THE CORPORATE RESPONSIBILITY TO REMEDY (3RD PILLAR RUGGIE FRAMEWORK)

Analysis of the corporate responses in three major oil spill cases: Shell - Nigeria; BP – US (the Gulf); Chevron – Ecuador

Authors:

Tineke Lambooy (Utrecht University, PhD), Mary Varner (University Utrecht, LL.M.), Aikaterini Argyrou (University Utrecht, LL.M.)

Abstract

From 2005-2011, the UN Special Representative for Human Rights and Business, Prof. John Ruggie, has built a governance framework comprising three pillars, i.e. ‘Protect, Respect, Remedy,’ to clarify the complementary roles of governments (public actors) and companies (private actors) in respect of the protection and realisation of human rights. The first pillar of the framework concerns the State’s duty to protect citizens from human rights violations by private actors, such as companies. The second pillar regards the corporate responsibility to respect human rights. The third pillar is about the shared responsibility of States and companies to provide legal and non-legal remedies to victims of corporate (mis)conduct. The concepts and ideas contained in this pillar still require sharpening as well as discussion on how to put them into practice. This article centres around that question. It firstly discusses the background and content of the third pillar: what does it mean to provide remedies, both from the corporate governance perspective and from a more operational perspective? Next, three case studies concerning major oil spillages will be presented. In each of them, problems with communities escalated resulting in many legal procedures. It concerns the BP disaster in the Gulf of Mexico, and the oil spillages and environmental pollution in water basins and soil in Ecuador and Nigeria for which, respectively, Chevron and Shell are being held accountable in various legal proceedings. Finally, the corporate responses by each of these multinationals towards said proceedings are analysed from the perspective of Remedy (and the prevention of conflicts).

1. INTRODUCTION RUGGIE FRAMEWORK

From 2005-2011, the UN Special Representative for Human Rights and Business, Professor John Ruggie, has developed a governance framework to clarify the roles of governments (public actors) and companies (private actors) in respect of business and human rights (the Ruggie Framework). The principle question addressed by the Framework is how to protect and realise human rights in light of corporate activities that may cause or contribute to human rights violations. In the Framework, the human rights governance is based upon three notions or ‘pillars’, that is ‘Protect, Respect, Remedy’, which fulfil complementary functions but also strengthen each other. The first pillar puts emphasis upon the State’s duty to protect citizens from human rights violations by companies. Drawing greatly on international human rights law, the first pillar of the Framework underlines that States Parties to human right treaties have the duty to protect citizens against the acts of third parties that violate human rights. States should proactively take a variety of measures to prevent violations. From human rights courts’ jurisprudence, human rights treaties bodies’ recommendations as well as academic literature, it becomes apparent that the concept of ‘third parties’

includes companies.\(^2\) One of the new elements in the Framework is the focus on policy coherence on the national and international public level, mainly between the policies issued by the investment promotion departments on the one hand and the human rights public policy makers on the other hand.\(^3\) The second pillar, which promotes the corporate responsibility to respect human rights, has gained a lot of attention from academia as well as public policy makers and corporate actors.\(^4\) The approach promoted by Ruggie emphasised that companies should employ due diligence to make sure that they respect human rights in all their business operations. This includes pro-actively assessing whether the business activities harm human rights or have the potential to do that.\(^5\) The second pillar has been widely embraced by the various stakeholders’ groups; the focus is now on the operationalisation hereof.\(^6\)

Regarding the third pillar, that is the shared responsibility of States and companies to provide legal and non-legal remedies to victims of corporate (mis)conduct, there has been some research done by Ruggie’s team, predominantly on non-judicial grievance mechanisms. This pillar, though, still requires a sharpening of ideas as regards the corporate approach towards solving CSR-type conflicts and related litigation. The authors feel that the corporate world is still struggling and confused about how to put the Remedy ideas into practice. The Remedy pillar advances the concept that companies as well as public authorities should provide effective courses of action and remedies to victims, that is both legal and non-legal recourse, including in-company grievance mechanisms.\(^7\) This article centres around that question. It firstly discusses the background and theoretical content of the third pillar: what does it mean to provide remedies, both from the corporate governance perspective and from a more operational perspective? And: what does it mean to prevent conflicts?

Next, three case studies will be presented concerning major oil spillages: (i) Chevron, which multinational is being held accountable for substantial oil pollution of water basins and soil in Ecuador caused in the period that Texaco companies (presently part of the Chevron group) were the operator of the commercial exploitation of the oil fields (from the 60s to the beginning of the 90s); (ii) Shell, which company has to defend itself in tort claims for oil pollution in the Ogoni Delta in Nigeria; and (iii) BP\(^8\) whose platform in the Gulf of Mexico exploded in 2010. In these cases, human rights and environmental problems with local communities over time escalated and led to protests and litigation. Questions to explore are how remediation is provided and whether the answers employed by the three oil companies to solve the problems were perceived by the local communities as effective remedies. A negative answer to this question may explain why these companies now find themselves entangled in


\(^{3}\) The 2008 Ruggie Report, supra note 1, paras. 33-46.


\(^{6}\) See for example, EU Tender on Due diligence Human Rights Guidelines, EU Commission Tender, No. 99/PP/ENT/CIP/11/E/ NO25001.


\(^{8}\) The company formally renamed itself BP-Amoco in the 90s, then dropped the ‘Amoco’ and hence it is presently named BP.
many legal procedures. Finally, the corporate responses by each of these multinationals towards said proceedings will be evaluated and analysed from the perspective of Ruggie’s Remedy pillar (and the prevention of conflicts).

2. THIRD PILLAR: REMEDY

2.1 WHAT IS IN THE FRAMEWORK?

As briefly explained in the Introduction, Ruggie’s Framework “Protect, Respect and Remedy” is an attempt to make clear which roles business actors and government representatives have in safeguarding human rights: who should do what and how are the different roles related? As regards the first pillar of the Framework, that is the State duty to protect against human rights abuses by third parties, including business enterprises, Ruggie points out that this should be realised by adopting and effecting appropriate policies, regulation, and adjudication. The second pillar is put in the light of corporate social responsibility: companies should respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third pillar regards the need for greater access by victims to effective remedies, both judicial and non-judicial. Ruggie emphasises:

each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.9

In 2008, Ruggie presented his Framework to the UN Human Rights Council, which extended his mandate until June 2011 and asked him to ‘operationalize’ the Framework – that is, to provide concrete and practical recommendations for its implementation.10 During the interactive dialogue at the Council’s June 2010 session, delegations agreed that the recommendations should take the form of ‘Guiding Principles’ (GP).11 The GP were drafted by the Ruggie team and put up for comments in November 2010.12 After evaluation of the comments received, a final version of the GP was released on 30 May 2011 and endorsed by the Human Rights Council on 16 June 2011. Some of the GP have been road-tested as well:13 the GP provisions elaborating on effectiveness criteria for non-judicial grievance mechanisms involving companies and the communities in which they operate were piloted in five different sectors, each in a different country. Furthermore, the Ruggie team organised ‘off-the-record, scenario-based workshops’ with officials from a cross-section of states, who had practical experience in providing assistance to companies doing business in conflict-affected areas.14 In short, the GP intend to provide guidance that is practical and informed by actual use. The next sub-section will present what directions the GP provide regarding the Remedy pillar.

---

10 HR Council resolution 8/7, Mandate of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, Welcoming the “Protect, Respect and Remedy” Framework and extending the mandate into a third phase, HRC/8/7, 18 June 2008, paras. 1-4.
11 UN HRC loc.cit. GP 9.
12 Lambooy is an advisor to the Dutch HUGO project, which submitted comments with regard to the third pillar to the draft GPs. The HUGO project advised to add to GP 29 that there is a need to establish a worldwide facility for CSR dispute management (preferably in The Hague), which can: appoint expert CSR mediators; advise on the best possible dispute management in individual cases (for example arbitration, mediation, or local procedures); and create awareness among companies on the usefulness of preventive dispute management. Submission available at: http://www.business-humanrights.org/media/documents/ruggie/world-legal-forum-others-comments-re-guiding-principles-28-jan-2011.pdf, accessed on 11 July 2011.
13 UN HRC loc.cit. GP 11.
14 Idem.
2.2 WHAT DO THE GUIDING PRINCIPLES PROVIDE REGARDING REMEDY?

One of the most difficult parts of the Ruggie Framework to implement is the Remedy pillar. While it may be obvious when remedies are inadequate, such as in the Chevron case discussed in section 3.1, the actual creation of an effective method of remedy is a difficult task.

2.2.1 General

GP 22 introduces the concept of ‘Remediation’, stating that:

Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.\(^{15}\)

The Commentary elaborates:

the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so. Some situations, in particular where crimes are alleged, typically will require cooperation with judicial mechanisms.\(^{16}\)

Perhaps a closer consideration of the term ‘remedy’ and its implied finality may be helpful. Sometimes interim measures after a rights violation is just as, if not more, important than the final settlement. Remedying human rights violations is a process and often requires continual engagement with the affected community. GP 25 under ‘III. Access to Remedy’ underlines the content of process in the context of grievance mechanisms: “any routinised, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought.”\(^{17}\) GP 31 adds that both State-based and non-State-based non-judicial grievance mechanisms should meet the following criteria in order to ensure their effectiveness:

(a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;\(^{18}\)
(b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;\(^{19}\)
(c) Predictable: providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;\(^{20}\)
(d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;\(^{21}\)
(e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake.\(^{22}\)

\(^{15}\) \textit{Ibidem}, GP 22.
\(^{16}\) \textit{Idem}, GP 22, Commentary.
\(^{17}\) \textit{Ibidem}, GP 25.
\(^{18}\) \textit{Ibidem}, see Commentary to GP 31: (a) Stakeholders for whose use a mechanism is intended must trust it if they are to choose to use it. Accountability for ensuring that the parties to a grievance process cannot interfere with its fair conduct is typically one important factor in building stakeholder trust.
\(^{19}\) \textit{Ibidem}, see (b) Barriers to access may include a lack of awareness of the mechanism, language, literacy, costs, physical location and fears of reprisal.
\(^{20}\) \textit{Ibidem}, see (c) In order for a mechanism to be trusted and used, it should provide public information about the procedure it offers. Timeframes for each stage should be respected wherever possible, while allowing that flexibility may sometimes be needed.
\(^{21}\) \textit{Ibidem}, see (d) In grievances or disputes between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and often lack the financial resources to pay for them. Where this imbalance is not redressed, it can reduce both the achievement and perception of a fair process and make it harder to arrive at durable solutions.
\(^{22}\) \textit{Ibidem}, see (e) Communicating regularly with parties about the progress of individual grievances can be essential to retaining confidence in the process. Providing transparency about the mechanism’s performance to wider stakeholders, through statistics, case studies or more detailed information about the handling of certain
(f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights; and  
(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.

Furthermore, the same GP stresses the importance of community involvement.

A grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it (…) engaging with affected stakeholder groups about its design and performance can help to ensure that it meets their needs, that they will use it in practice, and that there is a shared interest in ensuring its success. Since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.

The Commentary to GP 25 highlights that States “must take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur” and explains that “remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition”. As to the procedural aspect of remedy mechanisms it is stated that the provision of remedy should be “impartial, protected from corruption and free from political or other attempts to influence the outcome”. As remarked in section 1, the Remedy pillar applies to both States and business enterprises. Each of them has to provide remediation and organise effective remedy mechanisms in order to improve problematic situations. As regards judicial means, international law addresses human rights abuses by providing a framework for the recognition of rights. It provides for a system in which an international human rights court (pursuant to a complaint from an individual and/or NGO) or a treaty body (as part of its regular visit and reports on countries and special themes) can criticise a State for its failure to protect human rights and in which recommendations for improvement can be made to such a State. International human rights courts, however, have only jurisdiction over the State Parties that have ratified the pertinent treaty and protocols. Moreover, these courts have no jurisdiction over companies. Judicial means can also be found at the State level. Domestic courts provide a forum for claims against private parties like companies. But this system has limited ability to directly address the implementation by a company of human rights protection and the realisation of remediation for damages or grief caused by wrongdoers.

2.2.2 State-based mechanisms

As regards State-based judicial or non-judicial grievance mechanisms, the Commentary to GP 25 puts forward that these may be administered by a branch or agency of the State, or by an independent body on a statutory or constitutional basis, for example courts (for both criminal and civil actions), labour tribunals, National Human Rights Institutions, National Contact Points (NCP) under the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development (OECD and OECD Guidelines), ombudsperson offices, and Government-run complaints offices. It is also

cases can be important to demonstrate its legitimacy and retain broad trust. At the same time, confidentiality of the dialogue between parties and of individuals’ identities should be provided where necessary.

23 Ibidem, see (f) Grievances are frequently not framed in terms of human rights and many do not initially raise human rights concerns. Regardless, where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights.

24 Ibidem, see (g) Regular analysis of the frequency, patterns and causes of grievances can enable the institution administering the mechanism to identify and influence policies, procedures or practices that should be altered to prevent future harm.


26 OECD Guidelines, the updated version dates from 25 May 2011, at: http://www.oecd.org/document/28/0,3746,en_2649_34889_2397532_1_1_1_1,00.html, accessed on 13 August 2011.
Concerning State-based judicial mechanisms, the GP declare that “States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms (…) including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy”. The success of those mechanisms “depends on their impartiality, integrity and ability to accord due process”. Moreover, the provision of justice should not be obstructed by corruption of the judicial process, and courts should be independent of economic or political pressures from other state agents and/or from business actors. Various legal, practical and procedural barriers can prevent effective justice in business-related human rights abuse cases. The Ruggie-team has identified the following barriers that warrant special attention:

- The way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability;
- Where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim;
- Where certain groups, such as indigenous peoples and migrants, are excluded from the same level of legal protection of their human rights that applies to the wider population;
- The costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through government support, ‘market-based’ mechanisms (such as litigation insurance and legal fee structures), or other means;
- Claimants experience difficulty in securing legal representation, due to a lack of resources or of other incentives for lawyers to advise claimants in this area;
- There are inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), and this prevents effective remedy for individual claimants;
- State prosecutors lack adequate resources, expertise and support to meet the State’s own obligations to investigate individual and business involvement in human rights related crimes.

On the topic of State-based non-judicial grievance mechanisms, the GP emphasise that “judicial remedy is not always required; nor is it always the favoured approach for all claimants.” Ruggie advises governments to expand the mandates of existing non-judicial mechanisms and/or to add new mechanisms, such as mediation-based or adjudicative instruments. Other culturally-appropriate and rights-compatible processes could also provide effective remediation. The effectiveness-criteria set out above in section 2.2.1 should thereby be considered.

2.2.3 Non-State-based mechanisms

Firstly, regional and international human rights bodies have been referred to in GP 28 as ‘non-State based grievance mechanisms’. As these have dealt most often with alleged violations by States, it is interesting to point out that some have also dealt with the failure of a State to meet its duty to protect against human rights abuse by business enterprises.

