



Corporate Liability in a New Setting:

Shell and the Changing Legal Landscape for the
Multinational Oil Industry in the Niger Delta

Essex Business and Human Rights Project

**CORPORATE LIABILITY IN A NEW SETTING:
SHELL AND THE CHANGING LEGAL LANDSCAPE FOR THE MULTINATIONAL
OIL INDUSTRY IN THE NIGER DELTA**

BY THE ESSEX BUSINESS AND HUMAN RIGHTS PROJECT¹

REPORT

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Executive Summary

A TOUGHER TRANSNATIONAL LEGAL ENVIRONMENT

Shell faces some important shifts in the legal rules setting the terms on which the company is used to working, and these changes risk triggering a major wave of suits alleging damage to people and to the environment in the Niger Delta. The world has become used to a situation in which the company has been sued in Nigeria, with some exceptional cases being heard by courts in the US, the UK and the Netherlands. This is set to change. Despite the fact that recent UK legislation makes it more difficult for plaintiffs without significant financial resources to pursue claims that they have been damaged overseas in UK courts, the pursuit of such claims is still viable if the number of those damaged and the size of the claim are large, as has been true of several of the cases against Shell in the recent past. Alongside this, new legal principles are emerging in the UK, and are likely to spread to other jurisdictions, which increase the level of parent company responsibility for damage done via its subsidiaries. Courts in the UK have recently made it clear that where a parent company undertakes responsibility for setting environmental, health and safety standards on which a particular subsidiary relies, then the parent company must do its best to make sure to follow through, making sure that those standards are implemented. The parent can be sued by victims – including victims overseas - if it falls down on what the law labels as its duty of care.

This principle can be applied to Royal Dutch Shell, which although claiming to be remote from day to day activity in Nigeria, does oversee such standards worldwide, and is in ultimate control of their implementation. Victims allege that it has failed to follow through: falling short of making sure that the standards are implemented in the Niger Delta.

LIABILITIES ON THE HORIZON:

Environment and the issue of sabotage

It is against this background that the company must face up to fresh liabilities on the horizon for failures to deal with oil pollution in the Delta. Nigerian law makes it clear that while it has no duty to compensate victims where the pipelines have been sabotaged by third parties, the company is still liable for failing to clean up and remediate the areas affected by spillage. Nigerian litigation has resulted in some major verdicts against the company, but delays in enforcement have made real recovery for victims rare. The picture is beginning to change: to the extent that the parent company has not intervened to make its subsidiary in Nigeria, SPDC, carry out this obligation to clean up and remediate - an obligation that corresponds to

its own commitment to best practice - then it has arguably failed in its duty of care and can be pursued in UK courts.

Securities Regulation

Shell may also face difficulties in meeting the requirements of US and European securities law that misleading statements on matters of material fact should not be made to potential investors. From the company's Sustainability Reports, it appears that RDS monitors and controls the environmental policies and practices developed for its subsidiary corporations. However, in a case currently before the Netherlands judiciary, RDS says that it remains remote from the details of operations on the ground, and that even if it did know of negligent failures to maintain standards by SPDC it would not have "intervene[d] because the work was not performed with sufficient diligence and care." This discrepancy could give rise to an investigation under US, Dutch and UK securities laws.

Anti-corruption

Another area of potential concern, where legal responsibility is increasing and should put oil companies and investors on the alert, is that of stronger anti-corruption laws. The UK Bribery Act is a leading example. This once again calls for greater diligence at the highest levels to prevent actions by employees

Labour

There is the prospect of stronger labour protection measures in Nigeria itself, as measured by international labour standards. This can throw into question the widespread practice in the Oil and Gas Industry of using casual labor to carry out functions that are in reality those of long term employees. A wide range of employment rights are likely to be asserted, with the prospect of industrial conflict if they are not acknowledged.

Complicity in Human Rights Abuse

If accurate, recent allegations that Shell's spending on security to government forces and community groups, where there was a significant risk that these payments would fuel human rights abuses, could lead to further litigation.

Tools for Investors

This report aims at providing a toolkit providing investors with information together with samples of detailed questions they should ask their company in order to know more. Investors are a focus as they have both the motivation to ensure that their companies' liabilities are addressed and future liabilities minimised, as well as influence to enable this to happen. The report is also addressed to other stakeholders who will benefit from the company taking a more proactive approach to dealing with the problems the report identifies, rather than wait for successful legal claims to spread.

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INTRODUCTION

The purpose of this report is to analyse the law that is relevant to decisions about the management of the international oil companies that are operating in the Niger Delta. The focus is on the Shell Group², the largest company operating in the area, but the conclusions can have application to other companies in a similar position.

Various non-governmental organisations (NGOs) have raised and discussed the environmental and human rights impacts of Shell's operations in the Delta. Victims have filed lawsuits and obtained judgements in their favour within Nigeria. For reasons explored below, these efforts have not been sufficient to induce fundamental changes. The picture is not static, however. The Nigerian subsidiary of Royal Dutch Shell Plc (RDS), the Shell Petroleum Development Company of Nigeria Ltd (SPDC) has admitted liability for damage to the land and livelihoods of the Bodo Community in the Delta, and the terms of the settlement are being litigated before the UK courts.³ This development in the use of a foreign judiciary will encourage other affected communities to come forward with claims, and will include suits brought beyond the shores of Nigeria. Shell is likely to defend significant numbers of these claims, thus legal disputes can be expected to increase.

This prospect makes it timely to look at the picture as a whole. This report aims to add to the body of work that has been done in this area in several ways. Firstly, it considers the possibility of further litigation against Shell in Europe and the United States. Further, it situates Shell's activity within the context of its similar operations elsewhere in the world, both by Shell⁴, and its main competitors, so as to enable investors to evaluate the significance of the Nigerian operation's impacts on their holdings in the Group as a whole. Finally, apart from impacts on the environment and local communities, the report will consider two additional matters that should concern any oil company operating in the region: the treatment of employees in the Delta, as well as any potential liability for corrupt practices under US and European law.

² 'Shell' designates the collection of companies that are linked in the Shell Group. When a particular corporate member of that group is considered, it will be given the appropriate name. Further details on the structure and functions of the Shell Group are to be found below, section II.

³ See: <http://www.bbc.co.uk/news/world-africa-14391015> (last accessed 6 October 2012), <http://www.leighday.co.uk/News/2011/August-2011/Shell-accepts-responsibility-for-oil-spill-in-Nigeria> (last accessed 6 October 2012) and <http://www.guardian.co.uk/environment/2011/aug/03/shell-liability-oil-spills-nigeria> (last accessed 6 October 2012).

⁴ Shell has been challenged on its environmental law compliance record in other geographically remote operating theatres, such as in its Sakhalin island projects in Far East Russia. For example, the Sakhalin Energy company in the Sakhalin II project has been the subject of concern about environmental impacts and risks both on Sakhalin island and in the waters surrounding it. Shell was the majority shareholder of Sakhalin Energy until the former was forced by the Russian Federation government to relinquish its majority status to Gazprom.

Throughout this report, specific comments are addressed to investors in the international oil companies operating in the Niger Delta. Investors are particularly singled out as it is assumed that they have both significant motivation to ensure existing liabilities are addressed and future liabilities minimised, as well as influence to enable this to happen. This report offers investors and other relevant stakeholder's tools of analysis to assess the potential extent of the legal liabilities, both historic and on-going, which may help to catalyse a positive response from them. These groups will benefit from their company taking a more proactive approach to dealing with the problems prompting these court actions, rather than waiting for successful legal claims to spread.

This report is structured in three sections, with three appendices that provide greater information on specific legal issues. Section I outlines the legal risks arising from Shell's operations in Nigeria. In Section II, we consider which entities within the Shell Group face liabilities. Section III considers which jurisdictions can be utilised for litigating these claims.

SECTION I - THE POTENTIAL LIABILITIES OF OIL COMPANIES IN THE NIGER DELTA

A. DAMAGE TO THE ENVIRONMENT AND PROPERTY AND PERSONS OF LOCAL COMMUNITIES

It is important to consider this liability both as a matter of legislation and administrative regulation, as well as a matter of common law principles. While the former are important, they suffer from certain structural weaknesses and the latter remain a significant source of potential liability and compensation. However, as documented below, both the domestic regulatory framework and prospects for litigation at home and abroad against Shell are changing. Essentially, Shell faces two elements of potential liability risk stemming first, from steadily improving regulatory effectiveness on the part of the Nigerian authorities and second, from increasing litigation prospects both domestically and abroad (within its parent company's home jurisdictions) for individual and community-representative claims.⁵ Shell's potential exposure to liability has thus expanded in commensurate fashion to these legal developments.⁶ What follows is a summary of the evolving position. For a fuller analysis of the environmental liabilities, please refer to the report by David Ong in Appendix II.

Key questions for investors when considering the points below:

- What are the potential costs to the company of a rise in litigation against it arising from its activity in the Niger Delta? What are the potential costs if the site of this litigation shifts to the UK, the US, or the Netherlands because of the role of Shell's parent company, Royal Dutch Shell?
- What are the potential risks to Shell of falling so far below the standards for acceptable contamination set by the World Health Organization, as indicated in the report on the company's activity by the United Nations Environment Program?
- How effective a defence is Shell's claim that sabotage is often the reason for the oil spills?
- What standards can investors expect from Shell in the light of BP/US and Total/French/EU responses to the *Deepwater Horizon* and *Erika* oil spills?

⁵ Recent legislation in the UK (the Legal Aid, Sentencing and Punishment of Offenders Act 2012), as well as the EU (Rome II Regulation Arts 4, 15), have the effect of making it more difficult for claimants from poorer countries to face the costs of litigation in the UK, but for large group claims involving significant damages litigation should still be viable.

⁶ While there has been litigation in the UK against the parent companies of multinationals for damage done overseas, there has been a lack of clarity over the circumstances under which parent companies owe a duty of care in regulating the behaviour of their foreign subsidiaries. As indicated further on in this report, such a duty of care has recently been affirmed by courts in the UK, so providing a firmer basis for suits from abroad by victims.

i) The Constitutional, Legislative, and Regulatory Framework

The Federal Government of Nigeria has several laws and regulations to safeguard the environment. The basis for environmental policy and law in Nigeria was established in the 1999 Constitution of the Federal Republic of Nigeria, which contains provisions for the protection and improvement of the environment, including the safeguarding of Nigeria's water, air, land, forest and wildlife.⁷ This was the result of Nigeria's growing national environmental consciousness that dates back to its participation at the 1972 Stockholm Conference on the Human Environment.⁸

The relevant Nigerian federal regulatory and enforcement authorities are as follows: the National Environmental Standards and Regulations Enforcement Agency (NESREA), which is a regulatory agency of the Federal Ministry of Environment, Housing and Urban Development; the Department of Petroleum Resources (DPR), which is the regulatory agency of the Federal Ministry of Energy (FME); the National Oil Spill Detection and Response Agency (NOSDRA); and the Ministry of Water Resources, which regulates the pollution of watercourses and underground waters.

The environmental regulation of the petroleum industry is the province of the DPR, which sets guidelines and enforces standards. Its functions include monitoring the operations of oil companies, setting and enforcing environmental standards, collecting royalties and rents, as well as supervising and ensuring compliance with oil industry regulations and issuing licenses and permits, and protecting all oil and gas investments.⁹

NOSDRA is responsible for co-ordinating and implementing the National Oil Spill Contingency Plan and establishing the mechanism to monitor and assist, or where appropriate, to direct the response. The Agency's Director-General has identified key challenges including the fact that the Agency itself cannot detect oil spills independently of the oil companies, *but rather relies on the operating companies to report oil spills to it within 24 hours or face sanctions*. Even though the oil companies have been credited for cooperating with the Agency in this regard, it is there is no guarantee that the oil companies will promptly and accurately report the occurrence and magnitude of the oil they spill.¹⁰

⁷ See: *Federal Constitution of Nigeria*, 1999, at Section 20; Makinde, O. and Ayanbule, B., 'Chapter 36: Nigeria' in *International and Comparative Guide to Environmental Law*, 2006, written for the Global Legal Group, www.ICLG.co.uk (last accessed 7 October 2012).

⁸ See: Makinde, O. and Ayanbule, B., 'Chapter 36: Nigeria' in *International and Comparative Guide to Environmental Law*, 2006, written for the Global Legal Group, www.ICLG.co.uk (last accessed 7 October 2012).

⁹ See: Awogbade, S., Sipasi, S. and Iroegbunam, G., 'Getting the Deal Through – Oil Regulation 2008: Nigeria', 114-119, at 115. www.gettingthedealthrough.com/

¹⁰ See: *Tell: Nigeria's independent weekly magazine*, Special Edition on '50 years of oil in Nigeria', (18 February, 2008), cited in, Okpanachi E., 'Confronting the Governance Challenges of Developing Nigerian

The collective body of rules and procedures provide an important benchmark:

- They define good oil field practice in terms of international standards, referring to the Codes issued by the Institute of Petroleum Safety, the American Petroleum Institute, and the American Society of Mechanical Engineers.¹¹
- They require up-to-date equipment to be used in order to prevent pollution, and dictate prompt steps be taken to control and, if possible, end pollution. The regulations insist, in particular, that equipment be maintained in good repair.¹²
- The standard terms on which a license is granted include the provisions that:
 - Underground pipelines shall be protected against corrosion when soil conditions render such protection necessary in the opinion of the Director of Petroleum Resources.
 - All pipelines shall be patrolled and inspected once every 24 hours or at such longer intervals as the Director of Petroleum Resources may approve, and in addition at all times when pumping operations are taking place. The patrol and inspection must be undertaken by competent persons appointed by the licensee of the pipeline. Details of the inspection shall be recorded in a logbook provided for that purpose.¹³
- The obligation on an operator to act within 24 hours of the occurrence of the spill, so as to contain and recover it, exists regardless of whether or not its source is known. There is no room for the operator to refuse to contain a spill while waiting to determine its origin. This is true regardless of whether the operator suspects the damage was the result of the intervention of third parties.¹⁴

International standards are also clear about the steps that need to be taken to avoid sabotage. In the Double Standard Report Professor Steiner has indicated that, where there is a high risk of third-party interference, an operator could adopt measures such as; sabotage-resistant pipe specifications; alternative routing away from high risk areas; burial and concrete casements around a pipe; enhanced leak detection systems; and, crucially, enhanced

Extractive Industry: Policy and Performance in the Oil and Gas Sector', Review of Policy Research, volume 28, no. 1 (2011) 25-47, at 43-44.

¹¹ The Petroleum (Drilling and Production) Regulations of 1969 Art 25 contained in Petroleum Act, 1969.

¹² *Id.*

¹³ Standard forms contained in Petroleum Act, 1969, Form G.

¹⁴ NOSDRA, *infra*.

pipeline surveillance that is capable of detecting any disturbance to the integrity of the pipeline. These measures reflect some of the measures of the American Petroleum Institute.¹⁵

As Nigeria operates a Federal system of government over 30 states and a Federal Capital Territory, it should be noted that the State environmental protection agencies (SEPA's) are also involved in the environmental regulation and monitoring of individual states. These individual State-based agencies have not proved successful in combating/reducing oil spill incidence and magnitude. This is mainly due to the fact that, as noted above, petroleum industry controls reside almost totally with the Nigerian federal government, and especially the DPR.¹⁶ Thus, even though environmental degradation takes place within federal states, these states are not in a position to monitor and enforce compliance with environmental laws.¹⁷

It has also been argued that the process and politics of compensation among the various players in the oil industry have helped to aggravate conflicts in the region.¹⁸ The claim is that compensation computations fail to embrace or weigh fairly all the factors that are relevant to estimating value. These include the cultural heritage and significance of resources areas, and more importantly the need for long-term community sustainability. Furthermore, it is argued that government guidelines for compensation are far from adequate and comprehensive.¹⁹ This has led to a wider allegation made by a specialist that: "Statutory regulation of oil industry activities in Nigeria provides little or no protection for victims of oil pollution"²⁰.

The fall-back is the common law regime, based largely on the torts of trespass to land, nuisance, negligence, and related rules.

ii) The Common Law

As a complement to the regulatory framework, Nigeria's common law background – which often tracks developments in the UK - allows for the possibility of oil spill claims used in tort

¹⁵ Professor Steiner, R discusses these measures in, 'Double standard, Shell practices in Nigeria compared with international standards to prevent and control pipeline oil spills and the Deepwater Horizon oil spill', Report on behalf of Friends of the Earth/Milieudedefensie Netherlands, University of Alaska, Anchorage, Alaska USA (November, 2010), at p28 Available at:

<http://www.milieudedefensie.nl/publicaties/rapporten/double-standard> (last accessed 12 November 2013).

API, Standards are, available at <http://www.api.org/Publications-Standards-and-Statistics/Annual-Standards-Plan.aspx> (last accessed 6 October 2012).

¹⁶ See: 1999 Constitution, *supra*, Section 44(3).

¹⁷ Okpanachi, *supra*, at 37.

¹⁸ Onosode, G. 'Environmental and Community Consideration in Nigeria's Oil and Gas Industry: Towards a Re-assessment', paper presented at the International Seminar on the Petroleum Industry and the Nigerian Environment, Abuja, Nigeria (1998).

¹⁹ *Id.*

²⁰ Okonmah, P.D., 'Right to a Clean Environment: The Case for the People of Oil-Producing Communities in the Niger Delta', *Journal of African Law*, vol.41, no.1 (1997) 43-67, at 43.

law. While these sometimes offer the prospect to victims of levels of compensation greater than those provided by statute, there are well-known problems regarding the enforcement of these judgments.²¹ This raises the possibility of the enforcement of some of those judgments abroad, which will be considered below.

The findings by Nigerian courts that Shell has committed these common law wrongs are significant as a body of precedent that has been gradually building.²² A typical early example is found in the case of *Umudje v. Shell-BP Petroleum* (1975), where the Nigerian Supreme Court held the corporations liable for damage to the ponds and lakes of the plaintiffs.²³ The well-known case of *Agbara et al. v. Shell Petroleum et al.* is the most recent of the significant decisions.²⁴ The Federal High Court determined that Shell had committed a continuing wrong against the Ejama-Ebubu community since 1970 by not attending to an on-going spill. The Court awarded 15.4 billion naira, which approximates to \$ 100 million.²⁵

Moreover, the growing influence of human rights standards derived from regional human rights treaties (notably the African Charter on Human and People's Rights in the case of Nigeria,²⁶ and the European Convention on Human Rights in the case of the UK and Netherlands procedural law²⁷) have revealed the potential to favour greater individual and community protection. This is especially relevant in relation to improved prospects for legal standing to challenge interferences with private or common property rights.

Both the evolving attitude of the Nigerian courts²⁸ and the prospect of litigation in the EU and in the USA could transform future awards like this into important impacts on the corporate balance sheet. An insurance claims specialist estimates that the overall number of oil-spill related claims has massively increased.²⁹ In addition, there is the real prospect of a significant

²¹ See, as an example: the discussion of the case of *Ijaw community v. SPDC* (2006) in the accompanying report by Ong, D. in Appendix II.

²² See: *Shell-BP Ltd. v. Cole & Ors.* [1978] N.S.C.C., vol. 11, at 96. For a comprehensive treatment of the application of this common law rule in Nigeria, see: Adewale, O., 'Rylands v. Fletcher and the Nigerian petroleum industry', *Journal of Private and Property Law*, Vols. 8 & 9 (1987/88), 37.

²³ *Umudje v. Shell-BP Petroleum*, (1975) 9-11 S.C. 155.

²⁴ *Agbara v. Shell Petroleum*, Suit No: FHC/ASB/CS/231/2001.

²⁵ *Id.*

²⁶ See: Okonmah, *op. cit.*, and also, Eaton, J.P., 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment', *Boston University International Law Journal*, Vol.15 (1997) at 261; The Gbemre case before the Nigerian courts, which successfully alleged that gas flaring activities went against rights to a healthy environment under both the Nigerian Constitution and the African Charter rights, is a good example of the successful invocation of such human rights.

²⁷ For an initial treatment on this issue, see: Wilde, M., 'Locus Standi in Environmental Torts and the Potential Influence of Human Rights Jurisprudence', *Review of European Community and International Environmental Law*, Vol. 12, No.3 (November 2003) at 284-94.

²⁸ See: the detailed report by Ong, D. in Appendix II, referring to a relaxation of the *locus standi* rules, a relaxation of evidence rules, and a broadening of compensation awards.

²⁹ Global Risk Solutions (GRS) is a professional services company based in the US that specialises in "a diverse range of information management, cost analysis, and insurance and claims support services, designed to facilitate the loss indemnification and claims payments processes". It headlines its list of projects on its website with the title: "40,000+ Claims, Crude Oil Pipeline Break, Nigeria". GRS draws its prediction from its work in Nigeria in which it has "planned and managed receipt and recording of third party liability

rise in litigation against Shell taking place in venues such as the UK, the Netherlands, or the USA, as will be considered in Sections II and III below.

iii) Human Rights and Pollution: the Example of Health Protection

Certain human rights, as incorporated into Nigeria's legal order, are relevant here. For example, the United Nations has recently focused, *inter alia*, on the heightened risk of additional cancers due to the oil spills in the Niger Delta. A recent report by the United Nations' Environmental Program (UNEP) indicates that:

“(d)ifferent countries have different thresholds for policy-driven parameters, such as acceptable additional cancer risk. Thresholds ranging from 1 per 10,000, to 1 per 1,000,000 people have been used. The WHO guidelines are based on 1 per 100,000. Shell Global Solutions has used the acceptable risk threshold of 1 per 10,000 as there was no applicable national legislation. However, this was done without consulting the national authorities and explaining the likely impact on clean-up criteria. For example, using a risk threshold of 1 per 100,000, as used by the WHO, would have resulted in a clean-up threshold of 500 mg/kg in some instances. This lower threshold would have needed a different technological approach to clean-up and would have significantly increased the costs of clean-up to the company.”³⁰

Shell has accepted this UNEP report, and undertakes to act on it.³¹ Apart from these future undertakings, however, legal liabilities for what has already happened may also arise. As David Ong's accompanying report in Appendix II shows, the Nigerian judiciary has held that it has jurisdiction to grant leave to citizens and residents of the Federal Republic of Nigeria to apply for the enforcement of their fundamental rights to life and dignity of the human person as guaranteed by the Constitution.³² The Court has found that these constitutionally guaranteed rights include the right to a clean, poison-free, pollution-free healthy environment.³³ It is conceivable that interpretations of this right will fix the threshold for what

claims. Consulted on claims management strategies including negotiations with tribal chieftains and Nigerian governmental authorities. Assembled and managed a team of Nigerian claims adjusters.” Available at: <http://www.globalriskssolutions.com/projects.htm> (last accessed 6 October 2012).

³⁰ *United Nations Environment Programme: Environmental Assessment of Ogoniland* (2011) at 147, available at <http://www.unep.org> (last accessed 6 October 2012).

³¹ “... In 2011, the United Nations Environment Programme (UNEP) released a study of oil spills in Ogoniland, where SPDC operated until 1993. SPDC immediately accepted the full recommendations of the UNEP report, and has agreed to establish an independent scientific advisory panel to review SPDC practices in the rehabilitation and remediation of oil spill sites in the Niger Delta. SPDC hopes the UNEP report will be a catalyst for cooperation to address the challenges in Ogoniland and the wider Niger Delta. SPDC is currently working with the government and non-governmental bodies to define the next steps towards implementing the recommendations in the report. This response will require a joint effort by all stakeholders, and SPDC intends to play its full part.” *RDS Annual Report 2011*, at 51, available at: http://reports.shell.com/annual-report/2011/servicepages/downloads/files/entire_shell_20f_11.pdf (last accessed 6 October 2012).

³² 1999 Constitution, *supra*, at Sections 33(1) and 34(1).

³³ *Gbemre v. Shell Petroleum Development Company Nigeria Limited and Others* (2005), AHRLR 151 (NgHC 2005), available at:

constitutes a healthy environment closer to the WHO norm. Investors should be concerned, in the meantime, about the impact of this part of the UNEP report on their company's reputation.

iv) The Issue of Sabotage

a) Responsibility to secure hazardous facilities

Shell has persistently claimed that the major part of the damage caused has been due to third-party sabotage of the line. While there is considerable dispute about the accuracy of the figures they give, it is important to see what significance this claim has as a legal defence for the company. The legislation that regulates oil spills exempts the company from the required compensation payments in the event that the spillage comes from the malicious interference of third parties.³⁴ At the same time, however, the regulations incorporate clear international requirements about the need for special types of equipment and heightened degrees of surveillance, in a high-risk area such as the Delta. These standards should contribute to a parallel set of rules drawn from the common law. Here the core principle is that the one who carries out hazardous activity on land is responsible for failing to anticipate and minimise the damaging effect of all trespassers, even those who are ill-intentioned. If a facility is not adequately secured against such trespassers, then the owner or operator of that facility can be at least partly responsible for the damage done to third parties by, for example, thieves or others who have malicious intent.³⁵ These principles also apply in Nigerian law. As noted above, the law incorporates clear international standards that indicate special materials to be used, special surveillance to be exercised, and care in selecting the location of the route to be followed by the pipeline.³⁶ This will mean that, in any given case; (a) the claim of sabotage advanced by Shell may not be supported by the facts; and (b) even if it is, this does not absolve Shell from responsibility for not having adequately supervised the facility that was interfered with.³⁷

<http://www.chr.up.ac.za/index.php/browse-by-subject/418-nigeria-gbemre-v-shell-petroleum-development-company-nigeria-limited-and-others-2005-ahr-151-nghc-2005.html> (last accessed 6 October 2012).

³⁴ 1990 Oil Pipelines Act, Section 11(5)(c) reads as follows:

“(5) 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.”

³⁵ *Smith and Others v. Littlewoods Organisation Ltd.* [1987], UKHL 18; *Maloco v. Littlewoods Organisation Ltd.* House of Lords [1987], 2 W.L.R. 480 [1987] A.C. 241.

³⁶ See generally: 1990 Oil Pipelines Act, *supra*.

³⁷ For a detailed application of this principle and the expected management of sabotage risk in this area please see Steiner, R 'Double standard, Shell practices in Nigeria compared with international standards to prevent and control pipeline oil spills and the Deepwater Horizon oil spill', Report on behalf of Friends of the Earth/Milieudéfensie Netherlands, University of Alaska, Anchorage, Alaska USA (November, 2010), at p27-29 Available at:

<http://www.milieudéfensie.nl/publicaties/rapporten/double-standard> (last accessed 12 November 2013).

b) Sabotage does not relieve the obligation to clean up and to remediate

Even if this supervision was adequate, and there was nevertheless interference by third parties, this might absolve Shell from the responsibility for an initial leak, but it does not relieve the organisation from its obligation to stop the leak as soon as possible and to clean up promptly in order to minimise the resulting damage. These further obligations flow from its responsibility as a manager of the hazardous installation. The Environmental Guidelines and Standards for the Petroleum Industry, which apply in Nigeria,³⁸ require the operator to clean up the spill *irrespective of its cause*. If these responsibilities were extinguished, it would make local populations vulnerable to massive damage. Section 4.1 of these guidelines states that:

“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.”

Despite this, it is reported that the recent trend is for the SPDC to refuse to even contain the effects of spills allegedly caused by third parties.³⁹

v) Comparing Approaches

It is useful to contrast the company's approach in Nigeria with two contemporary examples of 'Big Oil' responses to clean-up, remediation and compensation for oil spills: the BP/US and Total/French/EU responses to the *Deepwater Horizon* and *Erika* oil spills, respectively. These examples arguably represent international best practice in this field.

It is important to note the swift admission of BP's overall corporate responsibility,⁴⁰ coupled with its advanced acceptance of an initial multi-billion US dollar liability for the *Deepwater Horizon* spill. This accompanied the establishment of a formal institutional framework for the management of compensation claims. This can be contrasted with the decades-old efforts to engage Shell (and other international oil companies) with their responsibility and liability for oil

³⁸ DPR, *Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN)*, first issued in 1992, revised edition in 2002. Under Section 9(i) b (iii) of the Petroleum Act 1969, the Minister is empowered to make regulations. A number of regulatory instruments have been promulgated and EGASPIN is a collection of standards and practices, and is the main environmental document used by the oil industry.

³⁹ See: Allen, F., *Implementation of Oil-Related Environmental Policies in Nigeria: Government Inertia and Conflict in the Niger Delta*, Cambridge Scholars Publishing, 2012.

⁴⁰ BP's overall corporate responsibility for the *Deepwater Horizon* oil rig explosion and consequent loss of life, as well as environmental damage from the resulting oil spill has now been confirmed by findings in the final investigation report of the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) of the US Federal Ministry of the Interior into the disaster: 'Report Regarding the Causes of the April 20, 2010 Macondo Well Blowout,' released on 14 September, 2011, available at: <http://www.boemre.gov/pdfs/maps/DWHFINAL.pdf> (last accessed 6 October 2012).

spills in the Niger Delta.⁴¹ Many NGOs and commentators such as Professor Steiner have drawn attention to the significant difference between efforts to clean-up, remediate and compensate oil pollution damage in the recent *Deepwater Horizon* spill and for the 1989 Exxon Valdez oil tanker spill in Prince William Sound, Alaska, with the continuing lack of such efforts for spills of similar overall magnitude in the Delta region, despite the latter taking place over a greater length of time.⁴²

A further example of corporate efforts at clean-up, remediation and compensation is evidenced from the Total oil company response following the *Erika* oil tanker spill off the French coast of Brittany.⁴³ Total, as the oil cargo owner, was sued by French local authorities and wildlife NGOs. They were co-defendants alongside several ship (worthiness) classification societies in a suit for clean-up and remediation costs. The plaintiffs obtained an initial order for Total to pay out billions of Euros in clean-up and remediation costs. Moreover, the European Court of Justice has ruled that the spill could be defined as an unauthorised waste disposal operation, utilising the very broad definition of 'waste' under EU environmental laws.⁴⁴

⁴¹ For a detailed comparison of the response to the Deepwater Horizon spill and the Niger Delta please see: Steiner, R 'Double standard, Shell practices in Nigeria compared with international standards to prevent and control pipeline oil spills and the Deepwater Horizon oil spill', Report on behalf of Friends of the Earth/Milieudéfensie Netherlands, University of Alaska, Anchorage, Alaska USA (November, 2010), at p28 Available at:

<http://www.milieudéfensie.nl/publicaties/rapporten/double-standard> (last accessed 12 November 2013).

⁴² Vidal, J., environment editor, 'Nigeria's agony dwarfs the Gulf oil spill. The US and Europe ignore it: The Deepwater Horizon disaster caused headlines around the world, yet the people who live in the Niger delta have had to live with environmental catastrophes for decades', *The Observer (UK) newspaper*, Sunday 30 May 2010.

⁴³ See: 'Erika Oil Tanker Break-up & Spill Incident,' France, 12 December 1999, Report of the International Oil Pollution Compensation Funds (IOPC) Organization, updated 9 May 2011, available at http://www.iopcfund.org/npdf/AR09_E.pdf (last accessed 6 October 2012).

⁴⁴ *Commune de Mesquer v. Total*, C-188/07. Summary of ECJ decision available at http://ec.europa.eu/dgs/legal_service/arrets/07c188_en.pdf (last accessed 6 October 2012).

B. SECURITIES LAW: The Need for Accuracy in Statements Made to Investors

Potential Liability:

Statements made in its securities filings and court filings, when compared to its statements before the judiciary, could suggest that RDS has overstated its degree of control over the Group's environmental policy in its 2010 Annual and Sustainability Reports. These reports, as securities filings, are intended to inform investors about the ways in which Shell manages and mitigates risks that could have an impact on its financial stability and earnings. As will be seen below, in defending its lawsuit in the Netherlands, RDS has stated that it has no ability to require Shell subsidiaries to comply, in the details of their day-to-day operations, with its stated environmental policies.² In its securities filings, however, RDS indicates that it stands at the apex of a well-disciplined group, having in place procedures to learn details of faulty operation and to require its subsidiaries to avoid or respond quickly to the faults.³ RDS itself is a holding company that does not engage in any activity that would require it to respond to spills itself. If it cannot, and does not, compel subsidiaries to abide by these policies and procedures, their usefulness in determining financial risk is limited. If RDS intentionally or recklessly misstated the level of its control over its environmental and social policy – implying that its policies mitigate risks that they simply cannot address – particularly in the area of responding to spills, these could constitute significantly misleading statements and subject RDS to fines and civil suits by shareholders.

RDS shareholders should be seeking further clarification about the degree of control RDS maintains over its subsidiaries. The relevant questions include:

- What level of involvement does RDS exercise over its subsidiaries, particularly relating to preventing or recovering from spills? Has this level of involvement changed substantially in the last 5 years?
- What does it mean for RDS to say that it 'expects' compliance with its policies and procedures? How does it follow up with subsidiaries to ensure compliance? What happens if a subsidiary does not comply or routinely fails to comply with Group standards? Are there corrective measures in place, and if so what are they? What happens if those corrective measures don't work?
- How does RDS reconcile its statements in its security filings with its statements in the Dutch litigation? What steps are taken for ensuring accurate information in its securities filings when it addresses its social and environmental standards?
- What are the consequences for Shell's reputation if the parent company, RDS, is found by the SEC to have made misleading statements in its materials soliciting investment about the degree of control exercised over its subsidiaries' activity?
- What can investors concretely call for by way of improved controls by RDS over the implementation by its subsidiaries of its environmental and social standards?

See: Section I(B)(ii) of this report and Section II.

² 'Motion for the Court to Decline Jurisdiction and Transfer the Case, also Conditional Statement of Defense in the Main Action, Oruma et al v. Royal Dutch Shell and SPDC,' Court of The Hague, Court Docket number: 2009/0579, Date: 13 May 2009, para. 139.

³ See: *infra* n. 51-58 and accompanying text.

i) Shell's Statements to Potential Investors in More Detail

RDS has incorporated its 2011 Sustainability Report into its US SEC 20-F filings through at least three cross-references, indicating to shareholders that they can rely on information in the Report. The language of the Sustainability Report also indicates that it can be used by shareholders in assessing the value of the Shell Group.⁴⁵ As a result, any materially misleading information contained in the 20-F filing or the Sustainability Report may violate Exchange Act § 10b-5 and SEC Rule 10b-5.⁴⁶

Throughout its Sustainability Report, its SEC Form 20-F filing, and the Shell website, RDS represents that it stands in ultimate control of a well-disciplined environmental policy throughout the Shell Group. Examples of this include:⁴⁷

- “Our Governance Standards: ... All our employees and contractors, including those at joint ventures we operate, are required to act in accordance with the Shell Health, Safety, Security, Environment and Social Performance (HSSE & SP) Control Framework. This defines standards and accountabilities for HSSE & SP at *every level in our organisation*. We have comprehensive assurance processes in place to *monitor compliance*. The people who manage our projects or facilities are accountable for running their operations responsibly.... *Overall accountability for sustainable development within Shell lies with the CEO and Executive Committee*. They set priorities and standards in sustainable development that help shape our business activities. *The CEO chairs the HSSE & SP Executive, which assesses how we manage our sustainability performance. The Corporate and Social Responsibility Committee (CSRC) of the Board of Royal Dutch Shell plc reviews policies and performance with respect to the Shell General Business Principles, Code of Conduct, HSSE & SP standards and issues of public concern on behalf of the Board.*”⁴⁸
- “The [Corporate and Social Responsibility] Committee met four times during the year ... The aim of the Committee is to *maintain a comprehensive overview of the policies and conduct of the subsidiaries* of the Company with respect to ... *the environment and social performance . . .*”⁴⁹
- “In the event that a spill occurs, we have in place a number of recovery measures to minimise the impact. Our major installations have plans to respond to a spill. We are able

⁴⁵ See, for example: Royal Dutch Shell Plc, ‘Sustainability Report 2009 at I’; Royal Dutch Shell Plc, ‘Sustainability Report 2010’, at 36 and ‘Sustainability Report 2011’, at 1.

⁴⁶ See: *In re AES Corp. Securities Litigation*, 825 F. Supp. 578, 588 (S.D. N.Y. 1993); see also; Case D.W., ‘Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective,’ 76 *University of Colorado Law Review*, (2005) 379, at 392.

