety management system, Shell also had to carefully document the history, circumstances, cause and consequences of the oil spills at issue.

56. For example, the Pipeline Integrity Handbook (**Exhibit Q.15**) includes the following:

> For a successful risk assessment and integrity management (IM) program, it is important to understand the critical role that the collection of data plays.[52]

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[50] See, for example, the video footage of the oil pollution in the Niger Delta of CNN and Zembla, Exhibit M.10 (case e) and M.11 (cases a - d), the annual reports and reports of NGOs such as Amnesty International ('Amnesty International Report 2006', Nigeria, Exhibit B.4 (cases a - e), p. 199); Human Rights Watch (Human Rights Watch: Chop Fine, (January 2007, Volume 19, Nr. 2(a)), Exhibit B.6 (cases a - e), p. 20); United Nations Development Programme ('Niger Delta Human Development Report 2006', Exhibit B.8 (cases a - e), pp. 77, 81); 'Niger Delta Natural Resource Damage Assessment and Restoration Project', Phase 1 – Scoping Report by Federal Ministry of Environment (Abuja), Nigeria Conservation Foundation (Lagos), WWF UK, CEESP-IUCN Commission on Environmental, Economic and Social Policy, Exhibit B.9 (cases a - e), p. 1.

[51] Final Judgment of the District Court of The Hague, 30 January 2013, par. 2.1 (all cases).

[52] R. Singh, *Pipeline Integrity Handbook: Risk Management and Evaluation* (Gulf Professional Publishing 2017), **Exhibit Q.15** (cases a - e), p. 19 (the relevant quote has not changed compared to the first edition of the handbook).

57. API 1160 Managing System Integrity for Hazardous Liquid Pipelines (**Exhibit Q.16**) stipulates that "*every effort should be made to collect data of the highest quality and consistency.*"[53] Exactly what data is to be collected is *inter alia* demonstrated by Table 7.1, *types of data to collect*.[54]

58. API Recommended Practice 1173 on Pipeline Safety Management Systems (**Exhibit Q.17**) stipulates the following:

> The pipeline operator shall maintain a procedure for investigating incidents and near-misses that led, or could have led, to an incident with serious consequences. Incident investigations shall be initiated as promptly as possible considering the need to secure the incident scene, protect people and the environment, and maintain and recover important evidence and testimony.[55]

59. The experts who investigated the oil spills at issue determined the following:

> When a leak occurs there must be a good response team to investigate the leak. Full close up pictures are essential together with on-site measurements of defect size, wall thickness and general pipe spool condition.[56]

60. Exactly what information could be considered to be present according to the expert investigation is discussed in more detail in section 3.8 below.

61. Accordingly, Shell could be expected to collect and provide the data based on which the cause of the oil spill can be (practically) definitively established.

The JIT reports are not a reliable source of information

62. The JIT reports do not constitute a source of information based on which Shell can be deemed to have fulfilled the obligations described above. In the Interlocutory Ruling, the Court of Appeal already found in the scope of the claim by virtue of Article 843a DCCP that "it is not immediately clear why Shell did not devote more attention to the quality of the evidence" regarding the point of the alleged sabotage, in part in view of the fact that a Shell report from 2003 demonstrates that the criticism of the JIT investigations, more specifically of designating sabotage as the cause of the oil spills in these investigations, had already been an issue for some time.[57]

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[53] API Standard 1160 (2001), **Exhibit Q.16** (cases a - e), par. 7.4. Part of this standard has been submitted before as L.11 (cases a - e).

[54] This also covers all the data requested by the experts.

[55] API Recommended Practice 1173 (2015), **Exhibit Q.17** (cases a - e), par. 9.1.1.

[56] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 19.

[57] Interlocutory Ruling of the Court of Appeal of The Hague, 18 December 2015, par. 5.2 (cases a + b), par. 6.2 (cases c + d).

63. First of all, the JIT reports have not been signed by all persons present, as required. In fact, the JIT report of the oil spill at Goi contains no more than half of the required signatures. Not only was the report not signed by the representatives of the Mogho community where the spill occurred, the representatives of the Nigerian authorities, the delegates of the Area Team and the members of the DTE team also failed to sign the report.[58]

64. The Joint Investigation Team also failed to reach agreement in Oruma. The JIT report in question was not signed by representatives of the DPR or by representatives of the Oruma community.[59]

65. Given that the cause of the oil spills was challenged from the start – by agencies and persons who by virtue of Nigerian legislation were allocated a role in the assessment process – it was up to Shell to provide adequate documentation, video footage and other evidence that endorses its interpretation of sabotage.

66. This is all the more the case given that for a long time, the system of JIT reports was being criticized by organizations.[60] For example, Amnesty International concluded that "*the JIV-process itself is deeply flawed, and Shell has claimed spills are due to sabotage without evidence when they are not. The process is open to manipulation, and has been manipulated*".[61] In 2013, the National Contact Point for the OECD guidelines found that Shell relies too easily on the sabotage defence.[62] A report drawn up by WAC Global Services at SPDC's behest had already concluded in 2003 that SPDC wrongfully attributes oil spills to sabotage.[63]

67. That the criticism of the JIT reports is correct has now also been demonstrated by the investigation of the experts appointed by the Court of Appeal, who assess the quality of the reports as *"very poor"*:

> The JIT reports supplied covering both leaks are of very poor quality. It is difficult to believe some of the information given in the reports particularly

[58] Exhibit A.5 (cases c + d); see the Summons, no. 282 and following (cases c + d) and the Statement of Appeal Phase 1 of Milieudefensie et al., no. 188.

[59] Exhibit A.4 (cases a + b); see the Statement of Appeal Phase 1 of Milieudefensie et al., no. 198. The District Court's finding that the report was co-signed by "representatives of the Ministries of Environmental Affairs of both the federal government and Bayelsa State" is incomplete to this extent (Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.19 (cases a + b), where the District Court refers to the finding in its interlocutory ruling).

[60] See the Statement of Appeal Phase 1 of Milieudefensie et al., no. 178.

[61] Amnesty International, *Bad information: oil spill investigations in the Niger Delta* (2013), Exhibit O.3 (cases a - e), p. 43.

[62] National Contact Point, Final Statement, 31 March 2013, Exhibit N.12 (cases a - e).

[63] WAC Global Services, 'Peace and Security in the Nigerdelta: Conflict Expert Group Baseline Report' (Working Paper for SPDC, December 2003), Exhibit C.7 (cases a - e), pp. 16, 17.

> with regard to condition of soil around the leak site and indeed depth of cover of the pipeline at that point.[64]

68. With regard to the investigation of the oil spill at Oruma, the experts find it unlikely that the UT measurement did not demonstrate any corrosion on the bottom of the pipeline:

> Given that the pipeline suffers from internal corrosion along its length and in the area of the leaks the corrosion at the 6 o'clock position is along the full length of each pipe spool then we would expect the ultrasonic device used to measure wall thickness would pick up the corrosion on the bottom of the pipe even though it may only be ≤ 25 % of wall.[65]

69. They conclude:

> The information supplied in the Joint Field Investigation Report is not detailed enough, has no good photographs of the leak site and is viewed as a poor-quality report not up to the standards usually associated with leak investigations on pipelines. We are also unsure as to the quality of the ultrasonic results taken around the leak site by the investigation team.[66]

70. The experts note the following regarding the JIT report on the oil spill at Goi:

> JIT report mentions 'previous excavation', 'soft soil backfill', 'trench already dug' and 'backfill all around the leak point'. The video coverage shows a large oil fountain. Although a blowout does not necessarily remove all the backfill, it does not rule that out either, so there is doubt about the firm statement in the JIT report that there is 'evidence of previous excavation'.[67]

Need of adequate investigation and settlement

71. The standards described here serve a clear purpose. Oil spills are an everyday occurrence in Nigeria. As described above, the starting point is that damage as a result of such oil spills is compensated, unless the sabotage defence can be successfully invoked.

72. The objective of this is, of course, that the compensation enables those who are affected by such an oil spill to make a living in another manner, or to find new housing. To enable those involved to get on with their life after an oil spill as soon as possible, it is crucial that quick and effective

[64] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 12.
[65] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 12.
[66] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 16.
[67] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 14.

action is taken following an oil spill – not only in terms of response and remediation, but also in terms of compensation.

73. For this reason, as well, stringent requirements must be stipulated for the investigation and the data based on which an oil company claims that it does *not* have to fulfil its compensation obligation. Moreover, irrespective of this compensation, the people affected are also entitled to be informed of the events and data that may be relevant for their position to the extent possible. There is a reason that the OECD guidelines for multinational enterprises and the Guiding Principles on Business and Human Rights emphasize transparency and the duty to provide information.[68] It speaks volumes that Shell only supplied the JIT reports to the Nigerian plaintiffs after attorneys requested this.[69]

74. In the case at issue, Shell consistently and exclusively relied on the JIT reports, whose defectiveness has meanwhile been demonstrated. Only after ten years of litigation and several requests to this effect from the appointed experts, and – in the case of Goi – more or less forced to act by the draft expert report, did Shell provide additional information that offers more insight into the possible cause of the oil spill. This information is far too late and is incomplete.

75. The reproach that Shell relies too easily on the sabotage defence has been made for a long time.[70] Shell was also aware of this (in any event since the report drawn up by WAC Global Services at Shell's behest)[71] and should have modified its work method in response to that charge. Its strategy of categorically denying liability and only relinquishing more information that sheds a light on the condition of the pipelines and the cause of the oil spills piecemeal when forced to do so in legal proceedings goes against the starting point of Nigerian law mentioned above and social care. After all, only a minimal part of those affected by the (on average) four oil spills a week in the Niger Delta – more than half of which are caused by sabotage according to Shell – is actually able to raise this cause of the damage in legal proceedings. It is virtually out of the question that they can afford three pipeline engineers to further investigate the cause of the damage.

76. For this reason, Shell has the obligation to ensure that the information and documentation of the oil spills is complete, in order in qualitative terms and can be verified.

77. The fact that Shell was aware of this need is demonstrated by [redacted]

[68] See also the Summons, chapter 13.3.1 and no. 352 (cases a + b); Summons, chapter 13.3.1 and no. 356 (cases c + d); Summons, chapter 13.3.1 and no. 375 (case e).

[69] Summons, no. 350 (cases a + b); Summons, no. 354 (cases c + d); Summons, no. 373 (case e).

[70] See the Summons, chapter 16.1.1 (cases a - d); Summons, chapter 16.3.1 (case e).

[71] WAC Global Services, 'Peace and Security in the Nigerdelta: Conflict Expert Group Baseline Report' (Working Paper for SPDC, December 2003), Exhibit C.7, p. 16-17.

[redacted]

78. Given that in the case at issue, it was possible to have experts further investigate the cause of the oil spills based on ILI runs and other underlying data, it is reasonable – in the absence of proper reports on the oil spills – to demand that such investigation leads to a completely unambiguous outcome of sabotage.

2.7 Probable proof based on contraindications

79. The requirements to be stipulated for the proof of sabotage are stringent, given that the information that is available demonstrates that the pipelines were quite obsolete and seriously neglected, and the monitoring of these pipelines was totally inadequate; thus, oil spills were bound to occur. Shell accepted this risk.

80. In this connection, it should be pointed out that procedural rules serve (also foreign) substantive law. In concrete terms, this means that in applying the rules of procedural law, if necessary through adjustment, the Court of Appeal must provide a basis in its own procedural law system for the effect of the foreign law. This means that the standard of proof '*beyond reasonable doubt*' under Nigerian law implies a threshold of 'statutory and convincing proof' that is similar to Dutch Criminal Law (Article 338 of the Dutch Code of Criminal Procedure) for civil law, as well. Irrespective of whether the standard of proof '*beyond reasonable doubt*' or '*preponderance or weight of evidence*' under Nigerian law is applied, by analogy with Dutch civil procedural law, at a minimum, the above translates into an increased obligation on the part of Shell to substantiate its (complete) defence to challenge the claims. To date, Shell has failed to fulfil this increased substantiation duty, even though the factual information required to distinguish oil spills caused by sabotage from oil spills caused by corrosion/inadequate maintenance is fully within Shell's control and is an area of knowledge that falls primarily within Shell's area of expertise. Bearing in mind the relevance of arriving at the truth, so that the judge is able to correctly establish the facts, this justifies that the acceptance of probable evidence by this Court of Appeal to the effect that oil spills as a result of defective maintenance are involved.

81. In this connection, reference is also made to the principle of *res ipsa loquitur* that applies under Nigerian law, which is discussed in the next chapter.

82. The (many) contraindications for sabotage, such as overdue pipeline maintenance and the failure to comply with the standards of good industry practice *inter alia* for pipeline integrity and data collection, in combination with Shell's sub-standard provision of information to the experts and not utilizing the opportunity or even frustrating the possibility of physically examining the relevant pipelines will be discussed below.

72 [redacted]

2.7.1 Overdue maintenance

83. It is common knowledge that the pipelines in the Niger Delta were in a very poor condition.[73] [redacted]

84. As *inter alia* demonstrated by Van de Vijver's note to the Committee of Managing Directors, asset integrity at SPDC left much to be desired, in part as a result of budget restrictions:

> A recent joint EPG/SPDC review has shown that, despite the transformation of SPDC started in 1998, considerable gaps remain. These relate to the existing business - particularly the management of hydrocarbon production, asset integrity and the effectiveness of basic services - as well as to the major challenges posed by the Growth Programme.[74]
>
> [...]
>
> 3.4 Restore and maintain asset integrity
>
> There is a backlog of maintenance activities following a period in the 1990's when funding was highly constrained. A combination of budget restriction, prioritisation and executive capacity still restricts the rate at which the backlog can be cleared.
>
> Response: progress has been made including development of asset integrity and HSE management system, and projects initiated for pipeline replacement, and refurbishment of the Bonny Terminal. Steps now being pursued include the introduction of modern maintenance system, sourcing of Key Group staff and restraining of existing field staff, as well as the development of a stronger maintenance culture within the organisation.[75]

85. The *SGN Challenges overview* that is added as an appendix includes under the heading *Must Do: "Catch up on asset integrity"*.[76]

[redacted] The following is described in [redacted] as [redacted]

[redacted]

[73] See *inter alia* the Summons, section 9.3.1 (cases a - e).

[74] Note to CMD – Nigeria Country review 2002, Exhibit Q.1 (cases a - e), p. 8.

[75] Note to CMD – Nigeria Country review 2002, Exhibit Q.5 (cases a - e), p. 10.

[76] Note to CMD – Nigeria Country review 2002, Exhibit Q.5 (cases a - e), p. 16. ALARP stands for *as low as reasonably possible.*

[redacted] case also notes: [redacted]

[redacted] The [redacted] that Shell made available for inspection further demonstrates that [redacted]

89. In Shell's 2006 sustainability report, Basil Omiyi (Shell Nigeria's CEO at that time) acknowledges:

> We do, however, have a substantial backlog of asset integrity work to reduce spills and flaring. That backlog is caused by under-funding by partners over many years, operational problems and, more recently, the lack of safe access to facilities.[79]

2.7.1.1 Ikot Ada Udo

90. The wellhead in Ikot Ada Udo, which was drilled as an exploratory well in 1959, was never put into operation and was subsequently left unattended by Shell. In all those years, Shell never performed any maintenance or inspection work, except when it had to act in the various oil spills that occurred over time as a result. All this time, the wellhead remained under pressure of the oil still present in the wellhead.

91. It is obvious that such an old, unmaintained well that is under pressure can develop leaks:

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

77 [redacted]

78 [redacted]

79 The Shell Sustainability Report 2006: 'Meeting the Energy Challenge', Exhibit D.5 (cases a - e), p. 33.

> permanently closed valves on a Christmas Tree do not prevent leakage through the valves, even multiple valves in series.[80]

92. For this reason, it is good industry practice that a well that is no longer used is isolated and abandoned.[81] This is also required by virtue of the EGASPIN:

> VIII.G.
>
> A.2.1 Decommissioning activities (for facilities completely shut down and/or abandoned) shall commence at least one year after abandonment and be completed within six months.
>
> 2.1.1 Licensee/Operator shall:
>
> (i) obtain appropriate permit from the Department of Petroleum Resources;
>
> (ii) isolate well from surface;
>
> (iii) plug and abandon downhole according to permit criteria;
>
> (iv) place surface cement plug below cellar, to allow removal of surface components, the process of removal should avoid any significant adverse effect on the environment;
>
> (v) isolate production interval to prevent communication between aquifers of different nature.
>
> (vi) Close pit appropriately.
>
> (vii) Satisfy other conditions as in API RP 57.

93. API Recommended Practice for Well Control Operations (51R) includes the following in this regard:

> Permanent abandonment is done when the wellbore has no further utility and is permanently sealed against fluid migration, Temporary abandonment operations may be performed when a wellbore has future utility [...]. The same environmental concerns exist in both cases.[82]

[80] Accufacts report, Exhibit M.2 (cases a - e), p. 8-9.

[81] See also the United Nations Environment Programme report: *Environmental Assessment of Ogoniland* (2011), Exhibit L.7 (cases a - e); Odita et al., *Abandonment of Wells in Shell Nigeria Operations*, Society of Petroleum Engineers (2004), Exhibit M.12 (case e); API Recommended Practice 51R (2009), **Exhibit Q.18** (cases a - e), par. 6.4.1:: *"Permanent abandonment is done when the wellbore has no further utility"*.

[82] API Recommended Practice 51R (2009), Exhibit Q.18 (cases a - e), par. 6.4.1.

94. In the case at issue, Shell had not performed any permanent or definitive abandonment work. Shell should have done so. Moreover, as long as it had not isolated the well – in breach of the standards – it should have conducted regular inspections due to safety considerations:

> Equipment operating in known corrosive conditions should be inspected on a routine basis for signs of corrosion, with corrective action taken, as needed, to assure the equipment continues to operate in an environmentally acceptable manner.[83]

95. Given that Shell claims that the well had been sufficiently secured with a *Sub Surface Safety Valve*, it should have been able to demonstrate this based on the documents that it had to maintain. API Recommended Practice 14B on *Design, Installation, Repair and Operation of Subsurface Safety Valve Systems* (**Exhibit Q.19**) includes the following in this regard:

> The user [...] shall establish and maintain document procedures to control all SSSV system equipment documents and data that relate to the requirements of this International Standard. These documents and data shall be maintained to demonstrate conformance to specified requirements. All documents and data shall be legible and shall be sorted and retained in such a way that they are readily retrievable in facilities that provide a suitable environment to prevent damage or deterioration and to prevent loss. Documents and data may be in any type of media, such as hard copy or electronic files.[84]

96. Oil spills had occurred before from the wellhead in Ikot Ada Udo. Shell should have properly monitored those problems, so that it could have taken adequate measures.[85] One of those measures, for example, is to install a concrete plug, as Shell has done in the meantime. Had Shell not done this, the wellhead would probably have started to leak again.

2.7.1.2 Goi

97. The following was already known regarding the pipeline at Goi: (i) that this was a very old pipeline that had been in operation for at least 40 years; (ii) that Shell's own investigation in 2000 had shown that *"some sections contain major risk and hazard"* and that *"outright replacement is necessary because of extensive corrosion"*;[86] (iii) that the same fact was confirmed in an SPDC report from 2002, which stated that SPDC should *"initiate an immediate replacement of this*

[83] API Recommended Practice 51R (2009), Exhibit Q.18 (cases a - e), par. 6.2.2. See also 8.7.2.

[84] API Recommended Practice 14B (2005), *Design, Installation, Repair and Operation of Subsurface Safety Valve Systems*, **Exhibit Q.19** (cases a - e), par. 5.4.1.

[85] See, for example, API Recommended Practice 51R (2009), Exhibit Q.18 (cases a - e), par. 6.2.3: *"All equipment should be inspected on a routine basis for a sign of leakage, with corrective action taken, as needed, to assure that the equipment continues to operate in a safe and environmentally acceptable manner"*.

[86] See the Statement of Appeal Phase 1 of Milieudefensie et al., nos. 84-89, 189; High Court of Justice, Technology and Construction Court, (Amended) Reply to the (Amended) Defence of the *Bodo Community and others* (UK), Exhibit O.2 (cases a - e), par. 18.5.

line";[87] and (iii) that at the time of the oil spills, for years the pipeline had not been inspected for the formation of corrosion by means of *Intelligent Pig Runs*. The expert investigation further demonstrated (iv) that no alternative forms of inspection/monitoring were applied;[88] and (v) that the (compulsory) cathodic protection was not in operation.[89]

98. When offered the opportunity with the question "are there other facts and circumstances that you consider relevant for answering the questions", the experts noted the following:

> In pt. 2.3 in doc. Code AD, the verdict of the court of 2013 is stated (translated from Dutch): "Since 1993, Shell does not operate any longer in Ogoniland due to unsafe situation for its employees in that area. Through this area is still a buried oil pipeline for which SPDC is the operator and till today (2013) in use for crude oil transport from oilfields to one of the harbour terminals used by SPDC." It is worrying if (and how), under these circumstances, the technical integrity of this trunkline could be guaranteed.[90]
>
> [...]
>
> It is good practice to guarantee the integrity of a crude oil line by performing In-Line Inspections. Guaranteeing integrity of a trunkline in operation should be done under all circumstances.[91] (Emphasis added by attorney).

2.7.1.3 Oruma

99. The following was already known regarding the pipeline at Oruma: (i) that this was an old, corroded pipeline which had already been said to be likely to leak; (ii) Shell's own investigation had demonstrated that the pipeline was *"likely to leak before the year 2003/2004"*.[92] The expert investigation also found that – with the English sense of understatement – that the Oruma pipeline [was] *"in a less than perfect condition with high levels of corrosion, albeit of a low level, along the complete pipeline length"*.[93]

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[87] See the *Reply to the Defence Bodo Community*, Exhibit O.2 (cases a - e), par. 102.7.2.

[88] As had already been demonstrated in the English proceedings: *Reply to the Defence Bodo Community*, Exhibit O.2 (cases a - e), par. 18.1.

[89] This had also been demonstrated previously in the English proceedings: *Reply to the Defence Bodo Community*, Exhibit O.2 (cases a - e), par. 17.1; see the Statement of Appeal Phase 1 of Milieudefensie et al. no. 84.

[90] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 14

[91] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 20.

[92] See the Statement of Appeal Phase 1 of Milieudefensie et al., nos. 82, 83, 200; Environmental Impact Assessment of the 20" x 37 km Kolo Creek - Rumuekpe Trunkline Replacement Project (SPDC 2004), Exhibit M.3 (cases a - d), pp. 2-17.

[93] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 10.

100. Against the recommendations, Shell did not replace the pipeline. Thus, Shell accepted the predicted "increased rate of crude leak into the environment", "contamination of the environment with crude leaking to degradation", "increased community unrest due to crude contamination of their environment" and other consequences "as constant spillage could spiral into areas not mentioned".[94]

101. When offered the opportunity with the question *"are there other facts and circumstances that you consider relevant for answering the questions"*, the experts made the following critical comment:

> Given that the pipelines in this area of Nigeria seem to have had a number of leaks and indeed looking at the 2016 ILI report there have been a number of pipe sections replaced and extra clamps fitted to the pipeline then the following points can be made
>
> - Internal corrosion seems to be a major problem with the pipelines therefore good monitoring is essential together with regular pigging of pipelines ad internal inspections.
> - Above ground monitoring is essential to ensure the safety of the pipelines.
> - When a leak occurs, there must be a good response team to investigate the leak. Full close up pictures are essential together with on-site measurements of defect size, wall thickness and general pipe spool condition.
> - The pipeline must be depressurized as soon as possible after the leak. With the 2000 leak the incident happened on 9th October and was reported on 13 October. However, on 24th October the pressure was still too high to work on line. Work on line was completed on 25th October. This would inevitably result in an extensive area of contamination of the area around the leak.[95]

2.7.2 Standards regarding pipeline integrity and data collection not observed

102. For a company like Shell, these well-intended recommendations did not come as a surprise, of course. The norms observed by the experts are recorded in numerous standards and rules.

[94] Environmental Impact Assessment of the 20" x 37 km Kolo Creek - Rumuekpe Trunkline Replacement Project (SPDC 2004), Exhibit M.3 (cases a - d), par. 2.3.3.1; see the Statement of Appeal Phase 1 of Milieudefensie et al., no. 83.

[95] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 18-19.

103. These standards are the norm for good oil field practice.[96] As such, and through references in the Nigerian laws and regulations, they also have effect in Nigerian law.[97]

104. In chapter 2.5 of the Statement of Appeal Phase 1, the Nigerian regulations in this connection were addressed in more detail. This chapter is referred to here.

105. The standards regarding wellheads have already been discussed above. In this section, the standards that pertain to pipeline integrity are discussed in more detail. In this connection, reference is also made to Steiner's report, *Double Standards*, which discusses the various applicable standards.[98] As Steiner also concludes, the Niger Delta must be considered to be a *High Consequence Area*, which increases the need for and obligation to have a good *integrity management system*.[99]

106. The requirements are *inter alia* worked out in ANSI/API Standard 1160 *Managing System Integrity for Hazardous Liquid Pipelines*.[100] It follows from this that an oil company must continually make sure that and to what extent its facilities and pipelines entail a risk and what measures must be taken to minimize that risk.[101] The same starting point underlies API Recommended Practice 1173, *Pipeline Safety Management Systems*.[102] The *Pipeline Integrity Handbook* summarizes:

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[96] To the extent that some of the standards mentioned date from after the date of the oil spills, they can still be considered to codify *good oil field practice*.

[97] Article 37 of the Petroleum (Drilling and Production) Regulations, Exhibit G.1 (cases a - e): "*the licensee […] shall carry out all his operations […] in accordance with these and other relevant regulations and methods and practices accepted by the Director of Petroleum Resources as good oil field practice*"; see Article 9(k) of the Oil and Gas Pipeline Regulations (S.I. 14 of 1995), annex with Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1A (cases a - e); Article 2.48 of the *Guidelines and Procedures for the Construction, Operation and Maintenance of Oil and Gas Pipelines and their Ancillary*; Article 7 of the Mineral Oil (Safety) Regulations, Exhibit G.1 (cases a - e). According to these regulations, in any event, the standards of the *Institute of Petroleum Safety*, the *American Petroleum Institute* and the *American Society of Mechanical Engineers* must be deemed to apply.

[98] Richard Steiner, *Double standards? International Standards to Prevent and Control Pipeline Oil Spills Compared with Shell Practices in Nigeria*, Alaska (November 2008), Exhibit B.1 (cases a - e).

[99] In its 2006 annual report, Shell Nigeria recognizes the vulnerability of the Niger Delta: "*The ecosystem [of the Niger Delta] is particularly sensitive to changes in water quality, such as salinity or pollution, or to changes in hydrology of the region*", Exhibit C.4 (cases a -e), p. 9.

[100] API Standard 1160 (2001), Exhibit Q.16 (cases a - e).

[101] API Standard 1160 (2001), Exhibit Q.16 (cases a - e), par. 8.11.

[102] See API RP 1173 (2015), Exhibit Q.17 (cases a - e), par. 8.2.1 (system integrity): "*The pipeline operator shall assure that pipeline systems subject to this document are designed, manufactured, fabricated, installed, operated, maintained, inspected, and tested pipeline systems subject to this document to maintain safety in a manner consistent with the specified requirements, regulations, and applicable standards".*

> A good pipeline IM system is capable of providing safe operation, accident prevention, accident control, and, in case of an accident ability, to initiate quick and effective damage control and corrective measures.[103]

107. SPDC – as it knew itself – had a totally inadequate *pipeline integrity management system*.

108. In-Line Inspections[104] (to chart internal corrosion) and cathodic protection[105] (to prevent external corrosion) play an important role in integrity management – in addition to other methods that Shell did not apply.[106] Section 462.2 of standard ASME B31.4-2002: *Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids* (**Exhibit Q.20**) stipulates:

> The operating company shall establish procedure for determining the corrosive effect of the commodity being transported, and the internal condition of its existing piping systems, and take appropriate action for the conditions found, including, but not limited to, the following.
>
> Examine and study records available from previous inspections and conduct additional inspections and investigations where the need for additional information is indicated. Corrective measures shall be in accordance with para. 464.

109. If In-Line Inspections are not possible, the importance of other forms of inspection increases, even though as a rule, these are not equivalent. This also follows from *Oil and Gas Pipelines: Integrity & Safety Handbook*:

> To operators these unpiggable pipelines are equally important to the overall integrity of the pipeline system, and suitable inspection solutions are therefore required. Although alternatives such as direct assessment and spot checks using infield, non-destructive testing exist, the most valuable information can only be obtained from the inside of the pipeline using ILI devices.[107]

110. The Nigerian *Oil and Gas Pipeline Regulations* stipulate the following regarding internal corrosion:

> 14. Internal corrosion control
>
> (1) This guidelines for the corrosion control of a pipeline are as follows, that is-

[103] R. Singh, *Pipeline Integrity Handbook: Risk Management and Evaluation* (Gulf Professional Publishing 2017), Exhibit Q.15 (cases a - e), p. 160 (The quote in question has not changed compared to the handbook's first edition).
[104] API Standard 1160 (2001), Exhibit Q.16 (cases a - e), par. 9.3.
[105] API Standard 1160 (2001), Exhibit Q.16 (cases a - e), par.10.2.1.
[106] For example, API Standard 1160 (2001), Exhibit Q.16 (cases a - e), par. 9.5 (hydrostatic testing); chapter 10 (mitigation options).
[107] R. Winston Revie, *Oil and Gas Pipelines: Integrity & Safety Handbook* (2015), Wiley Publishers, p. 545.

(a) no corrosive material shall be transported in a pipeline unless appropriate measures have been taken to mitigate the corrosive effect of the material on the internal coating of the pipeline;

(b) internal corrosion shall be prevented by-

(i) frequent pigging, inhibiting or scraping; or

(ii) the application of internal coating on the pipeline before it is laid.

(2) Whichever method is used under paragraph (1) *(b)* of this regulation, appropriate precaution shall be taken, for example-

(a) in the case of inhibition of the pipeline, sufficient coupon holders shall be used; and

(b) in the case of application of internal coating, the established industry standards of internal coating material shall be complied with.[108]

111. SPDC's own [redacted] – which was made available for inspection – also includes the following under [redacted]:

[redacted]

112. To prevent external corrosion, according to Article 11 of the *Oil and Gas Pipeline Regulations*, effective cathodic protection must be installed and monitored.

11. Maintenance of the cathodic protection system

(1) The cathodic protection system shall-

(a) be maintained in a serviceable condition; and

(b) be electrically tested at least once in two years.

[108] Oil and Gas Pipeline Regulations (S.I. 14 of 1995), annex with Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1A (cases a -e).

[109] [redacted]

> (2) Where a test under paragraph (1) *(b)* of this regulation reveals a weakness in the cathodic protection system, appropriate measures shall be taken and a report of the test and the measures taken shall be promptly sent to the Department.
>
> (3) All sources of impressed current such as rectifiers and other associated devices in the cathodic protection system, shall be inspected and tested every four months to ensure their proper functioning.[110]

113. Similar standards have been adopted in ASME B31.4-2002: Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids:

> The operating company shall establish procedures for determining the external condition of its existing buried or submerged piping systems and take action appropriate for the conditions found, including, but not limited to, the following.
>
> (a) Examine and study records available from previous inspections and conduct additional inspections where the need for additional information is indicated. The type, location, number, and frequency of such inspections shall be determined by consideration of such factors as knowledge of the condition of the piping system and environment, and public or employee safety in the event of leakage. Corrective measures shall be in accordance with para. 464.
>
> (b) Install cathodic protection on all buried or submerged piping systems that are coated with an effective external surface coating material [...].[111]
>
> 461.3. Monitoring
>
> (a) Cathodic protection facilities for new or existing piping systems shall be maintained in a serviceable condition, and electrical measurements and inspections of cathodically protected buried or submerged piping systems, including tests for stray electrical currents, shall be conducted at least each calendar year, but with intervals not exceeding 15 months, to determine that the cathodic protection system is operating properly and that all buried or submerged piping is protected in accordance with applicable criteria. Appropriate corrective measures shall be taken where tests indicate that adequate protection does not exist.[112]

[110] Oil and Gas Pipeline Regulations (S.I. 14 of 1995), annex with Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1A (cases a - e).

[111] ASME B31.4-2002, **Exhibit Q.20** (cases a - e), par. 461.2.

[112] ASME B31.4-2002, Exhibit Q.20 (cases a - e), par. 461.3.

114. In SPDC's [redacted], the following is also mentioned under [redacted]:

[redacted]

115. If the required inspections or the *leakage history* indicate active corrosion, additional anti-corrosion measures must be taken or existing measures must be intensified (*frequent scraping, pigging, or sphering, dehydration, inhibition, or internal coating* are all mentioned)[114]:

> 464 (b) Where inspections or leakage history indicate that active corrosion of metal is taking place in any portion of a piping system to the extent that a safety hazard is likely to result, that portion of the system shall be treated as specified in para. 451.6.2(a)(6) or (7) and:
>
> [...]
>
> (2) in the case of internal corrosion of piping, steps indicated in para. 462.1 shall be taken or augmented to mitigate the internal corrosion.[115]

116. It is clear that the situation around the pipeline at Goi, which was not monitored at all, is in breach of Nigerian regulations and good practice. In-Line Inspections had not been conducted for years in Goi and there was no (effective) cathodic protection; nor has any other form of periodic inspection or monitoring of the pipeline been demonstrated. As noted before, it had been determined that the pipeline was in urgent need of replacement.

117. In Oruma, Shell had also disregarded the urgent recommendation to replace the pipeline in order to prevent frequent leakages. In-Line Inspections were still conducted here; the results have been – in part – submitted to the experts. The experts observed that the cathodic protection in Oruma was also inadequate:

> The information about Cathodic Protection (CP) received by Shell is only data from the Oruma pipeline. The cathodic protection data of the Oruma pipeline show inadequate protection potentials against external corrosion. Only the C.P. data from 2013 show marginal protection over the first 30 km but the last

[113] [redacted]

[114] ASME B31.4-2002, Exhibit Q.20 (cases a - e), par. 462.1(a).

[115] ASME B31.4-2002, Exhibit Q.20 (cases a - e), par. 464(b).

7 km show very poor protection levels. This means that at external coating defects external corrosion and possible leakage of the pipe may occur.[116]

[redacted] The [redacted] that has been made available for inspection demonstrates that [redacted]

[redacted][117]

119. In brief, Shell's anti-corrosion management was very sub-standard. It is established within Shell, by the experts and based on the standards that Shell allowed unlawful risks of leakages in the pipelines as a result of corrosion to continue. Under those circumstances, Shell may be expected to take special care in substantiating its defence that the oil spills were not caused by corrosion.

120. However, the opposite is true. As explained above, Shell is not only unable to substantiate its sabotage defence based on documentation, Shell is also unable to refute the assumption that corrosion is a very likely cause of the oil spills based on adequate data. If Shell had acted according to good industry practice – in as far as it conducted any corrosion management – it would have kept adequate records of the relevant circumstances and risks that could possibly have undermined this scenario. To the extent that Shell claims that corrosion cannot have been the cause, but is unable to substantiate this with such data, its argument should be set aside as insufficiently substantiated; in the absence of these data, any doubts regarding the possibility of corrosion as the cause of the damage should be to Shell's detriment.

[116] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 13-14.

[117] [redacted]

121. In any event, by virtue of ASME B31.4-2002, Shell had to maintain the following data:

> 455 - records
>
> For operation and maintenance purposes, the following records shall be properly maintained:
>
> (a) necessary operational data;
>
> (b) pipeline patrol records;
>
> (c) corrosion records as required under para. 465;
>
> (d) leak and break records;
>
> (e) records pertaining to routine or unusual inspections, such as external or internal line conditions;
>
> (f) pipeline repair records.
>
> 465 - Records
>
> (a) records and maps showing the location of cathodic protected piping, cathodic protection facilities, and neighboring structures affected or affecting the cathodic protection system shall be maintained and retained for as long as the piping remains in service.
>
> (b) Results of tests, surveys and inspections required in this Chapter shall be retained as needed to indicate the adequacy of corrosion control measures. The minimum retention period shall be 2 years or until the results of subsequent inspections, tests or surveys are received, whichever is longer.[118]

122. Record keeping also plays a central role in API 1160.[119] API Recommended Practice 1173 *Pipeline Safety Management Systems* also emphasizes the importance of *data gathering*:

> 7.2 data gathering
>
> The operator shall maintain an inventory of the pipeline and environment in proximity to the pipeline that is required to define safe operating conditions [...] as well as maintenance. Recognizing that where there are historical gaps in data, the operator shall work to close gaps though on-going work related to operations, maintenance, and pipeline integrity or use conservative assumptions in setting operating parameters until a gap can be closed.
>
> These data serve as the foundation of risk management and shall include available data over the pipeline life cycle and shall be updated based on work

[118] ASME B31.4-2002, Exhibit Q.20 (cases a - e), par. 455 and 465.
[119] API Standard 1160 (2001), Exhibit Q.16 (cases a - e), par. 7.

performed and as needed during the life of the pipeline. Incident data, including the cause of incidents, shall be included as appropriate. the pipeline operator shall conduct a regular review to identify data gaps and evaluate data quality as part of risk assessment, consistent with continuous improvement.[120]

123. The EGASPIN require:

3.2 Inspections

3.2.1 All pipelines and flowlines for crude and petroleum products including gas shall be patrolled and inspected, once in every month or otherwise as approved by the Director of Petroleum Resources.

3.2.2 Details of the inspection shall be recorded in a log book which Shall include but not limited to the following:

(i) Licensee's Name

(ii) Identification of pipelines traces

(iii) Condition of the way leave (free from grass, weeds or inflammable material)

(iv) Irregularity along the pipelines which might endanger the line (e.g. access road construction or major excavation work at the vicinity of the line, proximity and encroachment of human habitation, usage of R.O.W. as access road by public and private transporters, conditions of river banks when intersected by the line, sea/river floor conditions affected by environmental influences, movement of bottom sediments, storm. scouring, ship anchorage etc.)

(v) Corrosion monitoring indications and measurements

(vi) Continuous pressure readings of all oil/product pumps involved in the transfer and receipt of products.

(vii) Operating conditions of pumps, metering devices, valves/shut-off system, firefighting appliances etc.

(viii) Actions taken to remedy any unfavourable inspection report.[121]

124. Chapters 6.3 and 7.3.2 explain that in breach of good industry practice and in contrast to Shell's argument, the pipelines did not have an adequate leak detection system, such as a system that measures the pressure in order to detect leakages in time. Thus, Shell did not provide the experts

[120] API Recommended Practice 1173 (2015), Exhibit A.17 (cases a - e), par. 7.2.
[121] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VI, par. E.3.2-3.22.

any data regarding such pressure measurements.[122] Had these data been available, the experts could have assessed on this basis whether the pressure difference was sudden, which indicates mechanical damage, or gradual, which indicates corrosion.

2.8 Shell's provision of information to the experts is sub-standard

125. The fact that Shell does not have its records in order, or at least refuses to provide the (complete) required data, demonstrates the manner in which Shell provided the experts with information. The risk that (in part) as a result, no decisive answer can be given to the question regarding the cause of the oil spills should come at Shell's expense.

126. The information required for the investigation into the cause of the oil spills is demonstrated by the e-mail that the experts sent to Shell on 2 August 2017, at the start of the expert investigation (**Exhibit Q.21**). According to the overview supplied with the e-mail, this pertains to the following data:

> <u>*Necessary* information for determining cause of damage to pipeline:</u>
>
> A. Information and data obtained during damage observation/investigation:
>
> 1. All footage, reports and measurements (wall thickness, defect dimensions, NDT, etc.) related to damage and repairs
> 2. Repair method, temporary and final.
> 3. Detailed full reports of In-Line Inspections of the pipelines including specifications of ILI devices used.
> 4. Exact location of leak, also referenced on ILI report.
> 5. Reports of excavations and measurements performed and its locations.
>
> B. General pipeline data:
>
> 1. Age of pipelines,
> 2. Pipeline: diameter, wall thickness, type of material and type of pipe (longitudinal seam/ spiral welded, ERW/HFI, ...), pipe specification.
> 3. Welding method for girth weld and its quality control,
> 4. Coating type (external and possibly internal),
> 5. Operating pressure, magnitude of pressure changes, temperature and its changes, sufficient for a representative image, e.g. over a period of one year,

[122] Category B.5 of the *necessary information* requested by the experts. Request for information from the experts dated 2 August 2017, **Exhibit Q.21** (cases a - e).

6. Incident history.

Additional information for damage verification

A. Specific data required for external causes consideration:

1. Depth of cover of pipeline, soil type, groundwater level, soil resistance, coating surveys 1 km up- and downstream of the leak.
2. Data on cathodic protection:
    a. Location of the nearest rectifiers, rectifiers' output: history of the last 5 years before the incident.
    b. Location of K.B. - measurement poles, 5 years historical K.B. - data (protection potentials) per measurement point before the incident.
    c. Potential influx of streams and / or alternating currents.

B. Specific data for internal cause's consideration:

1. Crude oil characteristics (composition, density, viscosity, water content, amount of sand (BSW) in any case the extremes),
2. Operating conditions (throughput, velocity, temperature, at least the extremes)
3. Slope or pipeline profile 1 km upstream and downstream of location of leakage.
4. Frequency cleaning runs and changes in the last 5 years prior to occurrence leakage.
5. If applicable, use of inhibitor in crude oil.
6. Any data on historical corrosion monitoring of pipeline [123]

127. The information that Shell provided – three months later – in response to these questions is submitted as **Exhibit Q.22**. With regard to four of the five categories listed under A that the experts indicate as *"necessary information to determine the cause of damage to the pipeline"*, Shell merely refers a few times to the JIT report. With regard to the categories of "necessary information" listed under B, Shell suffices by paraphrasing – unverifiable – data. In so doing, Shell thwarts the Court of Appeal's finding in the Interlocutory Ruling of 18 December 2015, in

[123] Request for information from the experts dated 2 August 2017, including annex, **Exhibit Q.21** (cases a - e).

which the Court of Appeal considers that in view of the many indications that the JIT reports are unreliable, more attention should be paid to the quality of the furnished evidence.[124]

128. It speaks volumes that in response to the oil spill at Goi, Shell provided the data of a completely different section of the pipeline than the one in which the leakage occurred. The 24" Nkpoku-Bomu T/L originally mentioned by Shell is to the north-west of the relevant pipeline section between Bomu and Bonny, was installed in 1990 and had polyethylene coating according to Shell's data.[125] The confusion continues, even if Shell later submits the *pipe tally* of the relevant pipeline section, because for the rest, Shell continues to rely on mostly the same data. For example, Shell maintains its point of view that the pipeline had a polyethylene coating, which did not even exist at the time the pipeline at Goi was installed. It is not clear to what extent Shell's arguments regarding, for example, prior incidents on the pipeline do pertain to the relevant area.

129. While the experts designate *"incident data"* as *necessary information*, Shell limits the information it provides to data regarding one or two incidents on the pipeline at Goi, because *"any history on other incidents at other locations will not, in Shell et al.'s view, provide any information on the cause of the leaks at Oruma and Goi"*.[126] Here Shell thwarts the experts' opinion regarding what information is relevant in forming an opinion regarding the cause of the oil spills. Moreover, in this way, Shell (again) thwarts the Court of Appeal's Interlocutory Ruling of 27 March 2018, which stipulated "that the parties will provide the information requested by the experts, if available".[127] Without offering any reaction, Shell ignored Milieudefensie et al.'s request to provide the experts information regarding the incidents that according to the ILI report preceded the repair work that was performed on the Kolo creek-Rumuekpe pipeline at Oruma.[128]

130. With regard to other data, as well, such as regarding the cathodic protection, the information is so cursory that the experts later requested Shell to provide information again.[129] Other information is not available at all. For example, Shell stated: *"there is no separate reporting on corrosion monitoring or coating surveys"*.

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[124] Interlocutory Ruling of the Court of Appeal of The Hague, 18 December 2015, par. 6.2-6.3 (cases c + d) and par. 5.2-5.3 (cases a + b); see also the letter from attorney Samkalden to attorney De Bie Leuveling Tjeenk and the experts dated 22 November 2017, Exhibit Q.6 (cases a - e), p. 1.

[125] See also the map of the SPDC Trunklines as inserted in chapter 1.2.

[126] Attachment with the e-mail from attorney De Bie Leuveling Tjeenk to the experts and attorney Samkalden dated 3 November 2017, **Exhibit Q.22** (cases a - e), p. 4.

[127] See also the Interlocutory Ruling of the Court of Appeal of The Hague, 18 December 2015, par. 6.4 (cases c + d) and par. 5.4 (cases a + b), in which the Court of Appeal considered that the parties had to render their assistance to the experts if they felt that by virtue of Article 198(3) DCCP, access to particular documents was required/useful for their investigation.

[128] See the letter to Shell and the experts dated 22 November 2017, Exhibit Q.6 (cases a - e).

[129] In a letter dated 1 August 2018, a copy of which was sent to the Court of Appeal, the experts (again) requested that Shell provide information regarding the ILI runs, pipeline coating quality and cathodic protection.

131. The experts repeatedly refer to the fact that the information provided by Shell is incorrect, incomplete and inconsistent. It has already been described above that the conclusions in the JIT reports are not supported by any other data. With regard to the ILI reports regarding the pipeline at Oruma, the experts noted the following:

> There is also some confusing information given on the pipeline. The ILI reports suggest the line is constructed using seamless pipe spools but the information received on document (W) - additional information gives it clearly as of longitudinal seam welded ERW pipe.
>
> Shell has now confirmed that the pipeline is indeed constructed of seamless pipe and reference document W was incorrect.[130]

132. According to the experts, it would not have been difficult to gather relevant data based on which they could have made an adequate estimate:

> Good detailed information is lacking for the area around the leak including details of the dent reported around the 2000 leak and the damage to the pipe wall itself. <u>One good picture of the area would have solved all our problems.</u>
>
> The UT readings taken around the area of each leak are also questionable as to their accuracy.[131] (Emphasis added by attorney).

133. The information that Shell provided regarding Goi also caused confusion:

> The JIT report also mentions coal-tar enamel as external pipeline coating, although Shell states confusingly in their comments that it is polyethylene (PE), which coating type was not available for a pipeline commissioned in 1964.[132]

134. And:

> The pipeline was commissioned in 1964, although the ILI report mentions 1990 as construction year.[133]

135. Based on the information provided by Shell, the experts were simply unable to arrive at an opinion that endorses the JIT's conclusions. With regard to the pipeline at Goi, it was shown that there is no cathodic protection information at all. Thus, the experts concluded:

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[130] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 12.
[131] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 12.
[132] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 13.
[133] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 13.

> Overall, this information is too limited and the detail is too vague to verify the conclusion of the JIT that it is due to a saw cut.[134]

136. Despite the experts' explicit request for the entire report of the ILI run at Goi in 2016,[135] Shell only made a few parts of this report available for inspection. Thus, again, Shell was not prepared to enable the experts to conduct a full investigation into the cause of the oil spill based on the information that the experts believe is required for this. The experts established the following in their report:

> However, we have comments on the limited section of ILI report supplied to us as follows:
>
> - The report states that there are 16 cases of repaired metal loss under sleeves near to the location of the leak, all at the top of the line but no information is given as to the nature of these defects. [...]
> - Low level corrosion at 6'clock position is evident along the pipeline, as was also seen in the Oruma pipeline, but no details of this are given in the section of report supplied to the experts.[136]

137. Thus, the experts' reply to the first question they were asked: "to what extent does the available material enable you to form a complete picture of the possible cause of the leaks" was:

> 6.3.1 Answers to the questions for the Oruma leak
>
> 1. The available material supplied by Shell does not enable us to form a 100% complete picture of the possible cause of the leaks in the pipelines.
>
> The main reason for this is primarily the lack of photographs and good quality measurements taken from the leak points.[137]
>
> 6.3.2 Answers to the questions for the Goi leak

[134] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 14.

[135] See the experts' request for information dated 2 August 2017, Exhibit Q.21 (cases a - e), and Sowerby's e-mail to the Court of Appeal and Shell dated 1 August 2018. Based on the ILI results, the experts observe that the oil spill at Goi probably did not involve a weld seam. The fact that they felt that they could only conclude this after receiving the ILI results shows that the District Court's finding that it is unlikely that a weld seam would burst open with jagged edges, or that attempts to close the leak would create an opening with jagged edges is, in fact, incorrect. (Final Judgment of the District Court of The Hague of 30 January 2013, par. 4.21 (cases c + d).

[136] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 15.

[137] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 15.

> 1. From the available material and information, it is not possible to make a decisive conclusion about the cause of the leak. The main reason for this is primarily the lack of good quality photographs and measurements taken from the leak point.[138]

138. Finally, the following is noted here. The conclusion that Shell knew that it was providing information or at least was taking positions in these proceedings that Shell knew or at least should have realized were incorrect is inevitable. One illustration of this is a map that Shell provided to the experts, which allegedly depicts the extent of the pollution and the impact this has on Dooh's fish ponds in 2009.[139] This is incompatible with Shell's previous point of view that it allegedly does not know where Dooh's land is. As the Court of Appeal already found in the Interlocutory Ruling,[140] Shell's argument that it is not clear what lands and fish ponds are involved is not very compatible with its previous arguments that, in brief, the areas that Shell contends it remediated comprise the lands and fish ponds of Dooh and of Oguru and Efanga.

2.9 The experts cannot give a decisive answer

139. In part in light of the above, it should be concluded based on the experts' consideration that based on the available material, they did not obtain a complete picture of the possible cause of the oil spill that Shell's sabotage defence cannot succeed. Both with regard to the oil spill at Goi and the one at Oruma, the experts have too many doubts to be able to start from sabotage at this point.

Oruma

140. With regard to the oil spill at Oruma, the experts concluded:

> We cannot come to a definitive conclusion on the cause of the leaks [...].[141]

141. Even though the experts believe that the available information indicates *external interference*, there are too many gaps in the available documentation material to convincingly draw this conclusion.

142. In particular, the experts complain about *the lack of photographs and good quality measurements taken from the leak points*.[142] According to the experts, the JIT report is not a suitable source of information, while "*without a good investigation report [...] there is some remaining doubt as to the cause"*.

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[138] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 19.

[139] Annex C1 with the e-mail from attorney De Bie Leuveling Tjeenk dated 16 October 2018, **Exhibit Q.54**.

[140] Par. 5.7 (cases c + d) and par. 4.3 (cases a + b).

[141] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 18.

[142] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 16.

143. In light of information that Shell provided in August 2018, the experts concluded "that the most likely cause of the leak is external interference rather than corrosion. The exact nature of the external interference cannot, however be assessed because of the poor quality of the investigation report held after the leak with no associated photographs of the area of the leak".

144. What matters is that what is *"most likely"* is insufficient in light of the standard of proof described. To successfully rely on the complete defence of sabotage, it is in any event required that this sabotage – and thus also the manner in which the sabotage was committed – can actually be established.

145. However, a number of circumstances have caused continuous doubts on the part of the experts. First of all, this is the lack of clear evidence. The experts also noted the following:

> Secondly the depth of cover of the pipeline at the leak points appears to be in the region of 2.5 meters and one would question why sabotage would be attempted at such a point in the pipeline as we are sure there will be easier points along the pipeline to attempt sabotage.[143]

146. The experts decided:

> The way to absolutely confirm the leak was caused by sabotage is to de-pressurise the pipeline and remove the repair clamp to reveal the defect that caused the leak in 2005, re-investigate the leak area, supply a good quality report with good quality photographs and information from the investigation.[144]

147. Given that Shell did not use the opportunity to do so and therefore, the experts are unable to offer a decisive answer to the question regarding the cause of the oil spill, the defence that Shell relies on fails.

Goi

148. With regard to Goi, the experts also concluded:

> From the available material and information, it is not possible to make a decisive conclusion about the cause of the leak. The main reason for this is primarily the lack of good quality photographs and measurements taken from the leak point.[145]

[143] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 18.
[144] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 19.
[145] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 19.

149. The experts consider that most information that was made available to them, including the JIT report and fragments of an ILI run conducted in 2015 that Shell provided in response to the draft expert report point in the direction of *external interference*. However, the experts cannot fully rely on these sources:

> If the JIT report had included good quality photos and measurements and if we had received all available information (e.g. full ILI reports) our confidence level would have been greater.
>
> [...]
>
> Poor quality of the JIT reports, especially the lack of photographs to prove the observations, really hampered the verification of the conclusion that it is sabotage.[146]

150. Thus, here as well, Shell can be blamed for the fact that the experts are currently unable to arrive at a firm opinion. Moreover, based on the available data, there are also doubts:

> It can be calculated that a 24" pipe with a wall thickness of 9,5 mm can be penetrated by a straight saw cut with a length of 2* SQRT (Re^2-Ri^2) = 15,1 cm at a minimum. The registered length of 46 cm is much longer than the minimum length necessary to cause a leak. If it is indeed a saw cut, as is mentioned in the JIT report, much more sawing (e.g. under different angles) has been performed before causing the oil leakage, than was actually necessary.[147]

151. In this context, it can be noted that as a result of the pressure in the pipeline, the oil would spurt out of the pipeline with enormous force (as can be seen on the video of the leakage) – into the face of the person wielding the hacksaw – as soon as the pipeline wall has been cut through. It is extremely unlikely that in such a situation, someone would continue to saw – moreover, this does not serve any purpose.

152. The experts noted that based on the video footage it is not possible to distinguish between a weld seam and a saw cut. Based on the fragments from the ILI report that Shell provided later, they concluded that this must involve a *"circumferential defect"*. However, according to the report, rather than a saw cut this could also be a "*fracture of the pipeline"*.[148]

[146] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 19, 20.
[147] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 14.
[148] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 15.

153. In this connection, it is pointed out that Accufacts already concluded before that the leakage had probably been caused by a pipe fracture:

> The so-called "saw cut" is not straight or smooth edged, but wavy and jagged edged which is more indicative of other pipe failure fracture mechanics such as previous flaws in the pipe either from manufacture or other damage such as from construction.[149]

154. Thus, based on the available material, it cannot be concluded here that the oil spill was caused by sabotage, either. The experts decided as follows:

> A proper re-examination after depressurization and removal of the Plidco sleeve is expected to supply the necessary information to come to a definitive conclusion.[150]

2.10 Shell did not use the opportunity to physically examine the pipelines and, in fact, frustrated this opportunity

155. In the absence of documentation based on which the cause of the oil spill could have been convincingly demonstrated, it was Shell's responsibility to ensure that more clarity would have been obtained by a physical examination of the pipelines. However, Shell failed to utilize the opportunities it had to this end and even deliberately closed off these opportunities.

156. The fact that according to its statements, due to safety risks, Shell does not have the possibility to physically examine the pipelines comes at Shell's expense – as the operator who chooses to nevertheless (continue to) perform its work in the Niger Delta.

157. With regard to Goi, the experts noted as follows, after considering that only a physical examination can provide a decisive answer:

> We are surprised that in order to carry out the ILI run in 2015, the line was depressurised and filled with water in order to propel the ILI tool through the pipeline. When a pipeline is in this condition we would have thought it would be prudent of Shell to remove the repair clamp and finally confirm that the point of leak was external interference.[151]

158. Indeed, in 2015, Shell apparently had the opportunity to subject the pipeline to a further inspection. It is incomprehensible and unreasonable that Shell failed to do this at the time.

159. Subsequently, in 2017 - despite the discussion on digging up the pipelines in order to subject these to a physical examination - Shell replaced the pipe section at Goi in which the leakage had

[149] *Accufacts* report, Exhibit M.2 (cases a - e), p. 5.

[150] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 20.

[151] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 20.

occurred. This replacement work was observed by people living in the vicinity of Goi. An employee of Milieudefensie photographed the area in which the oil spill had occurred in 2004 and the replacement work was performed in 2004. On 18 April 2018, Shell was asked for its reaction to this observation. On 24 January 2019, Shell responded, submitting that the answer took a great deal of time, because the location at which the photographs that had been sent to Shell had been made was not clear and Shell had to exert 'considerable efforts' to determine this location. Shell could have inferred this location from the argument that this was the location of the oil spill, of course, or could have checked this with Milieudefensie. Shell et al. allege that repairs on another section of the pipeline were performed, but refused to provide any additional information in this regard. Milieudefensie et al. maintain their argument that a large part of the pipeline has been replaced. If desired, they will submit witness statements of this, but they note that again, providing specific information on the work that was performed is much more Shell's responsibility.

160. Replacing the pipeline without notifying Milieudefensie et al. and the Court of Appeal of this and in so doing, definitively closing off the possibility of subjecting the pipeline to a physical inspection is careless and inappropriate - especially in light of the discussion about this that has been conducted between the parties since 2015. Given that it has been established that only a physical examination can provide a definitive answer regarding the cause of the damage, this risk must also be borne by Shell.

161. In Oruma, as well, Shell did not use the opportunity to better investigate the cause of the oil spill. After all, Shell returned to the pipeline in Oruma to install a new clamp. In light of the controversy regarding the JIT report, it would have been obvious for Shell to use that opportunity to conduct an additional investigation and make photographs of the leak.