Another category encompasses operational grievance mechanisms. Typically, such remedies are administered by enterprises, alone or in collaboration with others, including relevant stakeholders. Alternatively, a mutually acceptable external expert or body can perform this role. GP 28 considers that these are non-judicial, but may use adjudicative, dialogue-based or other culturally appropriate and

---

27 See supra note 17.
29 Ibidem, GP 26, Commentary.
30 Ibidem, GP 27.
31 Ibidem; GP 28. A different categorisation of non-State based grievance mechanisms comprises multi-stakeholder initiatives based on membership including companies, membership excluding companies, a combination of certification and membership, financing institutions, bilateral union-company arrangements, national mechanisms, multilateral mechanisms, international mechanisms. For more specific examples, see Rees, loc.cit. (note 7).
rights-compatible processes. These mechanisms may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach. Business has a responsibility here, and additionally States can play a helpful role in facilitating access to such options. An early-stage recourse and resolution can be attained if an operational-level grievance mechanism is accessible directly to individuals and/or communities adversely impacted by a company’s activities. An important element for access is that the grievance mechanism does not require that those bringing a complaint first access other means of recourse and that they can engage the company directly in assessing the issues and seeking remediation of any harm. Such a mechanism can serve as a channel for those directly impacted, or threatened to be impacted, to raise concerns. Hence, it can support the identification of adverse human rights impacts as a part of a company’s on-going human rights due diligence. In this way, companies can identify systemic problems and adapt their practices accordingly. Moreover, grievances can be timely addressed in a timely manner, thereby preventing escalation. The effectiveness-criteria set out above in section 2.2.1 should again be considered and can vary “according to the demands of scale, resource, sector, culture and other parameters.” Grievance mechanisms can complement stakeholder engagement and collective bargaining processes, but cannot substitute for them, nor should they preclude access to judicial or other non-judicial grievance mechanisms. Another important consideration is that corporate human rights ambitions and norms developed in sector, multi-stakeholder and other collaborative initiatives should provide for clear follow-up during which affected parties or their legitimate representatives can raise concerns when they believe the commitments in question have not been met. Grievance mechanisms can just offer that.

3. CASE STUDIES

Having discussed remedies in the general sense, one can now move to the practical application of these ideas. Unsurprisingly, there is a vast difference between theoretical commitments to the ideas espoused in the Ruggie Framework and actual enacted policies. To illustrate how policy may fall short of ideals, this paper focuses upon the corporate response to three incidents of oil pollution: Texaco (now Chevron) in Ecuador, Shell in Nigeria, and BP in the Gulf of Mexico (presented chronologically by litigation). While in these incidents one can see the evolution of more effective remedies, all three companies rely heavily upon the court system to provide remedies and thus, according to the victims, fail to provide full remediation. The Oil Fund utilised by BP does provide a glimmer of hope for an alternative means of recompense but, as will be discussed below, there is still room for improvement.

3.1 CHEVRON – OIL POLLUTION IN ECUADOR

Ecuadorian protestor at Chevron’s general shareholders meeting in 2011: “I want to remind you that our fight in Ecuador is for life and justice you must own up to your responsibility to the people in the Amazon”. Chevron’s CEO answered “Perhaps it’s not enough, and we could always do more.” (http://www.sfbg.com/politics/2011/05/26/activists-speak-out-chevron-shareholder-meeting and http://amazonwatch.org/news/2011/0525-18-billion-ecuadorian-lawsuit-dominates-chevron-shareholder-meeting)

3.1.1 Problem statement: pollution impacting human rights

During twenty years of operation in rural of Ecuador and the Amazon rainforest in the 70s and 80s of the last century, Texas Petroleum Company a subsidiary in Ecuador of Texaco. Inc. the multinational oil company which was headquartered in Houston, Texas (hereinafter: Texaco) allegedly released

32 Idem.
33 Ibidem, GP 29.
34 Ibidem, GP 29, Commentary
36 Idem.
37 Ibidem, GP 30, Commentary.
millions of gallons of toxic waste during the exploitation of the oil facilities and the exploratory drilling. Most of this waste was deposited in open natural pits, from where it was expected to be directly discharged in the environment, either by leaching out or overflow from the rain water. After the oil was extracted from the land it was pumped to special separation stations where the oil was separated from toxic constituents such as oil remnants, gas and toxic chemical substances all discharged in the natural pits. Furthermore, oil and toxic waste spilled in the water streams due to leaks of the pipelines connecting the stations, poor construction and maintenance of the special tanks storing the oil, and the transportation processes of the oil portions in the facilities network. Cheap infrastructure and the lack of the oil facilities led to the permanent contamination of the water, the farmlands, and the forests while the burn of the debris gases and the waste oil products in the open pits resulted in the air contamination with toxic particles.

Texaco’s operations in Ecuador commenced in 1964, when a concession was agreed with the government of Ecuador and Texaco Petroleum Company. The concession was transferred to the subsidiaries Compania Texaco de Petroleos del Ecuador C.A (hereinafter: Texpet) and Gulf Ecuatoriana de Petroleo S.A (hereinafter: Gulf and the Texaco-Gulf Consortium). The parties formed a consortium (each participated for 50 per cent) and acquired the right to explore and exploit the area of Oriente (that is East Ecuador) after identifying a huge amount of oil. In 1965, a ‘Joint Operating Agreement’ (JOA) was executed between Texpet and Gulf on the one side and the State on the other side. In response to the sudden oil boom, the State of Ecuador attempted to keep the dominion over the natural resources through the establishment of a State-owned company; this was Corporacion Estatal Petrolera Ecuatoriana (CEPE). The 1965 JOA was replaced in 1973 by a new JOA between CEPE, Texpet and Gulf (hereinafter: ‘The contract of 1973’). Under the contract of 1973, Texpet continued to exploit the most of the oil infrastructure, providing the State of Ecuador with the necessary expertise to build, manage and use the oil. This resulted in a big network of pipelines and oil facilities all over the country, but in particular concentrated in the Oriente region.

38 In the Aguinda class action the claimants accused Texaco of exploratory drilling practices generating wasting products which contain toxic substances (…) discharged into open pits. The pits would overflow, allowing these toxic substances to discharge into streams, rivers and groundwater from which claimants and the class obtain drinking water and food, see factual background, US District Court for the Southern District of New York Aguinda v Texaco Inc., Original Complaint submitted by the claimants, 3 November 1993, pp.23 -24.
40 The Oriente is a region of eastern Ecuador, comprising the eastern slopes of the Ecuadorian Andes and the lowland areas of rainforest in the Amazon basin, see map, at: http://www.google.nl/imgres?q=oriente+ecuador+texaco&um=1&hl=nl&client=firefox-a&rls=org.mozilla:en-US:official&biw=1366&bih=611&tbm=isch&tbnid=1e6VcdLGSITZDM:&imgrefurl=http://chevronecuador.crazydumguy.com/&docid=70aXhuPYNO6u9M&w=525&h=587&ei=huRUTuvJCIL0-gauy-THBg&zoom=1&iact=hc&vpx=689&vpy=83&dur=341&hovh=237&hovw=212&tx=123&ty=117&page=1&tbnh=160&tbnw=143&start=0&ndsp=17&ved=1t:429,r:3,s:0, accessed on 24 August 2011
41 Superior Court of Nueva Loja, Lago Agrio Class Complaint, 7 May 2003.
In June 1974, CEPE acquired an undivided 12 per cent participating interest, rights and obligations from Texpet and a 12.5 per cent interest from Gulf of the Texaco-Gulf Consortium. At that time, the Ecuadorian government had decided to gradually nationalise the oil industry and hence it started buying shares from Texpet and Gulf resulting in a transfer of a stake of 62.5 per cent to CEPE in 1976. In 1992, when the contract of 1973 expired, CEPE (which was renamed into ‘Petroecuador’) gradually had assumed full ownership of the consortium. However, from 1973-1992, Texpet operated and controlled most of the oil facilities and infrastructure in the region. Texpet was responsible to do so until 1992 when the concession contract (contract of 1973) and the JOA expired. Then, Texpet, Petroecuador and the Government undertook negotiations to determine the environmental impact resulted from the consortium. Subsequently, the parties conducted an environmental audit identifying contaminated areas. A settlement agreement between the Ecuadorian government and Texpet was concluded in 1995, requiring exchange for a release of any liability for damages resulting from the prior twenty operational years. In 1998, after two main audits have been conducted by independent auditors and under the inspection of Ecuadorian officials, the Government of Ecuador certified that Texpet has conducted successfully its remediation programme (this will be explained in more detail below in section 3.1.5). Since then, Texaco (later: Chevron, see below in section 3.1.2) claims that it has been released by the Ecuadorian government from any future claims and obligations (this will be elaborated below). Since 1998, Petroecuador was the remaining and sole operator of the facilities in Ecuador.

43 Ibidem, pp. 2-3.
44 Idem.
The subsequent phases of ownership and control of the operations are pictured below:

**First Phase: Texaco-Gulf Consortium (1965-1973)**

COMPANÍA TEXACO DE PETRÓLEOS DEL ECUADOR C.A. 50%

GULF ECUATORIANA DE PETRÓLEO S.A. 50%

STATE OF ECUADOR


COMPANÍA TEXACO DE PETRÓLEOS DEL ECUADOR C.A. 37.5%

GULF ECUATORIANA DE PETRÓLEO S.A. 37.5%

CEPE 25%

STATE OF ECUADOR

**Third phase: CEPE Consortium (CEPE has acquired full ownership)**

CEPE 100%

Renamed into Petroecuador

---


However, even though remediation took place, the local inhabitants of the Oriente have never been satisfied about the clean-up, as we can tell from the many protests and court cases that have been filed by them. The province of Sucumbíos is probably the most contaminated province of Oriente in Ecuador. The indigenous people have many times protested, and even travelled to California to attend the annual shareholders meeting of Chevron (currently the ultimate parent company of Texaco and Texpet). The protesters presented their claims and requests in the meeting as proxy shareholders for example: “I want to remind you that our fight in Ecuador is for life and justice you must own up to your responsibility to the people in the Amazon”, which was expressed by a resident of Ecuador’s oil patch, to which Chevron’s CEO answered ‘Perhaps it’s not enough, and we could always do more.’ The people of Sucumbíos, furthermore, accepted to visualise their effort towards remediation and compensation in the documentary Crude Oil of Joe Berlinger’, who was later subpoenaed by Chevron together. In 2008, the State of Ecuador replaced its Constitution. The rationale was the embodiment of the Right to Nature fact that was confirmed in September, 2008 by the Ecuadorian people. The new Constitution recognises the right of the population to live in a healthy and ecologically balanced environment, and declares as matters of public interest environmental conservation, the integrity of the country’s genetic assets, the prevention of environmental damage and the obligation for recovery in cases of degraded natural spaces. Articles 396 and 397 of the new Constitution institutionalise the capacity for policy adoption and enforcement of the laws in case of environmental damages for the people and for the environment per se.

3.1.2 Chevron: general facts

In October 2001, Texaco merged with the US based multinational oil company Chevron Corporation (hereinafter Chevron Corp.) establishing ChevronTexaco Corporation. Chevron agreed to acquire all of the common stock of Texaco in exchange for stock in Chevron, giving to Chevron’s shareholders

49 After the merger of Chevron and Texaco the new headquarters were moved to San Ramon, California see at: Chevron’s Press Release, Chevron moving corporate headquarters to San Ramon California, 5 September 2001 at: http://www.chervon.com/chevron/pressreleases/article/09052001_chevronmovingcorporateheadquarterstosanra monca.news, accessed on 24 August 2011.
54 The new constitution was approved after a referendum held on 28 September 2008 with 63.93 per cent votes in favour. The constitution enhances the content of the substance of the social rights protection, creates a new right for nature and finally provides new rights for indigenous people especially the ability to form territorial administrative districts, International Law Observer Website, Positive vote for the new Ecuadorian Constitution confirmed- a brief review, 16 October 2008, at: http://internationallawobserver.eu/2008/10/16/positive-vote-for-the-new-ecuadorian-constitution-confirmed-a-brief-review/, accessed on 24 August 2011
61 per cent of the new combined company.\(^{57}\)

According to Chevron, between the years 2001-2005 Texaco Inc. maintained its legal capacity as an independent company without Chevron assuming its liabilities and obligations related to the operations in Ecuador.\(^{58}\)

In this period Chevron operated the combined companies’ activities under the ‘ChevronTexaco’ brand name.\(^{59}\)

In 2005, before Chevron acquired the US based multinational oil company Unocal Corp., ChevronTexaco Corp. changed its name into ‘Chevron Corp.’ (hereinafter: Chevron). Chevron decided to keep the brand of Texaco together with its other retail brands such as Caltex.\(^{60}\)

Chevron is currently the second largest oil company in the US\(^{61}\). The parent company of the international group is incorporated under the laws of the State of Delaware\(^{62}\) though he headquarters are San Ramón, California. By 2011, Chevron has a workforce consisting of approximately 58,000 employees\(^{63}\) and 4,000 service station employees producing 2.763 millions of barrels of oil per day\(^{64}\) in 180 different operating countries around the world.\(^{65}\)

Chevron’s shares are listed at New York Stock Exchange. Chevron’s net income over 2010 was $19 billion\(^{66}\) meaning a profit of $9.48 per share, and $2.84 of cash dividends for its shares listed at the NYSE, having a rise in 2010 of 18.5 per cent.\(^{67}\)

According to NYSE information, Chevron is involved in every facet of energy industry: the production and transportation of crude oil and natural gas, the refining, marketing, distribution and transportation of fuels and the manufacturing of petrochemical products.\(^{68}\)

### 3.1.3 Chevron about the Ruggie Framework and policies

The website of Chevron in respect of the development of the Ruggie Framework states:

Since 2007, Chevron has actively participated in the public consultation process with Prof. John Ruggie, the United Nations Special Representative on business and human rights. Ruggie is developing the concept of shared responsibility between governments and business concerning human rights. It is embodied in the U.N. Framework—the government duty to protect and the corporate responsibility to respect human rights. Along

---

\(^{57}\) The merger occurred using a company called Keepep Inc. as special purpose vehicle wholly owned by Chevron Corp. Texaco Inc. wholly absorbed Keepep Inc. See infra note 58.

\(^{58}\) Superior Court of Nueva Loja, Lago Agrio Class v Chevron/Texaco, Chevron’s Response to the Lago Agrio Complaint, pp. 1-3.


\(^{64}\) Ibidem, Company profile, at: http://www.chevron.com/about/leadership/, accessed on 13 August 2011


\(^{68}\) NYSE Website, at: http://www.nyse.com/events/1268219685213.html, accessed on 13 August 2011
with our engagement with key international human rights institutions, our participation with the U.N. Framework continues to complement the implementation of Chevron’s Human Rights Policy. The business responsibility to respect human rights, as outlined by Ruggie, suggests an operational framework to manage potential human rights issues related to business operations. Chevron’s Human Rights Policy is consistent with the U.N. Framework.69

Chevron’s commitment is embodied in the ‘Chevron Way’, which contains a brief list of values and principles as well as in its ‘mission statement’. Chevron wishes: ‘to be the global energy company most admired for its people, partnership and performance’70 in the value list, the company prominently promotes protection of the people and the environment. Chevron states its commitment to a responsible performance towards the people and the environment by prioritising the health and safety of the company’s workforce and the company’s assets without mentioning anything to third parties being victims of its corporate practices.71 The company claims that it is committed as it complies with the letter and the spirit of all environmental, health and safety laws and regulations.72 In an effort to comply with the new Ruggie Framework, Chevron has promoted proactive risk assessment behaviour. It has adopted an ‘Operational Excellence Management System’ (henceforth OEMS), for example ‘a systemic management of process safety, health and personal safety, environmental, reliability and efficiency in order to achieve world class performance’.73 Its content is confidential. The OEMS processes and performances are supposed to be audited every three years, but the most recent audit is dated in 2007.74 Regarding respecting human rights, Chevron declares its intent for a proactive awareness of all the potential human right risks in sensitive areas under the guidance of the Voluntary Principles on Security and Human Rights (hereinafter VPSHR)75 and in compliance with the Universal Declaration of Human Rights (UDHR) and the Fundamental Principles and Rights at Work (ILO Declaration).76 Furthermore, Chevron supports the Global Compact, though this fact is not stated in its 2010 CSR report.77 Chevron reports that it has introduced the content of the VPSHR into its private security contracts78 and that it externally is engaged with the US State Department and the International Petroleum Industry Environmental Conservation Association (IPIECA).79 Chevron also promotes its engagement with the local community where it operates. It states that it contributes to their socioeconomic development,80 maintains an on-going, proactive and two-way communication with all the potential stakeholders, and performs an ‘Environmental, Health and Security Impact 

71 Ibidem.
72 ‘All of us must obey the letter and spirit of the law at all times, wherever we live or work. Each of the countries where our company does business has its own laws, regulations and customs. Sometimes there can be significant differences from one place to another and between regions within a single country. However, no matter where we work, we are all responsible for respecting all applicable laws and following the policies in our Code’, Chevron Business Conduct and Ethics Code, p.4, at: http://www.chevron.com/documents/pdf/chevronbusinessconductethicscode.pdf, accessed on 13 August 2011.
74 Ibidem.
75 More information about the content of the principles is available at:
76 Supra note 72, p.27.
77 Global Compact Website, Chevron’s Communication on Progress Report submitted on 29/7/2009, at:
79 IPIECA is the global oil and gas industry association dealing with environmental and social issues improving the industry to develop and establish good practices, to enhance communication and knowledge to work in partnership with all the key stakeholders. It is consisted in term of membership by over the half of the world’s oil production and it is the main communicator with the UN in the oil and gas industry, IPIECA Website, at: http://www.ipieca.org/about-ipieca, accessed on 13 August 2011.
80 Chevron Corporate Responsibility Report, Social Investment, at:
http://www.chevron.com/globalissues/economiccommunitydevelopment/, access on 13 August 2011
Assessment’ process (EHSIA) in the major projects as well as those that are considered operated in sensitive areas.

