

# judgment

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## **DISTRICT COURT OF THE HAGUE, THE NETHERLANDS,**

Civil-law sector

### **Judgment of 14 September 2011 in the ancillary action concerning the production of exhibits and in the main action**

in the proceedings with case number / cause-list number: 337050 / HA ZA 09-1580 of

1. **FRIDAY ALFRED AKPAN**,  
residing in Ikot Ada Udo, Akwa Ibom State, Nigeria,
2. **VERENIGING MILIEUDEFENSIE**, an association with legal  
personality with its registered office in Amsterdam, the Netherlands,  
claimants in the main action and applicants in the ancillary action,  
counsel in the proceedings: M.J.G. Uiterwaal,  
counsel of record: W.P. den Hertog,

v.

1. **ROYAL DUTCH SHELL PLC**, a company incorporated under foreign  
law, with its registered office in London, United Kingdom, but having  
its principal place of business in The Hague,
2. **SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA  
LTD.**, a legal person incorporated under foreign law, with its  
registered office in Port Harcourt, Rivers State, Nigeria,  
defendants in the main action, respondents in the ancillary action,  
counsel: J. de Bie Leuveling Tjeenk,

The Court will hereinafter refer to the parties to the proceedings as “Akpan”, “Milieudefensie”, “RDS” and “SPDC”. Akpan and Milieudefensie will be jointly referred to as “Akpan et al.”; RDS and SPDC jointly as “Shell et al.”.

### **1. The proceedings**

- 1.1. The course of the proceedings is evidenced by:
  - the judgment in the ancillary action concerning jurisdiction of 24 February 2010 and all prior court documents referred to therein, including all exhibits;

- the judgment in the ancillary action concerning lis pendens of 1 December 2010 and all prior court documents referred to therein, including all exhibits;
- Akpan et al.'s statement of claim in the ancillary action pursuant to Article 843a of the Dutch Code of Civil Procedure ("DCCP");
- the statement of defence in the ancillary action pursuant to Article 843a DCCP, with exhibits;
- the reply in the ancillary action pursuant to Article 843a DCCP;
- the rejoinder in the ancillary action pursuant to Article 843a DCCP, with exhibits.

1.2. On 19 May 2011, arguments were submitted in the ancillary action pursuant to 843a DCCP, on the occasion of which the parties (by exchange of statements) also submitted exhibits. The parties deployed written summaries of the arguments.

1.3. Finally, judgment in the ancillary action was scheduled for today.

## **2. The disputes in the main action**

2.1 In a summons served on 27 April 2009 of 86 pages, along with two folders containing 82 exhibits in total, Akpan et al. moved for the Court, in an immediately enforceable judgment:

- I to issue a declaratory judgment that Shell et al. have acted unlawfully towards Akpan, on the basis of the arguments put forward in the body of the summons, and are jointly and severally liable towards Akpan for the damage they have suffered and have as yet to suffer as a consequence of these unlawful acts by Shell et al., the cost of which damage is to be assessed by the Court and settled according to law, plus the statutory interest from the date of the summons until the date on which payment is made in full;
- II to issue a declaratory judgment that Shell et al. have acted unlawfully towards Milieudefensie, on the basis of the arguments put forward in the body of the summons, and are jointly and severally liable for the damage to the environment near Ikot Ada Udo in Nigeria as a consequence of these unlawful acts by Shell et al.;
- III to order Shell et al. to commence with bringing into line with current standards for wellheads the wellhead near Ikot Ada Udo in Nigeria (hereinafter to be referred to as: "the wellhead") within two months of service of this judgment, or within a term to be determined by the Court, and to complete such replacement within three months of commencement, or within a term to be determined by the Court;
- IV to order Shell et al. to commence, within two weeks of service of this judgment, with the cleaning up of the pollution resulting from the oil leakages, until this meets the applicable international and local environmental standards, and to complete such cleaning up within one month of commencement, with proof of completion in the form of a unanimous declaration of decontamination to be made by a panel of three experts appointed within two weeks of the judgment, one of whom is to be selected by Shell et al. jointly, one by