2.11 No evidence whatsoever of sabotage in Ikot Ada Udo

162. Shell did not submit any evidence demonstrating that the oil spill was caused by sabotage to substantiate its defence that this was the cause of the oil spills in Ikot Ada Udo. No JIT reports or other reports were drawn up of the oil spills. Nor is there any video footage of the oil spill in 2006.

163. It follows from the principle of *res ipsa loquitor* and the rule in *Rylands v. Fletcher* that Shell's sabotage defence cannot succeed for this reason.[152]

164. This is certainly the case, given that in light of the circumstances described above, another scenario is possible and more likely. The obligation to properly isolate a wellhead when it is no longer used exists to prevent the wellhead from possibly starting to leak. Accufacts described that the valves of a Christmas tree that are not being maintained start to corrode and show defects and in this way can lead to leakages.

[152] See chapter 4.2 below on the legal framework.

165. The only fact that Shell contended to substantiate sabotage, i.e. that the leakage could be remedied by closing the valve using a monkey wrench, does not mean that the leakage had also been caused by manually opening this valve:

> While the Ikot Ada Udo release could be sabotage, the video evidence (…) does not rule out that the release could also be associated with wellhead valve inappropriate alignment/closure, deterioration over time of valve seals or sealing surfaces, or vibration that can crack open or unseal well head valves.[153]

166. It was up to Shell to gather evidence that this scenario did not apply and that the oil spills were caused by sabotage.

167. In any event, the fact that the oil spill in 2007 could be remedied by closing the valve using a monkey wrench does not mean that the earlier spill of 2006 was caused by sabotage.

168. Thus, the situation is the same as in *SPDC v. Firibeb & Anor*, in which Awotoye J.C.A. concluded:

> There is no police report nor charge which evidence I of prosecution some persons for destruction of Yorla Bomu Pipeline in order to establish the defence contention that the spillage was the result of a third party. All I can deduce is that the defendants having averred they left Ogoni which P.W.1 in evidence confirmed that Defendant left Ogoni land leaving their facilities behind.
>
> The defendant claim of a third party's act cannot be sustained in the absence of any evidence.[154]

2.12 Conclusion: sabotage defence does not hold

169. Shell's sabotage defence does not hold. Based on the available material, the experts were unable to provide a definitive answer on sabotage as the cause of the damage.

170. The expert investigation shows that sabotage could in any event not be demonstrated based on the documents that Shell submitted into the proceedings. Thus, again, Shell too readily relied on the sabotage defence.

171. With the new information that Shell provided, the experts still have doubts regarding the circumstances that gave rise to the oil spills, primarily because there is no proper information in this regard. In this context, the experts also mentioned possible other causes that cannot be ruled out based on the information provided by Shell.

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[153] *Accufacts* report, Exhibit M.2 (cases a -e), p. 9.

[154] Prof Emeka Duruigbo's Legal Opinion, including Annexes A to G (cited cases), Exhibit Q.1 (cases a - e), p. 9 (B), which refers to *SPDC v. Firibeb*, Suit no. CA/PH/168/2007, Court of Appeal (Port Harcourt Judicial Division); Judgment delivered on December 7, 2011, Annex C with Exhibit Q.1.

172. Accordingly, sabotage has not been proven, according to either the criterion of 'beyond reasonable doubt' alleged by the appellants or based on 'preponderance of weight of evidence'.

173. Shell was able and, based on the sabotage defence it had conducted and good industry practice, it was required to carefully investigate and document the cause of the oil spills. Given that the failure to observe good industry practice meant that doubts still exist regarding the cause of the oil spills, these doubts come at Shell's expense.

174. This is all the more true in light of the many oil spills that occur and occurred in the Niger Delta every year, most of which are caused by sabotage according to Shell. In light of the enormous impact that these spills have on people and the environment, it goes without saying that Shell carefully maps the cause of those oil spills - especially if based on these spills, it argues as an exception to the rule that it is not liable to pay compensation.

175. Moreover, Shell did not act in conformance with good industry practice in monitoring the condition of the pipeline, collecting data in this regard and applying anti-corrosion measures. In this light, as well, Shell has an increased substantiation duty to demonstrate that the oil spills can be traced back to sabotage (and were not caused, as is obvious, by corrosion / inadequate maintenance). In light of the contra-indications for sabotage, the fact that the JIT reports are insufficiently reliable to prove sabotage in conformance with the standard (or standards) that applies here, and the fact that Shell failed to fulfil its increased substantiation duty, any (remaining) doubts regarding an unambiguous cause of the oil spills should come at Shell's expense and risk.

176. Thus, the District Court wrongly concluded that the oil spills (in all cases) were caused by sabotage. Given that sabotage cannot be proven, Shell committed tort and based on Article 11(5)(c) and the rule in *Rylands v Fletcher* is required to compensate the appellants (and the affected parties who are represented by Milieudefensie) for this.

3 GROUND FOR APPEAL 3 (ALL CASES): THE DISTRICT COURT WRONGLY FOUND THAT IN THE EVENT OF SABOTAGE, UNDER NIGERIAN LAW, THE MAIN RULE IS THAT AN OPERATOR IS NOT LIABLE FOR THE DAMAGE

3.1 The judgment

177. The District Court wrongly found as follows in par. 4.20, 4.41, 4.43 and 4.45 (cases c + d); par. 4.19, 4.43, 4.45 and 4.47 (cases a + b) and par. 4.18, 4.36, 4.38 and 4.40 (case e).

> 4.20. It follows from grounds 4.7 – 4.9 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.

> 4.41. 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 Dooh caused by the oil spill in 2004 near Goi, unless this oil spill can be blamed on Dooh or sabotage by third parties. In ground 4.25 above, the District Court already ruled definitively that this oil spill was caused by sabotage. For this reason, by virtue of Section 11 (5) (c) OPA or based on *the rule in Rylands v. Fletcher*, SPDC cannot be liable for damage caused by this oil spill occurring.

> 4.43. [...] 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 licence, 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.

> 4.45. 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.

3.2 Legal framework

178. Under Nigerian law, sabotage is a complete defence that can only be successfully invoked if the operator did not act negligently in the circumstances that led to sabotage. This follows both from the Oil Pipelines Act and from Nigerian common law. This is further explained below.

179. The legal framework of liability under Nigerian law has already been addressed in chapter 2.3 of the Statement of Appeal Phase 1 and chapter 3 above. We refer to that explanation here, as well. In this connection, reference is also specifically made to the legal opinions of Emeka Duruigbo, which have been submitted as Exhibits M.1 and Q.1.

3.2.1 Strict liability

180. As already explained in the documents mentioned above, under Nigerian law, the starting point is that an operator is liable for damage as a result of an oil spill. This liability is recorded in Article 11(5) of the Oil Pipelines Act (OPA), which reads:

> The holder of a licence shall pay compensation -
>
> (c) to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good.

181. By virtue of Article 11(5)(c) OPA, strict liability exists, unless the licensee can successfully invoke the sabotage defence. To this extent, this *statutory strict liability* codifies the rule in *Rylands v. Fletcher*.

182. The rule in *Rylands v. Fletcher* has been applied in numerous Nigerian lawsuits dealing with oil spills.[155] The Nigerian Supreme Court recently held that the principle applied in the case *SPDC v. Anaro*.[156] This case involved leakages from pipelines, in which the exact cause of the damage had not been determined. In her concurring opinion, Supreme Court Justice Ogunbiyi sets out the rule in *Rylands v. Fletcher*:

> The principle laid down in Rylands V. Fletcher (supra) is to the effect that an occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound to take responsibility and prevent its escape. In the event

[155] See the case law with Prof Emeka Duruigbo's Legal Opinion, including Annexes A to G (cited cases), Exhibit Q.1 (cases a - e). Further also: *Chief M.A. Ajanaku & Ors. v. Mobil Producing Nigeria Unlimited*, Suit No: FHC/L/CS/274/2002; Judgment delivered on 14th December, 2016, **Exhibit Q.23** (cases a - e), p. 50, in which justice Buba held: *"It is settled law that victims of oil operations spillage/damage can maintain an action for compensation under the rule in Rylands vs. Fletcher".*

[156] *SPDC v. Anaro*, LOR (5/6/2015) SC, **Exhibit Q.24** (cases a - e).

> of escape however, the occupier will be liable for all the direct consequences of its escape, even if he has been guilty of no negligence. See again the English case of Hale V. Jennings Bros. (1938) 1 All ER 579 at 582 and 584. The English authorities as ancient as they may be are good and applicable in our courts.[157]

183. The trial judge had found as follows in *SPDC v. Otoko*:

> It is noteworthy that the rule of Rylands v Fletcher which is alternatively pleaded by the plaintiffs in this case applies to the circumstances of this case. The crude oil which passed through the pipe lines could not naturally have been there. The defendant gathered the crude oil into the pipes and it was a substance which was dangerous and likely to escape. It was not a natural user of land but was brought in there by the act of the defendant. Since therefore it had escaped and caused damages the defendant is liable in the consequences of its act.[158]

184. Thus, application of the rule in *Rylands v. Fletcher* does not also require that negligence on the part of an operator is involved.

185. For a more extensive discussion of the rule in *Rylands v. Fletcher*, please refer to Duruigbo's opinion,[159] and the arguments advanced in this regard in the first instance.[160] In chapter 12, it will be explained that the rule in *Rylands v Fletcher* also applies to damage that was caused by the manner in which Shell responded to the oil spill and cleaned up (or failed to clean up) the lands and fish ponds.

3.2.2 Res ipsa loquitur

186. The principle of *res ipsa loquitur* ('the case speaks for itself') is applied in the event of damage that normally would not occur if no negligence of a party was involved. It creates a presumption of negligence. In *SPDC v. Edamkue*, the Supreme Court found:

> An accident may, by its nature be more consistent with its being caused by negligence for which the defendant is responsible than other causes, [..] in such a case, the mere fact of the accident is prima facie evidence of such negligence. In such a case, the burden of proof is on the defendant to explain and to show that the accident occurred without fault on his part.[161]

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[157] *SPDC v. Anaro,* LOR (5/6/2015) SC, Exhibit Q.24 (cases a - e), p. 18.

[158] *SPDC v. Otoko* [1990] 6 NWLR 693, Annex F with Prof Emeka Duruigbo's Legal Opinion, Exhibit Q.1 (cases a - e).

[159] Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1 (cases a - e), nos. 71-78.

[160] Statement of Reply (cases a - e), chapter 4.6.3.

[161] *SPDC v. Edamkue and others* (2009) 14 NWLR (Pt. 1160) 1; (2009) 6-7 S.C. 74, Annex 12 with Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1A (cases a - e).

187. If the defendant cannot refute the presumption of negligence under *res ipsa loquitur*, this may lead to liability under the rule in *Rylands v. Fletcher*. In *SPDC v Edamkue*, the Supreme Court continued as follows:

> If a plaintiff relies on *res ipsa loquitur* as basis for proving negligence of the defendant, then once the primary facts of the occurrence have been accepted, the burden shifts on the defendant to establish a defence. In the instant case, there was an oil spillage which caused damage to a vast area. The trial court and the Court of Appeal found that if proper care was taken, such a spillage would not have occurred to cause damage to the respondents. The onus shifted on the appellant to prove that there was no negligence on its part. It however failed to discharge this duty. Thus from the evidence in the case, the maxim *res ipsa loquitur* and the rule in *Rylands v Fletcher* rightly were clearly evocable, and the trial and appellate courts rightly applied them in depicting the negligence of the appellant which failed to give any tenable explanation that was satisfactory to the contrary.[162]

188. This may also explain why under Nigerian law - as Shell argued - there are few cases in which an operator was deemed liable based on negligence in the event of sabotage: after all, if *res ipsa loquitur* and the rule in *Rylands v. Fletcher* are applied, there is no longer any need to separately prove negligence.[163] Any invocation of the complete defence of sabotage usually fails based on the high standard of proof or the presumption of negligence.

189. In the more recent case *SPDC v. Anaro*, the Nigerian Supreme Court also applied these principles. Supreme Court Justice Bayang Aka'ash, who wrote the leading judgment, cites the following in this judgment, with the Court of Appeal's consent:

> ...the doctrine is applicable because the respondents in the case in hand do not know how the pipeline got ruptured, cracked or broken (sic) as borne by the totality of the evidence contained in the record. I therefore hold that the doctrine of Res Ipsa Loquitur is clearly applicable in these consolidated cases on appeal. It should be noted that pipelines that are well maintained and fault free do not ordinarily burst crack and rupture spilling their contents.[164]

190. In her concurring opinion in the same case, Ogunbiyi J.S.C. clearly explains the meaning of the principle:

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[162] *SPDC v. Edamkue and others* (2009) 14 NWLR (Pt. 1160) 1; (2009) 6-7 S.C. 74, Annex 12 with Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1A (cases a - e).

[163] This does not preclude that - in addition to the rule in *Rylands v. Fletcher* and/or the Oil Pipelines Act - negligence can also be advanced as a ground; see, for example, *SPDC v. Isaiah* [1997] 6 NWLR 236, Annex E with Prof Emeka Duruigbo's Legal Opinion, Exhibit Q.1 (cases a - e).

[164] *SPDC v. Anaro*, LOR (5/6/2015) SC, Exhibit Q.24 (cases a - e), p. 13.

> The maxim **res ipsa loquitor** applies whenever it is so probable that such an accident would not have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused. The question that must exist before the principle could be applied was stated by **Sir William Erle C. J. in Scott v. London and St Katherine Docks Co. (1865) 3 H.L. & C. 596 at 601** as follows:- "There must be reasonable evidence of negligence but where the thing is shown to be under the management of the defendant or servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant, that the accident arose from want of care."
>
> See also **Boe V. Minister of Health (1954) 2 Q.B.66 at 78**. The effect of the application of the **maxim** is that the onus of proof of negligence, normally placed on the plaintiff, shifts. The defendant is therefore required to establish that there was in fact no negligence on his part. [...]
>
> [...]
>
> In my view therefore, the rule res ipsa loquitor was applicable to the situation at hand. This is more so with the appellant knowing fully well that it was keeping materials – i.e. the crude oil, which could be regarded as dangerous to the environment if allowed to spill and there was in fact a spillage. The Rule in Rylands v. Fletcher, supra, was squarely applicable as rightly held by the lower Court in affirming the finding by the trial court.[165]

191. These findings by the Supreme Court were recently also applied in *Ajanaku v. Mobil*, in which the Federal High Court concluded that oil company Mobil was liable for the damage that had occurred as a result of an oil spill.[166] The Federal High Court based this liability on the principle of *res ipsa loquitur* and the rule in *Rylands v. Fletcher*. [167]

192. The case law demonstrates that in order to avert *res ipsa loquitur*, proving sabotage is not sufficient. In view of the presumption of negligence, an operator will also have to demonstrate

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[165] *SPDC v. Anaro,* LOR (5/6/2015) SC, Exhibit Q.24 (cases a - e), p. 18-19. KUMAI BAYANG AKA'AHS, J.S.C., who wrote the leading judgment, cites Rowland JCA with consent, who expressed this as follows: *"I therefore hold that the doctrine of Res Ipsa Loquitur is clearly applicable in these consolidated cases on appeal. It should be noted that pipelines that are well maintained and fault free do not ordinarily burst crack and rupture spilling their contents."*

[166] *Chief M.A. Ajanaku & Ors. v. Mobil Producing Nigeria Unlimited,* Suit No: FHC/L/CS/274/2002; Judgment delivered on 14th December, 2016, Exhibit Q.23 (cases a - e), pp. 70-71.

[167] *Chief M.A. Ajanaku & Ors. v. Mobil Producing Nigeria Unlimited,* Suit No: FHC/L/CS/274/2002; Judgment delivered on 14th December, 2016, Exhibit Q.23 (cases a - e), pp. 48-53.

that it was not negligent in preventing this sabotage. The Court of Appeal also acknowledged this in the interlocutory ruling, in the scope of the claim by virtue of Article 843a DCCP.[168] Duruigbo stated the following in this regard:

> Even if a defendant is able to prove beyond reasonable doubt that the damage or destruction was effected through the malicious act of a third party, the defense of sabotage would still fail if the act of sabotage was foreseeable and the defendant did not take adequate measures to ensure that its installations are not sabotaged before it can successfully rely on the defense.[169]

193. In *Shell Petroleum Development Company Ltd v. Otoko* (in which the rule in *Rylands v. Fletcher* was also deemed to apply), SPDC had also invoked the sabotage defence.[170] Omosun J.C.A. found as follows:

> The defense is that the act was that of a 3rd party. In law the owner of a dangerous thing is not liable if the thing has escaped through the independent act of a third party and there has been no negligence on his part. [...]
>
> Where the proximate cause is the malicious act of a third person against which precautions would have been inoperative, the defendant is not liable in the absence of a finding either that he instigated it or that he ought to have foreseen and provided against it.[171]

194. In *SPDC v. Amachree*, a leakage had occurred in a manifold. SPDC had argued that someone had tampered with a valve, causing the oil to start flowing. The plaintiffs had invoked the principle of *res ipsa loquitur.* Acholonu J.C.A. found that based on this principle, it was up to the defendant to prove that it had not been negligent. The fact that sabotage was involved was insufficient for this. In the judgment, Acholonu referred to the cases in *Parry v. Kendricks Transport Ltd* and *Davies v. Liverpool Corporation,* in which the following was held:

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[168] See the Interlocutory Ruling of the Court of Appeal of The Hague, 18 December 2015, par. 5.5 (cases a + b), par. 6.5 (cases c + d) and par. 5.2 (case e).

[169] Prof Emeka Duruigbo's Legal Opinion, including Annexes A to G (cited cases), Exhibit Q.1 (cases a - e), no. 27.

[170] *SPDC v. Otoko* [1990] 6 NWLR 693, Annex F with Prof Emeka Duruigbo's Legal Opinion, Exhibit Q.1 (cases a - e). The trial judge had found the following to this end: *"It is noteworthy that the rule of Rylands v Fletcher which is alternatively pleaded by the plaintiffs in this case applies to the circumstances of this case. The crude oil which passed through the pipe lines could not naturally have been there. The defendant gathered the crude oil into the pipes and it was a substance which was dangerous and likely to escape. It was not a natural user of land but was brought in there by the act of the defendant. Since therefore it had escaped and caused damages the defendant is liable in the consequences of its act."*

[171] *SPDC v. Otoko* [1990] 6 NWLR 693, Annex F with Prof Emeka Duruigbo's Legal Opinion, Exhibit Q.1 (cases a - e).

> An unauthorised or wrongful act of third person does not break the chain of causation if it might reasonably have been foreseen.[172]

195. In this case, Acholonu J.C.A. believed that the damage was not foreseeable, and *res ipsa loquitur* did not apply, because SPDC had already taken special precautionary measures:

> In this case, what precautionary measures if any did the appellant take toward off intruders and mischievous people who might meddle with the manifold? All parties agree that the manifold was fenced around. [...] There was evidence of a fence and a lock which I might describe as double protection.
>
> [...]
>
> If the scenario had been where there was a burst oil pipe or there is incompetently secured valve or there was no fence and possibly no lock then I believe the doctrine of *res ipsa loquitur* would apply.[173]

196. It is clear that Nigerian law offers room for liability of the operator in cases of sabotage. This is not altered by the fact that in the cases mentioned above, the operator had taken sufficient precautionary measures to be considered not to be liable. By virtue of Nigerian law, it is up to the operator to demonstrate that i) sabotage was involved and ii) the operator was not negligent in preventing this sabotage.

197. It is emphasized that in Nigerian case law, the principle of *res ipsa loquitur* is still valid (including after the ruling of the English court in *Bodo v. SPDC*), and including under the Oil Pipelines Act.[174] In the case *AGIP PLC v. Ossai* (**Exhibit Q.25**), the Court of Appeal dismissed the appellant's argument (who referred to the *Bodo* case for this purpose) that the doctrine should not be applied:

> Appellant had also faulted the application of the Res Ipsa Loquitor by the trial Court in this case, saying the common law principle would not apply, where there was a statutory provision, as in Oil Pipelines Act (OPA), Cap 07 LFN 2004, which Appellant said relates to this case. Appellant said Section 11(5) of OPA imposes on the holder of Oil Pipeline Licence, the obligation to pay compensation to person(s) suffering damages by reason of any neglect on the part of the holder or his agent to protect, maintain or repair any work, structure or thing, executed under the licence. I do not think this case comes under the Oil Pipeline Act (OPA), and that the doctrine of Res Ipsa Loquitor will cease to apply, even in a case relating to negligence under that Act (OPA), where

[172] *SPDC v. Amachree* (2002) F.W.L.R., Annex G with Prof Emeka Duruigbo's Legal Opinion, Exhibit Q.1 (cases a - e), p. 1662 (D).
[173] *SPDC v. Amachree* (2002) F.W.L.R., Annex G with Prof Emeka Duruigbo's Legal Opinion, Exhibit Q.1 (cases a - e), p. 1662 (E) and (H).
[174] In contrast to what Shell submits in its Statement of Defence on Appeal Phase 1, nos. 51 – 54.

> the Court sees reason to infer the application of such legal principle, in appropriate circumstances. [175] [Emphasis added by attorney].

198. Moreover, this is also in line with Article 11(6) of the Oil Pipelines Act, which stipulates the following:

> For the removal of doubt it is hereby declared that the powers granted to the holder of a licence under this Act shall: be exercisable only subject to the provisions of this Act and of any other enactment or rule of law.

199. In other words, the OPA explicitly stipulates that the operators are also bound by the rule of law, which also covers the common law provisions.

200. In light of the grounds described in the previous chapter, in particular the very poor status of the maintenance and the absence of proper documentation, Milieudefensie et al. believe that the principle of *res ipsa loquitur* should also be applied in the oil spills at issue.

201. In any event, the applicability in the case of Ikot Ada Udo is obvious. Had Shell - as befitting an oil company - sealed off the drilling well after it was no longer used (as it currently did with a concrete plug) and isolated this well from the environment, it could not have started to leak. However, Shell not only failed to properly abandon the well, it even failed to put up a fence to block access. This line of reasoning also appears to be implied in the District Court's finding.

3.2.3 Negligence

202. The *tort of negligence* is one of the grounds that the plaintiffs advanced to substantiate their claim. If *res ipsa loquitur* is applied, this negligence is assumed to exist. It has been explained above and in the Statement of Appeal Phase 1[176] that this principle should currently be applied, which leads to a reverse burden of proof. Even if the burden of proof of negligence falls on the appellants, Shell is liable based on the *tort of negligence* and/or Article 11 (5)(b) of the Oil Pipelines Act.

203. Statutory and common law negligence are discussed in more detail in the opinions of Emeka Duruigbo and in chapters 2.3 and 2.4 of the Statement of Appeal Phase 1. Only the main points are discussed again below.

204. Shell has a statutory duty of care to protect its pipelines. Article 11(5)(b) of the Oil Pipelines Act stipulates the following in this regard:

The holder of a license shall pay compensation-

[175] *AGIP PLC v. Ossai* , CA/OW/324/2014, 14th June, 2018; LOR (14/6/2018) CA, **Exhibit Q.25** (cases a - e), p. 14.

[176] Chapter 2.3.1.

> (b) to any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work, structure or thing executed under the license, for any such damage not otherwise made good.

205. This provision does not recognize - as Article 11(5)(c) does - an exclusion for damage caused by third parties. On the contrary, the obligation explicitly also includes the obligation to protect the pipeline. In the context of the Oil Pipelines Act, this can only mean protection against factors that constitute a risk of damage, including the risk that third parties will damage the pipeline.

206. Akenhead J arrived at the same conclusion in *The Bodo Community and others v. SPDC*:

> Short of a policing or paramilitary defence of the pipelines,[177] it is my judgment that the protection requirement within Section 11(5)(b) involves a general shielding and caring obligation. An example falling within this would be the receipt by the licensee of information that malicious third parties are planning to break into the pipeline at an approximately definable time and place; protection could well involve informing the police of this and possibly facilitating access for the police if requested. Other examples may also fall within the maintenance requirement such as renewing protective coatings on the pipelines or, with the advent of new and reliable technology, the provision of updated anti-tamper equipment which might give early and actionable warning of tampering with the pipeline.[178]

207. Thus, according to Akenhead, protecting the pipeline falls under the obligation of Article 11(5)(b) OPA. The question regarding what may be expected from the operator in this connection pertains to the content of that standard and will have to be assessed on a case-by-case basis. In any event, Akenhead suggests that installing *updated anti-tamper equipment* is part of an operator's duty of care.

208. With reference to Article 11(5)(c) OPA, Shell alleges that Article 11(5)(b) OPA cannot be read such that Shell may still be liable in the event of sabotage. In so doing, Shell fails to recognize the distinction between the strict liability of Article 11(5)(c) and the liability based on negligence of Article 11(5)(b). The appellant's interpretation does not render the sabotage defence meaningless, as Shell asserts; after all, Shell can use this defence to evade strict liability. Moreover, this is also in line with the doctrine of *res ipsa loquitur* described above: sabotage may constitute a defence, but not in the event of negligence on the part of the operator. On the other hand, Shell's interpretation would render Article 11(5)(b), in fact, superfluous; therefore, this cannot be followed.

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

[178] *Bodo Community v. SPDC* (2014), Exhibit O.1 (cases a - e), par. 92(g).

209. The District Court insufficiently took the difference between a statutory duty as expressed in Article 11 of the Oil Pipelines Act and in the tort of negligence into account. After all, the Oil Pipelines Act stipulates a statutory obligation to properly protect, maintain and repair the pipelines. In that case, the only question to be answered is whether this obligation has been violated. The District Court wrongly tested whether under the circumstances of the case, it is reasonable to accept a duty of care. This question has already been answered positively by the Nigerian legislator.

210. Thus, the District Court's finding that under Nigerian law, in principle, an operator is not liable in the event of sabotage flatly contradicts these obligations created by the Nigerian legislator. The District Court's assumption that "in general, the case law on the tort of negligence also applies in the scope of interpreting this Nigerian statutory provision" is wrongful in this sense.[179] An operator can only evade liability in cases involving sabotage in which it was not negligent. The Nigerian court will not allow a claim of sabotage defence - even if the sabotage is undisputed - if the operator acted negligently in the circumstances that led to sabotage. This is also acknowledged by Shell.[180]

211. Thus, whether assuming a duty of care is reasonable is only a relevant question in as far as the common law tort of negligence is invoked; an alternative legal ground (which is, however, also invoked by the appellants).

212. Under common law, the threefold Caparo test applies to answering this question. To this end, the judge must assess: (i) whether the damage was foreseeable; (ii) whether proximity between the parties is involved; and (iii) whether the assumption of a duty of care is fair, just and reasonable. In *Smith v. Littlewood*, Lord Goff defined that liability based on negligence may also be involved if the damage was caused by a third party. That is the case if the defendant *(i) negligently (ii) causes or permits to be created a source of danger, and it is (iii) reasonably foreseeable that third parties may interfere with it and (iv), sparking off the danger, thereby cause damage to persons in the position of the pursuer*.[181]

3.2.4 Trespass to chattel

213. The *tort of trespass to chattel* is an unlawful act under Nigerian law, which involves an infringement of (the use of) a good, intentionally or *negligently*.[182] Thus, the assessment of this tort is closely associated with the assessment of whether a tort of negligence is involved. In the event of trespass to chattel, as well, the question regarding the cause of the oil spill is irrelevant such that the extent to which the operator acted negligently in this must be consistently assessed.

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[179] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.43 (cases c + d), par. 4.45 (cases a + b), par. 4.38 (case e).

[180] Statement of Defence on Appeal Phase 1 of Shell, no. 46.

[181] *Smith v. Littlewoods Organisation Ltd* [1987] UKHL 3, AC 241, Annex 10 with Shell exhibit a.19/b.14/c.26/d.29.

[182] See also the Statement of Reply (cases a - e), chapter 4.6.2.

214. Should the Court of Appeal believe that it has indeed been established beyond reasonable doubt that sabotage was involved, the Court of Appeal must answer the question regarding whether Shell was negligent in preventing this sabotage based on both negligence and trespass to chattel. The fact that this is the case is explained in chapter 6 below.

215. Chapter 14 explains in more detail why the District Court's findings regarding trespass to chattel cannot be upheld, and that a tort of trespass to chattel is also involved in respect of the inadequate response and remediation.

3.3 Conclusion

216. The District Court incorrectly applied Nigerian law. The District Court's assumption that in principle, under Nigerian law an operator is not liable in the event of sabotage is incorrect. Under Nigerian law, in principle, an operator is liable for damage as a result of leakages from its pipelines. The operator can only evade liability if it can demonstrate that (a) sabotage was the cause of the spill, subject to the stringent standard of proof that applies to this;[183] and (b) the operator did not act negligently.

217. A correct application of Nigerian law means that Shell has an obligation to pay compensation based on the provisions of Article 11(5) of the Oil Pipelines Act, and is also liable based on the rule in *Rylands v. Fletcher*, the tort of negligence and trespass to chattel.

[183] See chapter 3.4.

4 GROUND FOR APPEAL 4 (ALL CASES): THE DISTRICT COURT WRONGLY FOUND THAT SPDC DID NOT HAVE A (GENERAL) COMMON LAW DUTY OF CARE TO PREVENT SABOTAGE IN GOI AND ORUMA.

4.1 The judgment

218. The District Court wrongly found as follows in par. 4.45 (cases c + d); par. 4.47 (cases a + b) and par. 4.40 (case e):

> 4.45 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.

219. The District Court wrongly found as follows in par. 4.48 and 4.50 (cases c + d) and 4.50 and 4.52 (cases a + b):

> 4.48. However, the District Court is of the opinion that in this specific case, no special circumstances have been submitted and/or demonstrated that allegedly justify a specific duty of care of SPDC in respect of Dooh. In the case at issue, the sabotage of the underground oil pipeline in October 2004 near Goi was not easy to carry out. After all, the oil pipeline was dug in so that it was necessary to first dig relatively deeply to reach the steel oil pipeline. Then the pipeline had to be damaged with a tool such that oil could start to leak. For this reason, in October 2004 near Goi there was no specific and/or exceptional risk of sabotage for people living in the vicinity such as Dooh, which was considerably larger or essentially different than the general risk of sabotage for all other people living in the vicinity of oil pipelines and oil facilities of SPDC in Ogoniland or elsewhere in Nigeria. For this reason, it cannot be held that in October 2004, by continuing to use the underground oil pipeline, SPDC created a special risk and allowed this risk to continue, which could be abused by a third party in the sense referred to by Lord Goff (see ground 4.28 above).
>
> 4.50. In view of the above, the District Court is of the opinion that under Nigerian law, there was no proximity between SPDC and Dooh in October 2004, nor is it fair, just and reasonable to rule that at that time, SPDC was under a specific duty of care in respect of Dooh to take the security measures specified by Milieudefensie et al. or other, additional security measures to prevent sabotage of its dug-in oil pipeline near Goi. Under those circumstances, the District Court is of the opinion that in this case, no tort of negligence of SPDC against Dooh is involved.

4.2 Incorrect assessment of negligence

220. The previous chapter demonstrates that SPDC most certainly had a duty of care to protect its pipelines.

221. Moreover, this demonstrates the inaccuracy of the District Court's assumption that "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".[184] After all, the case law demonstrates that installing and keeping an oil pipeline or oil facility is designated as creating or maintaining a dangerous situation; in principle, this gives rise to strict liability for this reason. In that case, as has been demonstrated, the question regarding whether the operator also acted negligently in this regard does not have to be answered.

222. The distinction between a 'general' and a 'specific' duty of care is not easy to comprehend. By its nature, the duty of care that the Nigerian legislator created in the Oil Pipelines Act is most certainly 'general'. To determine whether or not an operator is liable based on the (common law) tort of negligence will consistently have to be assessed based on the circumstances of the case and the criteria developed in *Caparo* and *Smith v. Littlewoods*.[185]

223. In contrast to the District Court's findings in the Final Judgment, it is irrelevant in this context whether the risk of sabotage in, for example, Goi or Oruma was larger or smaller than elsewhere in the Niger Delta.[186] After all, the essence is that transporting oil through oil pipelines entails a substantial risk. The risk of environmental pollution is the focal point - not the cause of the damage. This is confirmed in the EGPASIN:

> License holders for exploration, prospecting, exploitation, hydrocarbon processing, transportating, marketing etc. of Petroleum Resources are required by legislation to take/adapt Practical Precautions and/or all steps Practicable to prevent pollution.[187] (Emphasis present in the original version of the EGASPIN)

[184] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.45 (cases c + d), par. 4.47 (cases a + b), par. 4.40 (case e).

[185] See chapter 4.2.3 above, check no. 212.

[186] Opinion of Robert Weir QC, Exhibit N.2 (cases a - e), par 25; otherwise: Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.48 (cases c + d); par. 4.50 (cases a + b).

[187] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. B.1.1.1, p. 145. See. part VIII, par. A.5.5: "*all the existing and potential hazards associated with the construction, operation, maintenance and abandonment shall be assessed and mitigated*".

224. Moreover it most certainly follows from the fact that Ogoniland is a 'dangerous area that has been extremely difficult to access since 1993' for SPDC,[188] even though its main pipeline still runs through this land, that the risk of sabotage in Goi had to be considered to be greater.

225. In this connection, it is also relevant that the experts noted the following regarding the oil spill at Oruma:

> There was a similar leak on the pipeline in 2000 just 12 meters from the 2005 leak point as mentioned above. This leak was also classed as caused by outside interference. A question to resolve concerns the location of these leaks. Do they occur in an area known by Shell as an area of easy approach by people attempting sabotage or an area where the pipeline route is well known or not protected?[189]

226. Despite the experts' request and the Court of Appeal's order to cooperate in this, Shell did not provide any relevant data regarding other incidents that occurred on the pipeline. Since 2013, the Nigerian NOSDRA (National Oil Spill Detection and Response Agency) has maintained a database containing data regarding registered oil spills in the Niger Delta.[190] Via this website it can be seen that the oil spills at issue are by no means the exception. Many additional oil spills occurred (from the same pipelines) in the immediate vicinity of Oruma and Goi.

227. Subsequently, the District Court confuses the question regarding whether Shell had a duty of care with the question regarding whether Shell violated this duty of care. In par. 4.48 and 4.49 of its Final Judgment (cases c + d), the District Court finds that reasonably, Shell could not and should not have done more to prevent sabotage. In chapter 6 below, the appellants will contest those findings. Be this as it may, the question regarding what standard of care applies and the extent to which this standard has been complied with is preceded by the question regarding whether it is reasonable to assume a duty of care. At best, the conclusion that the measures taken – such as burying the pipelines – are deemed to be sufficient can lead to the assumption that a duty of care was not *violated* - not that it did not exist at all for this reason. The same is true for the District Court's finding that sabotage 'was not easy to carry out'.[191]

228. The District Court rightly starts from the fact that it was foreseeable for SPDC that third parties wanted to sabotage the pipeline.[192] How the District Court arrived at the conclusion that no proximity is involved based on an assessment of the measures taken in cases a - d is impossible

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[188] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.49 (cases c + d).

[189] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 18.

[190] Available via https://oilspillmonitor.ng.

[191] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.50 (cases a + b) and par. 4.48 (cases c + d).

[192] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.47 (cases c + d), par. 4.49 (cases a + b), par. 4.42 (case e).

to follow. By installing its facilities and pipelines in the immediate vicinity of the living environment, land and fish ponds of the appellants, SPDC itself effectuated this proximity. This fact also follows from the various compensation regulations, such as the *Oil Pipelines Act*, the *Petroleum Act*, the *Petroleum (Drilling and Production) Regulations* and the EGASPIN.[193] Nor is there a single ruling in which the Nigerian courts had any doubts regarding this proximity in the event of damage as a result of oil spills.[194]

229. That it is reasonable to assume that based on common law, Shell also had a duty of care to prevent sabotage *inter alia* follows from the following circumstances:

i. Oil spills entail considerable damage for people and the environment;

ii. The Niger Delta is a so-called *High Consequence Area*, which means that the damage as a result of spills is even greater;

iii. Shell was perfectly aware of those risks;

iv. Nigerian laws and regulations and *Good oil field practi*ce stipulate that an operator must take the requisite measures to prevent such environmental damage;

v. Shell makes doing the same one of its spearheads;

vi. Shell opted to install its pipelines and facilities in an inhabited, ecologically sensitive area in Nigeria;

vii. For years, sabotage has been a major problem in Nigeria and according to Shell is the cause of most of the oil spills;

viii. Shell had withdrawn from Ogoniland for safety reasons, but fully continued to use its pipelines in the region;

ix. Shell could foresee that its withdrawal from the region would give rise to an increased risk of sabotage on its facilities (but did not take any additional measures);

x. Nevertheless, in Ikot Ada Udo, Shell left a well that was no longer used unsealed and unattended for years;

xi. International standards stipulate specific measures to protect facilities and pipelines from sabotage by third parties.

4.3 Nigerian regulations

230. The above is confirmed in Nigerian laws and regulations, which also demonstrate a duty of care. The statutory duty of care based on the Oil Pipelines Act has already been sufficiently addressed

[193] See the Statement of Appeal Phase I of Milieudefensie et al., chapters 2.3.2 and 2.5.

[194] See also in this connection API Recommended Practice 51R, *Environmental Protection for Onshore Oil and Gas Production Operations and Leases* (July 2009), Exhibit Q.18 (cases a - e), Annex A: "*Good Neighbor Guidelines*", with "*guidance for a company to consider as it manages its relationships wth surface users, communities and others in areas where it operates*".

above. Where the legislator already answered the question regarding the reasonableness of imposing a duty of care, it is obvious to assume the same under common law.

231. The *Petroleum (Drilling and Production) Regulations* also make it clear that Shell has a duty of care to prevent the risk of oil spills - irrespective of their cause:

> 25. The licensee or lessee shall adopt all practicable precautions, including the provision of up-to-date equipment approved by the Director of Petroleum Resources, to prevent the pollution of inland waters, rivers, watercourses, the territorial waters of Nigeria or the high seas by oil, mud or other fluids or substances which might contaminate the water, banks or shoreline or which might cause harm or destruction to fresh water or marine life, and where any such pollution occurs or has occurred, shall take prompt steps to control and, if possible, end it.[195] (Emphasis added by attorney).

232. The *Oil and Gas Pipelines Regulations* stipulate that a pipeline must be patrolled in order to detect any irregularities at the earliest possible stage:

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

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

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

234. Here reference is made in particular to the legal opinions by Duruigbo and Weir,[196] and to chapter 2.5 of the Statement of Appeal Phase 1.

4.4 International standards

235. Based on international standards, as well, an operator is required to take all requisite measures to protect its pipelines and facilities in part against damage by third parties.

236. These standards are the norm for good oil field practice. As such, and by means of references in the Nigerian rules and regulations, they also have effect in Nigerian law.[197]

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[195] Article 25 of the Petroleum (Drilling and Production) Regulations, Exhibit G.1 (cases a - e).

[196] Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1 (cases a - e); Prof Emeka Duruigbo's Legal Opinion, including Annexes A to G (cited cases), Exhibit Q.1 (cases a - e); Opinion of Robert Weir QC, Exhibit N.2 (cases a - e).

[197] Article 37 of the Petroleum (Drilling and Production) Regulations, Exhibit G.1 (cases a - e): *"the licensee [...] shall carry out all his operations [...] in accordance with these and other relevant regulations and methods and*

237. That an operator may indeed be liable if its conduct does not satisfy the standards is *inter alia* demonstrated by the recent case of *Agip Plc v. Ossai*, in which the Court of Appeal confirmed the following opinion of the trial judge:

> At paragraph 4 of his deposition, DW4 alluded to the fact that the Defendant has the duty of care in carrying out its operations at its Akiri 9 Oil Well, in accordance with International Best Practices. The Defendant cannot deny that it possesses a duty of care. . . . I hold the view, as a result of the evidence before me that since the oil well was under the exclusive control of the Defendant and the fire could not have occurred if the Defendant had complied with the duty of care imposed upon it under International Best Practices, and as such occurred due to defendants negligence, the doctrine of res ipsa loquitor applies in this case.[198]

238. API Recommended Practice 1173, *Pipeline Safety Management Systems*, does not distinguish between possible leakage causes when describing an operator's duty of care:

> 7.1 General
>
> The pipeline operator shall maintain (a) procedure(s) for the performance of risk management. The operator shall maintain a description of the assets comprising the pipeline, including the surrounding environment, to identify threats to pipeline safety.
>
> The operator shall analyze risk considering the threat occurrence likelihood and consequence. The operator shall evaluate pipeline safety risk and make decisions on how to manage it through preventive controls, monitoring and mitigation measures.
>
> [..]
>
> NOTE 2 The term "threat," meaning threats to pipeline safety, is used in this document in a similar way that "hazard" is used in other industries. The intent in identifying threats or hazards is to define "what can go wrong?". Threats in this context are broader than the set typically considered for pipeline integrity.[199]

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practices accepted by the Director of Petroleum Resources as good oil field practice"; see Article 9(k) of the Oil and Gas Pipeline Regulations (S.I. 14 of 1995), annex with Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1A (cases a - e); Article 2.4.8 of the *Guidelines and Procedures for the Construction, Operation and Maintenance of Oil and Gas Pipelines and their Ancillary*; Article 7 of the Mineral Oil (Safety) Regulations, Exhibit G.1 (cases a - e). According to these regulations, the standards of the *Institute of Petroleum Safety*, the *American Petroleum Institute* and the *American Society of Mechanical Engineers* must in any event be deemed to apply.

[198] *AGIP PLC v. Ossai* , CA/OW/324/2014, 14th June, 2018; LOR (14/6/2018) CA, Exhibit Q.25 (cases a - e), p. 13.

[199] API Recommended Practice 1173 (2015), Exhibit Q.17 (cases a - e), par. 7.1.

> 7.4 Risk prevention and Mitigation
>
> Risk prevention and mitigation measures to reduce the likelihood and consequences of a release shall be identified and evaluated to improve situational awareness. Information to consider shall include, at a minimum:
>
> a) learnings from internal and external events;
>
> b)review of equipment operability, including control systems and materials;
>
> c) reviews of procedures, authorities, responsibilities, and accountabilities;
>
> d) review of training, drills and scenario development;
>
> e) review of incident response preparation, including response time adequacy and the ability to coordinate and stage an incident command system with response personal internal and external to the organization;
>
> f) identification of areas of high consequence; and
>
> g) in selecting measures to reduce risk, preference shall be given to prevention measures that eliminate or reduce the likelihood and/or consequences of incidents. Operators shall implement the selected measures and evaluate their impact on risk.[200]

239. Other standards also demonstrate that to protect the environment, an operator must take precautionary measures against all possible identifiable risks, thus including the risk of sabotage. In view of their enormous impact, this is certainly obvious for oil spills.[201]

240. In previous case documents, API standard 1160, *Managing System Integrity for Hazardous Liquid Pipelines*, was already referred to. Chapter 10.1 of this standard is devoted to the *Prevention of third-party damage*:

> TPD is a major cause of pipeline releases. Current US DOT data indicates that roughly one-quarter of all reported pipeline incidents are caused by TPD. The following mitigation activities should be considered.[202]

241. According to Shell, in Nigeria, two-thirds of all oil spills, not one-quarter of these spills, are caused by sabotage. Thus, the suggestions worked out in the Standard should certainly be contemplated in Nigeria. These are:

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[200] API Recommended Practice 1173 (2015), Exhibit Q.17 (cases a - e), par. 7.4.

[201] See, for example, ISO Standard 14001 on E*nvironmental management systems (Requirements with guidance for use): "The organisation shall establish, implement and maintain a procedure(s) (a) to identify the environmental aspects of its activities [...]that it can control and those that it can influence; (b) to determine those aspects that have or can have significant impact(s) on the environment".* See also API Recommended Practice 51R, *Environmental Protection for Onshore Oil and Gas Production Operations and Leases* (July 2009), Exhibit Q.18 (cases a - e), chapter 8.7, par. 8.7.2.

[202] API Standard 1160 (2001), Exhibit Q.16 (cases a - e), par. 10.1

10.1.1 One-call Utility Location Systems

10.1.2 Improved Line Marking

10.1.3 Optical or Ground Intrusion Electronic Detection

10. 1.1 Increased Depth of cover

10.1.5 Improved Public Education

10.1.6 Right-of-way Maintenance

10.1.7 Improved or More Frequent Right-of-Way Inspections

10.1.8 Mechanical Pipe Protection

10.1.9 Additional Pipe Wall Thickness

10.1.10 Pipeline Marker Tape or Warning Mesh Installed over Pipeline[203]

242. In the Niger Delta, it would in any event have been obvious if SPDC (a) had fitted its pipelines with technical features that can limit (the consequences of) sabotage; (b) had implemented a system of electronic monitoring;[204] and (c) had conducted inspections more frequently.

243. The experts also concluded:

> Above ground monitoring is essential to ensure the safety of the pipelines.[205]

244. API 1130 *Computational Pipeline Monitoring for Liquids* (**Exhibit Q.26**) describes various forms of internal and external electronic monitoring. For example, the first group includes *fiber optic* or *dielectric hydrocarbon sensing cables*, *acoustic emissions detectors* and *hydrocarbon sensors*.[206]

245. Frequent patrols are also required under Nigerian law. The Oil and Gas Pipeline Regulations stipulate that "*the right of way shall be regularly patrolled for prompt detection of any line break, encroachment or any other development that may endanger the safety of the pipeline*".[207] ASME B31.4-2002, *Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids*, also stipulates periodical inspections.[208]

246. The *Pipeline Integrity Management Handbook: Risk Management and Evaluation* states the following regarding *third-party damage*:

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[203] API Standard 1160 (2001), Exhibit Q.16 (cases a - e), par. 10.1.1-10.1.10.

[204] API Standard 1160 (2001), Exhibit Q.16 (cases a - e), par. 10.1.3; API 1130 (2002), **Exhibit Q.26** (cases a - e), par. 5.2. and following.

[205] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 18.

[206] API 1130 (2002), Exhibit Q.26 (cases a - e), par. 4.1.1 and 4.1.2. The group of (internal) *computational pipelines monitoring systems* includes *line balance methods, pressure monitoring* and *statistical analysis*.

[207] Article 9(h) of the Oil and Gas Pipeline Regulations (S.I. 14 of 1995), annex with Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1A (cases a - e).

[208] ASME B31.4-2002, Exhibit Q.20 (cases a - e), par. 451.5: Patrolling.

> Due to the uncertainty of its occurrence, effective threat mitigation program is required. Shallow depth of buried pipe in an agricultural land is especially susceptible to third party damage. [...]
>
> Control on land encroachment and monitoring the length of pipeline should be carried on a regular basis. Several modern steps have been taken, and tools are available for monitoring including online monitoring and areal observation, coupled with GPS coordinates to locate potential source of damage encroachment and unplanned activities around the pipeline, and immediate reaction.
>
> The data to be collected for risk assessment should include the following:
>
> (a) History of vandalism to the pipe and also in the area to other pipelines,
>
> (b) Bell-hole inspection data of the pipe location hit,
>
> (c) Any history of leaks due to damage and its location,
>
> (d) ILI inspection reports of dents and gouges at the top half of the pipe,
>
> (e) one-call records, and
>
> (f) encroachment records.
>
> The risk assessment should establish the possible level of threat, and plans must be in place to address the failures that can sometimes be high consequence and create emergency situation.
>
> Prevention is the best step to control third party damage threats to pipeline. Prevention measures are the first line of defense from third party damages; however, if a damage occurs, the repair is the next step. [209]

247. Based on his overview of applicable standards, Richard Steiner also concluded as follows:

> Taking into account the threat of Intentional TPD [third party damage; added by attorney]/ sabotage in an operating area, particularly one with such security risk as the Niger Delta, it is reasonable to expect an operating company to evaluate and incorporate into their Integrity Management program rigorous safety measures designed specifically to mitigate this threat. These additional sabotage prevention measures should include such things as more robust

[209] R. Singh, *Pipeline Integrity Handbook: Risk Management and Evaluation* (Gulf Professional Publishing 2017), Exhibit Q.15 (cases a - e), p. 81-84 (the quotation in question has not changed since the first edition of the handbook). Based on the Court of Appeal's Interlocutory Ruling of 18 December 2015, Shell was required to make the described incidents on the pipeline available for inspection. The experts also requested a history of incidents. However, according to Shell, these data do not exist or are irrelevant (Exhibit Q.22 attachment with the e-mail from attorney De Bie Leuveling Tjeenk to the experts and attorney Samkalden dated 3 November 2017). This contributes to the conclusion in chapter [xxx] that Shell breached its duty of care.

> Design Factors including sabotage resistant pipe specifications, thicker walled pipe, reduced D/t ratio (pipe diameter / pipe wall thickness), higher grade steel, pipe-in-a-pipe or pipe-bundle technology, etc.; alternate choices for routing pipelines away from high-risk areas; deeper burial of underground pipeline segments; concrete casements around pipe; more rigorous and frequent inspection protocols; enhanced Leak Detection Systems with greater sensitivity; better community engagement; and other traditional security techniques.
>
> A crucial component of pipeline sabotage prevention system is enhanced pipeline surveillance. Pipeline surveillance regimes can include remote closed-circuit television cameras, fibre-optic sensor technology along the entire length of the pipeline, more frequent aerial patrols, remote listening devices (e.g. hydrophones, etc.) to detect drilling, digging, tapping, engine noise, explosions; satellite imaging; and so forth. Additional technologies that should be considered for Nigeria include the Westminster DDS-J Diver Detection Sonar system that scans a distance underwater of 1 km / node, 25 m on each side and 50 m vertically, has hydrophones to detect any disturbance, and sounds an alarm when a disturbance occurs in the scanned area. As well, fibre-optic cable sensors can detect digging, tapping, or other disturbance, with one sensor capable of scanning a 40 km pipeline segment. Once an enhanced surveillance system is implemented, a robust public information campaign to inform local residents that enhanced security is in place will act as a deterrent to sabotage and illegal bunkering.[210]

248. Moreover, these starting points also apply *mutatis mutandis* for other facilities, such as a drilling well. See, for example, API RP 51R, which stipulates the following:

> It is essential that all formations bearing [...] oil, or geothermal resources be protected and/or isolated. The prevention of gas or fluid migration to other zones or to the surface is of primary importance.[211]

4.5 Assumed duty of care

249. Moreover, Shell itself embraced the standards mentioned above and incorporated these in its internal standards and manuals.

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[210] Richard Steiner, *Double standards? International Standards to Prevent and Control Pipeline Oil Spills Compared with Shell Practices in Nigeria*, Alaska (November 2008), Exhibit B.1 (cases a - e), p. 30-31.

[211] API Recommended Practice 51R, *Environmental Protection for Onshore Oil and Gas Production Operations and Leases* (July 2009), Exhibit Q.18 (cases a - e), par 6.4.2.3.

250. Chapter 5.1.2.1. of the Statement of Reply (in all cases) works out in more detail that Shell prides itself on making every effort to prevent any adverse consequences of its work on people and the environment.[212]

251. A first requisite step in this direction - as also demonstrated by the standards discussed in the previous paragraphs - is charting risks and maintaining records of relevant data, such as incidents, and hazards and effects. The Shell Group manuals require operating units to develop an adequate risk management system. In this respect, EP95-0100 implements ISO standard 14001.

252. According to section 4.1 (*hazards and effects*) of EP95-0100, this not only pertains to risks that fall under the direct control of the operating company, but also those *"over which it can be expected to have an influence"*.[213] The [redacted] is to demonstrate that *"controls are in place to reduce risks to ALARP"*.[214]

253. In this connection, operating companies are also deemed to maintain a *Hazards and Effects Register*. The objective of this is to address the identified risks and minimize any adverse consequences for people and the environment. EP95-0300 *Overview Hazards and Effects Management Process* includes the following in this regard:

> 4.3.2 Hazards and effects register
>
> The hazards and effects information gained from the application of HEMP tools and techniques is incorporated in the HSE Case in what is called a Hazards and Effects Register.
>
> The HSE Case has to demonstrate that:
>
> - all hazards, effects and threats have been identified
> - the likelihood and consequences of a hazardous event have been assessed
> - that controls to manage potential causes (threat barriers) are in place
> - that recovery preparedness measures to mitigate potential consequences have been taken.[215]

[redacted] In SPDC's [redacted], the [redacted] mentions the following: [redacted]

[212] See *inter alia* the Statement of Reply (cases c + d), nos. 164-165.

[213] EP 95-100, *Hazards Effects Management Process*, Exhibit N.8 (cases a - e), par. 4.1.

[214] EP 95-100, *Hazards Effects Management Process*, Exhibit N.8 (cases a - e), par. 3.8. ALARP stands for *As Low As Reasonably Practicable*.

[215] EP95-0300 Overview Hazards and Effects Management Process, Exhibit N.9.

[redacted] The [redacted] also includes the following [redacted]

255. [redacted][218] the *Hazards and Effects Register*.

256. [redacted] The appellant's claim to submit this plan was previously dismissed.[220]

257. In 2004, Shell employees wrote the following in an article for Petroleum Engineers:

> Although, Well abandonment (decommissioning) is part of a Field development Plan, this activity has often being delayed because it is a non-oil generating activity. Moreso, it is most often ranked low when competing for the limited funds with other oil generating activities.
>
> However, SPDC has recognised the need to accommodate 'limited' well abandonment activities every year to ensure that as a responsible operator it aims to safeguard people and environment as required by law.[221]

258. In his 2002 Country Review for the members of the *Committee of Managing Directors*, Van de Vijver already observed the following in the *'SGN Challenges Overview'* under the heading "*Must Do*": "*Improve HSE*".[222]

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216 [redacted]

217 [redacted]

218 [redacted]

219 [redacted]

[220] Interlocutory Ruling of the Court of Appeal of The Hague, 18 December 2015, par. 5.10 (cases a +b), par. 6.10 (cases c + d), par. 5.6 (case e).

[221] Odita et al., *Abandonment of Wells in Shell Nigeria Operations*, Society of Petroleum Engineers (2004), Exhibit M.12 (case e), p. 1.

[222] Note to CMD – Nigeria Country Review 2002, Exhibit Q.5 (cases a - e), p. 16.

4.6 Conclusion

259. Shell had both a statutory and a common law duty of care to take measures in order to prevent any damage as a result of oil spills that were caused by third parties. This duty of care in any event entailed that Shell had to chart the risks of various causes of oil spills and minimize these risks.

260. Therefore, sabotage is one of the most prominent risks that Shell had to take into account. Shell could thus be expected to take reasonable measures to prevent sabotage.

5 GROUND FOR APPEAL 5 (GOI/ORUMA): THE DISTRICT COURT WRONGLY CONCLUDED THAT SPDC WAS NOT NEGLIGENT WITH REGARD TO THE OCCURRENCE OF THE OIL SPILLS

5.1 The judgment

261. The District Court wrongly found as follows in par. 4.48-4.50 (**cases c + d**) (see par. 4.50-4.52 (**cases a + b)**):

> 4.48. [...] In the case at issue, the sabotage of the underground oil pipeline in October 2004 near Goi was not easy to carry out. After all, the oil pipeline was dug in so that it was necessary to first dig relatively deeply to reach the steel oil pipeline. Then the pipeline had to be damaged with a tool such that oil could start to leak. [...]
>
> 4.49. In addition, SPDC could only have reduced or ruled out the general risk of sabotage near Goi in 2004 at very high cost. Milieudefensie et al. submitted that SPDC could and should have taken more measures to prevent sabotage, such as installing cameras or measuring instruments that could have detected sabotage of the underground oil pipeline (sooner) and/or deploying (more or better) surveillance teams. However, for the employees of SPDC, Ogoniland is a dangerous area that has been extremely difficult to access since 1993, so that for this reason alone, continuous monitoring of the entire pipeline or a swift response to an observed attempt at sabotage was, in fact, not easy for SPDC in 2004. It must be pointed out that the cameras or measuring instruments mentioned can also be sabotaged. In addition, in no. 117 of the rejoinder, Shell et al. submitted that – at its own expense - SPDC already had surveillance teams chosen from the local communities conduct daily surveillance rounds of this underground pipeline in Ogoniland, monitored by means of helicopters and used a system to measure the pressure in the pipelines. On the occasion of the pleadings, Milieudefensie et al. have not (sufficiently) refuted these factual arguments of Shell et al., which means that the District Court will consider these factual arguments of Shell et al. in these two proceedings to be correct. However, these additional preventive measures taken by SPDC were unable to prevent the subject sabotage in 2004 near Goi in Ogoniland. Thus, only the extreme measure mentioned by Milieudefensie et al. of permanently closing off the oil pipeline in Ogoniland and installing and putting a new oil pipeline that circumvents Ogoniland into operation was, in fact, the only adequate measure for ruling out the risk of sabotage as committed in October 2004 near Goi. However, it has not been submitted or demonstrated that in 2004 under Nigerian law, SPDC could reasonably be demanded to take such a costly and extensive measure.
>
> 4.50 [...]Under those circumstances, the District Court is of the opinion that in this case, no tort of negligence of SPDC [against Dooh] is involved.