⁴⁷ Emphasis added

⁴⁸ Royal Dutch Shell Plc, *Sustainability Report 2011*, at 3; Available at http://reports.shell.com/sustainability-report/2011/servicepages/downloads/files/entire_shell_sr11.pdf (last accessed 6 October 2012). (Emphasis added)

⁴⁹ Royal Dutch Shell Plc, *Annual Report and Form 20-F for the Year Ended December 31 2010*, (2011) at 80. (Emphasis added)

- to call upon significant resources such as containment booms, collection vessels and aircraft. We conduct regular response exercises to ensure these plans remain effective.”⁵⁰
- Shell “expect[s] every Shell company to follow our environmental and social standards and practices when operating. *We define who is responsible for applying these standards and we monitor performance.*”⁵¹
 - In its *Group Governance Guide*, RDS says that the “*CMD* (Executive Committee) 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.*”⁵²
 - Finally, in emphasising the element of control that is exercised over the actions of subsidiaries, the company states that there is in place the Shell Global Helpline: “... Employees, contract staff and third parties with whom Shell has a business relationship (such as customers, suppliers and agents) may raise ethics and compliance concerns through the Shell Global Helpline. The Shell Global Helpline is a worldwide reporting mechanism, operated by an external third party, which is open 24 hours a day, seven days a week through local telephone numbers and through the internet at www.shell.com or www.compliancehelpline.com/shell.”

The natural inference to draw from these statements is that RDS controls at the highest level the formulation and implementation of standards for all companies in the group, including SPDC. A different picture is presented by RDS in the recent litigation in the Netherlands. Here, the issue is whether the company might be found by the courts to share in legal responsibility for damage done in the Delta, along with SPDC. RDS is concerned to distance itself from that liability by stating to the court that:

- “.... RDS is not directly involved in operations of its operating companies, including SPDC. RDS has prepared guidelines in various areas that are relevant for the group as a whole, such as care for the environment . . .” However, the company goes on to say that it “... could not be expected to interfere in the clean-up and remedial work of the oil spill in dispute...”⁵³

⁵⁰ *Id.*, at 51.

⁵¹ Shell, *Environment & Society: Sustainable Development: Governance, controls and assurance*, available at: http://www.shell.com/home/content/environment_society/s_development/controls/ (last accessed 26 May 2011, attached as Attachment A). (Emphasis added)

⁵² RDS Group Governance Guide, at 4. (Emphasis added)

⁵³ *RDS and SPDC v. Oguru*, Motion for the Defense, Court of The Hague Docket number: 2009/0579 Date: 13 May 2009 at para 127; RDS also argues (para 139 ff) that it would be incompatible with its role under corporate law to intervene. This degree of interference is ‘incompatible’ with corporate law principles only in the sense that the company loses the normal protection of limited liability accorded to shareholders. It does not violate corporate law in any way that attracts, for example, fines. It only shifts from the status of typical shareholder to one with an added level of potential responsibility. For further analysis of this point, see Section II.

- The company adds that “... even if the clean-up and remedial work was not performed with sufficient diligence and care, an (indirect) holding company like RDS may still not be expected to verify SPDC’s conduct in this context, *nor can it be expected that it should have intervened because the work was not performed with sufficient diligence and care.*”⁵⁴ This was true, the company claims, since “... *even if RDS had the knowledge alleged by [the plaintiffs]. by law RDS was still not required to intervene in any way because RDS could not be expected to interfere with the daily operations of subsidiaries (twice removed) such as SPDC.*”⁵⁵

The problems with these interpretations of the law as a foundation for company policy will be considered in Section II (C) & (D). Here, it is important to note the clash between Shell’s portrayal of its position before a court and its portrayal of its position in its securities filings and sustainability statements. The latter invite the investor to take a stake in the company based on an understanding that RDS, as a parent company, is careful to superintend standards for environmental and related standards “... at every level in our organization.” This is backed by mechanisms, such as the worldwide telephone hotline, which are designed to feed significant details concerning what is happening at all levels back to “... the HSSE & SP Executive which assesses how we manage our sustainability performance.” At the same time, as has been seen, RDS claims that, even if informed of certain spillages in the Delta in violation of its standards, these could be considered too insignificant for it either to monitor or for it to feel duty bound to act upon. This is difficult to reconcile with the picture of a company that “..... expect[s] every Shell company to follow our environmental and social standards and practices when operating. We define who is responsible for applying these standards *and we monitor performance.*”⁵⁶

It is not easy to see how the company *effectively* monitors performance, and does so by insisting that Group standards be met, when at the same time it would not feel it appropriate to intervene even when it knows that there is a breach of those standards taking place at a given site. The company is portraying a tightly disciplined approach for some purposes which turns into distant management of semi-autonomous units on other occasions.

Rather than having overstated the degree of control over group environmental policies, RDS may have, before the Court, understated the degree of that control. This will be examined further in Section II. However, alongside any information that will come out as future litigation progresses, investors should ask RDS to delineate where and when it exercises particular types of influence over environmental and human rights impacts. Investors should further ask

⁵⁴ *Id* para 127.

⁵⁵ *Id.* para 139.

⁵⁶ Shell, *Environment & Society: Sustainable Development: Governance, controls and assurance*, available at: http://www.shell.com/home/content/environment_society/s_development/controls/ (last accessed 26 May 2011, attached as Attachment A). (Emphasis added)

for greater explanation of what the chain of responsibility is for reporting spills, receiving those reports, and organising an appropriate response.

RDS might claim that Nigeria is a special case, but it regularly makes references to its Nigerian operations in relation to overall Group activities, using terms such as ‘us’, ‘we’ and ‘our’ in its relevant documents. It is unclear what legal basis they would have for making a claim that Nigeria and SPDC are unique cases. SPDC, like many of RDS’s other subsidiaries, is wholly owned by RDS.⁵⁷ If RDS claims that it is not permitted by law to intervene in the day-to-day work in SPDC even if it knows it is “... failing to exercise sufficient diligence and care...” this would logically be its approach towards its other subsidiaries. If it places on itself this comprehensive refusal to intervene, then investors should be informed of this since, as was pointed out earlier, it weakens the impact of its environmental and human rights policies on the Group’s actual extraction or transportation activities. RDS appears to have omitted important and relevant facts pertinent to its SEC filings.

It is worth noting that RDS’s 2011 report is even more forceful in its description of corporate supervisory roles and expectations than the 2010 report. It now states: “All our employees and contractors, including those at joint ventures we operate, are *required to act in accordance* with the Shell Health, Safety, Security, Environment and Social Performance (HSSE & SP) Control Framework. This defines standards and accountabilities for HSSE & SP at every level in our organisation.”⁵⁸ The assertion continues: “We have comprehensive assurance processes in place to monitor compliance. The people who manage our projects or facilities are accountable for running their operations responsibly.... HSSE & SP specialists, who are located at facilities around the world, are responsible for working with business leaders to help improve our sustainability performance.”

The 2011 report also insists that the CEO and Executive Committee – who are all part of the parent RDS – are responsible for “[o]verall accountability for sustainable development.” These individuals “set priorities and standards in sustainable development that help shape our business activities.” Additionally, the Corporate and Social Responsibility Committee and the parent RDS’s Board of Directors “review policies and performance with respect” to the standards, *with members of the committee “visit[ing] facilities to become more familiar with our operations and the views of local people”*⁵⁹.

⁵⁷ The responsibility of RDS for SPDC is also mentioned by Steiner, R in ‘Double standard, Shell practices in Nigeria compared with international standards to prevent and control pipeline oil spills and the Deepwater Horizon oil spill’, Report on behalf of Friends of the Earth/Milieudéfensie Netherlands, University of Alaska, Anchorage, Alaska USA (November, 2010), at p42 Available at:

<http://www.milieudéfensie.nl/publicaties/rapporten/double-standard> (last accessed 12 November 2013)

⁵⁸ RDS, *Shell Sustainability Report 2011*, at 3, available at: http://reports.shell.com/sustainability-report/2011/servicepages/downloads/files/entire_shell_sr11.pdf (last accessed 6 October 2012). (Emphasis added)

⁵⁹ *Id.*

These statements widen the gap between the position that RDS asserts in litigation and that which it maintains in its statements to investors: between the distance it claims from the day-to-day running of its subsidiaries' operations when its legal liability is at stake, and the closeness of its involvement with those operations when it portrays its level of social responsibility.

ii) The Legal Background in More Detail

The United States

Securities laws in the US, the UK, and the Netherlands have in common the requirement that companies selling shares on their stock exchanges must not mislead investors on material issues. Liability for misleading shareholders may arise in any or all three countries. The US requirements are set out in the Securities Exchange Act of 1934 (the Exchange Act) §10b-5 and SEC Rule 10b-5. These provisions make it unlawful for anyone to “directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange . . . (b) *To make any untrue statement of a material fact or to omit to state a material fact necessary* in order to make the statements made, in the light of the circumstances under which they were made, not misleading....”⁶⁰ If the statements are found to be misleading, fines may be levied, and it is possible to bring private suits alongside those brought by the SEC.

While there is no ‘bright-line rule’ for determining whether statements are material,⁶¹ US courts have deemed declarations regarding a corporation’s environmental history, outstanding liability, and procedures as potentially ‘material’ statements, and courts have found that false or misleading statements relating to environmental standing may give rise to liability under Rule 10b-5.⁶² Additionally, if any false statements were to be made on the Shell Group website, in the sections generally targeted at investors (such as ‘governance’) could give rise to such claims as well.

Under US law, liability can arise through an SEC complaint or through private actions by individual investors.⁶³ Private securities litigation in the US has a higher standard for pleading

⁶⁰ 17 C.F.R. § 240.10b-5; *see, also*, 15 USC §78j. (Emphasis added)

⁶¹ In re BP p.l.c. Securities Litigation, Slip Copy, 2012 WL 468519, *17 (S.D. Texas, February 13, 2012); *Matrixx Initiatives, Inc., v. Siracusano*, 131 S. Ct. 1309, 1318-23 (2011).

⁶² *See*: In re AES Corp. Securities Litigation, 825 F. Supp. 578, 588 (S.D. N.Y. 1993); *Grossman v. Waste Management, Inc.*, 589 F. Supp. 395, 411-412 (D.C. Ill. 1984); *see also*: Case D.W., ‘Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective,’ 76 *University of Colorado Law Review*, (2005) 379, at 392. For similar conclusions regarding misleading environmental declarations as materially relevant when included in proxy statements, *see*; *United Paperworkers International Union v. International Paper Company*, 985 F.2d 1190, 1199-1200 (2d Cir., 1993).

⁶³ *See, for example*: In re AES Corp. Securities Litigation, 825 F. Supp. 578, 588 (S.D. N.Y. 1993); In re BP p.l.c. Securities Litigation, Slip Copy, 2012 WL 468519, *15 (S.D. Texas, February 13, 2012).

claims than normal civil actions.⁶⁴ This pleading requirement only extends to private securities litigation and not to litigation instigated by the SEC.⁶⁵ A private complaint must show that the materially misleading statements were made with “an intent to deceive or a reckless indifference as to whether the statements were misleading.”⁶⁶ Plaintiffs can meet the standard by alleging facts that show a set of facts that when taken together “give rise to a strong inference” of intentional fraud that is stronger than any opposing inference provided by the defendant.⁶⁷ Alleging only motive and opportunity are not sufficient for plaintiffs. Plaintiffs must therefore be able to show that there was knowledge that the statements were false, or a reckless disregard as to whether they were false.⁶⁸

Shell and its investors may find informative a recent securities decision regarding BP’s environmental statements in light of the *Deepwater Horizon* incident in the Gulf of Mexico.⁶⁹ There is a similarity in the statements made by Shell in its reports with statements made by BP that became the subject of the private securities litigation. Ultimately, the plaintiffs’ claim was dismissed because they had not met the heightened pleading requirements for private securities litigation in the US. What is significant about the case, though, is that: (1) the Court found that BP’s statements in its securities filings were materially misleading when they portrayed BP as having a standard environmental and safety operating system when, in fact, that standard system was not operational throughout the Gulf Coast; and (2) Even though the plaintiffs did not yet show that BP officials had acted intentionally, the Court specifically noted that they could in fact do so in a future pleading. The complaint was therefore not necessarily without merit, but the plaintiffs had not yet given the Court enough facts to allege an intent to deceive.

Amongst other statements at issue in the case, BP claimed in its 2009 Annual Review that “[s]afe, reliable and compliant operations remain the group’s first priority. A key enabler for this is the BP operating management system (OMS), which provides a common framework for all BP operations, designed to achieve consistency and continuous improvement in safety and efficiency. Alongside mandatory practices to address particular risks, OMS enables each site to focus on the most important risks in its own operations and sets out procedures on how to manage them in accordance with the group-wide framework.”⁷⁰ The plaintiffs alleged that BP had never provided the relevant Gulf operations with OMS material and had not intended

⁶⁴ *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319, 321-322, 127 S.Ct. 2499, 2507, 2509 (U.S. 2007).

⁶⁵ 15 USC §78u-4.

⁶⁶ In re BP p.l.c. Securities Litigation, Slip Copy, 2012 WL 468519, 47 (S.D. Texas, February 13, 2012), *citing Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 709 (7th Cir., 2008).

⁶⁷ *Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S.Ct. 2499 (U.S. 2007).

⁶⁸ *Id.*

⁶⁹ In re BP p.l.c. Securities Litigation, Slip Copy, 2012 WL 468519 (S.D. Texas, February 13, 2012).

⁷⁰ *Id.* at 27.

to implement BP's OMS system in the Gulf.⁷¹ The Southern District of Texas found that its statements could be material under Rule 10b-5.⁷²

"Continually referring to OMS with descriptors such as 'framework,' 'overall,' and 'company-wide' becomes misleading when the safety program was not intended to apply to the majority of BP's Gulf operations. ... [G]iven the manner in which OMS was repeatedly described . . . a reasonable investor would likely find it material to know that OMS's application to 'all' BP operations would exclude, in the Gulf region alone, six of the seven rigs BP worked on. BP apparently attributes different meaning to descriptors such as 'all,' 'company-wide,' 'common,' 'framework,' 'each,' 'single,' and 'consistent' than the average investor might assume."⁷³

The Court made a similar finding in relation to a statement in BP's 2009 Sustainability Report, which stated that BP "seek[s] to ensure an infrastructure is in place to deal effectively with spills and their impacts. Our operating facilities have the capacity and resources to respond to spill incidents and we participate in industry and international forums to coordinate planning and emergency response."⁷⁴ BP attempted to claim that the statements and omission regarding the operation of BP's OMS in the Gulf was only material in light of the *Deepwater Horizon* accident, so that it was not material to investors at the time it was made.⁷⁵ The court rejected this.⁷⁶

Ultimately, the Court found that the plaintiffs had not adequately pled one aspect of the law: whether BP had made the misleading statements with intent to deceive.⁷⁷ The BP plaintiffs needed to provide specific claims indicating that the management or officers of BP had intended to deceive the shareholders. The Court found that while the BP plaintiffs had not adequately met this requirement, they could do so in future pleadings regarding the exact same statements.⁷⁸ Whether the statements were reckless was not considered, but could be in future cases.

Applying the BP decision to the statements by Shell, it appears that RDS could face liability if the statements regarding the group-wide nature of its environmental policies are actually misleading and were made with an intent to mislead, or reckless indifference as to whether they were making misleading statements. In the light of its pleadings to the Dutch court, it is important for shareholders to seek greater clarification as to what types of liability they are potentially facing, and how RDS reconciles what appear to be two competing positions.

⁷¹ *Id.* at 28.

⁷² *Id.* at 29-30.

⁷³ *Id.* at 30.

⁷⁴ *Id.* at 37.

⁷⁵ *Id.* at 38.

⁷⁶ *Id.* at 38.

⁷⁷ *Id.* at 47.

⁷⁸ *Id.* at 47.

The United Kingdom

Similar to the US law, in the UK, the Financial Services and Markets Act of 2000 (the FSMA) Section 96A and the Disclosure Rules and Transparency Rules of the Financial Services Authority (the FSA) Rule 2.2.1 require that the issuer shall disclose any inside information⁷⁹ that directly concerns the issuer. Rule 1.3.4 further requires that an issuer of securities “must take all reasonable care that any information” it discloses “is not misleading, false or deceptive and does not omit anything likely to affect the import of the information.”⁸⁰ If there is reasonable concern that the issuer failed to comply with the disclosure requirements, the FSA has the authority to suspend the trading of the issuer’s financial instruments. It may also impose conditions on the issuer that it finds necessary for lifting the suspension.⁸¹ Pursuant to Rule 1.5.3, FSA may impose penalties on *the issuer or the persons discharging managerial duties or a connected person* that breach any of the disclosure rules.

In addition to the classic disclosure requirements, the Companies Act 2006, in Section 417(5), requires that the Director’s Report for quoted companies, which is required to be prepared each financial year, shall include information regarding ‘*environmental matters (including the impact of the company’s business on the environment)*’ and ‘*social and community issues*’.⁸² This annual report prepared by directors constitutes a part of the annual financial report submitted to the FSA under the Disclosure Rules and Transparency Rules Rule 4.1.5. Any misleading information included in the directors’ report on environmental matters and social and community issues will lead to an FSA investigation. If the issuer is found in breach of the disclosure rules as a result of the investigation, the issuer or the persons discharging managerial duties⁸³ will face penalties.⁸⁴

⁷⁹ Disclosure Rules define the inside information as follows:

“**2.2.3** Information is inside information if each of the criteria in the definition of inside information is met.

2.2.4 (1) In determining the likely price significance of the information an *issuer* should assess whether the information in question would be likely to be used by a reasonable investor as part of the basis of his investment decisions and would therefore be likely to have a significant effect on the price of the *issuer’s financial instruments* (the reasonable investor test). [Note: Article 1(2) 2003/124/EC]

(2) In determining whether information would be likely to have a significant effect on the price of *financial instruments*, an *issuer* should be mindful that there is no figure (percentage change or otherwise) that can be set for any *issuer* when determining what constitutes a significant effect on the price of the *financial instruments* as this will vary from *issuer* to *issuer*.” (Emphasis added)

⁸⁰ Disclosure Rules and Transparency Rules of the Financial Services Authority (“the FSA”) Rule 1.3.4.

⁸¹ *Id.*, at Rule 1.4.1 and Rule 1.4.3.

⁸² See Companies Act 2006, Sections 415 and 417(5).

⁸³ FSMA Section 96B (1) reads as follows: “For the purposes of the provisions of this Part relating to disclosure rules], a “person discharging managerial responsibilities within an issuer” means—

(a) a director of an issuer falling within section 96A(1)(c)(i) or (ii); or

(b) a senior executive of such an issuer who—

(i) has regular access to inside information relating, directly or indirectly, to the issuer, and

(ii) has power to make managerial decisions affecting the future development and business prospects of the issuer.”

⁸⁴ Section 100 of the FSMA.

C.

C. BRIBERY AND CORRUPT PRACTICES

Potential Liability:

Shell's potential financial liability for any bribery or corruption in Nigeria has expanded in the last two years. RDS and two subsidiaries have already been found liable under US law for bribery in Nigeria. RDS and its subsidiaries paid \$48 million in civil and criminal fines to the US in 2010, including the disgorgement of profits obtained through the bribery. Bribery by a subsidiary in Nigeria can implicate RDS's liability not just in the US, but also under UK and Dutch laws. All three countries have laws addressing bribery committed overseas, and securities related laws that address inaccurate bookkeeping.² Prosecution in the US does not preclude the UK from bringing similar charges,³ and prosecution in either the UK⁴ or the Netherlands would not bar prosecution in the US.⁵ While the prohibition on 'double jeopardy' applies within a state – meaning that a state cannot prosecute for the same criminal conduct – the underlying legal principle does not apply transnationally.⁶ Since a state is not bound to respect the double jeopardy principle simply because the same conduct has given rise to prosecution elsewhere, if it were shown that RDS or a subsidiary engaged in the same acts, RDS could face further liability, adding to the \$48 million \$ it has already paid.⁷

See: In Re Royal Dutch Shell Plc and Shell International Exploration and Production, Inc., *Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934*, Release No. 3204 (4 Nov 2010) at 2;

² In the UK, *The UK Bribery Act 2010* and in the Netherlands Articles 177a and 178a of the *Criminal Code* as amended in 2001

³ See: BBA and Clifford Chance, *Double Jeopardy in the EU: Focusing on the Possibilities of Schengen as a Solution for Prosecutors and Regulators Alike*, at 1-2 (noting that only EU law requires the UK to recognize foreign judgments for the purpose of double jeopardy or *ne is in idem*), available at www.bba.org.uk/download/1802 (last accessed 7 October 2012); see also, Scottish Law Commission, *Report on Double Jeopardy*, Scot Law Com No. 218 (Dec. 2009) at 21-22 (noting that they recommend Scotland recognises foreign judgments for the purpose of double jeopardy, but that nothing is binding that determination and "criminal jurisdiction is usually territorially based, and that foreign judgments in criminal cases do not receive automatic recognition in English courts but are treated as questions of fact."); see also: *Double Jeopardy (Scotland) Act 2011*, Section 10.

⁴ Wasmeier, M. and Thwaites, N., 'The Development of Ne Bis in Idem Into a Transnational Fundamental Right in EU law: comments on recent developments,' *European Law Review*, vol. 31(4), (2006) 565-578, at 565-566 (discussing the prohibition in terms of EU law, and noting that the Netherlands "recognize[s] a *res judicata* effect" from prosecutions in other states, but noting that "[i]n most states, *ne bis in idem* traditionally applied solely at national level."). European law would prohibit both the UK and Netherlands from prosecuting for crimes arising from the same conduct, but it appears that either one could prosecute in addition to the United States. See; Poels, A., 'A Need for Transnational Non Bis in Idem Protection in International Human rights Law,' *Netherlands Quarterly of Human Rights*, vol. 23(3), (2005) 329-347, at 340-342 (discussing the lack of transnational requirements regarding double jeopardy but discussing the prohibition under European law); Swoboda, S., 'Paying the debts – late Nazi trials before German courts: the case of Heinrich Boere,' *Journal of International Criminal Justice*, vol., 9(1), (2011) 243-269, at 244 (discussing EU requirements for mutual recognition of criminal judgments under the Charter on Fundamental Freedoms and the Convention Implementing the Schengen Agreement).

⁵ See: *United States v. Rashed*, 234 F.3d 1280, 1282 (D.C. Cir., 2000); *United States v. Guzman*, 85 F.3d 823, 826 (1st Cir., 1996); *Chua Han Mow v. United States*, 730 F.2d 1308, 1313 (9th Cir., 1984); *People v. Papaccio*, 251 N.Y.S. 717, 721 (1931); *United States v. Lanza*, 260 U.S. 377, 382-85 (1922) (all applying the US common law doctrine that the prohibition on double jeopardy does not prohibit successive prosecutions by different sovereigns, including different sovereigns within the US); see also: Slye, R.C., 'The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible', *Virginia Journal of International Law*, vol., 43, (2002) 173, at 215-220; Baylis ,E.A., 'Parallel Courts in Post-Conflict Kosovo,' 32 *Yale Journal of International Law* (2007) 1, at fn 182 and accompanying text.

⁶ See, for example: Poels, A., 'A Need for Transnational Non Bis in Idem Protection in International Human rights Law,' *Netherlands Quarterly of Human Rights*, vol. 23(3), (2005), 329-347.

Any subsequent convictions could further increase RDS's financial liability within the US, and also within the UK. The UK's Bribery Act, introduced in 2010, echoes the US law, and expanded the UK's capacity for prosecuting RDS for overseas bribery and corrupt practices undertaken for its benefit. Even before the new law came into being, the UK government had prosecuted UK firm Mabey & Johnson for overseas corruption in Ghana, Jamaica, and violation of UN sanctions in Iraq.⁸ In total, Mabey & Johnson, which voluntarily reported its acts, was forced to pay over 10% of its annual turnover in fines.⁹ While it is unlikely RDS would be forced to pay over 10% of its annual turnover (unless a pattern of abuse was established), the UK has clearly established that it has the ability to try its corporations for liability for bribery that occurred even before the enactment of its Bribery Act 2010.

Since the Bribery Act 2010 came into force, a parent company such as RDS is put under indirect but potentially significant pressure. If a bribe is paid by a subsidiary in Nigeria in order, *inter alia*, to sell the goods or services of another member of the Shell Group located in the UK, then the latter could be in violation of the Act. RDS, as a holding company, is not likely to be in this position itself, since it is not likely to market any items. However, the liability of other members of its group is an important concern for RDS. Furthermore, it may be liable under other legal provisions. There is, for example, the offence of false accounting if the subsidiaries' accounts are consolidated with its own accounts. The new UK law has steep punishments. Corporations found to have committed any of the offenses in the Bribery Act can face unlimited fines, and may be debarred from tendering for public procurement contracts in the EU.

All three countries can simultaneously seek criminal and/or civil liability if any new evidence of bribery emerges in Nigeria, and the potential financial liability arises not just under anti-bribery legislation, but also under securities laws. RDS, as a listed company in the US, is responsible for ensuring its books are accurate and reflect the payments actually made. Failure to do so – which would be necessary to avoid liability for bribery under overseas bribery acts – constitutes a violation of US securities laws. Similar laws exist in both the UK and the Netherlands. Such a finding is perhaps more severe than normal criminal fines, as a violation of the US securities law leads to the disgorgement of profits. This ensures there is no financial benefit – or financial offset to the criminal bribery fines so that RDS could, ostensibly, come out 'even' – for acts committed by Shell entities. Any additional accusations of bribery against RDS or its Nigerian subsidiaries may give rise to similar complaints by the SEC, and similar financial liability for both the parent and subsidiary.

Even if alleged bribery takes place exclusively in Nigeria, Nigeria is not the only state that has jurisdiction over the offense. The US SEC found that RDS did not have adequate procedures in place to detect and prevent bribery within the Group. Failure by the Group to adjust its procedures in light of the 2010 agreements are likely to lead to larger fines in any future cases.

⁷ *Id.*, at 339-342. Some States have domestic provisions requiring that punishments from other States be factored into the domestic court's order, but that does not affect the potential prosecutions, only the potential total judgments. See, Poels, *supra*, at 342.

⁸ <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey--johnson-ltd-sentencing.aspx> (last accessed 6 October 2012).

⁹ Stocker, T., 'Overseas Corruption – toughening global regime: be aware. Be prepared', *I.E.L.R.*, 2009, 8, 288-292.

Investors should be inquiring as to what steps have been taken to ensure that the 2010 criminal and civil liabilities are not repeated. Specific questions should include:

- What Group-wide changes have been made?
- How have the accounting mechanisms and procedures been adjusted in light of the SEC findings?
- What training has been implemented to make those further down the subsidiary chains aware of the potential liability they pose to the entire Group?
- What procedures are available to subsidiaries' low-level employees who learn about bribery in their company and wish to alert relevant authorities?

i) The Factual Background:

In November 2010, SNEPCO⁸⁵, a Nigerian subsidiary of RDS, entered into a 'deferred prosecution agreement' with the US Department of Justice, paying a \$30 million criminal penalty.⁸⁶ It was alleged that SNEPCO had paid \$ 2million to a freight and logistics company knowing that some or all of the money would be used to bribe Nigerian officials.⁸⁷ The prosecution of this event in the USA does not preclude the Netherlands, Nigeria or the UK from pursuing similar criminal charges against SNEPCO or RDS, if the latter had knowledge of SNEPCO's actions. Even though the UK's capacity to prosecute for overseas bribery was dramatically increased in 2010, there is still a potential that the UK courts could exercise jurisdiction and find RDS or its subsidiaries liable for bribery that occurred before 2010. The Netherlands' law dates back to 2001 and would therefore cover the bulk of the factual allegations in the US cases. Since prosecution in the US does not preclude the UK or the Netherlands from bringing similar charges, RDS could face further liability for the actions that cost it \$48 million \$ in 2010. Similarly, any additional accusations of corruption against RDS or its Nigerian subsidiaries could lead to further findings, further disgorgement and further criminal liability for any companies involved.

Simultaneous to SNEPCO's settlement with the Department of Justice, RDS and its US subsidiary, Shell International Exploration and Production Inc. (SIEP), paid \$18.1 million in disgorgement of profits and prejudgment interest as part of a settlement with the US Securities and Exchange Commission (the SEC). SIEP had utilised a 'customs broker' to pay

⁸⁵ Shell Nigeria Exploration and Production Company.

⁸⁶ *United States of America v. Shell Nigeria Exploration and Production Company, Ltd.*, submitted 1 November 2010, available at www.justice.gov/opa/documents/shell-dpa.pdf (last accessed 6 October 2012). A deferred prosecution agreement allows for "targets of US criminal investigations . . . [to] avoid criminal charges in exchange for their commitment to abide by the dictates of the [agreement], including financial penalties and remedial measures." The agreements are entered into with court oversight and approval. Raskin, D., 'Deferred Prosecution Agreements and U.S. Approaches to Resolving Criminal and Civil Enforcement Actions,' (24 May 2012) at 1, available at:

http://www.cliffordchance.com/publicationviews/publications/2012/05/deferred_prosecutionagreementsandus.html (last accessed 6 October 2012); "A criminal charging instrument accompanies the DPA and the corporation typically accepts responsibility for those allegations in some form;" *Id.* at 4.

⁸⁷ *Id.*

approximately \$3.5 million in suspicious payments to Nigerian customs officials.⁸⁸ The payments benefitted Shell's Bonga project, which was operated across several Shell subsidiaries.⁸⁹ The settlement recognised that “[n]one of the improper payments were accurately reflected in Shell's books and records, nor was Shell's system of internal accounting controls adequate at the time to detect and prevent these suspicious payments.”⁹⁰ On the company books, the illegal payments were “recorded as legitimate transaction costs such as ‘local processing fees’ and ‘administration/transport charges’”.⁹¹ Because RDS's books did not accurately reflect the improper payments, the SEC found that the parent company had violated US securities laws.⁹² It then found an additional violation because RDS's internal accounting systems were not reasonably constructed to detect and prevent these types of illegal payments.⁹³

ii) The Legal Background:

a) *US Foreign Corrupt Practices Act and its incorporation into international and foreign law*

The US's Foreign Corrupt Practices Act (FCPA) makes it illegal for any securities issuer, or “any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer,” to bribe a foreign official in order to gain a business advantage or to induce the foreign official to undertake an act or omission contrary to what they are legally required to do.⁹⁴ This includes the provision of a gift or promise in exchange for the purpose of influencing the official's decision, or “securing any improper advantage.”⁹⁵ Similarly, it is illegal to do the same things with the purpose of “inducing such foreign official to use his influence with a foreign government . . . to affect or influence any act or decision of such government...”⁹⁶

⁸⁸ In Re Royal Dutch Shell plc and Shell International Exploration and Production, Inc., ‘Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934,’ Release No. 3204, (4 Nov 2010) at 2.

⁸⁹ *Id.*, at 4.

⁹⁰ *Id.*, at 2.

⁹¹ *Id.*, at 7.

⁹² *See; id.*

⁹³ *See; id.*

⁹⁴ 15 U.S.C. § 78dd-1; A bribe includes providing anything of value, or an offer, gift, or promise to give anything of value, to a foreign official for the purpose of “influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage.”

⁹⁵ 15 U.S.C. § 78dd-1(a)(1)(A)(i).

⁹⁶ 15 U.S.C. § 78dd-1(a)(1)(A)(ii).

This law has been replicated, in large part, in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions⁹⁷ and the UN Convention against Corruption.⁹⁸ There are at least 39 States Parties to the OECD Convention, including the USA, the UK and the Netherlands. There are currently 154 States Parties to the Convention against Corruption, including Nigeria, the USA, the UK, and the Netherlands.

Both the OECD Convention and the UN Convention require States Parties to adopt legislation criminalising the bribery of a foreign official.⁹⁹ The OECD Convention also requires States to adopt laws criminalising the aiding or abetting of bribery.¹⁰⁰ While there are slight differences in the wording between the two Conventions, they both define bribery in a way consistent with the USA's FCPA. The UN Convention defines bribery as an intentional act of:

“... promis[ing], offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.”¹⁰¹

In addition to the criminal liability of natural persons, both Conventions require States to recognise the liability for legal persons in addition to natural persons.¹⁰² Both Conventions require States Parties to ensure the offenses are punishable by ‘effective, proportionate, and dissuasive’ penalties.¹⁰³ The Netherlands adopted legislation consistent with its obligations in 2000,¹⁰⁴ and the UK incorporated the Conventions’ principles into its Bribery Act of 2010.¹⁰⁵ A single act of bribery within Nigeria could therefore lead to criminal sanctions in the USA, the UK and the Netherlands.

⁹⁷ The US, the UK and Netherlands are also parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted 21 November 1997, *entered into force* 15 February 1999. The US and UK Parties ratified the Convention in 1998, making them Parties since its entry into force, while the Netherlands ratified the Convention in 2001. Available at: http://www.oecd.org/department/0,3355,en_2649_34859_1_1_1_1_1_1,00.html (last accessed 6 October 2012).

⁹⁸ United Nations Convention against Corruption, General Assembly resolution 58/4 of 31 October 2003, U.N. Doc. A/58/422, *entry into force*, 14 December 2004.

⁹⁹ OECD Convention, *supra*, at Art. 1 (1)-(2); United Nations Convention against Corruption, Art.16.

¹⁰⁰ OECD Convention, *supra*, at Art. 1(2).

¹⁰¹ U.N. Convention, *supra*, at Art. 16.

¹⁰² *Id.*, at Art. 26; OECD Convention, *supra*, at Art. 2

¹⁰³ U.N. Convention, *supra*, at Art. 26(4); OECD Convention, *supra*, at Art. 3(1)-(2).

¹⁰⁴ *Staatsblad van het Koninkrijk der Nederlanden*, Jaargang 2000, 616 (13 December 2000) [English translation: *Official Gazette of the Kingdom of the Netherlands*, 2000 vintage, 616 (13 December 2000)].

¹⁰⁵ UK Bribery Act 2010, Section 6.

b) US Securities Law Liability for Bribery

In addition to criminal liability for bribery, US Securities law provides that any publicly traded company in the US may be liable for bribery under its *accurate records* requirements. The Exchange Act requires issuers to ensure accurate books and records regarding transactions. Since bribery is usually not recorded – and clearly was not accurately recorded by RDS previously – a finding of bribery will give rise to a violation of § 30A of the Exchange Act.¹⁰⁶

c) The U.K. Bribery and Corruption Laws

Legal Framework Prior to the Bribery Act 2010

Prior to the Bribery Act 2010's entry into force on 1 July 2011, criminal acts which covered corruption and bribery were the Public Bodies Corrupt Practices Act 1889, Prevention of Corruption Act 1906 and the Anti-Terrorism, Crime and Security Act 2001 (ATCSA). Part 12, section 109 of ATCSA extends the jurisdictional scope of UK anti-corruption law to crimes committed extraterritorially.¹⁰⁷ The Public Bodies Corrupt Practices Act 1889 and Prevention of Corruption Act 1906 did not impose a penalty for corrupt acts committed overseas.

On 25 September 2009, the Serious Fraud Office (SFO) convicted and fined Mabey & Johnson for overseas corruption, making that company the first British-based firm to be convicted of overseas bribery.¹⁰⁸ The company referred itself to the SFO and pleaded guilty to statutory conspiracy for having paid bribes to officials in Jamaica and Ghana between 1994 and 2001 and for breaching UN sanctions in Iraq. The company was fined a total of £6.6 million. The sentence represents more than 10 per cent of M&J's annual turnover.¹⁰⁹ After Mabey & Johnson, the SFO prosecuted, *inter alia*¹¹⁰, BAE Systems for corrupt practices in its

¹⁰⁶ Securities Exchange Act of 1934, § 13(b)(2)(A), and §13(b)(2)(B), available at <http://www.sec.gov/about/laws/sea34.pdf> (last accessed 6 October 2012).

¹⁰⁷ "(109) Bribery and corruption committed outside the UK

(1) This section applies if—

(a) a national of the United Kingdom or a body incorporated under the law of any part of the United Kingdom does anything in a country or territory outside the United Kingdom, and

(b) the act would, if done in the United Kingdom, constitute a corruption offence."

Entered into force on 14 February 2002.

¹⁰⁸ <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey--johnson-ltd-sentencing-.aspx> (last accessed 6 October 2012).

¹⁰⁹ Stocker, T., 'Overseas Corruption – a toughening global regime: be aware. Be prepared', *I.E.L.R.*, 2009, 8, 288-292.

¹¹⁰ See: <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/insurance-broker-jailed-for-bribing-costa-rican-officials.aspx> (last accessed 6 October 2012); <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/deputy-international-limited-ordered-to-pay-4829-million-pounds-in-civil-recovery-order.aspx> (last accessed 6 October 2012); <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/innospec-ltd-former-executive-in-court-on-fraud-and-corruption-charges.aspx> (last accessed 6 October 2012).

operations in Tanzania¹¹¹. These investigations convey that even for bribery or corrupt acts committed overseas by UK based corporations prior to the Bribery Act 2010's entry into force, there is a limited possibility of prosecution.