In October 2010, Chevron announced the ‘We Agree’ campaign, a global advertising campaign in which Chevron admits the abuses of the oil industry companies, to the environment and to human rights. In this way Chevron aims to make known its responsible character. ‘Chevron is making a clean break from the past by taking direct responsibility for our own actions’ said Rhonda Zygocki, Chevron vice president of Policy, Government and Public Affairs she follows: ‘We Agree’ conveys that Chevron is all for people, (...) Just as ‘We’ is inclusive, so Chevron is inclusive. It’s time we were on the side of people, no matter where those people are from.

Chevron also advertises its honesty in doing business with statements such as ‘We're telling truths no one usually tells, we’re changing the way the whole industry speaks.’ In this framework of honesty and inclusivity, Chevron in the ‘We Agree Campaign’ declares that all companies should be aware of the environmental destruction caused by the carbon emissions that necessitate the strict rules and policies towards the limitation of the emissions as Chevron did. They mention:

For decades, oil companies like ours have worked in disadvantaged areas, influencing policy in order to do there what we can't do at home. It's time this changed. People in Ecuador, Nigeria, the Gulf of Mexico, Richmond, and elsewhere have a right to a clean and healthy environment too.

Chevron recommends ‘that all companies face their mistakes directly by accepting financial and environmental responsibilities and by funding new technology to avoid future mistakes.’ Finally, Chevron claims to have the most equipped personnel for the preventing and handling of oil spill accidents. However, there is no mention of physical or financial remediation or of establishing funds to provide compensation to the victims of the abuses.

3.1.4 Litigation and collective actions

US class action litigation (1993)

81 ‘The process requires all new capital products to be assessed for potential environmental, social and health impacts and aims to the elimination and minimisation of this negative impacts. Stakeholders’ engagement is considered an indispensable part of the assessment’ Chevron Website, Environment, at: http://www.chronv.com/globalissues/environment/, accessed on 13 August 2011.
82 Frade Field in the Campos Basin offshore Brazil is an example of projects being assessed under the Chevron EHSIA, another example is Chevron Thailand Shore Base project available at: http://www.chuchawalroyalhaskoning.com/projects/Chevron2.html, accessed on 13 August 2011.
83 The amount spent for the ‘We Agree’ campaign by Chevron is confidential though it is estimated that it spends $90 million per year on advertisement only in the territory of US, Website Chevron, Press Release, at: http://chevron-press.com/article/Radical-Chevron-Ad-Campaign-Highlights-Industry-Problems/, accessed on 13 August 2011.
84 These tactical statements can be justified especially after the incidents in the Gulf Coast on April 2010 with BP and Deepwater Horizon and the huge contamination of the following leak which caused the aversion of the global society against oil companies.
86 Idem.
88 Idem.
90 Idem.
In 1993, 30,000 indigenous Ecuadorian citizens commenced a class action (the “Aguinda” action) in the US Federal District Court for the Southern District of New York against the US company Texaco Inc. (later merged into Chevron) under the US Alien Tort Claims Act. They sought compensatory and punitive damages as well as equitable relief for alleged human rights violations and environmental damages to the Ecuadorian Amazon rainforest. Claimants alleged that Texaco failed to use the reasonable industry standards of oil extraction or comply with American, local, or international standards of environmental safety and protection. Claimants also alleged that Texaco Inc. and its group companies failed to pump properly the toxic waste back into the wells, instead disposing of it in open pits or by burning without air pollution controls, resulting in contamination of drinking water and high level air pollution. The claimants also sought redress for personal injuries, diseases, and cancers due to extensive contamination of their livelihoods and living environment. Texaco Inc. consented to jurisdiction in Ecuador. After several appeals, the US court finally dismissed the case in May 2011 on grounds of forum non conveniens and requested Texaco to consent to be bound by any ruling of the Ecuadorian courts and to honour any judgment rendered on the claimant’s claims. The Alien Tort Claims Act enables US courts to exercise extraterritorial ‘jurisdiction for a civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’ Ecuadorian claimants stated in their complaint: ‘Defendant's acts and omissions of intentionally and tortuously discharging crude oil and other toxins into the environment; in damaging the pristine rain forests of the Oriente; in destroying the streams, rivers, waterways and aquifers, and in threatening the survival of the indigenous people of the Oriente, violate the laws of nations, international law, worldwide industry standards and practices, as well as the laws of the United States.’ Aguinda case was dismissed in the US courts; it was refilled in the Ecuadorian courts as the Lago Agrio complaint.


Until 1999, Ecuadorians were legally able but procedurally unable to file a class action before the Ecuadorian courts although the Law of Prevention and Control of Environmental Pollution (enacted in 1976). This incapacity was due to the general and abstract wording of the provisions of the above mentioned law. The existing laws had never been actually tried to be enforced in the Ecuadorian courts. Despite the recognition of an actio popularis there was no adequate substantial legal basis

---

91 Maria Aguinda and Carlos Crefa were individually guardians for the class.
92 Amazon Defence Coalition, Understanding Chevron Amazon “Chernobyl”, Detailed Background on Landmark Legal Case over Chevron’s Environmental Contamination in Ecuador, Amazon Defence Coalition, Ecuador, Winter 2009, p. 3.
93 This is a class action brought on behalf of citizens and residents of the Amazon region of Ecuador known as the ‘Oriente’ against Texaco Inc. Claimants and the class seek compensatory and punitive damages, and equitable relief, to remedy the pollution and contamination of the claimants' environment and the personal injuries and property damage caused thereby (…) As more fully set forth in the ‘Factual Background’ and ‘Claims for Relief’ sections of this Complaint, Texaco did not use reasonable industry standards of oil extraction in the Oriente, or comply with accepted American, local or international standards of environmental safety and protection. Rather, purely for its own economic gain, Texaco deliberately ignored reasonable and safe practices and treated the pristine Amazon rain forests of the Oriente and its people as a toxic waste dump. Loc. cit. (Aguinda Complaint). p. 4.
94 Idem.
95 Idem.
98 28 U.S.C §1350.
99 Idem.
100 Ley de prevencion y control de contaminacion ambiental, Decreto Supremo No. 374. RO/97, 31 de Mayo de 1976.
101 Other existing Ecuadorian Decrees generally regulating business conduct and environmental degradation during 60s and 70s comprised: the ‘Hydrocarbon Law’ (enacted in 1971) which required oil producers to adopt all necessary measures for the protection of the flora and fauna, to prevent the pollution of water, the atmosphere
in the Ecuadorian legal system to support the claimants’ claims for remediation and compensation for environmental damages. Instead, the claimants commenced the abovementioned US class action in 1993.

While the parties of the Aguinda case were litigating in the US, in 1999 the Ecuadorian government enacted the Environmental Management Act (original name is in Spanish hereafter referred as EMA). The EMA provides claimants the ability to bring an action for the cost of remediation of environmental harms, even absent of proof of any personal injury or property damages for a specific claimant. Any Ecuadorian is now allowed to file a suit asking remediation for environmental damages on behalf of the collective. Articles 41 and 42 provide:

(…) a forum for any natural or legal person or human group to denounce the violation of environmental standards, and guarantees the ability to be heard in any criminal, civil or administrative court by the initiation of proceedings due to environmental violations. Article 43 allows a class action before the Ecuadorian courts for the reparation of environmental damages, including ‘damage caused to health or the environment including biodiversity, damage compensation for the community directly affected and repair of damages caused.

Taking advantage of the EMA, the claimants filed a new suit in 2003 against ChevronTexaco Corp. This suit sought the removal of the contaminating elements threatening the environment and health of the local inhabitants, the cleaning of all the contaminated areas, the removal of all the structural elements and machinery that cause the contamination, the clearance of the contaminated terrains, plantations, crops of the claimants and the compensation to all the affected people, the recourse to be delivered to the NGO Amazon Defense Coalition.

Chevron replied to this claims stating that the court has no jurisdiction and competence over the case, the EMA has no retroactive application, and that the ChevronTexaco Corp. is not the successor of Texaco Inc. and thus has never acted in Ecuador nor has been a party in a concession contract with the Ecuadorian Government.

After eight years of extensive litigation, the Ecuadorian court delivered its judgment in February 2011, finding Chevron liable for $18.2 billion in total damages. The court specifically imposed $8.646 billion in damages for reparations measures, $864 million directly to the Amazon Defense Coalition which was not a named claimant in the litigation and another $8.646 billion as a punitive penalty.

and land and the Hydrocarbon Exploration and Exploitation Regulations, Decree 530 (1974), which required the operator to take all necessary measures and precautions to avoid damages or injuries to persons, properties, natural resources and locations of religious or archaeological interest. The decrees were characterised by a pragmatic inability to bring claims for environmental damages in the Ecuadorian courts using the Ecuadorian tort system under their vague and weak provisions. See Texaco in Ecuador, Environmental and Health Claims, at: http://www.texaco.com/sitelets/ecuador/en/responsetoclaims/default.aspx, also supra(note 18),pp. 23-25

Ecuadorian Civil Code, author’s translation, article 2236 of actio popularis: ‘as a general rule, a popular action is granted in all cases of contingent harm that threatens indeterminate persons because of someone’s imprudence or negligence. But if the harm threatens only determinate persons, only one of them may file the action’

Center for Economic and Social Rights Report, loc. cit. (note 4).

Articles 41 and 42 of the Environmental Management Act.

Author’s translation. The original articles of EMA read as follows: Article 41: ‘Con el fin de proteger los derechos ambientales individuales o colectivos, concédezse acción pública a las personas naturales, jurídicas o grupo humano para denunciar la violación de las normas de medio ambiente, sin perjuicios de la acción de amparo constitucional previsto en la Constitución Política de la República (…), será el competente para conocer las acciones que se propongan a consecuencia de la misma. Si la afectación comprende varias jurisdicciones, la competencia corresponderá a cualquiera de los presidentes de las cortes superiores de esas jurisdicciones’, at: http://www.derecho-ambiental.org/Derecho/Legislacion/Ley-Gestion-Ambiental-Ecuador.html, accessed on 13 August 2011.

Idem.

Most of the claimants overlap with those in the Aguinda Class Action. Claimants were added also from the provinces of Sucumbios and Quito.

unless Chevron issues a public apology in Ecuador or in the US within 15 days of the judgment.\footnote{109} Chevron appealed the case in March 2011.\footnote{110} Chevron’s public response to this judgment was:

The Ecuadorian court’s judgment is illegitimate and unenforceable. It is the product of fraud and is contrary to the legitimate scientific evidence. Chevron will appeal this decision in Ecuador and intends to see that justice prevails. US and international tribunals already have taken steps to bar enforcement of the Ecuadorian ruling. Chevron does not believe that today’s judgment is enforceable in any court that observes the rule of law. Chevron intends to see that the perpetrators of this fraud are held accountable for their misconduct.\footnote{111}

Considering that Chevron has no assets anymore in Ecuador, the claimants have to seek relief for enforcement in other jurisdictions where Chevron holds assets, such as in the US.\footnote{112} Enforcing a foreign judgment in the US requires recognition by American courts. The recognition procedure varies a bit from state to state. The US court reviews the case materials determine that the foreign court did not act in a manner contrary to US judicial system/policy/etc. The other party has the opportunity to present their own materials, and will probably argue that the foreign court was unfair, didn’t follow due process, etc. The US court then announces its own judgment, which may be just a repetition of the foreign judgment. As far as the authors could determine the Ecuadorian claimants have not yet –as per September 2011-commenced a recognition procedure in the US. However, in the US there is no direct enforcement mechanism regarding foreign judgments.

**BIT arbitration**

Interestingly before the Ecuadorian court issued the judgment in February 2011 Chevron commenced arbitration proceedings, already in 2009, under the US-Ecuador before the international UNCITRAL arbitral tribunal administered by the Permanent Court of Arbitration in The Hague (hereinafter: the ‘BIT tribunal’).\footnote{113} Chevron claimed that the Ecuadorian courts handling the Lago Agrio case had violated Chevron’s due process rights because Lago Agrio litigation had violated the settlement agreement of 1995 between the government and Texaco.\footnote{114} Chevron also argued that the president of Ecuador, Rafael Correa interfered in the Lago Agrio proceedings by visiting the polluted sites and by announcing its support for the Lago Agrio claimants. Finally Chevron alleged the Ecuadorian judiciary had conducted the case ‘in total disregard of Ecuadorian law, international standards of fairness, and Chevron’s basic due process and natural justice rights.’\footnote{115} In the arbitration, Chevron and Texpet seek (i) a decision that they have no liability or responsibility for environmental impacts, that Ecuador has breached the BIT and the release of Texpet, (ii) an order requiring the Ecuadorian court to recognise that Chevron has been released from all liabilities due to the 1992 settlement, (iii) a declaration that Ecuador and Petroecuador are exclusively liable for the execution any judgment issued in the Lago Agrio case, and (iv) finally indemnification for any judgment entered against it in the Lago Agrio case. Subsequently, in December 2009, Ecuador sought before the US Federal Southern District Court of New York an order for the restraint of the arbitration proceedings, which upheld the competence of the BIT tribunal.\footnote{116} In March 2010, the BIT tribunal found that Ecuador had ‘breached Article II (7) of the

\footnote{109} See supra note 41, Lago Agrio Class Complaint.

\footnote{110} Sucumbíos Provincial Court of Justice, Lago Agrio Class v Chevron Corp, Lago Agrio Appeal by Chevron, 9 March 2011.


\footnote{114} Ibidem, Para. 69.

\footnote{115} Ibidem.