5.2 Measures against oil spills caused by sabotage

262. The appellants contest (i) that the measures described by the District Court had indeed been applied and (ii) that in this way, Shell had done enough to prevent sabotage.

263. It is correct that the pipelines had been buried. According to the experts, the pipeline at Goi had been buried at a depth of 1-1.5 metres and the pipeline at Oruma at a depth of approximately 2,5 metres. Under Nigerian law, a pipeline that is buried must be at a depth of at least 1 metre in *'dry land'* and *'swamp areas'*. According to API 1160, an *increased depth of cover*, for example approximately 1.5-2 metres, may help to prevent sabotage.[223]

264. Burying the pipelines is also the only previously mentioned measure that SPDC took. Shell did not follow the subsequent obvious suggestions from the standards and handbooks:

- Mechanical pipe protection/ renewing protected coatings;[224]
- Optical or electronic ground intrusion detection systems;[225]
- Improved or more frequent right-of-way inspections;[226]

265. The possibilities mentioned are frequently applied in the industry. In addition, there are also state of the art detection possibilities, of course, for example cameras that can be used to immediately detect any tampering with the pipeline. Moreover, the possibility of performing such camera monitoring with drones (with infrared sensors) has existed for a long time; this minimizes the risk that in turn, the cameras are sabotaged.

266. Shell could also have opted to divert the pipelines or to install new pipelines with stronger features, for example in the area of coating, wall thickness, technology, etc.[227]

267. The District Court wrongly found that less could be demanded of SPDC in Goi, because "continuous monitoring of the entire pipeline or a swift response to an observed attempt at sabotage was, in fact, not easy for SPDC in 2004",[228] given that it had withdrawn from Ogoniland for safety reasons. However, SPDC's withdrawal should have been precisely the reason for careful risk assessment and for taking measures to prevent Shell's absence from leading to a - foreseeable - increase in sabotage attempts.

268. The fact that the "cameras or measuring instruments […] can also be sabotaged",[229] does not discharge Shell from the obligation to take such measures, either. Moreover, in the interim, Shell

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[223] API Standard 1160 (2001), Exhibit Q.16 (cases a - e), par. 10.1.4.

[224] See the High Court of Justice, Technology and Construction Court, Judgement dated of 20th June 2014, *Bodo Community and Others v. SPDC* (VK), [2014] EWHC 1973 (TCC), Exhibit O.1 (cases a - e), par. 92(g); API Standard 1160 (2001), Exhibit Q.16 (cases a - e), chapter 10.1.8.

[225] See *Bodo Community v. SPDC* (2014), Exhibit O.1 (cases a - e), par. 92(g); API Standard 1160 (2001), Exhibit Q.16 (cases a - e), chapter 10.1.3.

[226] API Standard 1160 (2001), Exhibit Q.16 (cases a - e), par. 10.1.7.

[227] See API Standard 1160 (2001), Exhibit Q.16 (cases a - e), par. 10.1; Richard Steiner, *Double standards? International Standards to Prevent and Control Pipeline Oil Spills Compared with Shell Practices in Nigeria*, Alaska (November 2008), Exhibit B.1 (cases a - e)

[228] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.49 (cases c + d).

[229] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.49 (cases c + d) and par. 4.51 (cases a + b).

apparently has taken such measures. In its brochure *Shell in Nigeria - Security, Theft, Sabotage and Spills*. Shell writes:

> We have also installed state-of-the-art high definition cameras to a specialised helicopter that greatly improves the surveillance of our assets and have implemented anti-theft protection mechanisms on key infrastructure.[230]

5.3 No effective measures by Shell

269. The District Court further wrongly assumed that Shell had surveillance teams chosen from the local communities conduct daily surveillance rounds of this underground pipeline in Ogoniland, monitored by means of helicopters and used a system to measure the pressure in the pipelines.

270. It is an established fact that the pipelines were not equipped with a system that measures the pressure. For the pipeline at Goi, this was already demonstrated by an expert investigation in the *Bodo* case;[231] [redacted]:

[redacted]

271. The 'low pressure safety-control' that Shell described in no. 277 of the Statement of Defence on Appeal Phase 1, which causes the pumps in the flow stations to automatically switch off if the pressure falls below a specific minimum level does not qualify as a *Leak Detection System* in this sense, [redacted] because there is such a long time between (a) the start of a leak at a random point in the pipeline and (b) a substantial decrease in the pressure in the flow station kilometres away which causes the pump to switch off, that unnecessary environmental damage is suffered for a long period. In addition, this method does not offer any indication whatsoever regarding the location of the oil spill.

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[230] *Shell in Nigeria - Security, Theft, Sabotage and Spills* (2017), available via https://www.shell.com.ng/media/nigeria-reports-and-publications-briefing-notes/security-theft-and-sabotage.html (lastly visited on 13 January 2018). See in this connection also the IUCN report: https://portals.iucn.org/library/sites/library/files/documents/2018-047-En.pdf, p. 10, which describes measures that SPDC took after the 2013 IUCN report.

[231] *Reply to the Defence Bodo Community*, Exhibit O.2 (cases a - e), par. 16.1: "*SPDC has admitted that there was no LDS operating on the Bomu-Bonny section of the TNP*"; see also the Statement of Appeal Phase 1 of Milieudefensie et al., chapter 2.6.3.

[232] [redacted]

272. The appellants have consistently challenged that Shell had the pipelines patrolled and monitored using helicopters on a daily basis. At best, both the patrols and the helicopter flights occurred incidentally and therefore were not adequate measures for preventing sabotage.

273. It has meanwhile been shown in the English *Bodo* case that (i) there were not enough security guards around the pipeline at Goi, and that, moreover, the guards who were present (ii) were insufficiently trained and (iii) inadequately equipped,[233] and that (iv) their work was not supervised.[234] SPDC did not know how many security guards were actually working around Bodo in the period 2000-2009;[235] this work was not (or was hardly) reported to SPDC.[236] The limited reliability and effectiveness of the possible surveillances is further also demonstrated by the fact that (v) Shell claims that it is necessary to first verify their reports of oil spills itself before taking any measures to limit the damage.[237] In 2014, it was demonstrated just how poor the supervision of the security was when Shell's own contractors were arrested for oil theft.[238] [redacted]

274. The [redacted] that Shell made available for inspection [redacted] demonstrates [redacted]

275. In the Interlocutory Ruling of 18 December 2015, at that stage of the proceedings, the Court of Appeal dismissed the claim for access to *inter alia* the surveillance contracts and helicopter logs. In par. 6.5 (cases c + d),[240] the Court of Appeal seems to suggest that at a later stage in the proceedings, there may possibly be a reason to reconsider the legitimate interest in the claim for access to the documents specified as j to n. Should the Court of Appeal conclude that the oil spills were caused by sabotage, the appellants believe that currently they do have a legitimate interest in access. The following is noted in light of Shell's argument that it no longer has these documents.[241]

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[233] *Reply to the Defence Bodo Community*, Exhibit O.2 (cases a - e), par. 23, 24.

[234] *Reply to the defence Bodo Community*, Exhibit O.2 (cases a - e), par. 25.

[235] *Reply to the defence Bodo Community*, Exhibit O.2 (cases a - e), par. 25.1.

[236] *Reply to the defence Bodo Community*, Exhibit O.2 (cases a - e), par. 25.2, 25.3.

[237] See *inter alia* the statement of rejoinder, no. 18 (cases c + d).

[238] News report of 24 June 2013, formerly available via http://www.stakeholderdemocracy.org/cgblog/535/89/Serious-questions-following-Trans-Nigerian-Pipeline-explosion-at-Bodo.html, lastly visited on 3 October 2014.

[239] [redacted]

[240] See par. 5.5 (cases a + b).

[241] Shell's Statement of Defence on Appeal in the Motion, no. 309.

276. Shell's obligation to maintain adequate documentation has been set out at length in the above.[242] ASME B31.4 *(Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids)* explicitly mentions this category of documents in section 455:

> 455 RECORDS
>
> For operation and maintenance purposes, the following records shall be properly maintained:
>
> (b) pipeline patrol records
>
> (e) records pertaining to routine or unusual inspections

277. Given that according to good industry practice, Shell could be expected to carefully document the risks and the measures that it had taken, in as far as there are any doubts regarding the adequacy of the surveillance and patrols, the consequences of such inadequacy should be borne by Shell.

278. The District Court further wrongly finds that other measures, and ultimately closing off the pipeline, could not reasonably be demanded from SPDC.[243] As demonstrated by chapter 6.2, SPDC had numerous measures at its disposal to limit the risk of sabotage. In view of the enormous impact of the oil pollution caused by oil spills from the pipelines - of which the oil spills at issue are no more than a fraction - SPDC should have examined all venues to limit that pollution. If less extensive methods prove to be inefficient, this also includes the possibility of replacing, diverting or closing off the pipeline.

279. Finally, in this connection it is also relevant that - in breach of good oil field practice - Shell apparently failed to map the risk of damage as a result of sabotage, which was consistently foreseeable for Shell,[244] and to document incidents on the pipeline,[245] or at least to keep these data such that they *"remain legible and readily identifiable"* and *"readily available and accessible"*.[246] This also demonstrates that Shell accepted the occurrence of damage as a result of oil spills from its pipeline, irrespective of whether these were caused by overdue maintenance or by influences of third parties, in advance.

5.4 Conclusion

280. SPDC violated its duty of care to protect the pipelines against all causes of leakage, including sabotage. SPDC should have protected the pipelines using modern techniques; in addition, it should have secured the pipelines by means of (more intensive) surveillance operations.

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[242] In addition to the standards mentioned before, see also: API Spec Q1 (9th edition, in force as of June 2014) and the HSE Performance Monitoring and Reporting Manual (Exhibit Q.8).

[243] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.48-4.49 (cases c + d) and par. 4.50-4.51 (cases a + b).

[244] [see: xxx obligation to maintain a hazards and effects register]

[245] API Recommended Practice 1173 (2015), Exhibit Q.17 (cases a - e), par. 9 and 14.

[246] API Recommended Practice 1173 (2015), Exhibit Q.17 (cases a - e), par. 14.1 (Control of documents), (c) and (d).

281. Given that, despite the large number of oil spills that are allegedly caused by sabotage, no measure has been shown to have been taken other than burying the pipelines, the conclusion must be that SPDC violated its duty of care.

6 GROUND FOR APPEAL 6 (ALL CASES): THE DISTRICT COURT WRONGLY FOUND THAT SHELL DID NOT HAVE ANY DUTY OF CARE TO ADEQUATELY RESPOND

6.1 The judgment

282. The District Court wrongly found as follows in par. 4.51 (cases c + d); par. 4.53 (cases a + b):

> 4.51. Milieudefensie et al. further argued that SPDC committed a tort of negligence against Dooh by failing to adequately respond to the oil spill in October 2004 near Goi. 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 demonstrates that SPDC may have committed a tort of negligence by failing to adequately respond to an oil spill. In addition, as already found above, none of the exceptional situations prescribed by Lord Goff occurs in the case at issue. Moreover, (in brief) in the case at issue, in October 2004 SPDC, in fact, remedied the oil spill within three days and as quickly as reasonably possible, so that it cannot be held that its response was inadequate. The conclusion is that in this respect, as well, SPDC did not commit any tort of negligence against Dooh.

283. And regarding Ikot Ada Udo (case e):

> "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."

6.2 The duty of care to adequately respond

284. Irrespective of the cause of the oil spill, Shell had the obligation to take action after the oil spill occurred in order to limit the damage to the extent possible.

285. This is already obvious because as operator / licensee, Shell is the only party in the position to limit the harmful consequences of the oil spill.

286. This duty of care in part results from Nigerian laws and regulations and international standards. In the event of a failure, the operator is also liable based on the tort of negligence.

287. As the District Court rightly determined, it was foreseeable for Shell that the oil spills would lead to damage for people who live in the vicinity or who farm and fish at that location.[247] Proximity is also involved, given that Shell opted to put its facilities in or have its pipelines run through the immediate vicinity of the land of the appellants and other victims of the oil spills.[248] This means that the requirements of the *Caparo* test have been satisfied.[249]

288. The fact that Shell also considers it to be its obligation to adequately respond after an oil spill is also demonstrated by its own communication, in which it states that Shell is: *"committed to stopping and containing all spills, recovering and cleaning up as much oil as possible and restoring sites in compliance with regulations as quickly as possible."*[250]

6.2.1 Statutory duty

289. Based on the Oil Pipelines Act, SPDC had the obligation to repair its pipelines:

> The holder of a license shall pay compensation-
>
> (b) to any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work, structure or thing executed under the license, for any such damage not otherwise made good.

290. Thus, to the extent that the damage is the result of Shell's failure to repair the pipeline, Shell is required to compensate that damage.

6.2.2 Nigerian regulations

291. The EGASPIN not only stipulate that practical measures must be taken to prevent pollution,[251] they also stipulate in so many words that swift, adequate measures must be taken following an oil spill, irrespective of the cause of this oil spill:

> An operator shall be responsible for the containment and recovery of any spill discovered within his operational area, whether or not its source is known. The

[247] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.47 (cases c + d); par. 4.49 (cases a + b); and par. 4.42 (case e).

[248] See also: ground for appeal 3.

[249] For a more extensive substantiation of this point, also see the Statement of Reply (cases a + e), chapter 6.1.

[250] Formerly available via http://www-static.shell.com/static/nga/downloads/pdfs/briefing_notes/env_perf_oilspills.pdf.

[251] "*License holders [...] are required [...] to take/adapt Practical Precautions and/or all steps Practicable to prevent pollution:* EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. B.1.1.1.

> operator shall take prompt and adequate steps to contain, remove, and dispose of the spill.[252]

292. According to the EGASPIN, extra haste is called for if there is a risk that groundwater will also be polluted, as in an area with creeks and rivers:

> Due consideration should be given to prevent groundwater contamination. This is particularly necessary in areas where groundwater table is close to the surface. In a situation where a spill occurs adjacent to water courses and drainage system, a high priority shall be given to containment procedures to prevent its spread into these areas.[253]

293. Due to this vulnerability, the EGASPIN even stipulate hard terms:

> (i) For all waters, there shall be no visible oil sheen after the first 30 days of the occurrence of the spill no matter the extent of the spill
>
> (ii) For swamp areas, there shall not be any sign of oil stain within the first 60 days of occurrence of the incident.[254]

294. Thus, the EGASPIN stipulate Environmental Sensitivity Index (ESI) mapping; the mapping by the operator of areas that are particularly vulnerable in the event of oil pollution.[255] It follows from the EGASPIN that the intention of this is to allocate priority to these areas *"to effect a quick oil spill response strategy".*[256] The EGASPIN also contain conditions, for example regarding the availability of equipment,[257] communication methods,[258] and documentation.[259]

295. In the *Oil Contingency Plan* to be drawn up by the operator, the operator is deemed to consider all of the following factors:

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[252] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. B.4.1.
[253] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. B.2.6.2.
[254] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. B.2.11.3.
[255] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. B.2.3.2.
[256] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. B.2.3.2.1: *objectives of an E.S.I.* See the Summons, par. 9.3.1 (cases a - e).
[257] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. B.2.5.2: *"It shall be mandatory that each operator stocks and/or is capable of mobilizing a minimum quantity of containment equipment at each facility. The minimum equipment shall be such as to contain at least the quantity of the largest possible spill that can occur from the facility"* and B.2.5.4: *"An operator of a facility shall be required to have in the plan appropriate equipment/capabilities for recovering and removing spills from the environment within which the operation is conducted"*.
[258] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. B.2.7.
[259] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. B.2.10.1: *"Operators or facility owners shall accurately record the history of the oil spill. A log of daily events shall be kept from the time a spill is first noticed until clean-up operations are completed"*.

> 2.3.1 Each operator or facility owner shall describe the areas of operation. The operator is to identify beforehand, all sensitive areas that should be protected in the event of a spill.
>
> 2.3.1.1 It is mandatory to locate all Potential sources of spills from the facility(ies) and thereafter:
>
> (i) Estimate the size of each potential spill;
>
> (ii) Predict movement of spills and determine potential containment sites;
>
> (iii) Determine the response time necessary;
>
> (iv) Establish the probability of more than one spill occurring at the same time and the consequences of such occurrences;
>
> (v) Determine the equipment and materials required to contain and clean- up the potential spills (See Appendix VIII-B1).
>
> (vi) Make an inventory of available assets which would satisfy the equipment and personnel requirements to include the maximum necessary for the anticipated concurrent spills.
>
> (vii) Determine the deficiencies of equipment and personnel by comparing the requirements of the plan with the available assets, and correcting such deficiencies according to the said requirements, on a continual basis.
>
> (viii) Select the response vehicle which will provide the control/combat response that has been determined to be required.
>
> (ix) Locate environmentally sensitive areas requiring priority protection. This will involve the development of an Environmental Sensitivity Index (ESI) Map of the operational areas. The guidelines for the development of ESI Maps are as in Article 2.3.2.[260]

296. The *Petroleum (Drilling and Production) Regulations* also go further than the general duty of care mentioned above that requires an operator to do everything possible to combat environmental pollution. In addition, Article 25 requires that "*where any such pollution occurs or has occurred, [to] take prompt steps to control and, if possible, end it*".[261] Article 37 of the Petroleum (Drilling and Production) Regulations requires:

> The licensee or lessee shall maintain all apparatus and appliances in use in his operations, and all boreholes and wells capable of producing petroleum, in good repair and condition, and shall carry out all his operations in a proper and workmanlike manner in accordance with these and other relevant

[260] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. B.2.3.1.

[261] Article 25 of the Petroleum (Drilling and Production) Regulations, Exhibit G.1 (cases a - e).

> regulations and methods and practices accepted by the Director of Petroleum Resources as good oilfield practice; and without prejudice to the generality of the foregoing he shall, in accordance with those practices, take all steps practicable [...]
>
> (d) to prevent the escape of petroleum into any water, well, spring, stream, river, lake, reservoir, estuary or harbour; and
>
> (e) to cause as little damage as possible to the surface of the relevant area and to the trees, crops, buildings, structures and other property thereon. (Emphasis added by attorney).

297. Article 37 stipulates that the licensee must act in accordance with good oil field practice. What good oil field practice entails is to be determined in part based on international standards.[262]

298. Finally, reference is made here to the obligation expressed in the EGASPIN, after observing an oil spill, to complete the remediation work, to maintain a log and to inform the *Department of Petroleum Resources* of the developments.[263]

299. In the case of *Agip Plc v. Ossai* discussed above, the Court of Appeal (like the District Court in the first instance) included the *Mineral Oils (Safety) Regulations* - similar to the regulations referred to above - in its assessment that served to find that the summoned oil company had a duty of care that it had violated.[264]

6.2.3 Duty of care in Nigerian case law

300. In contrast to what the District Court apparently assumes,[265] Nigerian case law also demonstrates that Shell had a duty of care to adequately respond.

301. In the *SPDC v. Isaiah* case the issue was that SPDC had failed to create a (proper) oil trap to collect and isolate the spilled oil. The Court of Appeal confirmed the trial court's finding that SPDC had been negligent:

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[262] See Article 9(k) of the Oil and Gas Pipeline Regulations (S.I. 14 of 1995), annex with Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1A (cases a - e); Article 2.4.8 of the *Guidelines and Procedures for the Construction, Operation and Maintenance of Oil and Gas Pipelines and their Ancillary*; Article 7 of the Mineral Oil (Safety) Regulations, Exhibit G.1 (cases a - e). According to these regulations, at a minimum the standards of the *Institute of Petroleum Safety*, the *American Petroleum Institute* and the *American Society of Mechanical Engineers* must be deemed to apply.

[263] Statement of Reply, no. 259 (cases c + d); no. 260 (cases a + b); no. 247 (case e).

[264] Chapter 4.2.2.

[265] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.51 (cases c + d), par. 4.53 (cases a + b) and par. 4.47 (case e): "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 demonstrates that SPDC may have committed a tort of negligence by failing to adequately respond to an oil spill."

> It is an act of negligence on the part of the defendant for not digging or ensuring that there was an oil trap to contain any spillage before cutting the dented portion of the pipe for replacement. If an oil trap had been dug, the spillage would have been contained therein and would not have spilled on to the plaintiffs' land and swamp to pollute the crops, vegetation, ponds and water.[266]

302. As demonstrated by the submitted case law and already explained in chapter 4.2.2, application of the rule in *Rylands v. Fletcher* frequently leads to the result that the question regarding whether or not an operator acted negligently does not have to be assessed.[267]

303. Moreover, the District Court also wrongly found that in the case at issue, none of the exceptional situations described by Lord Goff occurred.[268] Robert Weir states the following in this regard:

> 39. I consider it clear that an operator of a pipe which is damaged (through no fault of its own) will owe a duty to repair its pipe and to stop the leak once it is or ought to be on notice of the leak. A passer-by can watch a house burning and lawfully do nothing under English law. The owner of the house, on the other hand, returning to discover that his home is on fire through no fault of his own, is, I think, obliged to take steps to stop the fire and so prevent or limit damage to others. This fits into category (iv) of Lord Goff's analysis in *Smith v Littlewoods* but barely requires legal authority to support such an obvious statement. The duty would not arise simply because there is a leak – it arises when the operator is (or should be) on notice that the leak has occurred. The duty is, in substance, codified in section 11(5) OPA.
>
> 40. I cannot, therefore, agree with the assessment made by District Court of the Hague at 4.51 insofar as there the court is indicating that, when on notice, the operator is nevertheless not under a legal duty (whether under the OPA or at common law) to respond adequately to the leak.[269]

6.2.4 Standards

304. A glance at the applicable standards for good oil field practice also makes it obvious that in the event of an oil spill, an operator is consistently required to take action in order to limit the

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[266] *SPDC v. Isaiah* [1997] 6 NWLR 236, Annex E with Prof Emeka Duruigbo's Legal Opinion, Exhibit Q.1 (cases a - e), p. 251 (H).

[267] See also *Umudge v. Shell* [1975] (SC 254/73), Annex 53 with Ladan and Ako's Legal Opinion, Exhibit L.1 (cases a - e) and *SPDC v. Anaro,* LOR (5/6/2015) SC, Exhibit Q.24 (cases a - e).

[268] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.51 (cases c + d) and par. 4.53 (cases a + b): "In addition, as already found above, none of the exceptional situations prescribed by Lord Goff occurs in the case at issue."

[269] Opinion of Robert Weir QC, Exhibit N.2 (cases a - e), par. 39-40.

consequences of this spill. As explained before, under Nigerian law, the failure to comply with *International Best Practices* leads to liability based on negligence.[270]

305. The experts who studied the cause of the oil spill also addressed this in their report. They explicitly consider that *"the pipeline must be depressurized as soon as possible after a leak"*.

306. API *recommended Practice 51R (Environmental protection for onshore oil and gas production operations and leases)* considers the following:

> In the event a spill occurs, the source of the spill should be stopped, or reduced as much as possible, in a safe manner. The spread of the spilled substance should be controlled or contained in the smallest possible area to minimize the adverse effects.[271]

307. Based on ASME B.31.4-2002, an operator is in any event required to prepare an Emergency plan, which "*shall include procedures for prompt and expedient remedial action providing for the safety of the public and operating company personnel, minimizing property damage, protecting the environment, and limiting accidental discharge from the piping system*".[272] The plan must *inter alia* provide for "*acquainting and training of personnel responsible for the prompt execution for an emergency action*"[273] and communications with the police, fire brigade, etc. "*to provide prompt intercommunications for coordinated remedial action*"[274]. The Emergency plan must also describe the procedures to remove the pressure from the pipeline "*by ceasing pumping operations on the piping system, opening the system to delivery storage on either side of the leak site, and expeditious closing of block valves on both sides of the leak site*".[275]

308. API *Recommended Practice* 1173 also describes that an operator must develop procedures *"for responding effectively to a pipeline incident"*.[276] This in any event includes:

> a) determination of potential types of emergencies [...]
>
> b) internal and external notification requirements;

---

[270] See chapter 5.4.

[271] API Recommended Practice 51R, *Environmental Protection for Onshore Oil and Gas Production Operations and Leases* (July 2009), Exhibit Q.18 (cases a - e), par. 8.7.5.

[272] ASME B.31.4-2002, *Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids*, Exhibit Q.20 (cases a - e), par. 454(a).

[273] ASME B.31.4-2002, *Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids*, Exhibit Q.20 (cases a - e), par. 454(b).

[274] ASME B.31.4-2002, *Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids*, Exhibit Q.20 (cases a - e), par. 454(c).

[275] ASME B.31.4-2002, *Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids*, Exhibit Q.20 (cases a - e), par. 454(e)(2).

[276] API Recommended Practice 1173 (2015), Exhibit Q.17 (cases a - e), par. 12. See also 7.4 on *Risk prevention and mitigation.*

> c) identification of response resources and interface, including local emergency responders;
>
> d) recognition and use of Unified Command. Incident Command Structure;
>
> e) safety health and environmental processes;
>
> f) communication plan;
>
> g) training and drills, including involvement of external agencies and organizations;
>
> h) lessons and improvement processes; and
>
> i) periodic review and update of the plans. [...][277]

309. The need for well-trained personnel is also emphasized here:

> The pipeline operator shall assure that personnel whose responsibilities fall within the scope of the PSMS have an appropriate level of competence in terms of education, training, knowledge, and experience.[278]

310. The *Guide to Tiered Preparedness and Response* by the International Petroleum Industry Environmental Conservation Association (**Exhibit Q.27**) finds as follows:

> The fundamental components of preparedness are consistent across all tiers of capability and include:
>
> - A management framework defining the roles and responsibilities of the various stakeholders potentially involved in the range of different oil spill scenarios.
> - An oil spill contingency plan that sets out the essential elements for a successful response and the processes for managing the integration of local, regional, national and international resources as appropriate.
> - Response strategies set in generic terms for the various areas of operation and in detail for particular areas of high environmental or socio-economic importance.
> - On-site equipment commensurate with the Tier 1 risk available at all times.
> - Arrangements for the integration of additional support at all tier levels.
> - Logistical arrangements to facilitate and support response operations across all tier levels.

[277] API Recommended Practice 1173 (2015), Exhibit Q.17 (cases a - e), par. 12.
[278] API Recommended Practice 1173 (2015), Exhibit Q.17 (cases a - e),

- Trained practitioners in oil spill response both on-site and also at the Tier 2 and Tier 3 levels.
- Programme of simulation exercises to test different aspects of preparedness, build familiarity and ensure competence.[279]

311. It has already been described in chapter 5 that based on Nigerian regulations and those international standards, SPDC had the obligation to conduct frequent surveillance to detect oil spills early. *Inter alia* API *Recommended Practice 51R (Environmental Protection for Onshore Oil and Gas Production Operations and Leases)* demonstrates that a similar obligation exists for drilling wells:

> All equipment should be inspected on a routine basis for signs of leakage, with corrective action taken, as needed, to assure that the equipment continues to operate in a safe and environmentally acceptable manner.[280]

312. The need for an adequate *Leak Detection System* has also been pointed out. It is obvious, especially if inspection possibilities are limited, that a leak detection system must enable the operator to quickly detect and stop an oil spill. API Standard 1160 describes in chapter 10.1 and 10.3, under the headings *"Prevention of third-party damage"* and *"detecting and minimizing unintended pipeline releases"*, various - more and less technically advanced - possibilities for achieving this.

313. API standard 1160 further emphasizes - as do the sources mentioned above - the relevance of well-trained personnel and clear procedures aimed at stopping the spill as soon as possible:

> 10.3.7 Isolation and control of the Release Source
>
> The source of an active unintended release needs to be immediately controlled. Control measures may vary depending on the release volume, rate, location, and pipeline operation capabilities. Pipeline operators shall have procedures that address each of these issues for all pipeline segments.
>
> The primary methods of resource control for an active unintended release are:
>
> i. Reduction of pipeline operating pressure.
>
> Total shutdown of pipeline product flow and closure of release source area line valves, when applicable,
>
> Isolation of pipeline segment containing the release by closing main line block valves or other mechanisms.

[279] IPIECA, *Guide to Tiered Preparedness and Response, International Petroleum Industry Environmental Conservation Association* (2007), **Exhibit Q.27** (cases a - e), p. 8. In this sense also: API Technical Report, *Guidelines for Oil Spill Response Training and Exercise Programs* (2014).

[280] API Recommended Practice 51R, *Environmental Protection for Onshore Oil and Gas Production Operations and Leases* (July 2009), Exhibit Q.18 (cases a - e), par. 6.2.3.

> Operator personnel with authority and responsibility to reduce operating pressures and/or stop flow of pipeline product need to be clearly defined and accessible at all times. Criteria for restricting or stopping flow of pipeline product during an unintended release event should be clear and concise. Flow restriction should then be implemented immediately when the situation warrants.[281]

314. API 1160 discusses a number of starting points for using *Block or Check Valves* and *Emergency Flow Restricting Devices*, which are to enable an operator to quickly stop the oil flow. Article 10.3.8 further stipulates:

> When the volume and location of an unintended release warrants immediate on-site control measures, operator response teams and third-party response teams need to be dispatched. Maximum time-to-respond criteria should be developed for all pipeline sections. The teams should be equipped and trained, or have access to contract resources, to contain unintended releases of various volumes.

315. The International Union for Conservation of Nature, which was instructed by SPDC to examine its remediation methods, concluded as follows:

> The speed of response is critical in handling new spills since one of the complications of delayed response is the formation of more complex hydrocarbons that are more difficult to degrade. (...) Historically, delayed response encouraged a time lag that allowed spills and plumes to spread and/or seep deep into groundwater levels in certain soil types"[282]

6.2.5 Interim conclusion: measures for an adequate response

316. It follows from the above that even prior to the oil spills, Shell should have taken measures to ensure that it could respond swiftly and adequately in the event of an oil spill.

317. In any event, Shell should have ensured that it had configured its systems and pipes such that it:

i. was quickly notified of the occurrence of an oil spill;
ii. if necessary, could quickly stop the oil flow in the event of an oil spill; in order to
iii. remedy the leakage in the immediate future and in a professional manner;

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[281] API Standard 1160 (2001), Exhibit Q.16 (cases a - e), par. 10.3.7. See also 10.3.7.1 and 10.3.7.2 on *block or check valves* and *emergency flow restricting devices*. See further API Recommended Practice 51R, *Environmental Protection for Onshore Oil and Gas Production Operations and Leases* (July 2009), Exhibit Q.18 (cases a - e), par. 8.7.4: *"In the event a spill occurs, it is extremely important for all responsible operating personnel to know how to respond quickly and effectively to control, contain and clean up the spill"*.

[282] International Union for Conservation of Nature (IUCN), *Sustainable Remediation And Rehabilitation Of Biodiversity And Habitats Of Oil Spill Sites In The Niger Delta* (2013), Exhibit O.6 (cases a - e), p. 34. See also: United Nations Environment Programme-rapport, *Environmental Assessment of Ogoniland* (2011), Exhibit L.7 (cases a - e), p. 145.

iv. and in this way minimize the damage to the environment.

318. In more concrete terms, this means that Shell (i) should have used a properly functioning system of intensive surveillance and patrols, and/or (ii) should have ensured that its pipelines were equipped with technology based on which Shell was quickly notified of an oil spill. To stop the leaking of oil, Shell should also have ensured that in such a situation, it could quickly access the site of the oil spill. To this end, Shell (iii) had to have properly trained personnel, as well as (iv) proper equipment that was available in the immediate vicinity, and Shell had to make efforts to ensure that (v) its ties with the local communities were such that in principle, Shell would have the opportunity to perform its work. To the extent that Shell could foresee that it would be unable to take measures on site or at least would be unable to do so swiftly, Shell could be expected to (vi) configure its facilities such that, if necessary, it could also remotely limit the damage as a result of oil spills, for example, by taking the pressure off the pipeline, or at least by decreasing this pressure. In (vii) considering the possibilities, Shell had to take account of the seriousness/scope of the oil spill, the (possible) consequences of this spill for the people living in the immediate vicinity and the specific characteristics of the area where the oil spill occurred.

6.3 Breach of duty of care

319. Shell breached its duty of care to adequately respond in the event of oil spills. There was a disproportionate amount of time between the oil spills and stopping these spills, which allowed the pollution to spread further. According to the establishments by the District Court, this took three days in Goi (during which at least 24,000 litres of oil leaked out); and eleven days in Oruma (during which at least 64,000 litres of oil leaked out); in Ikot Ada Udo this took more than a year (during which at least 100,000 litres of oil could flow out).[283]

320. Shell defended itself against the conclusion that it breached its duty of care by referring to the role of the communities. In so doing, Shell took the position that as a result of access problems, it was unable to stop the oil flow sooner or repair the leak.

321. The District Court wrongly accepted this defence.[284] After all, it follows from the above that SPDC could take measures in several areas to ensure that the damage as a result of oil spills is limited. The standards described above demonstrate that the procedures of an operator must

[283] However, with regard to the volumes of spilled oil, also see the introduction, no. XXX.

[284] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.51 (cases c + d): "Moreover, (in brief) in the case at issue, in October 2004 SPDC, in fact, remedied the oil spill within three days and as quickly as reasonably possible, so that it cannot be held that its response was inadequate."; par. 4.53 (cases a + b): "Moreover, (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 its response was inadequate.", and par. 4.47 (case e): "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."

specifically seek to address the various risks and complications that may occur. Numerous suggestions are also offered for this.

322. In particular if access problems are foreseeable, the relevance of other measures increases. For this reason, Shell cannot unilaterally blame its alleged inability to stop the oil spills on the communities - and via them on the appellants.

323. On the contrary, it has meanwhile become clear that Shell was totally unable to adequately respond, because it failed in numerous areas in the prevention.

In , a was conducted at SPDC in the area of . Shell made this available after the interlocutory ruling of 18 December 2015.

325. notes:

326. The audit report that - where applicable - will be addressed below.

327. Shell's *inter alia* describes the following :

328. In the *Negligence in the Niger Delta* report (**Exhibit Q.28**), Amnesty International investigated the response of Shell and the Italian oil company ENI to oil spills in the Niger Delta.[287] To this

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[287] Amnesty International: '*Negligence in the Niger Delta, Decoding Shell and ENI's poor record on oil spills'* (2018), Exhibit Q.28 (cases a - e).

end, 3592 JIV documents and photographs were analysed. Amnesty concluded that the response of both companies left much to be desired, but that Shell's response was significantly poorer than that of ENI. Shell only managed to get a response team to the site of the oil spill within the prescribed 24 hours in 25.7% of the cases; ENI managed to do this in 76% of the cases. On average, it took Shell seven days to respond after an oil spill, while ENI required an average of two days for this. Amnesty also concluded that in 13.6% of the investigated cases, it took Shell ten days or longer to organize a Joint Investigation Visit, compared to 3% for ENI.

329. Given that the circumstances are the same, it is unclear why ENI manages to do what Shell alleges it cannot do through no fault of its own.

330. The *Sustainable remediation and rehabilitation of biodiversity and habitats of oil spill sites in the Niger Delta* report drawn up for Shell also includes the following recommendation:

> Speed up response to oil spill incidents.[288]

6.3.1 Defective surveillance & verification

331. The obligation to conduct inspections on site on a regular basis has already been addressed above.[289] The relevance of surveillance serves to detect (the risk of) oil spills in a timely fashion in order to take swift action.

332. The District Court wrongly concluded that the underground pipeline in Goi and Oruma was patrolled on a daily basis.[290] Shell did not advance anything to substantiate its argument, even though the standards show that it should have such documentation. Nor were helicopter flights frequently conducted. For the record: in Ikot Ada Udo, including according to Shell's own arguments, no inspections were conducted at all.

333. In Goi and in Ikot Ada Udo, Shell had to learn about the oil spills from third parties.[291] Even if regular surveillance was conducted, this proved to be ineffective, given that the oil spills at that location were not noticed.

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[288] International Union for Conservation of Nature (IUCN), *Sustainable Remediation And Rehabilitation Of Biodiversity And Habitats Of Oil Spill Sites In The Niger Delta* (2013), Exhibit O.6 (cases a - e), Executive summary – Recommendations, p. 16.

[289] Chapter 5.4.

[290] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.49 (Goi: cases c + d) and par. 4.51 (Oruma: cases a + b).

[291] See the Statement of Defence, no. 31 (cases a, b and e).

334. If, as the District Court assumes, the pipeline at Goi and Oruma was inspected on a daily basis,[292] it is not clear why it took 2[293]and 3[294] days, respectively, before SPDC could determine the existence of the oil spills.[295] Moreover, if it is true that Shell used effective helicopter monitoring, it could have quickly verified the oil spills in this manner, without depending on the local population in any way for this. The fact that SPDC believes that it must always verify reports following surveillance and apparently needs days to do this, during which the oil spill continues, in any event demonstrates the lack of effectiveness of this. Shell did not contest that the oil spill at Oruma could also have been verified using binoculars from the public road.[296]

6.3.2 Defective detection technology

335. As also demonstrated by the various standards and handbooks, the importance of a *leak detection system* lies in the fact of being able to signal and detect an oil spill in a timely fashion. This importance is greater, of course, if an operator itself is not in the vicinity, or believes that it cannot rely on patrols and inspections.

336. The 'low pressure safety control' that Shell described in no. 277 of the Statement of Defence on Appeal Phase 1, which automatically switches off the pumps in the flow stations if the pressure falls below a certain minimum level does not qualify as a *Leak Detection System* in this sense, [redacted], because there is such a long period of time between (a) the start of an oil spill at a random location of the pipeline and (b) a substantial decrease in the pressure in the flow station kilometres away that causes the pump to switch off that unnecessary environmental damage is suffered for a long time. In addition, this method offers no indication whatsoever regarding the location of the oil spill. Nor does the system appear under one of the *release detection systems* described in API 1160.

[redacted]

[292] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.49 (Goi: cases c + d) and par. 4.51 (Oruma: cases a + b).

[293] Inspection at Goi 12 October 2004 (see the Statement of Defence, no. 41 (case c); no. 69 (case d)).

[294] In Oruma, an initial inspection was conducted on 29 June 2005, three days after the report (see the Statement of Defence, no. 65 (case a); no. 35 (case b)).

[295] See the Statement of Rejoinder, no. 19 (cases a + b); no. 18 (cases c + d); no. 29 (case e).

[296] See the Statement of Reply, no. 296 (cases a + b).

[redacted]

338. In the proceedings of the Bodo Community against Shell, an expert had already concluded that a leak detection system was completely absent. [298] Nor was the manifold equipped with the extremely customary *flow rate meters*;[299] nor had manometers been installed in the flow stations and on the manifolds.[300]

[redacted]

340. Had SPDC effectively depressurized the pipeline, the fire could not have raged for such a long time and would simply have burned itself out. However, as demonstrated by the following, this was not the case.

6.3.3 Insufficient trained personnel and unavailable equipment

341. Well-trained personnel is not only perfectly able to assess and/or repair a leakage in technical terms, but is also trained on the details and customs of the specific area where it is deployed. Both were absent at SPDC.

342. This is first of all demonstrated by the described problems with the security. The experts also observed that it is likely that the UT measurements at Oruma were not properly performed.[302]

[redacted]

[297] [redacted]

[298] See chapter 6.3, no.270.

[299] See the *Reply to the Defence Bodo Community*, Exhibit O.2 (cases a - e), par. 16.2; Statement of Appeal Phase 1 of Milieudefensie et al., no. 107.

[300] *Reply to the Defence Bodo Community*, Exhibit O.2 (cases a - e), par. 18.7.1.

[301] Idem.

[302] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 12.

344. The identifies

345. The latter is explained as follows:

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[redacted]

348. Thus, it cannot come as a surprise that the IUCN made the following recommendation in 2013:

> Increase the number of oil spill response bases (including remediation materials) across the Niger Delta and maintain an adequate stock of requisite materials (such as inflatable booms for containment, recovery materials, biodegradable sorbent booms, biosurfactants, enzymes, nutrients and peroxides). It is pertinent to note that due to the sensitivity of materials recommended for remediation, it is important for SPDC to hold and issue specialized stock to contractors when required, in order to maintain Quality Assurance and Quality Control.[308]

349. With regard to Oruma, Shell contended that the contractor had to be mobilized at a moment's notice, as a result of which "material shortages occurred several times during the repair work".[309] However, as also follows from the above, it is Shell's responsibility to ensure that it has sufficient equipment available, including - and in the event of oil spills: *especially* - at a moment's notice.

306 [redacted]

307 [redacted]

308 IUCN (2013), Exhibit O.6 (cases a - e), p. 42.

309 Statement of Defence, no. 85 (case a), no. 55 (case b).

6.3.4 Own responsibility in community relations

350. It is obvious - and this also follows from the standards discussed above - that an operator that has its pipelines run through a particular area must ensure that it also has access to its possessions.

351. Shell submits that the communities of Goi, Oruma and Ikot Ada Udo can be blamed for the fact that Shell did not take action sooner, because they allegedly denied Shell access to the oil spills.[310] Shell's argument that the Goi community denied Shell access has not been substantiated, nor is it demonstrated by its response to the notice of liability and the descriptions in the JIT report.[311] To reach the pipeline, Shell required the consent of the Mogho community, where the oil spill had occurred.[312]

352. Thus, the appellants' interpretation of what occurred after the oil spills differs from Shell's interpretation.[313] In addition to the arguments already advanced in this regard in the first instance, it seems to be true for both interpretations that only the examination of witnesses can provide more clarity regarding the precise events.

353. In a general sense, it is noted here that in both Goi and Oruma and in Ikot Ada Udo, Shell advances the access problems as the reason for the fact that the oil spill could continue for such a long time. UNEP and Amnesty International observed that oil companies frequently conduct this defence in the Niger Delta.[314] The investigation by Amnesty International demonstrates that the access defence is frequently wrongfully invoked.[315] Moreover, this report demonstrates that in terms of oil spill response, Shell's performance is significantly poorer than ENI's. Apparently, ENI did manage to build such a relationship with the communities (or at least take other measures) that it can respond significantly faster to oil spills in the Niger Delta.

[redacted] The fact that Shell's problems with the local communities were structural is further demonstrated *inter alia* by (i) the submitted Country Business Plans, in which the subject is described as a critical factor; (ii) the memo from managing director Van der Vijver to the CMD, in which he describes managing community disturbances as a *must-do*;[316] (iii) the investigation that WAC Global Services conducted by order of Shell, in which the risks of *"unfulfilled promises and non-*

[310] Statement of Defence on Appeal Phase 1 of Shell, nos. 73-75; Statement of Defence, nos. 38-40 (case c); nos. 66-68 (case d); nos. 62-65 (case a); nos. 32-35 (case b); nos. 42-45 (case e).

[311] Exhibit A.2 (cases c + d); Exhibit A.3 (cases c + d); Summons, nos. 304-309 (cases c + d).

[312] In chapter 16.2 of the Summons (cases a - e), this defence by Shell was discussed more extensively.

[313] With regard to the response to the oil spills, see: the Summons, chapter 9.4 (cases a - e); Statement of Reply, chapter 6 (cases a - e). With regard to access, see: the Summons, chapter 16.2 (cases a - e); Statement of Reply, chapter 7 (cases a - e).

[314] United Nations Environment Programme-rapport, *Environmental Assessment of Ogoniland* (2011), Exhibit L.7 (cases a - e), p. 151: *"The oil industry often cites access restrictions placed by the community as reason for the delay between the reporting of an incident and addressing it"*; Amnesty International: '*Negligence in the Niger Delta, Decoding Shell and ENI's poor record on oil spills'* (2018), Exhibit Q.28 (cases a - e).

[315] Amnesty International: '*Negligence in the Niger Delta, Decoding Shell and ENI's poor record on oil spills'* (2018), Exhibit Q.28 (cases a - e), p. 24.

[316] Note to CMD – Nigeria Country review 2002, Exhibit Q.5 (cases a - e), p. 16.

completion of tangible projects" and insensitivity to local customs are pointed out;[317] (iv) the UNEP report, which in 2011 observed a *"loss of control"* with regard to Shell's relationship with the local communities;[318] [redacted]

355. The case documents already specify how fundamental Shell's own contribution to the disturbed relationship with the communities was; including in Goi, Oruma and Ikot Ada Udo.[320] It is a fact that for years, Shell underestimated the importance of maintaining proper relations with the communities from whose raw materials Shell greatly benefited. There is a good reason that the SWOT analysis that SPDC prepared described *arrogance* as a threat for the company.[321]

356. It is a fact that the communities were confronted with very substantial risks and consequences of oil pollution for which they did not ask. It was Shell's responsibility to permanently invest in a good neighbourly relationship with the local communities, irrespective of whether the pollution was the result of sabotage (in combination with defective security measures) or of corrosion/inadequate maintenance.

357. If Shell had actually faced the access problems it described, it was further Shell's responsibility to ensure that it could adequately respond in other ways when an oil spill from its pipelines occurred - for example by ensuring that it could remotely stop the oil flow, or stop this using other technical measures.[322]

6.3.5 Defective flow restriction

358. Shell alleges that the oil flow in Goi was stopped on 11 October 2004 and the flow at Oruma on 29 June 2005.[323] It has already been argued above that Shell should have done this sooner.

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[317] WAC Global Services, 'Peace and Security in the Niger Delta: Conflict Expert Group Baseline Report' (Working Paper for SPDC, December 2003), Exhibit C.7 (cases a - e), pp. 52, 89.

[318] United Nations Environment Programme-rapport, *Environmental Assessment of Ogoniland* (2011), Exhibit L.7 (cases a - e), p. 12, 98, 151.

[319] [redacted]

[320] Summons, par. 16.2.1 (cases a - e).

[321] Arrogance is one of the threats for the company observed by SPDC itself: 1996 Country Business Plan, **Exhibit Q.29** (cases a - e), Appendix D.

[322] See also below, [7.3.5].

[323] Statement of Rejoinder Goi, no. 18 (cases c + d); Statement of Defence Oruma, no. 36 (case b); no. 66 (case a). Statement of Defence on Appeal Phase 1 of Shell, no. 73.

359. The video footage shows that on 11 October 2004, the oil was still spurting under high pressure from the pipeline at Goi.[324] When the pipeline in Oruma was repaired on 7 July 2005, oil was also still flowing from the pipeline.

360. Even if Shell at some point did close off the oil flow, as it claims, this did not prevent large volumes of oil from spilling and polluting the environment via creeks and rivers. Thus, manually shutting down the flow stations and closing the manifolds, as Shell claims it did in Oruma,[325] proved to be inefficient.

361. In the Statement of Rejoinder, Shell argued that it also stopped the oil flow in Goi a few days after the leakage. This is incompatible with the footage that is available of the leakage, nor did Shell substantiate its argument with data and logs - in contrast to what it did in the event of Oruma. To the extent that Shell's point of view that it 'takes a long time before the pressure in the pipeline has been decreased' and this explains why this pipeline was still under considerable pressure two days later is correct,[326] it must also be assumed that its possible *flow restriction* systems were inadequate.

362. Moreover, this is in line with the expert's finding in the *Bodo* case to the effect that as a result of problems with the valves at the Bonny terminal it was frequently impossible to effectively shut off the oil flow.[327]

363. In the absence of a proper pressure measurement system, it was not possible to determine whether the pipeline had been effectively isolated, either.[328]

[redacted] Precisely because the risk of oil spills was considerable, even though Shell had poor access to the area, Shell should have ensured that it was able to efficiently stop the oil flow, including remotely. However, Shell did not have shutters that could be closed remotely. This had already been demonstrated by Shell's account of its conduct regarding the oil spills,[329] [redacted]

[redacted]

[redacted]

[redacted]

[324] Exhibit A.8 (cases c + d).

[325] Statement of Defence, no. 36 (case b); no. 66 (case a).

[326] See *inter alia* the Statement of Rejoinder, no. 18 (cases c + d).

[327] *Reply to the Defence Bodo Community*, Exhibit O.2 (cases a - e), par. 52.2 and 53.3.

[328] See above, 6.3 and 7.3.2 and the *Reply to the Defence Bodo Community*, Exhibit O.2 (cases a - e), par. 18.7.2.

[329] See also the experts' findings in the *Bodo* case; *Reply to the Defence Bodo Community*, Exhibit O.2 (cases a - e), par. 18.7.2.

[redacted]

365. The experts noted the following in their report:

> The pipeline must be depressurized as soon as possible after a leak. With the 2000 leak the incident happened on 9th October and was reported on 13 October. However, on 24th October the pressure was still too high to work on line. Work on line was completed on 25th October. This would inevitably result in an extensive area of contamination of the area around the leak.[331]

366. If the oil flow had been stopped swiftly, this would not only have prevented the oil pollution from further spreading via the surface water to the extent that it did; this would also have considerably limited the harmful consequences of the fire. As it turned out, the fire was not extinguished until two days later, on 13 October 2004. However, the firefighting report submitted by Shell notes the following:

> Pipeline fire could go off on its own if the crude is shut off.[332]

6.3.6 Inadequate risk assessment

367. There is nothing to show that in determining its response, Shell took the special characteristics of the area where the oil spill had occurred into account. On the contrary, it has already been set out in section 7.3 above that the manner in which risk analysis was performed within SPDC in and of itself constituted a risk.[333]

[redacted]

[330] [redacted]

[331] Report on the expert investigation into the cause of the leakages of the pipelines at Goi and Oruma, 17 December 2018, p. 19.

[332] Exhibit 3 with the Statement of Defence (case c), p. 3.

[334] [redacted]

6.4 Conclusion

369. As the operator, Shell could be expected to make the requisite efforts to limit oil pollution as a result of oil spills from its pipelines to the extent possible.

370. Shell had taken insufficient measures to ensure that it was quickly informed of the occurrence of an oil spill, or at least could respond swiftly and stop the oil flow in the event of an oil spill. As a result, the spilled oil reached the creeks and thus a much larger area, including the appellants' land and fish ponds. This could have been prevented had Shell stopped the oil flow in time. For this reason, Shell is required to pay compensation by virtue of Article 11(5)(b) of the Oil Pipelines Act and is also liable based on the tort of negligence.

7 GROUND FOR APPEAL 7: THE DISTRICT COURT WRONGLY FOUND THAT SPDC DID NOT VIOLATE ITS DUTY OF CARE TO PROPERLY REMEDIATE

7.1 The judgment

371. The District Court wrongly found as follows in par. 4.53 (cases c + d); par. 4.55 (cases a + b); par. 4.49 (case e):

> 4.53 [...] However, the District Court is of the opinion that Milieudefensie et al. failed to offer sufficient concrete substantiation that those general circumstances already render 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 Goi in the period relevant for these two proceedings. For this reason, the District Court dismisses Milieudefensie's point of view that the mere use of the RENA method in conjunction with the UNEP report already means that it can be concluded that this specific oil contamination near Goi was insufficiently cleaned up by SPDC.

372. The District Court further wrongly found (cases c + d) (par. 4.54-4.58):

> 4.54. 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 Goi mentioned in grounds 2.10 and 2.11 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.
>
> 4.55. In this connection, Milieudefensie et al. firstly submit that 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 JIT report and the certificates, in the case at issue near Goi end results of only 296.10 and 334.17 mg/kg of TPH were achieved. In response, Shell et al. submitted that 50 mg/kg of TPH is only a target value and that the end results near Goi are 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 of the subject oil contamination near Goi was insufficient.
>
> 4.56. Secondly, Milieudefensie et al. submit that the Bryjark report submitted with the summons (see ground 2.9 above) demonstrates that the remediation was insufficient. However, the assessment study in the Bryjark report dates from June 2007, which was before the subject remediation was completed and before the subject certificates of the Nigerian government were issued. Moreover, during the pleadings Shell et al. advanced a substantiated argument and during the pleadings Milieudefensie insufficiently refuted that Arcadis' later report (see ground 2.15 above) sufficiently demonstrates that (in brief) the conclusions from the previous Bryjark report – even if these were correct at the time – have meanwhile been superseded by the facts and

that SPDC sufficiently cleaned up the land and fish ponds contaminated by the subject oil spill near Goi, in any event after Bryjark's study and before the subject certificates of the Nigerian government were issued.

4.57. Thirdly, Milieudefensie et al. invoke the email from Mr. Von Scheibler that they produced on the occasion of the pleadings (see ground 2.16 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 Goi following this specific oil spill in 2004 are substantively incorrect or have otherwise been wrongfully issued.

4.58. 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 Goi – has not been established as regards the facts in these two proceedings.

373. In Oruma (cases a + b), the District Court wrongly found as follows (par. 4.56-4.60):

4.56. 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 certificate of the Nigerian government regarding the clean-up near Oruma mentioned in ground 2.9 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.

4.57. In this connection, Milieudefensie et al. firstly submit that 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 JIT report and the certificates, in the case at issue near Oruma an end result of only 61 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 Oruma 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 certificate issued by the Nigerian government, SPDC's clean-up of the subject oil contamination near Oruma was insufficient.

4.58. Secondly, Milieudefensie et al. submit that the Bryjark report submitted with the summons (see ground 2.10 above) demonstrates that the remediation was insufficient. However, during the pleadings Shell et al. advanced a substantiated argument and during the pleadings Milieudefensie insufficiently refuted that Arcadis' later report (see ground 2.14 above) sufficiently demonstrates that (in brief) the conclusions from the previous Bryjark report are not sufficiently reliable due to a defective study method and that – even if Bryjark's measurement results are correct – the TPH content in the soil near Oruma was so low at that time that a "clean soil" was involved. Only in two places did Bryjark measure a strongly increased TPH content near Oruma in June 2007, but this may have other causes, as the Bryjark report also states. It has not been sufficiently submitted or demonstrated that those two high measurement results of Bryjark in June 2007 can

be attributed to the consequences of the subject oil spill in June 2005, including in view of the certificate issued by the Nigerian government in August 2006 for the remediation completed at that time by order of and at the expense of SPDC. According to Milieudefensie et al., the Bryjark report also demonstrates that SPDC's clean-up was incorrect because the crude was burned uncontrolled in waste pits, which allegedly led to damage to surrounding crops. However, the Bryjark report does not demonstrate how Bryjark was able to determine this in its study in June 2007 – approximately one year after the clean-up in June 2006 near Oruma had been completed. Thus, the District Court will also dismiss this argument by Milieudefensie et al. because no sufficiently concrete substantiation has been offered for this argument.

4.59. Thirdly, Milieudefensie et al. invoke the email from Mr. Von Scheibler that their attorney produced on the occasion of the pleadings (see ground 2.15 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 certificate issued by the Nigerian government for this specific clean-up near Oruma following this specific oil spill in 2005 is substantively incorrect or has otherwise been wrongfully issued.

4.60. 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 Oruma – has not been established as regards the facts in these two proceedings.

374. And in Ikot Ada Udo (case e) (par. 4.50-4.54):

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.

7.2 The obligation to properly remediate

375. The District Court rightly took the starting point that based on the EGASPIN and/or good industry practice, SPDC had a duty of care to have the oil pollution caused by sabotage properly remediated.[335] This obligation also results from the *Petroleum (Drilling and Production) Regulations*[336]; according to its own communications, Shell itself has also accepted this.[337]

376. However, the District Court wrongly felt - in brief - that the plaintiffs did not demonstrate that the RENA method is unsuitable, or that it was demonstrated that the remediation - as determined in the *Cleanup and Remediation Certification Formats* - was inadequate, given that the TPH values specified in the formats are well below the intervention values specified in the EGASPIN.

377. As will be explained below, the obligation to properly remediate comprises (i) the obligation to return the land and water to the former condition to the extent possible. To achieve this result, an operator (ii) must conduct an investigation into the specific properties of the land and pollution

[335] See also the Statement of Appeal Phase 1 of Milieudefensie et al., par. 2.5.4.

[336] Articles 25 and 37 of the Petroleum (Drilling and Production) Regulations, Exhibit G.1 (cases a - e).

[337] See Richard Steiner, *Double standards? International Standards to Prevent and Control Pipeline Oil Spills Compared with Shell Practices in Nigeria*, Alaska (November 2008), Exhibit B.1 (cases a - e), h. 4.7; Statement of Reply (cases a - e), chapter 7.1.2.1. See, for example, the Shell brochure *Shell in Nigeria, Security, Theft, Sabotage and Spills* (2017), in which Shell states: *"SPDC cleans and remediates areas impacted by spills from its facilities, irrespective of cause"*: https://www.shell.com.ng/media/nigeria-reports-and-publications-briefing-notes/security-theft-and-sabotage.html (lastly visited on 13 January 2018). [redacted]

in advance in order to detect the most suitable remediation method; (iii) have the remediation commence as quickly as possible; and (iv) carefully map the method and effects of the remediation.

378. In this connection, reference is already made here to the definition of remediation in the EGASPIN:

> Remediation - Remediation has a wider meaning than it has under its common usage. It includes assessment action, remedial treatment action and monitoring action.[338]

379. These obligations not only result from the provisions in the EGASPIN to be indicated below and from good industry practice; logically, they also follow from the conclusion that an operator has the obligation to clean up the pollution. After all, there is no careful method to implement that obligation other than by means of a thorough analysis of the situation that is to be remedied and the most appropriate possibilities to do so. Certainly in view of the interest of recovery of nature, on the one hand, and the technical character of soil remediation in which as a rule, the injured parties themselves do not have any insight, on the other, it likewise stands to reason that an operator, if necessary, can offer insight into the method used in this process.