- Milieudefensie, and one by the two experts so selected jointly, to be submitted by Shell et al. to Akpan et al. within one month of completion of the cleaning up, or within terms to be determined by the Court and by means of a proof of decontamination to be determined by the Court;
- V to order Shell et al. to commence, within two weeks of service of this judgment, with the purification of the sources of water in and around Ikot Ada Udo, and to complete such purification within one month of commencement, with proof of completion in the form of a unanimous declaration of purification to be made by a panel of three experts appointed within two weeks of the judgment, one of whom is to be selected by Shell et al. jointly, one by Milieudefensie, and one by the two experts so selected jointly, to be submitted by Shell et al. to Akpan et al. within one month of completion of the purification, or within terms to be determined by the Court and by means of a proof of purification to be determined by the Court;
  - VI to order Shell et al. to maintain the wellhead in good condition to current standards following the modifications, in accordance with “good oil field practices”, including at minimum the performance of obligatory wellhead inspections, the establishment or maintenance of an adequate system of inspection and duly acting in accordance therewith; ordering Shell et al. to consistently submit written reports of these inspections to Akpan et al. within two weeks of their taking place;
  - VII to order Shell et al. to implement an adequate plan for responding to oil leakages in Nigeria and to ensure that all conditions are met for a timely and adequate response should another oil leakage occur near Ikot Ada Udo; including in any event the making available to Akpan et al. of sufficient materials and means – evidence of which Shell et al. will provide to Akpan et al. in the form of overviews – in order to limit the damage of any potential oil leakages to the greatest possible extent;
  - VIII to order Shell et al. to pay a penalty of EUR 100,000 (or another amount to be determined by the Court in the proper administration of justice) to Akpan et al., each time that Shell et al., either individually or jointly, act contrary with that ordered at III, IV, V and/or VI above;
  - IX to order Shell et al. jointly and severally to pay the extrajudicial costs;
  - X to order Shell et al. to pay the costs of these proceedings, or alternatively, to order each of the parties pay their own costs of the proceedings;
- 2.2. Akpan et al.’s grounds for these ten claims in the main action, at this point in the proceedings, are in summary as follows. In 1958, the legal predecessor of SPDC drilled an oil well called Ibibio-I – situated near Ikot Ada Udo, Akwa Ibom State, Nigeria – and sealed it with a wellhead (hereinafter: the wellhead). A wellhead is an installation that seals an oil well that is not connected to a pipeline. The wellhead consists of above-ground and underground sections. From

1996 a quantity of oil leaked from the wellhead from time to time, with the leakages becoming more serious from August 2006. The most serious leakage took place at the end of July 2007, which leakage continued until 7 November 2007. As a consequence of this leakage, Akpan suffered damage, both material and immaterial. Akpan's fishponds and agricultural land have since become unusable, as have the fishponds of family members of Akpan's, which he managed and from which he earned an income. Furthermore, Akpan is suffering (potential) damage to his health as a result of the pollution of the soil and the drinking water. The oil leakages have affected the environment in a large area around Ikot Ada Udo. As the owner and/or licence holder and/or 'operator' of the wellhead, SPDC has acted unlawfully towards Akpan et al. because it acted contrary to its duty of due care. SPDC has breached its duty of due care, firstly in failing to ensure that the wellhead meets current standards, in failing to maintain it sufficiently and thereafter to secure it against leakages and sabotage, as a result of which the oil leakages came about. In addition, SPDC breached its duty of due care in failing to react adequately to the leakages and to clean up the oil in a timely or comprehensive manner. Apart from SPDC, RDS has acted unlawfully towards Akpan et al. because RDS was aware of the problematic situation involving oil leakages in Nigeria. As the parent company of SPDC, RDS could and should have used its influence on and authority over SPDC's policy, in particular that regarding the environment, to (i) prevent as much as possible SPDC's oil production in Nigeria from causing damage to people and the environment, and (ii) ensure that SPDC clean up the pollution caused by these oil leakages in a timely and comprehensive manner. RDS breached this duty of due care. According to Akpan et al., Milieudefensie, whose objective is to promote protection of the environment globally, has an independent interest in establishing the unlawfulness of SPDC and RDS's acts and omissions, on the basis of Article 3:305a of the Dutch Civil Code (DCC).