\footnote{116} (…) New York Civil Practice Law and Rules because the Lago Agrio judgment falls within the content of Article 53 including fraud and a judicial system that does not provide impartial tribunals that are incompatible with due process – the Court of Appeals found that the arbitration claim was not inconsistent with Texaco’s earlier promise to the lower courts and rejected each of Ecuador’s estoppel claims Chevron’s consent to the
BIT through the undue delay of the Ecuadorian courts and is liable for the damages to the Claimants resulting therefrom.\textsuperscript{117} In February 2011, the BIT tribunal in its order for interim measures ordered the Ecuadorian state to suspend the enforcement of the Lago Agrio judgement inside and outside of Ecuador.

The Respondent (meaning the State of Ecuador) has to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against the First Claimant (Chevron) in the Lago Agrio Case.\textsuperscript{118}

By September 2011 there is no clarity yet as to any further actions will be taken by the Ecuadorian claimants in order to get their Ecuadorian judgement enforced in the US against Chevron’s US assets.

**Chevron lawsuit against Lago Agrio claimants**

Before the BIT tribunal had delivered its judgment, Chevron had already filed another lawsuit in February 2011 in the US federal District Court of New York against the Lago Agrio claimants, their lawyer Donziger and the NGO Amazon Defense Coalition (hereinafter ADC see below) under the US Racketeer Influenced and Corrupt Organizations Act (RICO). Chevron thereby sought a temporary restraining order and/or preliminary injunction against defendants and a court declaration that ‘any judgment against Chevron in the Ecuador lawsuit (meaning the Lago Agrio lawsuit) is the result of fraud and therefore unenforceable.\textsuperscript{119} In March 2011, the court indeed issued the preliminary injunction that Chevron petitioned.\textsuperscript{120} However, the US Court of Appeals for the Second Circuit overturned this order.

### 3.1.5 The 1992-1998 Settlement and Remediation Programme of Texaco in Ecuador

In 1992 at the end of the concession agreement between Texpet and the government of Ecuador a settlement agreement was negotiated where Texpet would assume responsibility for specified environmental remediation projects corresponding to its minority interest (35.7 per cent) for the years between 1973-1992, in which period Petroecuador acquired full ownership of all the facilities. In exchange it would be released from any future liability even for the projects outside of its ‘Scope of Work’.\textsuperscript{121}The Government, Texpet and Petroecuador in 1994 signed a Memorandum of Understanding (hereinafter MOU) in which they agreed to forgive Texpet ‘for environmental impact arising from the operations of the consortium’ accomplished in two steps.\textsuperscript{122} The first step involved the release of Texpet from any responsibility for environmental impacts not included in the specified projects that would be repaired by Texpet, and the second step was releasing any responsibility of Texpet related to the ‘Scope of Work’ upon remediation.

In 1995, the parties signed a ‘Settlement Agreement’ identifying the scope of work for Texpet and specifying the particular sites that constitute Texpet’s remediation responsibility. The State of Ecuador, as a consideration for full remediation, insisted that Texpet must negotiate with four municipalities in Oriente and take into account the socioeconomic compensation. Finally, Texpet settled its disputes with four Ecuadorian municipalities by entering into written agreements and releases. Texpet had also settled its disputes with the provinces of Sucumbíos and Napo. The citizens who are the claimants in the Lago Agrio case live in said provinces. In 1998, Texpet, Petroecuador, and the Government of Ecuador executed a ‘Final Act

\textsuperscript{117}Permanent Court of Arbitration, Hague, Partial Awards of the Merits, 30 March 2010, pp. 246-249.

\textsuperscript{118}Idem, Order for Interim Measures, No:2009-23,9 February 2011.

\textsuperscript{119}US District Court, Southern District of New York, Chevron’s Complaint, No:11 civ 0691, 1 February 2011.

\textsuperscript{120}Idem, Judge Lewis Kaplan’s Judgment, No:11 civ 0691, 7 March 2011, p. 125.

\textsuperscript{121}‘The Scope of Work consisted the specified projects decided to be remediated by Texaco and Petroecuador in 1995’, Permanent Court of Arbitration, Hague, Claimant’s Notice of Arbitration, 23 September 2009, pp. 3-6.

\textsuperscript{122}Idem.
of Compliance of the Contract for the Carrying out the Environmental Repair Works and Liberation of Responsibility and Demands’. The $40 million remediation programme was audited by two independent internationally recognised consulting firms, also under the inspection and certification of the Ecuadorian government.\textsuperscript{123} Claimants in the Lago Agrio complaint challenged ChevronTexaco Corp.(as it was renamed after the merger) for its remediation performance, stating that it was insufficient and inadequate considering the existence of polluting elements thrown into the environment that continue to cause ecological and personal damages.\textsuperscript{124} The court in Lago Agrio ruled on Chevron’s defence stating that both the MOU in 1994 and the final 1995 agreement released Texaco only from governmental claims but not from claims brought by third parties.\textsuperscript{125}

Nonetheless, in this case, the claimants, who were not a party to the mentioned contract, maintain that beyond the possible fulfilment of the contract, there is contamination at these sites that signifies a risk to their health and their lives. It is the opinion that these citizens cannot see themselves deprived of their fundamental rights, and in exercise of them have brought action before the public body charged with administering justice, settling competence on this Presidency of the Court so it would pronounce on their claim for the redress of various environmental harms that supposedly occur in several of the same subject of the Contract As we have reviewed lines above.\textsuperscript{126}

The court also found in a contamination test that the remediated well sites were equally polluted as those which have not been cleaned by Texpet in 1995 and were never cleaned in the past.\textsuperscript{127}

3.1.6 Role of the NGO ADC and the trust fund

A number of NGOs are actively involved in the Ecuador pollution protests and law suits. Three are specifically relevant such as Amazon Watch,\textsuperscript{128} the Rainforest Action Network (RAN)\textsuperscript{129} and the Amazon Defense Coalition (ADC, that is aka Amazon Defense Front or Frente de Defensa De la Amazonia). The latter one is the NGO mostly involved in the legal disputes. ADC was created in June 1995 as an NGO based in Nueva Loja, Sucumbios after the approval of the Ecuadorian Ministry of Social Welfare\textsuperscript{130} with the objective is to be the most prominent representative of the Amazon people, to integrate the entire population of the Amazon Basin in order to defend and protect their interest on their natural resources and finally to pursue legal action against those who caused environmental damage.\textsuperscript{131} ADC commenced the class actions of Aquinda in 1993. Ten years later, the Lago Agrio judgment named ADC as the beneficiary of the trust of the compensation to be paid by Chevron:

\begin{itemize}
\item \textsuperscript{123} Texaco in Ecuador Website Remediation, at: http://www.texaco.com/sitelets/ecuador/en/remediation/default.aspx , accessed on 13 August 2011
\item \textsuperscript{124} Supra note 41, Lago Agrio Class Complaint, pp. 8.
\item \textsuperscript{126} See supra note 108, Lago Agrio Judgment, paras. 12-13.
\item \textsuperscript{127} Idem, during the litigation it has been possible to confirm that many sites included in the Remediation Agreement, which after the execution of the works were accepted as remediated by the Government, still nowadays have contamination at levels that are dangerous, which should be eliminated in order to protect the health of persons’.
\item \textsuperscript{128} Amazon Watch, at: http://amazonwatch.org/, accessed on 13 August 2011.
\item \textsuperscript{129} Rainforest Action Network, at: http://ran.org/, accessed on 13 August 2011.
\item \textsuperscript{130} No 535, Ministerio de Bienestar Social (MBS), 4 June 1995, at: http://www.ecuancen.etc/fda/fda.htm, accessed on 13 August 2011.
\item \textsuperscript{131} Idem, Objectives, Integrar a toda la población organizada de la Amazonía, con el fin de proteger y defender sus intereses integrales, así como sus recursos naturales renovables y no renovables; (…) Velar que los organismos públicos o privados, nacionales e internacionales que realicen cualquier actividad susceptible de afectar al medio ambiente en la Amazonía, incorporen en sus planes o programemas de acción, el principio de
\end{itemize}
Within a period of 60 days of the date of service of this judgment, the claimants shall establish a commercial trust, to be administered by one of the fund and trust administrator companies located in Ecuador. The entire endowment shall cover the necessary costs for the contracting of the persons in charge of carrying out the measures of reparation and the legal and administrative expenses of the trust. The representatives of the Defence Front or those they designate on behalf of the affected persons will constitute the board of trust, which will be the body for decision-making and control and will establish a reparation plan within the parameters established.

In 2011, Chevron in its complaint under RICO accused amongst others ADC for conspiracy causing ‘maximum damage to the company’s reputation’ and to put personal pressure on the company’s executives by disrupting Chevron’s relations with its shareholders and investors, to provoke US federal and state governmental investigations and thereby force company into making a payoff in order to ‘achieve extortion, money laundering, obstruction of justice, unjust enrichment and civil conspiracy’. Chevron also asserted that it is questionable if ADC is an existing legal person and why it is the main financial beneficiary of all the litigation proceedings of Lago Agrio while it has never presented a non-profit report or an annual report. At Chevron’s RICO complaint Chevron stated that the claimants seek no individual damages because they were forced by the conspirators to sign the Lago Agrio complaint; the claimants could not benefit of the redress provided by the Lago Agrio judgment because they are under fraud and corrupt acts perpetrated on their behalf. ADC was allegedly engaged in tortious acts such as solicitation of funds for the purpose of carrying the conspiracy, publication of false and misleading statements through its website, use of lobbying practices in the US Congress. Except from the official accusations against ADC by Chevron the existence of ADC generates questions regarding its reason of formation in Ecuador instead of US, despite US funding and a US public relation company. This vagueness with respect to the main trustee of the victims’ compensation is problematic especially because the court itself in Lago Agrio did not manage to put substantive safeguards regarding ADC’s role as a beneficiary. It also poses questions on the level and way of involvement of the NGOs in these remediation efforts and the need for transparency of the remediation procedures.

3.1.7 Concluding remarks on Chevron

Summarising, the authors draw the attention to the following observations based on the previous sections:

(i) A settlement agreement with the State of Ecuador required Texaco to clean-up all of its operating areas for the years 1964-1992. Texaco and, later Chevron, emphasise that their responsibility has ended because of this agreement.
(ii) In 1993, the inhabitants of the impacted area were unsatisfied with the clean-up and filed a claim in a US Federal Court under US law, that is, based on the ATCA. After much litigation and several appeals, the case was dismissed under the doctrine of forum non conveniens.

---

132 Supra note 108, pp. 186-187
133 Supra note 119, Chevron’s RICO Complaint.
135 Supra note 133.
(iii) In 2003, the case was re-filed in Ecuador under Ecuadorian law, the EMA. This new act created a collective cause of action for environmental damage.

(iv) In 2011, the Ecuadorian Court found Chevron (who had subsumed Texaco after the merger in 2001) liable, awarding damages to the affected villagers.

(v) However, an UNICITRAL tribunal found that Ecuador was acting in breach of a BIT, and hence that the Ecuadorian the judgment was unenforceable. So far (by September 2011), no one has attempted to enforce the judgment in the US.

(vi) Litigation continues over the funds granted to the villagers. It is doubtful that meaningful recompense will be available in the near future. One cannot help but wonder what the Ecuadorian environment would look like if the legal fees involved in this case had instead been spent on clean-up.

3.2 SHELL – OIL POLLUTION IN NIGERIA

In the aftermath of Deepwater, Shell’s CEO Peter Voser explained to financial analysts in February 2011: “The risk-management practices of some companies in the Gulf of Mexico do lag behind the standards set by other companies. We at Shell have been applying the best of the North Sea standards to our worldwide operations for many years.” (http://royaldutchshellplc.com/category/peter-voser/)

3.2.1 Problem statement: pollution impacting human rights

In August 2011, a major new independent scientific assessment report came out: Environmental Assessment of Ogoniland (the Report or the UNEP Report). It reported on the environmental and public health impacts of oil contamination in Ogoniland, a kingdom in Nigeria's Niger Delta region, and recommended options for remediation. The United Nations Environment Programme (UNEP) undertook this assessment at the request of the Federal Republic of Nigeria. The Report shows that pollution from over 50 years of oil operations has penetrated further and deeper than many may have supposed. The Ogoni have been claiming for decades that Shell has devastated their area. They

---


137 The concerned area is shown on a map on p. 44 of the UNEP Report. In the assessment, UNEP has been working with the Rivers State University of Science and Technology, Nigerian government officials at the national and Rivers State level, traditional rulers, local landholders, laboratories and many other stakeholders. During 14 months, the UNEP team examined more than 200 locations in Ogoniland, assessed approximately 1000 square kilometers, surveyed 122 kilometres of pipeline rights of way, reviewed more than 3,000 medical records and engaged over 23,000 people at local community meetings. Detailed soil and groundwater contamination investigations were conducted at 69 sites, which ranged in size from 1,300 square metres (Barabeesoom-K.dere, Gokana local government area (LGA) to 79 hectares (Ajeokpori-Akpajo, Eleme LGA). Altogether more than 4,000 samples were analysed, including water taken from 142 groundwater monitoring wells drilled specifically for the study and soil extracted from 780 boreholes. A source at UNEP office reported that the study cost $9.5 million and was (partly) funded by Shell Petroleum Development Company. The Report was formally presented to the Nigerian President The Hon Goodluck Jonathan in the Nigerian capital Abuja on 4 August 2011.

have tried to stop the pollution and the gas flaring by asking, demanding, protesting, and filing court cases in Nigeria and elsewhere against Shell and the Nigerian state. They partly succeeded in stopping Shell to undertake new operations in the area (MOSOP, 1993)\(^{139}\). However, the existing exploitation consisting of oil pumping installations, pipe lines, and gas flaring continued to be in use. The Ogoni have asserted that they suffer from health problems and that the oil pollution has destroyed their farm lands and fishing ground, hence their means of existence. The Report confirms what the Ogoni have been stating for a long time, the human and environmental tragedy associated with the oil contamination. According to Achim Steiner (UNEP Executive Director), the Report provides the scientific basis on which a long overdue and concerted environmental restoration of Ogoniland can begin. He said: “The oil industry has been a key sector of the Nigerian economy for over 50 years, but many Nigerians have paid a high price, as this assessment underlines.” The oil production in Ogoniland has generated $30 mrd to the Nigerian government according to the Report’s estimate.\(^{140}\) The Report supports the claims of the Ogoni and Amnesty\(^1\) that their rights to water, food, health, environment, and to maintain a traditional way of living and culture, have been violated or at least been put into danger by oil operations in Ogoniland.\(^{142}\) As regards health, the Report concludes that “the Ogoni community is exposed to hydrocarbons every day through multiple routes. While the impact of individual contaminated land sites tends to be localised, air pollution related to oil industry operations is all pervasive and affecting the quality of life of close to one million people”. Besides causing health threats, these factors negatively impact the Ogoni’s ability to continue their traditional farmer and fishermen lifestyle, and have impeded their capacity to find drinking clean water and to generate food. The assessment also revealed that “control and maintenance of oilfield infrastructure in


\(^{140}\) Idem. FD Selections 5 August 2011.

\(^{141}\) Amnesty International Report 2009, loc. cit. (note 138)

\(^{142}\) Evidence presented in the Report shows that in many Ogoni communities (10), drinking water is contaminated with high levels of hydrocarbons, which seriously threatens public health. In one community (Nisisioken Ogale), the water wells are contaminated with benzene - a known carcinogen - at levels over 900 times above World Health Organization guidelines. An 8 cm layer of refined oil was found floating on the groundwater which serves the wells. This was reportedly linked to an oil spill which occurred more than six years ago. The site is close to an oil pipeline. UNEP recommends that this warrants emergency action ahead of all other remediation efforts. Other areas, which appear unaffected at the surface, are in reality severely contaminated underground. The impact of oil on mangrove vegetation has also been disastrous. According to the Report, the highly persistent oil contamination of many intertidal creeks has left mangroves - nurseries for fish and natural pollution filters - denuded of leaves and stems with roots coated in a layer of bitumen-type substance sometimes one centimetre or more thick. This effectively resulted in a destruction of fish habitat as fish tend to leave polluted areas in search of cleaner water, hence causing an impossible situation for the local fisheries sector: “Where entrepreneurs have established fish farms for example their businesses have been ruined by an “ever-present” layer of floating oil”. Regarding oil spill on land, it was reported that often fires break out, killing vegetation and creating a crust over the land, making remediation or re-vegetation difficult.
Ogoniland has been and remains inadequate: the Shell Petroleum Development Company’s own procedures have not been applied, creating public health and safety issues”.

