IN THE NAME OF THE QUEEN

judgment

DISTRICT COURT OF THE HAGUE, THE NETHERLANDS,

Civil-law sector

Judgment of 14 September 2011 in the ancillary actions concerning the production of exhibits and in the main actions

in the proceedings with case number / cause-list number: 330891 / HA ZA 09-0579 of

1. **FIDELIS AYORO OGURU**,
2. **ALALI EFANGA**,
   both of Oruma, Bayelsa State, Nigeria,
3. **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,

and in the proceedings with case number / cause-list number: 365498 / HA ZA 10-1677 of

1. **FIDELIS AYORO OGURU**,
2. **ALALI EFANGA**,
   both residing in Oruma, Bayelsa State, Nigeria,
3. **VERENIGING MILIEUDEFENSIE**, an association with legal personality with its registered office in Amsterdam,

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. **SHELL PETROLEUM N.V.**, a public limited company with its registered office in The Hague,
2. **THE "SHELL" TRANSPORT AND TRADING COMPANY LIMITED**, a legal person incorporated under foreign law, with its registered office in London, United Kingdom,

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 "Oguru", "Efanga", "Milieudefensie", "RDS", "SPDC", "Shell Petroleum" and "Shell T&T". Oguru, Efanga and Milieudefensie will be jointly referred to as "Oguru et al."; RDS, SPDC, Shell Petroleum and Shell T&T will be jointly referred to as "Shell et al.".

1. Both sets of proceedings

The proceedings with cause-list number 09-0579

1.1. The course of the proceedings is evidenced by:
- the judgment in the ancillary action concerning jurisdiction of 30 December 2009 and all prior court documents referred to therein, including all exhibits;
- Oguru 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 exhibit;
- the reply in the ancillary action pursuant to Article 843a DCCP, also containing change of claim in the ancillary action;
- 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.

The proceedings with cause-list number 10-1677

1.4. The course of the proceedings is evidenced by:
- the summons of 21 April 2010, with exhibits;
- the statement of defence in the main action, with exhibits;
- Oguru et al.'s statement of claim in the ancillary action pursuant to Article 843a DCCP;
- the statement of defence in the ancillary action pursuant to Article 843a DCCP, with exhibit;

- the reply in the ancillary action pursuant to Article 843a DCCP;
- the rejoinder in the ancillary action pursuant to Article 843a DCCP, with exhibits.

1.5. 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.

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

2. The disputes in the main actions

The proceedings with cause-list number 09-0579

2.1 In a summons served on 7 December 2008 of 83 pages, along with two folders containing 82 exhibits in total, Oguru et al. moved for the Court, an immediately enforceable judgment:

I to issue a declaratory judgment that RDS and SPDC have acted unlawfully towards Oguru and/or Efanga, on the basis of the arguments put forward in the body of the summons, and are jointly and severally liable towards Oguru and/or Efanga for the damage they have suffered and have as yet to suffer as a consequence of these unlawful actions by RDS and SPDC, 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 RDS and SPDC 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 Oruma in Nigeria as a consequence of these unlawful actions by RDS and SPDC;

III to order RDS and SPDC to commence with the replacement of the outdated (parts of the) oil pipeline near Oruma in Nigeria, 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 RDS and SPDC to commence, within two weeks of service of this judgment, with the cleaning up of the soil around the oil leakage, 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 RDS and SPDC jointly, one by Milieudefensie, and one by the two experts so selected jointly, to be submitted by RDS and SPDC to Oguru 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 RDS and SPDC to commence, within two weeks of service of this judgment, with the purification of the sources of water in and around Oruma, until these meet the applicable international and local environmental standards, 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 RDS and SPDC jointly, one by Milieudefensie, and one by the two experts so selected jointly, to be submitted by RDS and SPDC to Oguru 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 RDS and SPDC to maintain the oil pipeline near Oruma in good condition following its replacement, in accordance with “good oil field practices”, including at minimum the performance of obligatory pipeline inspections, the establishment or maintenance of an adequate system of pipeline inspection and duly acting in accordance therewith; ordering RDS and SPDC to consistently submit written reports of these inspections to Oguru et al. within two weeks of their taking place;