- 2.3. In a response of 28 October 2009 of 61 pages, along with a folder containing 19 exhibits, Shell et al. advanced a reasoned defence.

### **3. The disputes in the ancillary action pursuant to Article 843a DCCP**

- 3.1. Akpan et al. move for the Court to order in a provisionally enforceable judgment that Shell et al. provide Akpan et al. with access to the documents specified below within 21 days of the date of this judgment, and order that, subsequent to such access, Shell et al. provide Akpan et al. with copies and excerpts of those parts of these documents desired by Akpan et al. in photocopy format or in a standard digital format or other form the Court deems advisable:

- (I) Documents providing evidence of which Shell entity was the owner of the wellhead in the period 1996-2008 (or whether this was the Joint Venture);
- (II) Documents providing evidence of when the wellhead (or parts thereof) was last replaced prior to the leakages commencing in 2006;
- (III) Documents providing evidence of the wellhead's technical specifications when constructed, including the materials used and their age;
- (IV) Documents providing evidence of when and how repairs and inspections of the wellhead were made by SPDC in the period 1959-2007;
- (V) Documents providing evidence of all investigations into the wellhead carried out by SPDC since 1959;
- (VI) Reports drawn up by SPDC as a consequence of the oil leakage(s) from the wellhead in the period 1996-1999;
- (VII) Documents providing evidence of the inspections of the wellhead that have taken place since 1996;
- (VIII) The Joint Investigation Team (JIT) report regarding the 2006 leakage, or alternatively the report of the alleged visit by the JIT to Ikot Ada Udo of 31 August 2006;
- (IX) All images (such as photographs and video footage) of the oil leakages that are part of these proceedings, their consequences and the clearing up of the leaked oil;
- (X) The daily logbooks of the oil leakages near Ikot Ada Udo covering the period from 2006 up to and including November 2007;
- (XI) SPDC's "Oil Spill Contingency Plan";
- (XII) The "Post-Impact Assessment Study" or "Environmental Evaluation (Post-Impact) Study" of the Ikot Ada Udo area, including in any case an analysis of the damage caused as a result of the leakages and the period estimated for a full recovery;
- (XIII) Shell et al.'s policy documents providing evidence of the criteria on which SPDC reports oil leakages to RDS, as well as when and by whom such policy was decided;
- (XIV) The full names and addresses of those who were directors of SPDC in the period 1996-2008;
- (XV) Documents providing evidence that, in the period 1996-2008, RDS used its powers as an (indirect) shareholder to its group company SPDC, in order to secure unity of policy within the group on the subject of the environment;
- (XVI) SPDC's certificate of incorporation and/or the articles of association, including the submission of the dates and content of any amendments made to these documents in the period 1996-2008;
- (XVII) The Joint Operating Agreement regarding the Joint Venture and the Memorandum of Understanding or Letter of Intent that preceded it, or similar documents with other titles, providing evidence of arrangements for the authority, powers,

responsibilities and roles of the SPDC as a Joint Venture partner, insofar as these documents concern the period 1996-2008;

- (XVIII) Documents regarding the years 1996-2008 containing the annual policy plans (“work programs” or “business plans”) and maintenance plans, and SPDC’s budgets related to these;
- (XIX) The reports or minutes of meetings (however formal or informal) of the executive body (‘committee’) of SPDC, in which the proposals referred to at XVIII were discussed, and of the meetings (however formal or informal) in which decisions were made concerning these proposals, and those in which these were approved, adopted or rejected;
- (XX) The communication regarding the (content of the) documents referred to at XVIII between SPDC on the one hand and RDS or its subsidiaries located in the Netherlands or the United Kingdom on the other, as well as the minutes of the meetings of the Executive Committee (known as the Committee of Managing Directors until 2005) and/or the Board of Directors (known until 2005 as the Conference), in which this communication and/or these documents were discussed;
- (XXI) All reports, including management reports, and other communication between SPDC or the Joint Venture on the one hand, and the Executive Committee and/or the Board of Directors and/or Shell International Exploration and Production B.V. on the other, concerning oil leakages in the Niger Delta in the period 1996-2008, and the oil leakages from the wellhead from 2006 in particular;
- (XXII) SPDC’s assurance letters to the Executive Committee concerning the period 1996-2008, and documents from the SPDC to the Executive Committee concerning the oil leakages in the Niger Delta in the period 1996-2008 and the oil leakage near Ikot Ada Udo from 2006;

3.2. Shell et al. have advanced a reasoned defence to the ancillary claims. The arguments of the parties are discussed, where relevant, hereinafter.