380. The obligation to have the remediation commence as quickly as possible following an oil spill has already been extensively discussed in the previous chapter; for this reason, it is not individually addressed in this chapter.

381. Milieudefensie et al. have requested soil expert Edelman to assess what conclusions can be made regarding the remediation based on the arguments and documents in the case file. His expert report is currently submitted as **Exhibit Q.30**. In addition to the existing sources - which have been partially assessed by Arcadis and Von Scheibler[339] - he examined the *Sediment Hydrocarbons in Former Mangrove Areas, Southern Ogoniland, Eastern Niger Delta, Nigeria* chapter that was published in 2018 (**Exhibit Q.31**).[340] Edelman explains that the Nigerian standards are quite similar to and have even been derived from the soil remediation standards in force in the Netherlands. The reports and documents submitted by Shell do not demonstrate that the applicable standards have been complied with. Because here, as well, there is no adequate Shell documentation, no conclusions can be drawn regarding the soil investigation, surface and depth of the soil pollution, any contamination with heavy metals or the degree of groundwater contamination. Edelman does infer from the available information that no proper sampling was

[338] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part X, Definitions and Acronyms.

[339] Evaluation of soil remediation by soil expert Von Scheibler, Exhibit M.5.

[340] D.I. Little, et. al., '*Sediment Hydrocarbons in Former Mangrove Areas, Southern Ogoniland, Eastern Niger Delta, Nigeria*' (Springer International Publishing: 2018), Exhibit **Q.31** (cases a - e).

performed, that contamination of the ground water was likely, and contamination with heavy metals was very likely - and partially a fact.[341] Where applicable, the report is discussed below.

382. The obligation to clean up the soil pollution not only constitutes a tort of negligence, but also a breach of the appellants' right to a clean living environment. Especially within the Nigerian legal system, this basis must be distinguished from the tort basis; this is discussed in more detail in chapter 10.

7.2.1 Objective of remediation: restore the original state to the extent possible

383. Remediation means that the land must be restored to its original state to the extent possible. This is demonstrated in so many words by the EGASPIN:

> It shall be the responsibility of a spiller to restore as much as possible the original state of any impacted environment. The process of restoration shall vary from one environment type to another. (See PART VIII F).[342,343]

384. The EGASPIN further make it clear that the objectives regarding polluted soil must be to make the contaminated land and water "*suitable for use*" again, which must be taken to mean:

> Ensuring that land and water resources are suitable for their current use - in other words, identifying any land or water resources where contamination is causing unacceptable risks to human health and the environment, assessed on the basis of the current use and circumstances of the land, and returning such land and underground water to a condition where such risks no longer arise ("remediating" the land).[344]

385. The Niger Delta Panel of the International Union for Conservation of Nature, which examined SPDC's remediation methods in 2013 at SPDC's request, also concluded:

> The overall goal of ecosystem restoration is to return the impacted site back to near pre-spill conditions.[345]

386. Thus, in the event of a successful remediation, Dooh, Efanga, Oguru and Akpan, who could formerly grow crops on the land and raise fish in the ponds, should be able to do so again after the remediation.

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[341] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria', 7 March 2019, **Exhibit Q.30** (cases a - e), pp. 18-19.

[342] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. B.2.11.1.

[343] See also in this connection: the Summons, no. 132 and following (cases c + d); no. 117 and following (cases a + b); no. 142 and following (case e).

[344] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. F.1.2.1.1.1.

[345] International Union for Conservation of Nature (IUCN), *Sustainable Remediation And Rehabilitation Of Biodiversity And Habitats Of Oil Spill Sites In The Niger Delta* (2013), Exhibit O.6 (cases a - e), par. 4.2.

387. To test the results of the remediation, the EGASPIN specifies target and intervention values for various harmful substances. Different types are distinguished: *(a) aromatic compounds*, *(b) metals*, *(c) chlorinated hydrocarbon*, *(d) polycyclic aromatic hydrocarbon (PAHs)*, and *(e) other pollutants.* The last category comprises mineral oil, measured as (part of) the TPH.

388. Thus, to evaluate remediation, measuring only the TPH is insufficient. The presence of other harmful substances, such as metals, will also have to be reduced before restoration can be involved. The Oil Spill Clean-Up and Remediation forms in the EGASPIN thus contain an overview in which the various values for all harmful substances must be listed.[346]

389. Moreover, it is insufficient to determine whether the harmful substances remain below the specified *intervention values.* The objective is to return the land to its original state to the extent possible; the specified target values entail a best-effort obligation for the operator to set up the remediation such that the target values are achieved to the extent possible. This is also demonstrated by the EGASPIN:

> The restorative process shall attempt to achieve acceptable minimum oil content and other target values (quality levels ultimately aimed for) for BTEX, metals and polycyclic aromatic hydrocarbon (PAHS) in the impacted environment. (Also see PART VIII F).[347]

390. Edelman explains that the target and intervention values included in the EGASPIN are based on the Dutch standards and for the most are identical to the values applicable in the Netherlands.[348] According to the chapter submitted as Exhibit Q.31, this is related to the dominance of the Dutch Shell in Nigeria.[349] The remediation goals described in the EGASPIN also correspond to those in the Dutch system, i.e. either a) eliminating risks, and thus making "suitable for use", or complete removal of pollutants.[350] It follows from this that the method of using the target and intervention values must also have been intended to copy the Dutch practice.[351] Edelman explains that in the Netherlands, target and intervention values have nothing to do with a remediation goal to be achieved. The intervention value merely serves as a measure to determine whether serious soil pollution is involved; the target values have been derived to characterize clean land (for the

[346] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, Appendix VIII-B3.

[347] EGASPIN (2002), Shell exhibit.13/b.8/c.15/d.19/e.19, part VIII, par. B.2.11.3.

[348] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 7.

[349] D.I. Little, et. al., '*Sediment Hydrocarbons in Former Mangrove Areas, Southern Ogoniland, Eastern Niger Delta, Nigeria*' (Springer International Publishing: 2018), Exhibit Q.31 (cases a - e), p. 339.

[350] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 8.

[351] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 7-8.

remediation to be performed). Naturally, Shell is aware of this distinction - even more aware of this than the appellants.

391. Thus, the District Court wrongfully considered the intervention values, in fact, as a remediation goal, and the target values as no more than numbers worthy of pursuing.[352] However, the District Court should have started from the criterion that the EGASPIN do stipulate, namely that the land must be returned to the original state to the extent possible - and therefore should in any event be suitable for use - or, in the event of sensitive areas (which is in any event involved in mangrove areas),[353] that the pollution must be removed *completely*.

7.2.2 The duty of care to remediate comprises the obligation to carefully assess what remediation method is to be applied.

392. In his report submitted as Exhibit Q.30, with reference to the NEN standards in force in the Netherlands, Edelman explains the process used in the Netherlands to clean up soil pollution:

> In cases of serious soil pollution in the Netherlands, the soil remediation is always preceded by an investigation that is mandatory by law.
>
> This investigation is performed in three logical, successive steps:
>
> 1. Preliminary investigation [...]
>
> 2. Exploratory investigation [...]
>
> 3. Further investigation [...]
>
> Most industrialized countries have a similar approach.
>
> [...] These elements are essential for assessing a remediation strategy and for evaluating the soil remediation.

393. Such a work method is to be considered to be good industry practice. Edelman also notes that these are also the customary starting points for soil remediation in Nigeria, referring to the EGASPIN, chapter VIII F, *Management and remediation of contaminated land.*[354] In par. 3, this chapter describes a similar procedure for *appropriate investigations*:

> 4.1 At the discretion of the licensee/lessee, waste generator or the Director, Petroleum Resources, appropriate investigations shall be conducted by the licensee/lessee to identify/locate sites that are contaminated and to determine the nature, concentration and distribution (plume) of these contaminants and the application where appropriate of remediation (REMEDIAL

[352] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 8.

[353] Based on the EGASPIN, the polluter has an obligation to verify whether a sensitive environment is involved, which is discussed in more detail below.

[354] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 7.

TREATMENT ACTION or MONITORING ACTION). The intention and scope of such investigations shall be agreed with the Director, Petroleum Resources and a report submitted at completion. 1

4.1.1 The strategy for such investigation normally comprise the following phases Also See Figure VIII-FI)

4.1.1.1 Preliminary Investigation that will comprise desk study and site reconnaissance or work-over surveys. From this a Conceptual Site Model and strategy for on-site investigation is developed.

4.1.1.2 Exploratory Investigation intended to confirm the presence of contamination and initial conclusions concerning the hydrology and geology of the site, and to provide information to aid the design of the main or detailed investigation.

4.1.1.2 Detailed Investigation, intended to fully characterise the extent of contamination, the hydrology and the geology, and to gather information required for hazard identification/assessment, risk assessment and post-impact assessment.

4.1.1.4 Risk Evaluation, Currently the screening values 1 are those presented in Section 8.0. Operators shall consult with the Department of Petroleum Resources to discuss the need (when and where necessary) to subject these screening levels to further analysis, following the detailed investigation.

4.1.1.5 Interim Action or Remediation Investigation, designed to confirm the applicability and feasibility of one or more potential amelioration/remedial options and collect information of relevance to application of selected remedial option/strategy.

4.1.1.6 Monitoring for Compliance and Performance, which seeks to confirm proper implementation and effectiveness of remedial measures.[355]

394. The EGASPIN clarify that under all circumstances, the specifics of the area must be examined first, before the remediation begins. It has been previously pointed out that the EGASPIN clarify that "*the process of restoration shall vary from one environment type to another*".[356] The EGASPIN further stipulate:

> Clean-up of oil spills in contaminated environments shall be conducted in such a manner as not to cause additional damages to the already impacted

[355] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. F.4.1.
[356] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. B.2.11.1.

> environment. It is therefore required that an operator adopts an approved method that would suit the environment within which the spill occurred.[357]

395. And:

> Any restorative process to be embarked upon shall adequately evaluate the biological sensitivities of the impacted environment. In a situation where a sensitive environment is impacted, it shall be required that a post spill impact assessment study be conducted to determine the extent of damage and the estimated duration for complete recovery of such an environment.[358]

396. The fact that the operator is expected to coordinate the remediation method to the specific circumstances of the area is already demonstrated by the obligation of mapping sensitive areas in advance (*Environmental Sensitivity Index (E.S.I.) mapping*) in order to enable an efficient response.[359]

397. If a sensitive area is involved, an extensive assessment as described above is consistently required.[360] In other cases, the operator is in any event consistently required to prepare an Environmental Evaluation (post-impact) report (EER):

> An operator or licensee whose activity has been observed to cause significant and adverse environmental effects and impact (see Article 4.0) shall be required to prepare an EER. Spillages of oil or hazardous materials/wastes are under this category.[361]

398. See also the EGPASIN VIIIB, 7:

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

399. At a minimum, the EER must contain the following information:

> (i) Description of the existing action namely; installation/project, operations, oil/hazardous materials/waste spillage, waste generation, characteristics of wastes, existing pollution control technology, disposal methods, etc.

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[357] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. B.2.6.3.

[358] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. B.2.11.2.

[359] Which is discussed in more detail in chapter 8.3.2 below.

[360] Idem. See also the EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. B.2.6.5 regarding *mangrove/wetlands*: *"Clean-ups shall be based on a study and evaluation of the socio-economic and ecological sensitivity of such swamps. Such methods to be adopted may include gentle flushing, ditch digging and manual recovery."*

[361] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. A.2.1.(i).

> (ii) Qualitative and quantitative descriptions of the already impacted environment.
>
> (iii) Levels of significance for losses of environmental resources affected by the already existing installations/projects or action. These environmental resources are the elements, features, conditions and areas valued by man that can be characterised as physiographic, biological (including bioaccumulation and chronic toxicity testing) cultural, aesthetic, etc.
>
> (iv) Modification/mitigating/ameliorating plans to processes or systems to either eliminate or decrease adverse environmental impacts to the greatest extent possible.
>
> (v) Environmental Management Plan (post-EER)[362]

400. To map the extent of the polluted area and determine the nature of the pollution, samples are usually taken.[363] After all, it is impossible to properly determine the pollution with the naked eye. The EGASPIN also start from such a method:

> 1.3.1 The management and control of contaminated land/water resources, produced by the oil and gas related activities in Nigeria, shall be carried:
>
> i) Through site investigation and to then compare the contaminants levels measured, with soil and ground water quality standards or criteria based on human toxicological and ecotoxicological values and;
>
> ii) On a voluntary basis, in the context of the Risk Based Corrective Action (RBCA) methodology. [364]

401. The EGASPIN also contain technical conditions for the sampling in the investigation of the pollution:

> Sampling shall be sufficient to confirm the nature and distribution of any significant chemical of concern, confirm relevant pathways and permit any necessary corrective action to be undertaken. For investigations of areas where there are no data on site or operational history such that targeted sampling can be undertaken then the main sampling pattern recommended for these investigations is the herringbone pattern. However, the square grid and the stratified random patterns can be utilised with justification, satisfactory to the Director, Petroleum Resources. [365]

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[362] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. A.2.2.

[363] See Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), pp. 4, 6 and 12.

[364] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. F.1.3.

[365] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. F.4.2.

402. The EGASPIN further set out:

> To determine the need for remedial treatment action or monitoring action requires the magnitude, the distribution and significant of those samples which have shown the greatest contamination to be carefully considered.[366]

403. The following arises from the above. In order to remediate the pollution as a result of oil spills as effectively as possible, it is customary and necessary that prior to remediation, (i) the extent of the pollution is mapped out and (ii) the most suitable remediation method, (iii) taking into account the specific characteristics of the land and water, is indicated. For this purpose, the EGASPIN comprise a detailed procedure, which is very similar to the compulsory work method under Dutch law and in other industrialized countries. Therefore, following the obligations in the EGASPIN, proper remediation is part of Shell's duty of care.

404. Even if the EGASPIN could not be enforced under Nigerian law, it should be considered to be good industry practice and, moreover, socially responsible that in determining the remediation process, the operator consistently takes the specific characteristics of the land to be remediated and the remediation method to be used into account, and takes measures to ensure that the land can be returned to its original state to the extent possible. This means that in any event, an operator must have: (i) proper data (samples) based on which the extent of the polluted area can be determined; (ii) data regarding the specific characteristics of the polluted area and possible special sensitivity of this area that must be taken into account; (iii) data regarding the possible and foreseeable effects of the remediation methods chosen for that specific area.

7.2.3 The duty of care to remediate also comprises the obligation to carefully map the remediation and its effects

405. It stands to reason that an operator that is required to remediate oil pollution must also be able to explain that this remediation was, in fact, properly performed.

406. This obligation is also included in the EGASPIN. Article 2.10.1 of chapter VIIIB stipulates:

> Operators or facility owners shall accurately record the history of the oil spill. A log of daily events shall be kept from the time a spill is first noticed until clean-up operations are completed.

407. In addition, the EGASPIN stipulate that the following information is specifically documented:

> (i) An executive summary
>
> (ii) a site description
>
> (iii) A summary of the site ownership and use
>
> (iv) a summary of the past releases or potential source areas

[366] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. F.4.3.

(v) a summary of current and completed site activities

(vi) a description of regional hydrogeological conditions;

(vii) a description of site-specific hydrogeological condition

(viii) A summary of beneficial use

(ix) a summary of the ecological assessment

(x) a site map of the location

(xi) an extended site map to include local land use and ground water supply wells;

(xii) Site plan view showing location of structures etc.

(xiii) site photos, if available

(xiv) a ground water elevation map

(xv) Geologic cross-sections

(xvi) identification of the chemicals/contaminants of concern [...]

(xvii) Dissolved plume map(s) of the contaminants of concern

(xviii) information on complete or potentially complete pathways.[367]

408. The adequacy of the remediation must further be demonstrated by the forms prescribed by the EGASPIN, in particular the *Oil Spillage Response Clean-up Report* ("Form-C")[368] and the *Oil/Chemical Spill And Contamination Clean-Up Certification Form.*[369]

409. The *Oil Spillage Response Clean-up Report (Form-C)* must be submitted within four weeks after the oil spill and contains information *inter alia* regarding the site and scope of the pollution and the remediation method used. In addition, the *Oil/Chemical Spill And Contamination Clean-Up Certification Form 'Part A' inter alia* contains information regarding the presence of various harmful substances, including metals, in the soil, surface water and groundwater based on sampling and control values. Thus, this work method is also similar to the normal procedure in

[367] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. F.5.1. These and other data are also required for a 'risk-based corrective action plan': EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, Appendix VIII-F2, par. 2.1.

[368] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, Appendix VIII-B2, Form C.

[369] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, Appendix VIII-B3.

the Netherlands.[370] The form must be accompanied by a map indicating the locations where the various samples were taken.[371]

410. This information is important to determine whether the investigation was properly conducted and that the results are thus representative. This verifiability is crucial, especially in a system in which Shell itself sets up and conducts the remediation.[372]

411. Finally, the EGASPIN require that in remediation work, the operator continues to monitor the environment:

> EGASPIN 2.11.3 Any operator or owner of a facility that is responsible for a spill that results to impact of the environment shall be required to monitor the impacted environment alongside the restorative activities. The restorative process shall attempt to achieve acceptable minimum oil content and other target values (quality levels ultimately aimed for) for BTEX, metals and polycyclic aromatic hydrocarbon (PAHS) in the impacted environment .(Also see PART VIII F).
>
> (i) For all waters, there shall be no visible oil sheen after the first 30 days of the occurrence of the spill no matter the extent of the spill.
>
> (ii) For swamp areas, there shall not be any sign of oil stain within the first 60 days of occurrence of the incident.
>
> (iii) For land/sediment, the quality levels ultimately aimed for (target value), is 50mg/kg, of oil content. (See PART VIII F) [373]

412. The fact that in view of effective remediation, monitoring over a longer period of time may be necessary is *inter alia* demonstrated by the IUCN's recommendation in this regard:

> Recommendation 4.2.5: Introduce annual monitoring post remediation to reduce residues of chemicals of special concern (CoSC) and support biodiversity rehabilitation[374]
>
> Recommendation 4.3.4: Further to the existing sign-off procedures, introduce a final sign-off process within three years post-remediation to ensure that residues of Chemicals of Special Concern have reduced to the required levels

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[370] See Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 12.: "*In the Netherlands and elsewhere, it is customary to first map the pollution of the soil, the groundwater and the water bed by sampling these compartments and analysing the samples*".

[371] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, Appendix VIII-B3. With regard to sampling, also see chapter 8.2.2 above.

[372] See the Statement of Appeal Phase 1 of Milieudefensie et al., no. 117, with reference to the International Union for Conservation of Nature, which made the following recommendation (IUCN (2013), Exhibit O.6 (cases a - e), p. 38): "*SPDC should introduce independent monitoring teams"*.

[373] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. B.2.11.3

[374] IUCN (2013), Exhibit O.6 (cases a - e), p. 45.

and to ensure that there is clear evidence of return of the previous biodiversity and ecosystem function in line with the Panel's Outcome Success Matrix (Annex III, Section iii)

- Introduce two sign-off levels as a means to support restoration of biodiversity. The first regulatory sign-off should be based on more stringent target levels especially for CoSC as would be indicated in the proposals for revised guidelines based on calculations and field trials.
- Ensure adherence to improved target levels (based on calculations and field trials) to significantly reduce toxicity levels and promote re-establishment of biodiversity and habitats through successful cycles of phytoremediation (see Annex IV, Section v).
- Conduct annual monitoring within three years post-remediation for ecosystem recovery before internal sign-off.[375]

7.3 Shell failed to properly remediate

413. Shell failed to properly clean up the oil pollution that resulted from the oil spills. After the remediation work, the land and fish ponds were still polluted. As will be explained below, the assessments and clean-up remediation formats that Shell submitted do not demonstrate that the clean-up work actually achieved the desired results. Moreover, in breach of its duty of care, Shell did not maintain any data based on which its arguments could be verified.

414. Thus, Shell's negligence in the area of documentation management plays a large role here, as well; it means that Shell is unable to provide objective data to substantiate its arguments regarding the due care that it allegedly exercised in the remediation. This is especially deplorable in light of the very harmful consequences of oil pollution for the environment, on the one hand, and the criticism that has been expressed of Shell for many years due to its role in this harm, on the other.[376]

415. This problem was also recognized by the *International Union for Conservation of Nature*, when it made the following recommendation to SPDC regarding its remediation work:

> Improve ready access to information, such that it is quicker and easier to obtain relevant information for internal assessments and analysis of situations.[377]

[375] IUCN (2013), Exhibit O.6 (cases a - e), p. 51.

[376] See also the Statement of Appeal Phase 1 of Milieudefensie et al., no. 120 and following.

[377] IUCN (2013), Exhibit O.6 (cases a - e), p. 15.

7.3.1 Land and fish ponds not suitable for use

416. It has been described above that the remediation obligation entails that the land is to be restored to its original state to the extent possible, in accordance with the *'suitable for* use' criterion expressed in the EGASPIN. This means that after the remediation, Dooh, Efanga, Oguru and Akpan should be able to grow crops and raise fish again. However, that is not the case.

7.3.2 The pollution was not carefully mapped

417. It follows from what has been discussed above that prior to remediation, an operator must assess (i) the extent of the pollution or the size of the polluted area, (ii) the specific characteristics of that area and (iii) the most suitable remediation method.

418. As Edelman described, soil samples are taken to determine the extent of the pollution. This is also required based on the EGASPIN. According to the EGASPIN, sufficient samples must be taken *"to confirm the nature and distribution of any significant chemical of concern*".[378]

419. In addition, the EGASPIN stipulate that an assessment *inter alia* comprises a map of the oil present in the land and groundwater.[379]

420. This information is missing entirely from the documents that Shell submitted, including the *close-out reports* and the *Clean-up and Remediation Certification Formats*. On the other hand, it can be inferred from this information that Shell did not conduct any investigation into the precise scope of the pollution. Edelman states the following in this regard:

> Report [3] specifies the surface area and the depth of the pollution in Oruma. A depth of 0.3 metre is specified for the entire polluted surface area of 60,000 m2. Reports [8] and [10] specify the surface areas and depths of the pollution in Goi. A depth of 0.3 metre is specified for the entire polluted surface areas of 311,000 m2 and 23,500 m2. Report [15] specifies the surface area but not the depth of the pollution in Ikot Ada Udo. This surface area is 15,000 m2.
>
> In view of the different oil spills with their own characteristics, the different locations with different soil conditions, the heterogeneity of soils within a location and the large differences in the distance to the oil spill it is very unlikely that the depth of the pollution is the same for the entire surface area in the first two areas. This must be a general assumption that is not based on observations. This provides no certainty at all regarding any (and probably existing) pollution of the soil deeper than 0.3 metre. Report [13] reports at the location where the oil spill at Goi occurred that the Intervention value in the soil is exceeded at a depth of more than 1 metre below ground level. Report

[378] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. F.4.2.
[379] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. F.5.1.

> [20] addresses the irregularity of the pollution as a result of variations in soil composition. This confirms the need for small-scale custom work.[380]

421. As argued above, it is rather likely that the pollution reached deeper layers of soil and groundwater. Edelman points out that the *Clean-up and Remediation Certification formats* do not demonstrate how the groundwater level was measured, but that it is obvious that the groundwater level varies:

> Reports [3], [8] and [10] state regarding the groundwater level that it is deeper than 3, 7 and 7 metres, respectively. They probably drilled in a few places to 3 and 7 metres, respectively, without finding groundwater in that zone.
>
> Report [4] states that the banks of surface water have been remediated. Normally, the groundwater level shows a gradient inland from the banks of surface water. This means that there is probably a multitude of groundwater levels, including shallow ones.
>
> In addition, it is normal that the groundwater levels vary over the course of the year. Close to the sea, this even occurs at the tidal rhythm. This way, an increasing groundwater level with a layer of oil floating on top of the groundwater can contaminate the soil above it.
>
> Report [18] points out the possibility that the groundwater has been contaminated. This is in line with the conceptual model presented in paragraph 2.3. [381]

422. The UNEP previously already determined the following regarding Ogoniland:

> The assessment found there is no continuous clay layer across Ogoniland, exposing the groundwater in Ogoniland (and beyond) to hydrocarbons spilled on the surface, In 49 cases, UNEP observed hydrocarbons in soil at depths of at least 5 m. This finding has major implications for the type of remediation required.[382]

[380] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 12.
[381] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 13.
[382] United Nations Environment Programme report, *Environmental Assessment of Ogoniland* (2011), Exhibit L.7 (cases a - e), p. 9.

7.3.3 The remediation method was not carefully chosen

423. Based on the data regarding the pollution, on the one hand, and the specific characteristics of the impacted area, on the other, the operator can make a careful choice regarding the remediation method to be applied.[383]

424. In contrast to what an operator should do according to good oil field practice and based on the EGASPIN, Shell did not prepare an assessment or an Environmental Evaluation (post-impact) report (EER).[384]

425. Nor has it been otherwise demonstrated that Shell took the specific characteristics of the polluted area into account in determining the remediation method. On the contrary, everything indicates that Shell simply chose to apply RENA, removing only 30 cm of the top layer of the polluted soil (despite the long period of time that had expired since the oil spill, during which the oil could penetrate the deeper layers of soil and groundwater). Edelman stated the following in this regard:

> It is remarkable that the same approach was used for three different cases of oil pollution. Differences in leakage, soil composition, groundwater level and distance to the spill logically should have resulted in a differentiated approach between and within locations.[385]

[redacted]

427. SPDC's pig-headedness in this regard is demonstrated, given that years later, IUCN again emphasized the importance of a careful investigation prior to remediation:

> There is therefore a need to heed the cautions expressed in Annex IV (Sections i and iii) regarding the importance of investigating spill site properties prior to

[383] See section 8.2.2 above.

[384] Statement of Defence on Appeal Phase 1 of Shell, nos. 286-287.

[385] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 15.

[386] [redacted]

> treatment in order to select the most appropriate combination of approaches to achieve the best results. [387]

428. It is true that the affected areas comprise a specifically vulnerable area on account of the many creeks and rivers through which the oil can spread extremely quickly.[388] As already demonstrated before, the EGASPIN stipulate specific requirements for (the preliminary investigation during) the remediation of such wetland and mangrove areas.

429. Moreover, the land farming method, as RENA is also called, which Shell chose, and the removal of a limited layer of 30 cm is unsuitable, because there was a long period of time in the various locations between the occurrence of the pollution and the remediation, during which the oil managed to penetrate deeper into the soil and spread via the (ground) water. Shell failed to sufficiently take the presence of this probable pollution in these deeper layers of the soil and the groundwater into account.[389]

430. The UNEP also observed that Shell wrongfully started from the fact that the oil will not move any deeper:

> Remediation by enhanced natural attenuation (RENA) - so far the only remediation method observed by UNEP in Ogoniland – has not proven to be effective. Currently, SPDC applies this technique on the land surface layer only, based on the assumption that given the nature of the oil, temperature and an underlying layer of clay, hydrocarbons will not move deeper. However, this basic premise is not sustainable as observations made by UNEP show that contamination can often penetrate deeper than 5 m and has reached the groundwater in many locations. [390]
>
> The RENA approach, if using bioremediation as the primary process to be enhanced, will not work at depths below 1 metre due to difficulties with oxygen transfer.[391]

431. Moreover, Edelman explains that RENA is not suitable for cleaning soil that has been contaminated by heavy metals, even though – very high concentrations of – precisely such heavy

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[387] IUCN (2013), Exhibit O.6 (cases a - e), par. 5.1.

[388] See *inter alia* the Summons in all cases, chapter 7.2.

[389] See Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 12 ("*This leaves any (and probably existing) pollution of the soil deeper than 0.3 metre entirely in the dark*.") and 18 ("*No attention was paid to the soil layers deeper than 30 c, probable layers of oil floating on the groundwater and probable pollution of the groundwater*.").

[390] United Nations Environment Programme report, *Environmental Assessment of Ogoniland* (2011), Exhibit L.7 (cases a - e), p. 12.

[391] United Nations Environment Programme report, *Environmental Assessment of Ogoniland* (2011), Exhibit L.7 (cases a - e), p. 145; See the Statement of Reply (cases c + d), chapter 7.2.2.

metals were found.[392] Thus, according to Edelman, additional methods are required to clean the soil from heavy metals, as well.[393] Nor can RENA be used to remove floating oil on the groundwater; however, Shell did not investigate this at all.[394]

432. It seems that meanwhile, SPDC has somewhat modified its work method; in a report regarding the collaboration between SPDC and IUCN, the latter authority noted the following:

> The Panel identified in their recommendations the need to understand site-specific conditions for effective remediation. This articulated need resulted in SPDC developing a new set of Conceptual Site Models (CSMs) for the identified Niger Delta ecozones: lowland forest, wood forest, swamp forest, mangrove swamps and coastal barrier islands. These models support differentiated evaluation of risks if oil spills occur within any of the ecozones, as each has unique characteristics and site-specific conditions.
>
> The models continue to provide a framework for risk evaluation and help the selection of the most appropriate mitigation, remediation and rehabilitation options.[395]

7.3.4 Incorrect test in using intervention values

433. In fact, the District Court - and Shell - wrongly considered the intervention values as a remediation goal, and the target values as no more than a number worth pursuing.[396] However, the District Court should have started from the criterion that the EGASPIN stipulated, i.e. that the land had to be returned to the original state to the extent possible - and in any event had to be suitable for use again - or, in the event of sensitive areas (which in any event are involved in the case of *mangrove areas*),[397] that the pollution had to be removed *completely*.

434. It has already been explained in chapter 8.2.1 above that the target and intervention values do not have the meaning allocated to these terms by the District Court, but serve to characterize clean

[392] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), pp. 15-16.
[393] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), pp. 15-16.
[394] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 16.
[395] G.S.M. Mehers, *IUCN Niger Delta Panel: stories of influence* (2018), p. 6. Available online via: https://portals.iucn.org/library/sites/library/files/documents/2018-047-En.pdf <lastly visited on 13 February 2019>
[396] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.55 (cases c + d); par. 4.57 (cases a + b) and par. 4.49 (case e).
[397] By virtue of the EGASPIN, the polluter is required to verify whether a sensitive environment is involved, which is discussed in more detail below.

soil or serious soil pollution. Edelman clarified that this may be assumed to be the same in Nigeria, given that Nigeria derived its system of standards from the Dutch system regarding this point.[398]

435. Moreover, Edelman makes it clear that the target values for Goi and Oruma do not constitute a proper remediation limit, given that the Bryjark/Braide and Arcadis reports demonstrate that so-called ecological stress is involved at those locations, including in the event of low oil content:

> This means that soil life is under pressure, which may manifest itself in the type composition and activity of organisms. This is highly relevant, if only for determining a remediation goal. After all, par. 3.4 specified the elimination of risks and thus making the land suitable for use or (in principle) the complete removal of pollutants as the remediation goal in Nigeria. Ecological stress is a risk, in part because it prevents the further degradation of oil components. […]
>
> This means that the target value for oil in this case is not a proper remediation limit.[399]

436. Even if the target and intervention values were to be used in the meaning advocated by Shell and the District Court, the fact that the observed oil pollution in TPH remained below the intervention values may not be taken to mean that the remediation was adequate.

437. Shell applied the exact same remediation method in all locations and did not show in any way that the starting point in the remediation was to achieve the target values. Neither did Shell argue that, for example, excavating the soil to a deeper level in order to obtain better results would be a disproportionate burden.

438. The reports that Shell submitted exclusively specify the alleged value of Total Petroleum Hydrocarbons (TPH). In Goi, this value was determined at 296.10 and 334.17 mg/kg, in Oruma at 61 mg/kg, and in Ikot Ada Udo at 198.18 mg/kg. Thus, at all locations, it was determined that the THP is below the intervention value, but above the target value.

439. In its report, the IUCN concluded that the intervention values of the EGASPIN do not contribute to proper remediation:

> Furthermore, the current intervention levels for pollutants, remediation standards and monitoring techniques are inadequate to achieve restoration and rehabilitation of biodiversity and habitats.[400]

440. The target values are also severely criticized in the report:

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[398] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 8.

[399] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 13-14.

[400] IUCN (2013), Exhibit O.6 (cases a - e), p. 41.

> With respect to EGASPIN standards in general, the Panel noted that the target limits for CoSC [Chemicals of Special Concern, adv.] were higher than the limits set in other countries such as USA, Canada and the Netherlands (see Annex III). Some PAHs that are considered carcinogenic by the United States Environmental Protection Agency (USEPA) and are commonly found in aged or weathered oil spills are not listed at all in EGASPIN. For example, benzo(a)pyrene, which EPA and the World Health Organization (WHO) consider to be one of the most toxic and carcinogenic PAHs, has no listed target levels for soil and surface water in EGASPIN. Furthermore, EGASPIN levels are generalized and not site-specific to the four ecozones. In contrast, Canadian and American target levels are either site-specific or soil-specific. There is a need to encourage a review of some levels by the regulatory agency in order to promote quicker ecosystem recovery. In the meantime, SPDC is encouraged to use the suggested target levels indicated in Annex III as a guide for monitoring ecosystem recovery, until specific standards are established for the Niger Delta ecosystem.[401]

441. The IUCN concludes that "*inadequate benchmarks for target values of pollutants' residues in the environment*" are involved and therefore recommends the following:

> Redefine and establish intervention and target standards to support remediation and rehabilitation respectively.[402]

442. And:

> A new guideline should be developed for ecosystem rehabilitation in the Niger Delta, to include a wider range of pollutants, CoSCs, especially for PAHs in soil and groundwater.[403]

443. In conclusion, both the intervention values and the target values of the EGASPIN are too high to derive from this that oil pollution was actually remediated. To achieve that result, values must sometimes be achieved (as proposed by the IUCN) that are below the determined values, or which have not even been determined at all in the EGASPIN. Against this background and the requirement that the goal must be that the land is returned to its original state to the extent possible, the District Court should not have assumed that Shell had properly remediated the land, because

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[401] IUCN (2013), Exhibit O.6 (cases a - e), p. 13.

[402] IUCN (2013), Exhibit O.6 (cases a - e), p. 16 and recommendation 4.2.2 (p. 43): "*Redefine nature of treatment of oil spill sites bringing it up to acceptable and comparable national standards that support quicker ecosystem recovery - In support of ecosystem recovery, regulatory agencies should review target levels/standards of CoSC to levels that can support ecosystem recovery by comparing EGASPIN standards with those of other countries, such as Canada (see Annex III) as well as reviewing international guidelines for testing of CoSC published by OECD in 1995, and EC in 2010, and calculating degradation kinetics using local assumptions to achieve Nigerian specific standards for interim sign–off*".

[403] IUCN (2013), Exhibit O.6 (cases a - e), p. 41.

the TPH values remained below the intervention values described in the EGASPIN. At a minimum, the District Court should have assessed whether an actual attempt was made to achieve the target values specified in the EGASPIN. This has not been shown.

7.3.5 The Clean-up reports do not demonstrate any adequate remediation

444. To substantiate its argument that its remediation was adequate, Shell refers to the *Clean-up and Remediation Certification formats* and the *close-out reports* of its contractors. Edelman states the following in this regard:

> It cannot be inferred from Shell's reports whether the soil was properly remediated.[404]

445. Earlier, Von Scheibler had arrived at the same conclusion.[405]

446. In order to determine the adequacy of the remediation, at a minimum the remediation reports should have contained the following information:

i. A soil survey and map

ii. Values for all harmful components that may remain behind in the soil as a result of the oil pollution, in any event including all the substances described in the EGASPIN and in the Clean-up and Remediation Certification format.

iii. Data regarding the sampling to assess those values; i.e. the locations at which the various samples were taken and the manner in which and the depth at which those samples were taken and stored.

iv. The above information regarding the presence of harmful substances in the soil and groundwater.

447. Given that all these data were absent, it cannot be determined that the soil was remediated. It has already been argued before that the operator has the obligation to determine and document the adequacy of the remediation. Shell did not comply with this obligation.

448. The importance of a proper factual substantiation is further increased by i) the plaintiffs' argument that the land and fish ponds were still not suitable for use even after remediation; ii) the conclusion of different independent organizations that it is frequently wrongfully concluded in *Clean-up and Remediation Certification* formats that the remediation is completed and iii) the knowledge that structurally, Shell did not have its affairs in the area of *oil spill response and remediation* in order.

[404] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p.19.

[405] Von Scheibler's report, Assessment of soil remediation, Exhibit M.5 (cases a - d), Exhibit M.4 (case e).

449. (re ii) The UNEP's extensive criticism of the manner in which remediation processes were set up within Shell was referred to previously.[406] Here it is sufficient to cite the UNEP investigators' conclusion that:

> It is evident from the UNEP field assessment that SPDC's post-oil spill clean-up of contamination does not achieve environmental standards according with Nigerian legislation, or indeed with SPDCS's own standards. [...] Some of these locations had actually been documented by the operator as assessed and cleaned up, while others were still to be cleaned up. The difference between a cleaned-up site and a site awaiting clean-up was not always obvious.[407]

450. This criticism is shared by the IUCN, which was ordered by Shell to examine Shell's work methods in remediation. For this reason, the IUCN recommended the following:

> SPDC should conduct stricter monitoring of sites before sign–off as contractors may not have conformed to current remediation standards, as seen in some cases.[408]

451. Moreover, according to the IUCN, more stringent monitoring should also be conducted after sign-off, because it is impossible to determine the ultimate success of the remediation (or lack thereof) at such an early stage:

> SPDC should introduce independent monitoring teams comprised of professionals from relevant backgrounds and selected on an ad hoc basis (enhancing transparency) to undertake scheduled visits in order to check more stringently the target levels for CoSCs, in order to support rehabilitation of biodiversity and habitats. Even with stricter monitoring prior to first sign-off, the first few months are inadequate for biodiversity rehabilitation, therefore monitoring needs to continue with annual monitoring for up to a period of three years to allow enough time for habitat recovery in accordance with the protocols of the IUCN–NDP Outcome Success Matrix (see Annex III) and the reappearance of biodiversity before final sign-off.[409]

[redacted] (re iii) The [redacted] already demonstrated that within SPDC, this area suffered from [redacted]

[406] See *inter alia* the Statement of Reply, par. 7.2.2 (cases c - e); par. 7.2.1. (cases a + b); Statement of Appeal Phase 1 of Milieudefensie et al., no. 120 and following;

[407] United Nations Environment Programme-rapport, *Environmental Assessment of Ogoniland* (2011), Exhibit L.7 (cases a - e), p. 150.

[408] IUCN (2013), Exhibit O.6 (cases a - e), p. 40.

[409] IUCN (2013), Exhibit O.6 (cases a - e), Recommendation 4.1.2 (p. 38): Redefinition of monitoring protocols.

[redacted]

[redacted]

454. The [redacted] further determined the following:

[redacted]

413 [redacted]

[redacted]

455. In brief, not only is Shell unable to demonstrate with its *Clean-up and Remediation Reports* that the remediation was adequate; based on the investigations by the UNEP, [redacted], amongst others, the probability that it was inadequate should be assumed.

7.3.5.1 Presence of heavy metals and other harmful substances was not investigated

456. As demonstrated *inter alia* by the report from Von Scheibler[415], Edelman's expert report[416], the passage in the IUCN report described above[417] and the EGASPIN, the measured TPH is just one of the characteristics based on which the extent of the oil pollution can be determined. However, oil pollution comprises additional harmful substances that are not part of the TPH.[418] This also includes heavy metals. Thus, the TPH does not say anything about the presence of heavy metals.[419]

457. In table VIIIF1, the EGASPIN specify the target and intervention values for many of those harmful substances. The form included in the EGASPIN for a *Clean-up Remediation and Certification Report* contains a table in which the extent of the presence for each individual substance in the soil and groundwater must be listed. The reports that Shell submitted do not include this breakdown into chemical substances.

458. Edelman observed:

> The presence of inorganic substances such as heavy metals was not taken into account in the remediation."[420]

459. But also:

> It is reported in [17] that the soil is not only polluted by organic components, but also by heavy metals, lead and mercury.[421]

[redacted]

[415] Von Scheibler's report, Assessment of soil remediation, Exhibit M.5 (cases A - D), Exhibit M.4 (case e).

[416] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e).

[417] IUCN (2013), Exhibit O.6 (cases a - e).

[418] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 9.

[419] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 11.

[420] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 19.

[421] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 11.

460. Edelman also noted the following with regard to Goi:

> The polluted area in Goi is frequently flooded by salt water. This is relevant for the gravity of the pollution with heavy metals. Salt water makes the heavy metals far more mobile as a result of the presence of chloride. The mobile metals can spread more easily through the groundwater, but can also be absorbed by plants more easily.

461. Given that heavy metals were not taken into account in the remediation, it cannot be inferred from the reports that the remediation was successful for this reason alone.

462. In this connection, it is pointed out that the values for lead and mercury observed by Udo are even well above the intervention values determined in the EGASPIN.[422] Given that the natural attenuation method determined by Shell is not suitable for removing heavy metals, it must be assumed that this pollution is still present in the soil.[423] The expert investigation into the extent of the pollution demanded by the appellants will also have to test for heavy metals.

7.3.5.2 Inadequate sampling

463. The *Clean-up Remediation and Certification formats* do not demonstrate anything regarding the location and sampling method. For this reason, it is impossible to assess what can be inferred from the values found in these samples.

464. Edelman noted the following in this connection:

> Reports [3], [8] and [10] contain data regarding the extent of the pollution before and after remediation. A mixed sample per area was apparently analysed. It is unlikely that the extent of the pollution before and after remediation was exactly the same for the entire site. The use of a single mixed sample for 18,000 m3 of soil in Goi, and 93,300 m3 and 7,050 m3, respectively, in Oruma cannot provide a representative picture.[424]
>
> Report [12] indicates that mixed samples were indeed used for each area. The report does not state how many sub-samples comprised the mixed samples. The objection to mixed samples is that samples with a different degree of pollution are combined, thus evening out the extent of the pollution.[425]

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[422] See Prof E.J. Udo, Environmental impacts of the oil spill at Ikot Ada Udo, Exhibit B.2 (case e) and Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 19.

[423] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 15.

[424] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 12.

[425] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 13.

465. It is obvious that a mixed sample in which different parts of polluted soil in an area of 18,000 m3, 93,300 m3 and 7,050 m3 cannot provide a representative picture of the extent to which oil pollution is still present in that area.

466. No additional information is known regarding the sampling method, even though the work method in sampling is essential in order to start from the reliability of the sampling:

> The reports that have been made available do not state anything regarding the manner in which the samples were conserved during the period between sampling in the field and analysis in the laboratory. If this was not done in the correct manner, this may have resulted in lower contents in the laboratory.[426]

[redacted] In this connection, it is relevant that [redacted];[427] (ii) independent agencies determined that the remediation was often wrongfully considered to be completed[428] and (iii) the [redacted] observed that [redacted]

[redacted]

468. The samples taken for the *Clean-up and Remediation Certification* are therefore not representative, firstly because a mixed sample per area, to exclusively measure TPH, is insufficient to assess any pollution that is still present and, secondly, because the mixed samples were probably produced and treated incorrectly.

469. Moreover, the analysis results only pertain to the land to which RENA was applied, thus the top 30 cm. No information is provided regarding possible soil contamination below the level that was cleaned using the RENA method. As Edelman noted, this land may have been polluted by excavating oil-saturated soil.[430]

7.3.5.3 No investigation into groundwater

470. Moreover, again in breach of good practice and the EGASPIN,[431] Shell failed to investigate the groundwater.

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[426] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 18.

[427] See no. 452 above.

[428] See numbers 449 and 450 above.

[429] [redacted]

[430] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 16.

[431] See the EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, table VIII-F1.

471. It is common knowledge that after an oil spill - especially if more time is lost, as in the case at issue - the oil almost always reaches the groundwater.[432] Edelman points out that this is likely, especially given that oil was also found in the surface water.

> Normally, the groundwater level shows a gradient inland from the banks of surface water. This means that there is probably a multitude of groundwater levels, including shallow ones.[433]

472. The risk of oil in the groundwater is considerable, because - as Edelman also described - the groundwater level may fluctuate and an increasing groundwater level with a layer of oil floating on top of the groundwater may recontaminate the soil above.[434]

473. As Edelman noted, RENA cannot be used to remove layers of oil that float on the groundwater. The reports that have been made available for inspection do not address the possible presence of layers of oil floating on the groundwater anywhere.[435]

7.3.5.4 Results have not been monitored

474. Shell not only made insufficient efforts to verify the results at the time of the close-out of the remediation, it also subsequently failed to monitor whether the *natural remediation* went according to plan, even though the effects of RENA can only be tested in the long term; thus, at the time of the *Clean-up and Remediation Certification Formats*, Shell was unable to determine whether the ultimate goal of *suitability for use* could be reached.

7.3.6 Remediation work was inadequate

475. In addition to the above, the following is pointed out regarding the remediation of the individual oil spills. The following applies without prejudice to the arguments already advanced in previous case documents.

7.3.6.1 Goi

476. After the oil spill of 2003, no remediation work whatsoever was performed on Dooh's land and fish ponds.

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[432] See Von Scheibler's report, Assessment of soil remediation, Exhibit M.5 (cases A - D), Exhibit M.4 (case e); Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 9; IUCN (2013), Exhibit O.6 (cases a - e), p. 34: *"The speed of response is critical in handling new spills since one of the complications of delayed response is the formation of more complex hydrocarbons that are more difficult to degrade. (...) Historically, delayed response encouraged a time lag that allowed spills and plumes to spread and/or seep deep into groundwater levels in certain soil types"*; United Nations Environment Programme report, *Environmental Assessment of Ogoniland* (2011), Exhibit L.7 (cases a - e), p. 145.

[433] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 13.

[434] Idem.

[435] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 16.

477. Shell did not begin the clean-up of the oil spill of 2004 until 27 months after the spill. All this time, air, water and land were exposed to the oil and the oil managed to penetrate deeper into the soil and groundwater. To the extent that Shell blames this delay on its problems in getting access to the area, please refer to the arguments in this regard in the context of chapter 7.

478. In addition, Shell referred to a letter from the authorities of Rivers State in which Shell was ordered not to perform any further clean-up work. This letter dated from 8 December 2004. Shell failed to explain why it did not commence the remediation work immediately after stopping the leak - and thus long before this letter was sent, as the EGASPIN and good practice require. Moreover, this letter was in the context of a different discussion - namely an overdue large-scale clean-up of a polluted area[436] - and does not discharge Shell from its responsibility to remediate the pollution at Goi.

479. The reports provided for Goi are confusing and inconsistent, except with regard to the fact that all 27 contractor reports are virtually identical (including typos).[437] The data included in the reports do not correspond with the data that Shell specified for the start and completion of the clean-up work.[438]

480. In addition, the reports demonstrate that Oclansorb was used in the remediation. This is an absorbent to which oil attaches and which is to be removed after use. This was apparently not done, given that this is not demonstrated by the reports, which even refer to the product as a nutrient, which remains in the soil. By using this method, Shell inflicted additional damage on the environment.[439]

481. The area at Goi is swamp and mangrove area, which is extremely vulnerable in the event of oil pollution. The oil can quickly spread via the soil and groundwater. The remediation method used, which did not include the groundwater and only removed 30 cm of the soil surface, is unsuitable in advance. It was up to Shell to demonstrate that adequate results could nevertheless be achieved; however, those data are absent.

482. The fact that Dooh had a say in what contractors were to be hired by Shell does not make Dooh responsible for the result of their work. He has not a hierarchical relationship with Shell and also lacks the expertise for this.

483. The District Court's conclusion that it has not been established that the objections of the UNEP report actually occurred in the location in question is factually incorrect, in any event for Goi. The UNEP report comprises so-called *Site Specific Fact Sheets*, in which the pollution at specific locations in Ogoniland was investigated; these results were the basis for the UNEP's general findings in the main report. The *Site Specific Fact Sheet* for Saanako-Mogho (**Exhibit Q.32**)

[436] See the Statement of Reply (cases c + d), no. 360.

[437] See the Pleading Notes of attorney Samkalden of 11 October 2012, no. 145.

[438] See the Statement of Reply (cases c + d), no. 368.

[439] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. B.2.6.3.

specifically pertains to the location where the oil spill at Goi occurred in 2004 on the Bomu-Bonny pipeline.[440] For the Mogho area at Goi, the report specifies that the intervention value is exceeded in the groundwater.[441]

484. The extent of the pollution at the location where the oil spill occurred and the knowledge that the pollution managed to penetrate deeper into the ground water is relevant for the question regarding the extent to which Dooh's land and fish ponds may have been polluted, of course. Thus, Shell's argument that the report does not pertain to the situation at Goi that the District Court followed is incorrect. Moreover, Milieudefensie et al. believe that Shell must have been aware of this inaccuracy, given that it rendered its assistance in creating the UNEP report and must be deemed better able to interpret the findings – with which Shell claims it will comply – than anyone else.

7.3.6.2 Oruma

485. With regard to Oruma, Shell acknowledged that the oil flowed beyond the strip of land to which Shell has a Right of Way. However, Shell argued that it was unable to verify whether the oil also flowed into the waterways that Oguru et al. specified in the summons, *"by the fact that it was unable to find out the location of the Olumogbogo-gbara Creek and the Oba Creek mentioned by Oguru et al.*"[442]

486. If Shell had carefully mapped the extent of the pollution as it should have done, it would also have been clear to Shell what area was affected by the oil spill and to what extent the oil also managed to spread via waterways. The fact that Shell does not have this information means that its point of view that its remediation was adequate is untenable.

487. Approximately one year passed between the oil spill and the remediation in Oruma. The remediation only began in 2005 and was completed in June 2006. During all this time, the air, water and land were exposed to the oil and the oil managed to penetrate deeper into the soil and groundwater. To the extent that Shell blames this delay on its problems of getting access to the area, please refer to the arguments already advanced in this regard in the context of chapter 7.3.4.

488. According to Shell, despite the considerable time that had elapsed and the many creeks and rivers in the area, 350 of the alleged total of 500 barrels of spilled oil were nevertheless allegedly remediated by removing 30 cm of the soil surface. This number is implausible.

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[440] United Nations Development Programme, *Site-Specific Fact Sheet Saanako Mogho* (July 2011), **Exhibit Q.32** (cases a - e). Compare the aerial photograph included in the fact sheet with the photograph that was attached to attorney Samkalden's e-mail to Shell and the Court of Appeal, in which she raised digging up the pipeline by Shell at the location in question.

[441] Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 13.

[442] Statement of Defence, no. 81 (case a); no. 51 (case b).

489. By burning oil in places not suitable for this, trees and crops were scorched. In this way, Shell inflicted additional damage on the environment.[443]

7.3.6.3 Ikot Ada Udo

490. In Ikot Ada Udo it also took more than a year before the land was remediated. All this time, the air, water and soil were exposed to the oil and the oil managed to penetrate deeper into the soil and groundwater. To the extent that Shell blames this delay on its problems in getting access to the area, please refer to the arguments already advanced in this regard in the context of ground for appeal 5.

491. Shell argued that the pollution in Ikot Ada Udo did not move beyond the area to which Shell has a Right of Way. The appellants have contested this. The statement by a Shell official *("some quantity washed into third party farmland")*[444] and the contractor's clean-up report *("The released crude oil spread beyond the spill point area and imparted third party land.")*[445] also demonstrate that the pollution went beyond Shell's own Right of Way.

492. Had Shell carefully mapped the extent of the pollution - as it should have done - it could also have explained how the oil had spread or not. The fact that Shell does not have this information means that its point of view that its remediation was adequate untenable.

493. Even if the pollution had remained within Shell's Right of Way, this does not discharge Shell of its responsibility to adequately remediate and in this way to prevent damage to people and the environment. It has meanwhile been sufficiently demonstrated that oil spreads via the air, soil and (ground) water. Moreover, according to Shell, illegal farming was being conducted on its Right of Way. Shell did not explain how it is possible to grow crops on a Right of Way, which according to Shell is subject to frequent patrols. However, it is an established fact that after the oil spill, a considerable amount of harmful substances were found in the polluted area, including 493-6659 mg/kg of lead (intervention value 312 mg/kg) and 1,0-25,6 mg/kg of mercury (intervention value 7 mg/kg).[446] As Edelman explained, the presence of these substances can lead to increased contents in agricultural crops, which may have very detrimental effects on people's health.[447] Thus, Shell should have ensured that no people lived and/or grew crops on its Right of Way,[448] and after an oil spill, should have removed the oil pollution immediately.

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[443] EGASPIN (2002), Shell exhibit a.13/b.8/c.15/d.19/e.19, part VIII, par. B.2.6.3; See the Summons, no. 118 (cases a + b).

[444] Newspaper The Punch, 'Nigeria: Senate condemns Shell over N'Delta crisis, oil spills', 8 November 2007, Exhibit I.3 (case e).

[445] Exhibit 16 of Shell (case e), p. 7.

[446] Report of Prof E.J. Udo, Environmental impacts of the oil spill at Ikot Ada Udo, Exhibit B.2 (case e), p. 18

[447] Report of Prof E.J. Udo, Environmental impacts of the oil spill at Ikot Ada Udo, Exhibit B.2 (case e), p. 12.

[448] The UNEP and Amnesty International also criticized the lagging inspection and enforcement of Shell's right of way in view of the dangers this posed for the people involved. See Amnesty International, *Bad information: oil spill investigations in the Niger Delta* (2013), Exhibit O.3 (cases a - e) / United Nations Environment Programme report, *Environmental Assessment of Ogoniland* (2011), Exhibit L.7 (cases a - e).

494. It has in any event been established for Ikot Ada Udo that the RENA method was unsuitable, given that large amounts of heavy metals have been found in the soil. See also Edelman:

> The RENA method is unsuitable for soil pollution with heavy metals. Although in that case, the oil may have been wholly or partially removed from the soil, the heavy metals are still fully present.

7.4 Conclusion

495. Based on the EGASPIN, Shell was required to properly clean up oil pollution, irrespective of the cause of the oil spill. In concrete terms, this means that Shell was required to return the land to its original state to the extent possible. The fact that Shell failed to do this is already demonstrated by the fact that since the oil spill, the people affected have not been able to grow crops on their land and there is no longer any fish in the fish ponds.

496. As the responsible operator and, moreover, the only party that has this information on account of its work, it is up to Shell to prove that it nevertheless properly remediated the land. Shell has been unable to prove this.

497. In breach of the EGASPIN and good industry practice, Shell did not conduct a proper investigation into the nature and extent of the pollution and the effectiveness of the remediation method used and to be used. In contrast to Shell's argument, the submitted Clean-up and Remediation Certification Formats do not demonstrate that the remediation was adequate, either, given that these formats do not include crucial data regarding the presence of harmful substances, the spreading of the pollution and the manner in which and location at which soil samples were taken.

498. Against this background, the District Court wrongly concluded that SPDC's tort of negligence, which consists of the inadequate remediation of the environment of the respective villages, has not been established, in fact, in these proceedings.

8 GROUND FOR APPEAL 8: THE DISTRICT COURT WRONGLY CONCLUDED THAT THE PARENT COMPANIES DID NOT COMMIT ANY TORT OF NEGLIGENCE

8.1 The judgment

499. The District Court wrongly found as follows in par. 4.31 – 4.39 (cases c + d); par. 4.33 – 4.41 (cases a + b); par. 4:26 – 4.34 (case e):

> 4.31. 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, Shell Petroleum and Shell T&T 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 4.28 above).
>
> 4.34. 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 the parent companies of the Shell Group exists.
>
> 4.35. 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, the parent companies RDS, Shell Petroleum and Shell T&T can be blamed for failing to induce and/or failing to enable their (sub-) subsidiary SPDC to prevent and limit any damage caused to people living in the vicinity by sabotage. This situation fundamentally differs from the one in *Chandler v Cape*.
>
> 4.36. 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 the parent companies of the Shell Group knew and know that SPDC's business operations involve health risks for third parties. However, the businesses of the parent companies and SPDC 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. It is further not clear why the parent companies 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 Dooh allegedly relied on the fact that the parent companies of the Shell Group would use this superior specific know-how, if any, to protect the local community near Goi.

4.37. 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, Shell Petroleum and Shell T&T have a duty of care in respect of Milieudefensie and Dooh. In other words: the District Court is of the opinion that *Chandler v Cape* does not create any precedent in the subject case.

4.38. In the circumstances of this case, it cannot be assumed on other grounds, either, that the parent companies in The Hague and London 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 the parent companies made the prevention of environmental damage caused by operations of their (sub-) subsidiaries the main focus of their policy and that to some extent, they are involved in SPDC's policy constitutes insufficient reason to rule that under Nigerian law, those parent companies 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 the parent companies in The Hague and/or London, on the one hand, and those people living in the vicinity in Nigeria, on the other, or that it would be fair, just and reasonable to assume that the parent companies of the Shell Group had a specific duty of care in 2004 near Goi. 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.