In order to bring back the contaminated drinking water, land, creeks, and important ecosystems such as mangroves to full, productive health, the whole area of Ogoniland requires environmental restoration. The Report estimates that while some on-the-ground results could be immediate, countering and cleaning up the pollution and catalysing a sustainable recovery of Ogoniland could take 25 to 30 years. It is suggested to deploy modern technology for the clean-up, improved environmental monitoring and regulation, and collaborative action between the government, the Ogoni people, and the oil industry. The Report indicates that this could prove to be ‘the world’s most wide-ranging and long term oil clean-up exercise ever undertaken’, but ‘that action to protect human health and to reduce the risks to affected communities should occur without delay’. The UNEP Report recommends, amongst other proposals, to create an ‘Ogoniland Environmental Restoration Authority’, an ‘Environmental Restoration Fund for Ogoniland’, a ‘Centre of Excellence for Environmental Restoration’, and to ‘declare the intent to make the wetlands around Ogoniland a Ramsar site’. The amount required to proceed with the UNEP recommendations will exceed $1 billion (which figure has been calculated in respect of the ‘preliminary cost estimate for the first five years of restoration’).

Following the release of the Report, the value of Shell’s stock dropped over 14.66 per cent.

3.2.2 Shell: general facts and policies

Royal Dutch Shell plc. is the parent company of the Shell Group, one of the world’s leading energy brands, active in exploration, exploitation and the sale of oil and gas (upstream and downstream), hereinafter: the Shell Group. The Shell Group has worldwide operations: it employs around 97,000 people in over 90 countries. The ‘Royal Dutch Shell PLC Annual Report and Form 20-F for the year ended December 31, 2010’ (hereinafter: Shell Annual Report) provides information on the Shell Group including the Consolidated Financial Statements. The plc. is Shell’s parent company and is incorporated and registered in the United Kingdom. The physical and tax headquarters of Shell are located in The Hague in the Netherlands. The Shell Group sees itself as one corporate group that manages one business organisation; i.e. it is a real multinational company. It uses one brand name for all of its products and operations, ‘Shell’, it has one corporate communication strategy and group business principles, it issues one set of consolidated financial statements and one ‘Sustainability Report’, it has one board of directors taking pride in managing the whole group as appears in the annual general meetings of shareholders. The Consolidated Financial Statements affirm this picture of the multinational company Shell, stating:

Royal Dutch Shell plc. and the companies in which it directly or indirectly owns investments are separate and distinct entities. But in this publication, the collective expressions ‘Shell’ and ‘Shell Group’ may be used for convenience where reference is made in general to those companies. Likewise, the words ‘we’, ‘us’, ‘our’ and ‘ourselves’ are used in some places to refer to the companies of the Shell Group in general.

143 UNEP Report, pp. 225-231. See also the Convention on Wetlands (Ramsar, Iran, 1971).
144 UNEP Report, p. 227.
145 Information on Royal Dutch Shell PLC (RDS.B.L); at: http://uk.finance.yahoo.com/echarts?s=RDSB.L#symbol=rdsb.l;range=20110801,20110808;compare=;indicator =volume;charttype=area;crosshair=on;ohlcvalues=0;logscale=off;source=;accessed on 8 August 2011.
Hence, in this article, the terms ‘Shell’ and ‘Shell Group’ are used to refer to the group or to one or more of the Shell Group companies, as the case may be.

Shell shares and American Depositary Shares (ADSs) are listed at the stock exchanges in Amsterdam, London, and New York.\textsuperscript{148} According to the ‘Consolidated Statement of Income and of Comprehensive Income Data’ of the ‘Shell Group Summary Consolidated Balance Sheet’, the Revenue over 2010 totalled $368 billion and the ‘Income attributable to Royal Dutch Shell plc. shareholders’ exceeded $20 billion. Total assets per 31 December 2010 were $322.6 billion and total debt was $44.3 billion. The ‘Equity attributable to Royal Dutch Shell plc. shareholders’ was $148 billion USD, as communicated in the ‘Consolidated Balance Sheet Data’. Total shareholder return in 2010 was 17 per cent (that is, the difference between share prices at the beginning and end of a book year plus dividends delivered during the calendar year.)\textsuperscript{149} Basic earnings per were $3.28 in 2010.\textsuperscript{150} The share price in € closed at €24.73 as per 31 December 2010.\textsuperscript{151}

The brand and reputation of Shell are its most important assets, as it can be conferred from the risk paragraph of the Shell Annual Report: ‘An erosion of our business reputation would have a negative impact on our brand, our ability to secure new resources, our licence to operate and our financial performance’\textsuperscript{152} In order to protect its reputation, Shell has formulated ‘General Business Principles’ and a ‘Code of Conduct’ which govern how Shell and the individual companies have to conduct their affairs. Shell expresses this:

We are judged by how we act - our reputation is upheld by how we live up to our core values honesty, integrity and respect for people. Our eight Business Principles are based on these core values and indicate how we promote trust, openness, teamwork and professionalism.\textsuperscript{153}

Shell states that it is a challenge to ensure compliance with these requirements by all employees and that

failure – real or perceived – to follow these principles, or other real or perceived failures of governance or regulatory compliance, could harm our reputation. This could impact our licence to operate, damage our brand, harm our ability to secure new resources, limit our ability to access the capital market and affect our operational performance and financial condition.\textsuperscript{154}

All Shell companies, joint venture partners and (sub)contractors are expected to comply with the Shell General Business Principles.\textsuperscript{155}CSR is based on the commonly accepted assumption that corporate reputation is based on good performance in all three fields of Planet, People and Profit.\textsuperscript{156} Shell communicates in this line as is demonstrated by their General Business Principles. For example, Principle 5 expresses Shell’s ambitions regarding ‘Health, Safety, Security and the Environment’:

Shell companies have a systematic approach to health, safety, security and environmental management in order to achieve continuous performance improvement. To this end, Shell companies manage these matters as critical business activities, set standards and targets for improvement, and measure, appraise and report performance externally. We continually look for ways to reduce the environmental impact of our operations, products and services.\textsuperscript{157}

\textsuperscript{148} Ibidem, p. 88. €0.07 is the nominal value of the ordinary shares.
\textsuperscript{149} Ibidem, p.8.
\textsuperscript{150} Ibidem, p. 98.
\textsuperscript{151} Ibidem, p. 90.
\textsuperscript{152} Ibidem, p. 13.
\textsuperscript{155} Ibidem.
\textsuperscript{157} Ibidem.
Principle 6 testifies of the ambition to perform well in respect of ‘Local Communities’:

Shell companies aim to be good neighbours by continuously improving the ways in which we contribute directly or indirectly to the general wellbeing of the communities within which we work. We manage the social impacts of our business activities carefully and work with others to enhance the benefits to local communities, and to mitigate any negative impacts from our activities (...). Shell companies recognise that regular dialogue and engagement with our stakeholders is essential. We are committed to reporting of our performance by providing full relevant information to legitimately interested parties, subject to any overriding considerations of business confidentiality. In our interactions with employees, business partners and local communities, we seek to listen and respond to them honestly and responsibly.

Shell indicates in its Sustainability Report 2010 that the CEO proudly signed the “Global Compact LEAD initiative” and that Shell was a founding member of the Global Compact in 2000. Shell also stresses that it has been an active supporter of the VPSHR since 2000 and that all new security contracts now contain a clause on these principles. Shell further states that it supports the following external voluntary initiatives: the OECD Guidelines; the Extractive Industries Transparency Initiative (EITI) Statement of Principles and Agreed Actions; the Transparency International Business Principles on Countering Bribery (2002); The World Economic Forum ‘Principles for Countering Bribery’ (2004); the ILO Core Conventions; and the UDHR.

3.2.3 Shell and the Ruggie Framework

The Shell Sustainability Report declares that Shell contributed to the work of Ruggie and the Shell website has a heading referring to the ‘UN Special Representative’, stating:

We have worked closely with Professor John Ruggie who was appointed UN Special Representative on business and human rights as he developed the Protect, Respect and Remedy framework. In March 2011, Professor Ruggie released “Guiding Principles for the Implementation of the United Nations ‘Protect, Respect and Remedy’ Framework.”

Shell’s traditional home base is the Netherlands. This small country also hosts a number of active NGOs such as Amnesty Netherlands, Greenpeace Netherlands and Greenpeace International, Milieudefensie, that is the Dutch chapter of Friends of the Earth, and SOMO. All of them keep an eye on the contributions of Shell towards sustainable development, and in particular they have an interest in Shell’s behaviour regarding human rights and the environment. Campaigns against Shell have often been organised. Besides civil society organisations, Dutch leftish political parties demand also attention for human rights and environmental protection. They do this through proposing laws, posing questions to the cabinet, and by adopting motions. They are also eager to advocate CSR. In this

158 Shell Sustainability Report, supra note 147, pp. 1 and 7.
161 Shell Sustainability Report, supra note 147, p.1 (‘Introduction from the CEO’).
162 See Shell website at: http://www.search.shell.com/search?__utmna=32229756.1915441974.1269962577.1269962577.1310127706.2&_utmmb=32229756.4.9.1310127758855&_utmnc=32229756&_utmz=32229756.1310127706.2.1.utmcsr%3Dgoogle%7Cutmcct%3Dorganic%7Cutmcud%3Dorganic%7Cutmcct%3Droyal%2520dutch%2520shell%2520ruggie&_utmv=-&__utmv=7261488, accessed on 8 July 2011.
context, a one-day public hearing on CSR practices of Dutch Multinationals operating in West-Africa ('Maatschappelijk verantwoord ondernemen in West-Afrika') was organised by the Dutch Parliament on 26 January 2011. In actual fact, the hearing was set up to discuss Shell’s operations in Nigeria, to address the question to what extent Shell is complying with the norms set out in the Ruggie Framework, and to find out how this can be improved. Questions regarding remediation of oil spills, how to respect human rights and how to prevent corruption, were posed to high executives of Shell by approximately 15 Members of Parliament (from left to right wing). Furthermore, experts in the fields of CSR and oil exploration were heard as well as various of Nigerian and Dutch NGO representatives. The Shell executives stressed that the conditions in Nigeria were particularly harsh. Questions that appeared difficult for them to answer concerned matters of how Shell was making use of its bargaining power in its contacts with Nigerian politicians and authorities, that is just to affirm its economic rights or also to encourage the Nigerian counterpart of the necessity of implementing a sustainable development and fighting corruption? The MPs and experts suggested that Shell could provide transparency about these contacts, but this was firmly rejected by the Shell executives, who stipulated that this would not be in their commercial interest. Other questions which were apparently difficult for the executives to answer were those regarding court cases. Nigerian people have submitted tort claims in court demanding from Shell remediation of the environment and compensation for oil pollution and also that gas flaring has to stop. The MPs put forward the outcome of various Nigerian court cases, in which Shell was sentenced for the pollution, and/or was ordered to stop the gas flaring, they asked why Shell is delaying performance. Shell’s position in regard to Nigerian court sentences is usually that it lodges appeals, delays paying fines, or does not comply with them labeling them unfair. As shown in subsequent newspaper and blog discussions, not everyone in the audience felt satisfied with the explanation by Shell executives claiming that Shell has the right to defend itself in court, to use all possible legal formal defences, and to appeal whenever it has lost a case. Another matter concerned the question of whether Shell is prepared to share the results of environmental and human rights assessments with the local communities. A similar issue relates to fact finding missions in case of oil spills. Whereas the CSR experts in the hearing advocated joint fact finding and the sharing of results, the Shell executives and Shell representatives in the audience explained that this would not be (fully) possible because of commercial reasons.


165 For example, mr. P. de Wit, president director Shell Nederland, and mr. I. Craig, executive vice-president Shell Sub-Saharan Africa.

166 Idem.

167 Similar arguments were communicated by Chevron about the Ecuadorian judiciary, as was observed in section 3.1 above.

168 Liesbeth van Tongeren (GroenLinks) specifically asked about the Nigerian judgement of 5 July 2010 in which Shell was ordered to pay $10 million for a clean-up operation somewhere in Nigeria. The executives informed the audience that they had not yet become aware of that judgement: ‘This came up yesterday and we had not much time to look into it’. And ‘We will do what is reasonable. We think that this judgement is wrong and we will appeal, like any individual would do’. Compare the judgement of a Nigerian court (2006) imposing a sanction on Shell to pay a compensation to local people who had suffered from oil spillage, which judgement Shell has appealed and so far refused to pay the fines. See Lambooy, Rancourt, loc.cit. (note 138), pp.251-253.

169 Shell’s position here is a very legalised position: Shell’s argument is usually that sharing those facts and results would limit possible defences of Shell in subsequent court proceedings. See also below, section 3.2.5
Shell operated for decades in Nigeria, both onshore and offshore, accounting for approximately 9 per cent of Shell’s total production. In Nigeria, operations are performed by Shell Petroleum Development Company of Nigeria Limited (SPDC).\(^{170}\) SPDC is the largest oil and gas company in Nigeria. It is the operator of a joint venture between the government-owned Nigerian National Petroleum Corporation – NNPC (55%), SPDC (30%), Total Exploration & Production Nigeria Limited – a subsidiary of Total (10%), and Nigerian Agip Oil Company Limited (5%). SPDC’s operations are in shallow water and onshore in the Niger Delta spread over 30,000 square kilometres. They include a network of more than 6,000 kilometres of flowlines and pipelines, 86 oil fields, 1,000 producing wells, 68 flowstations, 10 gas plants and two major oil export terminals at Bonny and Forcados. The company is capable of producing an average of over one million barrels of oil equivalent per day (boe/d).\(^{171}\)

As briefly mentioned in section 3.2.1, since the beginning of the 90s, many complaints have been lodged by local communities about oil pollution of soil and water ways, especially regarding the operations in the Ogoni river delta in the south eastern part of Nigeria. Gas flaring is another subject that has caused many complaints from the Delta inhabitants, later supported by NGOs. In the 90s, protests were led by Ken Saro Wiwa; later on, protests took a more violent course and were asserted by the MEND and other organisations.\(^{172}\)

As has been explained in the UNEP Report discussed above, oil spills harm the environment, impact livelihoods, and waste valuable resources. Oil spills can be caused by operational failure, that is spills due to corrosion, human error, and equipment failure, but can also result from sabotage. According to Shell, more than 80 per cent of spill volume from SPDC facilities in the Niger Delta in 2010 resulted from sabotage or leaks caused when thieves damaged pipelines and wellheads. They are costly to clean up. Shell states that some communities delay SPDC teams from accessing spill sites to stop the leak and start cleaning up: “Sometimes they do this because they are angry or worried about the impact on their land and lives. Others want clean-up contracts and extract greater compensation. Whatever the reason, the volume of a spill is often made significantly greater as a result.”\(^{173}\)

The Shell website states that SPDC is “committed to minimising oil spills to the environment and to cleaning up all spills in the Niger Delta when they occur, as fast as possible, no matter what their cause.”\(^{174}\) Shell asserts that the SPDC facilities and pipelines are operated to the highest international standards, certified annually to ISO14001 standard, and publicly report oil spill statistics to further transparency.\(^{175}\) The statistics are supposed to track the progress of the spill response from when Shell learns about the leak to when clean-up is completed and signed off. Moreover, the Shell Nigeria website states that a so-called ‘Joint Inspection Visit’ team (JIV) visits the site, as quickly as possible after the leak occurs. JIV is led by SPDC experts and includes representatives of the Nigerian

---


\(^{171}\) Idem.