#### **4. The assessment of the ancillary action pursuant to Article 843a DCCP**

- 4.1. Dutch law must be applied (*lex fori*) to the ancillary claims pursuant to Article 843a DCCP, because the obligation to produce exhibits is part of Dutch procedural law.
- 4.2. To assess the ancillary claims, it is nonetheless important to provide a (provisional) opinion on the applicable substantive law in the main action. The claims in the main action concern an oil leak in Nigeria, near Ikot Ada Udo, Akwa Ibom State, in 2006 and 2007, for which, according to Akpan et al., Shell et al. are liable, having acted unlawfully. For this reason, the Dutch Unlawful Act (Conflict of Laws)

Act [*Wet conflictenrecht onrechtmatige daad ("Unlawful Act Act")*] is applicable. If SPDC has committed an unlawful act, this has taken place in Nigerian territory. Insofar as RDS has committed an unlawful act in relation to these oil leakages, this legal person's unlawful act has had a damaging impact in Nigeria. In view of this, the Court is (provisionally) of the opinion that, on the basis of Article 3(1) and (2) of the Unlawful Act Act, the claims in the main action must be assessed under Nigerian substantive law, and more specifically under the law that is applicable in the federal state of Akwa Ibom, where the leakages occurred.

- 4.3. Shell et al. have submitted that Milieudefensie's claims in the main action are inadmissible, and that its ancillary claims pursuant to Article 843a DCCP must therefore also be declared inadmissible. Shell et al. argue that Article 3:305a DCC is part of substantive Dutch law, because it is included in the Dutch Civil Code, while the applicable substantive Nigerian law includes no (comparable) representative action law. The Court does not agree with Shell et al. here. In published Dutch case law, other sections of laws that have been included in the same title as Article 3:305a DCC have in the past often been applied, while foreign law was applicable to the claims brought. From the parliamentary history of Article 3:305c DCC – which statutory provision states in paragraph 2 that Article 3:305a DCC paragraphs 2 to 5 apply *mutatis mutandis* – it appears, moreover, that the legislature deems Article 3:305a DCC as a rule of Dutch procedural law (Explanatory Memorandum, Parliamentary Documents II 26 693, no. 3, pp. 5, 6 and 8). In response to this argument of Shell et al.'s, the Court notes in addition that the Unlawful Act Act does not state that the admissibility of a party's claim is regulated by applicable substantive law and, contrary to what Shell et al. argue, neither can this be inferred from the scope of the law. The Court concludes from this that Article 3:305a DCC is a rule of Dutch procedural law.
- 4.4. Neither does the Court agree with Shell et al. in their arguments that Milieudefensie's claims are inadmissible because its interests alone are being promoted, because representative action offers no advantage above the litigation of the interested parties acting individually, because Milieudefensie has not engaged sufficiently in actual activities in respect of the Nigerian environment, or because purely local interests are involved. A number of Akpan et al.'s claims clearly rise above the individual interests of (solely) Akpan; the decontamination of the soil and the cleaning up of the fishponds would – if ordered – benefit not only Akpan but also the rest of the community and the environment around Ikot Ada Udo. The litigation of the interested parties acting individually, seeing as this may now affect many people, could well be inconvenient. In addition, the Court – in contrast to Shell et al. – finds the conducting of campaigns aimed at halting pollution of the Nigerian environment as an actual activity that Milieudefensie has engaged in to support the interests

of the environment in Nigeria. Finally, the protection of the environment globally is an objective set down in Milieudefensie's charter. There is no reason to assume that this objective is not sufficiently specific, nor is there any reason to assume that localised damage to the environment abroad falls outside that objective or outside the application of Article 3:305a DCC. All of the foregoing brings the Court to the (provisional) opinion that Milieudefensie's claims are admissible.