The Bribery Act 2010

The UK Bribery Act 2010 entered into force on 1 July 2011. The offences in the Bribery Act may be triggered by small bribes paid to expedite routine Government action (so-called 'facilitation payments'). Corporations found to have committed any of the offenses in the Bribery Act could face unlimited fines, and may be debarred from tendering for public procurement contracts under Article 45 of the EU Public Sector Procurement Directive 2004. Individuals, including senior officers of companies that are involved in the bribery, could be sentenced to a maximum of 10 years in prison and/or an unlimited fine.

Bribery of a Foreign Public Official

With regard to the bribery of foreign public officials¹¹², Section 6 of the Act provides that the offence is committed when, in order to obtain or retain business or an advantage in the conduct of business, a person offers, promises or gives financial or other advantage to a foreign public official or to another person at the foreign official's request or with his/her assent or acquiescence with the intention to influence him/her in his/her capacity as a foreign public official. The Act provides that UK courts have jurisdiction for bribery offences committed outside the UK only over bodies incorporated in the UK and Scottish partnerships.¹¹³

While domestic bribery cases require the prosecution to prove conduct which amounts to 'improper performance' of a relevant function or activity, bribery of a foreign official does not.¹¹⁴ There is no need to prove an improper performance or an intention to induce it.¹¹⁵ Instead, prosecutors must prove that an advantage was offered, promised, or given and that the foreign official was not permitted or required by the written local law to be influenced by

¹¹¹ <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/bae-fined-in-tanzania-defence-contract-case.aspx> (last accessed 6 October 2012).

¹¹² Pursuant to Section 6(5), 2010 UK Bribery Act, the term 'foreign public official' refers to persons that hold a legislative, administrative or judicial position of any kind of a country or territory outside the UK, as well as any person that exercises a public function for or on behalf of a country or territory outside the UK, or for any public agency or public enterprise of that country. Furthermore, officials or agents of public international organisations, such as the United Nations or the World Bank, can also fall into this category.

¹¹³ Section 12(4), 2010 UK Bribery Act.

¹¹⁴ See: 'Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing' (the Guidance), published by the Ministry of Justice at 11, para.23 explains the reason underlying this distinction between a domestic bribery and bribery committed overseas. It states that "...it is not the Government's intention to criminalise behaviour where no such mischief occurs, but merely to formulate the offence to take into account of the evidential difficulties referred to above."

¹¹⁵ *Id.*

the offered advantage. Hospitality expenditures will not be considered as bribery under the Bribery Act, as long as they are reasonable and proportionate.¹¹⁶

Research conducted by Ernst & Young suggests that the oil and gas industry is expected to be hit hardest by the Bribery Act.¹¹⁷ The research was based on bribery convictions made under the US FCPA.¹¹⁸ Oil and gas companies accounted for 18 per cent of all the prosecutions carried out so far. According to the research there is no evidence of direct link between bribery and corruption convictions and the long-term share price performance. However, the firm stressed that company management cannot be complacent as individuals can be fined and even imprisoned when the Bribery Act is enacted. This poses a reputational risk to the company, which remains a key factor in performance.

d) The Netherlands Bribery Framework

In order to bring its anti-bribery legal framework into compliance with the international conventions it had signed, the Netherlands amended its Criminal Code in 2001.¹¹⁹ The new Article 178a extends the jurisdiction of the Dutch courts regarding active bribery offences to foreign public officials and officials of international organisations, such as the UN and the World Bank. Furthermore, Article 177a was introduced in order to establish the offence of bribing a public servant in order to obtain an act or omission from him/her that is not in breach of his/her official duties (facilitation payments). The amendments also increased the penalties for imprisonment from 2 to 4 years and for fines from category 4 to category 5.¹²⁰

An OECD Follow-Up Report indicates that no foreign bribery cases have been tried before the Dutch courts; however, there have been some investigations.¹²¹ The anti-bribery articles in the Dutch Criminal Code are not as detailed as the UK Bribery Act or the US FCPA regarding bribes paid or offered overseas, but they represent a potential risk to Shell. Since RDS is headquartered in the Netherlands, any corrupt practice perpetrated by Shell in Nigeria may amount to violation of these articles.

¹¹⁶ *Id.*, at 12, para. 26.

¹¹⁷ <http://www.ey.com/UK/en/Newsroom/News-releases/Assur--11-5-9--Oil-and-gas-sector-most-at-risk-from-investigation-under-the-UK-Bribery-Act> (last accessed 6 October 2012).

¹¹⁸ See: Section I, B, *supra*.

¹¹⁹ The amendments were published in the Official Gazette on 28 December 2000 (Staatsblad 2000 nr. 616) and entered into force on 1 February 2001.

¹²⁰ According to the OECD Follow-Up Report on the Implementation of Phase 2 Recommendations to the Netherlands drafted by the Working Group on Bribery in International Business Transactions (OECD Follow-Up Report), published on 17 December 2008, "the maximum fine applicable to a legal person for the most serious foreign bribery offence is still EUR 670 000."

¹²¹ *Id.*, at 3: "...the Netherlands reported that 12 feasibility investigations and 3 preliminary investigations are underway in alleged foreign bribery cases, and that 4 requests for mutual legal assistance have been sent out in respect of a foreign bribery offence."

D. THE POTENTIAL FOR CRIMINAL AND CIVIL COMPLICITY IN HUMAN RIGHTS ABUSE

Potential Liability

It has recently been alleged that Shell has funded and supplied military personnel in Nigeria who were committing or intending to commit gross human rights and humanitarian law violations. If these claims are accurate, the company, or individuals in the company, could be found criminally or civilly liable, both inside and outside of Nigeria.² This type of liability is distinct from liability for violations committed by those whom Shell directly employs. It would arise if Shell Group companies were to fund third parties who engage in human rights and humanitarian law violations. Shell corporate members could then be found to have criminal responsibility or civil liability towards victims due to their complicity. Individuals working with the Shell Group could also be found criminally responsible for complicity and evidence gathered for such prosecutions could then be used in civil cases.

What should be particularly noticed is that complicity in international crimes or gross human rights violations can give rise to universal jurisdiction. This means that a Shell member company could be prosecuted anywhere it operates, as long as there is also recognition within the national system for the criminal responsibility of corporations.³ This jurisdiction, conferred by a national system, is distinct from international criminal law which has so far excluded corporations from the jurisdiction of international courts.⁴ Individuals acting on behalf of the corporation, however, may well be subject to international jurisdiction for these crimes. Universal jurisdiction is the extension of a national criminal jurisdiction over certain, limited crimes even when the perpetrator, victim and crime are not connected to its own territory or nationality. Torture, when committed outside of an armed conflict, constitutes a serious human rights violation for which universal jurisdiction arises. When committed as part of an armed conflict – which, at times, conflict in the Niger Delta may arguably amount to – torture constitutes a grave breach of the Geneva Conventions; in particular, Common Article 3. Torture is an international crime for which immunity is prohibited.

A company which is alleged to be complicit in an international crime through hired security must also take measures to prevent or punish such crimes.⁵ “In order to avoid liability, company officials must show they took all possible action within their power to do so. After a crime has been committed, company officials would be advised to immediately end the operational activities of security personnel, initiate an internal investigation, report the incident to the law enforcement authorities and cooperate with them in their investigations.”⁶

This report should not be understood as alleging that members of the Nigerian police or military allegedly paid by Shell have actually committed such abuses. Such factual investigation is beyond the scope of this analysis. Instead, this report simply raises concerns about the potential liability Shell could face based on the factual allegations

For details, see: Platform, *infra*.

² For more on the issues of corporate complicity responsibility, see the chapter by Van Ho, T., in *Corporate Accountability in the Context of Transnational Justice*, Michalowski, S., (ed.), Routledge: forthcoming, 2013.

³ See: *Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Volume 2: Criminal Law and International Crimes*, at 24-26, 52-53 56-58, available at http://old.icj.org/news.php3?id_article=4405&lang=en (last accessed 29 September 2012).

⁴ *Rome Statute of the International Criminal Court*, Art. 35, 2187 U.N.T.S. 90, entered into force July 1, 2002.

⁵ See: ICJ Report, *supra* n. 3, at 43.

⁶ See: *id.*

Highlighted below. These allegations principally come from a recent report by the UK-based NGO, Platform, which claims that Shell is providing weapons and funds to the military in the Niger Delta in the midst of the conflict. If, as alleged, Shell operates close relations with the Nigerian police and military, supplying them with weapons and funds, the company could be exposed for any abuses committed by these personnel.

Shareholders should be concerned about the criminal and civil implications arising from allegations about the relationship between Shell and the Nigerian military and police. Suggested questions shareholders should ask include:

- Are weapons, helicopters, funds or other materials being supplied to forces other than those directly employed by SPDC or other Shell Group members? If so:
 - Why does SPDC provide this to outside forces?
What procedures are in place to guide these decisions? Who makes the decision and what limits are placed on their powers?
 - What types of investigations are undertaken to ensure these materials are not being funnelled to those accused of war crimes?
 - What investigations are undertaken to assess potential issues of complicity if an allegation is made that those who are provided with funding or weaponry have committed war crimes or grave violations of human rights?
- Does SPDC or the Shell Group have a programme for remedying civil claims made in this area, as expected by the UN Guiding Principles?

i) **The Factual Background:**

In August 2012, the UK-based NGO, Platform, released a report alleging that Shell was supplying funds and weaponry to the Nigerian military for use in combat in the Niger Delta.¹²² It claims that some of the payments made by Shell and other oil companies “have added fuel to the fire of intense conflict between rival militant groups and government forces”.¹²³ It further alleges that the “corporate practices have become a central part of the conflict dynamics in the Delta, leading to “the killing and displacement of thousands of local people in ethnic and communal conflicts”.¹²⁴ The charges are not new; in 2007, the Shell Group representatives in Nigeria affirmed to the UN Special Rapporteur on torture that Shell “provide[s] payments to officers assigned for protection, which amount to premiums above their regular monthly salaries”.¹²⁵

¹²² Platform, ‘Dirty Work: Shell’s Security Spending in Nigeria and Beyond,’ August 2012, available at <http://platformlondon.org/wp-content/uploads/2012/08/Dirty-work-Shell%E2%80%99s-security-spending-in-Nigeria-and-beyond-Platform-August-2012.pdf> (last accessed 28 September 2012).

¹²³ *Id.*, at 8.

¹²⁴ *Id.*, citing Omeje, K., 2004: ‘The State, Conflict and Evolving politics in the Niger Delta, Nigeria’, *Review of African Political Economy*, No. 101 at 436, as quoted in Groves, A., (2009): ‘(Un)civil society and corporate security strategies in the Niger Delta’, at 27, available at: <http://www.e-ir.info/2009/06/10/shell-and-society-securing-the-niger-delta/?article2pdf=1>. (last accessed 7 October 2012).

¹²⁵ U.N. Doc. A/HRC/7/3/Add.4 at 7, footnote 2.

Platform claims that Shell spent around \$383 million on security in Nigeria between 2007 and 2009.¹²⁶ According to the Platform allegations, “[a]pproximately a third of Shell’s global security budget in 2008, or \$99 million, was spent on third parties,”¹²⁷ the payments have principally been “to government forces in Nigeria who exacerbated the conflict” in the Niger Delta.¹²⁸ The most pertinent part of the Platform allegations for considering Shell’s complicity liability is this: Shell utilises “over 1,300 government forces,” and that “Shell has supplied these government forces with gunboats, helicopters, vehicles, food, accommodation, satellite phones, stipends and large-scale funding throughout years of conflict in the Delta region”.¹²⁹

This report examines the responsibility that could arise – and the questions shareholders should ask – as a result of the Platform report. What would be Shell’s liability if human rights and humanitarian law abuses are committed by security forces that Shell funds or provides with equipment facilitating the carrying out of these abuses?

This is not to suggest that such abuses have occurred, or that it is proven, if they have occurred, that Shell had any role in facilitating them. However, the questions need to be raised. As the former UN Special Rapporteur on torture, Manfred Nowak, recognised in his 2007 report on Nigeria, allegations of torture do arise from the conflict in the Niger Delta.

“The increasing violence in the Niger Delta . . . impacts upon the practice of torture and ill-treatment. The rise of serious violent crime and attacks by vigilante and criminal gangs against the local population and the oil companies operating there, and the resultant heavy response from security forces and police paid by oil companies, invite allegations of torture and ill-treatment.”¹³⁰

Similarly, the UN Special Rapporteur on extrajudicial killings has found that the use of the military to supplement law enforcement “has sometimes involved massive abuses”.¹³¹

Because of the allegations raised by Platform, and the background provided in UN reports, it is necessary to consider what responsibility Shell could have in the future if, as alleged, Shell knowingly supplied or funded military personnel who were committing such abuses.

ii) The Legal Background:

The role of economic actors – including corporations – in funding and supplying conflict has come under increased scrutiny in the last two decades and is leading to claims of corporate

¹²⁶ Platform, ‘Dirty Work: Shell’s Security Spending in Nigeria and Beyond,’ August 2012, at 3, available at <http://platformlondon.org/wp-content/uploads/2012/08/Dirty-work-Shell%E2%80%99s-security-spending-in-Nigeria-and-beyond-Platform-August-2012.pdf> (last accessed 28 September 2012).

¹²⁷ *Id.*, at 63.

¹²⁸ *Id.*, at 4.

¹²⁹ *Id.*, at 6.

¹³⁰ U.N. Doc. A/HRC/7/3/Add.4 at 7.

¹³¹ U.N. Doc. E/CN.4/2006/53/Add.4 at 3.

complicity in the commission of human rights and humanitarian law violations. While “the responsibility of economic actors for perpetration of gross human rights violations is increasingly acknowledged, the juridical dimension of this responsibility is only beginning to be investigated and considered”.¹³² It is a rapidly developing area of the law, and the allegations made by Platform are exactly the type that could bring increased scrutiny or judicial proceedings.

As was pointed out above, international criminal law has excluded corporations from the jurisdiction of international courts,¹³³ but corporations, directors, managers or others could be found criminally liable for complicity in international crimes through domestic statutes. Not all states recognise a corporation’s capacity to commit crimes, but an increasing number of states do.¹³⁴ “In the majority of those jurisdictions that already recognise the potential criminal responsibility of companies, companies can be held responsible for both national crimes and crimes under international law.”¹³⁵ For international crimes, accomplice liability is generally recognised, while statutes of limitations are considered to violate international law.¹³⁶

Under the principle of universal jurisdiction, “any state has the authority to investigate, prosecute and punish certain crimes . . . which are universally condemned, irrespective of where the crimes occurred or the location or nationality of the victims of perpetrators”.¹³⁷ States Parties to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment are expected to have universal jurisdiction over torture,¹³⁸ and often genocide, crimes against humanity and war crimes are recognised as crimes that give rise to universal jurisdiction.¹³⁹ Consequently, even if a company opens operations in a State twenty years from the time of the crime’s commission, it could face criminal prosecution if that State recognises both universal jurisdiction for these crimes and corporate criminal responsibility. It

¹³² Reggio, A., ‘Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for “Trading with the Enemy” of Mankind,’ 5 *International Criminal Law Review*, (2005) 623, 626.

¹³³ Rome Statute of the International Criminal Court, art. 35, 2187 U.N.T.S. 90, entered into force July 1, 2002.

¹³⁴ Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Volume 2: Criminal Law and International Crimes, at 56-57, available at http://old.icj.org/news.php3?id_article=4405&lang=en (last accessed 29 September 2012).

¹³⁵ *Id.*, at 57.

¹³⁶ *Id.*, at 15, 53.

¹³⁷ *Id.*, at 53.

¹³⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ICAT), Arts. 1, 4, and 5, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.

¹³⁹ See, for example: Canadian Crimes Against Humanity and War Crimes Act 2000, §8(b); New Zealand International Crimes and International Criminal Court Act 2000, §8(1) (c); Australian Criminal Code Act 1995 (Act No. 12 of 1995), § 15(4), 268.117; German Code of Crimes Against International Law 2001, art. 1, 42 ILM 995 (2003); South African Implementation of the Rome Statute of the International Criminal Court Act 2002 (27/2002), § 4(3)(c); US Genocide Accountability Act 2007, 18 U.S.C. § 1091; see also: Akande, D. & Shah, S., ‘Immunities of state officials, international crimes and foreign domestic courts,’ 21(4) *European Journal of International Law* 815, 847 and footnote 149; Jalloh, C.C., ‘Universal Jurisdiction, Universal Prescription? A Preliminary assessment of the African Union Perspective on Universal Jurisdiction,’ 21(1) *Criminal Law Forum* 1, (2010) 9-10.

is therefore important for any company to consider its financial and material support to a military carefully.

Perhaps one of the most relevant precedents in considering the responsibility of Shell and its personnel is the Dutch prosecution in an analogous case of Frans van Anraat, accused of selling components of mustard gas to the regime of Sadaam Hussein.¹⁴⁰ Van Anraat was the head of his company and was found guilty of complicity in war crimes committed by the Hussein regime because of his willingness to sell one component that was used in the construction of the gas. The gas was then used against civilians in Iraq and Iran.¹⁴¹ The Dutch courts found he had known the Hussein regime's intent with the purchase, and was therefore liable for supplying them with the necessary weaponry.¹⁴² Van Anraat was prosecuted individually, but the case is significant because it suggests that, at times, the mere supplying of means for international crimes, with knowledge that those crimes are likely to be committed, is sufficient for criminal prosecution.

Van Anraat must be read together with the case against Guus Kouwenhoven, also in the Netherlands.¹⁴³ Kouwenhoven was a shareholder with the Royal Timber Company and a shareholder and president-director of Oriental Timber Company (OTC).¹⁴⁴ It was alleged that, through the corporation, he was knowingly financing the acts of Charles Taylor when the former President of Liberia was waging both a civil war and a conflict in Sierra Leone.¹⁴⁵ The allegations also stated that members of the OTC security forces were involved in war crimes as part of Taylor's military.¹⁴⁶ From this, the prosecution indicated it was to be inferred that Kouwenhoven knew, consented to, and was criminally responsible for these acts.¹⁴⁷ The court rejected this, finding that providing weaponry to the military was not sufficient to indicate a participation in war crimes.¹⁴⁸ According to the court decisions, the principal problem was a lack of "lawfully obtained and solid evidence" rather than "just . . . general reports and ideas".¹⁴⁹

¹⁴⁰ See: Van der Wilt, H., 'Genocide v. War Crimes in the Van Anraat Appeal,' 6 *Journal of International Criminal Justice*, (2008) 557; Van der Wilt, H., 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court,' 8 *International Criminal Law Review*, (2008) 229, 244; Huisman, W. and Van Sliedregt, E., 'Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity,' *Journal of International Criminal Justice*, volume 8, (2012) at 803-828, 805, 807.

¹⁴¹ *Id.* at 803-828, 805, 807; Van der Wilt, H., 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court,' 8 *International Criminal Law Review*, (2008) 229, 244;

¹⁴² Huisman, W. and Van Sliedregt, E., 'Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity,' *Journal of International Criminal Justice*, volume 8, (2010) at 803-828, 805, 807.

¹⁴³ See; *id.* at 803-828, 805, 810.

¹⁴⁴ *Id.* at 803-828, 805, 810.

¹⁴⁵ *Id.* at 803-828, 811.

¹⁴⁶ *Id.* at 803-828, 811.

¹⁴⁷ *Id.* at 803-828, 811.

¹⁴⁸ *Id.* at 803-828, 811-812.

¹⁴⁹ *Id.* at 803-828, 812.

While at first glance these cases may seem contradictory, the difference appears to turn on a matter of the production of evidence.¹⁵⁰ In Kouwenhoven, the prosecution could not produce sufficient evidence to suggest he knew of the activities. Reading van Arnaat and Kouwenhoven together, it appears that those who engage in the support of international crimes knowingly or with intention could face criminal sanction. As an Expert Panel for the International Commission of Jurists (ICJ) has noted, when company officials are accused of criminal responsibility for the acts of others,

“...two critical questions will always be asked. First, what did the official do or fail to do in terms of his own behaviour or that of an actor over whom he or she had effective control and second, what was his or her mental state at the time?”¹⁵¹

These are the questions that appear to be at the heart of the difference between van Arnaat and Kouwenhoven. Kouwenhoven was found not to have taken a clear action of support while van Arnaat was found to know and understand his role. The more direct the assistance, and the more closely it is tied to the commission of an international crime, the more likely it is that the company or individuals within it will be found complicit.¹⁵²

If evidence can be provided that corporate officials know that money and equipment they provided would be used to commit gross human rights or humanitarian law violations, it could give rise to criminal responsibility for complicity in war crimes or other gross human rights violations. This is admittedly a high standard, but not one beyond the realm of possibility if a prosecutor is interested in the case. The potential for criminal responsibility extends to individuals within the corporation, but also potentially to the corporation itself. It seems unlikely that RDS would be pursued criminally at this time, but that does not mean that any involvement Shell has with security forces could not later give rise to criminal or civil responsibility.

If proven, Shell's financial support of the Nigerian military in light of the on-going conflict in the Niger Delta arguably constitutes a civil wrong for which reparations are owed to victims. The Van Arnaat decision could be used to demonstrate that there is a recognised tortious duty of care¹⁵³ not to facilitate gross human rights and humanitarian law violations, and that the knowing funding of those who do so can represent a violation of that duty. Even in jurisdictions where RDS cannot be criminally pursued as a corporate entity, if an individual

¹⁵⁰ See: *id.*, at 803-828, 813-815.

¹⁵¹ Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Volume 2: Criminal Law and International Crimes, at 37, available at: http://old.icj.org/news.php3?id_article=4405&lang=en (last accessed 29 September 2012).

¹⁵² *Id.*, at 37.

¹⁵³ More details on the duty of care for RDS are considered in Section II, D - E

within the firm is convicted, evidence produced from a criminal prosecution could be used in a civil suit against the corporation.

Such a finding against Shell or an employee would be precedent setting. The law is evolving in this area, and some have concluded that “Dutch authorities are making serious efforts to take action against those who provide questionable regimes with the means to carry out serious violations of international humanitarian law”.¹⁵⁴ UK and Dutch courts would likely let such claims move forward if the allegations relate to actions taken by RDS, as set out in Section II. US courts, though, are unlikely to retain jurisdiction over such claims unless made under the Alien Tort Statute (ATS), the future of which remains unclear. Sabine Michalowski discusses the potential for such claims in her Annex to this Report.¹⁵⁵

E. LABOUR RIGHTS

Question for investors to consider:

- What can the company do to deal with the fact that many of its employees in the region are treated as casuals when they are, for all practical purposes, long term?

Shell is potentially liable, along with other companies operating in the Niger Delta, for large-scale violations of labour rights. This arises from the fact that it hires a significant proportion of its workforce as temporary labourers, employed on short-term contracts which are renewed as long as the company has need of the individuals in question. These are, in other words, permanent employees who are treated as if they were casuals. The impact on their conditions of work is important. They are routinely denied trade union rights, are often subject to lesser wages than their permanent counterparts even though they do the same work, and have no access to pensions or the other entitlements that permanent employees enjoy. The accompanying detailed report by Rosemary Danesi covers these points. It is a state of affairs that adds to instability in the region, and that in turn can affect the ability of the company to assure a steady flow of income to investors.

F. INTERACTIONS WITH THE LEGAL PROCESS IN NIGERIA

Judicial decisions fixing liability over the years have been vulnerable to Shell's reluctance to accept initial Nigerian court rulings, as well as its tendency to prolong litigation through appeals. The attached report by David Ong details these points. However, there is, for

¹⁵⁴ Zqanenburg, M. & Den Dekker, G., 'Prosecutor v. Frans van Anraat, Case No. 07/10742,' 104 *American Journal of International Law*, (2010) 86, at 93-94.

¹⁵⁵ See: Annex I.

investors, a price to pay as Nigerian litigants can now sue in Europe or the US, where such approaches are more difficult for Shell to take: a point to be considered in Section III of the Report.

G. PREVENTION, COMPENSATION, AND INVESTMENT STRATEGY

Question for investors when considering the points below:

- What are the long term consequences for the region, and for Shell, if it avoids proactive action designed to prevent spills and instead relies on compensation if required once the damage has happened? What can investors concretely call for to remedy the situation?

The latest case in the UK, brought by the Bodo community, indicates that substantial compensation may be forthcoming. Shell has also indicated a willingness to clean up and restore damaged areas. However, in this operation, Shell will have likely earned more during the period that oil was extracted from this site than it is now required to pay out. This raises the prospect that, over time, regulators will aim to remove the temptation for a company to allow damage to happen and to stand ready to pay compensation in the expectation that its overall returns will far exceed any bill it has to pay. The World Bank's International Finance Corporation (IFC) already gives priority to risk avoidance over compensation for damage done, demanding that companies receiving its loans "... favor the avoidance and prevention of impacts over minimization, mitigation, or compensation, wherever technically and financially feasible".¹⁵⁶

Investors can anticipate future action by host governments that complement the IFC requirement. This could lead to the development of remedies that require 'disgorgement' of profits from a particular operation, as certain financial regulations do presently. This measure requires that the company surrender to the authorities all profit earned from an operation in which it has violated the law. This goes well beyond compensation to local populations for damage to their agricultural holdings, fishing activity, etc.¹⁵⁷

There is also the possibility of a greater use of court orders – usually injunctions – stopping operations until a fault has been repaired. This remedy is available in Nigerian law, but

¹⁵⁶ International Finance Corporation, Performance Standard 1: Social and Environmental Assessment and Management Systems, April 2006, para. 14, available at: [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/\\$FILE/IFC+Performance+Standards.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_PerformanceStandards2006_full/$FILE/IFC+Performance+Standards.pdf) (last accessed 6 October 2012).

¹⁵⁷ For an example of the way in which an administrative agency together with the judiciary can take the initiative to shape such a remedy in other areas of law, see US developments in Gibbs, J.N. and Fleder, J.R., 'Can FDA Seek Restitution or Disgorgement?', 58 *Food & Drug Law Journal*, (2003) at 129.

Nigerian courts have often been unwilling to make use of this power. The courts have been convinced that the overall revenue gains to the State from allowing operations to continue despite the damage outweigh the material losses to domestic populations.¹⁵⁸ It has been an attitude that led Shell's legal manager in Nigeria, J. A. Odeleye, to say in 1998: "The law is on our side because in the case of a dispute, we don't have to stop operations".¹⁵⁹ It would be a mistake to rely on this approach in the future. There is much greater awareness, both in Nigeria and worldwide, of the scale of damage that has been done by courts allowing operations to continue. Arguments before the judges in fresh cases will increasingly press on the point that international human rights standards prevent too easy priority being given to the goal of promoting overall national wealth when this is obtained at the expense of drastic losses to local populations.¹⁶⁰

¹⁵⁸ Frynas, J., 'Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria', *Journal of African Law*, 43 121-150 at 122-3.

¹⁵⁹ Interview reported in *id.*, at 123.

¹⁶⁰ For elaboration on this point, see; *Global Project Finance, Human Rights, and Sustainable Development*, Leader, S., and Ong, D., (eds.), Cambridge University Press, Cambridge, (2011) Ch. 5.

SECTION II - WHICH COMPANIES AND INDIVIDUALS WITHIN THE SHELL GROUP ARE POTENTIALLY LIABLE?

Questions for investors when considering the points below:

- If RDS is potentially liable in the future for its failure to intervene in order to improve SPDC's implementation of Group Standards, what concrete changes can be called for in order to deal with this development in the law? What does this require by way of changes in the way SPDC is monitored and controlled?
- How vulnerable are Shell officials to personal liability for decisions they take, or fail to take, regarding the Delta? What impact might this have on company reputation and share value?

While certain companies within the Group are potentially liable in ways that will be described below, the ultimate impact of this liability will be on the value of shareholdings in the parent company, RDS. Investors should therefore be concerned that, even if legal responsibility is focused on a company within the group other than the parent (as will be considered below), this can nevertheless have a strong negative impact on the overall value of shares. For these purposes, it is enough to establish that RDS – a company whose shares are publicly traded - indirectly owns 100% of the shares in the Nigerian subsidiary SPDC.

A. FURTHER DETAILS ABOUT THE STRUCTURE OF THE GROUP

The Royal Dutch Shell Group consists of companies incorporated in several jurisdictions around the world, and organised in several layers of ownership and control. Some of these companies service the functional needs of those operating on the ground in petroleum extraction and transport, such as the SPDC¹⁶¹. The lines of ownership are such that the shares of SPDC are wholly owned by another company within the group, which is in turn owned by another higher up until the final layer of ownership is held by the parent company, RDS. RDS is a legal entity organised under the laws of the United Kingdom with a registered address in the United Kingdom and its head office in the Netherlands.

There are functional committees, designed to set Group-wide operating norms. Among these functions are those of the Corporate and Social Responsibility Committee. The aim of this committee is “...to *maintain a comprehensive overview of the policies and conduct of the*

¹⁶¹ Organised under the laws of Nigeria.

subsidiaries of the Company with respect to ... the environment and social performance; the Shell Code of Conduct; and major issues of public concern." It reports its own conclusions and recommendations to executive management and the Board. "In this regard, the *Committee fulfils its responsibilities by reviewing with management: Shell's overall health, safety, security, environmental and social performance; Shell's annual performance against the Code of Conduct; the management of social and environmental impacts at major projects and operations; and emerging social and environmental issues.*"¹⁶²

B. THE JOINT VENTURE IN NIGERIA

SPDC is the operator of installations that are owned by a joint venture made up of Nigerian and international oil companies. The joint venture has no corporate personality, but is based on a Joint Operating Agreement. The relevant parties to the Agreement here are the Nigerian State-owned company Nigerian National Petroleum Corporation (NNPC), SPDC, Total E&P Nigeria Ltd. (formerly Elf (Nigeria) Ltd.) and Nigerian Agip Oil Company Ltd. NNPC, which represents the interests of the Federal Government of Nigeria, holds an interest of 55 per cent in the joint venture, while SPDC has a stake of 30 per cent. Total has a stake of 10 per cent and Agip has a stake of five per cent.

i) The position of SPDC

a) Operational liabilities:

The types of liability that SPDC has incurred as an operator, and can do in the future, have been considered in Section I (A) of this report. As will be considered further in this report, and in the cases discussed on the relevant environmental standards in Annex II, SPDC has repeatedly been found liable for spills due to its failure to maintain and supervise the operation of its equipment. It has also been found liable for failures to clean up and to remediate.

b) Value of SPDC holdings in Joint Venture:

In addition to its liabilities as operator of the relevant oil and gas facilities on behalf of the Joint Venture, SPDC also has a 30 per cent share of that Joint Venture, which holds more than 30 Niger Delta onshore Oil Mining Leases (OML) due to expire in 2019.¹⁶³ As litigation mounts, the value of these leases can be expected to fall, affecting the value of Shell's holdings.

¹⁶² Royal Dutch Shell Plc, 'Annual Report and Form 20-F for the Year Ended December 31 2010', (2011) at 80 (emphasis added).

¹⁶³ Shell Annual Report 2011, at 26.

Against this background, SPDC is engaged on a programme of divesting itself of certain shares in oil blocks in the Niger Delta. In 2010, Shell sold its interests in three blocks in the Niger Delta, and related equipment, to a consortium led by two Nigerian companies. In October 2010, Shell reached agreement to transfer its rights in another block in the Niger Delta to a subsidiary of First Hydrocarbon Nigeria Limited. This transaction is expected to be completed in 2011, subject to approval by NNPC and the Federal Government of Nigeria.¹⁶⁴ Furthermore, in its 2011 Annual Report Shell disclosed the sale of a 30 per cent interest in OMLs 26¹⁶⁵ and 42 and related facilities in the Niger Delta and the assignment of its interests in respect of OMLs 34 and 40, which is still awaiting requisite consents for completion.¹⁶⁶

This has caused some disquiet over the impact this might have on liabilities to local populations.¹⁶⁷ It is not clear that Shell operates any due diligence concerning the environmental record of companies acquiring the leases.

ii) The position of the parent company: Royal Dutch Shell plc and its predecessors

It is important to isolate and identify the particular liabilities of RDS that are likely to arise in the future. This is because RDS denies, and can be expected to continue to deny, any liability accruing to itself arising from events in Nigeria. RDS denies this for two reasons, both of which have been advanced in on-going litigation in the Netherlands and which are likely to be repeated in future cases in other jurisdictions: the effect of the Group unification in 2005 on the plaintiffs' claims; and the impact the 'corporate veil' has on its due diligence obligations.

a) The position prior to the unification of the Group

Royal Dutch Shell (RDS) was formed by unifying its previously split corporate structure. Two companies which had been previously at the apex of the UK and Dutch branches of the company have been turned into subsidiaries, of which RDS is now the owner. This has been accomplished by transforming the shares of the owners of the two previous parent companies

¹⁶⁴ *Id.*, at 25.

¹⁶⁵ Pursuant to Shell's statements in its 2010 Annual Report, OML 26 was awaiting approval from the NNPC and the Federal Government of Nigeria. It is understood from the 2011 Annual Report that these approvals were obtained.

¹⁶⁶ Shell Annual Report 2011, at 26.

¹⁶⁷ On July 22 2011 this statement was issued: "The Shell Petroleum Development Company of Nigeria Ltd (SPDC) has said divestment of its equity from some oil blocs in the Niger Delta is compliant with its contractual rights and regulatory frameworks which guide the oil industry in Nigeria. The company also rejects any suggestions that its divestment exercise is illegal, non transparent or done to undermine the interest of any stakeholders;" Available at: http://www.shell.com.ng/home/content/nga/aboutshell/media_centre/news_and_media_releases/2011/divestment.html (last accessed 6 October 2012).

into shares of the new parent, RDS. RDS argues that it does not inherit the liabilities of companies in the Shell Group of which it is now the owner. Its ownership is in the form of shares in those two companies and it claims to benefit from the classic principle of limited liability; a principle which prevents the liability for damage done by a company owned from becoming a liability of the shareholder in that company.

RDS claims that, since it only came into existence in 2005, it has no liability for events prior to that date. RDS was formed, in its current state, in 2005 following a shareholder vote approving a 'unification', through which RDS would become the publicly owned company and the former parents, the Shell Transport and Trading Company plc (STT)¹⁶⁸ and Koninklijke Nederlandse Petroleum Maatschappij N.V. (Shell NV) would become the principal, wholly-owned subsidiaries of RDS while also functioning as holding companies for companies lower down the chain of enterprises making up the Group.¹⁶⁹

RDS argues that this was, for the purposes of the English law under which the transformation was carried out, an exercise that fell short of a merger, but was simply a rearrangement of shareholdings, transforming the shareholdings in the Dutch and UK parent companies into a shareholding in RDS. It was an arrangement that did not cause one or more of the previous companies to dissolve and merge into another.¹⁷⁰ As such, RDS claims any responsibility prior to the date of this new arrangement did not pass to RDS. By implication, any responsibility as parent company for the pre-unification period remains with those companies to which SPDC was answerable as parent. Even if this argument were technically successful, it is not a position in which investors can take comfort since at most it shows that plaintiffs in litigation must locate their target correctly. Under this theory, plaintiffs must simply be more certain of which member of the Group was the relevant company at the relevant time the group established the policies that were meant to prevent damage to environment, property, and people.

b) The position since the unification of the Group: RDS and the duty of care

There is a second, more fundamental, argument that RDS advances – on which it can also be expected to rely in future: as a parent company, RDS claims that it owes no duty of care *per se* to victims of damage done by SPDC in the Niger Delta, even after the unification in 2005. According to the company, whether or not RDS is negligent in setting or implementing its widely publicised standards for environmental safety, those damaged in Nigeria as a result of

¹⁶⁸ As a part of the unification scheme, STT was delisted on 19 July 2005, and later became The Shell Transport and Trading Company Limited.

¹⁶⁹ Full Announcement, Shell Unification, available at http://www.unification.shell.com/shell_proposal/stt/other/ (last accessed 6 October 2012).

¹⁷⁰ It was affected under Section 425 of the Companies Act, 1985 (then in force), but not under Section 427 which brings about a merger.

RDS not acting to adequately to implement those standards cannot recover from the company since it has no direct legal responsibility to them to do its best to make sure that the standards are met. At most, according to this view, victims can recover damages from the subsidiary, SPDC, for failures to implement standards. RDS argues for this position based on several key claims, which are important to assess given their relevance for the future.