VII to order RDS and SPDC 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 Oruma; including in any event the making available to Oguru et al. of sufficient materials and means – evidence of which RDS and SPDC will provide to Oguru 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 RDS and SPDC to pay a penalty of EUR 100,000 (or another amount to be determined by the court in the proper administration of justice) to Oguru et al., each time that RDS and SPDC, either individually or jointly, act contrary with that ordered at III, IV, V and/or VI above;

IX to order RDS and SPDC jointly and severally to pay the extrajudicial costs;

X to order RDS and SPDC to pay the costs of these proceedings, or alternatively, to order each of the parties pay their own costs of the proceedings;

2.2. Oguru et al.’s grounds for these ten claims in the main action, at this point in the proceedings, are in summary as follows. On 26 June 2005, an oil leakage from a pipeline near Oruma, Bayelsa State, Nigeria commenced, which leakage continued until 7 July 2005. As a consequence of this leakage, Oguru and Efanga suffered damage, because their fishponds and (agricultural) land were seriously polluted. Furthermore, Oguru and Efanga are suffering damage to their health as a result of the pollution due to oil of the environment

in which they live. The oil leakage has affected the environment around Oruma.
As the ‘operator’ of the leaking oil pipeline, SPDC has acted unlawfully towards Oguru et al. because it acted contrary to its duty of due care. SPDC has breached its duty of due care, firstly in failing to maintain the oil pipeline in question sufficiently and thereafter in failing to provide adequate supervision, as a result of which the oil leakage came about. In addition, SPDC breached its duty of due care in failing to react adequately to the leakage and to clean up the oil in a timely or comprehensive manner.
Apart from SPDC, RDS has acted unlawfully towards Oguru 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 this oil leakage in a timely and comprehensive manner. RDS breached this duty of due care. According to Oguru 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 actions and omissions, on the basis of Article 3:305a of the Dutch Civil Code (DCC).

2.3. In a response of 13 May 2009 of 63 pages, along with a folder containing 8 exhibits, RDS and SPDC advanced a reasoned defence.

The proceedings with cause-list number 10-1677

2.4. Should the court find in the proceedings with cause-list number 09-0579 that, due to internal restructuring at the Shell group, RDS can in any case not be deemed liable for damage relating to the period to 20 July 2005, Oguru et al. bring the same claims that they brought against RDS in the proceedings with cause-list number 09-0579 against Shell Petroleum and Shell T&T in the proceedings with cause-list number 10-1677, in a summons of 21 April 2010 of 89 pages, along with two folders containing 84 exhibits in total.

2.5. At this point in the proceedings, Oguru et al.’s grounds for the claims in the main action are in summary as follows. According to RDS, it only began leading the Shell group on 20 July 2005, prior to which the Shell group was led by Shell Petroleum and Shell T&T. Insofar as the court finds that, as a consequence of this, RDS cannot be held liable for damage originating in acts and actions prior to 20 July 2005, Shell Petroleum and Shell T&T are then liable for these.

2.6. In a response of 1 September 2010 of 82 pages, along with a folder containing 14 exhibits, Shell Petroleum and Shell T&T advanced a reasoned defence.

3. The disputes in the ancillary actions pursuant to Article 843a DCCP

The proceedings with cause-list number 09-0579

3.1. Following change of claim in the ancillary action, Oguru et al. demand move for the court order by provisionally enforceable judgment that RDS and SPDC provide Oguru et al. with access to the documents specified below within 21 days of the date of this judgment, and also order that, subsequent to such access, RDS and SPDC provide Oguru et al. with copies and excerpts of those parts of these documents desired by Oguru et al. in photocopy format or in a standard digital format or other form the court deems advisable:

(I) Documents providing evidence of when the section of the pipeline near Oruma in which the leakage occurred in June 2005 was laid, and when this section was last replaced;

(II) Documents providing evidence of the pipeline's technical specifications, including the materials used, their age, the diameter and thickness of the piping when laid, the material and the thickness of the coating and the details of the contractor that laid the pipeline;

(III) Documents providing evidence of the inspections of the pipeline(s) near Oruma that have taken place since the Asset Integrity Review in 2003;