- 4.5. Article 843a DCCP covers the exceptional obligation to produce exhibits at law and otherwise. This obligation to produce exhibits serves to have certain items of evidence in the proceedings produced as evidence. In the Netherlands, there is no general obligation for the parties to proceedings to produce exhibits in the sense that they can be obliged as a rule to provide each other with all manner of information and documents. With a view to this, and to avoiding so-called fishing expeditions, the allowability of claims based on Article 843a DCCP is restricted by several limiting conditions in that article. Firstly, the party claiming the production of an exhibit must demonstrate a genuine *legitimate interest*, which legitimate interest can be explained as *an interest in evidence*. An interest in evidence exists when an item of evidence may contribute to the substantiation and/or demonstration of a concretely substantiated and disputed argument that is relevant to and possibly decisive for the claims being assessed. Secondly, the claims must concern "*certain documents*" which, thirdly, are at *the actual disposal of the respondent*, or can be put at its disposal. Fourthly, the *party claiming the production of an exhibit* must be *party to the legal relationship* covered by the claimed documents specifically. This includes legal relationship as a result of unlawful act. If all of these conditions are met, there nevertheless exists no obligation to submit if, fifthly, there are no *serious causes* or if, sixthly, it can reasonably be assumed that *due administration of justice* is also guaranteed without such provision of information. If a claim for the production of exhibits is not contested by the counterparty, Article 24 DCCP applies and the Court has no official competence to present one or more defences against it or to reject the claim brought on such ground.
- 4.6. Section 11 (5) (c) of Nigeria's Oil Pipelines Act of 1956 provides the following: "*The holder of a license [in the present case, SPDC - Court] 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*". In view of this provision, the Court is provisionally of the opinion that, under Nigerian law, the cause of the leakages is relevant for the assessment of the disputes in the main action.



In addition, Nigeria's "Environmental Guidelines and Standards for the Petroleum Industry in Nigeria" (hereinafter: "EGASPIN") provide the following:

*"An operator shall be responsible for the containment and recovery of any Spill discovered within his operational area, whether or not its source is known. The operator shall take prompt and adequate steps to contain, remove and dispose of the spill."* In view of this, the Court is provisionally of the opinion that of equal relevance for the assessment of the disputes in the main action is that, under Nigerian law, the cleaning up of the spilled oil and/or the putting right of the consequences of the leakages be carried out appropriately, regardless of the question of how the leakages were caused.

- 4.7. In respect of the items claimed at II through V and VII, the Court finds as follows. Akpan et al. argue that they have a legitimate interest in the production of these documents to be able to substantiate and/or prove that the (maintenance) situation regarding the wellhead in question was below par, as a consequence of which the leakages of August 2006 and July 2007 came about. Shell et al. have pleaded that the oil flow from the wellhead in that period was caused by sabotage, as the valves on the wellhead had been opened by unknown third parties. According to Shell et al., the oil flow could have been halted simply by closing these valves. Shell et al. have supported this reasoned defence with video footage from November 2007, in which it may indeed be seen that the oil flow was halted by turning the valves of the wellhead closed with a few twists of a wrench. Furthermore, in their statement of defence in the ancillary action pursuant to Article 843a DCC at item 104, Shell et al. argued, in an as yet undisputed claim, that it would not in fact have been possible to have definitively halted the leakage with ease in 2007 had the leakages in 2006 and 2007 been caused by inadequacies in the materials or by inadequate maintenance of the wellhead. That Akpan et al. have as yet not been able to respond in the main action to Shell et al.'s defence does not mean that, in its assessment, the Court need not demonstrate due regard for Akpan et al.'s legitimate interest. It would have been logical for Akpan et al.'s to have anticipated in this ancillary action their response to that defence in the main action by explaining in their ancillary pleadings and/or written arguments why they have a legitimate interest. The legitimate interest in production of exhibits is, after all, limited to those items of evidence that may contribute to the relevant, potentially decisive arguments of Akpan et al., which are sufficiently concretely substantiated and disputed.
- 4.8. In view of this, Akpan et al. have as yet failed to contest Shell et al.'s argument that the alleged leakages in 2006 and 2007 were caused by sabotage in a sufficiently reasoned manner, so that this argument, at the present stage of the debate, must provisionally be considered correct. This leads to the conclusion that Akpan et al. presently have no legitimate interest in items of evidence that shed