\(^{172}\) Lambooy, Rancourt (2008), loc. cit., note 138; Amnesty Report 2009, loc. cit, note 138; the Erratum; Friends of the Earth gas flaring campaigns and court case in the Netherlands which commenced in 2008, loc. cit., note 138 (see below section 3.2.5).

\(^{173}\) Shell uses different figures when referring to spills caused by sabotage: sometimes 80 per cent, at other places 75, 70 or even 95. See Shell website, Home/Environment & Society/Society/Nigeria/Spills in Nigeria, at http://www.shell.com.ng/home/content/nga/environment_society/respecting_the_environment/oil_spills/; and http://www.shell.com/home/content/environment_society/society/nigeria/spills/; both accessed on 13 July 2011. See also the UNEP Report 2011.


\(^{175}\) In January 2011, SPDC launched a website that contains data on oil spills, including weekly progress updates, investigation reports and photographs. See Shell website: ‘Spill Incident Data’, at: http://www.shell.com.ng/home/content/nga/environment_society/respecting_the_environment/oil_spills/monthly_data.html, accessed on 8 August 2011.
Department of Petroleum Resources (DPR), the National Oil Spill Detection and Response Agency (NOSDRA), the relevant State Ministry of the Environment, and the police, as well as representatives of impacted communities. The JIV has to determine the spread, volume and cause of the spill in order to provide transparency. According to Shell, where the investigation shows that the spill was within SPDC’s control to prevent, SPDC negotiates compensation with the affected landowners: “In 2010, SPDC paid more than $1.7 million in compensation. Nigerian law does not require payment of compensation in cases of sabotage.” SPDC’s spill response team makes the necessary repairs and recovers as much of the spilled oil as possible. This is called the clean-up. After the clean-up, there can still be residual oil that has soaked into the soil, or oil sticking to vegetation. A post clean-up inspection, involving representatives from the same parties listed for JIVs, assesses whether the site needs further remediation to comply with international standards. Remediation is a process aimed at returning the site to its previous state.176 If remediation is not required, then the spill site can be certified clean and the incident closed out.177

Shell informs through its Shell Nigeria website that SPDC and its joint venture partners invest in social projects and programmes in communities primarily in the Niger Delta. As of 2006, several ‘Global Memoranda of Understanding’ (GMoU) have been concluded, placing emphasis on more transparent and accountable processes, regular communication with the grassroots, sustainability and conflict prevention.178

In the following sections, the corporate responses of Shell to claimants who have asserted that they are victims of oil pollution will be presented. In the last section 3.2.9 we will explore which way the company puts its ambition into practice to provide remedies to victims in connection with its ambition to respect human rights.

3.2.5 Oil spill litigation in the Netherlands

This section will analyse the corporate response of Shell in the litigation that is currently going on in the Netherlands and in which Shell is held accountable by villagers suffering from oil pollution.

In 2009, three separate cases of oil pollution in the Ogoni Delta have found their way to a Dutch court. Farmers in the three villages: Oruma, Goi and Ikot Ada Udo, have alleged that they suffer from oil pollution from Shell installations. The cases have been supported by the Dutch NGO Milieudefensie (Friends of the Earth Netherlands) and the NGO Friends of the Earth Nigeria. The legal proceedings were commenced against Shell Nigeria (the operating company) and Royal Dutch Shell plc. (the parent company). See Chart 3.2.5.

176 See Shell website, ‘Remediation Issues in the Niger Delta’, at: http://www.shell.com.ng/home/content/nga/environment_society/respecting_the_environment/remediation/; accessed on 13 July 2011. Shell indicates that there are three methods of remediation in use for land spills: ‘Remediation by Enhanced Natural Attenuation’ (RENA), ‘Remediation by Stabilization/Solidification’ and ‘Low Temperature Thermal Desorption’. The RENA technique is the predominant method in use and may be applied in-situ (treating the soil on site) or ex-situ (removing the soil to be cleaned elsewhere and returned site). Remediation in swampy terrain depends on the nature of swamp, whether seasonal or perennial. A seasonal swamp is dry during the dry season and holds water during rainy season. Remediation of the impacted soil can be undertaken using RENA method in the dry season. In perennial swamps, free phase oil on water and vegetation is cleaned by flushing and skimming whilst oily sludge is remediated by systematic agitation using swamp buggies coupled with application of suitable nutrient amendment to promote biodegradation and other natural attenuation processes. After completion of the remediation process, the site is handed over for close-out inspection and certification by the relevant Government agencies. The entire spill response process is governed by performance standards, as prescribed by Nigerian Law, in particular as defined in the DPR EGASPIN 2002 (Department of Petroleum Resources – Environmental Guidelines and Standards for the Petroleum Industry in Nigeria). This standard is applied to all spills, regardless of the cause.

177 Idem. According to Shell, in 2010, 270 sites were certified.

According to the claimants, they have been protesting against Shell in Nigeria for decades about the systematic pollution but that this has turned out to be ineffective. In May 2008, claimants filed a formal liability claim. In a written response in June 2008, Shell denied any wrongdoing and denied that the Shell holding is responsible for the events in Nigeria. It asserted that Royal Dutch Shell plc. is a publicly listed holding company and had ‘no direct involvement in the operations of its subsidiaries’. In November 2008 and May 2009, the Nigerian claimants served various subpoenas which describe the charges against Shell for the leakages in respectively Oruma, Goi and Ikot Ada Udo, and command Shell to appear before the District Court in The Hague, the Netherlands.

The first response of Shell was to contest the jurisdiction of The Hague court over Shell Nigeria (‘exceptie van onbevoegdheid’)181. Basically, Shell states that Shell Nigeria is a Nigerian company and thus not required to appear before a Dutch court, because of insufficient nexus. Shell also asserts...
that Nigerian law should be applicable. It further argues that the claimants abuse Dutch procedural law (‘misbruik procesrecht’) by commencing a claim against Royal Dutch Shell plc., because the grounds are ‘evidently insufficient’. According to Shell, the parent company is not responsible because it is only a shareholder and has no direct involvement in the operations of its subsidiaries. The position brought up by the Nigerian claimants and Milieudefensie is that the multinational company Shell operates as a single economic unit and it is therefore lawful to jointly try both companies Shell Nigeria and the Dutch headquarters in the Netherlands in the proceedings. Moreover, according to Shell, the NGO Milieudefensie cannot act as claimant and therefore the court is incompetent to hear its claim, because the right to collective action as provided for in Article 3:305a Dutch Civil Code (DCC, see section 3.2.6) is only applicable in cases where Dutch law applies.\textsuperscript{183} The Dutch court did not follow Shell’s arguments on the jurisdiction questions and ruled in an intermediate judgment that it is competent to decide on Shell Nigeria, that there is no abuse of Dutch procedural law, and that Milieudefensie can be a claimant.\textsuperscript{183}

In the Ikot Ada Udo case, Shell not only contested the jurisdiction of the court, but also brought up that this case could only be tried after other cases there were pending in Nigeria concerning the same oil leak would have been settled.\textsuperscript{185} This concerned a case in which a number of villagers from Ikot Ada Udo, who are not claimants in the case in The Hague, have been claiming compensation before a Nigerian court. However, the Dutch court rejected the defence.\textsuperscript{186}

Moreover, Shell uttered that Royal Dutch Shell plc. came into existence only in 2005 and cannot be held accountable. It was incorporated to unify the two top holdings that headed the Shell concern until than (that is: N.V. Koninklijke Nederlandse Petroleum Maatschappij and The “Shell” Transport and Trading Company plc.).\textsuperscript{187} Because of this formal defence, the claimants have decided to bring the former two parent companies also into the litigation.

The next line of defence of Shell is that (most of) the oil spills were caused by third parties, such as oil bandits and through sabotage.\textsuperscript{188} The claimants’ allegations assert that even if third parties played a role in causing the spills, it was still Shell’s duty to protect its pipes and installations.\textsuperscript{189} Furthermore, the Shell defence contends that the villagers have to blame themselves because if they help with the cleaning up and don’t perform well, they should not complain. In the Oruma case, Shell also states that village did not give permission for remediation on leakage, whereas the claimants maintain that Shell has its own entree route, and does not need permission. In respect to the damage, Shell generally utters that this is not as large as the villagers claim and that after cleaning up there is no damage anymore. The claimants’ position is that the pollution still hampers their way of living from fish and other animals from the creeks and ponds.

\begin{footnotes}
\item[183] Idem, pp. 33-42.
\item[185] That is, the ‘itis pendis’ question; Shell defence dated 28 October 2009, at: www.shellcourtcase.org and http://milieudefensie.nl/oliewinning/shell/olielekkages/documenten-shellrechtszaak#juridischedocumenten.
\item[187] Supra, the Shell Oruma case defence, pp. 6-7, 48-58, at: www.shellcourtcase.org and http://milieudefensie.nl/oliewinning/shell/olielekkages/documenten-shellrechtszaak#juridischedocumenten, accessed on 14 August 2011
\item[188] Idem, pp. 3-4, 24-32.
\end{footnotes}
Furthermore, the claimants explain what the duty of care is of the parent company, in respect of preventing and remediating oil spills.\textsuperscript{190} As a defence, Shell refers to Dutch and Nigerian corporate law.\textsuperscript{191} Shell emphasises that Nigerian law adheres to the ‘separate entity doctrine’ and that the parent company can only be liable if the doctrine of piercing the corporate veil is applicable. However, the claimants’ allegations are that the parent company has an own duty of care regardless of any piercing the corporate veil theory. Their position is that Shell operates as a multinational company, that is the parent company owns directly or indirectly 100 per cent of the subsidiaries’ shares and it can govern their practices in formal and informal ways. There are many instruments to control the international operations, for example by appointing and dismissing directors but also through company policies and personal contacts.\textsuperscript{192} Under Dutch law, a holding company can be held liable for its own acts, omissions and conduct, where useful together with one or more of its group companies. The tort standard will be whether the company has fulfilled its duty of care in respect of the victims abroad. Tort liability requires (i) a breach of a duty of care, (ii) relativity, (iii) causality (relevant is the ‘conditio sine qua non’ question: would the damage suffered by the victim have occurred if the act or omission had not taken place?), (iv) accountability (culpability for its own intentionally conducted or omitted act), and (v) damages. Claimants have to raise these five elements and prove them. As to the duty of care, the criterion is whether the company had known or reasonably should have known that its act or omission could have led to the damage in question. A lack of supervision can, for example, qualify as an omission. There is no substantial Dutch case law in the area of CSR claims against a multinational company. Clearly, these norms are being influenced by the international legal and semi-legal developments in this field such as the Ruggie GP and the revised 2010 OECD CSR Guidelines, and by the best practices that the company at hand exposes (such as adhering to sector codes of conduct and international frameworks such as the ISO 26000 process guidelines).\textsuperscript{193} This is mainly also what has been argued by the claimants.\textsuperscript{194} No decision on any of these substantive matters has yet been delivered (mid 2011). It is not expected before mid-2012. The principal rule of evidence under Dutch law is that the claimants have to prove their allegations and demonstrate the facts that support the allegations. There is no limitation regarding the type and quantity of means that can constitute evidence. Occasionally, a court may decide to give the defendant an aggravated burden to motivate his defence. Witnesses can be heard during trial and/or written testimonies can be submitted. Witnesses can be forced to testify. In the situation where the witnesses live abroad, the Dutch court can submit a request to the pertinent foreign court to hear the witnesses. The parties themselves can also be heard, either at their own request or at the request of the other party. Additionally, experts can be asked to draw up reports in three cases, briefs have been submitted on behalf of claimants and defendants in 2010 and all parties will get a chance to present oral arguments, possibly late 2011, after which the court can take a decision. It is possible that an appeal to a higher court will follow the court’s verdicts.\textsuperscript{195} Another issue in these cases is that the claimants’ lawyer has expressed the difficulty in finding public information on the division of tasks and responsibilities between the Nigerian group companies and...
the parent company of Shell. Neither Shell’s Annual Report nor the individual group companies’ accounts provide clear guidance on these issues. Chambers of Commerce, keeping a register of legal entities in their territory, hold information concerning directors and shareholders; however, even on that basis it generally remains very difficult to uncover a clear picture of ownership, governance, and control lines in respect of a parent company and the worldwide corporate network. For the claimants, it is important to find out which legal entity committed certain acts or failed to take action (an omission to act can also lead to the tort qualification under Dutch law). This is critical as ‘group liability’ or ‘enterprise liability’ as such does not exist under Dutch law, that is even with respect to an multinational company as the law stands today the alleged tort(s) has to be attributed to a distinct legal entity or entities. The information requested by the claimants is furthermore important when one wants to demonstrate that the parent company has not executed sufficient governance and control over its Nigerian subsidiary’s activities, and hence has violated its duty of care and thus committed a tort towards the victims of the subsidiary’s practices.

Furthermore, the claimants felt the need to request certain factual information regarding the oil spills and cleaning operations. As it was apparently difficult to obtain this information from Shell, the claimants asked the court to order Shell to give such information. The UK respectively US doctrines of ‘pre-trial discovery’ or ‘document disclosure’ (see below section 3.3), are not part of Dutch law. Theoretically, it is however possible to obtain information to a limited extent on the basis of the Dutch civil procedure law (exhibitie plicht, article 843a Dutch Code of Civil Procedure). The requirements follow from the Code and case law. In practice, it appears difficult and sometimes impossible to obtain documents that are in the possession of opponents who are unwilling to submit them. The requesting party must (i) have a legitimate interest, which will only be the case where an evidential interest exists; (ii) specify the desired documents in sufficient detail so that it is possible to determine which documents are meant and why the requesting party has a legitimate interest in them (this condition is designed to prevent so-called ‘fishing expeditions’ which is common practice in American litigation. This is particularly relevant when considering BP’s engagement in the settlement process: it may consider it a benefit due to the ability to hide potentially damaging documents. For example, if there existed internal memoranda regarding ‘acceptable’ safety risks it could be catastrophic); and (iii) the documents must ‘relate’ to a legal relationship (based on contract or tort) to

---


197 See L.F.H. Emekling, I. Giesen, M.J.C. van der Heijden, T.E. Lambooy, M.L. Lennarts, Y. Visser, ‘Privatrechtelijke handhaving in reactie op mensenrechtschendingen door internationaal opererende ondernemingen’, Nederlands Tijdschrift voor de Mensenrechten (NTM/NJCM-Bulletin) [Netherlands Journal for Human Rights], [2011-2 or 3, still to be checked]. Also concerning the (possible applicability of the) doctrine of piercing the corporate veil, it should be noted that Dutch law is very reluctant in this regard, because the identification of a parent company with its subsidiary company/companies does not sit well with basic notions of corporate law, that is each company is regarded as a separate legal entity, with its own (limited) liability. Since Dutch courts hardly accept this, it is more feasible to try to find the means to hold the parent company liable for its own behaviour (and thus not for that of its subsidiary). Lack of good corporate governance and supervision has been suggested as a possible ground for tortuous behaviour. This is also the line of the claimants in the three cases.


which it is a party.\footnote{Lambooy, CSR 2010, \textit{op. cit.}, pp. 330-331. As regards due diligence reports, there are examples of cases in which the claimant was allowed to receive a copy. In \textit{BVR/Ho-Cla}, a report prepared by a financial adviser for the buyer of a company was concerned. The court considered this document to ‘relate to’ the legal relationship between the buyer and the seller as laid down in their Share Purchase Agreement (\textit{i.e.} the third condition mentioned above had been fulfilled). See: \textit{BVR/Ho-Cla}, Den Bosch CoA 28 September 2004 (JOR 2005/23); similarly: \textit{Verder Holding/Hagemeijer}, Amsterdam District Court 13 April 2005 (JOR 2005/142); \textit{Aegon/Dexia}, Amsterdam District Court, 3 November 2004 (JOR 2004/326) concerning a request for due-diligence documentation, which was rejected because it was not sufficiently specified and, firstly, the Court had to decide on the scope of the information duty.} In the cases at hand, no decision has been issued on these matters by August 2011.\footnote{Expected on 14 September 2011. See: http://milieudefensie.nl/oliewinning/shell/olielekkages, accessed on 5 August 2011.} Shell had requested the court to allow to it the right to appeal against any intermediate judgement regarding the document disclosure request. The claimants have argued that this would lead to delays in the main proceedings.\footnote{See \textit{Conclusie van repliek in het incident ex art 843a RV}, p. 35, at http://milieudefensie.nl/oliewinning/shell/olielekkages/documenten-shellrechtszaak#juridischedocumenten.} They point at the revision of Dutch procedural law in 2002, which aimed at handling court cases with more speediness and to render decisions on the substance. The claimants state that the main rule is that appeal against intermediate judgments is not possible.