4.39. In view of all of the above, the District Court is of the opinion that under applicable Nigerian law, the parent companies in The Hague and London did not commit any tort of negligence against Milieudefensie and Dooh. For this reason, the District Court will dismiss all the claims initiated against RDS, Shell Petroleum and Shell T&T.

8.2 Introduction

500. The District Court applied an incorrect review to assess whether there was a duty of care on the parent companies. Subsequently, the District Court wrongly concluded that no such duty of care existed.

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

502. Why these circumstances lead to liability under Nigerian law (which is based on English law in this regard) will be explained in chapter 9.3. In this context, it will be explained that the District Court derived an incorrect review from *Chandler v. Cape* (9.3.1). In this context, two recent rulings in which the English Court of Appeal expressed an opinion on the question regarding the circumstances under which a duty of care may fall on a parent company will also be addressed (9.3.2). It follows from this that the circumstances described in the previous section may lead to liability under Nigerian law.

503. Chapter 9.4 explains the management method within the Shell group. In this context, the organizational design of the Shell group (before and after 2005) and the various guidance and control mechanisms that the parent company uses, as well as the knowledge it has, are discussed in succession. It will become clear that the parent company set environmental goals, took control of the HSE policy, and monitors compliance with this policy. Depending on the specific interest involved and the priorities that the parent company set for the group, the parent company was sometimes involved at the detail level in its subsidiaries' activities. It is already clear here that this was certainly the case with SPDC. In chapter 9.5 it is further substantiated that SPDC had an exceptional position within the group and that as a strategic theme of the EP business, Nigeria was explicitly on the CMD's agenda.

504. In chapter 9.6, it is explained that the parent company was aware of the structural shortcomings at SPDC, which could lead to the oil spills and the resulting (environmental) damage. In part based on the documents that Shell made available for inspection by virtue of the Court of Appeal's interlocutory ruling, it is demonstrated that the parent company knew that SPDC failed to comply with its HSE policy. More in particular, the parent company knew that SPDC faced major problems in the area of asset integrity, security and sabotage, staffing and oil spill response and remediation.

505. In chapter 9.7, Milieudefensie et al. explain that the parent company intensified its control over SPDC in the years prior to the oil spills, showing that it could exert its influence on the problem areas described above, but that it failed to exercise this influence to prevent the environmental damage that it witnessed.

506. All this compels the conclusion that the parent company had a duty of care and that it should be deemed to be partly liable for the damage of the individual appellants and the individual victims whose interests are represented by Milieudefensie by virtue of Article 3:305a DCC.

8.3 The circumstances under which a duty of care exists under Nigerian law

507. The review framework that the District Court used in respect of the question regarding whether the parent companies had a duty of care is incorrect. Below, Milieudefensie et al. will first explain that the District Court incorrectly applied the criteria developed in *Chandler v. Cape* (chapter 9.3.1). Following this, attention is paid to two relevant new rulings rendered in this connection in the United Kingdom, namely the *Lungowe v. Vendanta* and *Okpabi v. Shell* cases and the

relevance these cases have for the review framework to be applied in the case at issue (chapter 9.3.2). This review framework is worked out in more detail in chapter 9.3.3.

8.3.1 Incorrect application of Chandler v. Cape

508. In chapter 2.7.1 of the Statement of Appeal Phase 1, Milieudefensie et al. already explained that the *Caparo* test - which comprises the criteria of foreseeability, proximity and reasonableness - is used as the starting point in answering the question regarding whether a party has a duty of care. This review is worked out in *Smith v. Littlewoods Organisation Ltd*, in reply to the question regarding the extent to which a duty of care may exist to prevent other parties from suffering damage that is caused by third parties.[449] Another important example is *Chandler v. Cape*, which specifically pertained to liability of a parent company,[450] as did *Thompson v. The Renwick Group Plc*.[451]

509. The District Court determined that "in the case at issue, it is far less quickly fair, just and reasonable than it was in *Chandler v. Cape* to assume such a duty of care on the part of the parent companies of the Shell Group", because:

a. According to the District Court, the requirement of proximity will be complied with less readily, given that this does not involve the relationship between the parent company and the employees of its subsidiary, but the relationship between the parent company and people living in the vicinity of oil pipelines and oil facilities of its (sub-) subsidiaries in other countries;[452] and

b. The situation first mentioned 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". [453]

510. The District Court further found:

c. That *Chandler v. Cape* involved a situation in which the subsidiary itself directly inflicted damage on its employees, while at best, the parent companies in the case at issue can be

[449] *Smith v. Littlewoods Organisation Ltd* [1987] UKHL 3, AC 241, Annex 10 with Shell exhibit a.19/b.14/c.26/d.29.

[450] *Chandler v. Cape Plc* [2012] EWCA Civ 525, Shell exhibit a.25/b.25/c.37/d.37/e.36.

[451] *Thompson v. The Renwick Group Plc* [2014] EWCA Civ 635.

[452] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.34 (cases c + d), par. 4.36 (cases a + b), par. 4.29 (case e).

[453] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.34 (cases c + d), par. 4.36 (cases a + b), par. 4.29 (case e).

blamed for failing to induce and/or failing to enable their (sub-) subsidiary SPDC to prevent and limit any damage caused to people living in the vicinity by sabotage;[454]

d. That the businesses of the parent companies and SPDC "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";[455] and

e. That it is not clear why the parent companies should have more knowledge of the specific risks of the industry in which SPDC operates in Nigeria than SPDC itself;[456] and

f. Thus, it is also unclear why people living in the vicinity like Dooh allegedly relied on the fact that the parent companies of the Shell Group would use this superior specific know-how, if any, to protect the local community at Goi. [457]

511. The District Court's findings display a too limited and static an application of *Chandler v. Cape*. Even though the circumstances in *Chandler* that led to the conclusion that a duty of care was involved are an important indication, they do not form an exhaustive list of requirements that indicate a duty of care for a parent company. After all, the court uses an *incremental approach*.[458]

512. The fact that the circumstances mentioned in *Chandler* are not exhaustive was also emphasized in *Thompson v. The Renwick group,* in which Thomlinson LJ found:

> It is clear that Arden LJ intended this formulation to be descriptive of circumstances in which a duty might be imposed rather than an exhaustive list of the circumstances in which a duty may be imposed. I respectfully adopt the formulation of the editors of *Clerk & Lindsell on Torts*, 20th edition, 3rd supplement 2013 at para 13-04:
>
> The factors set out in (1)-(4), however, do not exhaust the possibilities and the case merely illustrates the way in which the requirements of *Caparo v Dickman* may be satisfied between the parent company and the employee of the subsidiary.[459]

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[454] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.35 (cases c + d), par. 4.37 (cases a + b), par. 4.30 (case e).

[455] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.36 (cases c + d), par. 4.38 (cases a + b), par. 4.31 (case e).

[456] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.36 (cases c + d), par. 4.38 (cases a + b), par. 4.31 (case e).

[457] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.36 (cases c + d), par. 4.38 (cases a + b), par. 4.31 (case e).

[458] Opinion by Robert Weir QC, Exhibit N.2 (cases a - e), par. 42 and following. This was also already found by the District Court in its final judgment, Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.27 (cases c + d), par. 4.29 (cases a + b), par. 4.23 (case e).

[459] Cited and confirmed in *Lungowe and Ors v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528, [2017], **Exhibit Q.33** (cases a - e), par. 81.

513. In his opinion that was submitted as Exhibit N2, Robert Weir set out the relevance of the Chandler case, by way of working out the criteria developed in *Caparo* and *Smith v. Littlewoods*, for the case at issue. He considered:

> 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. […]
>
> The fact that this case can be distinguished from the Chandler decision is not, therefore, a bar to the finding that there was a duty of care imposed upon RDS. The case of Chandler is not to be understood as the last word on the imposition of a duty of care on a parent company. It is a case involving the imposition of a duty of care on a parent company in the context of a claim by an employee of a subsidiary. On that factual premise, a duty of care is capable of being owed. It would be wrong to construe from this decision that it is necessarily harder to establish a duty of care in a different factual matrix involving damage to those living near plant operated by a subsidiary and subject to sabotage. [460]

514. The District Court's conclusion that in the case at issue, a duty of care can be assumed "*far less quickly*", because the circumstances described are different, is wrong for the following reasons:

a. The District Court failed to recognize that both in *Chandler v. Cape* and in the case at issue, the proximity is determined by the assumption of responsibility by the parent company. This is the third ground for liability that Lord Goff mentioned in *Smith v. Littlewoods.*[461] In this context, the special relationship that justifies the existence of a duty of care is not the one between the defendant and the injured party, but the one between the defendant and the third party who is responsible for the damage. The existence of a duty of care in such a situation had already been determined by the House of Lords in *Home Office v. Dorset Yacht Co Ltd.*[462] That case involved detained youngsters (borstal trainees) who had been put to work in a harbour and escaped in a stolen yacht, with which they inflicted damage on the properties of third parties. In that case, as well, the defendants argued that there was no relationship between them and the injured parties and that, moreover, those injured parties were physically at a quite considerable distance from the defendants. However, according to the House of Lords, this did not stand in the way of the existence of a duty of care, given that the *Home Office* had accepted responsibility for the youngsters and it must have been foreseeable that they would inflict damage in an attempt to escape. In the case at issue, as

[460] Opinion of Robert Weir QC, Exhibit N.2 (cases a - e), par. 44, 46.

[461] *Smith v. Littlewoods Organisation Ltd* [1987] UKHL 3, AC 241, Annex 10 with Shell exhibit a.19/b.14/c.26/d.29.

[462] *Home Office v. Dorset Yacht Co Ltd* [1970] UKHL 2.

well, a decisive factor is that the parent company had assumed responsibility and could foresee that as a result of SPDC's failure to prevent oil spills, remedy these in time and adequately remediate the spills, the people living in the vicinity of the pipelines and facilities would suffer damage.[463] Compare in this regard also the *Lungowe v. Vendanta* and *Okpabi v. Shell* cases to be discussed below, in which the Court of Appeal adopted the same approach in discussing *proximity*. Finally, see Weir:

> The real test is not how many people may be able to sue but whether the class of individuals wishing to sue are in a relationship of sufficient proximity. In this case, Dooh was, as I understand it, living close to the pipeline at the time of the incident and the others on whose behalf VM acts in a representative capacity fall into a category of individuals living close to the pipeline. In that case, the Claimants form a class which is discrete and has a proximate relationship with the pipeline and hence those responsible for preventing its sabotage. That is a different class of individuals from, say, employees of SPDC working on the pipeline (to draw an analogy of sorts with the *Chandler*) case but no less a valid and confined class of individuals.[464]

b. In contrast to what the District Court assumes,[465] the fact that this involves a potentially large group of victims may instead mean that it is even more fair, just and reasonable to assume a duty of care. There is no reasonable justification for the assumption that the larger or more widespread the extent of the damage is, it is allegedly less fair or reasonable to determine liability. If a large number of people suffer damage as a result of the acts or omissions of a party over whom control is exercised, the need to intervene is rather proportionately larger. Weir contends the following in this regard:

> 47. At 4.34 of the January 2013 judgment, the court took into account, as a factor militating against the imposition of a duty of care, that such a duty would then be owed "in respect of a virtually unlimited group of people in many countries." The actual number of people who could sue in respect of a claim is not the key in English law. If, for instance, there was an explosion in the heart of London as a result of a trivial but negligent act, causing injury and property damage to many tens of thousands, that would not be treated as a factor against the imposition of a duty of care. If that were so, it would mean that the more likely a defendant was to cause injury and to a greater extent, the less likely the defendant was to owe a duty, a paradoxical and unjust result.
>
> […]

[463] This point will be addressed in more detail below in discussing the *Okpabi* ruling.

[464] Opinion of Robert Weir QC, Exhibit N.2 (cases a - e), p. 13-14.

[465] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.34 (cases c + d), par. 4.36 (cases a + b), par. 4.29 (case e).

> 49. If it be the case that a group of companies (whether oil companies or any other) has so organised itself that (for reasons set out below) the parent company has responsibility for an accident occurring, then a duty of care may be imposed and the fact that the parent company may be large is not to the point. Further, if the parent company is responsible for the safety of a very large network of activities (whether pipelines in different countries or otherwise), and these are so run that they are all at risk of causing damage to those living in the neighbourhood of these activities, then again that cannot be treated as a reason not to impose a duty of care. Otherwise, a small business operating within one country could be held liable for the damage or injury caused by an accident on the premises of its subsidiary yet a multi-national company making exactly the same failings and thereby responsible for damage or injury to many more individuals across the globe could escape liability.[466]

Similarly, Sales LJ found as follows in the *Okpabi* case, which is discussed in more detail in chapter 9.2.2 below:

> The point about the size of the Shell group is misplaced, in my view. Whether RDS owes a duty of care in relation to the operations of subsidiaries will depend upon whether the operations of those subsidiaries arise in the context of affecting a foreseeable and proximate class of claimants (e.g. neighbouring property owners affected by oil spills) and whether on the facts RDS has assumed a material degree of responsibility for how the relevant operations of any particular subsidiary are carried out. It is certainly not enough that RDS, by ExCo, issues some DEPs which have some mandatory instructions, since even in these cases not every mandatory instruction will involve RDS assuming control to a relevant degree. But on the facts of a particular case, the issuing of mandatory instructions combined with close monitoring, intervention and enforcement, may show that there has been a material assumption of responsibility. More generally, I do not think that the simple matter of the sheer size of the Shell group can be an answer to the present claim: why should the parent of a large group escape liability just because of the size of the group, if the criteria for imposing a duty of care are satisfied for a number of companies in the group, while the parent of a smaller group (e.g. with one subsidiary) has a duty of care imposed on it when precisely the same criteria are satisfied in relation to its subsidiary?[467]

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[466] Opinion of Robert Weir QC, Exhibit N.2 (cases a - e), p. 13, 14.

[467] *Okpabi and others (suing on behalf of themselves and the people of Ogale Community) v. Royal Dutch Shell Plc and another; Alame and others v. Royal Dutch Shell Plc and another* [2018] EWCA Civ 191, **Exhibit Q.34** (cases a - e), par. 172 vi.

c. If the ground for appeal against the District Court's finding that the oil spills were caused by sabotage is successful, the District Court's consideration mentioned under (c) above no longer applies. Even if sabotage is to be started from, the District Court's conclusion that a duty of care may be less quickly involved, because "at best, the parent companies in the case at issue can be blamed for failing to induce and/or failing to enable their (sub-) subsidiary SPDC to prevent and limit any damage caused to people living in the vicinity by sabotage" [468], is incorrect. See also Weir:

> If the court finds that SPDC did owe a duty of care, then the fact that it was a positive duty to prevent a third party from causing direct damage is not key. Once it has been recognised that the subsidiary owed a duty of care, it matters little whether it was a duty based upon act or based upon omission.
>
> If SPDC is found not to have owed a duty of care, that is not, as a matter of principle, a bar to a finding that RDS itself owed a duty of care because the court is concerned with the question whether RDS owed a direct duty of care to the Claimants.[469]

d. The District Court further wrongly concludes that the businesses of the parent companies and SPDC "are not essentially the same". [470] Both the parent companies and SPDC are essentially involved in the production and processing of oil. The fact that the parent companies have organized the Shell Group such that different divisions and subsidiaries focus on different aspects of this production/processing does not justify the conclusion that essentially different activities are involved. Weir stated the following in this regard:

> The first issue is whether the businesses of the parent and subsidiary are in a relevant respect the same. In this case, they clearly are: RDS is in the business of oil production/manufacture etc. and so is its subsidiary SPDC. The assessment of the District Court of The Hague in its January 2013 judgment at 4.36 draws a false distinction between the business of RDS (formulating general policy lines, risk management) and SPDC (the production of oil in Nigeria). It is difficult to envisage any situation in which a parent's business is in all respects the same as that of its subsidiary: it is very much in the nature of a parent's business that it will be involved in overall group strategy etc. whereas the subsidiary will be involved in more concrete activities of manufacture etc. That is why Arden LJ was careful to ask the question whether the businesses were in a relevant respect the same.

[468] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.35 (cases c + d), par. 4.37 (cases a + b), par. 4.30 (case e).
[469] Opinion of Robert Weir QC, Exhibit N.2 (cases a - e), par. 50, 51.
[470] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.36 (cases c + d), par. 4.38 (cases a + b), par. 4.31 (case e).

> 54. The distinction that Arden LJ was seeking to draw was between cases where the subsidiary's business was distinct from that of the parent (in which case it was that much less likely that the parent would be responsible for health and safety issues arising out of the conduct of the subsidiary's business) and those where they both operated in the same area. In *Chandler* the parent and subsidiary both operated in the same core business of asbestos production and the claimant's injury was due to asbestos inhalation. Here, both RDS and SPDC's core business was in oil production/distribution and the Claimants' damage arose as a result of that core business. Hence, it can be expected that RDS might have an interest in the operations of the subsidiary which led to the Claimants' damage; determination of whether a duty was owed still requires that the further 3 tests are satisfied.

e. Moreover, as will be worked out in chapter 9.4.4 below, the District Court wrongly considered that "it is unclear why the parent companies should have more knowledge of the specific risks of the industry in which SPDC operates in Nigeria than SPDC itself".[471] The District Court should have examined the evidence that the plaintiffs furnished in the first instance, instead of basing its finding on an assumption.[472] As will be explained below, the question is not so much whether the parent companies have more knowledge of those specific risks, but whether they were well-placed to cope with those risks.[473] The parent companies were in the very best position to do that. Via the business line, they not only had knowledge and were aware of the specific circumstances at SPDC, they could also build on the knowledge and experience that had been acquired in other locations and within the service companies. Based precisely on this group-wide knowledge and experience, the parent companies were well placed to estimate the risks that occurred in Nigeria and to assess what measures had to be taken to cope with those risks. Again, see Weir:

> … given the court had assessed in 4.36 that RDS was responsible for formulating general policy lines and risk management, the ready inference from this limited evidential foundation is surely that RDS did have superior knowledge on the steps to be taken to protect the pipeline from sabotage or leakage through wear and on the steps to be taken to deal with any leakage, these being essentially issues of risk management. Much would turn on the extent to which these issues were controlled or managed or regulated by RDS.

f. The criterion used by the District Court that people living in the vicinity must have relied on the fact that the parent companies 'would use this superior know-how' is incorrect, nor can

[471] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.36 (cases c + d), par. 4.38 (cases a + b), par. 4.31 (case e).

[472] See the opinion of Robert Weir QC, Exhibit N.2 (cases a - e), par. 55.

[473] See chapter 9.3.3.

this be inferred from *Chandler v. Cape*.[474] After all, the criterion that Arden LJ expressed was whether *"the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection"*.[475] Weir states the following in this regard:

> 59. What the District Court has done is to focus entirely on the question whether the people living in the vicinity would rely on that superior knowledge. Arden LJ's test, however, asked the question whether such people or the subsidiary would rely on its using that superior knowledge. In the case of *Chandler*, Mr Chandler had no knowledge (or particular interest) in who was providing the superior knowledge on the risks associated with exposure to asbestos. In the same way, it would entirely unsurprising if it was found, as a matter of fact, that the Claimants had no knowledge of the division of responsibility for protection against sabotage between SPDC and RDS. Indeed, it may well be that the Claimants did not even know the legal structure in place and that there was a subsidiary company in Nigeria and a parent company in the Netherlands.
>
> 60. The real question that needed to be addressed was whether RDS ought to have foreseen that SPDC (not the Claimants) would rely on its superior knowledge for the protection of those living in the vicinity of the pipelines. That question was not asked or answered by the District Court of The Hague. As above, it could only be answered once relevant evidence has been produced. It would be relevant, for instance, to determine whether RDS had a practice of intervening in SPDC's management of pipe maintenance or oil spillages. As explained by Arden LJ in *Chandler* at para 80, it would also be relevant to determine whether, for instance, SPDC had a practice of intervening more broadly in the operations of SPDC, such as in its trading operations.[476]

This was confirmed in the *Lungowe v. Vendanta* and *Okpabi v. Shell* cases discussed below, in which it was determined that *"such a duty may be owned in analogous situations, not only to employees of the subsidiary, but to those affected by the operations of the subsidiary"*.[477]

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[474] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.36 (cases c + d), par. 4.38 (cases a + b), par. 4.31 (case e).

[475] *Chandler v. Cape Plc* [2012] EWCA Civ 525, Shell exhibit a.25/b.25/c.37/d.37/e.36, par. 80.

[476] Opinion of Robert Weir QC, Exhibit N.2 (cases a - e), par. 59, 60.

[477] *Lungowe and Ors v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528, [2017], Exhibit Q.33 (cases a - e), par. 83; *Okpabi and others (suing on behalf of themselves and the people of Ogale Community) v. Royal Dutch Shell Plc and another; Alame and others v. Royal Dutch Shell Plc and another* [2018] EWCA Civ 191, Exhibit Q.34 (cases a - e), par. 23 and following.

515. Reference is also made here to the arguments already advanced in nos. 131 and following of the Statement of Appeal Phase 1. In addition to the arguments advanced above, chapter 2.7 of the Statement of Appeal Phase 1 and chapter 2.5 of the Statement in the Motion to Produce Documents in the appeal should be considered to be repeated and included here.

8.3.2 Current developments: Lungowe and Okpabi

516. After *Chandler* and the Final Judgment of the District Court, two additional relevant rulings were rendered in the United Kingdom that dealt with liability of a parent company for activities of its subsidiary abroad. This involves the *Lungowe v. Vedanta* (**Exhibit Q.33**) and *Okpabi v. Shell* (**Exhibit Q.34**) cases, in which the Court of Appeal handed down its ruling in 2017 and 2018, respectively.[478] Both cases involved a *prima facie* assessment of possible liability of the parent company, in view of a jurisdiction defence by the foreign subsidiaries. In *Lungowe* this question was answered positively, and in *Okpabi* negatively. The English judge has not (yet) rendered a final ruling in these cases regarding the ultimate liability of the parent company. Because under English law, the jurisdiction question precedes the phase of disclosure, in which the parties have a statutory obligation to exchange possibly relevant evidence, no full collection of evidence ever occurred in *Okpabi*. Thus, in and of itself, the negative finding in the ruling mentioned does not mean that with full disclosure, the parent company of Shell may not have been liable. Moreover, for both cases leave was requested to launch an appeal with the Supreme Court. The case of *Lungowe v. Vendanta* has been brought before that court first.

517. In the cases at issue, the jurisdiction question has already been decided on. By virtue of Article 7 DCCP, in the Netherlands, a different review applies to this than the one in England. English law has a more stringent review, in which opportunity principles play a larger role. For example, in order to assume jurisdiction, English law requires that the judge assesses whether (i) the claim against the foreign subsidiary has a *real prospect of success*, and, if so, (ii) whether there is a *real issue* between the plaintiffs and the parent company. In that context, the judge must also determine (iii) that it is *reasonable* that the English judge deals with the dispute; (iv) whether the subsidiary is a *necessary and proper party* to the dispute against the parent company and, finally, (v) whether England is the *proper place* to settle this dispute.[479]

518. In Dutch procedural law, the *forum non-conveniens* principle no longer plays any role; based on Article 7 DCCP, efficiency criteria are the decisive factor. In the interlocutory ruling of 18 December 2015, the Court of Appeal already held that it cannot be ruled out in advance that under certain circumstances, a parent company may be liable for damage as a result of an act or omission

[478] *Lungowe and Ors v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528, [2017], Exhibit Q.33 (cases a - e); *Okpabi and others (suing on behalf of themselves and the people of Ogale Community) v Royal Dutch Shell Plc and another; Alame and others v. Royal Dutch Shell Plc and another* [2018] EWCA Civ 191, Exhibit Q.34 (cases a - e).

[479] *Lungowe and Ors v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528, [2017], Exhibit Q.33 (cases a - e), par. 41-43.

of a (sub-) subsidiary. The fact that this possibility actually exists under English or Nigerian law is also demonstrated by the rulings in *Okpabi* and *Lungowe*. Because those rulings extensively address the legal framework of parent company liability - in view of the more stringent opportunity review under English law - they will be discussed further below.

519. In *Lungowe v. Vedanta* (Vendanta is a British mining company with a Zambian subsidiary), the Court of Appeal further set out the circumstances under which a duty of care on the part of a parent company may be involved. The Court of Appeal started from this same framework in in *Okpabi v. Shell:*

> 83. [...] certain propositions can be derived from these cases which may be material to the question of whether a duty is owed by a parent company to those affected by the operations of a subsidiary. (1) The starting point is the three-part test of foreseeability, proximity and reasonableness. (2) A duty may be owed by a parent company to the employee of a subsidiary, or a party directly affected by the operations of that subsidiary, in certain circumstances. (3) Those circumstances may arise where the parent company (a) has taken direct responsibility for devising a material health and safety policy the adequacy of which is the subject of the claim, or (b) controls the operations which give rise to the claim. (4) Chandler v. Cape Plc and Thompson v. The Renwick Group Plc describe some of the circumstances in which the three-part test may, or may not, be satisfied so as to impose on a parent company responsibility for the health and safety of a subsidiary's employee. (5) The first of the four indicia in Chandler v. Cape Plc [80][480], requires not simply that the businesses of the parent and the subsidiary are in the relevant respect the same, but that the parent is well placed, because of its knowledge and expertise to protect the employees of the subsidiary. If both parent and subsidiary have similar knowledge and expertise and they jointly take decisions about mine safety, which the subsidiary implements, both companies may (depending on the circumstances) owe a duty of care to those affected by those decisions. (6) Such a duty may be owed in analogous situations, not only to employees of the subsidiary but to those affected by the operations of the subsidiary. (7) The evidence sufficient to establish the duty

[480] *Chandler v. Cape* specifically involved the following circumstances: (*i) are the businesses of the parent and subsidiary in a relevant respect the same? (ii) does the parent have, or ought it to have, superior knowledge on some relevant aspect of health and safety in the particular industry? (iii) does the parent know (or ought it to know) that the subsidiary's system of work is unsafe in some way? (iv) does the parent know (or ought it to have foreseen) that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection?* The same framework was started from in *Thompson v. The Renwick Group* [2014] EWCA Civ 645.

> may not be available at the early stages of the case. Much will depend on whether, in the words of Wright J, the pleading represents the actuality.[481]

520. Summarized, this means the following:

a. The guiding principle is the question regarding whether foreseeability, proximity and reasonableness are involved;

b. Under specific circumstances, a parent company may have a duty of care to employees of its subsidiary or to those who have been aggrieved by this subsidiary's activities. Those circumstances may in any event exist if the parent company:

   i. has assumed direct responsibility for the development of health and safety policy and the claim pertains to the adequacy of this policy; or

   ii. exercises control over the activities on which the claim is based.

c. A few of the circumstances under which a duty of care for the parent company may be involved are described in *Chandler v. Cape Plc* and *Thompson v. The Renwick Group Plc*.[482] The first of the four indications in *Chandler v. Cape* does not simply require that *'the business of the parent and subsidiary are in a relevant respect the same'*, but that in view of its knowledge and expertise, the parent company is in the position (*"well placed"*) to protect the subsidiary's employees. By analogy, such a duty of care may also exist in respect of those who have been aggrieved by the subsidiary's activities.

d. If the parent company and the subsidiary have similar knowledge and expertise and collectively take decisions that are implemented by the subsidiary, both companies may have a duty of care.

521. The criterion observed here that the parent company must be *well-placed* can be considered to be a specification of the circumstances that Arden LJ identified in *Chandler* and a mitigation of the requirement that Tomlinson LJ used that the parent company should be '*better placed*' to this end.[483] The latter is also demonstrated in so many words by point (6) in the passage from *Lungowe* cited above, which shows that in the event of similar knowledge and expertise, both the parent company and the subsidiary may be liable.

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[481] *Lungowe and Ors v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528, [2017], Exhibit Q.33 (cases a - e), par. 83; *Okpabi and others (suing on behalf of themselves and the people of Ogale Community) v. Royal Dutch Shell Plc and another; Alame and others v. Royal Dutch Shell Plc and another* [2018] EWCA Civ 191, Exhibit Q.34 (cases a - e), par. 23 and following.

[482] *Chandler v Cape* involved the following circumstances in particular: (i) *are the businesses of the parent and subsidiary in a relevant respect the same?* (ii) *does the parent have, or ought it to have, superior knowledge on some relevant aspect of health and safety in the particular industry?* (iii) *does the parent know (or ought it to know) that the subsidiary's system of work is unsafe in some way?* (iv) *does the parent know (or ought it to have foreseen) that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection?* The same framework was started from in *Thompson v. The Renwick Group* [2014] EWCA Civ 645.

[483] *Thompson v. The Renwick Group Plc* [2014] EWCA Civ 635, par. 37.

522. Application of this framework resulted in different outcomes in *Lungowe* and *Okpabi*. In *Lungowe v. Vedanta*, the Court of Appeal held that the plaintiffs could reasonably argue that as the parent company, Vedanta had a duty of care. It arrived at this conclusion based on the following circumstances:

i. A report by the parent company Vedanta, entitled Embedding Sustainability, which emphasizes that the board of Vedanta supervises all subsidiaries, and which explicitly refers to problems with discharges to water;

ii. An agreement between the parent company and the subsidiary, in which Vedanta had assumed the task of offering support in a number of relevant areas;

iii. The fact that Vedanta provided information in the area of technology and the environment, and arranged health, safety and environmental training courses within the group;

iv. Vedanta's financial support for KCM;

v. Vedanta's public statements regarding its commitment to cope with environmentally-related and technical problems at its subsidiary;

vi. Evidence by witnesses of a former employee regarding the extent to which Vedanta exercised control over its subsidiary KCM.[484]

523. In *Okpabi*, the Court of Appeal arrived at a different conclusion. To substantiate that the parent company had a duty of care, the appellants in this case had relied on:

i. The policy imposed from above, including the *standards* and *manuals* that SPDC had to comply with;

ii. The prescribed (compulsory) *design and engineering practices* (DEPS);

iii. The imposed system of supervision and control on the group standards that were relevant for the claim;

iv. The imposed system of financial control over SPDC in relevant areas;

v. A high degree of supervision and control regarding SPDC's activities.[485]

524. Simon LJ noted in general in *Okpabi* that as such a system of group standards and policy is insufficient to assume that the parent company has a duty of care.

> It is similarly important to distinguish between a parent company which controls, or shares control of, the material operations on the one hand, and a parent company which issues mandatory policies and standards which are

[484] *Lungowe and Ors v. Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528, [2017], Exhibit Q.33 (cases a - e), par. 84

[485] *Okpabi and others (suing on behalf of themselves and the people of Ogale Community) v. Royal Dutch Shell Plc and another; Alame and others v. Royal Dutch Shell Plc and another* [2018] EWCA Civ 191, Exhibit Q.34 (cases a - e), par. 86 and following.

> intended to apply throughout a group of companies in order to ensure conformity with particular standards. The issuing of mandatory policies plainly cannot mean that a parent has taken control of the operations of a subsidiary (and, necessarily, every subsidiary) such as to give rise to a duty of care in favour of any person or class of persons affected by the policies.[486]

525. With regard to the documents that the appellants submitted, Simon LJ found as follows:

> …[T]he extracts relied on reveal a centralised system based on industry standards and the Shell Group's own developed best practice. These are to be found in HSSE & SP Control Framework which provides for consistent mandatory standards throughout the Shell Group. To the extent that they established mandatory requirements, they were mandatory across all Shell Group companies. […] All this is as one might expect of best practices which are shared across a business operating internationally.[487]

526. According to Simon LJ, in and of itself, the existence of standardized regulations and customs cannot lead to the conclusion that the parent company also exercises a degree of control over its subsidiaries:

> 127. In the light of the evidence and, in particular, the documentary evidence before the court, I would conclude that none of the matters identified at (1)-(5) above, demonstrates a sufficient degree of control of SPDC's operations in Nigeria by RDS to establish the necessary degree of proximity. Nor, taken cumulatively do they do so. There were reputational concerns (in part in relation to personnel), there was concern about losses of oil and environmental damage, there was a desire to ensure that proper systems were put in place to reduce such losses and environmental damage; and there was the establishment of an overall system which was there to ensure best uniform practices. However, the claimants have not demonstrated an arguable case that RDS controlled SPDC's operations, or that it had direct responsibility for practices or failures which are the subject of the claim.[488]

527. One of the three judges, Sales LJ, disagreed with Simon LJ regarding this point. He noted that:

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[486] *Okpabi and others (suing on behalf of themselves and the people of Ogale Community) v. Royal Dutch Shell Plc and another; Alame and others v. Royal Dutch Shell Plc and another* [2018] EWCA Civ 191, Exhibit Q.34 (cases a - e), par. 89.

[487] *Okpabi and others (suing on behalf of themselves and the people of Ogale Community) v. Royal Dutch Shell Plc and another; Alame and others v. Royal Dutch Shell Plc and another* [2018] EWCA Civ 191, Exhibit Q.34 (cases a - e), par. 121.

[488] *Okpabi and others (suing on behalf of themselves and the people of Ogale Community) v. Royal Dutch Shell Plc and another; Alame and others v. Royal Dutch Shell Plc and another* [2018] EWCA Civ 191, Exhibit Q.34 (cases a - e), par. 127.

> As I have said above, simply setting global standards (even those which purport to be mandatory) to guide the conduct of operating subsidiaries would not be sufficient to lead to the imposition of a duty of care on RDS. However, they are significant in the context of the claimants' case overall. This is because the existence of such standards was capable of providing a mechanism for the projection of real practical executive control by RDS's CEO and ExCo over the affairs of SPDC, if they wished to. They could review how the global standards were implemented in Nigeria and, as deemed necessary, could use them as the basis for ExCo to impose operational measures according to its wishes in relation to SPDC's management of the pipeline and facilities. It is plausible to infer that there may well have been particularly close monitoring and direction by ExCo of the implementation of its mandatory instructions on the ground in the case of SPDC, even if the implementation of the mandatory instructions was not so enforced in the case of other, less troublesome subsidiaries.[489]

528. This point was especially relevant in the context of the stage of the case at the time in England, given that no evidence had yet been furnished – the question to be answered was whether there was any reason to do so. With Sales LJ it must be assumed that even though in and of itself, the existence of an "*overall system […] to ensure best uniform practices*" may not lead to control over a subsidiary, such a system can most certainly be the basis for exercising control.

529. In brief, the question regarding the extent of control at which an *assumption of responsibility* may be involved is fully in development in the case law. *Chandler v. Cape* and *Thompson v. The Renwick Group* are the two cases in which, based on a complete substantive assessment, the Court of Appeal concluded that such a duty of care was involved *(Chandler)*, or that this duty did not exist *(Thompson)*. No complete, substantive review based on furnished evidence was conducted in *Lungowe* or in *Okpabi*. This does not prevent the criteria used in those cases from also being relevant in the case at issue. Given that both cases have been submitted to the Supreme Court, it can be expected that the criteria for determining a duty of care for parent companies will soon be worked out in more detail.

530. With regard to *Okpabi v. Shell*, the following is noted in this connection. According to this ruling, the English Court of Appeal started from a part of the information that is discussed in the Statement of Appeal Phase 1 and below. This particularly involves (part of) the *mandatory policies, standards and manuals* and the *mandatory design and engineering practices* (DEPS). With regard to these categories of documents, the Court of Appeal found that in and of themselves, these do not lead to the assumption of a duty of care, given that those documents do not demonstrate that in enforcing the standards, the parent company was also specifically involved

[489] *Okpabi and others (suing on behalf of themselves and the people of Ogale Community) v. Royal Dutch Shell Plc and another; Alame and others v. Royal Dutch Shell Plc and another* [2018] EWCA Civ 191, Exhibit Q.34 (cases a - e), dissenting opinion LJ Sales, par. 161.

in SPDC. According to the ruling, the Court of Appeal did not examine a large number of the other documents that are addressed below, including the EP Business Plan and, especially, the documents that Shell et al. made available for inspection at the civil law notary in response to the Court of Appeal's interlocutory ruling of 18 December 2015.

8.3.3 Interim conclusion: the District Court applied an incorrect review

531. The District Court incorrectly applied the criteria developed in *Chandler*. This has been worked out in chapter 9.3.1 above with regard to the individual findings of the District Court regarding *Chandler*. The more recent cases of *Lungowe* and *Okpabi* confirm that and how the criteria of *Chandler* may also play a role in the case at issue.

532. First and foremost, based on the circumstances in a specific case, the court will consistently have to assess whether those circumstances give rise to the assumption of a duty of care. As confirmed in *Lungowe*, this may be the case if the parent company (a) has assumed responsibility for developing health and safety policy and the claim pertains to the adequacy of this policy, or (b) exercises control over the activities to which the claim pertains. These circumstances give rise to the assumption of *proximity;* in addition to *foreseeability* and *reasonableness*, this is one of the basic requirements for assuming that a duty of care exists.

533. For the time being, it can be inferred from most of the recent case law in the United Kingdom that imposing general standards *as such* is insufficient to assume that a duty of care exists. For this purpose, a degree of direct control or responsibility regarding the area to which the claim pertains must (also) be involved. It is required that in view of its knowledge and expertise, the parent company is *well-placed* to prevent third parties from being injured by the activities performed by its subsidiary. It must be assumed with Sales LJ that group standards may play an important role in this, because they can form the basis for this actual monitoring and control.[490]

534. If the correct review is applied, as follows from the case law described above, it may be concluded that the parent companies had a duty of care. The following circumstances play a role in this:

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[490] *Okpabi and others (suing on behalf of themselves and the people of Ogale Community) v. Royal Dutch Shell Plc and another; Alame and others v. Royal Dutch Shell Plc and another* [2018] EWCA Civ 191, Exhibit Q.34 (cases a - e), dissenting opinion LJ Sales, par. 161: *"As I have said above, simply setting global standards (even those which purport to be mandatory) to guide the conduct of operating subsidiaries would not be sufficient to lead to the imposition of a duty of care on RDS. However, they are significant in the context of the claimants' case overall. This is because the existence of such standards was capable of providing a mechanism for the projection of real practical executive control by RDS's CEO and ExCo over the affairs of SPDC, if they wished to. They could review how the global standards were implemented in Nigeria and, as deemed necessary, could use them as the basis for ExCo to impose operational measures according to its wishes in relation to SPDC's management of the pipeline and facilities. It is plausible to infer that there may well have been particularly close monitoring and direction by ExCo of the implementation of its mandatory instructions on the ground in the case of SPDC, even if the implementation of the mandatory instructions was not so enforced in the case of other, less troublesome subsidiaries.*"

a. The parent company has assumed responsibility for the health, safety and environmental policy in force within the Shell Group and made preventing environmental damage a spearhead of its policy;

b. Under responsibility of the parent company, an extensive system of norms and standards has been developed for this purpose;

c. Compliance with this policy is not optional for SPDC, given that the failure to comply with the established norms leads to deductions in the budget and bonuses, and to interference by higher Group management;

d. By means of the EP business line, the regional line and the financial line, the parent company was aware of the extent to which SPDC complied with the policy and of relevant developments at the subsidiary. For example, the parent company was aware of the fact that

i. SPDC had to address major maintenance and corrosion problems that it blamed on a defective budget;

ii. SPDC had to cope with problems of understaffing and professionalism; and that

iii. In Nigeria, large-scale oil pollution associated with SPDC's activities was involved.

e. Via the EP business and the financial line, the parent company exercised control over SPDC's activities, which represented a certain risk in the area of the financial, health, safety and environmental policy or reputation. Thus, the parent company was in a position to prevent the (environmental) damage suffered by the appellants from manifesting itself or from continuing.

f. Via the EP Business line, the parent company in any event had (i) the know-how to contend with technical problems; (ii) the position to allocate an adequate budget to SPDC (or to have this done); and (iii) well-trained international staff that had to offer a solution in Nigeria.

535. These circumstances are further explained below. First, Milieudefensie et al. address the manner in which the parent companies directed SPDC's activities within the group (chapter 9.4), and SPDC's special position within the Shell Group (chapter 9.5). Subsequently, Milieudefensie et al. explain that the parent companies were aware of the structural shortcomings at SPDC which resulted in the oil spills and the resulting (environmental) damage. Chapter 9.7 explains that in the years prior to the oil spills, the parent companies intensified their control over SPDC, showing that they could exercise their influence on the problem areas described above, but failed to use this influence to prevent the environmental damage that they witnessed. The appellants conclude that the parent companies were well-placed to intervene, but failed to do so (chapter 9.8).

8.4 The method of guidance within the Shell Group

536. For a factual understanding of the manner in which guidance is provided within the Shell Group for activities of subsidiaries in general and SPDC in particular, the formal corporate law organizational structure is not decisive, but rather the manner in which control and accountability

structures have been designed within the day-to-day work of the Shell Group. After all, those circumstances can lead to the assumption that a duty of care exists. No piercing the corporate veil is involved.

537. Below, in addition to the arguments advanced in this regard in the previous case documents, Milieudefensie et al. will explain how this control was designed in general within the Shell Group and what role the Group Holding Companies, the Committee of Managing Directors and the Businesses played in this. First of all, the situation from before 2005 is addressed. As also argued in previous case documents, chapter 9.4.1.6 explains that the so-called unification in 2005 - in which the CMD passed into the Executive Committee - did not entail any fundamental consequences for its work method. Subsequently, attention is paid to concrete guidance mechanisms that are used in this.

8.4.1 The organization of the Shell Group

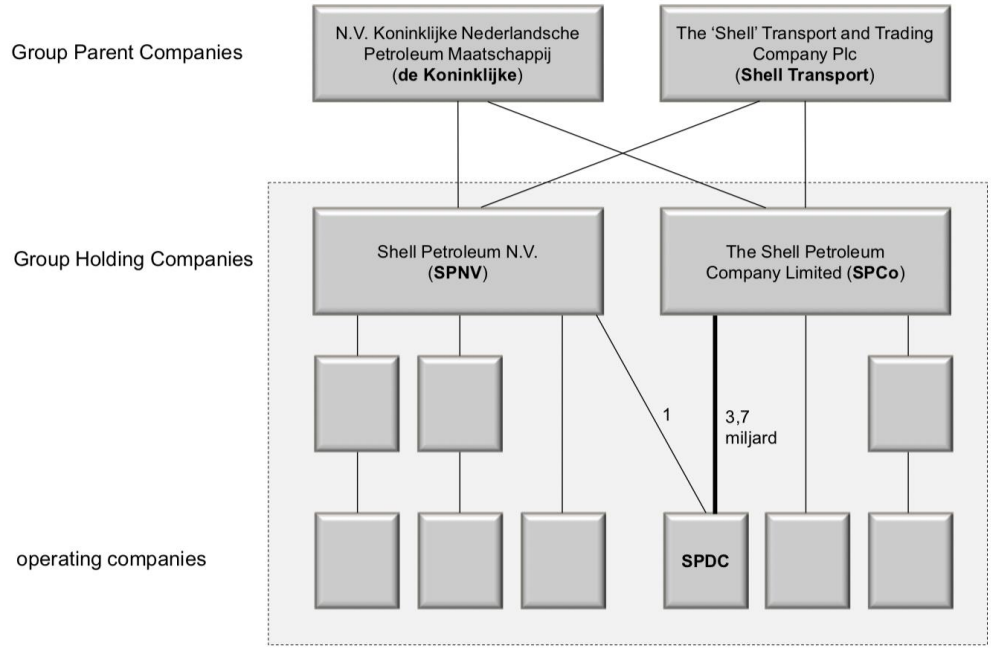
8.4.1.1 The parent companies and the Group Holding Companies

538. Before the unification in 2005, the Shell Group had two parent companies: Shell Transport and De Koninklijke (now Shell Petroleum N.V.). The managing directors of the parent companies met in the Conference.[491] The two parent companies collaborated intensively such that in terms of the guidance method within the Shell Group, they formed a cohesive unit.

539. The parent companies collectively held the shares in the two Group Holding Companies. In turn, these holding companies held the shares in the entire Shell Group. With regard to SPDC, the British holding company SPCo held most of the shares, while the Dutch holding company SPNV held a small part of the shares. Thus, via its two Group Holding Companies, SPDC was a full-fledged (sub-) subsidiary of the parent companies. Shell depicts this structure as follows:[492]

[491] See the Statement of Defence, no. 38 (case d); no. 37 (case a).

[492] Statement of Rejoinder, no. 30 (cases c + d); no. 28 (cases a + b).



540. Even though Shell et al. describe the position of the parent companies as separate from the Shell Group,[493] the actual situation proves to be otherwise, given that the managing directors of the two parent companies - all - always acted as the managing directors of the Group Holding Companies;[494] the boards of the Group Holding Companies were almost entirely comprised of managing directors of the two parent companies; moreover, the boards of the two holding companies were identical.[495]

541. In this light, Shell et al.'s argument that SPNV and SPCo (the two holding companies) collaborated "while retaining their independence" is, in fact, meaningless: after all, exactly the same people are consistently involved.[496]

542. By making their own managing directors the managing directors of the Group Holding Companies, as well, the parent companies ensured that the decisions regarding the exercise of the

[493] See *inter alia* the Statement of Rejoinder, nos. 27-28 (cases c + d).

[494] The 2002 Shell Transport and Trading annual report, **Exhibit Q.35** (cases a - e), p. 30, summarized this as follows: "*The members of the Board of Management of Royal Dutch and the Managing Directors of Shell Transport are also members of the presidium of the Board of Directors of Shell Petroleum N.V. and Managing Directors of The Shell Petroleum Company Limited (the Group Holding Companies). They are generally known as Group Managing Directors and are also appointed to the Committee of Managing Directors (CMD), which considers and develops objectives and long-term plans.*"

[495] Eleven of the twelve managing directors who were managing directors of the British holding company SPCO at any time in the period 2004 - July 2005 were simultaneously also managing directors or members of the Supervisory Board/non-executive director of one of the two parent companies, as demonstrated by the public annual reports of SPCo and Shell Transport and Trading. The Chamber of Commerce history of the Dutch holding company SPNV demonstrates that in this period, SPNV was managed by the same twelve managing directors.

[496] Statement of Rejoinder, no. 28 (cases c + d), no. 26 (cases a + b).

rights attached to the shares in operating companies are, in fact, taken by the managing directors of the parent companies. Thus, the fact that the "Group Holding Company boards, supported by CMD, set clear expectations as to how such companies are to be run, by providing guidance on policy and strategy" should be differentiated in the sense that this guidance, in fact, originates directly from the managing directors of the parent companies.[497]

543. Even if Shell's argument that decisions on exercising shareholder rights were taken by the SPCo's Board of Directors is correct in corporate law terms,[498] this representation of the facts therefore conceals that (i) all managing directors of SPCo are by definition the managing directors of the parent companies, (ii) the entire Board of Directors of SPCo is almost completely comprised of managing directors of the two parent companies, and (iii) this board was advised by the managing directors of the parent companies in their position as members of the CMD (see under the heading CMD below). Thus, there was, in fact, hardly any difference between the Board of Directors of SPCo and the parent companies.

8.4.1.2 CMD: the actual executive body of the parent companies

544. Before the unification of 2005, the CMD, the Committee of Managing Directors, constituted the *de facto* management of the Shell Group:

> CMD advises the Group Holding Companies on investments in Shell companies and on the exercise of shareholder rights for these companies. CMD guides the Group by providing strategic direction, support and appraisal to Group Businesses. The strategy, planning, appraisal and assurance cycle […] ensures that Group strategy is aligned with the interests of the Parent Companies. CMD regularly updates members of the boards of the Parent Companies, in the Conference, on strategy, organisation, plans and performance, as well as on risk management and internal control.[499]

545. Shell et al. argue that the CMD was instituted by the Group Holding Companies in view of coordinating the activities of the two holding companies (it is pointed out that these were managed by the same people).[500] However, the CMD was comprised exclusively of the managing directors of the parent companies. Thus, on account of their function as managing director of one of the parent companies, these so-called group managing directors were also members of the CMD and managing directors of the two Group Holding Companies.

546. Statements by Shell managers demonstrate that they also considered the CMD to be the management of the group on behalf of the parent companies (and not the holding companies).

[497] Group Governance Guide (2001), Exhibit E.1 (cases a - e), p. 3; see the Statement of Defence, no. 40 (case d); no. 39 (case a).

[498] See the Statement of Defence, no. 41 (case d); no. 40 (case a).

[499] Group Governance Guide (2001), Exhibit E.1 (cases a - e), p. 4.

[500] Statement of Defence, no. 39 (case d); no. 37 (case a).

John Jennings – a former member of the CMD – defined the CMD as follows: "*The CMD is a group consisting of the managing directors of Shell Transport and the managing directors of Royal Dutch*" .[501] When he was asked: *"Each group managing director also sat on the board of at least one of the parent companies, is that right?"*, Jennings replied: *"He can't be a group managing director unless he's a director of one of the parent companies"*.[502]

547. This is confirmed by Cornelius Herkströter, a former managing director of De Koninklijke:

> Q: Explain to me how you came to be on the – what process resulted in you becoming a member of the Committee of Managing Directors?
>
> A: That was an internal process whereby a director, an executive director of Royal Dutch becomes a managing director of Shell petroleum NV and Shell Petroleum Company limited. So that is an internal position following the appointment by the shareholders as a director, an executive director of Royal Dutch.[503] [Emphasis added by attorney].

548. In brief, the managing directors of the two parent companies are joined in the CMD; on account of their position within the parent companies, they exercised extensive influence in the CMD at the guidance of the Group Holding Companies and the group itself. Thus, the responsibilities of the CMD and the acts of (members of) this informal body must be regarded as *de facto* responsibilities and acts of the parent companies themselves.

549. Simons LJ concluded the same in *Okpabi* with regard to the CMD's successor, the Executive Committee:[504]

> In 2005, the Shell Group was reorganised and RDS came into existence. At this point the RDS Executive Committee ('ExCo') was established. In addition to the CEO and CFO, it consists of the head of each of RDS's Global Businesses. Although there is a factual dispute about its functions and at [101] the Judge said that he did 'not equate decisions taken by [ExCo] with decisions taken by RDS', I would regard ExCo as carrying out material functions in relation to the business which are attributable to RDS for present purposes.[505]

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[501] Public Deposition by John Jennings, 26 February 2004, **Exhibit Q.36** (cases a - e), pp. 39-40. The appellants submit a number of public depositions. These are verbatim transcripts of witness statements from American lawsuits. The public depositions that the appellants submit with this statement on appeal originate from two different lawsuits: the lawsuit regarding Shell's oil reserves and the *Wiwa* and *Kiobel* lawsuits against Shell.

[502] Public Deposition by John Jennings, 26 February 2004, Exhibit Q.36 (cases a - e), p. 116. Cornelius Herkströter also confirmed that you became a member of the CMD as a result of your appointment as managing director of one of the parent companies. If necessary, the appellants can also submit his public deposition.

[504] This is addressed in more detail in chapter 9.4.1.6, after the unification.

[505] *Okpabi and others (suing on behalf of themselves and the people of Ogale Community) v. Royal Dutch Shell Plc and another; Alame and others v. Royal Dutch Shell Plc and another* [2018] EWCA Civ 191, Exhibit Q.34 (cases a - e), par. 39.

8.4.1.3 Lines to the CMD: the Businesses

550. The appellants have just explained that the CMD was exclusively comprised of managing directors of the parent companies, also called Group Managing Directors. In addition to the guidance of the Shell Group by means of the CMD and the Group Holding Companies, each group managing director also guided a so-called Business. The Shell Group is divided into four businesses, namely 'Exploration and Production' (EP or E&P) (later also known as 'Upstream'), 'Oil Products', 'Chemicals', and 'Gas and Power'. SPDC fell under the EP Business.

551. Shell's 2002 Group Governance Guide describes the accountability structure of the four businesses as follows:

> A chief executive officer (CEO) heads each business, providing strategic direction, support and appraisal to its various operations. This is covered by inter-company service agreements. […] CEOs are accountable to CMD for the performance of their Business and for the effectiveness of their organization. The CEO is usually supported by a Business executive committee, or 'Excom', members of which he or she appoints, considering the advice of the Management Development Committee. The Excom is made up of senior executives responsible for the major organizational areas in the Business, or for functions such as finance or human resources. Excom members provide strategic direction, support and appraisal for their own organizational areas. They are accountable to the Business CEO for the performance of their own area, and support the CEO in his or her line accountability for the performance of the entire Business.[506]

552. Up to and including March 2004, the group managing director responsible for EP was **Walter van de Vijver**, who was succeeded by **Malcolm Brinded**. The group managing director guided the EP Business, thus including SPDC, in collaboration with his Business Executive Committee, or 'Excom' (not to be confused with the Executive Committee, the successor of the CMD after the unification in 2005). Walter van de Vijver also described the Excom as "*the senior executive team of the E&P business.*")[507] The Excom was comprised of "*senior executives*" who were responsible for different work within EP. On the one hand, there were executives who were responsible for their own region and the operating companies active in this region; on the other hand, there were functional executives, who - for example - were responsible for the development of technology within EP; but Human Resources and Finance also had their own executives.

553. The GGG includes the following regarding the executives guided by the CEO EP[508]:

> Executives in Shell operate through a combination of formal authority (such as for consideration of investment proposals) and personal influence, which

[506] Group Governance Guide (2001), Exhibit E.1 (cases a - e), p. 5.

[507] Public Deposition by Walter van de Vijver, 31 January 2007, **Exhibit Q.37** (cases a - e), p. 75.

[508] The CMD member responsible for EP.

> flows from their organizational position and leadership qualities. In many cases executives have limited formal authority over the business units to whom they provide strategic direction, support and appraisal. Instead they operate through appropriate inter-company service agreements, and use their influence to ensure that their advice is taken into account. Executives see to it that the strategic direction they provide is linked into operating decision-making and is translated into action.[509]

554. By means of the Businesses, information of operating companies was passed "upwards" to the CMD; the CMD's guidance based on this information was passed "downwards" to the EP Business. The available information demonstrates that the CMD had itself informed of all different aspects of EP, *inter alia* by the group managing director who headed the Excom by means of *'notes for information'*, *'country strategy reviews'*, *'country reviews'*, but also, for example, by means of presentations by the people involved[510], audits and Business Assurance Letters. Based on this information, the CMD could determine the further approach for the Business. Subsequently, the policy that was determined by the CMD was implemented in the Business by the group managing director responsible for EP. This is set out in more detail in chapters 9.4.2 and 9.4.3.

555. After the unification in 2005, this situation remained the same: the so-called Executive Committee (the successor of the CMD), was comprised of several Executive Directors, each of whom were responsible for their own Business. Just as the group managing directors rendered an account to the CMD, the Executive Directors do the same in the Executive Committee.

8.4.1.4 Lines to the CMD: regional responsibility

556. In addition to the classification of the CMD members into functional responsibilities, all of them were also grouped as responsible for a specific region. In the period relevant for this dispute, with regard to both classifications, Nigeria fell under the responsibility of **Walter van de Vijver** (up to and including March 2004) and his successor **Malcolm Brinded**. As group managing director, they were responsible for the EP Business; as Regional Managing Director ('RMD'), they were simultaneously responsible for the region West-Africa.[511]

[509] Group Governance Guide (2001), Exhibit E.1 (cases a - e), p. 5.

[510] For example, Brian Ward, who was the EP's CEO for Africa between 2001 and 2004 (and in this capacity also had a seat on the Excom) gave a presentation to the CMD on *"issues regarding SPDC*", Public Deposition by Brian Ward, 10 January 2007, **Exhibit Q.38** (cases a - e), pp. 87-88.

[511] This was true both before and after 20 July 2005.

557. In his capacity as RMD, a position that he held up to March 2004, Van de Vijver had frequent contacts with the President of Nigeria.[512] For example, he talked to him about a licence constraint issue. Van de Vijver stated:

> A: For me both areas the licence extension came about because in both areas we were planning massive investments in terms of activities in the countries and we wanted to get comfort that ultimately we would be able to get the rewards of that beyond what was then seen as the end of license.
>
> Q: When you say both areas?
>
> A: I'm talking Oman and Nigeria, sorry.
>
> Q: Okay. Let's take Nigeria. In particular what steps did you take to address the licence expiry or constraint issue?
>
> A: In terms of my personal action I remember raising it with the President of Nigeria.
>
> Q: And when was that?
>
> A: Somewhere in 2002.[513]

558. The Regional Managing Director was in direct contact with the Country Chair for Nigeria, who represented Shell's interests in Nigeria. According to the Group Governance Guide, examples of the duties of the Country Chair included:

> Coordinate and promote important issues and opportunities across the various Businesses in the country.
>
> Flag any significant concerns relating to those issues to the RMD, where unable to resolve through influence at a local level.
>
> Advise the RMD of any other information relating to the country that could potentially impact Shell's interest.[514]

559. In any event from 2005, the Country Chair for Nigeria was also the managing director of SPDC, Basil Omiyi.[515] From the regional line, separate Business Assurance Letters were also sent to Shell's CEO.[516]

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[512] Van de Vijver stated: "*I met with the President of Nigeria on a frequent basis as part of my regional job. As I explained yesterday as managing director I tried to maintain relationships with people like the President of Nigeria*.", Public Deposition by Walter van de Vijver, 31 January 2007, Exhibit Q.37 (cases a - e), p. 151.