light on the situation concerning the wellhead and its maintenance. The general situation regarding the wellhead in 2006 and 2007 has not as yet been shown to be causally related to the two alleged leakages, and even less so to the alleged damage. Insofar as Akpan et al. hold to the general argument that Shell et al. had or have an obligation towards Akpan et al. to replace or shut down the wellhead solely due to this wellhead's being outdated, and regardless of whether it was the cause of the alleged leakages in 2006 and 2007, the Court ignores such a general argument, because up to now this argument has not been substantiated in any way in the terms of the applicable Nigerian law. In view of the above, the Court dismisses the ancillary claims in respect of the documents referred to at II through V and VII.

- 4.9. Shell et al. have advanced reasons to dispute their having possession of the daily logbooks from the date of the oil leakages near Ikot Ada Udo regarding the period from 2006 until November 2007, the "Post-Impact Assessment Study" and/or the "Environmental Evaluation (Post-Impact) Report", the production of which is claimed by Akpan et al. at X and XII. According to Shell et al., these items of evidence were not drawn up, because this was not mandatory on the basis of EGASPIN. Also, in respect of the documents claimed at IX, Shell et al. have argued that these do not exist or that they have in any case not been able to trace these. Because Akpan et al. have not plausibly argued that, despite this, Shell et al. do possess these documents, the claim to have these documents produced in evidence is dismissed.
- 4.10. With regard to the ancillary claims in respect of the remaining documents referred to, the Court finds the following. Akpan et al. claim (put briefly) to have a legitimate interest in the production of these documents, in order to be able to substantiate and/or demonstrate the following arguments:
  - a. SPDC is not only the operator/licence holder, but also the owner of the wellhead (documents at I);
  - b. The cause of leakages from the wellhead in the period 1996-1999 possible lies in the state (of maintenance) of the wellhead (documents at VI);
  - c. The course of events regarding the Joint Investigation Visit in 2006 is as advanced by Akpan et al. in the summons (documents at VIII);
  - d. RDS had authority and influence over SPDC's policy, and in particular its environmental policy, or were in a position to exercise such authority (documents at XIII, XIV, XV, XVI, XVII, XX and XXI);
  - e. RDS was aware of the oil leakages and the situation in Nigeria or must be deemed to have been aware of these (documents at XIII, XX, XXI and XXII);
  - f. SPDC's policy in respect of the oil leakages was inadequate (documents at XI);

- g. SPDC did not provide adequate security or maintenance for the wellhead in question (documents at XVIII and XIX);
- h. Shell et al. did not register the oil leakages properly and/or did not report these properly to (among others) the Nigerian government (documents at VI);
- i. The relationships of ownership and authority within the Joint Venture are possibly otherwise than Shell et al. claim (documents at XVII).

4.11. The question now is whether the arguments referred to at ground 4.10 are relevant, or more specifically, decisive, for the assessment in the main action. In the Court's opinion, Akpan et al. have not as yet made this sufficiently plausible. Akpan et al. have up to now not substantiated that it makes any difference to the liability of SPDC or for the allowability or any claims in the main case under Nigerian law whether SPDC and/or the Joint Venture is/are "only" the operator(s) of the wellhead or also its owner (argument at a). In view of the Nigerian legislation cited at ground 4.6, the Court is provisionally of the opinion that this does not appear to be the case. Given that Akpan et al.'s claims pertain only to the leakages of 2006 and 2007, and in the light of that found at grounds 4.7 and 4.8, the cause of the leakages in the years 1996-1999 cannot be deemed of relevance to the assessment of the claims submitted (argument at b). Furthermore, Akpan et al. have insufficiently clarified which points the parties' opinions still differ concerning the course of events regarding the Joint Investigation Visit of 2006 and what the relevance thereof is for the claims to be assessed in the main action (argument at c).