- RDS grounds its claim on the well-established feature of corporate law in most jurisdictions that parent companies are distinct legal entities from their subsidiaries and, as such, benefit from the limited legal liability that shareholders of a company – in this case the parent as shareholder of the subsidiary - typically enjoy.¹⁷¹
- RDS rejects any suggestion that since it has the power to influence SPDC's behaviour if it so chooses, it is liable for not exercising that power to prevent injury. This implies, according to RDS, that it has no legal duty to monitor the implementation of the standards it sets and therefore that it cannot be held liable for failures of surveillance or failing to intervene with the subsidiary's operations to prevent the damage. SPDC is an autonomous body, it claims, and is not under the control of RDS for these purposes.¹⁷²
- RDS admits that it sets worldwide standards for environmental protection that it expects to be followed by all subsidiaries. However, it argues at the same time that these subsidiaries are, as claimed above, autonomous. Any mistakes they make are theirs alone. RDS has no responsibility to the outside world for making sure that its standards are met.¹⁷³

None of these arguments provides RDS with the protection from liability that it seeks. It is true that a parent company will not, under UK, Dutch, or USA law, be *automatically* responsible for the actions of its subsidiary simply by virtue of its ownership of the latter, even if that ownership stands at 100%¹⁷⁴. It is also not enough to establish RDS's duty of care that, as the owner of the series of companies that terminate in SPDC, it had the *potential* ability to control

¹⁷¹ See: Shell's submission in *OGURU et al v. Shell*, Court of The Hague, Docket number: 2009/0579, Date: 13 May 2009] paras. 121 ff.; RDS acknowledges that this separation could be overridden if SPDC were set up as a sham company, established purely for the purposes of avoiding responsibility for damage done by RDS and hence rightly ignored by the courts as they 'pierce the corporate veil' and attach responsibility for damage in Nigeria directly to the parent. There were no such fraudulent aspects to the creation of SPDC, RDS points out, and hence no basis for piercing the veil. *Id.*, at para. 123, 124, 125.

¹⁷² *Id.*, at para. 125. This is not correct for those situations in which the judiciary finds a duty of care to exist. Apart from such a duty, there is no liability for omissions *per se*. However, where there is a duty of care present, then an omission can be a mode of failing to comply with that duty. See: *Introduction to the Nigerian Law of Torts*, Hercy, A.N. and Atsegbua, L.A., University of Benin: 1990, at 87. See; for the UK the same point made by Lord Goff in the *Littlewoods* case referred to *supra*.

¹⁷³ *Id.*, at para. 124.

¹⁷⁴ See: Gower and Davies, *Principles of Modern Company Law*, 8th Edition, Sweet and Maxwell: 2008, Sections 9-16.

the policies and decisions taken by the latter.¹⁷⁵ It is necessary, in addition, to show that a further, special relationship has arisen between a parent in the active position occupied by RDS and a subsidiary in the position of SPDC. If this special relationship exists, it could ground the parent's duty of care, along with that of the subsidiary, towards the victims of damage to the environment, property and people.

C. RDS HAS MOVED BEYOND THE TYPICAL ROLE OF CONTROLLING SHAREHOLDER

This special relationship has arisen around the activity in the Niger Delta because RDS has gone beyond the normal role of a controlling shareholder in relation to a company it owns. In the latter position, it would be entitled, as shareholders generally are, to make known its policy preferences to management of the subsidiary. This can include requesting that the subsidiary adopt certain policies about the environmental and the social impacts of its activity. However, as indicated in Section I (B), RDS prides itself on showing that it has gone further, making sure that the Shell Group as a whole functions coherently and effectively in matters of environmental and social protection. As indicated earlier, RDS points out that the norms it has adopted, known as the Shell General Business Principles, do not only concern itself but "...define how Shell *companies* are expected to conduct their affairs".¹⁷⁶

The norms provided to SPDC reach a significant level of detail. For example, SPDC relies on three specific advisories issued by another member of the Group, Shell Global Solutions. These form the basis of SPDC's internal procedures for deciding its risk management policies in relation to contaminated land.¹⁷⁷ In turn, the company's compliance is not a matter of a voluntary choice by its management. Instead, sanctions are anticipated; a prospect opened by the creation of the channel through which "...any employee can report irregularities to management through a worldwide dedicated telephone line and website without jeopardising his or her position".¹⁷⁸

This takes the parent company well beyond the role of a shareholder indicating its preferences to management about company policy, including as a shareholder aiming to

¹⁷⁵ Were that enough by itself, it would turn all companies in which shareholders have the potential to control a subsidiary (e.g., by dismissing their directors) into entities which lose their status as companies offering limited liability.

¹⁷⁶ Shell Annual Report, 2010, *supra*, at 77. (Emphasis added)

¹⁷⁷ Framework for Risk Management of Historically Contaminated Land for SPDC Operations in Niger Delta, OG.02.47028; Framework for Risk Management of Historically Contaminated Land for SPDC Operations in the Niger Delta: Mangroves and other Swamp Areas, OG.03.47062.

¹⁷⁸ *Id.* The reference to 'management' here means RDS management, evidenced by the provision of a worldwide mode of communication for any employee in the Group.

make the demands of ethical investment. Instead, RDS moves into the terrain of setting and monitoring of standards that daily operation must attend to.¹⁷⁹

In the UK, this transformation of a parent company's role from that of concerned shareholder to a shareholder exercising managerial functions is of fundamental importance.¹⁸⁰ Management of the SPDC does not simply *listen* to the views of the parent and the entities to which it assigns competence, such as Shell Global Solutions; it *partially relies* on those views for guidance about its appropriate responses. It also knows that if it does not rely on that guidance, sanctions may be incurred. The UK Court of Appeal has made it clear, in seminal cases such as *MCA Records Inc v. Charly Records Ltd.*¹⁸¹, that if the latter happens, then the controlling shareholder steps out of its normal constitutional functions, where it would enjoy immunity from liability for damage caused by the company it owns. The shareholder moves into a position in which it becomes potentially liable for failings in the ways in which those rules and standards are formulated and implemented. RDS is arguably in this position.

D. RDS HAS AN OBLIGATION TO INTERVENE

RDS has advanced a fall-back argument in the Netherlands litigation; it argues that even if it might be responsible for negligence when it *actively* steps into a position of control of SPDC, it is entitled to decide how far that action should go. If it decides not to intervene with SPDC when the latter decides whether and when to follow its directives and adequately maintain its equipment, then RDS cannot be held liable for a subsidiary's decision that falls below the standards set by the law. As the company argues:

“Even though RDS naturally exercises its powers as (indirect) shareholder in group companies to safeguard the uniformity of the policy within the group RDS' involvement takes place at a much higher level of abstraction, and is far more removed from the operations of its group companies than Oguru et al. suggest. By law, this involvement is entitled to be at this higher level: *even if RDS had the knowledge* alleged by [the complainants] – which Shell denies – by law RDS was still not required to intervene in any way *because RDS could not be expected to interfere with the daily operations of subsidiaries (twice removed) such as SPDC.*”¹⁸²

This is not the position in England and Wales where the Court of Appeal, in *Chandler v. Cape plc*,¹⁸³ has reached a decision on parent company liability that is of general importance. It is a

¹⁷⁹ This supervisory role is exercised by the Corporate and Social Responsibility Committee referred to in Section I, which supervises compliance with all management with the company's Code of Conduct. In particular, “... *the management of social and environmental impacts at major projects and operations; and emerging social and environmental issues...*” is kept under regular review. Royal Dutch Shell plc, ‘Annual Report and Form 20-F for the Year Ended December 31 2010,’ (2011) at 80 (emphasis added).

¹⁸⁰ While there has been no case directly on the point in Nigerian courts, the latter can be expected to adopt the same view.

¹⁸¹ *MCA Records Inc & Anor v. Charly Records Ltd & Ors*, [2001] EWCA Civ 144.1

¹⁸² *Oguru v. RDS and SPDC*, Motion for Defense, Court of The Hague Docket number: 2009/0579, Date: 13 May 2009 Para. 139 (emphasis added).

¹⁸³ 2012] EWCA Civ 525; See also the informative High Court judgement at [2011] EWHC 951 (QB)2011.

decision that will provide a significant resource for lawyers in other jurisdictions, including Nigeria which often follows UK precedents. The issue is currently an open one in the on-going Dutch litigation, and a decision is expected shortly, with possible appeals to higher courts. Whatever the outcome of that case, the standards set by the UK are of great importance for RDS. The standards are likely to be followed in many countries where Shell operates which follow UK precedents, and will control future litigation in the UK itself.¹⁸⁴

In *Chandler*, a parent company was held to have a duty of care to an employee of its subsidiary where the employee had been made ill by asbestos dust on the subsidiary's premises.¹⁸⁵ The parent, Cape plc., was in a position that resembled that of RDS in an important respect: Cape had developed the health and safety policy regarding the hazardous substance for the group of companies, much as has been done regarding the standards for prevention of oil pollution by those entities within the Shell Group ultimately responsible to RDS. In both cases, standards were set both at subsidiary and at parent company level. The subsidiary in *Chandler* also had its own health and safety committee and made its own decisions on these matters. However, the Court insisted that even if the parent company did not decide on all aspects of health and safety policy, it retained ultimate control over that policy. The subsidiary looked to the parent for guidance on key aspects of the relevant standards, and the parent provided such guidance. The parent, in the words of the High Court, "... retained overall responsibility. At any stage it could have intervened [and the subsidiary] would have bowed to its intervention. On that basis ...the Claimant has established a sufficient degree of proximity between the [parent company] and himself".¹⁸⁶

The Court found that, having assumed this role of the body with ultimate authority in the Cape group for the provision of environmental standards, much as we have seen RDS indicates that it occupies in its Annual and Sustainability Reports, the parent company owed a duty of care to the injured employee, and so shared responsibility for his injury. Furthermore, and contrary to the view taken by RDS, the Court was clear that a parent company in this position has a duty to *intervene* in the subsidiary's operation in order to try to prevent the damage. The company's responsibility was not just to monitor the situation, but to actively do something about what had gone wrong.¹⁸⁷

¹⁸⁴ The Courts have said in the preliminary phase of the cases that the plaintiffs have not yet established this species of obligation of parent companies, so inviting further argument on the point. See: Oguru et al., paras 4.14-15; Dooh et al., paras 4.13- 14; Akpan et al., paras 4.12-13.

¹⁸⁵[2012] EWCA Civ 525; See also the informative High Court judgement at [2011] EWHC 951 (QB) 2011.

¹⁸⁶Court of Appeal [2012] EWCA Civ 525 at para 79 approving High Court [2011] EWHC 951 (QB) 2011 para. 75.

¹⁸⁷*Id.*

E. DOES THE REMOTENESS OF RDS FROM LOCAL CONDITIONS REDUCE ITS RESPONSIBILITY?

As has been seen, RDS claims that it cannot be held liable for what it considers to be relatively small spills that would not be expected to come to the attention of a distant parent company directing the Group worldwide. This parallels its claim that it cannot, as a parent company, be expected to intervene in the day-to-day operations of SPDC. However, its argument fails to appreciate the nature of the liability in question. The issue is of fundamental importance to corporate accountability. As the Court of Appeal put the point in *Chandler*, liability arose not from a "...failure in day-to-day management; (instead) this was a systemic failure of which the Defendant was fully aware".¹⁸⁸ In other words, the parent company will be liable if it fails to put in place an effective system designed to identify and remedy small spills as well as large ones. The responsibility concerns systemic failures. The only basis on which that responsibility can be discharged will be if, in any given case, it can be shown that, having taken responsibility for formulating group environmental protection standards, RDS did all it could be reasonably expected to do to assure itself that these standards would be implemented. If, despite those best efforts, SPDC ignored the advice and went ahead to cause damage through poorly maintained or supervised equipment, RDS's due diligence requirements would have been satisfied. Then, and only then, would the responsibility for damage done in Nigeria stop at the door of SPDC.¹⁸⁹

In policy terms, this is an illustration in law of the wider 'due diligence' principle that is being advocated by Professor Ruggie's *Guiding Principles on Business and Human Rights* endorsed by the UN's Human Rights Council.¹⁹⁰ The Principles on this point are formulated in terms that can include, while extending beyond, the law.

F. OTHER SOURCES OF LIABILITY FOR RDS

There is, in addition, direct responsibility of RDS and/or any other entity in the Shell Group for actions taken by its personnel which cause or contribute to damage done in Nigeria. This level of responsibility does not rely on any connection between SPDC and RDS (or any other company in the Group). It is enough that RDS has sent personnel to work alongside employees of the subsidiary, and that damage results from what they did or did not do negligently. For example, if personnel employed by RDS or another Shell company carried

¹⁸⁸ [2011] EWHC 951 (QB), para.73; approved by Court of Appeal [2012] EWCA Civ 525 para. 79.

¹⁸⁹ The fact that RDS is, as it says in the Netherlands litigation, an 'indirect' or 'twice removed' shareholder in SPDC means simply that it owns shares in subsidiaries via ownership of other companies in the Group which in turn own the subsidiary. This indirect ownership is nevertheless accompanied by sufficient control by RDS over SPDC to cause these tort principles to take effect.

¹⁹⁰ <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> (last accessed 7 October 2012). See Principles 17 ff.

out inspections of the pipelines in Nigeria, and these individuals did their work negligently, then the responsibility of RDS would be directly engaged. It would not simply be responsible for failing to implement the correct standards in SPDC's activity.

G. LIABILITIES OF OTHER SHELL GROUP COMPANIES

In Nigeria, the work of SPDC is often accompanied by the work of other companies within the Shell Group, which carry out specialist operations. These companies may also be liable for damage if they inadequately carry out their functions. For example, in the case of *Agbara et al. v. Shell Petroleum et al.*, the Federal High Court of Nigeria made its award of damages not only against SPDC, but also against Shell International Petroleum Company Ltd and Shell International Exploration and Production BV, registered in the UK and the Netherlands, respectively, both wholly owned by RDS¹⁹¹.

H. PERSONAL LIABILITIES FOR DIRECTORS

In addition to the duty of care owed to victims of negligent decisions by RDS and other controlling companies within the Shell Group, there is also potential liability of those directors who took those decisions. These fall into three categories: personal duties owed to victims; personal duties owed to RDS and SPDC; and personal criminal liability.

i) Personal duties owed to victims

If it can be shown that a director of RDS or of another company within the Shell Group was active in shaping a faulty policy that led to damage, it is possible that the courts would deem this to be action that took him or her beyond their normal role and into an area in which personal influence was exercised over the design and implementation of a policy. At that point, the director is open to a claim of personal liability, possibly as a joint tortfeasor with the company.¹⁹²

ii) Personal duties owed to RDS and to SPDC

In addition to the liability to victims of pollution, directors of companies in the Shell Group may be personally liable to their companies for a failure to exercise due skill and care in managing

¹⁹¹ *Agbara et al. v. Shell Petroleum et al.*, suit no: FHC/ASB/CS/231/2001

¹⁹² *MCA Records Inc & Anor v. Charly Records Ltd & Ors* [2001] EWCA Civ 1441. The principles cited above (n. 9) specifically apply to directors as well as to controlling shareholders.

the interests of their company. If any given spill successfully results in large damage claims, it is possible for the company to sue those directors who were responsible for the poor decisions taken. This can result not only in personal liability for damages, but also in removal from one's post.

iii) Personal criminal liability

There are also potential criminal claims that can lie against a director for violations of environmental laws. Nigeria's FEPA Act 1988 provides that directors and officers who were responsible for the conduct of a corporation's business at the time of an environmental wrongdoing may be found guilty of an offence, usually punishable by payment of a fine. The only defence open to such directors and officers is that the offence was committed without their knowledge or that they exercised all due diligence to prevent the commission of the offence.¹⁹³

Summary description of potential liabilities

In any given case, responsibility for damage done by members of the Shell Group in the Niger Delta can arise in the following circumstances:

- 1)** The level of SPDC's maintenance and supervision of equipment is found to be inadequate according to Shell's operational standards as well as Nigerian law;
- 2)** SPDC's failures are in part attributable to the quality of guidance provided by other companies or persons within the Shell Group which are mandated to set and to monitor standards, including but not limited to RDS;
- 3)** In carrying out the function in (2) the failures on the part of RDS and others in any given case may arise from inadequacy of the action they take to maintain standards and/or they may arise from inaction: failing to intervene to prevent foreseeable harm to victims in circumstances where a duty of care on the part of the parent arises;
- 4)** Failures in (3) can also engage personal liability on the part of directors and other corporate officers for failures to show due skill and care in protecting the interests of their company;
- 5)** Directors, officers, and employees may be personally liable for damage to local populations, employees, and others.

¹⁹³ See: Makinde, O. and Ayanbule, B., on behalf of the firm of Aluko & Oyeboade written for the Global Legal Group, www.ICLG.co.uk (last accessed 6 October 2012).

SECTION III - THE PROSPECTS FOR LITIGATION AGAINST MEMBERS OF THE SHELL GROUP IN THE EU

Key questions for investors when considering the points below:

- How vulnerable is the Group to suit within the EU or US?
- What would be the impact on the company of enforcement in the EU or US of damages awards made by Nigerian courts?

Given that the damage has been done in Nigeria, the relevant law to apply may be Nigeria's.¹⁹⁴ However, this does not mean that the violations of this law need only be considered in Nigerian courts. Instead, the venue for litigation may vary, and the location of a case is a strategically important consideration. Given the frustrations with the domestic legal process described in Section I, the attention of litigants is turning to venues in the UK, the Netherlands, or the USA. The capacity of these courts to deal with Group liabilities falls into two categories: A) litigation initiated against members of the Shell Group, and B) enforcement proceedings of Nigerian court judgements.

A. LITIGATION INITIATED IN THE UK AND THE NETHERLANDS

If, in any given situation, the law considered in Sections I and II points towards potential liability, then it is possible to sue in the UK or the Netherlands the Shell companies located outside of Nigeria along with those, such as SPDC, located inside Nigeria. This can include RDS on the basis of its role in setting and enforcing environmental and other standards of management.

1. *Suing RDS*: EU law now provides that a company domiciled in an EU State may normally be sued in that State, even for acts which it commits outside of the jurisdiction of that State.¹⁹⁵ The company can no longer make use of the defence that the issue is better tried in the country where the damage occurred because of the better access to witnesses, familiarity of judges with local circumstances, etc. This plea of *'forum non conveniens'* is no longer available,¹⁹⁶ though it is still relevant to US courts. Therefore, if it is possible

¹⁹⁴ This is the general rule in Regulation (EC) No 864/2007 "Rome II", Article 4, though for environmental damage, the person seeking compensation can base his or her claim on the law of the country in which the event giving rise to the damage occurred. See Article 7 of the Regulation

¹⁹⁵ The Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters) provides that a defendant shall be sued in its domicile. The domicile of a company is established by the location of its corporate headquarters or its registered office.

¹⁹⁶ European Court of Justice, *Owusu v. N. B. Jackson and Others* [2005] ECR I-1383; Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial

that RDS acted illegally within the terms considered in Section I, then the issue can be tried in the UK (its place of registration) or the Netherlands (where it has its headquarters).

2. *Suing SPDC or another Shell company located in Nigeria*: as a matter of UK law, these can be joined as co-defendants if the same facts must be assessed against both defendants in respect of a claim. SPDC or other Nigerian-based Shell companies can be tried in the UK if they are, in the terminology of court procedure, a 'necessary and proper party' to the UK litigation.¹⁹⁷

It is on the strength of a similar combination of principles that the judiciary in the Netherlands has accepted jurisdiction to hear a case against RDS and SPDC.¹⁹⁸ This will be an important precedent for future litigation against Shell based in the EU, whatever the final outcome of the decision on the merits of the dispute.

Finally, it is important to note that, even if one of the Group companies could not normally be brought before a UK court, there is nothing to prevent the company from voluntarily submitting to the jurisdiction of the court. This was done by SPDC in the current *Bodo Community* case, where the UK court will decide on the level of compensation to be paid.

Matters (2000); See also: Burke J.J.A., 'Foreclosure of the Doctrine of Foreign Non Conveniens under the Brussels I Regulation: Advantages and Disadvantages', *European Legal Forum* (E) 3-2008, 121-126, available at: <http://www.simons-law.com/library/pdf/e/886.pdf> (last accessed 6 October 2012).

¹⁹⁷ CPR Practice Direction 6B 3.1(3)(b)

¹⁹⁸ Oruma, *supra*.

B. ENFORCEMENT OF NIGERIAN SUPERIOR COURTS' JUDGEMENTS BY COURTS IN THE UNITED KINGDOM¹⁹⁹

If there are monetary damages awarded by a superior court in Nigeria against RDS or another company within the Shell Group, it may be possible for victims in Nigeria to sue in the UK to enforce that judgement. Strategically this prospect is also important: if there are assets of these companies available in the UK they can be applied to satisfy the Nigerian judgement. As a result, it will be more difficult for Shell to ignore those decisions.

For enforcement of a judgement by a Nigerian superior court, it is not enough that the Shell company delivers its services from a distance; it must, in addition, be deemed to reside in or have been 'present' in Nigeria at the time the damage was done.²⁰⁰ Significantly, in the 'Ejama-Ebubu' case mentioned in Appendix II, in which damages of \$100 million were awarded, the award was made against SPDC and two other companies in the Shell Group, Shell International Petroleum Company Ltd, and Shell International Exploration and Production BV, registered in the UK and the Netherlands respectively. This means that the Nigerian court found that these companies, although registered overseas, were nevertheless legally present in Nigeria at the time the damage was done. Once the appeal process is

¹⁹⁹ Administration of Justice Act, 1920, Section 9. Enforcement in the United Kingdom of judgments obtained in superior courts in other British dominions:

"(1) Where a judgment has been obtained in a superior court in any part of His Majesty's dominions outside the United Kingdom to which this Part of this Act extends, the judgment creditor may apply to the High Court in England or [F7Northern Ireland] or to the Court of Session in Scotland, at any time within twelve months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in the court, and on any such application the court may, if in all the circumstances of the case they think it just and convenient that the judgment should be enforced in the United Kingdom, and subject to the provisions of this section, order the judgment to be registered accordingly.

(2) No judgment shall be ordered to be registered under this section if—

(a) the original court acted without jurisdiction; or

(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court; or

(c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court; or

(d) the judgment was obtained by fraud; or

(e) the judgment debtor satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment; or

(f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court.

(3) Where a judgment is registered under this section—

(a) the judgment shall, as from the date of registration, be of the same force and effect, and proceedings may be taken thereon, as if it had been a judgment originally obtained or entered up on the date of registration in the registering court;

(b) the registering court shall have the same control and jurisdiction over the judgment as it has over similar judgments given by itself, but in so far only as relates to execution under this section;

(c) the reasonable costs of and incidental to the registration of the judgment (including the costs of obtaining a certified copy thereof from the original court and of the application for registration) shall be recoverable in like manner as if they were sums payable under the judgment .

²⁰⁰ See: *Adams and Others v. Cape Industries Plc. and Another*, [1990] 2 W.L.R. 657 (CA) passim.

completed in this case, this would allow for an enforcement action against the assets of the latter two in the UK and/or the Netherlands. The courts in these jurisdictions must agree with the Nigerian superior court that the company-defendant was indeed present at the time the damage was done, and if it does, the way is open to enforcement.

This last requirement can make it difficult, but not impossible, to enforce a judgment against a parent company in the UK. The courts will demand that the parent not simply exercise control over the subsidiary, but that it has a clear presence within the jurisdiction by functioning in the territory from a fixed place of business, or via an agent, rather than as simply the owner of the shares of subsidiary such as SPDC.²⁰¹ However, this is an evolving area of law. Future plaintiffs may press the courts for a more flexible approach to enforcement of judgements against parent companies.

This is a point of importance for RDS shareholders. Claims for enforcement of these judgements may well tie up their company in lengthy and complex legal battles. Given the attraction of UK or Dutch enforcement orders, which are more likely to be obeyed, the claims may come with relative frequency. The Group companies facing these claims may resist by insisting that the judgment was tainted in some way, including violations of accepted rules of procedure or other guarantees of impartiality.²⁰² However, this process would require a defence by Shell to each claim that will make significant calls on corporate time and skill.

Investors should be aware of the costs of such litigation. Albeit in a different jurisdiction, the *Trafigura* case involved a similar sized group of plaintiffs as in the *Bodo* case, and in the former the defendants paid £50 million as the plaintiffs' costs. That involved 30,000 claimants. The legal claims brought by the Bodo community involve so far approximately 49,000 individuals. This, in turn, is a figure that should be multiplied many times to account for all of the communities in the Niger Delta that are positioned to bring claims.

²⁰¹ There might be facts which fit in with the exceptions to the 'no presence of parent companies' principle articulated in the *Adams* case. The enforcement claim by victims must be brought within 12 months of judgement in Nigeria. If an appeal is pending, or the defendant intends to lodge an appeal, then the time limit will not begin to run until that appeal process is finished; Administration of Justice Act, 1920, Section 9 (2) (b). In certain circumstances English courts can be persuaded to extend the time limit.

²⁰² Administration of Justice Act, 1920, Section 9 (2).

CONCLUSION

The law that has framed the activity of Shell in the Niger Delta over many years is beginning to shift. The large damages claim being litigated in the UK coupled with an equally large award made by the Nigerian Federal Court, as well as the litigation in the Netherlands are the most visible parts of a much larger body of claims that have been or are waiting to be made. Litigation can be expected to intensify.

In anticipation of these future developments, investors should call for:

- Strengthened controls by RDS, and via RDS by other relevant members of the Shell Group, over SPDC's implementation of Group environmental and social standards.
- A recognition that RDS's distance from the day-to-day operations of its Nigerian subsidiary is irrelevant to its duty to have in place systems that require it to intervene to rectify a dangerous situation
- Transparency about alleged company payments for services designed to protect its installations and avoidance of any payments that make it vulnerable to complicity in human rights abuses
- Placing emphasis on proactive measures designed to prevent future damage, even if this requires slowing or stopping production until the problems are put right

These are urgent steps to take, since once international litigation takes hold, particularly for larger claims involving damage to large populations, the impact on Shell could be considerable. The less expensive route, as well as one that will yield the collateral benefit of an enhanced reputation, would be one in which the company shoulders the responsibility that national and international standards say belongs to it: to do what it takes to improve equipment so as to prevent spills; to clean up those that have happened; and to make whole the natural and social environments that its activities have damaged.

Appendix I - Elements of a potential claim under the US Alien Tort Claims Act (ACTA), by Sabine Michalowski

Platform, a UK based NGO has recently published *Counting the Cost*, a report which considers allegations that Shell shares responsibility for instances of serious violence in the Niger Delta region from 2000 to 2010. While the issues of fact may well call for further clarification, if they are shown to be correct, there could be issues of possible liability for Shell arising as a result of which investors should be aware. The report will not be summarised here, but can be accessed at http://platformlondon.org/nigeria/Counting_the_Cost.pdf.

The following comments are made subject to the proviso that the liability of corporations under ACTA is currently a matter on which US courts take different views by different courts, and the matter is due to be considered by the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.* Assuming that corporations can be held liable (and in certain Circuits they can, see *Doe v. Exxon Mobil Corporation*, USCA Case #09/7125 (DC Circ. 8th July 2011); and *Boimah Flomo et al. v. Firestone Natural Rubber Co.*, 2011 WL 2675924 (C.A.7 (Ind.)); but see, on the other hand, *Kiobel v. Royal Dutch Petroleum Co.*, 2010 WL 3611392 (2nd Circ. NY) rejecting the existence of such liability), several requirements have to be met.

As liability under the ATCA requires a violation of the law of nations, complicity liability of a private actor, including corporations, requires, in principle, that the private actor acted under colour of law, that is, together with the State or State officials (*Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir.1995)). With regard to the allegations in the Platform report that violations were committed by State military who were employed by Shell as security guards, if these allegations are proved, then it may also be possible to demonstrate that Shell bears legal liability for those violations under the Act. In respect of the crimes which have been alleged to have been committed by the private security guards financed by Shell, it would be difficult to show liability, even if the facts were proven. That is, if a corporation does not act under the colour of law, it is only liable where the crimes are committed in the context of genocide or war crimes - neither of which will be easy to argue in the Nigerian context.

So far as the allegations that security guards have committed extra-judicial killings, if these allegations were proved they may amount to violations of the law of nations and come within the remit of ACTA. Other allegations of torture or unlawful detention may do so, but more investigation would be required.

The *actus reus* to be demonstrated is that of 'practical assistance, encouragement, or moral support which has a *substantial effect* on the perpetration of the crime' (*In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (SDNY 2009), at 257 (emphasis added). See also;

Presbyterian Church of Sudan v. Talisman Energy, Inc., [374 F. Supp. 2d 331 \(S.D.N.Y. 2005\)](#), at 337-338 and 340; *Doe v. Unocal Corp.*, [395 F.3d 932 \(9th Cir. 2002\)](#), at 951). This has been interpreted by different courts in different ways. Sometimes it is argued that the *actus reus* of aiding and abetting liability is only met where the corporation provided the actual means through which the violations were carried out (*In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (SDNY 2009)). Courts are particularly sceptical of holding corporations liable where they provided the principal perpetrators with money, as the causal link is then routinely regarded as too tenuous (*In re South African Apartheid Litigation*, 617 F.Supp.2d 228 (SDNY 2009)). However, this argument is not convincing, as money can (and often will) have a substantial effect on the commission of violations. Complainants may argue that the violations would not have taken place, or would not have taken place with the same intensity over the same period of time without Shell having financed security guards who are alleged to have carried out these violations, whether or not Shell knew of them.

In the particular case of Shell's liability for the acts of government security forces it employed as security guards, it could be argued that Shell is responsible as an employer.

According to the Platform report referred to above,²⁰³ Shell air strips have also been used to launch military operations. To the extent that 'Shell provides [government forces] with such logistics as patrol vans, boats and helicopters' on a regular basis, one could argue that Shell provided the direct perpetrators with the means through which the violations were carried out. But in order to use this argument, it would have to be alleged that the means provided by Shell were used in order to carry out the violations, or at least had a substantial effect on their commission.

If the *actus reus* can be made out, another hurdle to overcome is that of the necessary *mens rea*. At the moment, it is highly debated whether the required *mens rea* is one of purpose (*Presbyterian Church of Sudan v. Talisman Energy Inc.*, 2009 WL 3151804 (2nd Cir. N.Y.), at 12-13; *Khulumani v. Barclay National Bank*, 504 F.3d 254 (2nd Cir. 2007, at 276-279 per Katzmann, J., and at 332-334 per Korman, J.) or of knowledge (*See, for example; Doe v. UNOCAL Corp.*, 395 F.3d 932 (9th Cir. 2002), at 950-951; *Doe v. Exxon Mobil Corporation*, USCA Case #09/7125 (DC Circ. 8th July 2011)). If purpose were to be the relevant test, then liability would not be possible in any of the scenarios revealed in the Platform report, as none of them seems to suggest that Shell or its subsidiaries acted with the desire to facilitate the commission of the offences under consideration. If the relevant test is one of knowledge, this might change, as in most of these scenarios it might be possible to show that Shell foresaw the consequences of its acts of assistance.

²⁰³ See: Platform, *supra*.

Appendix II – Remedying Oil Spills in the Niger Delta: Elements for Assessing Responsibility, by David M. Ong

I. BACKGROUND AND INTRODUCTION

The Niger Delta region in Nigeria covers an area of approximately 20,000 km², within an overall wetlands area spanning about 70,000 km². This region makes up 7.5 per cent of Nigeria's total land mass, with a population of 20 million people, composed of up to 40 different ethnic groups.²⁰⁴ Territorially located within the Nigerian federal State, the Niger Delta is usually assumed to include the area of nine Nigerian states where oil is exploited, namely: the Abia, Akwa, Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo, and Rivers states. Scientific and geographical definitions, however, limit the region to a few core states (namely: Bayelsa, Cross River, and Rivers), which are defined by common flora.²⁰⁵ Although it is the largest oil-producing area in Nigeria, it is also the most neglected region of the country. The environmental problems afflicting the Niger Delta are now well-documented, but seem far from being resolved.²⁰⁶ Okpanachi has recently identified three major sources of environmental damage from oil industry activities which have combined to despoil the rich, but sensitive and fragile, ecosystem of the Niger Delta. These are as follows: 1) the lack of gas utilisation infrastructure in Nigeria, allowing the continued practice of gas flaring; 2) oil spillage through seepage or leakage (mainly from high -pressure oil pipelines); and finally, 3) so-called 'asset integrity' problems, consisting of numerous badly designed or poorly maintained oil companies' drilling facilities, and especially, their pipelines.²⁰⁷

These problems arise from a complex combination of major oil and gas development activities being undertaken in a densely populated, as well as environmentally-sensitive, area. As Obagbinoko has recently reiterated, most of the industries whose activities cause environmental degradation are owned by international oil corporations (IOCs), including Shell, Exxon Mobil, Chevron Texaco, Agip, and Total. Among these IOCs, the Shell Petroleum Development Company (SPDC) is primarily responsible for most of the oil exploration activities in the Niger Delta region which have in turn caused the greatest environmental

²⁰⁴ See under the heading: 'Environmental issues in the Niger Delta', from *Wikipedia, the free encyclopaedia*, available at:

http://en.wikipedia.org/wiki/Environmental_issues_in_the_Niger_Delta (last accessed 6 October 2012).

²⁰⁵ Allen, F. and Okeke-Uzodike, U., 'Oil, Politics, and Conflict in the Niger Delta: A Non-killing Analysis', *Africa Peace and Conflict Journal*, Vol.3, No.2 (December, 2010), 32–42, at 32.

²⁰⁶ The latest official report by the United Nations Environment Programme (UNEP), albeit geographically confined to the Ogoniland region within the Niger Delta, serves to confirm the findings of many previous studies on this matter. See: UNEP, 'Environmental Assessment of Ogoniland', Nairobi (2011). The report and data gathered by UNEP as part of its assessment are available at: <http://www.unep.org/nigeria> (last accessed 6 October 2012).

²⁰⁷ Okpanachi, E., *supra* as indicated in Section I of the main Report, at 36.

degradation.²⁰⁸ As SPDC is the largest operator in the Delta, it may be assumed that it is therefore responsible for a large proportion of any environmental damage caused by oil spillage and other activities of oil exploration in the region. Moreover, Moffat and Linden have suggested that the oil industry in the Niger Delta (in which SPDC is the largest company) may be publishing statistics that show spill damage at one-tenth of its real level.²⁰⁹ The presence and activities of these major IOCs, and especially Royal Dutch Shell plc through its SPDC subsidiary in Nigeria, has exacerbated the situation in the Niger Delta region, creating a triangular relationship of disputes between these companies and the local communities from the areas they operate within, with the local (state) and federal Nigerian governments mediating between these two sides (not always successfully).²¹⁰ This complex intersection between State and transnational corporate responsibility for the provision of community environmental justice is increasingly occupying the attention of lawyers from across the ostensible legal sub-disciplinary (environmental/tort law) and jurisdictional (international/domestic) boundaries.²¹¹ In this regard, Osofsky has recently argued that whether we treat Nigeria-Shell relationship as an 'enclosed, permeable, or enmeshed' legal space can either limit or expand the ways in which such cases might fit within broader environmental justice strategies.²¹²

This study is an attempt to catalogue and then assess efforts to apply relevant environmental laws, standards and legal remedies to the specific environmental problems of the Niger Delta. It is argued that the continuing lack of success in tackling these issues has less to do with any systemic inadequacies of Nigerian environmental legal provisions or institutional frameworks for applying environmental laws and standards, but more to do with the approach to the domestic legal framework for environmental governance and enforcement taken by the main

²⁰⁸ Obagbinoko, C., 'The Crisis of Environmental Degradation in the Niger Delta Region: How Effective is the Law and its Enforcements?', in Ojokuto, V., (ed.), *Fresh Dimensions on the Niger Delta Crisis of Nigeria*, Journal of Alternative Perspectives in the Social Sciences (JAPSS) Press, Miami, USA (2009) 170-193, at 173, citing Idowu, A. A. 'Environmental Degradation and Human Right Violations', *Modern Practice: Journal of Finance and Investment Law*, Vol. 3, No.1 (1999).

²⁰⁹ Moffat, D. and Linden, O., 'Perception and Reality: Assessing Priorities for Sustainable Development in the Niger River Delta', *Ambio*, Vol 24 No.s 7-8 (December, 1995) at 527-538.