(IV) *withdrawn in the reply in the ancillary action, also containing a change of claim in the ancillary action*;

(V) Images (such as photographs and video footage) of the oil leakage near Oruma, of its consequences and the clearing up of the leaked oil, insofar as such images are in the possession of RDS and/or SPDC;

(VI) The daily logbooks of the oil leakage near Oruma covering the period from 26 June 2005 up to and including November 2005;

(VII) RDS and SPDC's "Oil Spill Contingency Plan";

(VIII) The "Post-Impact Assessment Study", including in any case an analysis of the damage caused as a result of the leakage and the period estimated for a full recovery of the Oruma area;

(IX) RDS and SPDC's policy or any other documents providing evidence of the criteria on which SPDC and RDS base their obligation to report oil leakages, as well as when and by whom such policy was decided;

(X) The full names and addresses of those who were directors of SPDC in the period 2000-2008;

(XI) Documents providing evidence that SPDC itself, and perhaps independently, adopted and implemented the Shell group policy, and that SPDC 'is deemed to' observe this group policy;

(XII) Documents providing evidence that, in the period 2000-2008, 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;

(XIII) 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 2000-2008;

(XIV) 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 2000-2008;

(XV) Documents regarding the years 2000-2008 containing the annual policy plans ("work programs") and maintenance plans, and the Joint Venture budgets related to these;

(XVI) The reports or minutes of meetings (however formal or informal) of the executive body ('committee') of the Joint Venture, in which the proposals referred to at XV 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;

(XVII) The communication regarding the (content of the) documents referred to at XV 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;

(XVIII) 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 2000-2008, and in particular the oil leakage near Oruma in June 2005;

(XIX) SPDC's report to Shell International Exploration and Production B.V.'s HSE (Health, Safety and Environment) team concerning the oil leakage near Oruma;

(XX) Documents providing evidence that Shell International Exploration and Production B.V.'s HSE team is not affiliated with RDS and was not obliged to report the leakage to RDS, and explaining why this is the case;

(XXI) SPDC's assurance letters to the Executive Committee concerning the period 2000-2008, and documents from the SPDC to the Executive Committee concerning the oil leakages in the Niger Delta in the period 2000-2008 and the oil leakage near Oruma in June 2005;

3.2. RDS and SPDC have advanced a reasoned defence to the ancillary actions. The arguments of the parties are discussed, where relevant, hereinafter.

The proceedings with cause-list number 10-1677

3.3. The ancillary claims pursuant to Article 843a DCCP in the proceedings with cause-list number 10-1677 are the same as those in the proceedings with cause-list number 09-0579, with the provisos that documents referred to at XI and XX are not being demanded, that “RDS” is to be read as “Shell Petroleum and Shell T&T” and that the claims have been brought against Shell Petroleum and Shell T&T.

3.4. Shell Petroleum and Shell T&T 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 actions pursuant to Article 843a DCCP in both sets of proceedings

4.1. Both sets of proceedings concern the same oil leakage and the claimants in both are the same parties. Furthermore, the ancillary actions concerning the production of exhibits in both sets of proceedings cover (virtually) the same documents and the defence statements in these ancillary actions are nigh on identical. For this reason, the court will deal with the ancillary actions jointly.

4.2. Dutch law must be applied (*lex fori*) to the ancillary actions pursuant to Article 843a DCCP, because the obligation to produce exhibits is part of Dutch procedural law.

4.3. To assess the ancillary actions, it is nonetheless important to provide a (provisional) opinion on the applicable substantive law in the main actions. The claims in the main actions concern an oil leak in Nigeria, near Oruma, Bayelsa State, in June 2005, for which, according to Oguru et al., SPCD and RDS and/or Shell Petroleum and Shell T&T 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, Shell Petroleum and/or Shell T&T have committed an unlawful act in relation to this oil leakage, these legal persons’ 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 actions must be assessed under Nigerian substantive law, and more specifically under the law that is applicable in the federal state of Bayelsa, where the leakage occurred.

4.4. Shell et al. have submitted that Milieudefensie's claims in the main actions 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.