4.12. Akpan et al. have up to now not substantiated that a parent company has acted unlawfully according to Nigerian law if it is aware of, and has influence and authority over, the inadequate environmental policy of a subsidiary, yet fails to intervene (arguments at d and e). Contrary to what Akpan et al. argue, an oil company's environmental policy cannot provide a definitive answer to the question of whether acts have been lawful or unlawful in relation to specific oil leakages. It has also not as yet been substantiated that a legal person can be ordered to implement a different (environmental) policy under Nigerian law, as claimed by Akpan et al. in the main action at VII (argument at f). Neither have Akpan et al. substantiated that the management or owner of an inadequately maintained wellhead can be obliged under Nigerian law to modify such a wellhead to current standards, regardless of whether this inadequate maintenance situation has led to leakages (argument at g). Akpan et al. have also as yet failed to substantiate sufficiently that potential shortcomings in the compliance with registration or reporting obligations regarding oil leakages can be unlawful towards interest groups or private individuals under Nigerian law. Moreover, there is no causal relationship between such a shortcoming and the alleged damage (argument at h). Finally,

Akpan et al. have not explained how the relationships of ownership and authority within the Joint Venture are relevant under Nigerian law to the liability of the participating enterprises (argument at i).

- 4.13. In view of this, Akpan et al. have as yet failed to substantiate sufficiently concretely that the arguments at a to e – both individually and when considered in relation to one another – imply that Shell et al. have acted unlawfully according to Nigerian law, or that any of Akpan et al.’s other claims in the main action that relate to this should, under Nigerian law, be allowed. Neither has this become evident elsewhere. The foregoing moves the Court to find that the claims for the production of all of these documents must be dismissed at present due to lack of legitimate interest.
- 4.14. In their arguments, Akpan et al. have also invoked their right to inspection on the basis of the principle of equality of arms pursuant to Article 6 of the ECHR, independently of the right to inspection pursuant to Article 843a DCCP. The Court finds that Article 843a DCCP constitutes an elaboration of that principle. The restrictive conditions that Article 843a DCCP applies to the right to production of documents, including the condition that a legitimate interest should exist, are compatible with Article 6 ECHR and the principle of equality of arms, except (potentially) when there are exceptional circumstances. It has not been made sufficiently plausible or evident in these sets of proceedings that such exceptional circumstances are present. For this reason, Akpan et al.’s appeal to this principle also fails.
- 4.15. As the parties found against, Akpan et al. are jointly and severally ordered to pay the legal costs for the ancillary action concerning the production of exhibits, estimated by the Court at EUR 1,356 in total, on the basis of notional legal fees.

## **5. The further course of proceedings in the main action**

- 5.1. During the written argument in the ancillary action concerning the production of exhibits of 19 May 2011, the counsels of both sides asked the Court to set out and direct the further course of these relatively broad, complex, and fundamental cross-border proceedings in the main action to the greatest extent possible. The Court grants this joint request of both parties in this interlocutory judgment.
- 5.2. As was found in the assessment of the ancillary action concerning the production of exhibits, the Court is (provisionally) of the opinion that Milieudefensie’s claims are admissible under Dutch procedural law, but that Nigerian substantive law applies to the claims. The proceedings will again be referred to the cause list for the last respite of the reply. In their reply, Akpan et al., as claimants, considering the foregoing, must as yet concretely substantiate which

specific accusations they are making (or may make) against each of the Shell et al. defendants under Nigerian law with regard to the occurrence and cleaning up of the oil leakages near Ikot Ada Udo, Akwa Ibom State, Nigeria, in 2006 and 2007, preferably substantiated with a legal opinion in accordance with Nigerian law, partly in response to the legal opinions of Professor Oditah produced by Shell et al.