²¹⁰ Indeed, Ako has recently argued that the poor allocation of Federal government oil revenues between the states and communities in the Delta region has contributed to the sense of injustice among these communities. See; Ako, R.T., 'Substantive injustice: oil-related regulations and environmental injustice in Nigeria', paper prepared for the joint-workshop organised by the IUCN Academy of Environmental Law, Environmental Law Centre and Commission on Environmental Law, entitled: 'Linking Human Rights and the Environment: A Comparative Review', held at the University of Ghent, Belgium, in September 2010. Available at:

<https://community.iucn.org/rba1/resources/Documents/Rhuks%20Temitope.pdf> (last accessed 6 October 2012).

²¹¹ See: Ong, D.M., 'The Relationship between Environmental Justice, Environmental Law and Human Rights: Transcending Disciplinary and Jurisdictional "Boundaries"', presentation delivered at a Conference on Environmental Justice in Legal Education, organised by the United Kingdom Centre for Legal Education (UKCLE), a subject centre of the Higher Education Academy, University of Warwick, Coventry, and University College London, England on 29 March, 2010. A synopsis of this presentation is available at: <http://www.ukcle.ac.uk/index.html> (Unpublished, revised and updated copy available from author).

²¹² Osofsky, H.M., 'Climate Change and Environmental Justice: Reflections on Litigation over Oil Extraction and Rights Violations in Nigeria', *Journal of Human Rights and the Environment*, Vol.1, No.2 (September, 2010) at 189 – 210.

private business actors operating in this region, in particular – one of the so-called ‘super major’ oil companies in the world today – Royal Dutch Shell plc,²¹³ which remains the largest foreign-based oil company operating in Nigeria, under its subsidiary, SPDC.²¹⁴ Within this context, it is important to note that Shell D’Arcy (which later became SPDC) gained a monopoly over rights to prospect for oil in the entire Niger Delta between 1908 and 1959, before any other oil companies did so.²¹⁵ Shell is therefore arguably *historically* responsible, as well as being contemporarily implicated, for what is now an endemic oil pollution problem within the Delta region,

The present discussion will highlight aspects of the SPDC’s environmental record in the Niger Delta, as well as drawing from Shell’s practice elsewhere in the world, notably its projects on Sakhalin island.²¹⁶ These aspects of Shell’s practice in remote areas around the world arguably point to a similar corporate response to potential liability for clean-up and remediation costs for oil spills from pipeline failures in particular. This could be at variance with Shell’s now famous ‘people, planet and profits’, combined corporate social, environmental and financial policy, apparently highlighting its responsibility to relevant stakeholders for the environmental and social impacts of its activities, while continuing to provide a profitable financial return for its investors.²¹⁷ While Shell’s environmental record in its Sakhalin projects has been brought to attention via its difficulties with Russian regulatory agencies, the Niger Delta issues open a window to its dealings with local community social and environmental concerns and actions, especially when these manifest themselves as legal challenges to its social and environmental record. More significantly, it would seem that Shell’s domestic environmental performance in diverse places around the globe such as the Niger Delta and Sakhalin island will increasingly be played out before the political and judicial institutions of its home jurisdictions, namely, the Netherlands and the UK.

For example, in January 2011 at an official Netherlands parliamentary committee hearing, Royal Dutch Shell executives defended their much-criticised operations in the Niger Delta before Dutch lawmakers in The Hague. Shell is currently fighting a \$100 million fine imposed

²¹³ Royal Dutch Shell is registered on the London stock exchange in the UK, but headquartered in The Hague, Netherlands. General corporate information on Royal Dutch Shell can be obtained from its website as follows: <http://www.shell.com/> (last accessed 6 October 2012).

²¹⁴ Information on SPDC is available from its website at:

http://www.shell.com.ng/home/content/nga/aboutshell/shell_businesses/e_and_p/spdc/ (last accessed 6 October 2012).

²¹⁵ Allen and Okeke-Uzodike, *op. cit.*, at 38.

²¹⁶ Sakhalin Island lies in the Sea of Okhotsk, directly north of the Japanese island of Hokkaido and due north/north-east of Vladivostok, the main Russian city in the Far East region of the Russian Federation. For an examination of the issues arising from the Sakhalin II project, see: Ong, D.M., ‘Transnational Investment Law and Environmental Protection: Russian State Intervention in the Sakhalin II Project - The Empire Strikes Back?’, *Netherlands International Law Review*, Vol.58, Issue 1 (2011) at 1-42.

²¹⁷ Shell claims to have integrated this concept into its overall corporate policy. See, for example: ‘People, planet and profits’, in the Shell Report, 2001. Available at:

http://sustainabilityreport.shell.com/2010/servicepages/previous/files/shell_report_2001.pdf (last accessed 6 October 2012).

by a Nigerian court for a 40-year-old oil spill in the *Ejama-Ebubu* case (see below). The company will not pay compensation for pollution allegedly caused by sabotage rather than poor maintenance by the company. Shell blames many of the oil spills on thieves breaking into pipelines. The company's failure to clean-up the oil pipeline spills has led to allegations of 'widespread human rights violations', including the right to food, clean water, livelihood and good health. A complaint was filed by Friends of the Earth and Amnesty International in January, 2011 with the Organization for Economic Cooperation and Development (OECD) against Shell, alleging that it issued 'discredited and misleading information' blaming militants for most of the oil pollution, which they charged breached OECD guidelines for multinational companies.²¹⁸ In response to this criticism, Peter de Wit, director of Shell (Netherlands) has maintained that: "When it comes to issues of the safety of people and crime ... it's the responsibility of the government".²¹⁹ Shell said that Nigerian government agencies determine responsibility for pollution, but it noted that the designated Nigerian federal agency for oil spills is still dependant on the operating oil company concerned to conduct the initial investigation and clean-up of any oil spills.²²⁰

These developments coincide with legal claims being brought directly against Royal Dutch Shell plc, the parent company of its Nigerian subsidiary (SPDC), before both Dutch and UK courts, on behalf of certain local communities in the Niger Delta area that have suffered from oil spill pollution allegedly not cleaned-up or properly remedied by Shell. The trend highlighted here concerns the continuing lack of compensation for indigenous claimants, even when their claims have been adjudged to be successful before domestic Nigerian courts, which has now resulted in an increased potential for transnational corporate liability against the parent oil company headquartered in The Hague, Netherlands, both within the Dutch and UK jurisdictions, where Royal Dutch Shell plc is registered.

The focus here is on the effectiveness of the legal remedies for the environmental damage of concern. Central to this discussion is the issue of clean-up and remediation work, as well as compensation for environmental (and other) damage caused by oil pipeline spills. This issue points not only to the significance of the oil pipelines system to the national economy of Nigeria, but also to the vulnerability of the local human and natural environments arising from the management of this system. For example, Rowland has noted that there is no more efficient, safe and (when properly constructed and maintained) environmentally-friendly way

²¹⁸ See: 'Milieudéfensie to speak about Shell at Parliamentary hearing'. Available at: Milieudéfensie/Friends of the Earth (Netherlands) website:

<http://www.milieudéfensie.nl/english/shell/news/milieudéfensie-to-speak-about-shell-in-nigeria-at-parliamentary-hearing> (last accessed 7 October 2012).

²¹⁹ Mason, R., 'Nigeria oil spill payouts would encourage terrorism, Shell claims', in *The Daily Telegraph* newspaper (UK) on 26 January, 2011. Available at:

<http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/8284806/Nigeria-oil-spill-payouts-would-encourage-terrorism-Shell-claims.html> (last accessed 6 October 2012).

²²⁰ Nwachukwu, C., 'Oil Spill: Shell Modifies Data to 70% from 98%' in *Vanguard News* (Nigeria) on 27 January 2011. Available at: <http://www.vanguardngr.com/2011/01/oil-spill-shell-modifies-data-to-70-from-98/>

than pipelines through which Nigeria's oil products can be transported. However, as Rowland also observes, the routing of oil pipelines in the Niger Delta has traditionally reflected economic considerations above all others, including social and environmental concerns.²²¹

Previous efforts of the Nigerian Government in environmental protection (pre-and-post independence) were geared primarily either towards safety or the protection and conservation of the economically important natural resources.²²² As we shall chart below, this initial prioritisation of other considerations over environmental protection has given way in recent years to a more balanced approach by the Nigerian public authorities, including the Nigerian judiciary.²²³ This suggests that it is no longer the lack of an adequate domestic environmental policy and legal framework for both standard-setting and enforcement of environmental laws in relation to the petroleum industry, but the continuing actions and omissions of the IOCs operating in Nigeria that can account for the continuing environmental damage in the Delta region, even when they have been taken to task for their failures of environmental performance. In particular, certain aspects of the general Shell approach and response to operational oil spills in remote areas of the world has fuelled the perception of recalcitrance on the part of Shell in the face of widespread allegations of its culpability for the oil pipeline spills in the Niger Delta region. In particular, there are claims of:

1. Evidence of a reluctance to admit culpability and hence liability for oil spill clean-up and environmental remediation efforts, even when these would result in a relatively small outlay for such a large company as Shell;
2. Dissatisfaction with compliance by locally-incorporated wholly or majority-owned Shell operating companies such as the SPDC in Nigeria. Kaufman has labelled this corporate strategy on Shell's part as a 'deny, delay and derailing of local justice' approach to documented incidents of oil pollution damage alleged to be attributable to Shell's operations.²²⁴
3. An equivalent environmental law compliance record is asserted in other geographically remote operating theatres such as in its Sakhalin island projects in

²²¹ See: Rowland, A., 'Developing Nigerian Oil and Gas Pipeline Using Multi-Criteria Decision Analysis (MCDA)', paper delivered at the National Engineering Conference and Annual General meeting (Gateway 2006): Technological and National Content Development for Economic Self-Reliance, 8pp., at 3.

²²² See: Adegoke, A., 'The Challenges of Environmental Enforcement in Africa: The Nigerian Experience', paper presented at the Third International Conference on Environmental Enforcement, 43-54, at 43.

²²³ Ogbodo, S.G., 'The Role of the Nigerian Judiciary in the Environmental Protection Against Oil Pollution: Is It Active Enough?', at 4. Available at:

<http://www.nigerianlawguru.com/articles/environmental%20law/THE%20ROLE%20OF%20THE%20NIGERIAN%20JUDICIARY%20IN%20THE%20ENVIRONMENTAL%20PROTECTION%20AGAINST%20OIL%20POLLUTION.%20IS%20IT%20ACTIVE%20ENOUGH.pdf> (last accessed 6 October 2012).

²²⁴ Kaufman, J., 'Stop Oil Companies from Denying, Delaying, and Derailing Local Justice', citing the outcome of the recent *Ejama-Ebubu* litigation (discussed in more detail below) as an *example*, EarthRights International posting, 11:02am, Tuesday, 13 July, 2010. Available at: <http://www.earthrights.org>. (last accessed 6 October 2012).

Far East Russia. For example, the environmental performance of Sakhalin Energy company in the Sakhalin II project, in which Shell was the majority shareholder (until it was required to give up its majority stakeholding to Gazprom by the Russian Federation government) has been alleged to be implicated in several incidents involving severe environmental impacts and risks both on Sakhalin island and in the waters surrounding it.²²⁵

4. Finally, a pattern is emerging from Shell practices in Sakhalin and the Niger Delta whereby liability for oil spill damage is accepted but the extent of compensation and remediation work to be paid for by Shell is contested. For example, Ian Craig, Shell's director for sub-Saharan Africa, has stated that Shell compensates residents for pollution caused by faulty production, but paying for damage from exploded pipelines due to sabotage would provide a 'perverse incentive' for more attacks.²²⁶ This policy contrasts with the policy behind the Environmental Guidelines and Standards for the Petroleum Industry, which apply in Nigeria, and which require the operator to clean up the spill irrespective of its cause.²²⁷ This attitude echoes Shell's response to the environmental damage allegedly caused by its operations in Sakhalin when it accepted liability on behalf of Sakhalin Energy for poor compliance with Russian environmental standards but refused to accept the full compensation bill for remediation of the resultant environmental damage to Sakhalin island and its waters, as calculated by the Russians.²²⁸

It is possible to suggest that Shell has developed a highly calibrated set of responses to the governments or public authorities regulating the social and environmental impacts of its operations within specific jurisdictions. This nuanced approach depends *inter alia* on a number of associated factors, such as the stage of socio-economic development the host country has reached and the purposefulness of the State's regulatory intent in relation to Shell's presence within its country. Thus, when faced with the single-minded and determined Russian government pressure to relinquish its major share-holding in the Sakhalin Energy consortium, due at least in part to its alleged poor environmental record in its Sakhalin island

²²⁵ According to information obtained, *inter alia*, from the 'Pacific Environment' NGO website, available at: <http://pacificenvironment.org/article.php?id=251> (last accessed 6 October 2012).

²²⁶ Mason, R., 'Nigeria oil spill payouts would encourage terrorism, Shell claims', in *The Daily Telegraph* newspaper (UK) on 26 January, 2011. Available at: <http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/8284806/Nigeria-oil-spill-payouts-would-encourage-terrorism-Shell-claims.html> (last accessed 6 October 2012).

²²⁷ See: DPR, Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN), *supra* and Allen, F., *supra*.

²²⁸ A further contentious issue in that project related to the fact that, under the terms of the Production-Sharing Agreement (PSA) between Sakhalin Energy and the Russian Federation for the Sakhalin II project, any environmental clean-up and/or remediation costs incurred by Shell in the start-up phase of the project before the upstream/downstream activities came on-line would be deductible from the State's share of the petroleum revenues and thereby ultimately borne by the Russian federal state rather than Shell itself. For an in-depth analysis of the implications of this transnational investment agreement (TIA) for environmental protection, see: Ong, D.M., NILR (2011), *op. cit.*

projects, Shell negotiated a significantly reduced shareholding (by 50%) within the consortium owning Sakhalin Energy. It has been reported that Shell accepted this significant reduction in its ownership in the Sakhalin II project due its longer-term strategic need to be involved in potentially vast more lucrative developments in the Russian petroleum development industry, both in the Arctic region and elsewhere in the Russian Federation.²²⁹

By way of contrast, there is Shell's confrontational response to Nigerian-based claims, whether from individual claimants, or class actions brought by local communities, or even by designated public authorities charged with environmental protection.

The next section of this study is a discussion of Nigeria's petroleum and environmental laws, as well as the public authorities/institutions charged with applying and enforcing these laws. Following this, the focus will turn to the clean-up and remediation aspects of these operational and accidental oil spills, including the adjudication of legal claims for environmental and other damages arising from these spills. These claims have initially been made before Nigerian courts, but even when successful have not always yielded adequate compensation and environmental restoration of the damage caused by these oil spills. Increasingly, therefore, these claims are also being made before the courts within the home jurisdictions of IOCs such as Royal Dutch Shell plc in the Netherlands.

²²⁹ *Id.*

II. REGULATING THE ENVIRONMENTAL IMPACT OF THE OIL INDUSTRY IN NIGERIA: INSTITUTIONAL FRAMEWORKS, LAWS AND STANDARDS

This section of the study will provide, first, a summary of the applicable Nigerian federal laws on the oil industry and environmental protection from its activities arising, especially the permitting/licensing/control regime for emissions/discharges from oil industry installations and/or pipelines into soil, water and air. Second, there is a discussion of the roles played by federal and state public institutions/authorities assigned by law to: a) permit/license emissions/discharges from installations and/or pipeline activities in the oil industry, as well as, b) enforce these permits and require remediation of, or compensation for, any oil spill damage will be undertaken.

To begin with, Nigeria's participation at the 1972 Stockholm Conference on the Human Environment raised the national environmental consciousness. Following this, the Federal Government of Nigeria promulgated different laws and regulations to safeguard the environment. Initially, the Federal Environmental Protection Agency (FEPA) was created by the Federal Environmental Protection Agency (FEPA) Act 1988,²³⁰ as the overall (unitary) body charged with the responsibility of protecting the environment in Nigeria. This Act was amended by Decree No.59 of 1992. Specifically, the Act/Decree establishing the Agency authorised it to, *inter alia*, establish and prescribe national guidelines, criteria and standards for water quality, air quality and atmospheric protection, noise levels, gaseous emissions and effluent limits etc; to monitor and control hazardous substances, supervise and enforce compliance. The Decree also gave the Agency broad enforcement powers, even without warrants, to gain entry, inspect, seize and arrest with stiff penalties of a fine and/or jail term on whosoever obstructed the enforcement officers in the discharge of their duties or makes false declaration of compliance etc. The FEPA executed its functions in accordance with the goals of the National Policy of the Environment which was launched on 27 November, 1989.²³¹ Section 21 of the FEPA Act/Decree provided that, in addition to the criminal penalty stated in Section 20, an offender shall be liable to pay the cost of removal of the offending substance, including any costs which may be incurred by any government body or agency in the restoration or replacement of any natural resources damaged or destroyed as a result of the discharge, and also the costs of third parties in the form of reparation, restoration, restitution or compensation. Under Section 23 of this Act/Decree (as amended), the FEPA was also given the responsibility for oil-related environmental pollution. This section provided that "the agency shall co-operate with the ministry of petroleum resources for the removal of oil-related pollutants discharged into the Nigerian environment and play such supportive role as the ministry of petroleum resources may from time to time request from the agency". However, as noted below, such clean-up operations cannot take place without the co-

²³⁰ Cap 131, Laws of the Federation of Nigeria (1990).

²³¹ See: Adegoke, *op. cit.*, at 44.

operation of the oil companies themselves. A more careful examination of Section 20 of the FEPA Act/Decree also shows that the discharge of hazardous substances like oil is still permissible provided this is within acceptable limits and not harmful. Indeed, oil is not explicitly included in the definition of 'hazardous substances', and sabotage is a defence against liability.²³² Moreover, as Ekpu has noted, this statute requires the Agency to determine the amount of compensation, but without providing adequate compensation measurement scales, leading to insignificant amounts of compensation for damages being collected so far.²³³

Presently, the key environmental legislation is the National Environmental Standards and Regulations Enforcement Agency Act, 2007 (NESREA Act).²³⁴ This act repealed the Federal Environmental Protection Agency Act (FEPA) discussed above. However, the subsidiary legislation under the FEPA is still in force. This includes: the National Environmental Protection (NEP) (Effluent Limitation) Regulations; the NEP (Pollution Abatement in Industries and Facilities Generating Waste) Regulations; and the NEP (Management of Solid and Hazardous Waste) Regulations. Additionally, the following Acts are also significant for our purposes in this report: The Environmental Impact Assessment Act, 1992 (EIA Act); The National Oil Spill Detection and Response Agency Act, 2005 (NOSDRA Act); and The Harmful Wastes (Special Criminal Provisions) Act, 1988 (Harmful Wastes Act).²³⁵ Typically, most of these statutes provide for their own enforcement mechanisms for the protection of public interests. Consequently, the public agency involved and its enforcement units are entrusted with enforcement powers under the relevant statute.²³⁶

The relevant Nigerian federal regulatory and enforcement authorities are therefore as follows: The National Environmental Standards and Regulations Enforcement Agency (NESREA),²³⁷; the Department of Petroleum Resources (DPR)²³⁸ (now known as the Ministry of Petroleum Resources); the National Oil Spill Detection and Response Agency (NOSDRA); and the Ministry of Water Resources.²³⁹ Under the 1992 Environmental Impact Assessment Act (EIA Act), the FMEHUD is responsible for monitoring and certifying environmental assessment on projects. The 2007 NESREA Act established the Agency as the body responsible for

²³² Section 21(1) of the FEPA Act/Decree and the FEPA Guidelines and Standards for Environmental Pollution in Nigeria 214 (1991).

²³³ See: Ekpu, A.O.O., 'Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria', *Denver Journal of International Law and Policy*, Vol.24 (1995) 55, at 87-88.

²³⁴ For information on the basis for further environmental policy and law in Nigeria, see *supra* as indicated in Section I (A) of the main Report.

²³⁵ See: 'Environment: Nigeria', A Q&A guide to environment law in Nigeria. Prepared by Awogbade, S. and Sipasi, S., of ALEX law firm. This Q&A is part of the PLC multi-jurisdictional guide to environment. Law stated as at 1 July, 2009. For a full list of jurisdictional Q&As visit: www.practicallaw.com/environmenthandbook, available at: <http://environment.practicallaw.com/1-500-2767?q=&qp=&qo=&qe=#a451491> (last accessed 6 October 2012).

²³⁶ Ogbodo, S.G., *supra*, at 4.

²³⁷ For more information on its role, see *supra*, as indicated in Section I (A) of the main Report.

²³⁸ For more information on its role, see *supra*, as indicated in Section I (A) of the main Report.

²³⁹ For more information on its role, see *supra*, as indicated in Section I (A) of the main Report.

enforcing compliance with environmental standards, regulations, laws, policies and guidelines.²⁴⁰ The NESREA ensures the protection and development of the environment, biodiversity conservation, sustainable development and the development of environmental technology. The Act prohibits the discharge in harmful quantities of any hazardous substance upon any land and into the waters of Nigeria or at the adjoining shoreline, except where permitted or authorised by law in Nigeria. Moreover, any activity on water that is likely to interfere with the quantity or quality of water in any watercourse or groundwater in Nigeria is regulated by the Minister in charge of Water Resources under the provisions of the Water Resources Act.²⁴¹ NESREA is also responsible for enforcing all environmental laws, guidelines, policies, standards and regulations, except with regard to the petroleum industry.

It is pertinent to note that the powers of the (NESREA) Agency do not extend to environmental issues arising from the oil and gas sector.²⁴² In other words, this Agency lacks jurisdiction over environmental matters emanating from the oil and gas sector. As for the environmental regulation of the petroleum industry, this falls under the jurisdiction of the Department of Petroleum Resources (DPR) noted above.²⁴³ The Petroleum Act of 1969 and its correlate, the Petroleum (Drilling and Production) Regulation of 1969, are fairly comprehensive laws with provisions for protecting the environment from damage caused by the activities of petroleum extraction, but oil companies do not comply with many of its regulations. For example, surplus gas is still being rampantly flared, causing damage to the environment. Moreover, no systematic and extensive assessment of its impact has been conducted, but the immediate negative effects on the air, land, and crops have been acknowledged, as has its destruction of wildlife.

As noted in the main report, the relevant Nigerian law requires that operators of oil fields observe internationally recognised standards with regard to 'good oil field practice'. For example, in the Mineral Oils (Safety) Regulations of 1962 (incorporated into the Nigerian Petroleum Act 1969) 'good oil field practice' is defined with explicit statutory reference to international standards: "[good oil field practice] shall be considered to be adequately covered by the appropriate current Institute of Petroleum Safety Codes, the American Petroleum Institute Codes, or the American Society of Mechanical Engineers Codes." Further to this

²⁴⁰ The National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007, No. 25. The Act officially commenced on 30 July, 2007. Section 36 of the NESREA Act expressly repealed the FEPA Act cap F 10 LFN, 2004. See: Ogbodo, S.G., 'National Environmental Standards and Regulations Enforcement Agency (NESREA) Act - A Review,' 7pp. at 1. Available at: <http://www.nigerianlawguru.com/articles/environmental%20law/NATIONAL%20ENVIRONMENTAL%20STANDARDS%20AND%20REGULATIONS%20ENFORCEMENT%20AGENCY%20%28NESREA%29%20ACT,%20QA%20REVIEW.pdf> (last accessed 6 October 2012).

²⁴¹ Onyeukwu, H., 'The Deepwater Horizon Spillage and Lessons in Liability Claims for Nigeria,' posted on Wednesday, 11 May 2011 12:46, available on the Lagos Oil Club website at: http://www.thelagosoilclub.com/index.php?option=com_k2&view=item&id=25:the-deepwater-horizon-spillage-and-lessons-in-liability-claims-for-nigeria&Itemid=1&tmpl=component&print=1 (last accessed 6 October 2012).

²⁴² Section 8 (g) (k), (n), (s) of the NESREA Act, *op.cit.*

²⁴³ For more information on its role, see *supra*, as indicated in Section I A of the main Report; See also: Awogbade, S., Sipasi, S. and Iroegbunam, G., *supra*, at 115.

provision, Regulation 25 of the Petroleum Drilling and Production Regulations of 1969 ('the Regulations' hereafter) requires operating companies to:

"adopt all practicable precautions including the provision of up-to-date equipment.....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."

The operators are also required by Regulation 37 of the Regulations to maintain all installations in good repair in order to prevent: "the escape or avoidable waste of petroleum", and 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".

As indicated in Section I of the main Report, these standards have been supplemented by the *Environmental Guidelines and Standards for the Petroleum Industry* (hereafter known as the 'Guidelines', or EGASPIN) - the most important set of provisions on the environmental management of the oil industry in Nigeria.²⁴⁴²⁴⁵ The Guidelines require the operator, *inter alia*, to clean-up the spill irrespective of its cause (section 4.1: "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"). Pursuant to section 2.6.3 of these Guidelines, the clean-up must commence within 24 hours of the occurrence of the spill. The Guidelines also require the operator to keep a log file of all spills until the cleanup is complete. Within 24 hours of a spill the operator must submit an 'oil spill notification report' to the director of the DPR of Nigeria. A follow-up report should be submitted 14 days after the spill and a clean-up report should be submitted four weeks after the spill. Pursuant to section 2.11.1 of the Guidelines, it is the responsibility of the operator to restore the environment in so far as it is possible to its original state. Section 2.11.3(i) of the Guidelines stipulates that for all waters, "there shall be no visible sheen after the first 30 days of the occurrence of the spill no matter the extent of the spill.' Furthermore: 'For inland waters/wetland, the lone option for cleaning spills shall be complete containment and mechanical/manual removal. It shall be required that these clean-up methods be adopted until there shall be no more visible sheen of oil on the water".

The Guidelines further stipulate that oil contamination of soil, sediment and surface water may not exceed specified levels that are consistent with internationally recognised standards for maximum levels of oil pollution. Once the clean-up report is submitted, the operator is

²⁴⁴ DPR, 'Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN)', *supra*.

²⁴⁵ For an extensive discussion of EGASPIN please see Steiner, R 'Double standard, Shell practices in Nigeria compared with international standards to prevent and control pipeline oil spills and the Deepwater Horizon oil spill', Report on behalf of Friends of the Earth/Milieudefensie Netherlands, University of Alaska, Anchorage, Alaska USA (November, 2010), p37 and further. Available at:

<http://www.milieudefensie.nl/publicaties/rapporten/double-standard> (last accessed 12 November 2013).

required to conduct an Environmental Evaluation (Post Impact) Study of the adversely impacted environment in accordance with s.7.1 of the Guidelines (EGASPIN) and Article 2 of the Environmental Impact Assessment Process Guidelines. Compensation is payable to victims of oil spillages pursuant to s.11(5) of the Oil Pipeline Act 1990 and Part VIII of the Guidelines (EGASPIN). The Petroleum Act, 1969 also states that the phrase: 'good oil field practice' shall be construed with reference to international industry standards and refers explicitly to the Institute of Petroleum Safety Codes, the American Petroleum Institute Codes (API), or the American Society of Mechanical Engineers Codes (ASME).²⁴⁶ In the United States, a system called Pipeline Integrity Management in High Consequence Areas (49 CFR 195.425), is required by law and is known as the international best practice standard. Internationally recognised standards for oil pipeline management include:

a) API 1160, which provides guidance for the implementation of the Integrity Management (IM) program for High Consequence Areas (defined as areas with high human population, navigable waterways or environmental areas which are sensitive to oil spills, e.g. drinking water areas, or productive ecosystems); and

b) ASME B31.4 (American Society of Mechanical Engineers) standard for design and construction of pipelines API 1130 standard for pipeline Leak Detection Systems.

The Niger Delta region meets criteria defined in the US as High Consequence Areas for oil spills and therefore Shell is required by Nigerian law to comply with the relevant API standards.²⁴⁷ However, the grave concerns historically expressed by local communities and both domestic and foreign NGOs on the lack of adherence of Shell (Nigeria) to the petroleum industry's international best practice standards have now been affirmed by the official UNEP report on Ogoniland:

"The control and maintenance of oilfield infrastructure in Ogoniland is clearly inadequate. Industry best practice and SPDC's own documented procedures have not been applied and as a result, local communities are vulnerable to the dangers posed by unsafe oilfield installations. The oil facilities themselves are vulnerable to accidental or deliberate tampering. Such a situation can lead to accidents, with potentially disastrous environmental consequences".²⁴⁸

²⁴⁶ The need to comply with international standards was also discussed by Steiner, R in 'Double standard, Shell practices in Nigeria compared with international standards to prevent and control pipeline oil spills and the Deepwater Horizon oil spill', Report on behalf of Friends of the Earth/Milieudedefensie Netherlands, University of Alaska, Anchorage, Alaska USA (November, 2010), on p17 and p23. Available at:

<http://www.milieudedefensie.nl/publicaties/rapporten/double-standard> (last accessed 12 November 2013).

²⁴⁷ This thesis was first advanced by Steiner, R in 'Double standard, Shell practices in Nigeria compared with international standards to prevent and control pipeline oil spills and the Deepwater Horizon oil spill', Report on behalf of Friends of the Earth/Milieudedefensie Netherlands, University of Alaska, Anchorage, Alaska USA (November, 2010), on P22 Available at:

<http://www.milieudedefensie.nl/publicaties/rapporten/double-standard> (last accessed 12 November 2013).

'It is the author's judgment that most, if not all, of the Niger Delta meets the U.S. High Consequence Area (HCA) criteria (e.g. most of the Niger Delta should be considered a High Consequence Area for pipeline Integrity Management).'

²⁴⁸ See: UNEP, *Environmental Assessment of Ogoniland*, Nairobi (2011), *op. cit.*, at 100.

Thus, the fact that the Niger Delta is now clearly an area susceptible to damage from third parties through sabotage and illegal bunkering may itself be linked in the first place to operational management by SPDC of these oil installations and pipelines. For example, the American Petroleum Institute has developed guidelines to protect operators from the risk of terror attacks and vandalism. An operator is obliged to adopt rigorous safety measures to mitigate the risk of sabotage and bunkering. These include sabotage resistant pipe specifications, alternative routing away from high risk areas, burial and concrete casements around a pipe, enhanced Leak Detection Systems and, crucially, enhanced pipeline surveillance which is capable of detecting any disturbance to the integrity of the pipeline. It will be important for investors to enquire how far these measures have been implemented in the Niger Delta²⁴⁹.

How are the above laws and standards implemented/enforced by Nigerian institutions/authorities and what is their relationship with the SPDC and other IOCs operating in the Niger Delta? What, in turn, is the enforcement/implementation record of these public authorities against the IOCs? As indicated in the main body of this report, Nigeria operates a Federal system of government over 30 states and a Federal Capital Territory. Central government agencies also have state or regional administrative offices. The Federal Environmental Protection Agency operates a central system with headquarters at the Federal Capital Territory, Abuja and five zonal (regional) offices located in Lagos, Port Harcourt, Benin-City, Kaduna and Kano. The zonal offices were established to address the environmental problems of the various ecological and industrial zones and to place within easy reach of states the required technical advisory support needed by state EPAs. However, it should be noted that the State Environmental Protection Agencies (SEPAs) are also involved in environmental regulation and monitoring in the individual states, in their areas of competence under the 1999 Constitution. The overlap of authorities and responsibilities between state ministries and federal ministries is another issue which has an impact on environmental management on-the-ground. Thus, separate state government agencies, which have similar mandates, often end up doing the same work. Moreover, these overlapping efforts are not always coordinated and can lead to suboptimal environmental management.²⁵⁰ Thus, even though environmental degradation takes place, states are not in a position to monitor and enforce compliance with environmental laws.²⁵¹

²⁴⁹ For an extensive discussion of this thesis please see: Steiner, R in 'Double standard, Shell practices in Nigeria compared with international standards to prevent and control pipeline oil spills and the Deepwater Horizon oil spill', Report on behalf of Friends of the Earth/Milieudéfensie Netherlands, University of Alaska, Anchorage, Alaska USA (November, 2010), p27 and further, Available at:

<http://www.milieudéfensie.nl/publicaties/rapporten/double-standard> (last accessed 12 November 2013).

²⁵⁰ *Id.*, at 138.

²⁵¹ Okpanachi, *supra*, at 37.

As noted above, the Guidelines (EGASPIN) confer a statutory role on the DPR to manage all environmental issues arising from oil industry activities, including clean-up of contaminated sites. However, since 2006, the National Oil Spill Detection and Response Agency (NOSDRA) has also assumed responsibility for the latter role, though NOSDRA's mandate does not cover supervision of contaminated site remediation. The National Oil Spill Detection and Response Agency (NOSDRA) was established by the NOSDRA (Establishment) Act, 2006. The Act states that the organisation's mandate 'shall be to coordinate and implement the National Oil Spill Contingency Plan for Nigeria'. The main focus of the Contingency Plan is on emergency response in the event of an oil spill. The NOSDRA Act also legislates for emergency response systems and capacity. However, in the five years since its establishment, very few resources have been allocated to NOSDRA, such that the Agency has no proactive capacity for oil-spill detection and has to rely on reports from oil companies or civil society concerning the occurrence of a spill. It also has very little reactive capacity – even to send staff to a spill location once an incident is reported. In the Niger Delta, helicopters or boats are needed to reach many of the spill locations and NOSDRA has no access to such forms of transport other than through the oil companies themselves. Consequently, in planning their inspection visits, the regulatory authority is wholly reliant on the oil company. Such an arrangement is inherently inappropriate. Equally important is the question of mandate when it comes to cleaning up a contaminated site. NOSDRA undertakes supervision of contaminated site assessment based on EGASPIN provisions. However, since the agency did not exist at the time EGASPIN was formulated in 1992 and re-issued in 2002, the Act itself does not empower NOSDRA. Consequently, little training and few resources have been provided to enable NOSDRA to carry out this task.

At the time that NOSDRA was created, a clear directive should have been issued delineating the operational boundaries between NOSDRA and the DPR. In the absence of such clarification, both bodies continue to deal with contaminated site clean-up, coordination between the two is poor, and in extreme cases they take differing approaches to interpreting the rules. More importantly, the two agencies have differing interpretations of EGASPIN, which further undermines clean-up operations.²⁵² Focussing on NOSDRA, this Agency is responsible for co-ordinating and implementing the National Oil Spill Contingency Plan and establishing the mechanism to monitor and assist, or where appropriate, to direct the response, including the capability to: a) mobilise the necessary resources to save lives; b) protect threatened environments; and c) clean-up, to the best practical extent, the impacted site. NOSDRA was set up to oversee the oil spill contingency plans of the oil companies with regard to their preparedness and readiness to cope with oil spills if it occurs, and to meet the requirements of the NOSDRA Act in relation to the quick detention of oil spills so that they can be stopped as soon as possible. However, the Agency's Director-General has identified as a key challenge for the Agency, *inter alia*, the fact that the Agency itself cannot detect oil spills

²⁵² UNEP, *op. cit.*, at 138.

independent of the oil companies, but rather relies on the operating companies to report oil spills to it within 24 hours or face sanctions as mentioned in the main body of this report.²⁵³

Moreover, petroleum resources account for 80 per cent of (Nigerian) national revenues and 95 per cent of export earnings, making the Ministry of Petroleum Resources, which licenses and regulates oil industry operations, a key ministry in Nigeria. In 1990, when the Ministry, through the DPR, developed the EGASPIN, there was no Federal Ministry of Environment (environment is currently part of the Federal Ministry of Environment, Housing and Urban Development). It seemed logical at that time for the Ministry to oversee the oil industry because of the strategic nature of the country's oil reserves as well as the technical nature of the industry and the specialised skills therefore needed to regulate it. However, there is clearly a conflict of interest in a ministry which, on one hand, has to maximise revenue by increasing production and, on the other, ensure environmental compliance. Most countries around the world, including in the Middle East where oil is the mainstay of the regional economy, have placed environmental regulation within the Ministry of Environment or equivalent body. It is noteworthy to mention in this context that, after the 2010 *Deepwater Horizon* incident, it came to light that the US Offshore Energy & Minerals Management Office (under the Bureau of Ocean Energy Management, Regulation and Enforcement) responsible for the development of the offshore oilfield was also the body that issued environmental approvals. Consequently, a new Bureau of Safety and Environmental Enforcement, under the US Department of the Interior, has been created, which is independent from the Department of Energy Resources.²⁵⁴ The UNEP Ogoniland report also highlights the fact that;

“(r)esource limitations, both physical and human, are a feature of all Nigerian ministries. ... For example: Both DPR and NOSDRA suffer from a shortage of senior and experienced staff who understand the oil industry and can exercise effective technical oversight. The main reason for this is that individuals with technical knowledge in the field of petroleum engineering or science find substantially more rewarding opportunities in the oil industry”.²⁵⁵

As Okpanachi has noted recently:

“In spite of their achievements, the efficacy of these organizations is often whittled down by several factors, including the absence of authoritative, strong, and effective environmental laws and weak regulatory and supervisory frameworks.