[513] Public Deposition by Walter van de Vijver, 31 January 2007, Exhibit Q.37 (cases a - e), pp. 149-150.

[514] Group Governance Guide (2001), Exhibit E.1 (cases a - e), p. 7.

[515] See the Shell Sustainability Reports 2005-2007, Exhibits D.4, D.5 and D.6 (cases a - e).

[516] See chapter 9.4.3.2.

560. Thus, there were two different channels from the CMD to SPDC: via the Business EP and via the regional function to the Country Chair for Nigeria.

8.4.1.5 Lines to the CMD: financial responsibility

561. The financial responsibility is a separate line, in which an account is rendered via the Finance Directors of the Business to the Chief Financial Officer, who is a member of the CMD and of the parent company's board. This way, the key performance indicators in the business plans are also tested and, if necessary, measures are taken.[517] Via the financial line, *inter alia* environmental clean-up obligations had to be reported on.[518]

8.4.1.6 Consequences of the unification

562. As of 21 July 2005, Royal Dutch Shell was at the head of the Shell Group. At that time, the CMD was replaced by the Executive Committee. The unification did not cause any relevant changes with regard to the guidance of the Shell Group by the parent companies that headed up the Shell Group.[519]

563. Prior to the unification, all managing directors of the former parent companies (the CMD) had already been appointed as executive directors of RDS; on 21 July 2005, they officially became members of "*the Executive Committee*". The Executive Committee has the same duties that the CMD previously had; during the relevant period, it was comprised of the exact same people. Without exception, the non-executive directors who were appointed at RDS in October 2004 had all previously been non-executive directors at one of the former parent companies. Schematically, the situation can be depicted as follows:

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[517] See Paddy Briggs, *Where the Buck stops in a Multinational Corporation*, Blogger News Network, 3 September 2012, Exhibit M.7 (cases a - d) and Exhibit M.6 (case e).

[518] HSE Performance Monitoring and Reporting Manual (Exhibit Q.8), pp. 73-74: *"Environmental Clean-up Obligations are defined by the financial policy C-76 which is concerned with environmental clean-up expenditure resulting from past operations. […] The C-72 policy is used to clarify the definitions of a number of financial lines in the Group accounts that relate to environmental liabilities. […] The following types of costs are considered "clean-up" costs for the purpose of this policy: 1. Costs of cleaning up existing soil and water pollution caused by spills, leaks, waste disposal or other means."*

[519] This is also demonstrated by the 2005 Annual Report of Royal Dutch Shell, **Exhibit Q.39** (cases a - e), p. 24: "*The Directors during the year were Malcolm Brinded, Sir Peter Burt, Linda Cook, Nina Henderson, Aad Jacobs, Sir Peter Job, Lord Kerr of Kinlochard, Wim Kok, Aarnout Loudon, Christine Morin-Postel, Lawrence Ricciardi, Rob Routs, Maarten van den Bergh, Jeroen van der Veer and Peter Voser. Since the year end to the date of this Report there have been no changes in the membership of the Board of Directors. All of the above have served as Directors of either Royal Dutch Shell or Shell Transport for the majority of the period from January 1, 2005 to July 20, 2005*".

CMD TO 20 JULY 2005 AND EXECUTIVE COMMITTEE AS OF 27 OCTOBER 2004				
Name managing director	**Former parent companies (CMD)**		**Royal Dutch Shell (Executive Committee)**	
	Position	*Period*	*Position*	*As of*
Jeroen van der Veer	Member of the Board of De Koninklijke	1997-2000	Chief Executive Officer (Group Chief Executive)	27 October 2004
	Chairman of De Koninklijke	2000 - 20 July 2005		
Malcolm Brinded	Member of the Board of De Koninklijke	2002-2004	Executive Director of Exploration and Production	27 October 2004
	Managing Director of Shell Transport	2004-20 July 2005		
Linda Cook	Member of the Board of De Koninklijke	2004 – 20 July 2005	Executive Director of Gas and Power	27 October 2004
Rob Routs	Member of the Board of De Koninklijke	2003 – 20 July 2005	Executive Director of Downstream Oil Products and Chemicals	27 October 2004
Peter Voser	Member of the Board of De Koninklijke	2004 – 20 July 2005	Chief Financial Officer	27 October 2004

NON-EXECUTIVE DIRECTORS				
Non-executive director	**Former parent companies**		**Royal Dutch Shell**	
	Position	*Period*	*Position*	*As of*
Adrianus G. ('Aad') Jacobs	Member (and as of 2000 Chairman) of the Board of De Koninklijke	1997 – 20 July 2005	Non-executive Chairman of RDS	October 2004
Lord John Kerr of Kinlochard	Non-executive Director Shell Transport and Trading	2002-2005	Non-executive Director and Deputy Chairman of RDS	October 2004
Maarten van den Bergh	Member of the Board of De Koninklijke	2001 – 20 July 2005	Non-executive director	October 2004
Peter Burt	Shell Transport and Trading	2002 – 20 July 2005	Non-executive Director	October 2004
Nina Henderson	Shell Transport and Trading	2001 – 20 July 2005	Non-executive Director	October 2004
Willem ('Wim') Kok	Member of the Board of De Koninklijke	2003 – 20 July 2005	Non-executive Director	October 2004
Aarnout Loudon	Member of the Board of De Koninklijke	1997 – 20 July 2005	Non-executive Director	October 2004
Christine Morel-Postel	Member of the Board of De Koninklijke	2004 – 20 July 2005	Non-executive Director	October 2004
Lawrence Ricciardi	Shell Transport and Trading	2001 – 20 July 2005	Non-executive Director	October 2004
Peter Job	Shell Transport and Trading	2001 – 20 July 2005	Non-executive Director	October 2004

564. It is a fact that in the restructuring in 2005, not a single managing director took office at RDS who had not previously already been a managing director of one of the parent companies. Thus, as of October 2005, the RDS Board was comprised entirely of managing directors, who had also headed up the Shell Group prior to 20 July 2005. RDS is the actual fusion of the two former parent companies.

565. Initially, the former parent companies continued to exist, but their shareholders exchanged their shares for a corresponding number of shares in RDS. Thus, De Koninklijke and Shell Transport did not merge into RDS; rather RDS was placed between them and the shareholders: RDS was positioned above the former parent companies as the new parent company of the Shell Group. In the event of a share merger (as opposed to in a legal merger), the acquired company continues to exist, but the control over the company and the business is placed with the acquiring legal entity. However, the unification of Shell on 20 July 2005 comprised much more than a mere transfer of shares, which meant that - as the Court of Appeal also noted in the interlocutory ruling of 18 December 2015 - it reflected many similarities to a legal merger. Not only were the shares transferred, the position in the Shell Group and the function of the company also passed to RDS. RDS acquired the management duties of the former parent companies and performs these positions by means of identical bodies, even using *the same* managing directors. In legal terms, the former parent companies did not merge into RDS; however, in factual terms, RDS is most certainly a fusion of the two.

566. In view of the fact that before the unification, the Shell Group already functioned as if there was only one parent company, there were no *de facto* changes in the organizational structure - even if formally, a new top layer was created in the company. The guidance of the Shell Group was still conducted by the same people who operated in similar bodies. Nor did the unification have any significant effect for the shareholders.[520]

567. In brief, RDS has the same shareholders, the same managing directors, the same subsidiaries and the same position in the Shell Group as the two former parent companies had before it came into being. In other words, RDS is most certainly a fusion of the former parent companies. There is a reason the process is referred to as the unification.

8.4.1.7 (Corporate) Social Responsibility Committee

568. In any event since the unification, Shell also has a Social Responsibility Committee, in the interim renamed the Corporate Social Responsibility Committee. This Committee consists of three non-executive directors of the parent company's board and supervises compliance with the HSE group standards (to be discussed below).

569. The Shell 2006 annual report (**Exhibit Q.41**) describes the role of the Social Responsibility Committee as follows:

> The main role of the Committee is to review on behalf of the Board the Shell General Business Principles, the Shell Code of Conduct, the Health, Safety and Environment Policy, the principles relating to Sustainable Development

[520] SEC form RDS 2005, **Exhibit Q.40** (cases a - e), p. 6: "*The Unification Transaction had little impact on the economic rights and exposures of shareholders of Royal Dutch and Shell Transport, as the separate assets and liabilities of Royal Dutch and Shell Transport are not material in relation to their interests in the rest of the Group, and the Unification Transaction did not result in the acquisition of any new businesses or operating assets and liabilities*".

> and other major issues of public concern. The Committee does this by receiving reports and interviewing management on the Group's overall HSE and social performance, on the Group's annual performance against the Code of Conduct, on the management of social and environmental impacts at major projects and operations and on emerging social and environmental issues. It also provides input on and reviews the Shell Sustainability Report, including meeting face-to- face with an external report review committee.
>
> In addition to regular meetings, the Committee also visits Shell locations, meeting with local staff and external stakeholders to understand first-hand the site's operational performance, what relationships are like with the local community, with interested NGOs and with governments at the local and national levels, as relevant to the project. In particular, the Committee observes how the Group's standards are being implemented in practice and where in its judgement there might be areas for increased focus. […] After each visit, the Committee reports its observations to the Executive Director responsible for that project or site and to the full Board.
>
> The Committee reports on these topics and on its own conclusions and recommendations to executive management and the full Board.[521]

8.4.2 Standardization by the parent company: global standards & control framework

570. The fact that the environmental interest is defined as a group interest within Shell has already been extensively addressed in previous case documents.[522] The Group Governance Guide emphasizes the relevance of a collective policy in the area of *people management*, *financial control* and *environmental management*.[523] The *Global Environmental Standards* are the basis for the latter. These stipulate:

> The management of identified environmental, social and health aspects shall comply with the appropriate Shell Group and Business standards. […]
>
> The Committee of Managing Directors (CMD) is informed of all serious environmental incidents and a root cause analysis should be reported to CMD. […]
>
> Plans shall be in place to deal with spills arising from the activities of a Business Unit/site. These plans shall: i) link to a national oil and chemical spill response plan, which includes interfaces with the relevant local authorities and

[521] Royal Dutch Shell plc, Annual Report 2006, **Exhibit Q.41** (cases a - e), p. 80-81. In the summons, no. 197 (cases c + d), no. 177 (a + b), no. 199 (case e), reference is made to a similar description in the Shell 2007 Annual Report and the abbreviated 2007 Financial Statements, Exhibit D.7 (cases a - e), p. 42.

[522] See *inter alia* the summons, chapter 12.1 (cases a - e).

[523] Group Governance Guide (2001), Exhibit E.1 (cases a - e), p. 8.

> ii) comply with the Group MOSAG 'Guidelines for Shell Companies on Preparedness, Response and Compensation for Oil and Chemical Spills". [524]

571. The problems in Nigeria were a concrete reason for preparing this group policy:

> Environmental standards and policies are currently under review at Group level, with the situation in Nigeria one of the main triggers for action. This links in to the high level review of group business principles and reputation. Meanwhile SPDC is reviewing, with SIEP support, the standards it should be aiming for in its operations, and scope for external verification and reporting which could largely defuse criticisms if adopted successfully.[525]

572. In the History of Royal Dutch Shell, Sluiterman also describes:

> The constant, serious problems in the Niger Delta had a very adverse impact on the group's reputation. Under pressure from the NGOs, who supported the inhabitants of the Niger Delta, Shell rewrote its policy starting points.[526]
>
> In addition to the review of the policy starting points, Shell developed an internal control system to verify whether all Shell companies actually complied with the policy starting points.[527]

573. In previous case documents, attention has already been devoted to the *Shell HSE Control Framework*, which comprises concrete standards for the policy in the area of *Health*, *Security* and *Environment*, and the *Global Technical Standards* (the so-called *Design and Engineering Practice* documents). Shell is also expected to comply with these standards, as follows *inter alia* from:

> Shell design and engineering practices (DEP) or equivalent company standards shall be consistently applied and variances shall be subject to a control mechanism.[528]

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[524] The Shell Group Environmental Standards (Shell 2002), Exhibit E.4 (cases a - e), p. 2 and via Online Global Environmental Standards (crtl+click for the link). The appellants do not have the *Group MOSAG Guidelines*. Nor do the appellants have the *Shell Environmental Quality Standards* regarding, for example, water (EP 95-0380) and soil and groundwater (EP 95-0385).

[525] Note for information, Review of Strategy for Nigeria, 22 March 1996, **Exhibit Q.42** (cases a - e), p. 9.

[526] K. Sluyterman, *Geschiedenis van Koninklijke Shell, Deel 3: Concurreren in Turbulente Markten*, 1973-2007 (Amsterdam: Boom, 2007), Exhibit H.6 (cases a - e), p. 461.

[527] K. Sluyterman, *Geschiedenis van Koninklijke Shell, Deel 3: Concurreren in Turbulente Markten*, 1973-2007 (Amsterdam: Boom, 2007), Exhibit H.6 (cases a - e), p. 358.

[528] EP 95-100, *Planning and Procedures*, Exhibit N.8 (cases a - e), par. 5.3.

574. Attention was paid to these standards and manuals in (particularly) the Motion to Produce Documents in the appeal and (more concisely) in the Statement of Appeal Phase 1;[529] part of those documents has been submitted as an exhibit. Here reference is made to those (case) documents.

575. The global standards are the basis for the knowledge, know-how and control of the parent company. These standards form the basis for the tasks, audits, risk assessments and, for example, the business assurance letters. See also Sales LJ in his dissenting opinion in *Okpabi*:

> 161. As I have said above, simply setting global standards (even those which purport to be mandatory) to guide the conduct of operating subsidiaries would not be sufficient to lead to the imposition of a duty of care on RDS. However, they are significant in the context of the claimants' case overall. This is because the existence of such standards was capable of providing a mechanism for the projection of real practical executive control by RDS's CEO and ExCo over the affairs of SPDC, if they wished to. They could review how the global standards were implemented in Nigeria and, as deemed necessary, could use them as the basis for ExCo to impose operational measures according to its wishes in relation to SPDC's management of the pipeline and facilities. It is plausible to infer that there may well have been particularly close monitoring and direction by ExCo of the implementation of its mandatory instructions on the ground in the case of SPDC, even if the implementation of the mandatory instructions was not so enforced in the case of other, less troublesome subsidiaries.
>
> […]
>
> 165. In my view, the evidence of Mr Sticco and the Shell Control Framework and the HSSE & SP Control Framework support a case that there was a pattern of distribution of expertise and control in relation to the handling of the risk of oil spills in the Niger Delta which is arguably capable of meeting the criteria for imposition of a duty of care as set out in Chandler v Cape plc and Lungowe v Vedanta Resources.[530]

8.4.3 Supervision and control

576. Between SPDC and the parent companies, there is a (voluntary) dependency relationship; SPDC is deemed to comply with the group policy and is also evaluated based on this.

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[529] See the ('conclusion' in the) Motion to Produce Documents in the appeal, nos. 87 - 105 (cases c + d); nos. 81 - 99 (cases a + b); nos. 49 - 63 (case e); Statement of Appeal Phase 1 of Milieudefensie et al. nos. 152, 167 and following.

[530] *Okpabi and others (suing on behalf of themselves and the people of Ogale Community) v. Royal Dutch Shell Plc and another; Alame and others v. Royal Dutch Shell Plc and another* [2018] EWCA Civ 191, Exhibit Q.34 (cases a - e), par. 161, 165.

577. Via the business line, the regional line and the financial line, formal and informal consultations were frequently held regarding affairs that could pertain to the Shell Group as a whole. In addition, a number of control mechanisms are used within the Shell Group, which meant that the parent companies were assured that SPDC remained within the tasks and priorities set by the parent companies.

8.4.3.1 Business plans

578. The parent company approved the business plans and set the budgets that were linked to these plans. The business plans contained the tasks of SPDC regarding specific policy fields, such as production, maintenance, the environment and safety. The business plans included tasks – *(financial and non-financial) Key Performance Indicators* – that had to be reported on to the Business on a monthly basis. As explained before, this Business was headed up by a member of the Executive Committee, formerly the Committee of Managing Directors, who was responsible for this within the parent company. In addition, the key performance indicators and compliance were monitored by the parent company via the Finance directors of the Business, who in turn rendered an account to the Chief Financial Officer, who was also responsible for this within the parent company.

579. This way, the parent company exercised supervision of the business plans of both the operating companies in Nigeria and of the EP business as a whole.

Country Business Plan

580. The activities of the operating companies were centrally coordinated, *inter alia* by the evaluation of an annual *Country Business Plan* (CBP) as part of the group policy. To this end, the CBPs were discussed in the service companies in The Hague and London and were subsequently submitted to the CMD for approval by the parent companies by a representative of SPDC and a service company, and then to the Conference (the complete boards of the two parent companies).[531]

581. The Country Business Plans ('CBPs') of SPDC for 1995 and 1996 are submitted as Exhibits Q.29 and **Q.43**,. Despite the fact that this was a period prior to the oil spills, a number of relevant data can be derived from these documents:

a. The country business plan contains detailed information regarding income, expenditures, current circumstances, priorities and key performance indicators of SPDC;

[531] Public Deposition by John Jennings, 26 February 2004 Exhibit Q.36 (cases a - e), pp. 128-130. This conduct of events is also confirmed by Cornelius Herkströter (former group managing director) and Robert Sprague (former employee of one of the service companies of the Shell Group and board member of SPDC). These public depositions primarily pertain to a different topic, but if necessary, the appellants can submit these documents into the proceedings. Thus, the business plan was not submitted for approval to the immediate shareholders, i.e. the Group Holding Companies. This confirms the image of the CMD and the Conference as *de facto* decision-making bodies of the Shell Group.

b. In addition to the business plans, more detailed programmes were drawn up that were submitted to the CMD;

c. The business plans confirm that SPDC did not operate independently in financial terms;

d. The targets set in the Business Plans and associated programmes are a commitment to the Committee of Managing Directors. The 1996 Business Plan demonstrates that such a commitment was specifically made with regard to the expenditures to be made by SPDC in the scope of environmental performance and community relations (in both plans also identified as corporate objective). The 1996 Business Plan discusses two growth scenarios, regarding which the following is stated:

> Both cases acknowledge the commitments made in the NFI to CMD covering expenditure improving SPDC's environmental performance and community relations.[532]

This task is apparently contained in the *Community Affairs, Environmental and Safety Programme Plan 1996-2000*, which the appellants do not have.[533]

e. The 1996 business plan *inter alia* extensively addresses asset integrity. The *Key Asset and Technical Integrity issues* are specifically discussed.[534] The subject is discussed in even greater detail in the *Integrated Operations Opportunities Book*, which is part of the programme for 1996, which the appellants do not have, either.[535]

f. A SWOT analysis included as Appendix D with the Business Plan mentions "infrastructure poorly designed and maintained" as a technical weakness, and "(further) environmental liabilities" as both a weakness and a threat.[536]

EP Business Plan

582. Moreover, SPDC came under the EP business plan; thus, it immediately felt the consequences of the key performance indicators and amounts set in this plan. The EP Business Plan applies to the EP business as a whole, but also comprises a number of key themes regarding subjects that are particularly important for the entire EP business.

583. In the first instance, the EP Business Plan 2000 was submitted as an exhibit.[537] This plan shows that the goals and priorities for the Business were determined at the group level. One of the

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[532] 1996 Country Business Plan, Exhibit Q.29 (cases a - e), p. 1.

[533] *Community Affairs, Environmental and Safety Programme Plan (including Occupational Health), 1996-2000* – SPDC (May 1995); 1996 Country Business Plan, Exhibit Q.29 (cases a - e), Appendix A, no. 7.

[534] 1996 Country Business Plan, Exhibit Q.26 (cases a - e), p. 37 and following.

[535] *"A detailed portfolio of opportunities for enhancing the technical integrity of SPDC Assets is documented in the Integrated Operations Opportunities Book published as part of the 1996 Programme documentation"*, 1996 Country Business Plan, Exhibit Q.29 (cases a - e), p. 37 and Appendix A.

[536] 1996 Country Business Plan, Exhibit Q.29 (cases a - e), Appendix D.

[537] Shell International Exploration and Production B.V. / Shell EP International BV, *'2000 Business Plan, Exploration and Production Executive Committee'*, 23 October 2000, Exhibit E.5 (cases a - e), p. 45.

specific themes that the EP Business Plan pertains to is HSE. The Business Plan includes the following in this regard:

> Q1, Q2 2000 HSE results […] indicate the need for continued vigilance and increased focus on HSE. EP must urgently progress to the effective implementation of HSE Management Systems (HSE-MS) essential to lasting improvements in HSE performance.

584. The plan describes a number of action points to this end, including:

- **ISO 14001** (or equivalent) **certification** of the environmental component for major installations to embed the MS at the working level […]
- A **revised HSE** audit **methodology** better to assess the effectiveness of the HSE-MS control framework in managing HSE risk;
- A **strengthened assurance process** to provide management confirmation that the MS is applied;
- Structured assessment and development of **HSE competence** in advisers and line staff, introducing, a.o. an HSE skills forum and e-learning;
- Approaches to drive the **improvements in "safety culture"** that are largely recognised as key to achieving a set change in safety performance. A set of tools that seek to reach the "hearts and minds" of the workforce are being developed and tested;
- Continued **external verification of HSE performance** supported by further improved quality and process of HSE data reporting;
- Reducing the Global Warming Potential of EP emissions […];
- **Reducing hydrocarbon spills** is a priority target – improved pipeline and flowline integrity in Oman and Nigeria is key;
- **Remediation** of previously identified high priority **contamination legacies** is complete except for SPDC's Ebubu site […]
- Improving the quality, scope and timeliness of **Environmental Impact Assessment** […]. Business processes to ensure the early notification of NGOs in sensitive areas, such as 'eco-regions' with high biodiversity, will be fully implemented.[538]

[538] Emphasis present in the original text, underlining added by attorney. Shell International Exploration and Production B.V. / Shell EP International BV, *'2000 Business Plan, Exploration and Production Executive Committee'*, 23 October 2000, Exhibit E.5 (cases a - e), p. 24.

585. The Business Plan not only demonstrates the guidance in the area of HSE. The Business Plan identifies six strategic themes that were the subject of *high-level strategic directions* for the EP Business, of which Nigeria is one:

> **Nigeria** has been raised to "theme" level to provide extra focus. The main challenges will be to restore onshore production levels to capacity, to balance onshore developments with growth offshore, to develop the local communities and to gain new licenses.[539]

586. The EP Business Plan comprises a *Theme Action Plan Nigeria*, setting out the strategic lines for Nigeria and SPDC.[540] Strategic focal points that are mentioned include *"commitment to staff development"* and *"Manage the portfolio to balance risks (funding, unrest)"*, as well as *"improve HSE performance"*. The following is explicitly noted for SPDC:

> Significant funds will continue to be required to maintain and upgrade SPDCs vast infrastructures, including the major refurbishment of Bonny terminal.[541]

587. The EP Business plan also contains the action points and budgets in the area of know-how development within the group:

> Technology Action Plan
>
> Maintain spend on in-house technology development programme at the 2000 level, i.e. at $130 MM, focussing on: Drill & Produce the Limit ($30.6Mln), Volumes to Value ($27.7 Mln), #1 Explorer ($15.6 Mln), Capital to Value ($7.1 Mln), Deepwater Leadership (14.9 Mln), New Energy/New Limits ($10.0 Mln), Technology Access ($26.5 Mln).[542]

588. One of those action points is human resources (which is discussed in more detail later in this chapter):

> **Human Resources**: Progress Centres of Excellence to operational phase and identify further opportunities, Advance acceptance of the Global Staff Pool concept, provide a People & Skills plan, and represent the global resourcing interests of EP; Implement "EP Open University' and e-Learning, Leveraging

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[539] Shell International Exploration and Production B.V. / Shell EP International BV, *'2000 Business Plan, Exploration and Production Executive Committee'*, 23 October 2000, Exhibit E.5 (cases a - e), p. 9.

[540] Shell International Exploration and Production B.V. / Shell EP International BV, *'2000 Business Plan, Exploration and Production Executive Committee'*, 23 October 2000, Exhibit E.5 (cases a - e), p. 45.

[541] Shell International Exploration and Production B.V. / Shell EP International BV, *'2000 Business Plan, Exploration and Production Executive Committee'*, 23 October 2000, Exhibit E.5 (cases a - e), p. 45.

[542] Shell International Exploration and Production B.V. / Shell EP International BV, *'2000 Business Plan, Exploration and Production Executive Committee'*, 23 October 2000, Exhibit E.5 (cases a - e), p. 28.

> organisational capabilities by maximising use of global networks and global consultants.[543]

589. The EP Business Plan was not prepared independently, but at the CMD's behest. The CMD set the targets that the Business had to realize each year. If the business plan of one of the businesses did not comply with those group targets, the Business in question was expected to come up with a new plan of approach. Brian Ward[544] stated the following regarding the EP Business Plan for 2002:

> Q: What do you recall about the – what was being discussed with respect to the EP business plan for 2002?
>
> A: The EP business plan was not acceptable to the CMD as it stood. It didn't meet the targets that they had set. We were asked to devise ways of figuring out how we could adopt the plan to meet the targets.
>
> Q: What were the targets that the business plan didn't meet?
>
> A: The business could be characterized by return on capital, reserves replacement ratio, unit costs and production levels, and these quite often conflicted. And the discussion was, for example, how would you meet specific return on capital and at the same time increase your production without the investment. So that was the type of conflict situation that we were in and that we discussed on a regular basis.[545]
>
> […]
>
> Q: What, if any, action was taken as a result of this conversation regarding the business plan being rejected by CMD?
>
> A: The action was for us to review our own plans and ensure that we couldn't contribute further to the overall EP plan than we had done. And this was a common theme in these discussions.
>
> Q: What do you mean by to ensure that you couldn't contribute further to the overall EP plan?
>
> A: What I mean by that is were our individual regional plans tuned to the group plan in the best way possible.[546]

[543] Shell International Exploration and Production B.V. / Shell EP International BV, *'2000 Business Plan, Exploration and Production Executive Committee'*, 23 October 2000, Exhibit E.5 (cases a - e), p. 28.
[544] Ward was the CEO of the EP Business for Africa between 2001 and 2004.
[545] Public Deposition by Brian Ward, 10 January 2007, Exhibit Q.38 (cases a - e), p. 96.
[546] Public Deposition by Brian Ward, 10 January 2007, Exhibit Q.38 (cases a - e), p. 99.

590. This way, the CMD ultimately determined for the business how much had to be produced in what manner and how much could be invested. In this manner, as well, the CMD directly influenced the targets and budgets of SPDC.

8.4.3.2 Assurance letters

591. The parent company stipulates that operating companies such as SPDC indicate each year in so-called *Assurance Letters* that and how they complied with the HSE policy and the related standards of the Shell Group. The Assurance Letters are addressed directly to the Shell Group Executive.

592. According to the Group Governance Guide, there are two types of assurance letters that inform the CMD of the HSE policy, namely the letter from the country chair and from each Business CEO. In this letter, the country chair *inter alia* has to address compliance with the Shell General Business Principles, as well as - based on the information that he receives from the businesses in his region - regulatory compliance issues. In his assurance letter, the Business CEO *inter alia* has to pay attention to *group policies and standards* and to *significant incidents or compliance issues on policies or standards*.

593. The chairman of the CMD subsequently discusses the assurance letters with the parent companies.

Assurance Letter Scope

There are two types of assurance letter, one submitted to CMD direct from each country chair, and the other submitted to CMD through the business line.

Each country chair submits an annual letter to the relevant RMD, relating to all Shell activities in the country, addressing

- Country chair role.
- Group policies and standards for which the country chair provides assurance, including SGBP, diversity and inclusiveness, and crisis management.
- Regulatory compliance issues arising, based on information received from each business operating in the country.

Each Business CEO – and service organisation – submits an annual Business assurance letter to CMD, addressing accountability for

- Group policies and standards managed by the business line.
- Significant incidents or compliance issues on policies or standards.

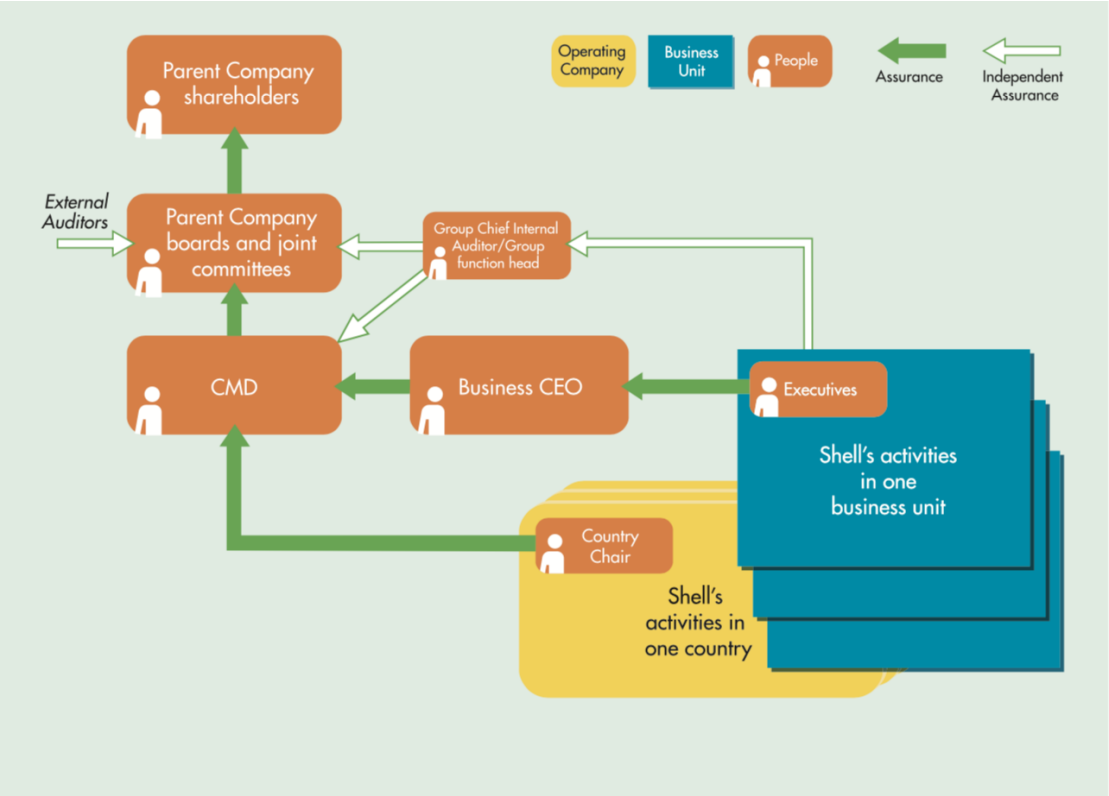
The Business assurance letter is based on cascaded assurances received from each business unit (or for some subjects – for example, financial reporting – from a lower organisational level where advised by the relevant function head). The Group Chief Internal Auditor and the relevant function heads have direct access to these assurances.

Each business unit bases its assurance on a structured self-appraisal, which takes account of the results of independent appraisal.

The Chair of CMD reports to each of the joint committees of the Parent Companies based on the Business assurance letters and the aggregated assurance statements from the country chair letters.

594. Shell has depicted this process schematically as follows:[547]

[547] Shell Group Guiding Principles, Exhibit E.1, p. 13.



595. In response to the Court of Appeal's interlocutory ruling of 18 December 2015, Shell made the - available for inspection. The are discussed in more detail in chapter 9.5.

8.4.3.3 Risk Management and Assurance Plans

596. The Shell HSE Manuals stipulate how operating companies are to set up their risk management systems, what they should document for this purpose,[548] how they should weigh specific risks,[549] and in what cases they should report risks and incidents to the parent company.[550]

597. Within the Shell Group, a Risk Assessment Matrix is consistently used for this purpose.[551] For these high potential incidents, a combination score is determined based on probability and possible effect. According to the guidelines, all significant incidents must be reported within 24 hours to the Business Head, Senior Business Leader, Business HSSE VP and Group HSSE VP;

[548] See, for example, EP 95-0100 regarding *Health, Safety and Environmental Management Systems*, Exhibit N.8 (cases a - e).

[549] See, for example, EP 94-0101 and EP 94-0201, *ASPIN version 1.1 Pipeline Failure Risk Assessment,* December 1993.

[550] See *inter alia* EP 95-0300, *Overview Hazards and Effects Management Process*, Exhibit N.9 (cases a - e) and EP 95-0352, *Qualitative Risk Assessment*.

[551] See the figure presented in no. 158 of the Statement of Appeal Phase 1 of Milieudefensie et al.

High Potential Incidents with a Ram Risk Rating of C5, D5 or E5 must be reported to the Regional or Class or Business Executive VP and the Business HSSE VP.[552]

598. Moreover, operating companies must prepare an annual Assurance Plan: an "outline of the various forms of appraisal […] to provide assurance regarding the effectiveness of a risk based control framework".[553] These Assurance Plans and the consequences (to be) allocated to these plans are also monitored.[554]

8.4.3.4 Audits

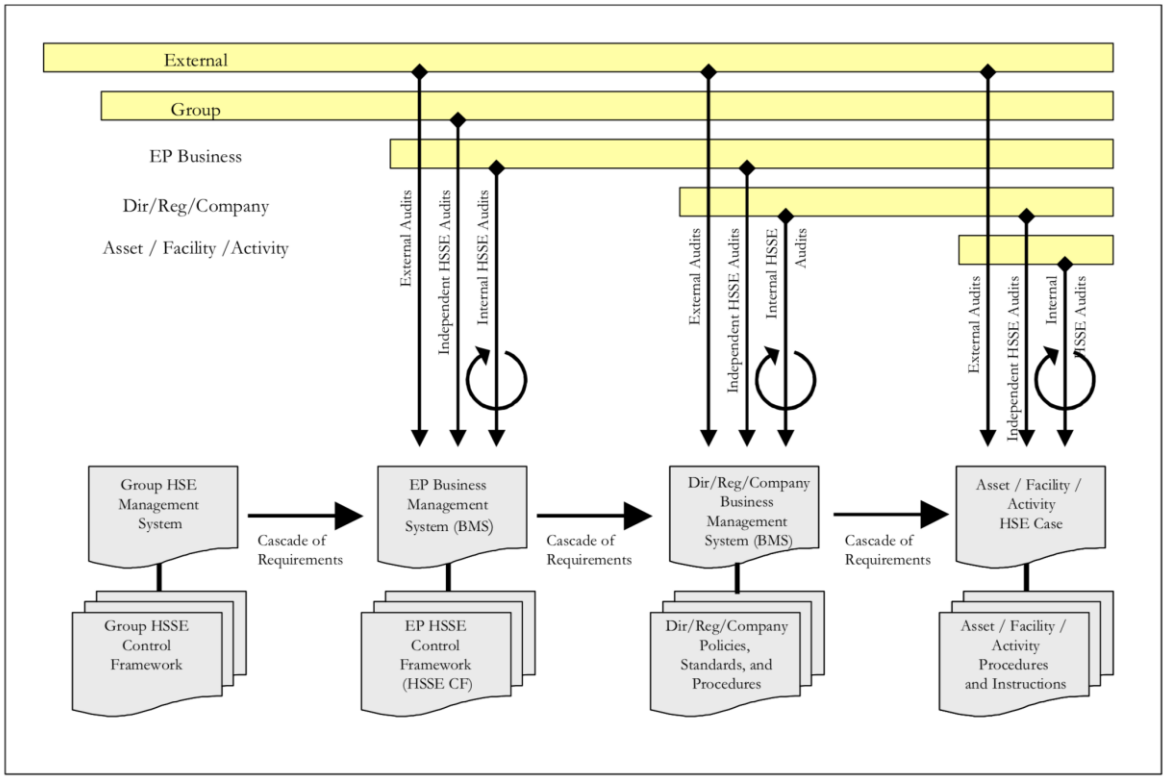
599. Operating companies are frequently audited for their compliance with various elements of the HSE policy. The results of those audits are shared at the business or group level, depending on the urgency; corrective actions are determined and the follow-up is monitored.

600. The audit system within Shell is described as follows in EP standard 2005-0180:

> Group HSSE Risk & Assurance provides the mandate for HSSE Audits. In EP, the HSSE Global Assurance Leadership Team (GALT) is responsible for ensuring that the HSSE Audits in EP are scheduled and undertaken in accordance with this Standard and the provided mandate. Performance against the mandate is reported to the Business Assurance Committees (BAC) at the EP and Dir/Reg levels, and to the Group Social Responsibility Committee (SRC).[555]

[552] HSSE Management System Manual, Exhibit N.11 (cases a - e), *Incident Investigation and Learning, Table 1: Timelines for Notification, Investigation, and Review of Significant Incidents and High Potential Incident,* p. 5.
[553] EP 2005-0180, *HSSE Auditing*, Exhibit N.10 (cases a - e), Appendix 1.
[554] EP 2005-0180, Follow-up HSSE Audit Findings, Exhibit N.10 (cases a - e), p. 9.
[555] Fragment and figure from: EP 2005-0180, *HSSE Auditing*, Exhibit N.10 (cases a - e), p. 2. The submitted document is the second version of this standard from 2009.

The HSSE Audit System Framework and Interfaces



601. The following is described as one of the requirements for the *HSE audit process*:

> An effective reporting process shall be maintained which provides quarterly and annual HSE audit status and progress reports to the Dir/Reg BACs, the EP BAC and the Group HSSE Risk & Assurance Manager.[556]

602. Action points are to be uploaded in a group-wide implemented tracking system.[557] At each level within the organization (business, regional, functional, operating company) there is a BAC that monitors the progress of follow-up actions and must approve the results.[558] Risks that are classified as serious or high must always be reported to the "*next level up BAC*".[559] The EP BAC monitors the planning and implementation of all activities described in the Assurance Plan; the follow-up of *risk areas evaluated as 'controls need major improvement'* and all *serious/high actions* must be reported to the regional/Business BAC. Every quarter, a report must be made to the EP BAC regarding *inter alia "control acceptability, key findings and actions linked to the identified risks"; "Information on emerging themes and trends arising from audits"; Summary of management's response to audit findings and agreed actions"* and *"Status of actions from*

[556] EP 2005-0180, *HSSE Auditing*, Exhibit N.10 (cases a - e), p. 3. EP BAC refers to the *Exploration and Production Business Assurance Committee*.

[557] EP 2005-0180, Follow-up HSSE Audit Findings, Exhibit N.10 (cases a - e), p. 3.

[558] EP 2005-0180, Follow-up HSSE Audit Findings, Exhibit N.10 (cases a - e), p. 2 and Appendix 1.

[559] EP 2005-0180-SP-02, Specification: Findings Assessment and Evaluation Criteria, Exhibit N.10 (cases a - e).

annual assurance statements".[560] In addition, each year the forthcoming audit program and the results of the pending audit program must be reported on.[561]

[redacted]

604. In response to the Court of Appeal's interlocutory ruling of 18 December 2015, Shell submitted two audit reports on *Emergency Response* and on Ma*nage oil spill response and remediation*. The findings in response to these audits are discussed in grounds for appeal 6 and 7 and in chapter 9.6 below.

8.4.3.5 Appointment of senior management and international staff

605. The CMD was directly involved in the appointment of SPDC's board and the placement of *high potential staff* in general in the Shell Group. Jennings states the following in this regard:

> Q: Could you explain to me how the process of how a managing director of an operating company was selected?
>
> A. Yes. He is selected by the process that I'd described called the management development committee, where the Committee of Managing Directors would put their MDC hat on, as we called it, and several times during the year would consider the list of higher potential staff and the plans for the succession of all the senior executive positions in the group operating companies, such that, when the time came for someone to move on – take the case of Nigeria, for example; when the time came for Brian Anderson to move on we had a list of names from which to consider who our recommendation would be for his successor. We did that for all the operating companies around the world."
>
> "My question was as non-managing directors of the operating companies? […]
>
> A: [a]nswering your question specifically; the regional managing director would take a view as to the appropriate recommended constituents of the members of the board of, say, SPDC or Shell South Africa or Norske Shell.[563]

606. In the 1996 Business Plan, SPDC describes executive capacity as one of the limiting factors for further growth:

> As several "SPDCs" can be set up over time, it is not the perceived executive capacity of SPDC that is constraining, but the executive capacity of the Group.

[560] EP 2005-0180, Manage the HSSE Audit process, Exhibit N.10 (cases a - e), Appendix 1.

[561] EP 2005-0180, Manage the HSSE Audit process, Exhibit N.10 (cases a - e), Appendix 1.

[562] [redacted]

[563] Public Deposition by John Jennings, 26 February 2004, Exhibit Q.36 (cases a - e), pp. 118-119, 122-124.

> Typically we consider the employment of highly qualified staff as one of the first constraints.[564]

607. Other international staff, including the many engineers and lower-level managers that were stationed *inter alia* in Nigeria, was recruited from The Hague by Shell International.

8.4.3.6 Financial control

608. As discussed in chapter 9.4.1, supervision is not only conducted via the business and the regional line, but also via the financial line.

609. The Business Plans and the associated budgets have already been discussed above. Financial control is further demonstrated by the allocated bonuses and salaries.

Bonuses for CEOs

610. In the first instance, the appellants already discussed that and how the members of the RDS Executive Committee that was instituted after the unification were held to account, *inter alia*, for the oil spills in Nigeria.[565] Thus, the parent company assumed that the executive managers (in particular the manager responsible for the EP Business) exercised influence over this.

611. The 2011 remuneration report shows that the bonuses of the members of the RDS Executive Committee are determined based on a so-called "scorecard", in which various aspects are deemed to be relevant (operational cash flow, operational excellence and sustainable development are mentioned as categories). In this context, the report specifies that "*the volume of operational spills was below target*",[566] and describes that the number of "*operational spills over 100 kilograms*" in 2011 had increased compared to 2010.[567] The report further also included the following:

> Large spills of crude oil and oil products can incur major clean-up costs as well as fines. They can also affect our licence to operate and harm our reputation. We have clear requirements and procedures to prevent spills, and multibillion programmes are underway to maintain or improve our facilities and pipelines.[568]

[564] 1996 Country Business Plan, Exhibit Q.29 (cases a - e), p. 55.
[565] Pleading notes of attorney Samkalden 11 October 2012, no. 171.
[566] Copy from the 2011 Shell Annual Report (Remuneration Report), Exhibit M.8 (cases a - d), Exhibit M.7 (case e), p. 69.
[567] Copy from the 2011 Shell Annual Report (Remuneration Report), Exhibit M.9 (cases a - d), Exhibit M.7 (case e), p. 9.
[568] Copy from the 2011 Shell Annual Report (Remuneration Report), Exhibit M.8 (cases a - d), Exhibit M.7 (case e), p. 51.

612. The same passage devotes two paragraphs exclusively to the problems regarding oil spills in Nigeria, explicitly noting that "there are still instances where spills occur in our operations from operational failures, accidents or corrosion".[569]

613. After weighing the results, the Remuneration Committee (REMCO) determines the ultimate result of the scorecard outcome. The conclusion in this case was:

> "On the basis of the wider operational performance and the reputational impact of incidents such as the Pulau Bukom refinery fire and the Bonga and Gannet spills, REMCO decided to adjust downwards the 2011 scorecard outcome from 1,44 to 1,30".[570]

Payments to Brian Anderson

614. The amount of the salary and the bonuses of SPDC's managing director were determined by (the managing directors of) the parent companies, as demonstrated by sources dating from the years 1994-1996. The direct shareholders, in this case SPCo and SPNV, were not involved in these decisions. Thus, in this regard, as well, (the manager of) SPDC had a dependency relationship with the parent company.

615. In 1994, the salary of Brian Anderson, at that time SPDC's managing director, was increased. At that time, he also received a *"high performance bonus"*, a higher *"cost of living adjustment factor"* and an increase in his *"representation allowance"*. These increases had *"the support of Mr. Van den Bergh"*, at that time one of the managing directors of De Koninklijke, the Dutch parent company.[571]

616. In 1996, Anderson was again given a salary increase and a bonus. The letter that he received in this regard explicitly referred to the parent companies:

> The above increase takes into account the review of remuneration levels of senior group management by the Remuneration and Succession Review Committee and the Parent Company Boards.[572]

617. Later in 1996, Anderson received a direct message from managing director Van Den Berg, announcing the following salary increase:

[569] Copy from the 2011 Shell Annual Report (Remuneration Report), Exhibit M.8 (cases a - d), Exhibit M.7 (case e), p. 51.
[570] Copy from the 2011 Shell Annual Report (Remuneration Report), Exhibit M.8 (cases a - d), Exhibit M.7 (case e), p. 69.
[571] 1994 salary review for Brian Anderson, 20 July 1994, **Exhibit Q.44** (cases a - e).
[572] 1996 salary review for Brian Anderson, 1 July 1996, **Exhibit Q.45** (cases a - e)

> I am pleased to advise you that it has been decided to increase your pensionable salary from 163,000 pounds to 180,000 pounds with effect from 1 November 1996.[573]

618. In brief, the parent companies not only determined the course of the career within Shell for SPDC's managing director,[574] but also determined his financial fate.

International staff

619. International staff at SPDC was not paid by SPDC, but by Shell from The Hague, in any event partially. Nor did international staff participate in the SPDC pension fund.

Substantial expenditures

620. The individual members of the CMD and the Director of Finance had the authority to decide on investments up to an amount of USD 100 million. Higher amounts or investments with unique circumstances or risks had to be submitted to the boards of the Group Holding Companies (on which the managing directors of the parent companies themselves had seats). In addition, the managing directors could delegate the authority to decide on investments not exceeding a value of USD 20 million to their senior Business executives.[575]

621. Thus, in any event for every investment exceeding USD 20 million, the SPDC managing director had to get approval from his executive director in the CMD. In turn, this executive director had to get approval from the complete CMD.[576] The board of the Group Holding Company (on which the entire CMD had a seat) then took the formal decision.

8.4.4 Know-how

622. Within the functional division of tasks within the CMD/Executive Committee, one of its members is specifically responsible for the development of know-how within the Shell Group. This know-how development is currently conducted in the Projects and Technology organization, which is separate from the businesses. Shell Projects & Technology, which also includes Safety & Environment, grants technological support, offers technological solutions and provides management of large projects in both upstream and downstream activities. Projects & Technology provides distinctive technical information technology (IT) for Shell; it also conducts research and develops innovative technological solutions for the future".[577]

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[573] Message from Maarten van den Bergh to Brian Anderson, 25 October 1996, **Exhibit Q.46** (cases a - e)

[574] See chapter 9.4.3.5 above.

[575] Group Governance Guide (2001), Exhibit E.1 (cases a - e), p. 15.

[576] Group Governance Guide (2001), Exhibit E.1 (cases a - e), p. 15: *"The prior support of CMD is expected".*

[577] Formerly available via http://www.shell.nl/nld/aboutshell/who-we-are/locations/rijswijk.html, lastly visited on 5 September 2013.

623. To a significant extent, the know-how development and coordination is performed by Shell Global Solutions, for which the executive director of Projects and Technology has final responsibility. Shell Global Solutions provides support in specific projects, such as investigations into the condition of pipelines and the need to replace these. It was a joint investigation by SPDC and Shell Global Solutions in 2002 that determined that *"outright replacement [is] necessary because extensive corrosion"*.[578]

624. Shell Global Solutions is also responsible for developing the Design and Engineering Practice publications, the so-called DEPS, which comprise specific technical manuals and regulations for the Shell operating companies. The *Global Technical Standards Index* demonstrates how broad the spectrum of areas and specific technological subjects is that is covered by these DEPS.[579] This includes the following:

- Selection of Materials, which includes the Selection of Materials for Life Cycle Performance (Upstream facilities) (DEP 39.01.10.11[580])
- Corrosion Management, including in the scope of the Corrosion Management Framework ('CMF'). This *inter alia* covers *Operational Pigging for Corrosion Control* (Appendix 4 with EP 2000 5712), *Pig Selection and Use* (EP 95 2580) and *Planning and application of pigging operations* (EP 97 6059), *Carbon steel corrosion engineering* (DEP 30.10.02.14 Gen.[581]), *Automated Ultrasonic Inspection* ('AUT') (DEP 37.81.40.32) and the qualification and field operations of the same (DEP 37.81.42.35)
- Protection systems for pipelines, including cathodic protection (DEP 30.10.73.10 Gen., DEP 30.10.73.31 Gen. and DEP 30.10.73.33 Gen.)
- Detection systems for leaks, including the *Leak Detection System ('LDS')* (DEP 31.40.60.11 Gen.[582])
- Wellhead and Christmas tree equipment, including modification or abandonment of this equipment (EP 39.01.30.30; ISO 10423)
- Integrity and repairs of pipelines, usually in the form of *Run & Maintenance Practice* standards ('RMP-Gen.'), for example with regard to *Pipeline Integrity* (RMP 31.40.00.51 Gen.) and Pipeline Repairs (RMP 31.40.60.50 Gen.)
- Specific environmental issues, such as *Environmental Assessment* (EP-0370); Drinking Water Guidelines (EP-0330) and *Environmental Quality Standards* with regard to *air* (EP 95-

[578] *Reply to the Defence Bodo Community*, Exhibit O.2 (cases a - e), par. 18.5.

[579] DEP 00.00.05.05-Gen, *Global Technical Standards Index*, Exhibit N.3 (cases a - e).

[580] DEP 39.01.10.11-Gen, *Selection of Materials for Life Cycle Performance – Materials*, Exhibit N.4 (cases a - e).

[581] DEP 30.10.02.14-Gen, *Carbon Steel Corrosion Engineering Manual for Upstream Facilities*, Exhibit N.5 (cases a - e).

[582] DEP 31.40.60.11-Gen, *Pipeline Leak Detection*, Exhibit N.6 (cases a - e).

0375), *water* (0380) and *soil and groundwater* (0385); monitoring the air quality (EP 95-0376); the water quality (EP 95-0381) and soil and groundwater (EP 95-0386)

- Dealing with contaminated soil and groundwater (EP 95-0387) and *waste management* (EP 95-0390)
- Disaster management, such as Emergency response (EP 95-0316); Fire plans and Fire Control (EP 95-0350, 0351), H2S in operations (EP-0317), Oil Spill Dispersants (EP95-0397), etc. In this context, see the EP (Exploration and Production) Crisis Guide, as well.
- Preparedness, Response and Compensation for Oil and Chemical Spills[583]

625. In nos. 87-105 of the Motion to Produce Documents in the appeal, a number of these DEPS have been discussed in more detail. For a further explanation, please refer to those paragraphs.[584]

626. The Shell Global Helpline is available 24/7 for recommendations regarding compliance with Shell standards, or to report abuses. [585]

627. The extent to which SPDC depended on the Shell Group for technical know-how is demonstrated *inter alia* by statements from Shell managers in the American oil reserves case.[586] In his deposition in 2007, CEO EP Walter van de Vijver explained how during his period in office, he worried about the technical quality of operating units within the EP Business:

> A: As I just explained from the previous e-mail, one of the things I felt uncomfortable with was the way Exploration was structured in the Group, where it was very fragmented, and I wanted to create one central core of excellence and accountability for Exploration in the Group. So that was one of the first changes I made, together with establishing a formal department on project execution where we would create a project organization within the center of the Hague that would have global responsibility for quality of project execution across the globe. [587]
>
> […]
>
> Well this is sort of the recurring theme of my tenure, that I felt operating units were not adequately managed and that there had been fragmentation in a lot

[583] So-called Group MOSAG Guidelines for Shell Companies on Preparedness, Response and Compensation for Oil and Chemical Spills.

[584] The appellants do not have all – but do have a significant part – of the standards mentioned here. They offer to still submit standards into the proceedings that the Court of Appeal has not yet been able to examine.

[585] Shell Global Helpline, via http://www.shell.com/global/aboutshell/who-we-are/our-values/compliance-helpline.html, lastly visited on 6 March 2019.

[586] In 2004 it was revealed that Shell had considerably over-estimated its oil reserves. One third of the booked reserves were deleted following an investigation. In the end, this led to the departure of Philip Watts, Judy Boynton and Walter van de Vijver. A settlement was reached in 2007.

[587] Public Deposition by Walter van de Vijver, 31 January 2007, Exhibit Q.37 (cases a - e), pp. 120-121.

> of the organizations, what was called an asset based organization, leading to the central technical and professional excellence eroding.[588]

628. For this reason, central "*organization centers of excellence*" were set up under his management.[589] Brian Ward, who was CEO for Africa Exploration and Production from 2001, describes:

> That was a follow-up phase where we tried to [organize] centers of excellence centrally, in The Hague mainly, at that time, and the idea being that we would do the daily work in the operating companies and the high level technical expertise would be gained from The Hague. […] I set up an outfit called technical operations and excellence, TOE. […] it came out of discussions with Walter van de Vijver. I felt very strongly that we needed to have a center of excellence that would set basic standards for our operations around the world.
>
> Q: And what was Mr. Van de Vijver's view?
>
> A: He thought it was a good idea.[590]

629. John Darley, who was the head of EP Technology from 2001, also confirms this trend in his deposition in 2006 (**Exhibit Q.47**):

> What we were seeing I think in early in the decade were some of the consequences of reorganizations that had been undertaken in earlier years in Shell. And some of those reorganizations had provided additional focus to the bottom line, the business of the company, but in the area of technical and operational work, we felt that we had lost some of the rigor. So, for example, the need for a baseline set of minimum standards by which operational activities could be undertaken was no longer clearly available. Operating units in different parts of the world have their own standards and would adhere to those very carefully, but a uniform worldwide standards was – was not something that was very quick to obtain. […] So the technical and operational excellence [T&OE] was to try and improve the approach by which the EP business was being run by bringing in those kind of improvement steps.[591] [Emphasis added by attorney].

630. SPDC depended on this know-how, because it did not have this know-how itself. Darley stated the following in this regard in his deposition:

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[588] Public Deposition by Walter van de Vijver, 31 January 2007, Exhibit Q.37 (cases a - e), pp. 331-332. From July 2001 to March 2004, Walter van de Vijver was managing director of De Koninklijke; in that capacity, he was responsible for EP.

[589] See also the reference to these Centres of Excellence in the 2000 EP business plan, section 9.4.3.1 above.

[590] Public Deposition of Brian Ward, 10 January 2007, Exhibit Q.38 (cases a - e), pp. 20-21.

[591] Public Deposition by John Darley, 16 November 2006, **Exhibit Q.47** (cases a - e), pp. 124-125.

> [A] significant piece of work was done for the Nigerian operating company, SPDC. […] largely done in the area of development and study planning. […] so field development planning is the work that was being undertaken. […] Based on that would come then what kind of facilities would be needed in terms of the flow stations, the gathering facilities, the export pipelines and so on.[592]

631. The following exchange during his deposition is also remarkable:

> Q: Do you recall specifically what it was that SGS [Shell Global Solutions] did in connection with the field development plans at SPDC?
>
> A: I don't – you ask if I recall specifically and I don't specifically, but in general terms, they undertook the work that was related to surface facilities. So pipelines, separator facilities, gathering station facilities, that was their area of expertise.[593]

[redacted] The operating companies had to pay for such services, but only on a *cost recovery basis*.[594] [redacted]

633. Thus, for the planning and performance of its projects, SPDC depended to a large extent on the know-how that was made available to SPDC from higher group layers via the coordinating role of the parent company.

8.4.5 Interim conclusion

634. The foregoing demonstrates:

a. That the Shell Group is a very centrally managed organization, in which the CMD/executive committee acts as the executive body of the parent companies;

b. That the CMD is kept abreast of the ins and outs within the group via different responsibility lines, namely via the businesses, via the regional line and via the financial line;

c. That at the group level, standards have been developed in the area of HSE policy and environmental policy, and that the parent company made the environmental policy a spearhead;

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[592] Public Deposition by John Darley, 16 November 2006, Exhibit Q.47 (cases a - e), pp. 14-16.

[593] Public Deposition by John Darley, 16 November 2006, Exhibit Q.47 (cases a - e), pp. 42-43.

[594] Public Deposition by John Darley, 16 November 2006, Exhibit Q.47 (cases a - e), pp. 11-12: "*Q: Am I correct that the OUs based on your testimony, paid SEPTAR for the study work that they performed in their behalf? A: Yes, they paid for it. It was on a cost recovery basis, so there was no profit element. It was simply a model whereby the cost of the SEPTAR organization was shared between the Shell operating units on a – on an annual basis*."