- 5.3. In their reply, on the basis of Nigerian legislation, case law and/or other juristic resources, Akpan et al. must therefore at least substantiate (and demonstrate why this is so) that SPDC has breached its duty of due care in a manner that, under Nigerian law, constitutes an unlawful act against Akpan et al., a consequence of which is that SPDC is liable for compensation towards Akpan. Akpan et al. must also concretely substantiate (and demonstrate why this is so) that RDS, as parent company of SPDC, has acted unlawfully towards Akpan et al. under Nigerian law, if it knew of, or had influence and authority over SPDC's (environmental) policy, but did not use such knowledge, influence or authority to (i) prevent SPDC as much as possible from causing damage to people and the environment near Ikot Ada Udo as a result of oil extraction in the Niger Delta and/or (ii) ensure that SPDC adequately clean up the pollution caused by these oil leakages.
- 5.4. Shell et al. also dispute that Akpan are the (exclusive) owners of the land and fishponds that were polluted by oil. In their statement of defence, Shell et al. concretely advanced (and demonstrated why this is so) that under Nigerian law, a person who is not the (exclusive) owner of land or fishponds cannot claim any damages due to loss of income as a consequence of pollution of that land or those fishponds. In view of this, in their reply, Akpan et al. must either further substantiate (preferably with items of evidence) that Akpan should be considered an (exclusive) owner (demonstrating why this is so), or further substantiate that Shell et al.'s argument is incorrect under Nigerian law (demonstrating why this is so). In addition, Akpan et al. must discuss, with concretely substantiated argumentation, Shell et al.'s defence that it is not possible under Nigerian law to claim damages for future personal injury or damage. Insofar as Akpan has now already sustained damage to his health as a consequence of the oil leakage(s), this also needs to be concretely substantiated. Furthermore, the Court advises Akpan et al. of the provisional judgments it has already pronounced in the grounds above. Finally, in reply and rejoinder, all parties to the proceedings must obviously discuss all that they themselves deem relevant for the decisions on the claims brought.
- 5.5. In these two sets of proceedings judgment has now been passed on one ancillary action concerning jurisdiction, one ancillary action concerning *lis pendens*, and one ancillary action concerning the production of exhibits. Though the proceedings commenced more

than two years ago now, in the main action there has up to now only been an originating summons issued and a statement of defence submitted. Pursuant to Article 20 DCCP, the Court is obliged to guard against unreasonable delays to proceedings; it must if necessary take measures on its own initiative. In relation to this, Article 208(3) DCCP provides that ancillary claims be instituted simultaneously whenever possible. On the basis of these articles, in conjunction with Article 209 DCCP, the Court now rules in advance that any further ancillary claims in these proceedings will not be handled in advance and individually, but will be dealt with together with those in the main action, and that decisions thereon will be made as much as possible concurrently with those made in the main action. Nor will the Court allow the possibility of interim appeal against this interlocutory judgment.

- 5.6. In view of the character and scope of these sets of proceedings, the Court will give the lawyers of both sides 13 weeks instead of 6 for their reply and rejoinder in the main action. As a general rule, no further postponement of these terms will be allowed, unless there is concrete evidence of compelling reason or force majeure.

## **6. The decision**

The Court:

### **in the ancillary action**

- 6.1. dismisses all claims of Akpan et al.;
- 6.2. orders Akpan et al. jointly and severally to pay Shell et al. the sum of EUR 1,356 in total for the legal costs of the ancillary action, stipulating that this amount be paid within 14 days of this judgment, failing which Akpan et al. will be in default;
- 6.3. declares this order for costs immediately enforceable;

### **in the main action**

- 6.4. lists both sets of proceedings for mention on **Wednesday 14 December 2011** for a reply on the part of Akpan et al., as last respite and with due regard for all that decided above at grounds 5.1 to 5.6 inclusive;
- 6.5. stays any further decision.

This judgment is delivered by the judges H. Wien, M. Nijenhuis and F.M. Bus, and was read in open court in the presence of the clerk of the court F.L.M. Munter on Wednesday, 14 September 2011.

[Signature F.L.M. Munter]  
(illegible)]

[Signature

[STAMP: DISTRICT COURT OF THE HAGUE]

[Clerk's stamp: Issued as a true process server's copy 14 Sept. 2011]

[Signature (illegible)]