²⁵³ For more information on this, see *supra*, as indicated in Section I A of the main body of the Report; See: *Tell: Nigeria's independent weekly magazine*, Special Edition on '50 years of oil in Nigeria', (18 February, 2008) cited in Okpanachi (2011), *op. cit.*, at fn.10, at 43-44.

²⁵⁴ UNEP, *op. cit.*, at 139.

²⁵⁵ *Id.*

This has led to regulatory capture and the propensity of the oil multinational companies to evade Nigeria's environmental laws".²⁵⁶

Indeed, the general consensus of regional commentators on this issue is pessimistic and can be summarised as follows:

"Although these laws exist, yet they have failed to adequately protect the environment and the victims from the deleterious consequences of oil pollution. Some of their shortcomings include the out-dated penalty sections, the incapacitation of the enforcement officials, the attitude of prosecution lawyers with respect to environment pollution cases, the attitude of the courts, etc".²⁵⁷

As Ite has reiterated: "Sustainable development and poverty are pervasive problems in the Niger Delta, mainly due to lack of significant Nigerian government commitment to the development of the region".²⁵⁸

On the other hand, at least one of the listed deficiencies listed above - namely, 'out-dated penalty sections' - appears to have been addressed. Adewale has noted in a survey of the development of Nigerian environmental law sanctions that: "In general there has been a trend to increase sanctions over the years, from, for example, a fine of 100 naira contained in some Regulations in the 1950s to 2000 naira in the 1960s and, for corporate bodies, 500 000 naira at present (1993)".²⁵⁹ Moreover, he suggests that:

"The current severity of sanctions may be primarily due to the fact that the major polluters are corporate entities. It is believed that heavy fines accompanied by sanctions such as forfeiture of licences or closure of the premises concerned will act as a deterrent to large entities. The validity of this remains to be proven: it has been said that this attitude has not worked in the past and will not work in the future".²⁶⁰

Adewale concludes by noting that:

²⁵⁶ Okpanachi, *supra*, text in fn.10, at 43.

²⁵⁷ Ogbodo, S.G., 'The Role of the Nigerian Judiciary in the Environmental Protection Against Oil Pollution: Is it Active Enough?', *op. cit.*, at 4.

²⁵⁸ Ite, U.E., 'Partnering with the state for sustainable development: Shell's experience in the Niger Delta, Nigeria', *Sustainable Development*, Volume 15, Issue 4, (July/August 2007) at 216–228. See also: Ojukwu-Ogba, N.E., 'Economic Development versus Environmental Regulation: The Niger Delta, a Region Endangered by Oil Spillage', *University of Benin Law Journal*, Vol. 8. No. 2 (2005).

²⁵⁹ Adewale, O., 'Nigeria', in Del Frate, A.A. and Norberry, J. (eds.), *Environmental Crime, Sanctioning Strategies and Sustainable Development*, UN Interregional Crime and Justice Research Institute/Australian Institute of Criminology, Rome/Canberra, Publication No.50, (November, 1993) 339-383, at 347.

²⁶⁰ *Id.*, citing Osunbor, O.A., 'Corporate social responsibility towards the environment: the limits of law', in Omotola, J.A. (ed.), *Environmental Laws in Nigeria, including Compensation*, Faculty of Law, University of Lagos, 1990.

“The trend that can be discerned in efforts to secure compliance with environmental laws has two elements. First, the law now imposes stringent penalties on environmental offenders. Second, enforcement agencies are moving to ensure that industries install pollution-abatement equipment. In practice, the emphasis has moved towards trying to persuade polluters to comply, although in theory the emphasis remains on stringent penalties”.²⁶¹

However, this positive outlook is contradicted in a later assessment by Frynas that the oil companies concerned have largely failed to change their harmful practices in the face of this environmental legislation.²⁶²

It can thus be summarised that, alongside the promulgation of relevant environmental laws, which apply accepted rules on pollution controls, replete with references to the relevant international petroleum industry standards, Nigeria has established the required institutional framework for ensuring compliance and enforcement of these environmental laws and standards. These include both federal and state environmental authorities. In addition, the Niger-Delta Development Commission (NDDC), established by an Act in 2000, includes relevant provisions for ensuring, *inter alia*, the sustainable development of this region. For example, the functions and powers of the Commission include the following injunctions: to tackle ecological and environmental problems that arise from the exploration of oil mineral in the Niger-Delta area and advise the Federal Government and the member States on the prevention and control of oil spillages, gas flaring and environmental pollution and liaise with the various oil mineral and gas prospecting and producing companies on all matters of pollution prevention and control.²⁶³ Thus, it would seem to be the case that, as SPDC has itself admitted, “(t)he issue in Nigeria is not the strength of the regulatory framework, but its transparent and accountable implementation”,²⁶⁴ As the recent UNEP report on Ogoniland notes: “In summary, there are systems and resources in place in Nigeria to deal with most oil spills, small and large”.²⁶⁵ On the other hand, the UNEP report goes on to directly implicate SPDC for inadequate clean-up and remediation, concluding 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 SPDC’s own standards”.²⁶⁶

²⁶¹ *Id.*, 347-8.

²⁶² See: Frynas, J.G., *Oil in Nigeria, Conflict and Litigation between Oil Companies and Village Communities*, Hamburg (2000), especially chapters 3 & 5.

²⁶³ See: Part II, Section 7, paras. h) and i) of the 2000 Act.

²⁶⁴ See: Amnesty International, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta*, London: Amnesty International Publications (June, 2009), 143 pp., at 60, fn.231, citing written response by SPDC to Amnesty International, undated. Available at: <http://www.amnesty.org> (last accessed 6 October 2012).

²⁶⁵ UNEP, *op. cit.*, at 142.

²⁶⁶ *Id.*, at 150.

Latterly, there is some evidence that SPDC (and, by extension, Shell) has recognised the extent of its alienation from the human and natural ecologies in the Niger Delta. More generally, there is now growing consensus that moves towards sustainable development should involve constructive inputs from business, government and civil society. This has spawned the widespread adoption of corporate social responsibility (CSR) policies by oil multinational corporations (MNCs) in Nigeria, supposedly marking a watershed in corporate–community relations in the Niger Delta. After decades of initially rejecting such responsibilities, oil MNC’s reversal of attitude towards CSR was expected to at least temper the scale and intensity of violence. Indeed, Shell has contributed in various ways to local community development in the region. Frynas, however, has questioned both the role and effectiveness of such CSR efforts of the hydrocarbon industry on local community development projects in relation to the achievement of wider, African national development agendas.²⁶⁷

More recently, Ite has charted the evolution of successive SPDC sustainable community development strategies, suggesting that, while earlier approaches ‘encouraged unsustainable development and a culture of dependency’, the most recent of these has the potential to succeed where others failed, if it is implemented within a tri-sector partnership framework involving Shell, the Nigerian government and civil society.²⁶⁸ Assessing this triangular relationship within the specific context of the emerging partnership between SPDC and the Niger Delta Development Commission (NDDC), Ite argues that, although SPDC is undertaking partnership with NDDC as part of its overall CSR strategy for the region, its success will be influenced by four key challenges. These are: “political support for NDDC, funding constraints, public perceptions and expectations of NDDC, as well as institutional priorities”.²⁶⁹ However, the latest writing on this issue suggests that, despite such widespread claims of adherence to the ideals of CSR, corporate–community conflict has remained unabated and oil companies continue to be accused of familiar misdemeanours. Thus, Idemudia has argued that structural and systemic deficiencies inherent in CSR practices limit the effectiveness of CSR as a vehicle for conflict prevention and reduction in the Niger Delta, concluding with a call to re-consider the role of CSR in the corporate-government-community conflict nexuses.²⁷⁰

²⁶⁷ Frynas, J.G., ‘The False Developmental Promise of Corporate Social Responsibility: Evidence from Multinational Oil Companies’, (*Journal of International Affairs: Critical Perspectives on Corporate Social Responsibility*, Vol. 81, No. 3, (May, 2005) 581-598.

²⁶⁸ Ite, U.E., ‘Changing times and strategies: Shell’s contribution to sustainable community development in the Niger Delta, Nigeria’, *Sustainable Development*, Volume 15, Issue 1 (Jan/Feb 2007) 1–14.

²⁶⁹ Ite, U.E., ‘Partnering with the state for sustainable development: Shell’s experience in the Niger Delta, Nigeria’, *Sustainable Development*, Volume 15, Issue 4 (July/August 2007), 216–228.

²⁷⁰ Idemudia, U., ‘Rethinking the role of corporate social responsibility in the Nigerian oil conflict: The limits of CSR’, *Journal of International Development*, Volume 22, Issue 7 (October 2010), 833–845.

A specific issue arising from the general assessment of Shell's CSR practice relates to the provision of information on individual oil spills and the effectiveness of the clean-up and remediation efforts by SPDC and other IOCs operating in the Delta region. A recent Amnesty International report first observes that greater transparency and access to information in the extractive sector are critical factors in building trust and better co-operation with communities. It then notes that, while there is no law in Nigeria that compels the publication of basic environmental monitoring data, there is nothing to prevent the disclosure of such information. Companies are therefore responsible for monitoring many aspects of their own environmental impact. While some information may legitimately be considered confidential, companies frequently take the approach that they will not disclose data unless required to by law. Of the operating IOCs, only SPDC discloses this information for the Niger Delta in a systematic manner on a yearly basis. Notwithstanding SPDC's annual reports, Amnesty International found a general reluctance among companies to disclose information on the environmental and social impacts of their operations.²⁷¹ Moreover, even SPDC has been implicated by the Nigerian courts for its failure to disclose specific information in relation to the damaging effects of individual spills that have been subject to compensation claims. In *Shell v. Isaiah*, Judge Onalaja, concurring with the lead judgement in the case which dismissed an appeal by Shell, also noted that:

“A vital consideration in the oil spillage cases is the extent of the oil spillage. The pattern of defence of the appellant has been to withhold from the court the report of the oil spillage carried out by their employees. In *Tiebo's* case *supra* [another oil case] the appellant's report of the oil spillage was similarly withheld from the court...”²⁷²

For example, 'asset integrity work' is a technical engineering term utilised for work that is directed towards improving the quality of the pipelines, well-heads, flowlines, flowstations and terminals to get the oil out of the ground and export it. In 2007, the managing director of SPDC, Basil Omiyi, was quite clear about the poor level of integrity of SPDC's assets, stating, “(w)e do (...) have a substantial backlog of asset integrity work to reduce spills and flaring”.²⁷³ The Shell Sustainability Report 2010 again blames the poor security situation in the Niger Delta region to excuse the apparent inability of SPDC to meet targets to end continued gas flaring, suggesting that militant violence had prevented safe access, and moreover, that a lack of funding from SPDC's (Nigerian) government partner delayed progress. However, as Aghalino has observed, “(b)laming major oil spillages on sabotage is a lazy and pedestrian

²⁷¹ See: Amnesty International (2009), *supra*, at 61.

²⁷² *Shell v. Isaiah* (1997) 6 NWLR (Pt. 508) 236, as cited in Amnesty International report, *id.*

²⁷³ See: Royal Dutch Shell, 'Shell Sustainability Report 2006', at 33. Available at: http://www.shell.com/static/envirosoc-en/downloads/sustainability_reports/shell_sustain_report_2006.pdf (last accessed 6 October 2012).

explanation of the obvious and archaic oil field practices of the oil firms in Nigeria”.²⁷⁴ He suggests that, “(t)he incentive for the oil companies operating in Nigeria to do so lies in the fact that Nigerian Law relating to oil, in the event of an oil spill that was attributable to sabotage, victims were not entitled to compensation”.²⁷⁵ On the gas flaring issue, Moffat and Linden have noted that Nigeria not only has the highest gas flares in the world, but also flares more gas than all the other major oil-producing countries.²⁷⁶ According to Shell, once conditions improved, work began in early 2010 to install equipment that reduced gas flaring from SPDC facilities. This drive to replace previously sabotaged facilities for containing gas that would otherwise be flared, or installing new equipment for collecting such gas, will apparently assist Shell in reaching its goal of ending continuous flaring. However, it should be noted that the Nigerian court decision in the *Gbemre* case (see below), which first outlawed gas flaring as being in violation of the human right to a healthy environment enshrined under both the Nigerian constitution and the African Charter on Human and Peoples’ Rights, dates back to 2005.²⁷⁷

In 2004, when questioned by the NGO, Christian Aid, a Shell Vice-President admitted that the overall picture of the age and condition of SPDC’s pipelines was incomplete. He promised improvements in transparency.²⁷⁸ These promises have not been met until very recently. Only in January 2011 did Shell finally launch a public information website which tracks the Shell response to, investigation and clean-up of, every spill from SPDC facilities, whether operational or the result of sabotage.²⁷⁹ Moreover, there is evidence of prevarication by Shell in response to legitimate queries of the environmental concerns previously identified by Shell itself. For example, in December 2007, Olav Ljosne, Shell’s former Regional Director Communications Africa, replied to a request by U.S. professor Richard Steiner, stating: “The Asset Integrity Reviews are internal Shell operating documents designed to provide information on the state of our assets and improvements that are necessary - and are regarded as strictly confidential and business sensitive.”²⁸⁰ In late 2010, Steiner concluded in a report for Milieudedefensie/Friends of the Earth (Netherlands) that Shell Nigeria continues to

²⁷⁴ Aghalino, S.O., ‘Corporate Response to Environmental Deterioration in the Oil Bearing Area of the Niger Delta, Nigeria, 1984–2002’, *Journal of Sustainable Development in Africa*, Volume 11, No.2 (2009) 14pp, at 6, available at:

http://www.jsda-africa.com/Jsda/V11N02_Fal2009/PDF/Corporate%20Response%20to%20EnvironmentalD.pdf (last accessed 6 October 2012).

²⁷⁵ *Id.*, citing Olisa, M. M., ‘Legal Frameworks for Pollution Control in Nigeria’, in *The Petroleum Industry and the Nigerian Environment*, Lagos: NNPC, 1981, at 13.

²⁷⁶ Okpanachi, *op. cit.*, at 36, citing Moffat & Linden (1995), *op. cit.*

²⁷⁷ *Gbemre v. Shell Petroleum Development Company Nigeria Limited and Others* (2005) AHRLR 151 (NgHC 2005), available at:

<http://www.chr.up.ac.za/index.php/browse-by-subject/418-nigeria-gbemre-v-shell-petroleum-development-company-nigeria-limited-and-others-2005-ahrlr-151-nghc-2005.html> (last accessed 6 October 2012).

²⁷⁸ Christian Aid, *Behind the mask: The real face of corporate social responsibility*, January 2004, at 30, Available at: <http://www.scribd.com/doc/38236692/Behind-the-Mask> (last accessed 6 October 2012).

²⁷⁹ See: ‘Nigeria’ section in *Shell Sustainability Report, 2010* 40 pp., 18-19, at 18. Available at: http://sustainabilityreport.shell.com/2010/servicepages/downloads/files/all_shell_sr10.pdf (last accessed 6 October 2012).

²⁸⁰ www.milieudedefensie.nl/publicaties/.../oilspills-in-the-niger-delta

operate well below internationally recognised standards to prevent and control pipeline oil spills. It had not employed the best available technology and practices that it uses elsewhere in the world. Steiner notes that, while the injured environment in the Gulf of Mexico (due to the BP *Deepwater Horizon* disaster in April-July 2010) stands to receive substantial funding and government attention, such environmental damage in the Niger Delta is left largely unattended. According to Steiner, this constitutes a double standard and far greater attention needs to be paid to the chronic long-term damage from oil and gas operations in the Niger Delta.²⁸¹ According to Shell, it is investing in an ongoing maintenance programme, citing as an example, the completion by SPDC of the construction of a \$1.1 billion replacement pipeline - the 97-kilometre Nembe Creek Trunkline - in 2010. Shell is also determined to be more transparent in its response to oil spills. Shell accepts that some are operational spills due to equipment failure or human error and recognises that no operational spill is acceptable, and that it has to improve its performance in this area. However, SPDC persists with the view that in recent years most spills from its facilities have been caused by sabotage and theft. There is compelling evidence of both of these types of activities.²⁸² While the exact amount of oil stolen per day in the Niger Delta is unknown, it is estimated to be between 30,000 and 300,000 barrels, costing the Nigerian economy approximately \$100 billion between 2003 and 2008.²⁸³ On the other hand, the established regulatory framework governing oil industry spills as a whole does not absolve SPDC from its overarching responsibility to deal with the clean-up and remediation of oil pollution-damaged environments, whatever their original causes, such as poor oil well/field abandonment practice, for example. The recent UNEP report has criticised SPDC practice in this regard, noting, for example, that “the current state of the abandoned facilities of oil field structure in Ogoniland (within the Niger Delta region) do not meet with international best practices”.²⁸⁴

III. OIL SPILL CLEAN-UP, REMEDIATION AND COMPENSATION IN THE NIGER DELTA

In this section of the study, we will first identify what the domestic Nigerian federal legal system provides for in cases of oil spill clean-up and remediation before addressing examples of international best practice from elsewhere in the world, with a view to making a case for Shell as a 'super major' oil company applying this international best practice in its operations

²⁸¹ See: Professor Steiner, R., 'Double standard, Shell practices in Nigeria compared with international standards to prevent and control pipeline oil spills and the Deepwater Horizon oil spill', Report on behalf of Friends of the Earth/Milieudéfensie Netherlands, University of Alaska, Anchorage, Alaska USA (November, 2010), at 35. Available at:

<http://www.milieudéfensie.nl/publicaties/rapporten/double-standard> (last accessed 6 October 2012).

²⁸² See: 'Nigeria' section of *Shell Sustainability Report 2010*, *op. cit.*, and UNEP report on Ogoniland (2011) *op. cit.*, at 101.

²⁸³ Okpanachi, *supra*, at 30, citing Asuni, J., 'Blood oil in the Niger Delta', *United States Institute of Peace Special Report*, Washington, DC: United States Institute of Peace, (August, 2009).

²⁸⁴ UNEP, *op. cit.*, at 99.

in Nigeria. As noted above, when examining the legal and institutional regulatory framework of the oil industry generally, these regulations require that action is taken to clean-up and rehabilitate land and water affected by oil pollution. Although the environmental regulations of the DPR deals with several sources of oil pollution, in reality the issue most frequently addressed by companies is oil spills. Other forms of pollution are neither systematically monitored nor reported on, and no systematic clean-up and remediation are known to take place. In many, if not most, circumstances the oil companies are expected to carry out these processes directly (or via contractors they hire). Exceptions include major oil spills, when the National Oil Spill Detection and Response Agency should be involved, and cases where people go to court.

Thus, while there is theoretically some government oversight, in reality this is minimal. As the Amnesty International report notes, the government of Nigeria has effectively placed substantial responsibility for remedying human rights and environmental harms in the hands of a non-state actor – the very same non-state actor that is responsible for much of the harm done to human rights and the environment in the first place. As a consequence, the remedial action is often ineffective, and the violations, far from being addressed, persist and are exacerbated. Moreover, in cases of oil spills - including spills that are attributed to vandalism or sabotage – the company is obliged to contain (limit the spread of), clean-up and remediate (return the area to its prior state) the affected area.²⁸⁵ Under Nigerian law, the operating oil company is responsible for the clean-up of oil spills, and clean-up is supposed to be both swift and meet good practice standards.²⁸⁶ According to the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria, issued by the DPR, clean-up should commence within 24 hours of the occurrence of the spill.²⁸⁷ These government guidelines also stipulate that for all waters “there shall be no visible sheen after the first 30 days of the occurrence of the spill no matter the extent of the spill”.²⁸⁸ In its 2009 report, Amnesty International found numerous violations of these regulations. Firstly, there are regular delays in carrying out the containment and clean-up process. Delays in clean-up of oil spills obviously exacerbate damage both to the environment and to human rights that are dependent on environmental quality. In some instances the delay in dealing with an oil spill is due to the communities refusing entry to the site of the spill until certain conditions are met. For example, communities may demand ‘access payments’ before allowing a company to enter the area. However, oil companies are also responsible for delays in carrying out clean-up operations. In some cases the oil operator or its representatives (companies often use contractors to carry out clean-ups) simply do not turn up for several days.²⁸⁹ Finally, in the

²⁸⁵ See: Egaspin, rev. edn. (2002), *op. cit.*, at 148, 269 and 152.

²⁸⁶ *Id.*, at 148, para. 2.6.3.

²⁸⁷ *Id.*

²⁸⁸ *Id.*, at 150, para. 2.11.3 (i).

²⁸⁹ See: case studies in the 2009 Amnesty International report, including the oil spills at Bodo, at 7, and Ogbodo, at 22.

context of oil spill remediation efforts, the recent UNEP Ogoniland report has pointed out a significant discrepancy:

“Nigerian legislation is internally inconsistent with regard to one of the most important criteria for oil spill and contaminated site management; specifically the criteria triggering or permitting remediation closure. This is enabling the oil industry to legally close down the remediation process well before contamination has been fully eliminated and soil quality has been restored to achieve full functionality for human, animal and plant life. This situation needs to be resolved for the whole of Nigeria, and in particular prior to initiation of the clean-up in Ogoniland”.²⁹⁰

There are also laws dealing with the payment of compensation for losses arising from oil prospecting and production activities. The legal basis for such oil pollution compensation can be found in the Nigerian Constitution and a few other enactments which are the Oil Pipelines Act 1956 Cap 338, Laws of the Federation of Nigeria (LFN) 1990, the Petroleum Act 1969 Cap 350 LFN 1990, Mining Act No 24, 1999, the Oil in Navigational Water Act, Cap 337 LFN 1990, the Land Use Act Cap 202 LFN 1990, and others. Specifically, Sec (40) of 1999 Constitution of the Federal Republic of Nigeria provides that compensation should be paid for damage to buildings, commercial forests or cash crops by any person who surveys, digs or lays pipes for the supply and distribution of energy and fuel. The Oil Pipelines Act 1956, sections 19-23, provides that “the court shall award such compensation as it considers just in respect of any damage done to any buildings, ‘lion crops’²⁹¹, or profitable trees by the holder of the permit in the exercise of his rights thereunder and in addition may award such sum in respect of disturbance (if any) as it may consider just”. As Onuoha observes, the significant point here is that the law makes provision for payment of compensation.²⁹² The Petroleum Act 1969, in paragraph 36 schedule 1, also made provision for ‘fair and adequate compensation.’ To clarify the interpretation of this law, the Petroleum Drilling and Production Regulation 1969 listed all the items for compensation. They include food crops and economic trees, developments on land such as structures, fishing rights, as well as injurious infections and disturbances. However, critical reviews of these laws have suggested that there is no comprehensive statutory provision for compensation in respect of oil pollution in the petroleum industry in Nigeria.²⁹³ Moreover, it has been noted that Nigerian law does not

²⁹⁰ UNEP, *op. cit.*, at 142.

²⁹¹ ‘Lion crops’ are food and economic crops such as yams, water yams and coco yams cultivated mainly by the men.

²⁹² Onuoha, A., ‘The Dilemma of Restorative Justice when “All Are Guilty”: A Case Study of the Conflicts in the Niger Delta Region of Nigeria’, *African Journal on Conflict Resolution*, Volume 7, No. 1 (2007) 63-88, at 71-72.

²⁹³ Udo, G.O. and Egbenta, I.R., ‘Using Contingent Valuation to Value Non-Use Goods for Compensation in Nigeria’, paper presented at the 1st African International Business and Management (AIBUMA) Conference, organised by the University of Nairobi School of Business, in Nairobi, Kenya, (25–26 August 2010) 22 pp., at 1. Available at:

http://www.uonbi.ac.ke/conferences/aibuma/African_International_Business_and_Management_Program_Final.pdf (last accessed 6 October 2012).

explicitly include natural resource damage within the range of liability headings for compensation.²⁹⁴

On the other hand, the 1956 Oil Pipelines Act provides in Section 11(5)(c) for the licensee to pay compensation to any person suffering damage for any leakage from the pipeline or ancillary installation (other than on account of his own fault or on account of the malicious act of a third party).²⁹⁵ The requirement of 'malice' in this regard on the part of the third party act causing an oil spill would appear to establish a high threshold of proof to be met by the licensee to absolve it from potential liability to injured parties. More recently, Allen notes that the Nigerian law on oil spills stipulates that oil companies should 'begin immediate clean-up operations following the best available clean-up practice and removal methods' in oil spill cases.²⁹⁶ As noted above, the Oil Pipelines Act also requires oil companies to pay compensation to any person suffering damage resulting from any breakage or leakage from the pipeline or associated installation. However, since this Act does not stipulate compensation in cases of spills caused by a third party, Allen notes that the recent trend is for SPDC to refuse to even contain the effects of spills allegedly caused by third parties by way of remediation.²⁹⁷

Focussing on the specific issue of compensation for oil spills - mainly from pipeline failures, but also from other petroleum industry facilities - Adewale has concisely set the scene for the present stalemate between local communities and the IOCs, especially Shell, that operate in the Niger Delta. He does so by noting that, even if spillage is inevitable in petroleum operations, such oil spills have various negative effects on the health of the populace, as well as the economic and scenic value of the environment. Compensation (rather than remediation, or better still, restitution) was seen as the method by which such oil spill damage could be addressed. Compensation arising from oil spills has therefore assumed a significant role in the Nigerian oil industry. However, he notes that the essence of compensation is to make amends for the loss suffered by the victims. In making amends, the loss experienced by the victim must be recompensed to the satisfaction of the victim. Otherwise the compensation cannot be said to be adequate for the damage suffered.²⁹⁸ This point would seem to be encompassed by Section 20(2) of the 1956 Oil Pipelines Act, which stipulates that when compensation cannot be agreed between the parties, the court will award compensation based on the following factors: any damage to buildings, crops, or so-called 'profitable' trees, or any disturbance to the land, or loss in value or interests in the land by the petroleum

²⁹⁴ Schopp, D. and Pendergrass, J., 'Natural Resource Valuation and Damage Assessment in Nigeria: A Comparative Analysis', A Report prepared for the Environmental Law Institute, Washington D.C., USA (August, 2003) 28 pp, at 20.

²⁹⁵ *Id.*, at 21, *citing* Cap 226, Laws of the Federation of Nigeria.

²⁹⁶ See: Allen F. (2012), *supra*.

²⁹⁷ *Id.*

²⁹⁸ Adewale, O., '[Oil Spill Compensation Claims in Nigeria: Principles, Guidelines and Criteria](#)', *Journal of African Law*, Volume 33, Issue 1 (1989) 91-104.

license holder. Furthermore, Regulation 25 of the 1969 Petroleum Act requires the licence holder/operator to pay adequate compensation to any person whose fishing rights are interfered with by the unreasonable exercise of the operator's rights. However, the restrictive scope of this provision has been noted in that the petroleum operator's actions must be deemed 'unreasonable', compensation is limited to damage to 'fishing rights', and 'adequate compensation' can be interpreted broadly or narrowly and does not seem to allow for compensation for more sophisticated valuations methods based on so-called 'existence' and 'option' values.²⁹⁹

Victims of oil spills have claimed that the compensation paid to them is unreasonable and cannot be said to be recompense for their loss. On the other hand, the oil companies claim that the compensation paid to the victims is adequate and that they operate within the parameters approved by the Inspectorate Division of the Nigerian National Petroleum Corporation or the State Ministry of Lands. Apart from this, many claims made by the communities are not honoured by the oil companies on the grounds that they are spurious and speculative. Even when the claims for damage are shown to be genuine, the oil companies may not pay if the spillage occurred as a result of acts of sabotage.³⁰⁰ However, Obi has contested the IOC and especially Shell (through SPDC) denials of attribution for such spills, arguing that: "While Shell has blamed the high incidence on sabotage by aggrieved villagers, a study by the Nigerian Ministry of Petroleum Resources puts the largest cause of spills as 'equipment malfunction' (38 percent), and 'corrosion of equipment' (21 per cent)".³⁰¹

Since the previous information about the scope and numbers of Nigerian oil spills was conveyed, the overall number of oil spill related claims has increased to at least 40,000. This can be discerned from the fact that Global Risk Solutions (GRS), a professional services company based in Miami, Florida, that specialises in 'a diverse range of information management, cost analysis, and insurance and claims support services designed to facilitate the loss indemnification and claims payments processes', is able to headline its list of projects on its website with the title: '40,000+ Claims, Crude Oil Pipeline Break, Nigeria', under which GRS states that it has acted in the following ways: "(P)lanned and managed receipt and recording of third party liability claims. Consulted on claims management strategies including negotiations with tribal chieftains and Nigerian governmental authorities. Assembled and managed a team of Nigerian claims adjusters".³⁰²

²⁹⁹ Schopp and Pendergrass (2003), *op. cit.*, at 22.

³⁰⁰ Adewale (1989), *op. cit.*

³⁰¹ Obi, C.I., 'Globalization and Environmental Conflict in Africa', *African Journal of Political Science*, Vol. 4, No. 1 (1999) 40-62, *citing* Oyekan, A., 'The Nigerian Experience in Health Safety and Environmental Matters during Oil and Gas Exploration and Production Operations', Ministry of Petroleum Resources, at First International Conference on Health Safety and Environment in Oil and Gas Exploration and Production, The Hague, The Netherlands (1991).

³⁰² Available from the GRS website at: <http://www.globalrisksolutions.com/projects.htm> (last accessed 7 October 2012).

Just as significant as the sharp growth in the *number* of claims being made, is the *type* of claims that have been made. For example, Udo and Egbenta re-iterate that most Nigerian oil production is currently being carried out in the Niger Delta region found in the southern part of the country, which also contains a relatively large amount of environmental (also known as 'non-use') goods such as wildlife, natural scenic views, wetland, natural heritage sites, recreation sites and many others, which have a positive impact on the life of the people.³⁰³ Ekeh has not only documented the fact that oil industry pollution activities has been a major source of damage to natural resources (land, water, air, livestock and wildlife) as well as human beings. He argues further that there is no region of the world that is subjected to as much environmental abuse as the Niger Delta.³⁰⁴ However, in common with most jurisdictions around the world, whether in countries with developed or developing economies, the Nigerian legal system has struggled to provide legal avenues for remedying natural resource and ecosystem damage, as opposed to the diminution of private property values, for example. According to Udo and Egbente, the Nigerian government established a technical committee to work out guidelines for the assessment of damages due to oil pollution,³⁰⁵ but the committee's recommendation only addressed compensation for land and buildings, 'economic' trees or crops, and aquatic environmental resources (mainly, fisheries), listed as 'use goods'. This ignores the fact that environmental goods have two component values - use and 'non-use' values. The 'non-use' value denoted here refers to the value that people derive from public goods (including natural resources) independent of any present or future use that people might actually make of those goods. This 'non-use' value was not included by the committee in the recommended guideline for the valuation of loss.³⁰⁶ More recently, the lack of legal definition and valuation of the lost ecological services provided by the Delta environment, protocols for their restoration, and regulatory agencies to oversee such restoration has been highlighted as continuing deficiencies in the scope of environmental law within Nigeria.³⁰⁷

The link between the environmental degradation caused by oil spills and social unrest in the Delta region has also been clearly established. Writing in 2001, Ukeje had noted that damage from oil spill pollution destroyed farmlands, streams, and the ecosystem itself. He stressed that the people of Niger Delta are collectively aggrieved because they are not adequately compensated for the damage done to their (private) land and the environment, generally.³⁰⁸ Examining the causes of the prevailing social problems in the Niger Delta, Jike concludes that the consequences of social disequilibrium cannot be understood independently of the

³⁰³ Udo and Egbente, *op. cit.*, at 2.

³⁰⁴ See: Ekeh, P.P., Editor's Introduction to a photo gallery, with notes on 'Oil Spills, Oil Fires, Gas Flares and other Environmental Damages in Nigeria's Niger Delta', (2001) Available at: <http://www.waado.org/Environment/PhotoGallery/PhotoGalleryPage.html> (last accessed 7 October 2012).

³⁰⁵ See: Federal Executive Council decision No CM (88) 186, 6 October 1988.

³⁰⁶ Udo & Egbente, *op. cit.*, 2-4, *citing* an Oil Producing Trade Sector (OPTS) report, Lagos, Nigeria (1988).

³⁰⁷ Imoobe, T.O.T. and Iroro, T., 'Ecological Restoration of Oil Spill Sites in the Niger Delta, Nigeria', *Journal of Sustainable Development in Africa*, Vol.11, No.2 (2009) 54-65, at 59-60.

³⁰⁸ Ukeje, C., 'Youths, Violence and the Collapse of Public Order in the Niger Delta of Nigeria', *African Development*, Vol. XXVI, Nos. 1 & 2 (2001) 237-365.

environmental problems of the region. These in turn stem from a development initiative that undermines the existential base of the Delta communities.³⁰⁹

Building on this argument, Onosode has argued that the process and politics of compensation among the players in the oil industry have helped to aggravate conflicts in the region.³¹⁰ This confirms Ekpu's view that Nigerian statutes and regulations generally do not confer any individual right of private action for the victims of pollution, such claims usually being brought under tort law.³¹¹ Thus, moving on from the above discussion of the legislative, regulatory and institutional domestic framework for making, applying and enforcing environmental laws against polluting oil industry activities, I will now examine the effectiveness of common law claims before Nigerian courts on these issues.

IV. COMMON LAW RESPONSES TO NIGER DELTA OIL SPILLS IN NIGERIAN COURTS

As noted above, Nigeria's common law system allows for the possibility of oil spill claims based in tort law. Specifically, the law of negligence, nuisance and the rule in *Rylands v. Fletcher*. According to Ebomhe, the net effect of the relatively sparse regulatory coverage and especially enforcement of oil spill-related regulation in Nigeria is that environment issues were reduced to matters of periodic litigation between aggrieved individuals and communities on the one hand and the oil producing companies on the other in the event of damage occasioned to fisheries and the environment through oil spillages or damming of the water ways. As he notes, in these parochial environmental pollution conflicts before Nigerian courts, parties invariably relied on common law remedies in pursuit or defence of their cases. Issues thus revolve around the rights, duties and obligations developed by the local courts pertaining to established tort law-based liabilities of negligence and nuisance, as encapsulated by the rules in *Donoghue v. Stevenson* [1932] A.C. 562, and *Rylands v. Fletcher* (1868) L.R. 3, respectively. Both the law of negligence and the *Rylands* rule were applied in the case of *Umudje v. Shell-BP* (1975),³¹² where the Nigerian Supreme Court held the defendants/appellants negligent in their construction of a road and strictly liable for the damage to the ponds and lakes of the plaintiffs/respondents, caused by an overflow of waste

³⁰⁹ Jike, V.T., 'Environmental Degradation, Social Disequilibrium, and the Dilemma of Sustainable Development in the Niger-Delta of Nigeria', *Journal of Black Studies*, vol. 34 no. 5 (May, 2004) 686-701.

³¹⁰ For more information on Onosode's arguments, see *supra*, as indicated in Section I A of the main body of the report; Onosode, G., (1998), *supra*.

³¹¹ Ekpu, *op. cit.*, at 90-92.