4.5. 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 Oguru et al.'s claims clearly rise above the individual interests of (solely) Oguru and Efanga; the decontamination of the soil and the cleaning up of the fishponds would – if ordered – benefit not only Oguru and Efanga but also the rest of the community and the environment around Oruma. 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.

4.6. 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.

4.7. 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 leakage is relevant for the assessment of the disputes in the main actions.
In addition, Nigeria's "Environmental Guidelines and Standards for the Petroleum Industry in Nigeria" (hereinafter: "EGASPIN") provide the following:
"An operator [in the present case, SPDC – Court] *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 actions is that, under Nigerian law, the cleaning up of the spilled oil and/or the putting right of the consequences of the

leakage be carried out appropriately, regardless of the question of how the leakage was caused.

4.8. In respect of the items claimed at I, II, III and V, the Court finds as follows. Oguru 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 pipeline in question was below par, as a consequence of which the oil leakage came about in June 2005. With regard to this leakage, Shell et al. have pleaded that the oil leaked from a round hole of 8mm diameter with smooth sides, the same as a hole made by a drill, that the surface of the pipeline around the hole was flat and there were no signs of dents or corrosion and that the pipeline thickness there was normal. Shell et al. refer in addition to the video footage Oguru et al. have submitted, in which the leakage is sealed and measurements of the thickness of the pipeline are carried out. Furthermore, Shell et al.'s argument is supported by a report of the Joint Investigation Team (JIT) investigating the leakage. The co-signatories of that report include representatives of the ministries of Environmental Affairs of both the federal government and Bayelsa State. Shell et al. have also submitted details from their December 2004 'intelligent pig run' investigation into the thickness of the pipeline in question. An 'intelligent pig' is a kind of robot that measures the thickness of the pipeline from within, while moving through the pipeline. At the point of the leakage, no reduction in the thickness of the pipeline was measured. According to Shell et al., from these circumstances it appears that the leakage was most probably caused by sabotage; it is out of the question that the damage to the pipeline could have been the consequence of the pipeline's being in poor condition and/or corroded.

4.9. Oguru et al. have up to now insufficiently substantiated that, despite the foregoing, this June 2005 leakage could in fact have been caused by corrosion or by any other inadequacy of the pipeline, or that the JIT report as co-signed by the state and federal authorities is unreliable. That Oguru et al. have as yet not been able to respond in the main actions to Shell et al.'s defence does not mean that, in its assessment, the court need not demonstrate due regard for Oguru et al.'s legitimate interest. It would have been logical for Oguru et al.'s to have anticipated in these ancillary actions their response to that defence in the main actions 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 substantiation/demonstration of possibly decisive arguments, which are sufficiently concretely substantiated and disputed.

4.10. In view of this, Oguru et al. have as yet failed to contest Shell et al.'s argument that this leakage was 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 Oguru et al. presently have no legitimate interest in items of evidence that shed light on the situation concerning the pipeline in question and its maintenance. The general situation regarding the pipeline has not as yet been shown to be causally related to the leakage, and even less so to the stated damage. Insofar as Oguru et al. hold to the general argument that Shell et al. had or have an obligation towards Oguru et al. to replace or shut down this pipeline solely due to this pipeline's being outdated, and regardless of whether it was the cause of the leakage, 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 I, II, III and V.

4.11. Shell et al. have advanced reasons to dispute their having possession of daily logbooks from the date of the oil leakage near Oruma up until the clean-up and remediation operations, the "Post-Impact Assessment Study" and/or the "Environmental Evaluation (Post-Impact) Report", the production of which is claimed by Oguru et al. at VI and VIII. According to Shell et al., these items of evidence were not drawn up, because this was not mandatory on the basis of EGASPIN. Because Oguru 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.

4.12. In respect of the document that Oguru et al. demand be produced at XIX, Shell et al. have advanced that no report exists concerning the oil leakage at Oruma, Bayelsa State in Nigeria specifically. Only a compiled report concerning oil leakages in the Niger Delta was drawn up, in which the leakage at Oruma is not specified. Oguru et al. have not contested this with reasoned argumentation. In the light of this, it has not become plausible that Shell et al. possess a document such as that claimed, relating (in part) specifically to Oruma. Therefore, this claim for the production of an exhibit is also disallowed.