3.2.6 Collectif action

Under Dutch law (article 3:305a DCC), a foundation or association, such as an NGO, has the right to submit a tort claim provided that this concurs with the NGO’s articles of association and that the NGO has adequately attempted to achieve the same results as the ones claimed in amicable consultation with the other party. Milieudefensie has based its standing in court on this article. According to them, these requirements have been met. Financial compensation cannot be claimed, however. Another mode under Dutch law is to negotiate a collective agreement on damages on behalf of more claimants, that is the ‘\textit{Wet Collectieve Afwikkeling Massaschade}’ (Articles 7:907-910 DCC). This type of settlement agreement can be submitted by claimants and defendants to the Appellate Court in Amsterdam. This court can issue a declaration to make the settlement agreement binding in respect of all current and future victims falling within a specified category of victims determined in the collective settlement agreement (unless they select to be ‘opted out’). Financial compensation is one option, though other remedies can be included in such an agreement.

3.2.7 Complaint violation Shell of OECD Guidelines

On 25 January 2011, Amnesty International, Friends of the Earth International and Milieudefensie submitted a complaint with the Dutch and UK National Contact Points (NCP) regarding breaches of the OECD Guidelines by Royal Dutch Shell in relation to the Niger Delta.\footnote{The complaint is submitted under the ‘Specific Instance Procedure’ of the OECD Guidelines (please note that this concerns the Guideline version of 2000). The text of the complaint is available at: http://www.foei.org/en/resources/publications/pdfs/2011/oecd-submission, accessed on 6 August 2011.} It relates to statements made by Shell to consumers and other stakeholders in relation to the incidents in the Niger Delta. Shell’s repeatedly claims that between 70 per cent and 85 per cent and, most recently, 98 per cent of oil spills in the region are due to sabotage committed by criminal gangs. These statements have serious and negative implications for the communities of the Niger Delta. The claimants state that the data are not based on impartial evidence gathering and that the figures are too high, arbitrary, incorrect, misleading, and disputed. Despite repeated requests in the past, Shell has failed to make clear the basis for the figures. The complaint charges that Shell has breached the OECD Guidelines, and in particular the sections (i) Disclosure (III)(1)(2)(4(e)), because:

the company provides misleading information and omits mention of relevant facts about causes of oil spills. Additionally, Shell bases its communications on biased and unverified information, thus failing to provide reliable and relevant information to external stakeholders. Incorrect and conflicting messages about causes of oil spills further contribute to low quality non-financial information.
It is further contended that Shell’s behaviour is in breach of (ii) Environment (V)(2)(3), which provision states that enterprises should “take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development” and in breach of (iii) Consumer Interests (VII), stating that companies should “act in accordance with fair business, marketing and advertising practices,” and in particular point 4 thereof requiring enterprises “not to make representations or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent, or unfair.”\(^{205}\) The Dutch NCP carried out an initial assessment of the notification and has accordingly determined that the issues raised merit further examination.\(^{206}\) The complaint was still pending at the moment of finalising this contribution (September 2011).

### 3.2.8 Settlement negotiations Bodo oil spills

A recent development concerns a court case in the UK in which Nigerian farmers alleged that they suffered from two massive oil leaks in 2008/9 from Shell operations which has caused devastating damage to the environment, in particular to the areas’ mangroves and waterways of the fishing community of the Bodo Community in the Niger Delta.\(^{207}\) Tens of thousands of barrels of crude oil, at an estimated rate of 2,000 barrels per day, leaked since August 2008, causing contamination to an estimated area of 20 km\(^2\) in the Gokana Local Government Area of Rivers State in Nigeria (see map 3.2.§). Shell disputes that, saying that a weld broke in September 2008 in the 50-year-old trans-Niger pipeline. Shell’s position is that it was informed of the first leak in early October 2008. The community’s position is that the leak by then had already been pumping oil for some six weeks and that it took Shell over a month to repair the pipeline defect. 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. According to oil spill assessment experts who have studied evidence of the two spills on the ground and on film, more than 280,000 barrels may have been spilled. Bodo is at the epicentre of several pipelines that collect oil from nearly 100 wells in the Ogoni district and there have been plenty of minor spills in and around the communities over the years. According to Centre for Environment, Human Rights and Development in Port Harcourt, these particular spills hit an exceptionally sensitive ecosystem for a very long time; it spread with the tides, and the health of people is at risk.\(^{208}\) Apparently, 80 per cent of the Bodo people here are fishermen or they depend on the water. They have lost their livelihoods; hence the spills have caused serious poverty. Social problems such as petty stealing and bunkering followed the environmental ones.\(^{209}\) The

\(^{205}\) OECD Complaint, pp. 12-13.


\(^{208}\) Idem. According to Nenabarini Zabby, head of conservation at the Centre for Environment, Human Rights and Development in Port Harcourt.

\(^{209}\) Idem. According to Chief James, assistant secretary to the Bodo council of chiefs and elders and Groobadi Petta, president of the Bodo city youth federation, youths from the area started to steal oil and refine it in illegal camps after the two spills occurred. Sylvester Vikpee, a barrister and legal adviser to the council of chiefs, said Shell had not responded humbly to the disaster. “They do not know the scale of the devastation. One of the richest companies in the world has done this to us. We have tried to talk to them and asked them what they plan. They have told us nothing.” “That Shell has now accepted responsibility for the massive spill at Bodo is surprising only in the sense that it is out of place for polluters of this sort to bow to the truth. We only hope that
amount of oil spilt is estimated at approximately 20 per cent the amount that leaked into the Gulf of Mexico following the BP Deepwater Horizon disaster. However, whilst that spill occurred in open ocean and allegedly dissipated, the oil spill in Nigeria was in the very creek in which the Bodo community live, feed, and fish. Experts claim the amount of coastline affected is equivalent to the Deepwater spill.

Map 3.2.8 (Source:[…])

The case was brought in April 2011 on behalf of some 69,000 Nigerians against SPDC. In an agreement between the parties, SPDC has agreed to concede to UK jurisdiction; the victims agreed to exclude Shell from the original action. In August 2011, the news came out that, Shell has accepted liability. Royal Dutch Shell plc confirmed that its Nigerian joint venture will begin out-of-court settlement talks with the affected community. The settlement negotiations will begin in autumn 2011 and are expected to lead to compensation to the community in "the tens of millions" of dollars, according to the claimants' lawyers. An SPDC spokesman confirmed it expects to pay compensation: "SPDC has always acknowledged that the two spills which affected the Bodo community and which are the subject of this legal action were operational. As such, SPDC will pay now they will wake up and accept responsibility for other places in the Niger delta," said Nimmo Bassey, chair of Friends of the Earth International from Lagos.

210 Idem.


compensation in accordance with Nigerian law. The legal process is continuing and could take several months to reach a conclusion.\textsuperscript{213}

The claimants’ lawyer welcomed the approach taken by Shell plc. He said: “The Bodo people are a fishing community surrounded by water. What was the source of their livelihood now cannot sustain even the smallest of fish. The spills have caused severe poverty amongst the community. We will be pressing Shell to provide them with adequate compensation immediately.” And: “I would hope that we will see urgent work being carried out to remediate the local environment.” It is expected that the settlement funds will be paid through a trust fund ‘within six months’, and that a clean-up operation would be underway ‘within weeks’. The shares in Shell stock went down in the week of the announcement of the settlement negotiations.\textsuperscript{214}

Royal Dutch Shell has been sued in a second case related to two oil spills at Bodo in the Niger Delta by the end of July 2011. The suit was filed at London’s High Court on behalf of King Felix Sunday Berebon of Bodo and 18 other parties. This second case is understood to be at a much earlier stage of negotiation than the case discussed above.\textsuperscript{215}

3.2.9 Concluding remarks on Shell’s corporate attitude towards Remedy

Concluding on the basis of the information presented in the previous sections, the authors present the following observations:

\begin{itemize}
  \item [(i)] Shell has been under attack from the people in the Ogoni delta and NGOs for a long time (at least since the beginning of the 90s).
  \item [(ii)] Shell has in the last decade defined CSR strategies and policies and communicates them firmly on its corporate website. Shell also declares it adheres to the Ruggie framework.
  \item [(iii)] One of the policies is to be more transparent about oil spills and the remediation thereof. Its website explains precisely what the Shell procedures are and since 2011, the company has introduced a website where stakeholders can follow how the company deals with each oil spill;
  \item [(iv)] Despite the clear policies, many stakeholders are unsatisfied with the company’s practices, as can be witnessed from the many protests made against the company and out loud about polluting the soil, water and air in the Niger Delta; about collaborating with the Nigerian authorities even when corruption is in play; and about the unfair distribution of the oil wealth in Nigeria. The UNEP report also remarked that Shell has not followed its own procedures in a diligent way. Protests have found their way to courts in Nigeria, the Netherlands and the UK, to parliamentary hearings in the Netherlands, into complaints to the Dutch and UK NCPs. The protests have been lodged by Ogoni, NGOs, investors, MPs and others;
  \item [(v)] In response to these protests, Shell claims that the Nigerian context is extremely complex and difficult to work in, that most oil spills are caused by sabotage, that Shell has difficulties to maintain their installations and pipelines in the Niger Delta and that they depend on others such as the Nigerian government as shareholder in their Nigerian joint venture of which Shell Nigeria is the operator, to stop gas flaring. As to the complaints that Shell collaborates too much and in a too non-transparent way with the Nigerian government, it states that such is necessary to protect its commercial interests. Regarding complaints that Shell is not prepared to share the results of oil spill investigations and the findings in EIA and HRIA, the company generally states that it cannot do so in order to maintain a solid legal position. As regards claims
\end{itemize}

\textsuperscript{213} See also news item, ‘This is Money’, at: http://www.thisismoney.co.uk/money/markets/article-2022259/Shells-clean-spill-pumped-2-000-barrels-oil-day-fishing-areas-Nigeria.html.

\textsuperscript{214} Supra note 45 [on the Shell share price in the week of 2-8 August 2011].

instituted in the Dutch court, the company defended itself first by bringing forward many formal defences that delayed the cases from a substantive evaluation by the court on the question of the duty of care that can be expected from Shell; in the UK, settlements have begun regarding a court case on oil spillages in Bodo where Shell commits to be at fault;

(vi) Shell also has started community projects and entered in MOUs with local villages;

(vii) The UNEP Report which came out in the beginning of August 2011 declared the Ogoni Delta and ecological and human disaster and estimated that it will take 20-30 years to restore the area;

(viii) Consequently, taking into account the GP on Remedy, there is room for improvement, for example: Immediate response; joint fact finding and data sharing; transparency on contact with authorities; joint governance in remediation projects and maybe also in any oil exploitation and exploration projects; mediation rather than litigation; using local mediatory conflict resolution methods; starting settlement funds for remediation is money better spend than in litigation (and lawyers still have work to do in setting up the funds :).

3.3 BP – OIL POLLUTION IN THE GULF OF MEXICO

BP CEO Tony Hayward responds to the disaster, which has destroyed the environment and livelihoods of many: "I’d like my life back". (http://www.huffingtonpost.com/2010/06/01/bp-ceo-tony-hayward-video_n_595906.html)

3.3.1 Problem Statement: Words are not Enough: Failures in Safety Culture

“The immediate causes of the Macondo [popularly referred to as Deepwater Horizon, due to the name of the oil rig] well blowout can be traced to a series of identifiable mistakes made by BP, Halliburton, and Transocean that reveal such systematic failures in risk management that they place in doubt the safety culture of the entire industry.”

On 20 April 2010, the oil rig known as Deepwater Horizon exploded in the Gulf of Mexico, resulting in an 87 day leak during which an estimated 205.8 million gallons of oil were discharged into the Gulf of Mexico. The rig was leased to BP from Transocean, a company that had committed multiple safety violations prior to the incident. Additionally, Transocean has been said to bear

---

216 White House Report, infra, note 216, at viii. This was written by the National Commission on the Deepwater Horizon Oil Spill, members of which were appointed by the President.


219 B. Meier, “Owner of Exploded Rig Known for Testing Rules” 7 July 2010, The NY Times, at: http://www.nytimes.com/2010/07/08/business/global/08ocean.html?hp.; See also Transocean Safety Statistics, at: http://www.deepwater.com/fw/main/Safety-Statistics-566.html, all websites accessed on 14 August 2011; The company’s own safety statistics, only through 2009 state that 4 (of at least 67) rights achieved a zero incident record in that period. As ‘incident’ as used by the company in this context is undefined, one must wonder what constitutes an incident; if ‘incident’ is defined only as a Deepwater Horizon level event then it is possible that
responsibility for “three of every four incidents that triggered federal investigations into safety and other problems on deepwater drilling rigs in the Gulf of Mexico since 2008”. BP’s own report finds a “lack of a robust Transocean maintenance management system for Deepwater Horizon.” Even if courts agree with BP’s findings, it is unclear what effect this will have as to liability. Under certain circumstances, most relevant to the case at hand engaging in hazardous activity, vicarious liability may be found in a contractor relationship. It will fall to the courts to allocate responsibility for the incident. Other preliminary responses to the event including oil executives testifying before Congress, as will be discussed below.

While the legal responsibility for the Deepwater Horizon oil spill has yet to be allotted, it is clear that safety measures were inadequate. Yet, in recent years, BP has been an industry leader in the pioneering of green energy and safety standards. One cannot help but wonder what happened? There appears to be a disconnect between the safety standards set out by the company and the actual implementation. One sees similar problems in the remedies afforded by the company; in practice, victims are left feeling inadequately compensated. As such, it is necessary to examine BP’s response to the oil spill and determine, through use of the Ruggie Framework, what further steps should be taken to ensure adequate respect for human rights.