³¹² *Umudje v. Shell-BP Petroleum*, (1975) 9-11 S.C. 155, as well as *Edhemowe v. Shell-BP*, Suit No. UHC/12/70, judgment of the Ughelli High Court (29 January, 1971) unreported, see Ekpu (1995), *id.*, at 93. See also: Frynas, J.G., 'Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria', *Journal of African Law*, vol.43 (1999) 121-150, at 126-127.

oil from their pit.³¹³ As for the former causes of action, certain perennial difficulties associated with the invocation of both negligence and nuisance claims in tort law persist before the Nigerian courts. The apparent reticence of both the Nigerian and original common law courts of the home country (United Kingdom) in this context is cast in an unfavourable light when compared with the progressive approach adopted by courts in other Commonwealth countries, notably in decisions of the Indian Supreme Court on environmental protection matters. For example, in *Vellore Citizens' Welfare Forum v. Union of India*,³¹⁴ the Court provenanced the relevant (Indian) constitutional and statutory provisions for environmental protection to the 'inalienable common law right' of every person to a clean environment. Citing *Blackstone's Commentaries on the English Law of Nuisance* (1876), the Supreme Court held that since the Indian legal system was founded on English common law, the right to a pollution-free environment was part of the basic jurisprudence of the land.³¹⁵ Here we can see the potential legal basis for grafting common law remedies onto the prevailing statutory framework for redressing environmental damage.³¹⁶

Focusing on the law of private nuisance, Ebeku has highlighted the trend within certain Commonwealth jurisdictions such as Canada to broaden the class of potential claimants to include those who can show 'substantial occupation' of a property.³¹⁷ However, as Obagbinoko observes, it is usually only an event causing serious inconvenience to private property rights that is deemed actionable as private nuisance. Conversely, where several adjoining claims are made, the courts have proved all too willing to classify the problem as a public nuisance, thereby requiring the individual plaintiffs to certify that they have suffered a serious interference to their individual properties over and above the disturbance caused to the general public.³¹⁸ Moreover, negligence suits are curtailed due to the high threshold of evidentiary proof set for the plaintiffs by the local courts. This was demonstrated in the surplus gas flaring case of *Chinda and Ors. v. Shell-BP Petroleum Company of Nigeria*.³¹⁹ The plaintiff sued the defendant company for heat, noise and vibration resulting from the negligent management and control of the flare set used during gas flaring operations which resulted in a lot of damage to the plaintiff's property. The court held that the plaintiff could not prove any

³¹³ See also: *Shell-BP Ltd. v. Cole & Ors.* [1978] N.S.C.C., vol. 11 at 96. For a comprehensive treatment of the application of this common law rule in Nigeria, see: Adewale, O., 'Rylands v. Fletcher and the Nigerian petroleum industry', *Journal of Private and Property Law*, vols. 8 & 9 (1987/88) 37.

³¹⁴ All India Reports (AIR) 1996 SC 2715.

³¹⁵ *Id.*, at 2722. See: Divan, S. and Rosencrantz, A., *Environmental Law and Policy in India: Cases, Materials and Statutes*, 2nd ed., Oxford: OUP, (2002) at 88.

³¹⁶ For more information on the growing influence of human rights standards derived from regional human rights treaties, such as the African Charter on Human and People's Rights in the case of Nigeria, and the European Convention on Human Rights in the case of the UK, see *supra*, as indicated in Section I A of the main body of the Report.

³¹⁷ Ebeku, K.S.A., 'Locus standi in environmental nuisance actions: a perspective from the commonwealth', *Environmental Law and Management*, Vol.17 (2005) 14-23, at 17, citing *Motherwell v. Motherwell* (1976) 73 Dominion Law Rep (DLR) 62, at 76-78, per Clement J A.

³¹⁸ Obagbinoko, *op. cit.*, at 187 and 190, citing Okukpon, A. O., 'Tort law and the protection of the individual against industrial pollution', *University of Benin Law Journal*, Vol. 6. No. 2 (2000/2001).

³¹⁹ (1974) 2 RSLR 1.

negligence on the part of the defendant in the management and control of the gas flaring operation. Moreover, an injunction request against such gas flaring operations also failed due to the reluctance of Nigerian courts to impinge upon continuing oil industry activities, notwithstanding the impact of oil operations on the surrounding environment and/or local communities.³²⁰ According to Obagbinoko, this problem is exacerbated by the huge discrepancies between the individual plaintiffs and industrial defendants involved, both in the knowledge base and available resources that can be devoted to making and defending these claims.³²¹ This conforms to the following summation of the capacity of Nigerian law to afford redress against impingement of land-use rights and natural resource/environmental damage:

“Nigerian law generally provides for fair and adequate compensation for compulsory acquisition of land use rights and for damage to resources. In practice, however, injured plaintiffs rarely receive fair and adequate compensation. Among the factors that contribute to this failure to meet the general legal standards are the relative imbalance in bargaining positions of claimants and oil producers, court delays that make litigation a poor alternative to negotiated settlement, lack of information about the amount of compensation paid in settled cases, the relatively large amounts paid to lawyers and other compensation agents in payment for services rendered with respect to claims, the use by oil producers of out-dated rate schedules for timber and crops, and the failure to consider the value of non-timber forest products (NTFPs) or other non-commercial products and uses of resources. Many claimants are poor and cannot afford to wait for years for a court decision on a disputed claim”.³²²

Juxtaposed against these generally negative views on the possibility of an adequate common law response to environmental damage from oil spills in Nigeria is the view expressed by Frynas, who has argued that the Nigerian judicial responses to common law claims against oil industry operations in negligence and nuisance have shown a willingness to accommodate and even ease the traditional problems of standing, evidence of damage, proof of causation etc. that traditionally stood in the way of successful common law claims in tort.³²³ Moreover, he has identified two key factors for this change in judicial approach to claims before Nigerian courts, namely, 1) the increased professional ability of legal counsel assisting the claimants; and 2) the changing attitudes of the judiciary, both Nigerian and elsewhere such as the UK, due to changing social attitudes towards the victims of corporate acts.³²⁴ Of course, this does not mean that all the previously problematic legal issues arising from common law-based

³²⁰ Frynas, *op. cit.*, at 123.

³²¹ Obagbinoko, *op. cit.*, at 191.

³²² Schopp and Pendergrass, *op. cit.*, at 22.

³²³ Frynas, (1999), *op. cit.*, at 149-50.

³²⁴ Frynas, 'Social and environmental litigation against transnational firms in Africa', *Journal of Modern African Studies*, vol.42, no.3 (2004) 363-88, at 374-376.

litigation in Nigeria have been addressed. Tamuno, for example, has recently highlighted continuing deficiencies in the utility of tort law-based claims for environmental damage in the Niger Delta and advocates the establishment of a statutory liability scheme in Nigeria akin to that of the 2004 EU Environmental Liability Directive now applicable in the UK.³²⁵ However, even these positive jurisprudential developments in the domestic (Nigerian) legal scene are undermined by the combative approach taken by SPDC against individual and collective/community legal claims against it. A summary of the background facts, individual and collective, community-oriented claims, judicial decisions and responses of SPDC to various legal actions against it on oil spill issues serves to illustrate this point:

Ejama-Ebubu community v. SPDC (2010)

As noted above in the introduction, the Nigerian Federal High Court in Asaba, Delta state delivered a judgment in July 2010 on the Ejama-Ebubu oil spill case for 15.4 billion naira (N) (c.\$100 million) against Royal Dutch/Shell's Nigerian subsidiary (SPDC), declaring it liable for the damage caused. Chief Isaac Agbara represented the Ejama-Ebubu community from the Tai Eleme Local Government Area of Rivers state, which also brought the suit in 2001 against Shell International Petroleum Company Limited and Shell International Exploration and Production BV as co-defendants. Since this claim was filed in 2001, following Nigeria's transition to a civilian government, Shell attempted to file interlocutory (interim) appeals no fewer than 27 times, thus delaying the merits of this case from being heard until the July 2010 judgment. Each time the court decided a preliminary issue in favor of the plaintiffs, Shell tried to suspend the proceedings in order to appeal to a higher court. Under most circumstances, final judgments may be appealed, but not interim orders. In the end, Shell was allowed to file interlocutory appeals only three times out of twenty-seven attempts. In the course of nine years of litigation, Shell managed to outlast two judges. The judge who finally decided the case was actually the third to be assigned to it. Shell raised an initial objection based on statutes of limitation arguing the case was predicated on the occurrence of a nuisance dating back to 1970 but long since discontinued. However, this objection was dismissed as Justice Ibrahim Buba considered that the case was predicated upon Shell's continuing nuisance. Shell did not adduce any evidence against the issues raised by the plaintiffs regarding its own (mis)conduct. Its only response to the allegations was denial of responsibility, pointing instead to local rebel activities. This is a common pattern – both Shell and Chevron have claimed for years that the vast majority of their oil spills in Nigeria have been caused by sabotage rather than their own poor record of maintenance. As Kaufman observes, “(w)hile it is undoubtedly

³²⁵ Tamuno, P.S., 'Negligence versus Strict Liability in the Fight Against Environmental Degradation in the Niger Delta of Nigeria,' International Energy Law and Policy Research paper Series, Working Research Paper Series No. 2011/01, Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP), University of Dundee, Scotland. Available at:

<http://www.dundee.ac.uk/cepmlp/gateway/index.php?news=31019> (last accessed 7 October 2012).

true that local criminal and insurgent gangs have been known to purposely damage oil facilities, the notion that the lion's share of environmental damage in the Delta is self-inflicted by the actions of the local communities who have to live with the consequences is absurd".³²⁶ Moreover, it is belied by reports of the operational and maintenance standards breached by corroded, leaky pipelines that sprawl across the region.³²⁷ As Kaufman concludes, "Shell's actions in this case thus fit a disturbing trend in international oil company liability cases – first, blame others; second, avoid international scrutiny; and third, overwhelm local courts and governments with limited resources".³²⁸

The details of the successful claim by the Ejama-Ebubu community consist of the following items:

1. Recovery of special damages of N1.772billion, allowing for interest for delayed payment for five years from 1996 at a modest mean Central Bank of Nigeria deregulated rate for that volume at 25 per cent per annum, totaling N5.4billion, for an oil spill that occurred in 1970.
2. Recovery of punitive general damages of N10bn for general inconveniences, acid rain, pollution of underground water and hardship to the population, who have been deprived of the right to self sustenance, education and good life. Interest for delayed payment for five years from 1996 at a modest mean Central Bank of Nigeria deregulated rate for that volume at 25 per cent per annum, totaling N5.4billion, for an oil spill that occurred in 1970.
3. The plaintiffs also requested an order directing the defendant to de-pollute and rehabilitate the dry land swamps to its pre-impact status.

The High Court in Asaba awarded N15.4billion (\$\$100 million) as special and punitive damages and An ordered the defendant to de-pollute and rehabilitate the dry land swamps to its pre-impact status. The damages break down along the following heads of claim: direct value of annual renewable crops/amenities, loss of income, N44.5m; injurious affection, N613.7m; forestry N115.5m; hunting income N236.2m; animal traps N4.9m; water supply, N80m; health hazards, shock fear N100m; desecration of shrines, N1.8m; interest for delayed payment for five years from 1996 at a deregulated rate of 25 per cent per annum, totalling N5.4billion; as well as punitive terms of general damages in the sum of N10 billion for general inconveniences, acid rain, pollution of underground water and hardship to the population who

³²⁶ Kaufman, *op. cit.*

³²⁷ See, for example: Steiner, R., 'Double Standard: International Best Practice Standards to Prevent and Control Pipeline Oil Spills, Compared with Shell Practices in Nigeria', Report prepared for Milieudefensie (Friends of the Earth) Netherlands (November 2008) 61pp.

³²⁸ Kaufman, *op. cit.*

have been deprived of the right to self sustenance, education and good life.³²⁹ The court also ordered Shell to remediate the affected land to its pre-spill condition. However, following the High Court judgment against it, Shell filed an application for a stay of execution and an appeal against the judgment alleging the spill occurred during the Nigerian civil war, when troops caused the leak and Shell was not operating in the area at the time because of the war. In light of this appeal by Shell, the communities whose lands and livelihoods were destroyed by Shell's negligent actions are years from seeing any relief.³³⁰

Ijaw community v. SPDC (2006)

In an earlier case, the Ijaw community had also brought a successful claim against SPDC before the Federal High Court in Port Harcourt, Rivers state, which delivered a judgment for N(aira) 210 billion (about \$\$1.5 billion) into the Central Bank of Nigeria (CBN), in favour of the Ijaw Aborigenes of Bayelsa State, in compensation for pollution and consequential environmental degradation in the Delta. The Ijaw took the case to court after Shell refused to make the payment ordered by a Nigerian parliamentary resolution. The order by Justice Okechukwu Okeke followed an appeal of stay of execution against a judgment delivered in February 2006, in which SPDC was ordered to pay the Ijaw the amount as compensation for the damage done to their land for nearly 50 years. After that February 2006 decision, SPDC filed an application for stay of execution, pending the determination of the substantive appeal. Following this application, the High Court ruled that SPDC should pay the N210 billion/\$\$1.5billion to the coffers of CBN in the name of the chief registrar of the Federal High Court, rather than to the Ijaw communities directly. Justice Okeke held that this ruling was on the basis that CBN was a neutral party in the suit between SPDC and the Ijaw. However, SPDC refused to make the payment and said it will not comply until the appeal is heard. Currently the case is pending before the Supreme Court.³³¹ In the case of the Sokebelou, Obotobo, Ofogbene and Ekeremor-Zion communities against SPDC before the High Court in Ughelli, compensation to the amount of N30 million (\$\$333,000) was successfully claimed in connection with a spill in 1982. However, in common with its response to previous and continuing claims, SPDC asserts that the spill was caused by sabotage, and that it is therefore not liable.

³²⁹ Information available at: <http://www.saharareporters.com/news-page/oil-spill-shell-ordered-pay-n154-billion-vanguard> (last accessed 7 October 2012).

³³⁰ For SPDC's response to the judgment, see: <http://www.vanguardngr.com/2010/07/shell-appeals-n15-4bn-oil-spill-penalty/> (last accessed 7 October 2012).

³³¹ Based on information culled from various websites, for example, Heller, K.J., 'Nigerian Court Orders Shell to Pay \$1.5 Billion', *Opinio Juris* legal news website, available at:

<http://opiniojuris.org/2006/02/28/nigerian-court-orders-shell-to-pay-15-billion/> (last accessed 7 October 2012).

See also: Onah, G., 'NIGERIA: Ijaw Win \$1.5 Billion Suit Against Shell', *Vanguard (Lagos)*, May 23rd, 2006. Available at the Corporation Watch (Corpwatch) NGO website at:

<http://www.corpwatch.org/article.php?id=13609> (last accessed 7 October 2012).

Iwherekan community (Gbemre) v. SPDC and Others (2005)

In this case, Jonah Gbemre (for himself and representing Iwherekan Community in Delta State) had successfully petitioned the Federal High Court of Nigeria against Shell, ExxonMobil, ChevronTexaco, TotalFinaElf and Agip joint venture companies, the Nigerian National Petroleum Corporation, and the Nigerian government to stop continuing gas flaring operations.³³² The plaintiffs argued that such gas flaring operations are a 'gross violation' of the constitutionally-guaranteed rights to life and dignity, which according to these communities include the right to a 'clean poison-free, pollution-free healthy environment'. Justice Nwokorie first held that the Mr Gbemre had been properly granted leave to institute these proceedings in a representative capacity for himself and for each and every member of the Iweherekan Community in Delta State of Nigeria. The court then held that it has the inherent jurisdiction to grant leave to the applicants as *bona fide* citizens and residents of the Federal Republic of Nigeria, to apply for the enforcement of their fundamental rights to life and dignity of the human person as guaranteed by sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and moreover, that these constitutionally guaranteed rights inevitably include the right to a clean, poison-free, pollution-free healthy environment. The court then held that the actions of the respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicants' community was a gross violation of their fundamental right to life (including healthy environment) and dignity of human person as enshrined in the Constitution. Moreover, the failure of the respondents to carry out environmental impact assessment in the applicants' community concerning the effects of their gas flaring activities was a clear violation of section 2(2) of the 2004 Environmental Impact Assessment Act,³³³ and had contributed to a further violation of the said fundamental rights. Furthermore, the judge held that section 3(2)(a) and (b) of the Associated Gas Re-Injection Act and section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations section 1.43 of 1984, under which gas flaring in Nigeria was allowed are inconsistent with the applicants' rights under 1999 Constitution of the Federal Republic of Nigeria (above), *as well as* articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights,³³⁴ and are thus unconstitutional, null and void by virtue of section 1(3) of the same Constitution.

³³² *Gbemre v. Shell Petroleum Development Company Nigeria Limited and Others* (2005) AHRLR 151 (NgHC 2005) Available at:

<http://www.chr.up.ac.za/index.php/browse-by-subject/418-nigeria-gbemre-v-shell-petroleum-development-company-nigeria-limited-and-others-2005-ahrlr-151-nghc-2005.html> (last accessed 7 October 2012).

³³³ See: cap E12 Vol 6, Laws of the Federation of Nigeria, 2004.

³³⁴ Incorporated into Nigerian law by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9, vol 1, Laws of the Federation of Nigeria, 2004.

Justice Nwokorie therefore ordered SPDC and the other oil companies operating in the region to stop flaring in the Iwerekhan community immediately, and ordered the Attorney General to meet with the Federal Executive Council to set in motion the necessary processes for new gas flaring legislation consistent with the Constitution. However, on 10 April 2006, the Federal High Court granted a 'conditional stay of execution of this court's order stopping gas flaring in the Iwherekan community'. Three conditions were attached, including the requirement that Shell and the other respondents stop gas flaring activities in Nigeria by 30th April 2007. The court also required Shell to produce a detailed plan of action showing how they will stop gas flaring in the Iwherekan Community. However, instead of complying with the order, Shell applied for a (further) stay of execution. Moreover, no detailed scheme had been submitted as of 30 April, 2007. Even beyond this deadline, Shell still has not stopped gas flaring, ostensibly because its (indigenous) Nigerian partner in the joint venture had not fulfilled its financial responsibilities. As noted above in its own 2010 corporate sustainability report, Shell has only recently begun to address gas-flaring from its SPDC installations. Shell's inaction in this regard, thereby rendering Justice Nwokorie's laudable initial decision ineffective, has been alleged to be disrespectful of the Nigerian legal system.³³⁵

Apart from the representative, community-based cases highlighted above, a few selected cases involving individual claims for losses are also noted here: The case of *SPDC v. Farah* is the leading authority on compensation for oil pollution. This case arose from an oil well blowout at Shell's Bomu II well in the Tai/Gokana local government area in Ogoniland in July, 1970. The respondent, SPDC conceded that the blow out had occurred, but stated that the company had paid a total of £22,000 to the individual claimants and rehabilitated the land by 1975, and hence that no further obligation was due in respect of the damage caused. The plaintiffs in the case asserted that the land had not in fact been rehabilitated and that an extended period of negotiation had followed over Shell's obligations which terminated in 1988 in Shell's refusal to take any further action. In 1989, litigation commenced in the High Court. The plaintiffs won their case in the High Court in 1991 and were awarded a total of N4,621,307 in damages for injury caused to the their lands, crops and trees. SPDC appealed, but lost their case in the Court of Appeal in 1994,³³⁶ where the c.N4.6 million (c.\$210,000 at the official exchange rate in 1994, according to Frynas) damages award was confirmed.³³⁷ This has prompted a leading Nigerian environmental law practitioner to note that : "In Nigeria, negligence has provided a platform for defendants to recover damages following an oil spill".³³⁸ Citing the cases of *SPDC v. Chief T Kille*, and *SPDC v. Amao*,³³⁹ where the

³³⁵ See: 'Shell Fails to Obey Court Order to Stop Nigeria Flaring, Again', May 2, 2007, Friends of the Earth International calls on Shell to immediately respect a court order to stop gas flaring in Nigeria. Available on the Climate Justice NGO website at: <http://www.climatejustice.org/media/2007May2/> (last accessed 7 October 2012).

³³⁶ [1995] 3 Nigeria Weekly Law Reports (NWLR) (Part 382) at148.

³³⁷ See: Frynas (2004), *op. cit.*, at 372.

³³⁸ See: Awogbade, S., President of the Nigerian Environmental Law Association and Partner, Aellex, Legal Practitioners and Arbitrators (prepared with the research assistance of Gideon Agbedo, Associate, Aellex), 'What is the Place of Practice of Environmental Law in Africa's Development?', paper presented at the Guinea Current Large Marine Ecosystem Project: Regional Capacity Building Workshop For Environmental Lawyers

plaintiffs recovered damages for losses caused by an oil spillage from SPDC's flow station, as well as a similarly successful claim in the case of *Nigeria National Petroleum Corporation (NNPC) v. Chief Stephen Sele*,³⁴⁰ Awogbade notes that in all these cases, the plaintiffs' losses were made good by the courts. However, he cautions that, "in none was any order made for the clean-up of the spillage or the defendant required to apply the sum recovered as damages to remediation of the environment. As such action in negligence is usually of limited value to the impacted or damaged environment",³⁴¹

In *SPDC v. Chief G.B.A. Tiebo VII and Others*,³⁴² the plaintiffs claimed before the High Court for the loss of drinking water sources, and fishing, as well as injury to and loss of young raffia palm crops caused by a major oil spill into the River Nun and surrounding agricultural lands in 1987, due to the negligence of the respondent/appellants. The High Court decided in favour of the plaintiffs, but stated that they had failed to satisfactorily prove the specific loss of drinking water sources and the injury to the raffia palms. In spite of this, the court awarded compensation to the amount of N400,000 for damage to the palms and N600,000 for the loss of drinking water as part of the total amount of general damages awarded. On appeal by SPDC, the decision of the High Court on these two headings was overturned. The Court of Appeal questioned whether it was proper for the High Court to award damages when there was insufficient proof. It held that proof of special damages (as opposed to general damages) is strict and where the plaintiff is unable to prove such special damages, the trial court cannot compensate him by way of general damages. Since the plaintiff could not specifically prove the loss of the raffia palms and drinking water, it was improper for it to award general damages for these when special damages were requested. It therefore overturned the compensation for these damages, but upheld that part of the award for damage to crops, farmlands, fishponds, streams and religious shrines as general damages, totalling N6 million (c.\$275,000 at the official exchange rate, according to Frynas).³⁴³ Shell then appealed to the Supreme Court against the jurisdiction of both the High Court and Court of Appeal to hear these claims in the first place, but this was denied.³⁴⁴

In another recent case, *Elder Baribor N. Saakpa and Saturday Giadom v. SPDC*, the plaintiffs (suing for themselves and on behalf of the members of the Saakpa family of Baranyowa-Dere, in Gokana Local Government Area of Rivers State) alleged that SPDC's activities had led to an oil spill in 2000, which in turn had adversely impacted on their landed property, of about 37 hectares in size. The plaintiffs made out a claim of: N10 billion as special, general

and Journalists, UNIDO Regional Coordination Unit, Accra, Ghana, (8-10 May, 2006) 21pp, at 15. Available at: <http://www.docin.com/p-101018939.html> (last accessed 7 October 2012).

³³⁹ (2000) 10 NWLR (Pt. 675) 248.

³⁴⁰ (2004) 5 NWLR (Pt. 866) 379.

³⁴¹ Awogbade, S., *op. cit.*

³⁴² (1996) 4 NWLR (Pt. 445) 657.

³⁴³ See: Frynas, J G (2004), *op. cit.*, at 372.

³⁴⁴ [2005] 9 NWLR (Part 931) 439 and [2005] 9 M.J.S.C 158.

and exemplary damages for damage caused to the land and farm crops by crude oil spillage from the defendant's Alesa, Eleme, Bonny Trunk line, which is the main SPDC oil pipeline from upstream production areas runs to the export terminal at Bonny (island). A breakdown of the claims comprised: disturbance and injurious affection at N4.848 billion; ecological degradation at N37 million; health hazards at N200 million; and, general damages at N900 million. SPDC denied any spill had occurred, stating that there was no record of any spill whatsoever from its manifold along the SPDC trunk line on or about 27 May 2000, as alleged by the plaintiffs. In deciding the matter, Justice Chukwu outlined two main issues for determination, namely, whether there had been an oil spill from the defendant's manifold on the trunk line at the relevant date, and whether the plaintiffs are entitled to the claim of general and special damages from SPDC. In his judgment, which was rendered in August 2008, both issues were resolved in the favour of the plaintiffs and he awarded the plaintiffs N5.5 billion in compensation. However, SPDC refused to accept these determinations and filed an appeal as well as requesting a stay of the execution.³⁴⁵ Initially they requested an unconditional stay on the judgment from Judge Olotu of the Federal High Court in Uyo, the capital of Akwa Ibom State. However, they were only able to secure a stay of the execution order pending the outcome of their appeal.³⁴⁶

This summary of recent individual/class action claims based on common law remedies such as negligence and nuisance, as well as the progressive way in which the case law precedents arising from this domestic litigation is developing, when coupled with the relevant environmental legislation regulating the Nigerian oil industry and related public authorities/agencies charged by Nigerian laws to apply this legislation noted above, strongly suggests Nigeria now has an adequate legal system to deal with the problem of oil spills clean-up, remediation, restoration and compensation for personal, property and even environmental damage resulting from such spills. Thus, we can observe that it is not the case of weak or inadequate Nigerian environmental laws against oil spills, nor necessarily even the poor functioning of the Nigerian legal system for environmental protection that ultimately prevents the clean-up, remediation and adequate compensation for oil spill damage. Instead, the main deficiencies that emerge from this assessment arise from the recurring approach towards the Nigerian legal system taken by SPDC (representing Shell in Nigeria) and other IOCs represented in Nigeria. Indeed, it is notable that even when the courts are brought in to adjudicate on individual/collective claims for the environmental damage caused by oil pipeline spills and other oil industry-related pollution incidents and the current lack of clean-up and

³⁴⁵ See: Badejo, E., 'Shell rejects N5.5b verdict over Bayelsa environment pollution', at Overseas Agency Nigeria (OAN) Ltd., website, available at:

<http://www.oan-agency.com/site/newsdetail.php?recordID=Shell%20rejects%20N5.5b%20verdict%20over%20Bayelsa%20environment%20pollution> (last accessed 7 October 2012).

³⁴⁶ Suit No. FHC/PH/CS/438/2005, FHC/UJ/CS/16/2009. See: Agina, C., 'Shell gets stay of execution on payment order', Friday, February 19, 2010. Available at NBF news website: <http://www.nigerianbestforum.com/blog/?p=37526> (last accessed 7 October 2012).

remediation work in the Delta region, this is apparently to no avail due to the willingness of SPDC to drag out proceedings using the full range/panoply of legal actions (for example, applications to stay proceedings, stay of the execution of judgments pending appeals etc).

V. LITIGATION BY NIGER DELTA COMMUNITIES AGAINST ROYAL DUTCH SHELL IN THE NETHERLANDS AND UK COURTS

A. Netherlands: *Oguru, Efanga and others v. Royal Dutch Shell Plc. and SPDC Ltd.*

In this case, (representative) Nigerian farmers and fishermen victims from the villages of Goi, Oruma and Ikot Ada Udo, who lost their livelihoods when leaking Shell oil pipelines polluted their fields and fishing ponds, are demanding compensation and want Shell to clean up the remaining oil contamination. The joint plaintiffs, Fidelis Ayoro Oguru, Alali Efanga and Milieudedefensie/Friends of the Earth Netherlands brought claims against SPDC (Nigeria) and Royal Dutch Shell Plc before a court in The Hague, Netherlands, for the following orders:

1. a declaratory judgment to the effect that RDS and SPDC committed tort against the plaintiffs and are jointly and severally liable towards them;
2. a declaratory judgment to the effect that RDS and SPDC committed tort against Milieudedefensie are jointly and separately liable for the damage to the environment near Oruma as a result of these torts;
3. RDS and SPDC to commence the replacement of the old (sections of) the oil pipeline near Oruma;
4. RDS and SPDC to commence the clean-up of the soil around the oil spill so that this will comply with the international and local environmental standards;
5. RDS and SPDC to commence purification of the water sources in and near Oruma;
6. RDS and SPDC to maintain the oil pipeline near Oruma in good condition after replacement, in accordance with 'good oil field practices';
7. RDS and SPDC 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 Oruma recurs;
8. RDS and SPDC to pay the plaintiffs a penalty of EUR 100,000 (or another amount to be determined by the judge in good justice) for each time RDS and SPDC fail to act against any similar recurrences of such oil spills.

In response, SPDC/Shell proposed a motion contesting the jurisdiction of the Dutch courts to adjudicate over the above issues and requesting that the court declare that it has no jurisdiction over the claims against SPDC and, moreover, that the plaintiffs were abusing the law by initiating proceedings against Royal Dutch Shell. In a significant preliminary ruling on its jurisdiction on 30 Dec 2009, the Dutch court dismissed Shell's arguments, concluding that it has international jurisdiction over both SPDC and Royal Dutch Shell on these matters.³⁴⁷

On 24 March 2010, the plaintiffs formally asked Shell for internal Shell documents for use in the preparation of their final written pleadings, delivered in mid-2011. These include documents which would help to clarify the relationships between the various subsidiaries of Shell. In its reply on 16 June 2010, Shell argued that it should not be forced, nor is it able to show internal corporate documents to the plaintiffs. On 8 September 2010, the plaintiffs responded to the Shell arguments as an attempt 'to prevent transparency on the situation in Oruma and the way the Shell concern is managed.' Since then, the former parent/holding Shell companies, namely, Shell Transport and Trading Company and Dutch Shell Petroleum N.V., have also been brought before the Hague court. They were forced to do so as Shell is arguing that it cannot be held responsible for acts performed by its predecessors. The current Shell holding company, Royal Dutch Shell plc, did not exist when the spills in Oruma happened. However, during the summer of 2011, Shell announced it would appeal if forced to open up certain documents, as it feared they would end up in the public domain. The latest decision of the court on 14 September, 2011 ruled that Shell is not obliged to open up company documents as requested by the plaintiffs. The court also set 14 December as the date for filing final written pleas. A court hearing on these cases is under way at the time of writing.³⁴⁸

B. United Kingdom: *Bodo community v. SPDC/Shell*

In addition to the litigation against Shell in the Netherlands, a legal claim has been brought in the UK on behalf of some 49,000 Nigerians living in the Bodo community. In this case, Shell has admitted liability for damage to the environment resulting from two massive oil leaks in 2008/9, in particular to the waterways used by this fishing community in the Niger Delta. London based law firm Leigh Day & Co represents the Bodo Community and brought a claim for damages against Royal Dutch Shell Plc (RDS) and its subsidiary Shell Petroleum Development Company (Nigeria) Ltd. (SPDC). Shell says it was informed of the first leak in

³⁴⁷ An English translation of this judgment is available at:

<http://www.milieudedefensie.nl/publicaties/factsheets/factsheet-the-people-of-nigeria-versus-shell-timeline-shell-courtcase/view> (last accessed 7 October 2012).

³⁴⁸ See: 'Shell Court case: Oil Leaks', available at:

<http://www.milieudedefensie.nl/english/shell/news/court-date-set-for-milieudedefensie-and-nigerians-versus-shell-11-october-2012> (last accessed 7 October 2012).

early October 2008. The community says by then the leak had already been pumping oil for some six weeks. Even then it took Shell over a month to repair the weld defect in one of its pipelines, which had resulted in oil pumping out of the pipeline into the local community at an estimated rate of 2,000 barrels per day.

The oil spill has caused massive contamination in the creek, rivers and waterways in the Bodo area, as well as the areas' mangroves, causing devastating pollution to the entire Bodo creek. The damage is estimated to have affected an area of 20 km² in the Gokana Local Government Area of Rivers State in Nigeria. A further spill occurred in December 2008 and was also the result of equipment failure. It was not capped until February 2009 during which time even greater damage was inflicted upon the creek as tens of thousands of barrels of crude oil pumped into the rivers and creeks. The amount of oil spilt is estimated to be as large as the spill following the Exxon Valdez disaster in Alaska in 1989 and that the amount of coastline affected is equivalent to the damage done following the BP Deepwater Horizon disaster in the Gulf of Mexico in 2010 (considered below).

Proceedings against Royal Dutch Shell and SPDC began in the UK High Court on 6 April, 2011. However, in August 2011, Shell was reported to have accepted legal responsibility for the two spills, stating, *inter alia*, that: "SPDC accepts responsibility under the Oil Pipelines Act for the two oil spills both of which were due to equipment failure. SPDC acknowledges that it is liable to pay compensation - to those who are entitled to receive such compensation".³⁴⁹ In an agreement between the parties, SPDC has agreed to formally accept liability and concede to the jurisdiction of the UK, which means that the claim against Royal Dutch Shell, the parent company of SPDC in Nigeria, has ceased.³⁵⁰ However, SPDC is currently contesting the claims of amount of damage

VI. RELEVANT INTERNATIONAL 'BEST PRACTICE' ON CORPORATE RESPONSES TO OIL SPILLS CLEAN-UP, REMEDIATION AND COMPENSATION

Having outlined the numerous instances in which Shell has faced challenges regarding its compliance with domestic Nigerian environmental laws and standards, as well as its attitude towards the enforcement of community and individual claims for damage caused, the next section of this study will provide two contemporary examples of corporate responses to oil spill clean-up, remediation and compensation that arguably represent international best practice in this field. These two examples, namely, the BP/US and Total/French/EU

³⁴⁹ See: Vidal, J., 'Shell accepts liability for two oil spills in Nigeria', Wednesday 3 August 2011. Accessed from *The Guardian* newspaper (UK) website, at: <http://www.guardian.co.uk/environment/2011/aug/03/shell-liability-oil-spills-nigeria?INTCMP=SRCH> (last accessed 7 October 2012).

³⁵⁰ See *id.*

responses to the *Deepwater Horizon* and *Erika* oil spills, respectively, are highlighted here as follows:

A. *Deepwater Horizon/Macondo* (BP/US) oil well spill

Most recently, following the Gulf of Mexico *Deepwater Horizon/Macondo* offshore oil well disaster on 20 April 2010,³⁵¹ the Obama Administration, through the US Coast Guard, and without in any way relieving other responsible parties of liability, directed British Petroleum (BP) as the designated operator of the well, to establish a single claims facility for all Responsible Parties to centralise claims processing for claimants. As an initial response to its acceptance of corporate responsibility and liability, BP announced on June 16, 2010, that it would create a \$20 billion escrow account to satisfy claims resolved by the Gulf Coast Claims Facility (GCCF) and certain other claims, including natural resource damages. BP established an irrevocable Trust (for the announced escrow account) on August 6, 2010, designating three trustees with fiduciary responsibility to collect promised contributions from BP and make disbursements to permitted categories of beneficiaries. It committed BP to fund the Trust on a quarterly basis over three-and-a-half years for a total of \$20 billion to be paid into the Trust until 2014. The funding schedule for the escrow account agreed to by the administration and BP was for contributions by BP of \$5 billion a year for 4 years. BP later confirmed that the funding schedule would include an initial deposit of \$3 billion, which was made on August 9, 2010, with an additional deposit of \$2 billion in the fourth quarter of 2010 and \$1.25 billion a quarter until the entire \$20 billion has been deposited. The Trust is to pay some OPA-compensable claims (under the US federal Oil Pollution Act (OPA) of 1990) and some other claims for personal injuries that are not OPA-compensable, but for which BP would be liable under other US federal or state laws, such as the Jones Act or state oil pollution acts. Under Section 1002 of OPA, 1990 each person responsible for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or up on the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages. BP established the GCCF to provide a mechanism for individuals and businesses to file claims for costs and damages incurred as a result of the *Deepwater Horizon* oil spill. Under the OPA 1990, these claims can cover damage to natural resources, including clean-up and remediation costs for wildlife habitats and ecosystems.³⁵²

³⁵¹ On 20 April 2010, an explosion on an ultra deepwater semi-submersible offshore rig, the *Deepwater Horizon* killed 11 crewmen and ignited a fireball seen 56 kilometres (35 miles) from the explosion. After 36 hours of burning, the rig sank on 22 April, leaving the Macondo well it had drilled in the Gulf of Mexico gushing onto the ocean bed and causing the largest offshore oil spill in the history of the United States. The spillage continued for 152 days until 19 September 2010, when BP confirmed the completion of cementing operations to prevent further oil from spilling from the Macondo Prospect well to which the *Deepwater Horizon* was attached when it exploded. The *Deepwater Horizon* was leased by BP America Production Company (BP) as part of the Macondo project. For an initial discussion of the liability issues arising from this disaster, see: Abeyratne, R., 'The DEEPWATER HORIZON Disaster - Some Liability Issues', 35 *Tulane Maritime Law Journal*, (Winter, 2010) at 125.

³⁵² 33 U.S.C. para.2701(20) and para.2702(b)(2)(A).