4.13. With regard to the ancillary claims in respect of the remaining documents referred to, the court finds the following. Oguru 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. RDS and/or Shell Petroleum and Shell T&T 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 X, XI, XII, XIII, XVII, XVIII and XXI);
b. RDS and/or Shell Petroleum and Shell T&T were aware of the oil leakage and the situation in Nigeria or must be deemed to have been aware of these (documents at IX, XVII, XVIII, XX and XXI);

c. SPDC’s policy in respect of the oil leakages was inadequate (documents at VII);
d. SPDC did not provide adequate security or maintenance for the pipelines in question (documents at XV and XVI);
e. The relationships of ownership and authority within the Joint Venture are possibly otherwise than Shell et al. claim (documents at XIV).

4.14. The question now is whether the arguments referred to at ground 4.13 are relevant, or more specifically, decisive, for the assessment in the main actions. In the court’s opinion, Oguru et al. have not as yet made this sufficiently plausible. Oguru 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 a and b). Contrary to what Oguru 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 a specific oil leakage. 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 Oguru et al. in the main actions at VII (argument at c). Neither have Oguru et al. substantiated that the management of an oil pipeline must provide security for it under Nigerian law, or that the management may be obliged to replace an inadequately maintained oil pipeline under Nigerian law, regardless of whether this inadequate maintenance situation has led to leakages (argument at d). Finally, Oguru 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 e).

4.15. In view of this, Oguru 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 Oguru 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.

4.16. In their arguments, Oguru 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, Oguru et al.'s appeal to this principle also fails.

4.17. As the parties found against, Oguru et al. are jointly and severally ordered to pay the legal costs for the ancillary actions concerning the production of exhibits in both sets of proceedings, estimated by the court at EUR 2,712 in total, on the basis of notional legal fees.

5. The further course of proceedings in the main actions

5.1. During the written arguments in the ancillary actions 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 actions 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 actions 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 replies. In their reply, Oguru 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 leakage near Oruma, Bayelsa State, Nigeria, presently at issue, 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 replies, on the basis of Nigerian legislation, case law and/or other juristic resources, Oguru 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 Oguru et al., a consequence of which is that SPDC is liable for compensation towards Oguru and Efanga. Oguru et al. must also concretely substantiate (and demonstrate why this is so) that RDS, Shell Petroleum and Shell T&T as parent companies of SPDC have acted unlawfully towards Oguru et al. under Nigerian law, if they 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 Oruma as a result of oil extraction and/or (ii) ensure that SPDC adequately clean up the pollution caused by this oil leakage.

5.4. Shell et al. also dispute that Oguru and Efanga 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 replies, Oguru et al. must either further substantiate (preferably with items of evidence) that Oguru and Efanga should be considered (exclusive) owners (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, Oguru 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 Oguru and Efanga have now already sustained damage to their health as a consequence of the oil leakage, this also needs to be concretely substantiated. Furthermore, the court advises Oguru et al. of the provisional judgments it has already pronounced in the grounds above. Finally, in replies and rejoinders, 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 and two ancillary actions concerning the production of exhibits. Though the proceedings with cause-list number 09-0579 commenced more than two-and-a-half years ago now, in the main action of those proceedings 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 actions, and that decisions thereon will be made as much as possible concurrently with those made in the main actions. 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 rejoinder in the main actions. 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 decisions

The court:

in both ancillary actions

6.1. dismisses all claims of Oguru et al.;

6.2. orders Oguru et al. jointly and severally to pay Shell et al. the sum of EUR 2,712 in total for the legal costs of the ancillary actions, stipulating that this amount be paid within 14 days of this judgment, failing which Oguru et al. will be in default;

6.3. declares this order for costs immediately enforceable;

in both main actions

6.4. lists both sets of proceedings for mention on **Wednesday 14 December 2011** for a reply on the part of Oguru 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] [Signature (illegible)]

[STAMP: DISTRICT COURT OF THE HAGUE]
[Clerk's stamp: Issued as a true process server's copy 14 Sept. 2011]
[Signature (illegible)]