[595] [redacted]

d. That the parent company not only developed these standards by means of the CMD/executive committee, but also monitors and enforces them by means of the various control and monitoring mechanisms that it can use, including:

   i. The business plans for Nigeria and the EP business, which set out the most important lines and allocates budgets in partnership with the CMD;

   ii. The annual business assurance letters at the country and business level, in which an account is rendered regarding the extent to which and the manner in which group policy and group standards have been complied with;

   iii. Assurance plans and reports following risk assessment and audits, with reports made each quarter and annually to the Business Assurance Committee of the EP business and to the Group HSSE Risk & Assurance Manager. The EP BAC is in any event informed of all serious and high actions.

   iv. The appointment of the SPDC management and senior management, and indirectly coordinating international staff through its supervision of and control over Shell International and human resources policy;

   v. Deciding on the salary of the executive director of SPDC, as well as deciding on his bonuses and the bonuses of the executive directors of the CMD, which was made dependent on performances *inter alia* in the area of oil spills;

   vi. Deciding on relevant investments via the CMD and the holding companies;

   vii. Coordinating and prioritizing the availability, development and distribution of technical know-how within the group.

8.5 The position of SPDC within the group

635. SPDC was not just an operating company within the Shell Group. Nigeria and SPDC in particular, represented a considerable interest for the Shell Group. The summonses already pointed out that between 2004 and 2009, Nigeria was responsible for an average of 15% of the worldwide production of oil and liquid gas.[596]

636. In 1996, the following was written about SPDC in a *Review of Strategy for Nigeria* for the EP Buscom (the precursor of the Excom):

> The Group's oil and gas reserves in Nigeria thus form a major part of Shell's EP portfolio – in fact, the single largest part – and in the next century they will play a very significant role, particularly if production can be increased above current levels to make up for declining production elsewhere.[597]

[596] Summons, no. 162 (cases c + d); no. 144 (cases a + b), no. 166 (case e), with reference to Royal Dutch Shell plc, *'Financial and Operational Information 2003-2007: Delivery and Growth'*, Exhibit D.1 (cases a - e), p. 52.
[597] Note for information, Review of Strategy for Nigeria, 22 March 1996, Exhibit Q.42 (cases a - e), p. 2.

637. The 2000 EP Business Plan includes the following in the 'Production' chapter:

> Dependency on Nigeria for production growth in oil and gas remains.[598]

638. It has already been discussed in chapter 9.4.3.1 that in the 2000 EP Business Plan, Nigeria was presented as a "*high-level theme"*, i.e. a strategic subject that affected the group's interest and regarding which decisions were taken at the level of the Business, and thus ultimately by the CMD. The CMD decided on the Action Plan proposed in the EP Business Plan, which mentioned staff development and improving HSE, amongst others, as spearheads, and which determined that significant funds were required to maintain and upgrade SPDC's vast infrastructures.[599] It stands to reason that Nigeria was also presented as a high level theme in later EP Business Plans; however, the appellants do not have these plans.

639. In 2002, Walter van de Vijver, managing director of De Koninklijke and at that time responsible in the CMD for EP, reported the following to the CMD:

> Considering the importance of Nigeria for the Group and the commitments already made, there is no alternative but to continue with the strategy of the Growth Programme. Every support will be given by the group to ensure sustainable growth and delivery, and continue to address Shell's asset integrity and other critical issues in Nigeria. New ways of working will be implemented, supported by a stronger governance model, integrity and other critical issues in Nigeria. New ways of working will be implemented, supported by a stronger governance model.[600]

640. Van de Vijver clarified SPDC's position within the group as follows:

> [W]ith respectively 33% and 27% of Shell's oil and gas expectation reserves, Nigeria is a key component of the Group's resource portfolio. […] The JV [of which SPDC is the operator; added by attorney] is one of the cornerstones of the EP portfolio[601]

641. One year before, Van de Vijver had also emphasized the interest of the operations in Nigeria for the Shell Group:

> Over the longer term Nigeria will continue to be an extremely important part of our portfolio. Let us nog forget some simple facts. Nigeria is West Africa's

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[598] Shell International Exploration and Production B.V. / Shell EP International BV, *'2000 Business Plan, Exploration and Production Executive Committee'*, 23 October 2000, Exhibit E.5 (cases a - e), p. 14.

[599] Shell International Exploration and Production B.V. / Shell EP International BV, *'2000 Business Plan, Exploration and Production Executive Committee'*, 23 October 2000, Exhibit E.5 (cases a - e); see further chapter 9.4.3.1 above.

[600] Note to CMD – Nigeria Country review 2002, Exhibit Q.5 (cases a - e), p. 1.

[601] Note to CMD – Nigeria Country review 2002, Exhibit Q.5 (cases a - e), p. 4.

> most prolific hydrocarbon basin. Remaining oil reserves total nearly 30 billion barrels, the fourth largest outside of the Middle East.[602]

642. Not only the financial value that SPDC represents, but also the problems that Shell had to contend with in Nigeria ensured special attention from and interference by the parent company and the CMD.

643. In Shell's Sustainability Reports, in which the company provides information each year regarding the sustainability of the Shell Group as a whole, Nigeria is consistently referred to as one of the "*locations identified as having environmental and social concerns that significantly affect our reputation and our business performance*".[603] In 2004, SPDC was mentioned as one of the six specific locations where serious problems occur.[604] The Shell Report 2005 only deals with two locations, one of which is again Nigeria.[605] The same is true for The Shell Report 2006;[606] The Shell Report 2007 even exclusively discusses Nigeria.[607]

644. In the 2006 report, Basil Omiyi, at the time the managing director of Shell Nigeria, stated the following:

> We do, however, have a substantial backlog of asset integrity work to reduce spills and flaring. That backlog is caused by under-funding by partners over many years, operational problems and, more recently, the lack of safe access to facilities.[608]

645. In brief, the Nigerian oil production is a constant issue of concern for the parent companies. Shell's CEO, Jeroen van der Veer, stated the following in this regard in early 2007:

> We are continually working on this, including at the highest level. Last year, there were many consultations between Malcolm Brinded, amongst others, and the federal government. I myself have also spoken with President Obassanjo.[609]

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[602] Royal Dutch/Shell Group of Companies Investor Relations Presentation, 18 December 2001, **Exhibit Q.48** (cases a - e), p. 20.

[603] The Shell Report 2004: 'Meeting the Energy Challenge – Our Progress in Contributing to Sustainable Development', Exhibit D.3 (cases a - e), p. 16; The Shell Sustainability Report 2005: 'Meeting the Energy Challenge', Exhibit D.4 (cases a - e), p. 24; The Shell Sustainability Report 2006: 'Meeting the Energy Challenge', Exhibit D.5 (cases a - e), p. 32.

[604] The Shell Report 2004: 'Meeting the Energy Challenge – Our Progress in Contributing to Sustainable Development', Exhibit D.3 (cases a - e), p. 16.

[605] The Shell Sustainability Report 2005: 'Meeting the Energy Challenge', Exhibit D.4 (cases a - e), pp. 26-27.

[606] The Shell Sustainability Report 2006: 'Meeting the Energy Challenge', Exhibit D.5 (cases a - e), pp. 32-33.

[607] The Shell Sustainability Report 2007: 'Responsible Energy', Exhibit D.6 (cases a - e), pp. 24-25.

[608] The Shell Sustainability Report 2006: 'Meeting the Energy Challenge', Exhibit D.5 (cases a - e), p. 33.

[609] Shell Venster, '*Voor Shell is het CO2- en klimaatdebat over*' (Publication of Shell Nederland B.V., January/February 2007), Exhibit E.7 (cases a - e), p. 6.

646. Malcolm Brinded, the successor of Van de Vijver as managing director of the parent company that is responsible for Exploration and Production, stated the following in 2007:

[redacted]

647. Thus, SPDC's position could not be easily compared to that of other operating companies; Shell Nigeria was a separate and as such designated interest for the Group, regarding which decisions were taken at the highest level.

8.6 Knowledge of systematic failures at SPDC

648. In the period of the oil spills at issue, systematic failures at SPDC were involved, of which the parent company was aware. In addition to the arguments already advanced regarding this, the following is pointed out.

649. In the 2000 EP Business Plan, Nigeria was made EP *Key theme*; the managing director of EP proposed an action plan (that had to be approved by the CMD, see chapter 9.4.3.1), in which one of the action points was: "*improve HSE performance*".[611]

650. In 2002, Walter van der Vijver, at that time managing director of Royal Dutch and the group managing director responsible for EP, observed in his [redacted]:

[redacted]

651. As explained in chapter 9.4.3.2, the [redacted] contain the annual account of the managing directors of the parent company regarding the extent to which their Business complies with group policy. Even though the [redacted] pertain to the entire business EP, [redacted]

652. [redacted]

610 [redacted]

611 Shell International Exploration and Production B.V. / Shell EP International BV, *'2000 Business Plan, Exploration and Production Executive Committee'*, 23 October 2000, Exhibit E.5 (cases a - e), p. 45.

[redacted]

653. For example, in 2003, Van de Vijver wrote the following to Philip Watts:

613

614

[redacted]

654. He also wrote:

[redacted]

655. The appellants are not familiar with the content of the [redacted]

656. Van de Vijver further observed that [redacted]

[redacted]

619 [redacted]
620 [redacted]
621 [redacted]
622 [redacted]
623 [redacted]
624 [redacted]

659. This point also returned in later letters, [627] In 2003, Van de Vijver wrote the following:

625
626
627
628
629

661. The [redacted] are not the only sources – albeit they are quite concrete ones – from which the parent companies' knowledge can be inferred. Based on the monitoring and control system discussed in chapter 9.4, the parent company was kept abreast of important developments – particularly via the CMD, and in any event was continually informed via its responsible Managing Director. In this connection, reference is made *inter alia* to the annual business plans discussed before, which had to be approved by the CMD.[630] Brian Ward, EP CEO for Africa, also stated that he reported directly to the CMD regarding the difficult circumstances in Nigeria:

> Q: Did you make any presentations to the CMD during this time period, 2002/2003, if your recall?
>
> A: I made one presentation to the CMD
>
> Q: When was that?
>
> A: I can't remember
>
> Q: Do you recall what the presentation regarded?
>
> A: Clearly about SPDC and Nigeria, and I put in a document about the critical, critical projects that we were working on, but I'm speculating.
>
> […]
>
> A: I have a vague recollection, yes.
>
> Q: What's your vague recollection
>
> A: That I was asked to report back to the CMD on some issues regarding SPDC.
>
> […]
>
> Q: And to what did you attribute the overall declining trend in production?
>
> A: The lack of investment into our fields and the inefficiency of our operations in Nigeria. It should also add the difficulty of running these fields in a violent and unrest situation."[631]

662. In principle, the non-executive board members of the parent company are informed of the state of affairs in Nigeria by the Executives. However, the Social Responsibility Committee, which only had non-executive members, also addressed Nigeria. For example, in 2007, Wim Kok visited Nigeria, to inspect the impact of the irregularities in the Niger Delta on the oil production in his capacity as chairman of the Social Responsibility Committee and non-executive director of the

[630] Chapter 9.4.3.1.

[631] Public Deposition by Brian Ward, 10 January 2007, Exhibit Q.38 (cases a - e), pp. 87-88.

parent company.[632] He was accompanied by Jeroen van der Veer, at that time the CEO of the parent company. Kok described the circumstances as "*extremely difficult*" and stated: "*I was deeply affected by what I saw there (...). Every day there is sabotage and oil leaks*".[633] His findings are shared with the rest of the board, "*including the Executive Director responsible for that project or site*", in this case Malcolm Brinded.[634]

663. In brief, the parent company was aware of the fact that SPDC:

i. [redacted]
ii. [redacted]
iii. [redacted]
iv. [redacted]

664. In addition, the parent company was aware of the fact that SPDC had specific problems in the area of (v) *asset integrity;* (vi) *abandonment*; (vii) sabotage; (viii) (qualified) staff; and (ix) *oil spill response* and *remediation*. This is explained below.

8.6.1 Knowledge of defective asset integrity

665. The parent company knew that there were considerable problems with the reliability of SPDC's pipelines and facilities. In the years prior to the oil spills at issue, asset integrity was a recurring item in the documents that were presented to the CMD.

666. Shell did not contest that the parent companies were aware of the asset integrity problems; Shell did contend that the parent companies did not have any specific knowledge of the condition of the pipelines at Goi or Oruma, or the wellhead at Ikot Ada Udo. Apart from the question regarding whether the parent company was aware of the fact that there were specific risks at those specific locations, the following demonstrates that the problems with corrosion and overdue maintenance observed in Nigeria (including by the parent company) obviously also created a risk for the pipelines at Goi and Oruma and the wellhead in Ikot Ada Udo – and thus for the environment.

667. As already discussed above,[635] asset integrity was a separate *Programme Issue* in the Country Business Plan (CBP) of 1995 and 1996.[636] SPDC worked out two growth scenarios in the 1996 CBP, the *Steady Expenditure case* and the *Growth case*, regarding which the following is noted:

[632] See chapter 9.4.1.7 above (social responsibility committee).

[633] See the Report by Wim Kok to the shareholders' meeting, Exhibit I.5 (cases a - e).

[634] The Shell Sustainability Report 2007: 'Responsible Energy', Exhibit D.6 (cases a - e), p. 35.

[635] See also chapter 9.4.3.1.

[636] The appellants do not have any Country Business Plans of a later date. A request for the submission of the 2001-2004 business plans was dismissed both in the first instance and on appeal.

> Both cases have one common feature: the heavy investment in Asset Integrity and the priority it has under both cases.[637]

668. The 1996 CBP further stated:

> For the 1996 CBP, a good portfolio of hydrocarbon asset-related integrity activities is carried. Given the continuing cash constrained environment, these activities have been prioritized and phased to maximise short term cash flow. Asset condition infringing on HSES standards and those causing high oil deferment were the main determinants used to establish "must do" activities and an incremental ranking targeted at the Growth case. Except for specific cases mentioned, the integrity programme for both the Steady Expenditure and the Growth cases are similar[638].

669. A SWOT analysis included as Appendix D with the Business Plan mentioned as a *technical weakness* "infrastructure poorly designed and maintained", and, both as a weakness and as a threat: "(further) environmental liabilities".[639] The following was observed in connection with the latter:

> Companywide contingent liabilities have been on the increase in recent times. Starting with a contingent liability of N2,299.2m in 1991 (240 suits), the contingent liability increased to N19.4 billion (352 suits) as at 2nd Quarter 1995: an increase of 89% over a four and half year period. This increase has been due to increased number of spillage due to the age of our facilities in addition to sabotage incidents. Increased community awareness of environmental issues and the present harsh economic climate have also not helped matters.[640]

670. The business plan also announced a series of measures that were required in the area of asset integrity *(key asset and technical integrity items), inter alia* regarding *well integrity, pipelines, flowstations, crude evacuation pumps, terminals*, etc.[641] For example, a *"regular programme of inspection and change-out of bad sections"* was introduced for pipelines, in which *"pipeline evacuation systems will be systematically appraised using intelligent pigging to identify sections*

---

[637] 1996 Country Business Plan, Exhibit Q.29 (cases a - e), p. 1. See p. 16: *"In the high case, total unit Opex* [operating expenditure; added by attorney] *will remain higher due catch-up on maintenance backlog and refurbishment (asset integrity), whilst increased crude availability".*

[638] 1996 Country Business Plan, Exhibit Q.29 (cases a - e), p. 37.

[639] 1996 Country Business Plan, Exhibit Q.29 (cases a - e), Appendix D.

[640] 1996 Country Business Plan, Exhibit Q.29 (cases a - e), p. 44.

[641] 1996 Country Business Plan, Exhibit Q.29 (cases a - e), p. 27 and following.

for replacement", in order to minimize leakages from pipelines and related loss of production.[642] The envisaged upgrade of the Bonny terminal was also specifically discussed.[643]

671. Another *key Asset and Technical Integrity item* mentioned in the 2000 EP Business plan is *asset abandonment.* The overview demonstrates that in the previous years, no measures were taken in the area of well abandonment.[644]

Asset Abandonment

Well abandonment has been included in the programme and some 30 wells per annum are scheduled for abandonment as from 1997 with sites fully restored and returned to their original owners.

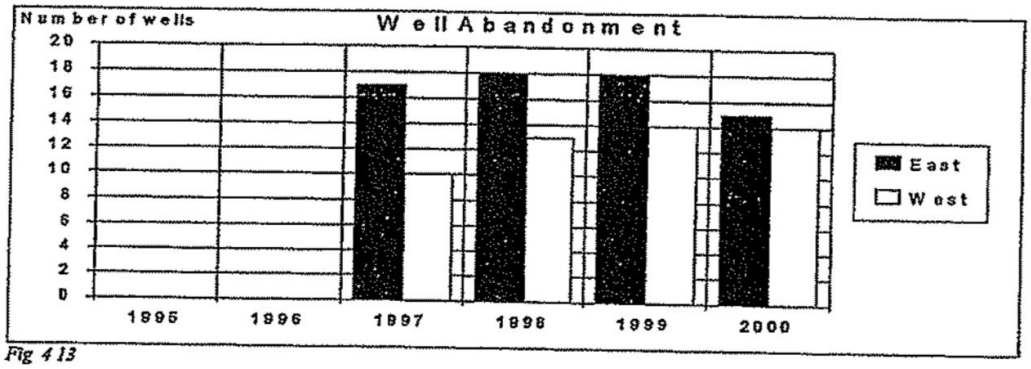


Fig 4 13

672. For a "detailed portfolio of opportunities for enhancing the technical integrity of SPDC Assets", the CPB refers to an "Integrated Operations Opportunities Book published as part of the 1996 Programme documentation". According to the Shell Nigeria Reference Documents included in Appendix A, this 1996 programme – which was apparently also presented to the CMD – comprises an Economics Book, a Performance Improvement Plan, a Community Affairs, Environmental and Safety programme plan (including occupational health) 1996-2000 and a Program Integrated Operations Opportunities.

673. Thus, the parent companies already had quite detailed knowledge of the *maintenance backlog* and *asset integrity problems* of SPDC from the Country Business Plan alone. It is a fact that the problems with asset integrity and leakages did not decrease in the subsequent years. Thus, it is likely that in those years, the situation in Nigeria was addressed just as extensively – if not more extensively – in the Country Business Plans and Programmes.

674. This is in any event also true for the 2000 EP Business Plan and other documentation to be discussed below. The 2000 EP Business Plan includes the following in a chapter on HSE:

> **Reducing hydrocarbon spills** is a priority target – improved pipeline and flowline integrity in Oman and Nigeria is key.

[642] 1996 Country Business Plan, Exhibit Q.29 (cases a - e), p. 58.
[643] 1996 Country Business Plan, Exhibit Q.29 (cases a - e), p. 40.
[644] 1996 Country Business Plan, Exhibit Q.29 (cases a - e), p. 42.

675. As described before, Nigeria is a key theme in the EP Business Plan.[645] The *Theme Action Plan Nigeria*, which is part of the 2000 EP Business Plan, further includes the following:

> Significant funds will continue to be required to maintain and upgrade SPDC's vast infrastructure, including the major refurbishment of Bonny terminal.

676. In 2002, Van de Vijver wrote the following to the Committee of Manging Directors:

> A recent joint EPG/SPDC review has shown that, despite the transformation of SPDC started in 1998, considerable gaps remain. These relate to the existing business - particularly the management of hydrocarbon production, asset integrity and the effectiveness of basic services - as well as to the major challenges posed by the Growth Programme.[646]
>
> [...]
>
> 3.4 Restore and maintain asset integrity
>
> There is a backlog of maintenance activities following a period in the 1990's when funding was highly constrained. A combination of budget restriction, prioritisation and executive capacity still restricts the rate at which the backlog can be cleared.
>
> <u>Response</u>: progress has been made including development of asset integrity and HSE management system, and projects initiated for pipeline replacement, and refurbishment of the Bonny Terminal. Steps now being pursued include the introduction of modern maintenance system, sourcing of Key Group staff and restraining of existing field staff, as well as the development of a stronger maintenance culture within the organisation.[647]

677. Thus, the *SGN Challenges overview* added as an appendix includes the following under the heading *Must Do*: *"Catch up on asset integrity"*. [648]

[redacted]

> [redacted]

---

[645] See chapters 9.4.3.1 and 9.5.
[646] Note to CMD – Nigeria Country review 2002, Exhibit Q.5 (cases a - e), p. 8.
[647] Note to CMD – Nigeria Country review 2002, Exhibit Q.5 (cases a - e), p. 10.
[648] Note to CMD – Nigeria Country review 2002, Exhibit Q.5 (cases a - e), p. 16.
[649] [redacted]

[redacted] In the Statement of Appeal Phase 1, the appellants argued that in view of the risk approach of the [redacted] and the link to the Business Plan, it is obvious that aspects (such as high priority action items) are known to the parent company.[650] Shell has not contested this. [redacted]

[redacted] Based on the Court of Appeal's interlocutory ruling, Shell should have made this report available for inspection. However, Shell failed to do so; Shell argued that it does not have (or no longer has) the report.[651] [redacted] As explained in chapter 9.4.3.4, high rated action items were consistently brought to the attention of the '*next level BAC',* and ultimately to the EP BAC, as well. Meanwhile, there can no longer be any doubts regarding the question of whether the problems in the area of asset integrity had penetrated at the group level, [redacted]

681. Finally, the fact that the parent company was aware of the problems is also demonstrated by the fact that in its 2006 sustainability report, Shell included the following quotation from Basil Omiyi, the managing director of Shell Nigeria at that time:

> We do, however, have a substantial backlog of asset integrity work to reduce spills and flaring. That backlog is caused by under-funding by partners over many years, operational problems and, more recently, the lack of safe access to facilities.[652]

8.6.2 Knowledge of sabotage problems

682. It has meanwhile become clear that the parent company was aware of the fact that the many oil spills in Nigeria were caused by the structural problems with asset integrity, on the one hand, and SPDC's inability to contend with the problems it faced in the area of security and sabotage, on the other. The following can be added to the arguments already advanced in this regard.

683. The 1995 Country Business Plan includes the following:

> In the field sabotage has become the major cause of oil spillage

[650] Statement of Appeal Phase 1 of Milieudefensie, no. 314.

[651] The appellants believe that this is implausible. The [redacted] must be known both within SPDC and within BAC and – at least partially – at the 'next level BAC' (see chapter 9.4.3.4). [redacted]

[652] The Shell Sustainability Report 2006: 'Meeting the Energy Challenge', Exhibit D.5 (cases a - e), p. 33

684. [redacted] The measures to be taken in this scope [redacted]

[redacted]

685. [redacted] to Jeroen van der Veer, Malcolm Brinded specified the - [redacted][653] He also stated the following in this connection:

[redacted]

8.6.3 Knowledge of problems with staffing levels

686. Another recurring theme in SPDC's information that was brought to the attention of the parent company was the shortage of (qualified) staff. This made it difficult for SPDC to cope with the problems that it faced. To this end, it appealed to the parent company.

653 [redacted]

687. The analysis in the Country Business Plan shows that the availability of executive capacity may possibly stand in the way of performing the so-called *growth scenario*. The following is noted in this regard:

> As several "SPDCs" can be set up over time, it is not the perceived executive capacity of SPDC that is constraining, but the executive capacity of the Group. Typically we consider the employment of highly qualified staff as one of the first constraints.[654]

688. In the EP 2000 Business Plan, in the theme action plan for Nigeria, the EP Business commits to *"commitment to staff development".*[655]

689. In his note to CMD of 2002, Van de Vijver wrote the following:

> A recent joint EPG/SPDC review has shown that, despite the transformation of SPDC started in 1998, considerable capability gaps remain. These relate to the existing business – particularly the management of hydrocarbon production, asset integrity and the effectiveness of basic services – as well as to the major challenges posed by the Growth Programme. The Country Review has confirmed that, despite progress in a number of areas, the long list of issues facing SGN presents a serious challenge for the already stretched staff in Nigeria.[656]

690. Van de Vijver announced a more active role for Global EP (which is further addressed in the next section).[657]

[redacted]

[654] 1996 Country Business Plan, Exhibit Q.29 (cases a - e), p. 55.

[655] Shell International Exploration and Production B.V. / Shell EP International BV, *'2000 Business Plan, Exploration and Production Executive Committee'*, 23 October 2000, Exhibit E.5 (cases a - e), p. 45.

[656] Note to CMD – Nigeria Country review 2002, Exhibit Q.5 (cases a - e), p. 8.

[657] Note to CMD – Nigeria Country review 2002, Exhibit Q.5 (cases a - e), p. 8.

693. To a significant extent, SPDC depended on contractors, for example for guarding the Right of Way and the remediation work.

694.

8.6.4 Knowledge of defective oil spill response and remediation

695. The parent company was also aware of SPDC's inability to comply with the group standards in the area of oil spill response and remediation. The parent company was aware of the risks this entailed for the environment and environmental liabilities. Moreover, the parent company was aware of the causes of the problem, which *inter alia* lay in the availability of staff and materials, and the problems with local communities.

658

659 See the Statement of Appeal Phase 1 of Milieudefensie et al., par. 3.4.8 and no. 314 with regard to knowledge of the parent company regarding the risks observed

660

661

696. The 1995 Country Business Plan includes the following:

> Over the last year, progress on key areas such as CAN (Clean Nigeria Associates) restructuring and the ESI (Environmental Sensitivity Index) mapping has been limited by operational problems which are now being resolved.[662]

697. The business plan states that *improvement programmes* are being developed in the area of *HR strategies, community relations and environmental aspects of our organisation*.[663] The fact that the two areas first mentioned had been an issue of concern for a longer time is demonstrated by the fact that on page 1, the business plan also refers to these areas as one of the *Critical Success Factors identified in the 1993 Strategy Review.* Thus, the plan specifically pays attention to the strategy to be pursued in community relations.[664]

698. This line is continued in the 1996 Country Business Plan, which describes the following as a corporate objective: "Improve relationships with oil and gas producing communities, whilst ensuring minimal environmental impacts in all operational areas". The following is noted regarding the growth scenarios outlined in that plan:

> Both cases acknowledge the commitments made in the NFI to CMD covering expenditure improving SPDC's environmental performance and community relations.[665]

699. According to the Business Plan, *mismanagement of host communities* and *environmental liabilities* are regarded as a threat for the organization. [666]

700. This risk is also signalled by managing director Van de Vijver at the parent company, when he wrote the CMD in 2002 that *"manage community disturbances"* is a must-do for SPDC.[667] The parent company can also read this one year later in the report by WAC Global Services. [668] [redacted]

[662] 1995 Country Business Plan, Exhibit Q.43 (cases a - e), p. 31.
[663] 1995 Country Business Plan, Exhibit Q.43 (cases a - e), p. 33.
[664] 1995 Country Business Plan, Exhibit Q.43 (cases a - e), p. 30-31.
[665] 1996 Country Business Plan, Exhibit Q.29 (cases a - e), p. 1.
[666] 1996 Country Business Plan, Exhibit Q.29 (cases a - e), Appendix D. Thus, improving this relationship with the local communities is an opportunity in the SWOT analysis.
[667] Note to CMD – Nigeria Country review 2002, Exhibit Q.5 (cases a - e), p. 16.
[668] WAC Global Services, 'Peace and Security in the Nigerdelta: Conflict Expert Group Baseline Report' (Working Paper for SPDC, December 2003), Exhibit C.7 (cases a - e), pp. 52, 89.

[redacted] The UNEP report signals in 2011 a *"loss of control"* when discussing the relationship of Shell with the local communities.[670]

[redacted] Both in his [redacted], Van de Vijver wrote to Shell's CEO that [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[670] United Nations Environment Programme-rapport, *Environmental Assessment of Ogoniland* (2011), Exhibit L.7 (cases a - e), p. 12, 98, 151.

[671] See chapter 9.6.3 above.

[672] [redacted]

[redacted]

8.6.5 Interim conclusion

705. The parent companies were aware of the fact that

> (a) SPDC's pipeline network had become seriously obsolete and was poorly maintained and that SPDC frequently did not abandon its wells;
>
> (b) serious security problems occurred, particularly in Ogoniland;
>
> (c) as a result of maintenance and security problems, oil spills frequently occurred in the pipelines operated by SPDC, as a result of which serious environmental damage had occurred;
>
> (c) SPDC was unable to adequately respond in the event of oil spills;
>
> (d) these problems were in part caused by defects in equipment and qualified staff;
>
> (e) partially for the same reasons, many of the polluted areas had not been (properly) cleaned up;
>
> (f) the risk assessments and other information and documentation regarding these issues of SPDC could not be relied on.

8.7 Intensified control and guidance in the years prior to the oil spills

706. The years prior to the oil spills were characterized by increased control of SPDC by the parent company; however, the parent company did not utilize this to intervene adequately at SPDC in order to prevent any further environmental damage.

707. Around the year 2000, a reorganization was implemented within the Shell Group that was supposed to result in a direct line of accountability between the operating companies and the group managing director in question. Brian Ward, as of 2001 CEO EP for the region Africa and in that capacity member of the EP Excom,[674] says the following in this regard:

> We had, prior to the reorganization, the operating companies were much more self-sustained and independent in terms of management and that's when we were regional business directors. SPDC specifically had its full complement of management and staff, technical, commercial. So it was a – it was an entity which didn't need a lot of support or was deemed not to need a lot of support. The idea was to move to a much more direct line responsibility and authority

673 [redacted]

674 Public Deposition by Brian Ward 2007, Exhibit Q.38 (cases a - e), p. 18.

> with the CEO being in the center and the, what used to be the managing directors in the various operating companies became production directors.[675] [Emphasis added by attorney].

708. Walter van de Vijver, who began in 2001 as the CEO EP and was responsible for Nigeria both in functional and regional terms, made increasing the central influence of the parent companies a spearhead:

> I felt that, that the structure in E&P was not the best it could be in getting direct hierarchy, hard-wiring of accountability in the organization, and this had to do with having a very strong operating units with very powerful CEOs at that level and not the ability to bring that sort of seamlessly together as it's reported up to the EP ExCom. You see as part of that follow-up that's one of the thing that changed during my tenure in E&P to improve that, uh, that organization and hard-wiring the accountability and the ownership.[676]
>
> Q: And why did you make organizational changes to the ExCom?
>
> A: As I just explained from the previous e-mail, one of the things I felt uncomfortable with was the way Exploration was structured in the Group, where it was very fragmented, and I wanted to create one central core of excellence and accountability for Exploration in the Group. So that was one of the first changes I made, together with establishing a formal department on project execution where we would create a project organization within the center of the Hague that would have global responsibility for quality of project execution across the globe.[677]

709. The new development had considerable consequences for SPDC, because – in view of the obvious group interests and the failures already observed at that time – the supervision of this operating company, in particular, was intensified.

710. Not much later, the Shell Group landed in difficulties when a significant discrepancy was shown to exist between reserves and production growth that Shell had claimed and the actual situation. Van de Vijver expressed this as follows in a note (that he prepared in 2002 for his own use)[678]:

> A decision was made to safeguard the Group's reputation as good as possible, thereby "blaming" underdelivery to either on "standard acceptable" factors (e.g. project delays in Nigeria) or on external factors (oil price, market.)

[675] Public Deposition by Brian Ward 2007, Exhibit Q.38 (cases a - e), pp. 18-19.
[676] Public Deposition by Walter van de Vijver, 2007, Exhibit Q.37 (cases a - e), pp. 120-121.
[677] Public Deposition by Walter van de Vijver, 2007, Exhibit Q.37 (cases a - e), pp. 120-121.
[678] Public Deposition of Walter van de Vijver, 2007, Exhibit Q.37(cases a - e), pp . 233-235.

> The actual gaps between external promises in Sept. 2001 and reality were significant […]
>
> Bottom line was that both reserves replacement and production growth were inflated.[679]

711. To somewhat compensate for this setback, production growth was more important than ever. From that time, Shell did everything to ensure that the planned production growth was realized. Nigeria was particularly important for this:

> The 2002 Business Plan for 2003/2004 contains a significant stretch in order to stay as close as possible to external commitments:
>
> […]
>
> - Continue 3% production growth, although "watered down"(capable of i.s. o. direct promise)(approx.. 20/80 forecast rather than 50/50 i.e. 20% chance of delivery probably reducing further when going to 2005 onwards given general decline uncertainty and high Nigeria dependence).[680]

712. The fact that the "*planned production rate increases*" had to be realized in Nigeria in particular is also confirmed in a *potential reserves exposure catalogue* that was prepared in those days:

> Reserves in some OUs might be at risk if planned production rate increases do not materialize. The OUs most affected are SPDC Nigeria and Abu Dhabi. Furthermore, Oman PDO must sustain current production rates throughout the remaining lifetime of the licence to ensure production of the booked proved reserves.[681]

713. The need for the parent companies to increase the production after 2002 is also demonstrated by the fact that the EP Business Plan for 2003 was rejected, because this plan would not realize the targets set by the CMD:

> Q: What do you recall about the – what was being discussed with respect to the EP business plan for 2002?
>
> A: The EP business plan was not acceptable to the CMD as it stood. It didn't meet the targets that they had set. We were asked to devise ways of figuring out how we could adopt the plan to meet the targets.
>
> Q: What were the targets that the business plan didn't meet?
>
> A: The business could be characterized by return on capital, reserves replacement ratio, unit costs and production levels, and these quite often

[679] Note for File – Managing the EP legacy issue, **Exhibit Q.51** (cases a - e), p. 2.
[680] Note for File – Managing the EP legacy issue, Exhibit Q.51 (cases a - e), p. 3.
[681] Potential reserves exposure catalogue (draft end-2002 dated 4 December 2002), **Exhibit Q.52** (cases a - e).

> conflicted. And the discussion was, for example, how would you meet specific return on capital and at the same time increase your production without the investment. So that was the type of conflict situation that we were in and that we discussed on a regular basis.
>
> […]
>
> Q: What, if any, action was taken as a result of this conversation regarding the business plan being rejected by CMD?
>
> A: The action was for us to review our own plans and ensure that we couldn't contribute further to the overall EP plan than we had done. And this was a common theme in these discussions.
>
> Q: What do you mean by to ensure that you couldn't contribute further to the overall EP plan?
>
> A: What I mean by that is were our individual regional plans tuned to the group plan in the best way possible.[682] [Emphasis added by attorney].

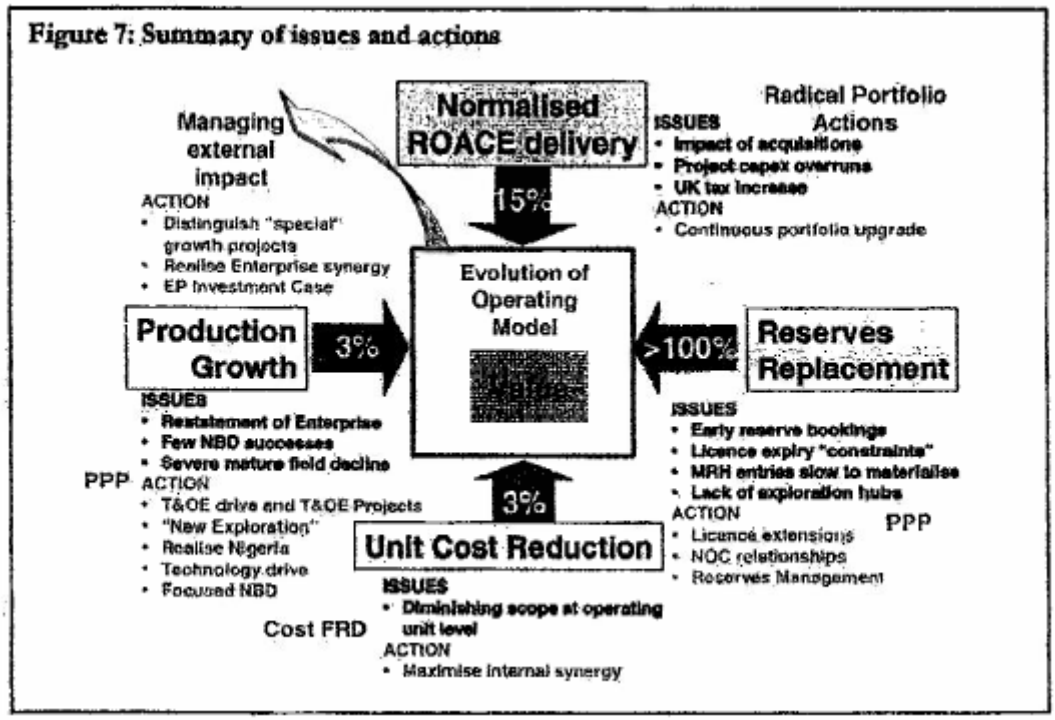
714. EP's first draft business plan for 2002 confirmed the parent companies' concerns:

> **Meeting our promises on profitability and Growth**
>
> The first draft of the 2002 Business plan (figure 3) confirms our concerns:
> – […]
> – Shortage of major new development projects and lack of material exploration success to feed medium term growth. 3% production growth is unlikely to be achieved organically on the Shell & Enterprise combined portfolio;
> – […]
> – Project over-expenditures (e.g. AOSP, Nigeria, USA); and
> – Unit operating costs not trending to meet the 3 % underlying reductions.[683]

715. Van de Vijver depicted the plans schematically as follows:

[682] Public Deposition by Brian Ward, 10 January 2007, Exhibit Q.38 (cases a - e), p. 99.
[683] Note to CMD – EP - Delivery through Globalisation, 24 September 2002, **Exhibit Q.53** (cases a - e), p. 3.

Figure 7: Summary of issues and actions



716. In this situation, an important role was earmarked for Nigeria, because the planned production (growth) of Nigeria was crucial to the group, on the one hand, and because Nigeria represented a risk due to uncertainties and high costs, on the other. In this situation, from 2002, the parent companies attempted to exercise their influence to achieve the production in Nigeria according to the growth scenario. In that year, Van de Vijver wrote the following in a note to the CMD:

> Considering the importance of Nigeria for the Group and the commitments already made, there is no alternative but to continue with the strategy of the Growth Programme. Every support will be given by the Group to ensure sustainable growth and delivery, and continue to address Shell's asset integrity and other critical issues in Nigeria. New ways of working will be implemented, supported by a stronger governance model.[684]
>
> […]
>
> The Country Review has confirmed that, despite progress in a number of areas, the long list of issues facing SGN presents a serious challenge for the already stretched staff in Nigeria. Responses will require an acceleration of the change process combined with new approaches in partnership with the Group, drawing on the resources and capabilities of Global EP to ensure they are resolved or at least managed in the most effective manner. The management style, which evolved in response to handling ongoing daily issues and crises has given SCiN a unique flexibility and capacity to adapt. A

[684] Note to CMD – Nigeria Country review 2002, Exhibit Q.5 (cases a - e), p. 1.

> more structured approach with stronger governance is now required to simultaneously manage/resolve SCiN issues and lead the implementation of the Growth Programme.[685] [Emphasis added by attorney].

717. A specifically instituted *Nigeria Steering Committee*, which was chaired by the Regional Managing Director (at that time Walter van de Vijver) was to monitor whether SPDC complied with the objectives set by the parent companies in the scope of the '*growth programme'*.[686]

718. The parent company recognized that the problems in the area of asset integrity, security and qualified staff could potentially stand in the way of realizing the growth scenario. To prevent this, it also exercised its influence in these areas: Van de Vijver designates these as *"top priorities for immediate action".*[687] This *immediate action* entailed that the parent company deploys its know-how, means and staff to improve the performances at SPDC.

719. Van de Vijver states the following regarding the need to deploy more group staff in Nigeria *(resource the plans)*:

[685] Note to CMD – Nigeria Country review 2002, Exhibit Q.5 (cases a - e), p. 8. See p. 12*: "Nigeria is a significant element of the EP portfolio. Given the importance of the growth plans to the EP business and the challenges faced by the present organisations (SPDC in particular), a new approach to conducting Shell EP business in Nigeria is necessary. New ways of working will be introduced, drawing on the resources and capabilities of Global EP and supported by relevant structures and processes".*

[686] Note to CMD – Nigeria Country review 2002, Exhibit Q.5 (cases a - e), p. 13.

[687] Note to CMD – Nigeria Country review 2002, Exhibit Q.5 (cases a - e), pp. 8, 10.

3.3 Effective deployment of sufficient executive capacity (resource the plans)

Major capability gaps have been identified and need to be bridged with urgency for both base business activities (particularly asset integrity) and the Growth Programme in terms of competencies and executive capacity. The Nigeria talent pipeline should be optimally allocated to all Shell entities in Nigeria (SPDC, SNEPCO, NLNG, etc.).

Response: in the short-term, it is essential that more Group staff be urgently deployed in Nigeria (particularly for operations and maintenance activities). This, however, can only be a partial solution given the overall shortage in key technical skills across EP, the general reluctance of staff to work in Nigeria and the limited capacity for SPDC to absorb new staff. Alternative strategies are being pursued, including conducting more work overseas and getting more support from selected contractors. Increased organisational focus within SPDC is also needed as well as raising staff effectiveness through improved basic services.

A range of initiatives is being pursued, including a new centre for field development studies outside the Niger Delta and support from the new EP-Projects Group. These measures should help meet requirements, but effective implementation will be a major challenge requiring co-ordinated efforts from SCiN and across EP.

A small SPDC-EPG team will address the mechanisms for implementation of the recommendations of the SPDC Programme Development (Resourcing) Review and will produce an Integrated Plan by July 2002, including monitoring aspects. The team composition will be chosen to facilitate buy-in to the new concepts from the existing organisation in Nigeria.

720. The Group must also ensure that the asset integrity and the HSE policy within SPDC improved, *inter alia* by utilizing Group staff and training existing staff:

3.4 Restore and maintain asset integrity

There is a backlog of maintenance activities following a period in the 1990's when funding was highly constrained. A combination of budget restriction, prioritisation and executive capacity still restricts the rate at which the backlog can be cleared.

Response: progress has been made including development of asset integrity and HSE management systems, and projects initiated for pipeline replacement, and refurbishment of the Bonny Terminal. Steps now being pursued include the introduction of modern maintenance systems, sourcing of key Group staff and retraining of existing field staff, as well as the development of a stronger maintenance culture within the organisation.

721. In addition, using Global Security, the security problems in Nigeria must be addressed:

3.5 Provide adequate security

The level of security in Nigeria is low, with increasing criminality and routine violence due to poverty and poor law enforcement, combined with regular ethnic, religious and cultural clashes.

Response: SCiN has policies in place to provide a secure business environment while safeguarding Group reputation. It is improving its security management and the physical protection of its people and assets, with the support of Global Security. Federal and State Governments have also begun to accept responsibility for providing an investment friendly security environment. This remains an area of intense lobby effort. The profile of this topic will be raised further, including addressing it as an industry investment issue for Nigeria.

722. The public deposition of Walter van de Vijver demonstrates that the problems of SPDC pertaining to community relations were also supervised from the parent company; this was part of one of the five large initiatives regarding Nigeria that were set up from the EP Business.[688]

723. Thus, forced to do so by the possible consequences of the reserves scandal, the parent company managed to utilize numerous instruments to achieve production growth at the operating units. Nigeria had an important role in this.

724. To reach the desired goal, the parent company *inter alia* exercised its influence by (i) enforcing objectives in the EP Business Plan; (ii) changing the governance structure and introducing a system of meticulous accountability; (iii) directing staff; (iv) helping develop asset integrity and HSE management systems, and to this end stationing Group Staff abroad and training field staff; (v) Global Security supporting the safety policy and the security of people and possessions.

725. In turn, SPDC could rely on the fact that the parent company would support it in realizing the objectives that the Group had imposed on SPDC.

726. It follows from the above that the parent company was also – and even pre-eminently – well-placed to ensure that in terms of these aspects, SPDC was placed into a position to reduce the harmful environmental effects of its operations. However, the parent company's intervention did not focus on this; it focussed instead on increasing SPDC's production.

727. Within this objective, closing off the pipelines for a longer period for the purpose of replacement or due to the serious security problems and the inability to exercise any monitoring in Ogoniland, was not an option - not even if this meant that leakages continuously occurred from those pipelines. Nor was there any room within this objective to utilize the requisite funds and available group staff to ensure that SPDC would clean up the pollution that had occurred quickly and properly.

8.8 Conclusion: the parent company breached its duty of care

728. The parent company was aware of the systematic problems at SPDC in the area of asset integrity and securing its pipelines against sabotage. As a result of SPDC's extremely obsolete pipelines and security systems, the parent company knew that every day there was a considerable chance of new leakages that would further exacerbate the serious environmental problems in the Niger Delta of which it was also aware. Moreover, the parent company knew that SPDC systematically failed in its response to those oil spills and in cleaning up the pollution.

729. The parent company had the knowledge, possibilities and means to ensure that the risks created in this way would not materialize, but failed to do so. In part as a result of this failure, the damage

[688] Public Deposition by Walter van de Vijver, 31 January 2007, Exhibit Q.37 (cases a - e), pp. 221-222. Moreover, the 1996 Country Business Plan (Exhibit Q.29) demonstrates that at that time, *environmental performance and community relations* were already the subject of agreements with the CMD.

at Goi, Oruma and Ikot Ada Udo could occur. The District Court wrongly concluded that the parent company is not liable based on negligence.

9 GROUND FOR APPEAL 9: THE DISTRICT COURT WRONGLY FOUND THAT SHELL IS NOT LIABLE BASED ON INFRINGEMENT OF HUMAN RIGHTS

9.1 The judgment

731. The District Court wrongly found as follows in par. 4.60 (cases c + d); par. 4.62 (cases a + b); par. 4.56 (case e):

> 4.60. Under II, Milieudefensie et al. moved for a declaratory judgment to the effect that SPDC is liable for affecting Dooh'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 matter. 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 at best for negligence. However, in all of the above the District Court ruled that no reprehensible conduct based on a tort of negligence is involved. 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.

732. The District Court found that the claimed declaratory judgment must be dismissed based on the assumption that reprehensible conduct in horizontal relationships and in the event of sabotage cannot be considered to be an infringement of a human right. As the appellants will demonstrate in this chapter, the legal finding contains both factual and legal inaccuracies that mean that this conclusion by the District Court cannot be upheld. Following a brief explanation to the basis itself (chapter 10.2) and the case law in this regard (chapter 10.3), the appellants will discuss the inaccuracies in the cited finding in succession (chapter 10.4). Breach of the right to a clean living environment

733. The appellants argue that as a result of the frequent exposure to oil pollution as a result of the oil spills at issue, their physical integrity and their right to a clean living environment are being infringed.

734. The right to a clean living environment is embedded in Articles 20, 33 and 34 of the Nigerian constitution,[689] Article 24 of the *African Charter on Human and Peoples' Rights* and fundamental international law rules. By virtue of the *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act*, the African Charter is part of the Nigerian legal system.

[689] Under Nigerian law, the right to a clean living environment is considered to be incorporated in the right to life and physical integrity; this is further discussed in chapter 10.3.

Article 24 stipulates that *"[a]ll peoples shall have the right to a general satisfactory environment favourable to their development".*[690]

735. The broad effect that is ascribed to these human rights provisions in the Nigerian legal system is recognized in the Fundamental Rights (Enforcement Procedure) Rules 2009 ("**FREP Rules**"). The recitals of the FREP rules consider the following:

> The overriding objectives of these Rules are as follows: (a) The Constitution, especially Chapter IV, as well as the African Charter, shall be expansively and purposely interpreted and applied, with a view to advancing and realizing the rights and freedoms contained in them and affording the protections intended in them." [Emphasis added by attorney].[691]

736. The District Court recognized the gravity of the environmental pollution in Nigeria:

> 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.

737. The appellants' living environment has been seriously polluted by the oil spills. As a result of the oil pollution, they can no longer till their land and utilize the fish ponds; in addition, they have suffered damage to their health. Due to the oil pollution, the village of Goi has become a ghost village; all inhabitants have been forced to move to other places. Moreover, the oil spills at issue are part of a pattern, given that Dooh, Efanga, Oguru, Akpan and other people living in the vicinity had to contend with oil pollution again, both before and after the oil spills at issue.[692]

738. The District Court should have concluded that Shell violated the right to a clean living environment of the appellants (and of the injured parties represented by Milieudefensie). The District Court wrongly concluded that SPDC cannot be reproached for any active act, but at best for negligence, and that reprehensible conduct in horizontal relationships and in the event of sabotage cannot be considered to be an infringement of human rights.

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[690] See also in this regard the Statement of Reply, chapter 8.2 (cases a - e) and the Statement of Appeal Phase 1 of Milieudefensie, chapter 2.2.

[691] FREP Rules 2009, preamble, par. 3, online available via https://www.refworld.org/pdfid/54f97e064.pdf

[692] See the Statement of Reply (cases a - e), chapters 8.2 and 10.2, where the impairment of the living environment is explained in more detail.

9.2 Nigerian case law

739. As the appellants argued in the documents, the *Gbemre v. SPDC* case from 2005 is instructive regarding this basis. In that ruling, in the scope of the right to a clean living environment, the Nigerian constitution was successfully invoked in combination with the African Charter.[693]

740. In *Gbemre*, the Nigerian Federal High Court confirmed that the right to a clean living environment is set forth in the Nigerian constitution and the African Charter, and as such must be applied in the Nigerian legal system.[694] The Federal High Court also found that this right has horizontal effect in the Nigerian legal system and that it can be invoked against companies like SPDC.[695] It was further determined that negligence may contribute to such a breach of rights in their horizontal relationships;[696] that the fact that the acts in question are permitted by law does not mean that no breach of human rights is involved;[697] and that due to such a breach of human rights, orders and prohibitions can subsequently be imposed.[698]

741. The following claims were awarded in Gbemre:

> Declaration that the constitutionally guaranteed fundamental rights to life and dignity of human person provided in sections 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria, 1999 and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9, vol1, Laws of the Federation of Nigeria, 2004 inevitably includes the right to clean poison-free, pollution-free and healthy environment.
>
> Declaration that the actions of the 1st and 2nd respondents in continuing to flare gas in the course of their exploration and production activities in the applicant's community is a violation of their fundamental rights to life (including healthy environment) and dignity of human person guaranteed by sections 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria,

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[693] For a more detailed discussion of this ruling, see the Statement of Reply, nos. 419-422 (cases c + d), nos. 388-391 (cases a + b), and nos. 379-382 (case e) and the Statement of Appeal Phase 1 of Milieudefensie et al., no. 19.
[694] Federal High Court of Nigeria, Benin City, *Gbemre and Others v. Shell Petroleum Development Company Ltd and Others*, [2005] AHRLR 151 (NgHC), Exhibit L.5 (cases a - e), par. 2.1 (p. 2) together with par. 6.0 (p. 8).
[695] Federal High Court of Nigeria, Benin City, *Gbemre and Others v. Shell Petroleum Development Company Ltd and Others*, [2005] AHRLR 151 (NgHC), Exhibit L.5 (cases a - e), par. 2.2 (p. 2) together with par. 6.0 (p. 8).
[696] Federal High Court of Nigeria, Benin City, *Gbemre and Others v. Shell Petroleum Development Company Ltd and Others*, [2005] AHRLR 151 (NgHC), Exhibit L.5 (cases a - e), par. 2.3 (p. 2) together with par. 6.0 (p. 8).
[697] Federal High Court of Nigeria, Benin City, *Gbemre and Others v. Shell Petroleum Development Company Ltd and Others*, [2005] AHRLR 151 (NgHC), Exhibit L.5 (cases a - e), par. 2.4 (p. 2) together with par. 6.0 (p. 8).
[698] Federal High Court of Nigeria, Benin City, *Gbemre and Others v. Shell Petroleum Development Company Ltd and Others*, [2005] AHRLR 151 (NgHC), Exhibit L.5 (cases a - e), par. 6.5 (p. 9): "*HEREBY ORDER that the 1st and 2nd Respondents are accordingly restrained whether by themselves, their servants or workers or otherwise from further flaring of gas in applicants' community and are to take immediate steps to stop the further flaring of gas in the applicant's community.*"

1999 and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9, vol1, Laws of the Federation of Nigeria 2004.

Declaration that the failure of the 1st and 2nd respondents to carry out environmental impact assessment in the applicant's community concerning the effects of their gas flaring activities is a violation of section 2(2) of the Environment Impact Assessment Act, cap E12 vol 6 Laws of the Federation of Nigeria, 2004 and contributed to the violation of the applicant's said fundamental rights to life and dignity of human person;

Declaration that the provisions of section 3(2)(a), (b) of the Associated Gas Re-injection Act cap A25 vol 1 Laws of the Federation of Nigeria, 2004 and Section 1 of the Associated Gas Re-Injection (continued flaring of gas) Regulations Section 1.43 of 1984, under which the continued flaring of gas in Nigeria may be allowed are inconsistent with the applicant's right to life and/or dignity of human person enshrined in sections 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria, 1999 and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9 vol 1 Laws of the Federation of Nigeria, 2004 and are therefore unconstitutional, null and void by virtue of section 1(3) of the same Constitution.

742. The appellants emphasize that *Gbemre* is prevailing law in Nigeria. Shell et al. contested this based on Oditah's argument in 2012 that at the time, Shell (SPDC) had initiated an appeal against the ruling mentioned above of the Federal High Court. However, more than thirteen years after the Federal High Court's ruling, this has still not been demonstrated. Thus, in contrast to what Shell's expert Oditah claims[699], the ruling is most certainly part of Nigerian law.

743. Oditah's point of view that the *Okpara v. SPDC* case allegedly demonstrates that the starting points in Gbemre are not (or are no longer) followed by the Nigerian court is also incorrect.[700] As Duruigbo set out in his expert opinion, (i) a ruling of a federal high court cannot detract from the ruling of another federal high court;[701] (ii) in Okpara, no reference whatsoever was made to Gbemre, and the suggestion that the court 'refused' to 'follow' that decision is therefore misplaced;[702] and (iii) Okpara involved a procedural question regarding admissibility and not a

[699] Prof F. Oditah states that "*the decision in Gbemre has been appealed and does not in any event represent Nigerian law"*, no. 7 of his Third Supplementary Opinion (exhibit of Shell et al.).

[700] *"In the more recent case of Okpara v SPDC, Justice Nwodo of the Federal High Court refused to follow the decision in Gbemre, which cannot therefore be regarded as authoritative"*, Third Supplementary Opinion by Prof F. Oditah QC, no. 7 (exhibit of Shell et al.).

[701] Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1 (cases a - e), no. 85.

[702] Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1 (cases a - e), no. 86.

substantive assessment of the human rights basis. The court even emphasized that "*the fact that a suit is incompetent because of procedural defect or Non-compliance to condition precedent does not mean there is no life cause of action.*"[703] In brief, the *Gbemre* case most certainly is authoritative in the Nigerian legal system; thus, this is instructive for the case at issue.

744. The horizontal effect of the fundamental right to a clean living environment in the Nigerian legal system was also confirmed in 2016 by the Federal High Court in the Lagos judicial division. In *Ajanaku v. Mobil*, negligence on the part of an oil company was involved, as well, which resulted in a breach of human rights.[704] More specifically (as in the case at issue), a lack of *post-impact remediation measures* was involved. Thus, the court awarded a declaratory judgment:

> A declaration that the Defendant's continuing failure, neglect and refusal to undertake post-impact remediation measures to restore the ecosystem of the lands and Waters of Life inhabited by the Plaintiffs and where they carry on their occupation of fishing and fish farming, is unlawful, unconstitutional and a violation of the Plaintiffs' right to life, and right to live in an environment favourable to their socio-economic development as guaranteed under Section 33 of the Nigerian Constitution, 1999 [and] Articles 22 and 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement Act Cap 10, Laws of the Federation of Nigeria 1990.[705]

745. The court also awarded the claim for an order that Mobil was required:

> [to do] all such acts and things to clean up the environment of the Plaintiffs and to restore same to its original state.[706]

746. This case also demonstrates that the right to a clean living environment is embedded in the Nigerian legal system and has horizontal effect, that no distinction is made in this context between negligence and active conduct, and that orders can be imposed in response to violation of the right to a clean living environment to ensure that the environment is returned to its original state.

9.3 Findings of the District Court

747. In the District Court's finding regarding this basis, three sub-findings are relevant in particular: i) the distinction between active conduct and reprehensible conduct; ii) the application of human rights in horizontal relationships; and iii) the fact that there is allegedly no case law that combines these two aspects in the event of sabotage. The appellants will address these aspects and demonstrate that i) the distinction between active conduct and reprehensible conduct is irrelevant

[703] Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1 (cases a - e), no. 87.

[704] *Chief M.A. Ajanaku & Ors. v. Mobil Producing Nigeria Unlimited,* Suit No: FHC/L/CS/274/2002; Judgment delivered on 14th December, 2016. Exhibit Q.23 (cases a - e).

[705] *Chief M.A. Ajanaku & Ors. v. Mobil Producing Nigeria Unlimited,* Suit No: FHC/L/CS/274/2002; Judgment delivered on 14th December, 2016, Exhibit Q.23 (cases a - e), p. 70.

[706] *Chief M.A. Ajanaku & Ors. v. Mobil Producing Nigeria Unlimited,* Suit No: FHC/L/CS/274/2002; Judgment delivered on 14th December, 2016, Exhibit Q.23 (cases a - e), p. 71.

for assessing whether an infringement of human rights was involved; ii) fundamental rights in Nigeria have horizontal effect; and iii) whether or not case law exists regarding reprehensible conduct in horizontal relationships in the event of sabotage is irrelevant.