The GCCF began operations and started accepting claim forms on August 23, 2010. The GCCF, administered by Kenneth R. Feinberg, draws funds from the Trust to pay claims.³⁵³

BP's admission of overall corporate responsibility,³⁵⁴ and the establishment of a formal institutional framework for management of compensation claims in the form of the GCCF, can be favourably contrasted with the decades-old struggle to engage Shell (and other IOCs) with their responsibility and liability for oil spills of in the Niger Delta.³⁵⁵ For example, a local civil society organisation, the Human Rights Writers' Association of Nigeria (HURIWA), not only applauded the landmark July 2010 Federal High Court judicial decision (noted above) requiring SPDC pay the Ejama-Ebubu community the sum of N15.4 billion as special and punitive damages, but also advised Shell to pay the damages immediately in line with 'international best practices' (sic), drawing a lesson from the response of both the White House and Capitol Hill to the *Deepwater Horizon* disaster in the United States.³⁵⁶ Indeed, the Dutch chapter of the Friends of the Earth (FOE) environmental NGO network has labelled the wide disparity between the BP and Shell responses to the *Deepwater Horizon* and Niger Delta spills, respectively, as 'Shell's double standard'.³⁵⁷

Standing in contrast to the recalcitrant efforts displayed by Shell towards its corporate responsibility and liability for the Niger Delta oil spills are Shell's own remediation efforts for oil spills and other environmental damage arising from its petroleum development and pipeline projects on Sakhalin island in the Russian Far East region. For the Sakhalin II project alone,

³⁵³ Based on information drawn from the United States Government Accountability Office (GAO), Study/Report on 'Deepwater Horizon Oil Spill: Preliminary Assessment of Federal Financial Risks and Cost Reimbursement and Notification Policies and Procedures', GAO-11-90R Oil Spill Liability Trust Fund. 57pp, in Enclosure I, at 14, Washington, DC, 12 November, 2010, available on GAO website at: <http://www.gao.gov> (last accessed 7 October 2012).

³⁵⁴ BP's overall corporate responsibility for the *Deepwater Horizon* oil rig explosion and consequent loss of life, as well as environmental damage from the resulting oil spill has now been confirmed by findings in the final investigation report of the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) of the US Federal Ministry of the Interior into the disaster: 'Report Regarding the Causes of the April 20, 2010 Macondo Well Blowout,' released on 14 September, 2011. Available at:

<http://www.boemre.gov/pdfs/maps/DWHFINAL.pdf> (last accessed 7 October 2012).

³⁵⁵ For more information on this, see: *supra*, as indicated in Section I A of the main body of the Report; See also: Vidal, J., environment editor, 'Nigeria's agony dwarfs the Gulf oil spill. The US and Europe ignore it: The Deepwater Horizon disaster caused headlines around the world, yet the people who live in the Niger delta have had to live with environmental catastrophes for decades', *The Observer* (UK) newspaper, Sunday 30 May 2010.

³⁵⁶ See: Iriekpen, D., 'Oil Spill: Rights Group Hails Court Ruling against Shell', 13 Jul 2010. Available at: <http://www.thisdaylive.com/articles/oil-spill-rights-group-hails-court-ruling-against-shell/83519/> (last accessed 7 October 2012).

³⁵⁷ See:

Steiner, R in 'Double standard, Shell practices in Nigeria compared with international standards to prevent and control pipeline oil spills and the Deepwater Horizon oil spill', Report on behalf of Friends of the Earth/Milieudéfensie Netherlands, University of Alaska, Anchorage, Alaska USA (November, 2010), on P22 Available at:

<http://www.milieudéfensie.nl/publicaties/rapporten/double-standard> (last accessed 12 November 2013).

and

Kate, A.T., 'Royal Dutch Shell and its sustainability troubles: Background report to the Erratum of Shell's Annual Report 2010', May 2011. This report was prepared on behalf of Milieudéfensie (Friends of the Earth Netherlands), at 8-9. Available at:

<http://milieudéfensie.nl/publicaties/rapporten/shell-background-report> (last accessed 7 October 2012).

Shell has reportedly paid out up to \$15 billion in environmental clean-up and remediation operations. However, this outlay was undertaken in the face of sustained pressure from the relevant Russian natural resources ministry and environmental protection agency. Moreover, even this large expenditure did not placate the Russians as Shell were able to write these costs off towards the costs of the project and hence take it off the revenue otherwise taxable by the Russian state. As noted above, the Russian government was unhappy with this outcome and ultimately engineered a halving of Shell's ownership share of this project.³⁵⁸ The absence of a similar threat from the Nigerian authorities in the face of Shell's long-term pollution issues in the Niger Delta arguably explains the difference between the Shell responses in each of these situations.

B. *Erika* (Total/France/EU) oil tanker spill

A further example of (ultimately) voluntary corporate efforts at clean-up, remediation and compensation is evidenced from the Total oil company response following the *Erika* oil tanker spill off the French coast of Brittany.³⁵⁹ As Royal Dutch Shell plc, the parent/holding company for SPDC (Nigeria) is an EU-based corporate entity, it is at least arguable that the application of the strict EU environmental law definition for 'waste' and consequent responsibility/liability placed against Total as the owner of the spilled oil cargo/'waste' should be analogously accepted and applied by Shell in its Nigeria operations as well (SPDC being the pipeline owner/operator whose oil is passing through the pipeline). For this reason, the facts and legal issues arising from the *Erika* oil spill clean-up and remediation are examined in some detail below:

On 12 December 1999, the 25-year old Maltese-registered oil tanker, *Erika* (19,666 gross tonnage) broke in two in the Bay of Biscay, some 60 nautical miles off the Brittany coast, western France, releasing tonnes of crude oil into the Atlantic. All members of the crew were rescued by the French maritime rescue services. The tanker was carrying a cargo of 31,000 tonnes of heavy fuel oil of which some 19,800 tonnes were spilled at the time of the incident. Some 400 kilometres of shoreline were affected by oil. Although the removal of the bulk of the oil from shorelines was completed quite rapidly, considerable secondary cleaning was still required in many areas. Operations to remove residual contamination began in spring 2001. Clean-up efforts were mostly completed by November 2001. More than 250,000 tonnes of oily waste were collected from shorelines and temporarily stockpiled. Total SA, the French major oil company that owned the oil cargo of the *Erika*, engaged a contractor to deal

³⁵⁸ See: Ong (2011), *op. cit.*

³⁵⁹ For more information on this, see *supra*, as indicated in Section I A of the main body of the Report; See: 'Erika Oil Tanker Break-up & Spill Incident', France, 12 December 1999, Report of the International Oil Pollution Compensation Funds (IOPC) Organization, updated 9 May 2011. Available at: http://www.iopcfund.org/npdf/AR09_E.pdf (last accessed 6 October 2012).

with the disposal of the recovered waste and the operation was completed in December 2003. According to Total, immediately following the sinking, the company spent more than €200 million to remedy the consequences of the oil spill through clean-up of hard-to-access areas of the coastline, pumping out the cargo remaining in the wreck and treatment of waste collected along the coast. Total established the *Atlantic Coast Task Force* to address the oil spill, which focused on the following technical issues : 1) the oil remaining in the (sunken) *Erika* tanks was pumped out and recovered (1 June to 6 September, 2000); 2) the coastline was cleaned and restored (January 2000 to June 2003); and 3) all waste was treated at the Donges refinery (2000 to 2004). According to Total, the action taken by the Task Force involved 800 personnel and a budget of €200 million, of which €72 million was for the oil pumping operations and €72 million was for waste treatment.³⁶⁰

The maximum amount of funds available for compensation under the applicable international tanker oil spill compensation scheme, namely, the 1992 Civil Liability Convention (1992 CLC) and the 1992 Fund Convention, for the *Erika* incident is 135 million SDR (Special Drawing Rights), equal to €184,763,149 (c. €185 million). The level of payments by the 1992 Fund was initially limited to 50% of the amount of the loss or damage actually suffered by the respective claimants. The 1992 Fund Executive Committee then decided in January 2001 to increase the level from 50% to 60%, and in June 2001, to 80%. In April 2003, the level of payments was increased to 100%. Both the French State and Total SA also made undertakings to 'stand last in the queue' for the final redemption of oil spill clean-up and remediation costs.³⁶¹ At the October 2010 session of the 1992 Fund Executive Committee, 7,131 claims for compensation had been submitted for a total of €388.9 million. Payments of compensation had been made in respect of 5,939 claims for a total of €129.7 million, out of which Steamship Mutual, the *Erika* shipowner's insurer, had paid €12.8 million and the 1992 Fund €116.9 million. Some 1,016 claims, totalling €31.8 million, had been rejected. A number of claims have been assessed but still await agreement from the claimants as to the quantum of the assessed amounts before payments can be finalised.³⁶² The different categories of claims allowed include the following headings: property damage and loss of tourism; damage to mariculture and oyster farming; shellfish gathering; fishing boats; fish and shellfish processors; and the costs of clean-up operations.

Aside from the clean-up, remediation costs and compensation claims, criminal charges were brought in the Criminal Court in Paris. A number of claimants, including the French

³⁶⁰ See: 'Erika: Measures taken by Total', available from the Total website at: <http://www.total.com/en/about-total/special-reports/erika/measures-taken-by-total-922664.html> (last accessed 7 October 2012).

³⁶¹ *IOPC Annual Report 2008*, at 78.

³⁶² *IOPC Annual Report 2010*, 47 pp., at 25. Following the *Erika* and *Prestige* incidents, a Supplementary Fund Protocol to the 1992 Fund Convention was adopted in 2003 and entered into force in 2005, providing (for those IOPC Member States who chose to make additional contributions) a much higher limit of compensation (Supplementary Fund Protocol). See: *IOPC Annual Report 2010*, at 6. Available at: http://www.iopcfund.org/npdf/AR2010_e.pdf (last accessed 6 October 2012).

Government and several local authorities, joined the criminal proceedings as civil parties, claiming compensation totalling €400 million. In its judgement, delivered in January, 2008, the Criminal Court held the following four parties criminally liable for the offence of causing pollution, the representative of the shipowner (Tevere Shipping), the president of the management company (Panship Management and Services Srl), the classification society (RINA) and Total SA, as follows:

- 1) The representative of the shipowner and the president of the management company were found guilty of a lack of proper maintenance, leading to general corrosion of the ship. The shipowner representative and the president of the management company were fined €75,000 each;
- 2) RINA was found guilty for its imprudence in renewing the *Erika's* classification certificate on the basis of an inspection that fell below the standards of the profession;
- 3) Total SA was found guilty of imprudence when carrying out its vetting operations prior to the chartering of the *Erika*. RINA and Total SA were fined €375,000 each.

The Criminal Court of First Instance also recognised the civil right to compensation for damage to the environment for a local authority with special powers for the protection, management and conservation of a territory. The judgment recognised the right of an environmental protection association to claim compensation, not only for the moral damage caused to the collective interests which it was its purpose to defend, but also for the damage to the environment which affected the collective interests which it had a statutory mission to safeguard. Regarding these civil liabilities, the judgement held the four parties jointly and severally liable for the damage caused by the incident and awarded claimants in the proceedings compensation for economic losses, damage to the image of several regions and municipalities, moral damages and damages to the environment. The judgment considered that Total SA could not avail itself of the benefit of the channelling provision of Article III.4(c) of the 1992 CLC since it was not the charterer of the *Erika*. The judgment considered that the charterer was one of Total SA's subsidiaries. The judgement considered that the other three parties, RINA in particular, were not protected by the channelling provisions of the 1992 CLC either, since they did not fall into the category of persons performing services for the ship.

The judgement concluded that French domestic law should be applied to the four parties and that therefore the four parties had civil liability for the consequences of the incident. The compensation awarded to the civil parties by the Criminal Court of First Instance was based on national law. The Court held that the 1992 Conventions did not deprive the civil parties of their right to obtain compensation for their damage in the Criminal Courts and awarded claimants in the proceedings compensation for economic loss, damage to the image of

several regions and municipalities, moral damages and damages to the environment. The Court assessed the total damages in the amount of €192.8 million, including €153.9 million for the French State. The four parties held liable, including Total appealed against both the criminal and civil liability aspects of this judgement. However, without admitting its liability, Total SA nevertheless made voluntary payments in full and final settlement to the plaintiffs who accepted it, including to the French local and State governments, to the amounts awarded by the Court, totalling €171.5 million. Accordingly, Total has spent over €370 million to clean-up, remediate and compensate for the damage resulting from the *Erika* incident.

In its judgment on 30 March 2010, the Court of Appeal of Paris confirmed the judgement of the Criminal Court of First Instance, and held, respectively, the representative of the shipowner (Tevere Shipping), the president of the management company (Panship Management and Services Srl), the classification society (RINA) and Total SA all criminally liable for the offence of causing pollution. The Court of Appeal also confirmed the fines imposed by the Court of First Instance. The Court found, *inter alia*, that Total was imprudent in implementing its vessel vetting process and ordered Total to pay the original (criminal) fine imposed by the court of first instance, to the amount of €375,000. The appellate court accepted not only material damages (clean-up, restoration measures and property damage) and economic losses, but also accepted moral damage resulting from the pollution, including loss of enjoyment, damage to reputation and brand image, and moral damage arising from damage to the natural heritage. The Appeal Court's judgement confirmed the compensation rights for moral damage awarded by the Criminal Court of First Instance to a number of local authorities and in addition, accepted claims for moral damage from other civil parties. The Court of Appeal also accepted the right to compensation for pure environmental damage, *i.e.* damage to non-marketable environmental resources that constitute a legitimate collective interest. The Court considered that it was sufficient that the pollution touched the territory of a local authority for these authorities to be able to claim for the direct or indirect damage caused to them by the pollution. The Court of Appeal awarded compensation for pure environmental damage to local authorities and environmental associations.

However, on the civil liability aspects of this case, the Court decided that Total SA was '*de facto*' the charterer of the *Erika* and could therefore benefit from the channelling provisions of Article III.4(c) of the 1992 CLC, since the imprudence committed in its vetting of the *Erika* could not be considered as having been committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. The Court of Appeal thus held that Total SA did not have civil liability for the consequent oil spill. However, the appellate court also decided that the voluntary payments made by Total SA to the civil parties

following the judgement of the Criminal Court of First Instance, were to be regarded as final payments which could not be recovered from the civil parties.³⁶³

Finally, a separate legal action was brought by a French local government authority, the Commune de Mesquer against Total SA before the French courts for reimbursement of the costs incurred in connection with the cleanup and remediation of its coastline territory on the basis of Directive 75/442/EEC on waste, arguing that the *Erika's* oil cargo spillage should be deemed an illegal 'waste' disposal under EU law. Following its unsuccessful actions in two lower courts, the Commune lodged an appeal before the Cour de cassation (Court of Cassation), which referred to the Court of Justice questions concerning the interpretation of the directive at issue. On 24 June, 2008 the European Court of Justice gave its judgment on a reference from the Cour de Cassation (France) in *Commune de Mesquer v. Total France, SA, Total International Ltd.*³⁶⁴

On the issue of whether heavy fuel oil can be treated as waste within the meaning of the directive in question, the ECJ drew a distinction between two situations. Transported heavy fuel oil does not constitute 'waste' where it is exploited or marketed on economically advantageous terms and is capable of actually being used as a fuel without requiring prior reprocessing. However, when such hydrocarbons are spilled following the sinking of a ship, mixed with water and sediment and drifting along the coast of a Member State until being washed up on that coast, they are to be regarded as substances which the holder did not intend to produce and which he discards, albeit involuntarily, while they are being transported, so that they must be classified as 'waste' within the meaning of the directive. The Court then went onto consider the question of who is required to bear the costs associated with waste disposal. The Court recalled first of all that, in the circumstances of this case, the Waste Directive (75/442/EEC) provides that, in accordance with the 'polluter pays' principle, that cost is to be borne by the 'previous holders' or by the 'producer of the product from which the waste came'. In the event of a shipwreck, the Court stated that the owner of the ship carrying the hydrocarbons is in possession of them immediately before they become waste. In those circumstances, the ship owner may thus be regarded as having produced that waste and be categorised as a 'holder' within the meaning of the directive.

The Court pointed out that the directive does not preclude the Member States from laying down, pursuant to their relevant international commitments, that the ship owner and the charterer can be liable for the damage caused by the discharge of hydrocarbons at sea only up to certain amounts and/or in particular circumstances linked to their negligent conduct. Nor

³⁶³ See: 'French oil company guilty but not responsible for ERIKA oil spill', *The Maritime Executive Magazine* website, April 1, 2010. Available at: <http://www.maritime-executive.com/article/french-oil-company-guilty-not-responsible-erika-oil-spill> (last accessed 7 October 2012).

³⁶⁴ *Commune de Mesquer v. Total*, C-188/07, *id.*

does it preclude a compensation fund with resources limited to a maximum amount for each accident from assuming liability, pursuant to those international commitments, for the cost of disposal of the waste resulting from hydrocarbons accidentally spilled at sea. In accordance with the 'polluter pays' principle, however, such a producer cannot be liable to bear that cost unless he has contributed by his conduct to the risk that the pollution caused by the shipwreck will occur.³⁶⁵

As de Sadeleer notes, this landmark ECJ judgment confirms the wide scope of the legal definition of 'waste' under EU law, as including transported heavy fuel oil that was accidentally spilled and therefore regarded as discarded by a tanker during a storm even if this was involuntary. Moreover, the ECJ then clarifies the extent of the potential liability for the clean-up costs of the heavy fuel oil spilled by observing that these costs can be imposed not just on the owner of the oil tanker that spilled the oil, but also on the companies who created the product involuntarily discarded as waste, notably in their capacity as former holder or producer of the product which became waste when it was accidentally spilled.³⁶⁶ Transplanting the wide definitions and therefore extended liability of corporate oil (tanker) cargo owners to that of the owners of oil supplies passing through pipelines would strongly suggest that SPDC/Shell should be held equally liable for oil pipeline spills in the Niger Delta, despite Nigeria being located beyond EU law jurisdiction, because of the EU home base of the oil companies involved.

VII. CONCLUSIONS

The present legal and institutional framework within Nigeria, as well as legal remedies available to individual and group claimants, for both the control and redress of environmental damage from oil industry spills is not perfect. However, its inadequacies can be seen as less of a consequence of poor design or even lack of implementation and far more to do with the asymmetrical relationship between the regulators and the industry they are attempting to regulate. In particular, the previous discussion has highlighted three aspects of Shell's operations in the Delta area which need urgent attention:

1. The need to act decisively to curb gas flaring, despite the clear (albeit not mandatory) government policy guidelines on this issue that have received judicial support when raised in claims before domestic Nigerian courts;

³⁶⁵ *Id.*

³⁶⁶ De Sadeleer, N., 'Liability for Oil Pollution Damage versus Liability for Waste Management: The Polluter Pays Principle at the Rescue of the Victims, Case C-188/07, *Commune de Mesquer v Total France SA* [2008] 3 *CMLR* 16, [2009] *Env LR* 9', *Journal of Environmental Law*, 21(2) (2009) at 299-307.

2. The need to respect successful individual and community legal claims that have received initial judicial *imprimatur*,
3. The need to implement established international 'best practice' standards in its operations, for example, in terms of oil industry asset maintenance, as well as recent BP (US) and Total (France) examples of 'best practice' in corporate responsibility for clean-up, remediation and compensation of environmental and other damages arising from oil spills, whether legally required to do so or not.

It remains to be seen whether the latest legal frontline that has been opened on this issue, namely, the apparently successful cross-jurisdiction pursuit of Royal Dutch Shell, through its subsidiary company, SPDC (Nigeria) in both Dutch and UK courts, will yield the requisite justice for the Niger Delta communities and its environment in the face of arguably decades of corporate activity in this region.

Appendix III - Labour Rights in the Oil and Gas Industry in Nigeria, by Rosemary Danesi

It is recognised globally that Multinational Enterprises (MNEs) play an important role in the economies of most countries. This role has been of increasing interest to governments, employers and workers alike.³⁶⁷ They are a source of foreign direct investments (FDIs) to many countries around the world, contributing to capital, technology and labour.³⁶⁸ MNEs ought to promote economic and social welfare, improvement of living standards, the satisfaction of basic needs, the creation of employment opportunities, and the enjoyment of basic human rights, including freedom of association.³⁶⁹

The ILO, in order to ensure that workers employed by MNEs enjoy freedom of association and the right to organise, came up with the Tripartite Declaration of Principles Concerning MNEs and Social Policy.³⁷⁰

However, as we have seen so far, this has not been given effect in the oil and gas industry (OGI) in Nigeria - which has been dominated by multinational corporations like Shell BP, Exxon Mobil and Chevron for a long time. There has long been discrimination between casual/contract workers and permanent employees in terms of pay, benefits, the right to freedom of association and collective bargaining. Casualisation, therefore, is regarded as one

³⁶⁷ ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1)

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ Adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) as amended at its 279th Session (Geneva, November 2000).

manifestation of the degradation of work from permanent to temporary and precarious forms of activity.³⁷¹

The exploitative use of casual and contract workers through agencies (known in the industry as labour and service contractors) is commonplace among the big employers like ExxonMobil, Nigerian National Petroleum Cooperation (NNPC), Shell, Chevron, etc. As of 1991, there were an estimated 14,559 casual and contract workers, as opposed to 23,065 junior workers in permanent jobs or positions in the OGI.³⁷² It is clear from these figures that these companies have decided to adopt casualisation as the dominant form of employment out of the need to avoid obligations imposed by labour laws and international labour standards.

The increasing use of casual workers in the industry has been a point of contention between the unions and management of the oil companies and their contractors over the years. It has generated violent crackdowns in the past when armed soldiers and police officers were used during the military regime of General Sanni Abacha³⁷³ against union executives and oil workers protesting against the pollution of the environment and the practice of casualisation and the violation of the right of workers to join or form unions. On 18 November 2007, one such protest took place at the Bonny Island terminal of the Nigeria Liquefied Natural Gas Company (NLNG), of which Shell Gas BV holds shares of 25.6%. The protest was met with tear gas fired at the casual/contract workers by the Nigerian Military Joint Task Force (JTF) along with the use of batons.³⁷⁴ The NLNG was alleged to have reneged on signing an agreement to grant contract workers union recognition through the oil workers' union NUPENG.³⁷⁵ In its reaction to this incident NUPENG and PENGASSAN organised a bigger demonstration and called for a nationwide strike by all oil workers in the industry.³⁷⁶ This threat led to the management of the NLNG recognising the union and paying compensation to the injured workers.³⁷⁷

It should be noted that the Nigerian government have, at every level, reiterated their objection to the exploitation of casual/contract workers in the industry. For instance, the Governor of Delta State Emmanuel Uduaghan, one of the oil producing states in the Niger Delta, recently

³⁷¹ 'The Degradation of work: Oil and Casualization of Labor in the Niger Delta', a Publication of *Solidarity Centre*, Washington DC, (2010) at 15. Available at: www.solidaritycenter.org (last accessed 10 July 2011).

³⁷² Figures from National Union of Petroleum and Natural Gas Union in Nigeria (NUPENG).

³⁷³ 'The Degradation of work: Oil and Casualization of Labor in the Niger Delta', A Publication of *Solidarity Centre*, Washington DC, (2010) at 14. Available at: www.solidaritycenter.org (last accessed 10 July 2011). Refer also to the oil workers' strike of 1992.

³⁷⁴ International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM) 'Nigeria: Police Use Violence to Break Up Unionising Subcontractors, 1 Worker Blinded,' ICEM in Brief, 3 December 2007. Available at: <http://www.icem.org/en/78-icem-inbrief/2492-nigeria-police-use-violence-to-break-up-unionising-subcontractors-1-worker-blinded> (last accessed 8 July 2011).

³⁷⁵ 'The Degradation of Work: Oil and Casualization of Labour in the Niger Delta', A Publication of *Solidarity Centre*, Washington DC, (2010), p.8.

³⁷⁶ Ibid.

³⁷⁷ Ibid.

decried the continued casualisation of workers in the oil and gas industry.³⁷⁸ He went on to condemn the practice of oil companies contracting jobs to contractors who casualise the employees recruited for the oil companies with deplorable conditions of service and reiterated his government's commitment to dealing with the issues of casualisation. Casualisation is deemed to be the greatest threat to industrial peace in this industry.

Casual workers are employed by contractors under various short-term contracts for Shell and other oil and gas companies in Nigeria. They perform the same technical and professional tasks as their permanent counterparts in the industry, yet earn less and lack any form of job security. They are usually laid off without notice and are never paid severance or redundancy benefits. Even though they work at the site of the user company, they are regarded as employees of small firms owned by those referred to as labour and service contractors, who supply them to the oil companies.

Many casual workers are on jobs that ordinarily should fall into the category of permanent employment, such as plant operators, rig-drilling operations, forklift operators, etc. These workers usually end up as 'permanent casuals or contract workers', as they are employed on a single project in the same manner as regular permanent employees for years at a time, but without the benefits accorded to permanent employees. For instance, ExxonMobil in 2008 had over 1,927 permanent employees and 1,650 contract employees. This meant that, out of the total number of employees, 46.13% were on temporary or short fixed-term contracts. In the same year, Chevron had 2,000 permanent employees and 2,400 contract employees. Contract workers therefore made up 54.55% of the total workforce, meaning that there were more contract and casual workers than permanent employees.³⁷⁹ I do not have the statistics for the Shell operation during the same period, but the union PENGASSAN has stated that 60% of Shell's workforce is made up of contract employees.³⁸⁰

Most casual workers are denied the right to join or form unions. They earn lower wages and receive fewer benefits than their permanent counterparts and are fired at will. The constitutional³⁸¹ right of workers to form or belong to a trade union of their choice in Nigeria is openly breached with impunity.³⁸² The practice of denying casual workers the right to organise has been held to be unconstitutional by the National Industrial Court in the case of *Management of Harmony House Furniture Company Limited v. National Union of Furniture, Fixtures and Wood*³⁸³ and a breach of section 1 of the Trade Unions Act was discovered in

³⁷⁸ 'Casualisation of Oil Workers Inhuman Says Uduaghan', *Vanguard Newspapers* (3 July 2012)

³⁷⁹ Figures received from Managers from ExxonMobil and Chevron in an interview in Lagos in January 2010.

³⁸⁰ Interview with Bayo Olowoshile, Secretary General of PENGASSAN on 26 January 2010 in Lagos, Nigeria.

³⁸¹ Section 40 of the Constitution of the Federal Republic of Nigeria (CFRN) 1999.

³⁸² Nigerian Union of Petroleum and Natural Gas Workers Union (NUPENG) Press Release, 22 June 2011, at 19. Available at: <http://nupeng.org/id20.html> (last accessed 7 October 2012).

³⁸³ NIC/3/86, Digest of Judgments of National Industrial Courts (NIC) 1978-2006, at 187.

the case of *Patovilki Industrial Planners Limited v. National Union of Hotels and Personal Services Workers*.³⁸⁴ In 2011, the National Union of Petroleum and Natural Gas Workers (NUPENG) declared a trade dispute with Shell and its labour contractors and took its case to the Industrial Arbitration Panel³⁸⁵ (IAP), accusing them of the following:

- i. "Refusal of the management to allow workers to join NUPENG even after they had applied to do so;
- ii. Arbitrary sacking of contract workers as a result of their participation in union activities;
- iii. Refusal to pay workers' salaries, allowances, and bonuses for 2-14 months;
- iv. Threats, victimisation, harassment and intimidation of union members and non-compliance with minimum labour standards".

The IAP, after a full and careful consideration of the facts and circumstances surrounding the dispute, held that:

- a. "All the employees of the labour contractors working for Shell should be allowed to join the union and bargain collectively;
- b. All employees of the labour contractors whose appointments were terminated based on their union activities must be re-instated within 30 days of the service of the award of the IAP on the parties;
- c. All the employees of the labour contractors whose salaries, allowances and bonuses were being withheld should be paid their entitlements without delay; and
- d. All forms of intimidation, witch-hunting and termination of appointment based on union activities must stop".³⁸⁶

It should be noted, however, that the ruling of the Industrial Arbitration Panel above has not been implemented by Shell and its labour contractors. Rather, they have appealed the judgement to the higher labour court known as the National Industrial Court. As at the time of writing a decision has not been reached by the court. Therefore, despite this ruling, the conditions of work of casual/contract workers in the industry remain precarious.

Using the UN Guiding Principles (the Ruggie principles)³⁸⁷ as a basis of analysis, the labour practices of an organisation must include all policies and practices related to work performed within, by or on behalf of the organisation, including subcontracted work.³⁸⁸ In other words, an

³⁸⁴ Suit no. NIC/12/89, Digest of Judgments of National Industrial Court (1978-2006) at 288-289.

³⁸⁵ The Industrial Arbitration Panel is the court of first instance in matters of labour and trade disputes in Nigeria.

³⁸⁶ NUPENG v SPDC & All the Labour Contractors of SPDC & National Petroleum Development Company - Ohaji - Egbema - Oguta in Imo State, M.A. Nwaokocha & Sons & 42 Ors. Suit No. IAP/1/2011.

³⁸⁷ 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', HRC/17/31. See also: the beginnings of implementation of the Principles in ISO/FDIS 26000, Guidance on Social Responsibility.

³⁸⁸ ISO/FDIS 26000, Guidance on Social Responsibility. Labour Practices, at 33

organisation is responsible for the actions of its subsidiaries and contractors and should take diligent care to ensure that they comply with the standards set by it, municipal laws and international labour standards.³⁸⁹ Organisations should also not benefit from unfair, exploitative or abusive labour practices of their partners, suppliers or subcontractors. Organisations should therefore ensure that their subsidiaries, intermediaries and contractors follow responsible labour practices and exercise due diligence in supervising them.³⁹⁰ In light of these principles, it is submitted that Shell and other oil and gas companies must ensure that their contractors obey and respect local as well as international labour standards in their operations.

The Nigerian government has come out with a new policy - known as *Guidelines on Labour Administration: Issues in Contract Staffing/Outsourcing in the Oil and Gas Sector*³⁹¹ (hereafter referred to as the *Guidelines*) - on outsourcing and contract labour in the OGI after years of negotiation through strikes, picketing and other forms of industrial action by the trade unions. The last threat to strike by the unions compelled the government to introduce a policy to check what it dubbed "unfair labour practices associated with contract and agency labour in the oil and gas industry"³⁹², culminating in the set-up of a 16 man Technical Working Group (TWG) to look into the situation in the OGI.³⁹³ The committee comprised of representatives of all stakeholders in the OGI, including the National Union of Petroleum and Natural Gas Workers (NUPENG)³⁹⁴ and the Petroleum and Natural Gas Senior Staff Association (PENGASSAN)³⁹⁵.

Many issues were tackled by the committee, such as: outsourcing practices, freedom of association and remuneration for contract staffs. Outsourcing shall be restricted to the non-core business of the company except in the case of proven-short term projects.³⁹⁶ With this new policy, only jobs considered not to be core to the business of the oil and gas industry shall be outsourced to contractors; all jobs as shown in the company's organogram are deemed to be permanent jobs. It therefore appears that the company will have to define which jobs are permanent and which can be outsourced as short-term contracts. The future scenario will be different from the present one, where more than 50% of the positions in the OGI are filled by employees on short-term fixed contracts.

³⁸⁹ ISO/FDIS 26000, Guidance on Social Responsibility. Related Actions and Expectations, at 35. "An organization should take steps to ensure that work is contracted or sub-contracted only to organizations that are legally recognized or are otherwise able and willing to assume the responsibilities of an employer and to provide decent working conditions. An organization should use only those labour intermediaries who are legally recognized and where other arrangements for the performance of work confer legal rights on those performing the work".

³⁹⁰ ISO/FDIS 26000, Guidance on Social Responsibility. Related Actions and Expectations, at 35.

³⁹¹ Issued 25 May 2011 at Abuja, Nigeria.

³⁹² 2 August 2010.

³⁹³ 13 August 2010.

³⁹⁴ Union of workers below supervisor positions in the oil and gas industry.

³⁹⁵ Union of workers from supervisor to middle level management.

³⁹⁶ Part 1 (1.4), 'Guidelines on Labour Administration: Issues in Contract Staffing/Outsourcing in the Oil and Gas Sector', at 2 (A Document of the Federal Ministry of Labour and Productivity) 25 May 2011.

The *Guidelines* further state that no employer, whether third party contractor or principal company, shall overtly or covertly hinder the unionisation of workers.³⁹⁷ All contract staff under manpower/labour contracts shall belong either to the NUPENG or PENGASSAN as appropriate.³⁹⁸ Principal oil companies shall endeavour to facilitate unionisation and collective bargaining by streamlining labour contractors, especially where there are large numbers of such contractors.³⁹⁹

The issue of freedom of association has been the biggest so far for contract workers in the OGI. The *Guidelines* have now made it mandatory for all contract employees to exercise the freedom to join unions. No employer shall violate this right and, in addition, the user company must ensure that contractors comply. This is in consonance with the UN Guiding Principles, which state that an organisation is at least morally responsible for the actions of its subsidiaries and contractors and should take diligent care to ensure that they comply with the standards set by the UN, municipal laws and international labour standards.⁴⁰⁰

Other issues that have long been in contention are the withholding of contract workers' pay for as long as six months and the refusal to pay for redundancy. However, these issues have now been addressed by the *Guidelines* and the user company is required to deduct this amount from the payment to the contractor. Contract agreements between the principal company and contractor companies shall include a clause which empowers the principal company to deduct from the contract sum whatever is owed to the contract staff by the contractor in cases of default in the payment of wages and/or other agreed entitlements of the worker.⁴⁰¹

The *Guidelines* also provide that the contractors' relationship with their workers shall be monitored by all relevant government agencies to ensure that Nigerian labour laws, as well as international labour standards, are strictly adhered to. The guidelines also provide that all contractors must have a recruiter's licence and it is deemed an offence for a user company to deal with a contractor without such a licence. Before now the unions have alleged that many contractors are not licensed as stipulated by the Labour Act⁴⁰² to recruit workers for user

³⁹⁷ Part 3 (3.1), 'Guidelines on Labour Administration: Issues in Contract Staffing/Outsourcing in the Oil and Gas Sector', at 5 (A Document of the Federal Ministry of Labour and Productivity) 25 May 2011.

³⁹⁸ Part 3 (3.2), 'Guidelines on Labour Administration: Issues in Contract Staffing/Outsourcing in the Oil and Gas Sector', at 5 (A Document of the Federal Ministry of Labour and Productivity) 25 May 2011.

³⁹⁹ Part 3 (3.3), 'Guidelines on Labour Administration: Issues in Contract Staffing/Outsourcing in the Oil and Gas Sector', at 5 (A Document of the Federal Ministry of Labour and Productivity) 25 May 2011.

⁴⁰⁰ ISO/FDIS 26000, 'Guidance on Social Responsibility', Related Actions and Expectations, at 35.

⁴⁰¹ Part 4 (4.2), 'Guidelines on Labour Administration: Issues in Contract Staffing/Outsourcing in the Oil and Gas Sector', at 7 (A Document of the Federal Ministry of Labour and Productivity) 25 May 2011.

⁴⁰² See: Sections 23 and 24 of the Labour Act Cap 198 LFN 1990 which stipulate that contractors shall not operate without license. See *also*: detailed analysis in chapter 3.

companies. Non-compliance with extant labour laws and other national laws of Nigeria is deemed sufficient grounds to terminate the contract of a contractor by the user company.

It is hoped that this new development will ensure compliance on the part of the contractors and strict monitoring on the part of NAPIMS and other monitoring agencies.

Workers supplied to Shell through labour contractors should therefore not be treated unfairly just because they are not the staff of Shell. Since these workers work on the premises of Shell and are controlled by them, Shell should ensure that its contractors comply with national laws as well as international labour standards. Usually Shell's defence to exploitation of casual workers is that they are not their employees, but that of the labour contractor.

Where local laws are adequate, an organisation should be seen to abide by the law even if the government's enforcement of it is inadequate or non-existent. In the event that there is no local legislation, organisations should be guided by the principles of international instruments and standards.⁴⁰³ With the Nigerian government's latest policy on outsourcing and contract staffing in the industry, one hopes that industrial peace and stability will be achieved and the employment terms and conditions of contract staff improved.

Employers are enjoined under Ruggie's principles not to circumvent the obligation placed on them by the law by disguising relationships that would otherwise be recognised as employment relationships under the law.⁴⁰⁴ It has been argued that employers use casual workers to avoid the obligations placed on them by labour law.

Ruggie also enjoined employers not to overlook the importance of secure employment to both the individual worker and to society. The use of casual labour should not be the dominant form of employment, but rather should only be used where the nature of work is genuinely short term or seasonal.⁴⁰⁵ There should be no discriminatory labour practices in terms of pay, benefits and freedom of association⁴⁰⁶ which is currently the practice in the oil and gas industry.

These points are of importance to investors in Shell because they have to be aware that Shell falls short of national and international standards in the treatment of its various categories of employees.

⁴⁰³ ISO/FDIS 26000, 'Guidance on Social Responsibility', Considerations, at 34.

⁴⁰⁴ ISO/FDIS 26000, 'Guidance on Social Responsibility', Related Actions and Expectations, at 35

⁴⁰⁵ ISO/FDIS 26000, 'Guidance on Social Responsibility', Related Actions and Expectations, at 35.

⁴⁰⁶ ISO/FDIS 26000, 'Guidance on Social Responsibility', Related Actions and Expectations, at 35.

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