9.3.1 The distinction between active conduct and reprehensible conduct is irrelevant

748. The District Court found as follows regarding the distinction between active conduct and reprehensible conduct:

> 4.60. […] The District Court finds that a fundamental difference can be pointed out between that case and the subject matter. 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 at best for negligence. However, in all of the above the District Court ruled that no reprehensible conduct based on a tort of negligence is involved.[707]

749. The District Court's finding is incorrect both factually and in legal terms. First of all, the District Court fails to recognize that in the *Gbemre* case, SPDC's negligent acts most certainly played an important role in the Federal High Court's assessment. In the community in question, SPDC had failed to perform an Environmental Impact Assessment in order to investigate the effects of gas flaring. Therefore, the Federal High Court concluded:

> [T]hat the failure of the 1st and 2nd Respondents to carry out environmental impact assessment in the Applicants' Community concerning the effects of their gas flaring activities is a violation of Section 2(2) of the Environment Impact Assessment Act, Cap. E12 Vol. 6 Laws of the Federation of Nigeria, 2004 and contributed to the violation of the Applicant's said fundamental rights to life and dignity of human person.[708]

750. In other words: not performing an Environmental Impact Assessment was reprehensible; according to the Federal High Court, this contributed to infringement of the plaintiffs' fundamental rights.

751. Secondly, the distinction that the District Court made between active acts and reprehensible acts or omissions is irrelevant for assessing a human rights violation under Nigerian law. As already explained above, specifically with regard to the violation of the right to a clean living

[707] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.60 (cases c + d); par. 4.62 (cases a + b); par. 4.56 (case e). The finding in Ikot Ada Udo (case e) is different in this case. For the deviating finding by the District Court in this case, see chapter 10.4.2.

[708] Federal High Court of Nigeria, Benin City, *Gbemre and Others v. Shell Petroleum Development Company Ltd and Others*, [2005] AHRLR 151 (NgHC), Exhibit L.5 (cases a - e), par. 2.1 (p. 2) together with par. 6.0 (p. 8).

environment, this follows from *Gbemre v. SPDC* and *Ajanaku v. Mobil*.[709] The question regarding whether under Nigerian law, liability may exist for reprehensible omissions exclusively arises in tort law. However, this doctrine is not at issue in assessing the infringement of human rights, because the standard has already been determined there. Subsequently, with regard to human rights, it is only relevant whether the conduct, i.e. the act or omission, constitutes infringement of a fundamental right.

752. In this connection, the appellants also points out that Oditah believes that regarding this point it is unimportant whether active acts or negligence are involved; after all, he also disregards this.

753. Thirdly, the District Court wrongly suggests that the possible violation of the right to a clean living environment in cases a - d in part depends on the success of the claim based on negligence. However, the conclusion that no tort of negligence was involved (which Milieudefensie et al. contest in chapters 5 to 8) cannot mean that for this reason alone, no infringement of a fundamental right is involved.

754. Fourthly, the District Court failed to recognize that the oil pollution in the appellants' living environment is the direct result of Shell's oil extraction and production operations in Nigeria. Continuing such activities without taking adequate precautionary measures is an active act that in the case at issue resulted in violation of the right to a clean living environment. In all cases, but in the event of Goi, in particular, Shell violated the right to a clean living environment by continuing to transport oil in seriously corroded pipelines that Shell either did not or was unable to supervise, or at least by drilling an exploratory well that it failed to properly isolate after discontinuing the use of this well. In this connection, it is further pointed out that the oil spills form a pattern in Nigeria – including for the appellants – and that the serious and recurrent threat of repeated infringement may also contribute to violation of that right.

755. Summarizing, neither the question regarding whether an active act or omission is involved, or the question regarding whether a tort of negligence was involved is relevant in assessing whether Shell et al. infringed their fundamental rights.

9.3.2 Human rights have horizontal effect under Nigerian law

756. With regard to the oil spill in Ikot Ada Udo, the District Court further wrongly found as follows:

[709] Moreover, in this connection reference is made to the ECOWAS case of *Kwasu v. Nigeria*, 10 October 2017, in which the Community Court of Justice of the ECOWAS found: "*Thus the refusal, neglect or omission of the officials to provide safety equipment for the training that led to the death of the deceased and that was a foreseeable consequence*", p. 24, and: "*The circumstances leading to the loss of life of the Applicants' son was due to the acts and / or omission of the officials of the NDA, an institution of the Defendant for failure to take steps to preserve the loss of the life of the deceased from drowning.*", pp. 26-27. Available via https://africanlii.org/sites/default/files/ECW_CCJ_JUD_04_17.pdf.

> 4.56. […] 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.

757. The Nigerian case law demonstrates that fundamental rights in Nigeria – as in the Netherlands – have both vertical and horizontal effect and therefore can also be invoked against companies like Shell. This not only follows from the *Gbembre* ruling. This had already been established long before the *Gbembre* ruling, but the Nigerian Supreme Court was crystal-clear in 2006 in its ruling in the *Abdulhamid v. Akar* case (**Exhibit Q.49**) where it stated:

> The position of the law is that where fundamental rights are invaded not by government agencies but by ordinary individuals, as in the instant case, such victims have rights against the individual perpetrators of the acts as they would have done against state actions. It follows therefore that in the absence of clear positive prohibition which precludes an individual to assert a violation or invasion of his fundamental right against another individual, a victim of such invasion can also maintain a similar action in a court of law against another individual for his act that had occasioned wrong or damage to him or his property in the same way as an action he could maintain against the State for a similar infraction.[710] [Emphasis added by attorney].

758. This was also reconfirmed in the more recent *Ajanaku v. Mobil* case. It follows from this case law that the Nigerian court does not distinguish between the vertical or horizontal effect of human rights. It is also demonstrated that under Nigerian law, negligence of a company like Shell and the question regarding whether this conduct resulted in a violation of a fundamental right should be assessed in exactly the same way as a situation in which this negligence can be ascribed to the Nigerian State. The District Court failed to recognize this in its final judgment.

9.3.3 Rulings of Nigerian courts regarding reprehensible omissions in horizontal relationships in the event of sabotage

759. The District Court found that there is no case law regarding the application of reprehensible conduct in horizontal relationships in the event of sabotage; for this reason, it concluded that the claim should be dismissed:

> 4.60. […] 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.

760. This finding is incomprehensible. Nigerian case law unambiguously demonstrates that fundamental rights have horizontal effect and that in assessing the violation of those rights, no

[710] Supreme Court of Nigeria, *Abdulhamid v. Akar*, [2006] 13 NWLR (Pt. 996) 127, 149, **Exhibit Q.49** (cases a - e). See, for example, also Court of Appeal, *Theresa Onwo v. Nwafor Oko & Others* (1996) 6 NWLR [Pt. 456] 584.

distinction is made between acts of the State or a company. As also demonstrated by the previous section, in determining a violation of fundamental rights, the relevant case law does not distinguish between an active act and negligence, either. For this reason, it is entirely irrelevant whether or not any case law exists that combines these aspects in the event of sabotage. As the Court of Appeal already rightly found in the Interlocutory Ruling, in assessing whether or not the case at issue involves a violation, the starting points in Nigerian law are leading - not the question regarding whether there is any case law. [711]

761. In its finding, the District Court further fails to recognize that Shell et al.'s negligence most certainly resulted in violation of the appellants' right to a clean living environment. After all, the negligence inflicted serious damage on the appellants' living environment; under Nigerian law, this is sufficient for infringement of a human right.

9.4 Conclusion

762. In the Nigerian legal order, fundamental human rights have horizontal effect and no distinction is made between active acts and negligence. In all three cases, the District Court wrongly found that this distinction was relevant. Given that in this context, the District Court starts from an incorrect opinion regarding the applicable Nigerian law, its further conclusions on this point cannot be upheld.

763. All cases involve violation of the right to a clean living environment of the appellants; under Nigerian law, this qualifies as a violation of human rights based on Article 24 of the African Charter.

764. In case e (Ikot Ada Udo), the District Court concluded that negligence was involved, which in that specific case constituted a tort of negligence. Even though in and of itself correct, at a minimum based on this establishment, but apart from that based on the above, the District Court should also have concluded that in view of the serious damage to the environment and the impairment of the drinking water as a result of the oil spills, the right to a clean living environment of the parties affected by the oil spill has been violated.

765. In cases a - d (Goi and Oruma), as well, the District Court should have concluded that – irrespective of an opinion regarding the tort of negligence – Shell violated the right to a clean living environment of Dooh, Ogura, Efanga and the other parties affected by the oil spills at Goi and Oruma.

[711] See the Interlocutory Ruling of the Court of Appeal of The Hague, 18 December 2015, par. 2.2 (cases a + b), par. 3.2 (cases c + d), and par. 2.2 (case e): "*The above is not altered by the fact that according to Shell, there are no rulings by Nigerian courts in which group liability has been accepted based on this ground. After all, this does not mean that by definition, Nigerian law does not offer any starting points for a (breach of the) duty of care of the parent company to be assumed under (those) circumstances, including in the scope of cleaning up the pollution and preventing any repetition.*"

10 GROUND FOR APPEAL 10 (ALL CASES): THE DISTRICT COURT WRONGLY DISMISSED MILIEUDEFENSIE'S CLAIM FOR A DECLARATORY JUDGMENT

10.1 The judgment

766. The District Court wrongly found as follows in par. 4.40 (cases c + d); par. 4.42 (cases a + b); par. 4.35 (case e):

> 4.40. 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 the oil spill in 2004 near Goi, so that no tort of negligence of SPDC against Milieudefensie can be involved. The District Court further notes that under common law, the proximity between SPDC in Nigeria and Milieudefensie in Amsterdam is not sufficient, either, for any damage that occurred in Nigeria near Goi. 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.

10.2 Change in the claim

767. The District Court dismissed Milieudefensie's claim, because no tort was allegedly committed against Milieudefensie.[712] To this end, the District Court essentially finds that the damage of those third parties cannot be considered to be damage of Milieudefensie itself. Thus, only the issue of own damage of Milieudefensie was involved in the assessment.

768. The District Court started from an incorrect interpretation of Milieudefensie's claim. It should have understood this claim such that the relevant damage is the damage of the parties affected, given that Milieudefensie represents the interests of those third parties. For the sake of clarity, Milieudefensie currently changes its claim regarding the declaratory judgment of tort and liability in this sense.[713] As Milieudefensie also argued and substantiated in the first instance, in this case it represents the general interest and the (environmental) damage suffered by the people who live in the vicinity of the oil spills at issue in Goi, Oruma and Ikot Ada Udo. Thus, as currently explicitly incorporated in the claim, its claim serves to protect the general interest mentioned above and the interests of those who were affected by the oil spills at issue, including the interest

[712] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.40 (cases c + d), par. 4.42 (cases a + b), par. 4.35 (case e).

[713] See chapter 17.

that they can actually expect to be compensated for their damage, in conformance with Nigerian laws and regulations.

769. The District Court's opinion also gives rise to the question regarding how a class action could still be possible under Dutch law if damage of the foundation or association itself were to be a condition for awarding the legal claim. After all, a class action pertains to the protection of similar interests, not exercising a subjective right to compensation of damage that the foundation or association suffered itself in law. Based on the current article 3:305a (3) DCC, compensation in cash cannot even be the purport of the legal action.

770. Below, Milieudefensie will address the District Court's finding in light of the change in the claim. Where Milieudefensie believes that this is applicable in this stage of the proceedings, it will also address its justified interest in the claimed declaratory judgment as contested by Shell et al. in the Statement of Appeal (Phase 1).

771. It is noted here that Milieudefensie increases its claim: in addition to a declaratory judgment that the respondents committed tort, Milieudefensie moves for a declaratory judgment to the effect that the respondents infringed the right to a clean living environment of the people living in the vicinity of Goi, Oruma, and Ikot Ada Udo as embedded in Articles 20, 33 and 34 of the Nigerian constitution and Article 24 of the African Charter on Human and Peoples' Rights.

10.3 The District Court wrongly did not include all grounds in its finding

772. The District Court wrongly did not include all grounds in its finding. Milieudefensie based its claim in the first instance on five grounds, i.e.: tort of negligence, the rule in *Rylands v. Fletcher*, tort of nuisance, trespass to chattel, and infringement of human rights. On appeal, Milieudefensie maintains its point of view that its claim based on each of these grounds can be awarded. Milieudefensie et al.'s points of view in this regard in the grounds for appeal in question apply *mutatis mutandis* with regard to the individual people involved whose interests are represented by Milieudefensie.[714]

773. In its final judgment, the District Court only dealt with the tort of negligence in respect of Milieudefensie's claim; the District Court wrongly only assessed the other grounds with regard to the individual plaintiffs (Dooh, Oguru, Efanga and Akpan). The District Court should have considered whether one of the alternative grounds of Milieudefensie could constitute a reason to render the claimed declaratory judgment. The fact that this is the case is demonstrated by the relevant grounds for appeal that are discussed in this statement on appeal. The grounds that apply to the individual claims of Dooh, Oguru, Efanga and Akpan apply *mutatis mutandis* with regard to Milieudefensie's claim, given that - as made explicit with the change in the claim - this involves the damage of individual people affected and not damage of Milieudefensie itself.

[714] This involves the following chapters: tort of negligence, chapters 5 to 8; the rule in *Rylands v. Fletcher*, chapter 12; tort of nuisance, chapter 13; trespass to chattel, chapter 14; and infringement of human rights, chapter 10.

774. In addition to the arguments already advanced in relation to the other grounds for appeal, below Milieudefensie explains why the District Court should have awarded Milieudefensie's claim based on negligence, based on the idealistic interest that it represents and based on human rights. The District Court used an incorrect review to assess proximity.

775. The District Court found as follows regarding the tort of negligence against Milieudefensie:

> 4.40. […] under common law, the proximity between SPDC in Nigeria and Milieudefensie in Amsterdam is not sufficient, either, for any damage that occurred in Nigeria near Goi. For this reason alone, Shell et al. have not violated any duty of care in respect of Milieudefensie.

776. This ground for appeal should be read in light of the change in the claim described above. Because this pertains to the damage of the individual injured parties, the proximity requirement does not pertain to the relationship between Milieudefensie, on the one hand, and SPDC and the parent companies, on the other, but between the individual injured parties whose interests are represented by Milieudefensie, on the one hand, and SPDC and the parent companies, on the other. The relationship between these parties is the same as the relationship between Shell and the individual plaintiffs. With regard to this relationship, the District Court - wrongly - considered in the cases of Goi and Oruma that no proximity was involved.[715] The fact that proximity is most certainly involved between these parties was already dealt with in the first instance,[716] and has also been explained in this statement on appeal. The considerations in this regard also apply here.

777. Even though the case documents refer to proximity between Shell and "the plaintiffs", it can be clearly inferred from the contents that the argument regarding proximity is aimed at the relationship between Shell and the injured parties, including the individual plaintiffs, Akpan, Dooh, Efanga and Oguru, but also possible other individual injured parties whose interests are represented by Milieudefensie by virtue of Article 3:305a DCC.

778. Moreover, especially if the intention of Article 3:305a DCC is correctly taken into consideration, proximity between Milieudefensie and Shell is most certainly involved. In view of the interests that Milieudefensie represents by virtue of the description of its objectives in its articles of association and factual activities, in which it frequently focuses on Shell in particular[717] – and in light of the District Court's establishment that "for years, there have been significant problems in Nigeria for people and the environment in the oil production operations of oil companies", which – as Milieudefensie explained – can primarily be blamed on Shell's acts and omissions in The Hague, the District Court could not conclude otherwise.

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[715] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.40 (parent companies) 4.52 (SPDC) (cases a + b), par. 4.38 (parent companies), 4.50 (SPDC) (cases c + d), in the event of Ikot Ada Udo, this proximity regarding SPDC has been assumed, par. 4.43, but not with regard to RDS, par. 4.33 (case e).

[716] *Inter alia* in the Statement of Reply, par. 5.1.2, 6.1.2, 7.1.2 and 9.1.2 (cases a - e).

[717] See more extensively in this regard: the Statement of Defence on Appeal in Phase 1 of Milieudefensie, no. 99 and following.

10.4 Also interest in a declaratory judgment based on an idealistic (environmental) interest and human rights

779. For the same reason, Milieudefensie has an interest in the declaratory judgment it demanded to the extent that it is based on the right to a clean living environment rather than negligence.

780. With the current state of the proceedings, it is not in dispute - see the Interlocutory Ruling, par. 4.4 (cases c + d); par. 3.4 (cases a + b; case e) - that there is no reason to doubt Milieudefensie's ultimate objective of ensuring a cleaner local environment; further cleaning up of (possibly) still existing pollution and preventing new oil pollution serves this objective. Shell's other arguments directed against admissibility of Milieudefensie were also dismissed in the interlocutory ruling, in which the Court of Appeal concurred with the opinion formed by the District Court and gave further reasons for its opinion.

781. It has been worked out in chapter 10 that the right to a clean living environment has also been acknowledged in Nigeria and has horizontal effect. Given that it has been established that Milieudefensie specifically represents this interest, in addition to the orders it claimed, it also has an interest in the declaratory judgment it demanded to the extent that this pertains to the protection of an idealistic interest rather than an individual interest.

782. Such an idealistic interest can be represented by an NGO based on both Article 3:305a DCC and on Nigerian law. The Court of Appeal rightly determined this in the Interlocutory Ruling of 18 February 2015, with reference to *inter alia* the *Fundamental Rights (Enforcement Procedure) Rules*.[718] Moreover, the Nigerian Supreme Court has recently also confirmed this for regular civil cases in the *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation* (NNCP) case, which is submitted as **Exhibit Q.50**.[719]

783. In these proceedings, in addition to this general interest, Milieudefensie also represents the right to a clean living environment of the people affected by the oil spills. The establishment that Shell et al. breached this fundamental right already offers some degree of satisfaction for these affected people - irrespective of the question regarding whether as a result (or on a different basis), Shell is also liable to pay compensation.[720]

784. For these reasons alone, Shell's argument that Milieudefensie does not have an interest in the declaratory judgment it claimed, because under Nigerian law, the claim of individual injured parties has already become time-barred, misses its mark.[721] After all, Milieudefensie's claim goes further than obtaining compensation.

785. Moreover, under Nigerian law, a claim based on violation of human rights - based on which an entitlement to compensation also exists - does not become time-barred. After all, the Nigerian

[718] Interlocutory Ruling of the Court of Appeal of The Hague, par. 3.3 (cases a + b; case e), par. 4.3 (cases c + d).
[719] Supreme Court of Nigeria, *Centre for Oil Pollution Watch v NNCP*, 20 July 2018, **Exhibit Q.50** (cases a - e).
[720] See chapter 10 above.
[721] Statement of Appeal Phase 1 of Shell et al., nos. 121-125.

legislator has not set a period of limitation for such a claim. This is confirmed in the Fundamental Rights Enforcement Procedure (FREP) Rules 2009, which provides:

> ORDER III – LIMITATION OF ACTION
>
> 1. An Application for the enforcement of Fundamental Right shall not be affected by any limitation Statute whatsoever.[722]

10.5 No other justification for dismissing the claim

786. For the rest there is no reason to dismiss Milieudefensie's claim for a declaratory judgment, either. In as far as in this phase of the appeal, Shell maintains its defence that Milieudefensie does not have any interest in this, because the claims of individual defendants have allegedly become time-barred, in addition to the arguments above, Milieudefensie notes the following.

787. Limitation of the claimed declaratory judgment on account of inadequate remediation can in any event not be involved, given that this tort still continues.

788. Milieudefensie further contests that a claim for individual injured parties has become time-barred under Nigerian law. To the extent that this is the case under Nigerian law, the objective and purport of Article 3:305a DCC prevents such a term of limitation from being applied by the Dutch court.

789. In addition, (health) damage may still occur as a result of the oil spills at issue.[723] The moment this health damage occurs, this gives rise to a claim for the injured parties involved whose term of limitation only commences at the time this damage occurs. Thus, they have an interest in a declaratory judgment based on which they can institute an action for damages in due course. Milieudefensie moves for the declaratory judgment in part in view of these (future) interests.

790. To the extent that Shell wishes to argue that it follows from the judgment of the District Court of Amsterdam of 15 January 2014 cited by Shell that Milieudefensie does not have any interest in its claim,[724] its defence also misses the mark, given that the circumstances in that case differed considerably from those in the case at issue.[725] The District Court of Amsterdam concluded that there was insufficient interest in the initiated claim, because i) it had been established that part of the claims of the interested parties had become time-barred and ii) the plaintiffs in that case had only generally argued that it could not be ruled out that there were shareholders whose claims had not become time-barred. These two (cumulative) circumstances are not involved in the case at issue. In this context, it is relevant that Shell's interest cannot be compared to the interest of the defendants in that case, because it is currently not at issue that Shell possibly incurs unnecessary

[722] FREP Rules 2009, order III, available online via https://www.refworld.org/pdfid/54f97e064.pdf

[723] Statement of Reply, chapter 8.4 (cases a - e).

[724] This regards the case District Court of Amsterdam, 15 January 2014, ECLI:NL:RBAMS:2014:489, cited in the Statement of Appeal phase 1 of Shell et al. par. 121-125.

[725] District Court of Amsterdam, 15 January 2014, ECLI:NL:RBAMS:2014:489, par. 4.11.

costs only on account of this claim for a declaratory judgment.[726] Shell did not contend or substantiate what legitimate interest it has in its defence; for this reason, the consideration of interests advocated by the District Court of Amsterdam should have a different result in the case at issue.

10.6 Conclusion sufficient interest

791. The District Court should have awarded the declaratory judgment that Milieudefensie demanded. In any event, the dismissal does not hold in light of the change in the claim explained in this chapter and worked out in chapter 17.

[726] District Court of Amsterdam, 15 January 2014, ECLI:NL:RBAMS:2014:489, par. 4.12.

11 GROUND FOR APPEAL 11 (ALL CASES): THE DISTRICT COURT WRONGLY FOUND THAT SPDC IS NOT LIABLE BASED ON THE RULE IN RYLANDS V. FLETCHER

792. The District Court wrongly found as follows in par. 4.41 (cases c + d) (see par. 4.43 (cases a + b); par. 4.36 (case e)):

> 4.41. 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 Dooh caused by the oil spill in 2004 near Goi, unless this oil spill can be blamed on Dooh or sabotage by third parties. In ground 4.25 above, the District Court already ruled definitively that this oil spill was caused by sabotage. For this reason, by virtue of Section 11 (5) (c) OPA or based on *the rule in Rylands v. Fletcher*, SPDC cannot be liable for damage caused by this oil spill occurring. However, Milieudefensie et al. submit that SPDC can still be liable on this ground for the failure to respond adequately to the oil spill 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.

793. In its findings, the District Court wrongly does not distinguish between statutory and common law torts. Liability based on section 11(5)(c) OPA is separate from liability based on the rule in *Rylands v. Fletcher*. The District Court fails to recognize the fact that the rule in *Rylands v. Fletcher* constitutes an independent ground for liability that must be assessed, and therefore wrongly failed to test the situation against the conditions of the rule in *Rylands v. Fletcher*. In this sense, reference is also made to the ruling in *Agip v. Ossai* discussed above, in which the Court of Appeal considered that the doctrine of *res ipsa loquitur* could also be applied in a case regarding negligence under the OPA, "*where the Court sees reason to infer the application of such legal principle, in appropriate circumstances*."[727] The same applies by analogy for the rule in *Rylands v. Fletcher*. This is also in line with the previously designated Article 11(6) OPA.[728]

794. In chapter 3, the rule in *Rylands v. Fletcher* has already been discussed in the scope of liability in the event of corrosion. In this chapter, liability based on the rule in *Rylands v. Fletcher* for failing

[727] *AGIP PLC v. Ossai* , CA/OW/324/2014, 14th June, 2018; LOR (14/6/2018) CA, Exhibit Q.25 (cases a - e), p. 14.

[728] See chapter 4.2.2.

to adequately respond and acts performed while not properly remediating the polluted soil is addressed in more detail.[729]

795. As explained before, the issue in the rule in *Rylands v. Fletcher* is strict liability.[730] The conditions for liability are:

> 1. The defendant must be an occupier of land or an owner of land who controls things on land
>
> 2. The defendant must bring, collect, or keep things on his land something which is dangerous in the sense of being likely to harm if it escapes
>
> 3. There must be an actual escape from the defendant's land to the plaintiff's land
>
> 4. There must be a non-natural use of the land
>
> 5. There must be damage resulting from the escape[731]

796. Negligence is not a requirement for assuming liability based on the rule in *Rylands v. Fletcher*.

797. The three cases at issue involve an oil spill from oil pipelines (**Goi, Oruma**) or from a wellhead (**Ikot Ada Udo**) on land that was under SPDC's control, after which oil escaped to the lands of the appellants and inflicted damage on those lands. With regard to the escape of oil from a pipeline or wellhead, a defendant can defend itself by relying on sabotage.

798. However, in the event of sabotage, as well, liability may be assumed based on the rule in *Rylands v. Fletcher* for (i) allowing oil to escape from its land to the appellants' land; and (ii) allowing the oil to spread further in the scope of the remediation methods. In this sense, the rule in *Rylands v. Fletcher* is broader than the statutory provision of section 11(5)(c) OPA. Because the rule in *Rylands v. Fletcher* is an independent ground, a review based on this ground must be conducted, irrespective of the possible absence of liability based on section 11(5)(c) OPA.

799. The first case involves the situation in which oil leaked from a pipeline or wellhead into land that was under the control of SPDC, after which SPDC - who was aware of the presence of "loose" oil on its land - allowed this situation to continue and become aggravated. As a result, this oil "escapes" to the lands of third parties, where damage is inflicted. As stated before, the rule in R*ylands v. Fletcher* pertains to strict liability. Based on this rule, the risk of damage occurring by holding a dangerous substance on your land is borne by the party who holds the substance. Sabotage is a defence such that it can free a defendant from liability for the escape of oil from its pipeline, because the oil escaped to the land of another party due to the act of a third party. The idea underlying this is that in such a case – in deviation from the main rule – the escape of the

[729] See also the Statement of Reply (cases a - e), 6.4.1 (inadequate response) and 7.4.1 (inadequate remediation).

[730] See chapter 4.2.1.

[731] Report of the Internationaal Juridisch Instituut (8 December 2011), Exhibit L.4 (cases a - e), p. 20. See also *Chief M.A. Ajanaku & Ors. v. Mobil Producing Nigeria Unlimited*, Suit No: FHC/L/CS/274/2002; Judgment delivered on 14th December, 2016, Exhibit Q.23 (cases a - e), p. 51.

dangerous substance cannot be attributed to the party who holds that dangerous substance, thus making it unreasonable to hold the party who holds the dangerous substance liable.

800. In contrast to causing the leakage, in the event of failing to adequately respond, the sabotage defence is not at issue. After all, had SPDC acted in line with the obligation of a properly acting oil company and would have had an adequate system to respond to oil spills, the oil could never have spread (so far).[732] Therefore, in conformance with the rule in *Rylands v. Fletcher*, in the case at issue the risk of the damage occurring as a result of oil escaping from the land that was under SPDC's control to nearby plots of land should come at SPDC's expense, including if the Court of Appeal believes that it is established *beyond reasonable doubt* that sabotage was involved.

801. In such a case, it would be unreasonable not to assume strict liability based on the rule in *Rylands v. Fletcher*. Duruigbo compares this to storing oil in an oil waste pit and concludes:

> The crude oil that accumulated on the land in the present case was initially brought there by SPDC and stayed on land under its control, even after the alleged act of sabotage. The fact that SPDC did not intentionally dig a pit and accumulate the oil as in Umudge is not controlling, as the point emphasized in that case is that the substance is on land that the defendant controls, which is the case here.
>
> Professor Oditah is correct that sabotage is a defense to a claim under the rule in *Rylands v. Fletcher.* That defense is not available where the escape does not relate directly to the pipeline damage, but the subsequent act of letting the oil linger for a long time, leading to its escape from a place under the Defendants' control. If the Defendants had cleaned up the spill after the alleged sabotage, it would not have escaped from the enclosed space into plaintiff's land.[733]

802. Shell et al.'s defence that "for the purposes of liability under the principle of Rylands v. Fletcher, it is the oil spill that is the relevant escape, not the alleged inadequate containment", like the District Court's position, indicates an interpretation of the rule in *Rylands v. Fletcher* that is too narrow and appears to be based entirely on section 11(5)(c) OPA, which regards "any breakage of or leakage from the pipeline or an ancillary installation". However, the rule in *Rylands v. Fletcher* does not by definition pertain to the escape of oil from a pipeline, but the escape of "the dangerous substance from a place in the occupation, or control, of the defendant to another place which is outside his occupation or control."[734] Thus, this also comprises the situation in which the oil escapes from the land that was under SPDC's control to the appellants' land instead of the escape of oil from a pipeline to the appellants' lands. After all, after it had leaked from the

[732] Which has already been worked out in chapter 7.

[733] Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1 (cases A - E), nos. 76-77.

[734] Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1 (cases A - E), no. 72, quotation from *Umudge v. Shell-BP*, p. 170.

pipeline, the oil was in "a place in the occupation, or control, of the defendant", namely the land to which SPDC had a right of way.

803. Duruigbo notes the following:

> Strict liability generally, emerged and exists to ensure the internalization of the externalities of industrial development. Entrepreneurs should not be allowed to externalize the costs of their operation to their innocent neighbors. Allowing oil to collect for months or even years after pipeline rupture should attract liability if the oil percolates or escapes and causes damage to adjoining property. [735] (Emphasis added by attorney)

804. In all the cases, SPDC responded inadequately to the oil spills that had occurred, as a result of which the oil spread from its Right of Way to third parties' lands. For this reason, SPDC is liable based on the rule in *Rylands v. Fletcher*, irrespective of the cause of the oil spill.

805. Case e (Ikot Ada Udo) more specifically regards oil that collected in the cellar pit around the wellhead. The oil started to leak from this cellar pit and then spread to third parties' lands. This has also been acknowledged by Mutiu Sonmonu, SPDC's production manager at the time.[736] This situation is comparable to the situation at issue in the *Umudge* case that was before the Supreme Court, in which the spilled oil had been collected in an oil pit:

> With reference to the 'escape' of oil-waste which respondents claimed had damaged their ponds and lakes, the findings of the learned trial Judge were that crude oil-waste previously collected in a pit burrowed by, and in the control of, the appellants escaped into the adjoining lands of the respondents where it damaged the ponds and lakes in Unenurhie land and killed the fishes therein. As already explained liability on the part of an owner or the person in control of an oil-waste pit, such as the one located at Location E in the case in hand, exists under the rule in Rylands vs Fletcher although the 'escape' has not occurred as a result of negligence on his part. There is no evidence of any novus actus interveniens in regard to the 'escape' of the crude oil-waste, nor is there any evidence that respondents either consented to, or in any way, contributed to the collection of the crude oil-waste in location E; nor is there any evidence of justification, under any statutory provisions, for collection of the same by the appellants who cannot, therefore avail themselves of any of the exceptions to the rule aforesaid (Rylands vs Fletcher). The appellants are,

[735] Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1 (cases A - E), no. 75.

[736] Newspaper The Punch, 'Nigeria: Senate condemns Shell over N'Delta crisis, oil spills' (8 November 2007), Exhibit I.3 (case e). Sonmonu stated: "*The leak was restricted to the cellar pit and SPDC Right-of-Way, but with some little quantity washed by rain into neighbouring third party farmland*." Moreover, the appellants contest that a small volume of oil was involved.

> therefore, liable under the rule in Rylands vs Fletcher, for damages arising from the escape of oil-waste from the oil pit.[737]

806. Even if the Court of Appeal were to conclude that it has been established beyond reasonable doubt that sabotage was involved, based on the rule in *Rylands v. Fletcher*, SPDC is liable for the escape of the oil from the cellar pit.

807. Finally, liability is involved based on the rule in *Rylands v. Fletcher* in the scope of the remediation methods. In cases a + b, this first of all involves the fact that SPDC dug so-called waste pits in which it dumped the oil waste. These waste pits offer no protection against the oil leaking out, which means that the spread of oil into the environment continues to date.[738] In all the cases, SPDC used the RENA method in its remediation. This method means that thirty centimetres of the contaminated soil is excavated, and placed on land that is not contaminated. As a result, the underlying soil could also become contaminated.[739] For this reason, as well, liability based on the rule in *Rylands v. Fletcher* is involved: after all, SPDC effectuated the spread of a dangerous substance that was under its control.

808. For this reason, based on the rule in *Rylands v. Fletcher*, as well, SPDC is liable for the appellants' damage because the spilled oil in Goi, Oruma and Ikot Ada Udo could spread further.

[737] Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1 (cases A - E), no. 73, *Umudge v. Shell-BP*, p. 172-173.

[738] See also the Summons (cases a + b), nos. 34 and 35.

[739] See Edelman, 'Evaluation of three soil remediation operations performed in Nigeria' report, 7 March 2019, Exhibit Q.30 (cases a - e), p. 16.

12 GROUND FOR APPEAL 12 (ALL CASES): THE DISTRICT COURT WRONGLY FOUND THAT SPDC IS NOT LIABLE BASED ON NUISANCE

809. The District Court wrongly found as follows in par. 4.42 (cases c + d) (see par. 4.44 (cases a + b); par. 4.37 (case e)):

> 4.42. 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 licence, 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 Dooh.

810. In accordance with its findings regarding the rule in *Rylands v. Fletcher*, the District Court wrongly failed to distinguish between statutory and common law torts with regard to the legal basis of nuisance. In this case, as well, the District Court fails to recognize that nuisance constitutes an independent ground for liability that should be assessed. Liability based on section 11(5)(a) OPA is separate from liability based on nuisance.[740] Thus, the issue is not "a tort of nuisance that is caused by exercising the license rights that the Nigerian government granted to SPDC". The issue is a tort of nuisance; a reference to the text of the OPA cannot exclude liability based on nuisance. Duruigbo advanced the following in this regard:

> If the Plaintiffs are able to show that oil escaping from SPDC's land affected the use and enjoyment of their land, SPDC will be held liable, even if SPDC's action of maintaining the pipeline is otherwise lawful or the acts of nuisance occurred against its desire. See *Eholor v. Idahosa*, *supra*, at p.336 ("To constitute a private nuisance, an act or omission need not necessarily be a breach of building regulations or be unlawful. A private nuisance may be and is usually caused by a person doing on his own land something which he is lawfully entitled to do."). In *Lagos City Council v Olutimehin, supra*, the Supreme Court held that a person would still be liable in nuisance even if his act is covered by statutory authority. Such statutory authority must be exercised in strict conformity with private rights and does not instead confer

[740] See the ruling in *Agip v. Ossai* mentioned before (Exhibit Q.25) and Article 11(6) OPA as discussed in chapter 4.2.2 Res ipsa loquitur and chapter 12.

> a license to commit nuisance in any place selected for the performance of the statutorily authorized action.

811. Thus, whether or not SPDC acted in accordance with the OPA is irrelevant for assessing a tort of nuisance. The District Court wrongly failed to assess whether an independent tort of nuisance was involved.

812. Nuisance is about protecting an individual against nuisance in the use of land ("*the tort of private nuisance addresses unreasonable and substantial interference with the use and enjoyment of land*"[741]).[742] The user of land can initiate an action based on nuisance against the party that can be held responsible for the nuisance. This is not necessarily the party directly causing the nuisance, but may also be the party who as owner or user is responsible for the land where the nuisance occurs.[743]

813. Nuisance is also described as:

> Basically it involves a balancing of the conflicting interest of adjoining landowners. A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbor not to be interfered with. It is impossible to give any precise or universal formula but it may be broadly said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind, living in a society.[744]

814. In assessing the question regarding whether nuisance is involved, the special circumstances of the case must be taken into account, such as the duration and time of the nuisance, its temporary or permanent consequences, etc.[745]

815. Ladan and Ako further describe the following in their opinion:

> The main question in instances of private nuisance; whether the claim is in respect of injury to property or in respect of interference with enjoyment of land, is: "was the defendant's activity reasonable according to the ordinary usages of mankind living in a particular society?" (Sedleigh Denfield v. O'Callaghan). Private nuisance protects anyone who has the use of enjoyment of land. Anyone who owns rights over or in connection with that land may also bring a claim for nuisance (Pemberton v. Southwark LBC).[746]

816. Duruigbo describes the relevant review framework as follows:

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[741] Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1 (cases a - e), no. 62.

[742] See also the Statement of Reply (cases a - e), 4.6.1.

[743] Kodilinye & Aluko, *The Nigerian Law of Torts* (2005).

[744] Report of the Internationaal Juridisch Instituut (8 December 2011), Exhibit L.4 (cases a - e), p. 38.

[745] See also *Universal Trust Bank of Nigeria* v. *Ozoemena*, Supreme Court of Nigeria, 26 January 2007.

[746] Legal Opinion Ladan and Ako, Exhibit L.1 (cases a - e), no. 60.

> Thus, the relevant issues here would be who caused the pollution, what effect did the pollution have on Plaintiff's enjoyment of his property rights, and how reasonable was the Defendant's conduct? Reasonableness is measured by the usefulness of Defendant's conduct and the seriousness or severity of the injury to Plaintiff's use of his land, i.e. the extent of the harm done.[747]

817. In other words, the reasonableness of SPDC's conduct is the key issue.

818. The appellants previously argued that the District Court wrongly found that the oil spills were caused by sabotage and not corrosion.[748] In the event that the Court of Appeal assumes that corrosion was involved, SPDC is liable for the damage that occurred based on nuisance. But also in as far as the Court of Appeal believes that sabotage was involved, this does not prevent an invocation of nuisance. Whether or not SPDC acted unreasonably with regard to adequately responding to the oil spills and subsequently remediating the land must still be assessed. SPDC failed to do so.

819. It is noted here that negligence is not a requirement for determining a tort of nuisance. Negligence may play a role in nuisance, but this is not required. Duruigbo states the following in this regard:

> Under Nigerian law, SPDC may be liable for nuisance in this case, even if it had not been negligent. As Lord Reid held in *Overseas Tankship (U .K) Limited v. The Miller Steamship Company Property (The Wagon Mound (No. 21)* 1967 A. C. 617, at p. 639, "negligence is not an essential element in nuisance." Nigerian decisional law is to the effect that the core factor in nuisance is whether the damage was caused by the defendant, not whether the injury was foreseeable or the result of negligence. Moreover, a private nuisance action can be maintained if the defendant's acts are substantially certain to produce harm, whether or not the actor desires the harm. Accordingly, even if it is not successfully shown that SPDC was negligent, an action in nuisance may still lie and I do not read anything in the Statement of Reply abandoning that position or limiting the basis of assertion of nuisance to negligence.[749]

820. Even though sabotage is a defence with regard to (allowing) the occurrence of the oil spill, this does not mean that sabotage is also a defence with regard to inadequately responding to an oil

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[747] Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1 (cases A - E), no. 65. He refers to *Sedleigh-denfield v. O'callaghan* (1940) AC 880 at p. 908, per Lord Wright (discussing the need to strike a balance between the right of the occupier to use his land as he sees fit and the right of his neighbor not to be interfered with, adding that "a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society.")

[748] See chapter 3.

[749] Prof Emeka Duruigbo's Legal Opinion, Exhibit M.1 (cases a - e), no. 64.

spill or failing to adequately remediate the land afterwards.[750] It must be assessed whether SPDC acted reasonably in this.

821. Nuisance may also be involved in the event that a party fails to limit a risk that was created by a third party, or otherwise fails to act in the event of a disturbing situation. In the event that a defendant argues that he is not liable based on nuisance, because the nuisance was caused by a third party, it must still be demonstrated that he took steps to minimize the effects of this third party's conduct as soon as he learned of this. This is demonstrated, for example, by Lord Goff's finding in *Smith v. Littlewoods*:

> More pertinently, in a case between adjoining occupiers of land, there may be liability in nuisance if one occupier causes or permits persons to gather on his land, and they impair his neighbour's enjoyment of his land. Indeed, even if such persons come on to his land as trespassers, the occupier may, if they constitute a nuisance, be under an affirmative duty to abate the nuisance. As I pointed out in P. Perl (Exporters) Ltd. v. Camden London B.C. [1984] QB 342 at p. 359, there may well be other cases. [Emphasis added by attorney].[751]

822. Chapters 7 and 8 extensively explained why SPDC's acts in this context were in breach of its duty of care in light of the (international) standards. The same facts underlie the argument that SPDC did not act reasonably by failing to adequately respond and subsequently failing to adequately remediate. As a result of its conduct, the infringement of the peaceful use of the environment and the possession of the appellants continued – unnecessarily – for which SPDC is liable.

823. The above leads to the conclusion that the District Court's findings regarding nuisance cannot be upheld, and that nuisance by SPDC in respect of the individual appellants and the individual injured parties whose interests are represented by Milieudefensie was most certainly involved.

[750] See also the Statement of Reply (cases a - e), 6.4.2 (inadequate response) and 7.4.2 (inadequate remediation).

[751] *Smith v. Littlewoods Organisation Ltd* [1987] UKHL 3, AC 24, Annex 10 with Shell exhibit a.19/b.14/c.26/d.29.

13 GROUND FOR APPEAL 13 (ALL CASES): THE DISTRICT COURT WRONGLY FOUND THAT NO TRESPASS TO CHATTEL WAS INVOLVED

824. The District Court wrongly found as follows in par. 4.59 (cases c + d) (see par. 4.61 (cases a + b); par. 4.55 (case e)):

> 4.59. Milieudefensie et al. submit that SPDC also committed a tort of trespass to chattel against Dooh, which the District Court takes to be an infringement of movable property. Under legal systems based on common law, a tort of trespass to chattel can only be involved if the movable property of another party is intentionally or negligently infringed. However, no intent has been submitted or demonstrated, while the District Court already ruled above that under Nigerian law, no negligence by SPDC in respect of Dooh is involved. For this reason alone, no tort of trespass to chattel by SPDC against Dooh can be involved, either.

825. The District Court rightly found that a tort of trespass to chattel can only be involved if the movable property of another party is intentionally or negligently infringed. However, the District Court failed to recognize that "intent" does not pertain to *subjective intent*, but *objective intent*. The issue is not the intent to infringe the movable property at issue, but the question regarding whether SPDC acted consciously. On the one hand, many oil spills in Nigeria are involved; the harmful consequences of this are known. In addition, SPDC was most certainly aware of the (international) standards regarding due care by oil companies. By failing to adjust its conduct in response – as described in chapters 5 to 8 – SPDC intentionally committed a tort of trespass to chattel against the individual appellants and the individual injured parties whose interests are represented by Milieudefensie.[752]

826. With regard to SPDC's negligent conduct, reference is also made here to its considerations regarding the committed tort of negligence.[753] These considerations apply *mutatis mutandis* here.

827. Trespass to chattel pertains to goods or properties that are not land. The chattel involved in the cases at issue is the appellants' trees, crops and fish.[754] Given that these properties of the appellants have been infringed by the spilled oil and that SPDC acted "consciously" or "negligently" in this regard, SPDC is liable based on trespass to chattel.

[752] See also the Statement of Reply (cases a - e), 4.6.2 (general), 5.4 (insufficiently preventing oil spill), 6.4.2 (inadequate response), and 7.4.2 (inadequate remediation).

[753] Chapters 5 to 8.

[754] The case at issue involves rural lands, which are governed by customary law; the annexation principle does not apply here. By virtue of customary law, goods that are attached to the land retain their status as chattel.

14 GROUND FOR APPEAL 14 (ALL CASES): THE DISTRICT COURT WRONGLY DISMISSED THE ANCILLARY CLAIMS

14.1 The judgment

828. The District Court wrongly found as follows in par. 4.62 (cases c + d); par. 4.64 (cases a + b):

> 4.62. […] 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. However, for the sole reason that in all of the above, the District Court already ruled that in the case at issue, under Nigerian law Shell et al. did not commit any tort against Milieudefensie and/or Dooh so that the main claims under I through III must be dismissed, the measures claimed under IV through VII, the penalties claimed under VIII and the extrajudicial costs claimed under IX must also be dismissed as ancillary claims.[755]

829. The District Court wrongly found as follows in par. 4.58 – 4.60 (case e):

> 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.

830. The District Court dismissed the ancillary claims in all cases. In the cases of Goi and Oruma (a to d), the claims were dismissed because the District Court had found that no tort was involved.

[755] Final Judgment of the District Court of The Hague, 30 January 2013, par. 4.62 (cases c + d), par. 4.58 (case e), and par. 4.64 (cases a + b).

Why this point of view of the District Court cannot be upheld has already been explained at length in this statement on appeal. Because the dismissal of the ancillary claims is based on the conclusion that no tort was involved, this ground for appeal is largely directly associated with this; thus, reference is made here to the previous grounds for appeal. Moreover, the District Court should also have assessed the ancillary claims from the viewpoint of the human rights ground.

831. In the case of Ikot Ada Udo (case e), the District Court concluded that a tort was involved, but that it did not see any reason to award one of the ancillary claims. The appellants will first address these to the extent that the ancillary claims pertain to Milieudefensie. Following this, they will argue more in general why – in all cases – the ancillary claims should be awarded based on Nigerian law. The ancillary claims regarding Ikot Ada Udo … *[sic]*

832. The reasons for dismissing the various ancillary claims vary and are therefore discussed in succession.

14.1.1 Ancillary claims V and VI

833. Milieudefensie's ancillary claims V and VI read as follows:

> 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.

834. The District Court wrongly found as follows:

> 4.59. […] 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.

835. The dismissal of this ancillary claim is based on the District Court's finding that no tort of negligence was committed with regard to the remediation. In chapter 8.3, Milieudefensie explained at length that SPDC most certainly committed a tort by inadequately remediating the land and water around and nearby Ikot Ada Udo. Should the Court of Appeal follow Milieudefensie in this point of view, the ancillary claims should also be awarded.

836. Moreover, with regard to the remediation, not only a tort of negligence against Akpan and the individual injured parties whose interests are represented by Milieudefensie is involved; a breach of their fundamental right to a clean living environment (chapter 10), liability based on the rule in *Rylands v. Fletcher* (chapter 12), nuisance (chapter 13) and trespass to chattel (chapter 14) are also involved. This is a relevant distinction, because injunctions are more likely to be awarded under Nigerian law in the event of certain grounds (see further chapter 15.3).

14.1.2 Ancillary claim VII

837. Milieudefensie's claim VII reads as follows:

> 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.

838. The District Court wrongly found as follows:

> 4.59. […] 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.

839. It has been argued above that SPDC committed a tort against Akpan and the individual injured parties whose interests are represented by Milieudefensie. In addition, Milieudefensie represents the general interest of the environment. On this account, in particular, it has an interest in the ancillary claim being awarded.

14.1.3 Ancillary claim VIII

840. Milieudefensie's claim VIII reads as follows:

> 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.

841. The District Court wrongly found as follows:

> 4.60. Because the District Court will dismiss all claimed injunctions, it will also dismiss the penalties claimed under VIII.

842. The appellants maintain their point of view that the claimed injunctions should be awarded. In the event that (one or more of) the claimed injunctions are awarded, the appellants believe that a penalty is in order.

14.1.4 Ancillary claim IX

843. Milieudefensie's claim IX reads as follows:

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

844. The District Court wrongly found as follows:

> 4.60. […] 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.

845. The appellants believe that based on various grounds, tort was committed against the individual injured parties whose interests are represented by Milieudefensie by virtue of Article 3:305a DCC. This has already been set out in chapter 11 above. Even though Milieudefensie does not claim any damages for itself, it is entitled to the (reasonable) costs for determining damages and liability.[756]

14.2 Ancillary claims under Nigerian law

846. Under both Dutch and Nigerian law, dismissing or awarding claims for an order or prohibition fall within the court's discretionary power. Under Nigerian law, the distinction into the basis (bases) of the tort is relevant in assessing the ancillary claims. The violation of human rights, trespass to chattel and nuisance, in particular, mean that the consideration is more likely to be to the advantage of the plaintiff.

847. For example, the following is written in the scope of a breach of the fundamental rights:

> Unlike the procedural limitations that have for example attended tort based claims, the human rights approach enabled the court to grant an injunction to protect rights considered to be fundamental and which should not be ignored

[756] See HR 13 October 2006, *NJ* 2008/527, annotated by C.C. van Dam (*DNB/Vie d'Or*).

on a balance of convenience test, as in the case of an injunction under tort law.[757]

848. In the event that the Court of Appeal concludes that the human rights of (one or more of) the appellants were infringed, the question regarding whether injunctions are imposed in that case must also be assessed in another manner. More value must be attributed to the fundamental rights of the appellants than to the respondents' interests. It also stands to reason that it is more likely to be concluded that a situation should be remedied in the event of infringement of the fundamental rights. In other words, the gravity of this should not be underestimated.

849. A similar point of view is adopted in common law in the event of an injunction to prevent trespass to chattel or nuisance from being continued.[758] The reason for this is also obvious: this prevents the defendants from buying off the tort.

[757] Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States, Olufemi O Amao in Journal of African Law, 52 1 (2008), Exhibit J.8 (cases a - e), p. 110.

[758] *Ogunyombo v. Ookoya* 2002 16 NWLR (pt. 793) 224 CA; *Turner LJ in Godsmith V. Timbridge WIC* (1866) L.R. (1 Ch. App. 349; Kennaway v Thompson [1981] QB 88; Modern tort law, Vivienne Harpwood, p. 163: "*A very common remedy for nuisance is the award of an injunction, and this will be almost automatic in many cases, though the court does have discretion to award damages in lieu of an injunction*."

15 OFFER OF PROOF

850. The appellants feel that they have sufficiently substantiated their arguments in the above.

851. To the extent that the Court of Appeal believes that this is not the case, without voluntarily accepting any burden of proof that does not fall on them by law, Milieudefensie et al. offer proof of these arguments by all legal means, in particular by examining witnesses or consulting experts.

852. Inhabitants of the various villages can testify regarding the factual events around the oil spills and their consequences. In addition, witnesses can be examined regarding SPDC's role. In particular, Milieudefensie et al. offer to examine Mr Willem van Gestel. Van Gestel is corrosion engineer, who was Head of Pipeline Integrity at SPDC from 1994 to 1999 and from 2006 to 2007. As a result, he can testify regarding the conduct of events at SPDC in the area of the (quality of the) pipelines, good oil field practice, the measures that were taken in the area of corrosion and sabotage and regarding the manner in which information was distributed within the group. As a possible witness, Milieudefensie et al. also propose examining Mr Walter van de Vijver. Van de Vijver was discussed extensively in this statement on appeal. He could further testify regarding the extent to which the parent companies were involved in SPDC's operations.

16 CONCLUSION

16.1 Change of claim by Milieudefensie

853. As previously announced, Milieudefensie currently changes part III of its claim, in the sense that this immediately demonstrates that by virtue of Article 3:305a DCC, Milieudefensie represents the interests of the parties injured by the oil spills.

854. Moreover, Milieudefensie currently increases its claim in the sense that it – as well as the individual appellants – also moves for a declaratory judgment that the respondents infringed the right to a clean living environment of the people living in the vicinity of Goi, Oruma, and Ikot Ada Udo.

855. Milieudefensie currently claims the following as part III of its claim:

a. A declaratory judgment in favour of the local communities that the respondents committed tort by causing the oil spills at issue, and/or by failing to adequately respond to the oil spills at issue, and/or failing to adequately remediate the (agricultural) land and fish ponds that have been affected by the oil spills at issue, and to combat any (additional) environmental and health damage suffered (and to be suffered in the future) by the people who live in the vicinity of the oil spills at issue in Goi, Oruma and Ikot Ada Udo, whose interests – which are similar to the interests of the individual plaintiffs – are in part represented by Milieudefensie in these proceedings, in conformance with the objectives of its articles of association; and/or

b. A declaratory judgment in favour of the local communities that the respondents infringed the right to a clean living environment as embedded in Articles 20, 33 and 34 of the Nigerian constitution and Article 24 of the *African Charter on Human and Peoples' Rights,* by causing the oil spills at issue, and/or by failing to adequately respond to the oil spills at issue, and/or failing to adequately remediate the (agricultural) land and fish ponds that have been affected by the oil spills at issue, and to combat any (additional) environmental and health damage suffered (and to be suffered in the future) by the people who live in the vicinity of the oil spills at issue in Goi, Oruma and Ikot Ada Udo, whose interests – which are similar to the interests of the individual plaintiffs – are in part represented by Milieudefensie in these proceedings, in conformance with the objectives of its articles of association.

16.2 Explanation to the claims

856. The appellants maintain their claims subject to Milieudefensie's change in the claim described above. They request that the Court of Appeal sets aside the judgment of the District Court of The Hague of 30 January 2013 and awards the claims, subject to the change in the claim described above, with an order for Shell to pay the costs of the proceedings in both instances, including the costs of the expert investigation.

857. Also in the event that the Court of Appeal does not set aside the District Court's judgment, the appellants request that the defendants are ordered to pay the costs of the expert investigation. Milieudefensie et al. have explained above that it is up to Shell et al. to prove that the oil spills were caused by sabotage. In the Interlocutory Ruling dated 18 December 2015, the Court of Appeal assumed that 'in this phase of the proceedings, it cannot be accepted as an established fact that the hole in the pipeline was the result of sabotage as described in the report of the Joint Investigation Team'. Even if Shell's defence that the oil spill was caused by sabotage succeeds, it is reasonable that Shell itself bears the costs for the substantiation of that defence. This is all the more the case in light of the defective documentation and information that Shell collected and/or made available, while this is a subject that uniquely and exclusively falls within Shell's sphere of knowledge. In this regard, the Court of Appeal rightly found that 'without reservation, it is not understandable why no attention was paid to the quality of the furnishing of evidence on this point'.

858. Alternatively, the appellants request that the additional costs of the investigation, which result from the fact that Shell failed to provide information in a timely fashion, be charged to Shell et al.

16.3 Claim

The appellants request that in cases a, b, c and d, in conformance with the notice of appeal, the Court of Appeal:

i) Sets aside the final judgment of the District Court in these cases in respect of the grounds for appeal mentioned above and, in a new ruling, awards the claims of the appellants, subject to Milieudefensie's change in the claim described in the grounds for appeal;

ii) Orders the respondents to pay the costs of the experts;

iii) Orders the respondents to pay the costs of the proceedings in both instances;

iv) Declares the ruling provisionally enforceable to the extent possible.

The appellants request that in case e, in conformance with the notice of appeal, the Court of Appeal:

i) Sets aside the final judgment of the District Court in this case with regard to the grounds for appeal mentioned above and, in a new ruling, awards Milieudefensie's claims III and V to X, subject to Milieudefensie's change in the claim described in the grounds for appeal;

ii) Orders the respondents to pay the costs of the proceedings in both instances;

iii) Declares the ruling provisionally enforceable to the extent possible.

17 ADDITIONAL EXHIBITS

Q.9. Daily Independent Online, 10 October 2003: *"Oil spill sacks 2000 Ogoni in Rivers"*, via http://news.biafranigeriaworld.com/archive/2003/oct/10/230.html

Q.10. This Day Online, 2 November 2003: "*His Soul is Still Marching On",* via http://www.thisdayonline.com/archive/2003/11/02/20031102sxt01.html

Q.11. Environmental site assessment of a crude oil spill site in Goi, Gokana, (March 2011)

Q.12. Niger Delta Project for Environment, Human Rights and Development: 'Shell's Shell in Ogoniland; Killing the Environment and Impoverishing the People' (2004)

Q.13. United Nations Development Programme, *Site Specific Fact Sheet Nweekol-Kegbara Dere* (July 2011)

Q.14. I.T. Amachree, Compensation claims relating to crude oil spillage & land acquisitions for oil & gas fields in Nigeria: a suggested practice guide (Pearl Publishers, 2011)

Q.15. R. Singh, Pipeline Integrity Handbook: Risk Management and Evaluation (Gulf Professional Publishing 2017)

Q.16. ANSI/API Standard 1160, Managing System Integrity for Hazardous Liquid Pipelines (November 2001)

Q.17. API Recommended Practice 1173, *Pipeline Safety Management Systems* (June 2015)

Q.18. API Recommended Practice 51R, Environmental Protection for Onshore Oil and Gas Production Operations and Leases (July 2009)

Q.19. API Recommended Practice 14B, Design, Installation, Repair and Operation of Subsurface Safety Valve Systems (October 2005)

Q.20. ASME B31.4 2002, Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids

Q.21. Request for information of the experts dated 2 August 2017, including annex

Q.22. Attachment to the e-mail from attorney De Bie Leuveling Tjeenk to the experts and attorney Samkalden dated 3 November 2017

Q.23. Chief M.A. Ajanaku & Ors. v. Mobil Producing Nigeria Unlimited, Suit No: FHC/L/CS/274/2002; Judgment delivered on 14th December, 2016

Q.24. *SPDC v Anaro*, LOR (5/6/2015) SC

Q.25. *AGIP PLC v Ossai* , CA/OW/324/2014, 14th June, 2018; LOR (14/6/2018) CA

Q.26. API 1130 Computational Pipeline Monitoring for Liquids (November 2002)

Q.27. IPIECA, Guide to Tiered Preparedness and Response, International Petroleum Industry Environmental Conservation Association (2007)

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