3.3.2 BP: General Facts and Policies

BP is a London-based oil and gas company the fourth largest in the world as determined by revenue. It has operations in over 80 countries and employs 79,700 people. Stock prices in the year before the 2010 Gulf incident were in the upper 50s and reached a high of $60 per share in February 2010, with a considerable drop directly after the incident resulting in a low of $27.02 at the end of June 2010. BP share prices have slowly improved in the year since the incident, and at the time of writing this article (mid 2011) now hover around $45. Thus as of September 2011, stock prices are still lower than pre-incident level. Given the general upward trend in the NYSE over this period as well as for competitors Shell and Texaco, one can reasonably infer that the decrease in BP share prices is due to investor choice rather than industry or general market conditions. BP reported a profit (pretax) of $26,426 million in 2009, and a loss of $3,701 million in 2010. Due to its geographically

lesser accidents are not counted in this statistics. This would result in a truly dismal safety record. As Transocean chooses not to present its statistics in a transparent manner, one must question the true safety record.

References:

221 BP Report, loc. cit. note 218.
222 The general common law principle of agency is that a principle is responsible for acts of an agent dealing on his behalf.
223 UN HRC, loc. cit. Due Diligence.
225 Idem.
227 Supra note 225.
228 Idem. This number is current as of December 2010.
229 Yahoo Finance, Investing, BP plc common stock (NYSE:BP), at: http://finance.yahoo.com/charts?s=BP+Interactive#chart1:symbol=bp;range=2y;indicator=volume;charttype=line;crosshair=on;ohlcvalues=0;logscale=on;source=undefined, accessed on 14 August 2011.
diverse operations, it faces the challenges of interacting with a variety of different legal systems, whether in the normal course of business or through litigation. Thus in creating corporate policy, BP’s legal team must also take into account international standards as well as location specific legal needs. This is particularly apparent in the case of environmental or human rights, an area of increasing concern for oil companies. This need for flexibility is demonstrated through BP’s Code of Conduct which states that it “complies with all applicable legal requirements and the high ethical standards (...) wherever we operate.”

BP America Inc. is the US operation of BP and it is incorporated in the state of Delaware. It is a wholly owned subsidiary. There is little distinction between the parent and the subsidiary; corporate materials such as reports and websites make no mention of BP America Inc, instead referring to the American operations as ‘BP in the US.’ Furthermore, the 2010 Annual Report states that the report “does not distinguish between the activities and operations of the parent company and those of its subsidiaries.” Legal documents in “In re Oil Spill on the Oil Rig Deepwater Horizon in the Gulf of Mexico on 20 April 2010” refer to merely ‘BP’ and the company has not attempted to limit its liability to the subsidiary, though due to the apparent lack of separation between operations, such a strategy would likely fail. Additionally, such a dismissal of responsibility would likely result in reputational damage worldwide.

Other actors involved in the Deepwater Horizon incident are Transocean, the owner of the Deepwater Horizon rig leased to BP, and Halliburton, a subcontractor responsible for various duties including, as relevant in the case at hand, cementing work. BP has since filed suit against Transocean and Halliburton, alleging that the other company shared in responsibility as “decisions made by “multiple companies and work teams” contributed to the accident.”


233 Note, though that there are rumours regarding a split between BP’s US and foreign operations so as to contain the fallout from the Deepwater Horizon incident. BP has not commented upon these rumours; See The Economist, Should BP split?, The Pros and Cons of Slicing Oil Giants Apart, 30 July 2011, at: http://www.economist.com/node/21524921, accessed on 14 August 2011; and also see R.Mason, The Telegraph.co.uk, Oil Spill: BP Split Would Trap Global Assets in US, 16 August 2011, at: http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/7827765/Oil-spool-BP-split-would-trap-global-assets-in-US.html, accessed on 14 August 2011.


238 American jurisprudence allows for piercing of the corporate veil when required by the interests of justice. Effective control of a company is sufficient reason when the parent company is strategically undercapitalizing.

239 Transocean Ltd. is one of the largest drilling contractors worldwide. It provides rigs and equipment; see at: http://www.deepwater.com/, accessed on 14 August 2011.

240 See supra note 216, BP Accident Report.

241 Halliburton is a Texas based company that provides oilfield equipment, at: http://www.halliburton.com accessed on 14 August 2011.

242 Idem.


BP has previously addressed human rights concerns in its corporate policy. In 2005, BP published an internal Guide to Human Rights. This includes a checklist for project leaders, a definition of “what human rights means to BP” and instructions upon what to do upon discovery of human rights abuses. The company also states in this guide that “governments have the ultimate responsibility for protecting and promoting human rights.” This is somewhat mitigated by the statement that “every individual and every organ of society”— generally interpreted to include business—shall strive to promote respect for the rights and freedoms outlined therein. Finally, BP makes clear the limits of its responsibility, noting that “According to current legal convention, only governments or individuals acting on behalf of government can commit human rights abuses. (Companies can, however, directly breach national civil and criminal laws.)” The authors of this article remark that this statement is somewhat problematic in that it is an oversimplification to argue that non-state actors cannot commit human rights violations; for example, companies are certainly capable of hiring children, despite multiple conventions prohibiting child labour, and only the most naïve could believe that discrimination does not occur regularly within many companies. As of this time, there is indeed no international legal framework in which to prosecute non-state human rights violations by companies so it instead falls to the national courts to enforce these norms.

BP utilizes an internal grievance process for its employees. While the precise details are not available to the public, presumably published instead in an employee handbook or similar document, one may glean the basics from a website search. BP states that it “expect[s] everyone who works for BP to ask questions or report any concerns they have about risky or unethical behaviours among our employees, contractors and business partners.” BP provides a forum for these concerns through its confidential OpenTalk hotline. BP notes that “OpenTalk contacts are initially handled by an independent organization before being passed to a senior BP compliance manager, who will arrange a response and, if appropriate, an investigation.” No additional information is given about the independent organization, though often BP utilizes Ernst & Young as a third party auditor. The authors wonder whether what practical effect this hotline has due to the difficulty in reaching it; for example, the telephone number is not available through the webpage discussion of the programme, but requires a search through BP’s Code of Conduct, a search which ultimately yields the number. Note that while the materials may be more readily available to employees (perhaps through internal posters, a handbook, or similar), the general public will have great difficulty finding and utilizing this complaint process.

246 Idem.
247 Idem.
248 Ibidem, Quoting UN Draft Norms, pp. 2-3.
249 Idem.
251 In Martin Scheinin’s proposal for a World Court of Human Rights, various actors besides States can accept jurisdiction of the Court, such as transnational companies who conduct a considerable part of the production or service operations in a country or in countries other than the home State. Even “entities” that have not generally accepted jurisdiction of the Court can accept that jurisdiction on an ad hoc basis. All kinds of exercise of jurisdiction can result in a legally binding judgement of the Court, M. Scheinin, Towards a World Court of Human Rights, Research Report within the framework of the Swiss Initiative to commemorate the 60th anniversary of the Universal Declaration of Human Rights, Agenda for Human Rights, 30 April 2009, pp. 18-20, at: http://www.udhr60.ch/report/hrCourt_scheinin0609.pdf, accessed on 14 August 2011.
253 Idem.
254 Idem.
255 See supra note 350.
mechanism. The number is intended for “Employees, contractors or other third parties who have questions about the code or are concerned that laws, regulations or the code of conduct may be being breached…” but due to the difficulties discussed above one must question the accessibility for communities impacted by BP. As for the practical effects of OpenTalk, a provided graph shows the number of OpenTalk cases gradually decreasing throughout the years shown, 2006 to 2010. Finally, BP’s reporting procedure also discusses an ombudsman, stating that “workforce can also contact our independent US office of the ombudsman, headed by former US District Court Judge Stanley Sporkin.” This discussion of an ombudsman position indicates that this webpage is not frequently updated, as BP announced that this past October that this position will close in June 2011. Thus while one sees grievance procedures, the actual effectiveness must be questioned.

In addition to the post spill actions discussed in 3.3.6, the Oil Pollution Act, applicable to all operations in US territory (Deepwater Horizon was located in US waters), also contains guidelines for pre spill behaviour. It requires oil companies to have in place a “plan to prevent spills that may occur” as well as a “detailed containment and clean-up plan” for oil spills. Prior to beginning the Gulf Oil drilling project, BP filed an “Exploration and Environmental Impact’ plan. This plan did not include a required detailed impact analysis; BP was apparently exempted from this portion of the requirement. BP’s incomplete drilling plan was approved by the Minerals Management Service of the Interior Department (now the Bureau of Ocean Energy Management Regulation and Enforcement), an approval process criticized by some as mere “rubber stamping” of BP practices. Post spill review of the plan suggests that it was merely an adaptation of a previous plan for spills in Alaska, as it referenced the need to protect “sea lions, seals, sea otters (and) walruses”, wildlife not found in the Gulf. Following the lengthy clean-up process in the Gulf since the incident, many have expressed the view that the plan was vastly insufficient.

3.3.3 BP and the Ruggie Framework

256 Furthermore, one must wonder how it is determined that an investigation is appropriate. The third party auditor is Ernst and Young, who are involved in many of BP’s auditing. While outside oversight is important, using the same company for all one’s activities may result in the development of a relationship. This is not to suggest that there is any inappropriate behaviour on behalf of the auditors or BP, but merely a concern for appearance when third party auditing is conducted with a third party one is closely linked to. Perhaps BP would be better advised to separate its financial and CSR reviews.

257 See supra note 251.

258 Idem. This is particularly interesting when one considers the allegations of safety violations (see below) during this time period. Furthermore, the process is somewhat confusing. The website link for complaints is given as http://opentalk.bpweb.bp.com, but this link is broken and only after a careful search of the site does one find that the OpenTalk is instead found at: https://www.opentalkweb.com/, both websites accessed on 14 August 2011.

259 Idem.


262 Idem.


265 For example, BP had multiple revisions regarding the proposed drilling method. One of these revisions was approved a bare five minutes after submission. Idem, citing Permit Snafus on BP’s Oil Well, Wall Street Journal, 1 June 2010.

As has been explained in section 2 above, the second pillar of the Ruggie Framework considers the company’s responsibility to respect human rights. This “means – according to Ruggie – to act with ‘due diligence’ to avoid infringing on the rights of others.”

BP has faced accusations of human rights abuses and so has chosen to formally address this issue in its corporate policy. BP “participated in discussions about the development of a new human rights Framework led by Professor John Ruggie” and while one cannot find reference to the Ruggie Framework in its current dealings, the company has announced its intent to “carry out some detailed analysis of its current practices regarding human rights and considering whether it needs to make any changes to them in light of the Ruggie Framework.” No additional information about the analysis is available at this time. BP is more explicit, however, about its adherence to other reporting standards, Global Compact and OECD standards. Though BP does not discuss its usage, one considers that this may be due to the more concrete nature of these guidelines.

### 3.3.4 Facts of the Deepwater Horizon Incident

It will be some time before the courts determine the true facts and who bears the ultimate responsibility for the incident. Yet, as shown in the accident report, one can already conclude that industry safety standards are either insufficient or not properly enforced, resulting in incidents and oil spills that have cost human lives and destroyed flora and fauna respectively has put the means of existence for many, mainly poor, people in peril. As will be demonstrated below, the remedies provided by the oil company have not at all fully restored damages caused to the local people and the environment. This case highlights the need for scrutiny of corporate safety instructions, human rights policies and strict environmental care policies, and controlling the compliance thereof, both pre and post-accident.

### 3.3.5 Litigation

The Deepwater Horizon spill resulted in the release of 205.8 million gallons of oil into the Gulf Region. The oil spill’s effect was felt far beyond its immediate impact upon wildlife; the damage to the environment had a ripple effect upon the marine food chain. As a result, fishermen along the Gulf Coast have lost their livelihoods. BP faces many claims relating to this disaster, ranging from tort to property damage to civil rights claims. BP states on its website that it is “committed to paying all

---

267 Lambooy, CSR 2010, op.cit. (note 278).
269 Compare to, for example, the concrete discussion of Chevron’s use of the framework, supra Section 3.1
270 Idem.
271 BP: Global Compact, at: www.bp.com/extendedsectiongenericarticle.do?categoryId=9036156&contentId=7066908, accessed on 14 August 2011; BP lists out the Global Compact principles and in the next column lists where it is addressed in both BP’s sustainability report and on the website. This is done in a general fashion: ethics rather than a specific anti-bribery plan. However, in spite of the practical problems in enforcement, this still shows a commitment to the principles. One hopes this is the first step towards true implementation of the Global Compact.
legitimate claims for damages resulting from the Deepwater Horizon Incident.\footnote{BP: Gulf of Mexico Claims, at: http://www.bp.com/sectiongenericarticle.do?categoryId=9034722&contentId=7064398, accessed on 14 August 2011.} There is no elaboration upon the definition of ‘legitimate’ in this context, which is interesting when one considers the limitations upon liability as a result of the Oil Pollution Act, discussed later. It is difficult to get a sense of how much this will ultimately cost the company, considering that the company’s website (as per mid 2011\footnote{The statistics released by the Fund suggest more money has been paid out.}) states that it has spent nearly $40 billion, with $20 billion of this being contributions to the fund it created for Gulf incident victim compensation (the Fund). Such compensation is as required under the Oil Pollution Act, but this Act also limits liability of oil companies to $79 million. This fund will be discussed in greater detail in 3.3.6.\footnote{BP: How We Responded Trust Fund, at: http://www.bp.com/sectiongenericarticle800.do?categoryId=9036584&contentId=7067605, BBCNews, BP Back to Profit After Oil Spill, 2 November 2010, at: http://www.bbc.co.uk/news/business-11671953, all websites accessed on 14 August 2011.} BP had “committed to making additional payments to the Fund of $1.25 billion each quarter until the end of 2013.”\footnote{“BP Argues Gulf Recovery So Strong that Future Loss Claims Should End.” Washington Post 8 July 2011, at: http://www.washingtonpost.com/business/apnewsbreak-bp-argues-gulf-recovery-so-strong-that-future-loss-claims-should-end/2011/07/08/gIQA3Vvp3H_story.html, accessed 14 August 2011.} While this Fund may appear more than sufficient, one must also consider the massive impact of the incident. BP’s commitment to “all legitimate claims” could conceivably exhaust the Fund. As the Oil Pollution Act puts a cap upon BP’s liability, a cap that has already been exceeded by several billion dollars, one must wonder how the company defines “all legitimate claims”. On 8 July 2011, BP appears to have given an answer to this question. The document, not yet available to the public, allegedly states a desire to cease future payments because “areas affected by the spill have recovered and the economy is improving.”\footnote{BP was removed from the Dow Jones Sustainability Index on 31 May 2010, due to the “... BP: How We Responded Trust Fund, at: http://www.bp.com/sectiongenericarticle800.do?categoryId=9036584&contentId=7067605, BBCNews, BP Back to Profit After Oil Spill, 2 November 2010, at: http://www.bbc.co.uk/news/business-11671953, all websites accessed on 14 August 2011.} 3.3.6 Responses to the Incident In addition to these costs, the Deepwater Horizon incident also resulted in reputational damage to BP, as shown by the decrease in stock prices and its removal from the DJSI.\footnote{BP was removed from the FTSE4Good Index. McAlister and Webb, ‘BP Thrown Off FTSE4Good Ethical Index’, The Guardian, 10 September 2010, at: http://www.guardian.co.uk/business/2010/sep/10/bp-thrown-off-ftse4good-ethical-index, BP does not link bonus pay to CSR ratings, though after the Gulf oil Spill it now links bonuses to safety. BP, Bonus Structure, at: http://www.bp.com/sectiongenericarticle.do?categoryId=9027666&contentId=7050547, all websites accessed on 13 August 2011.} Clearly the investment community had concerns about BP’s ability to remedy the problem. It is impossible to determine the dollar impact of the ‘boycott BP’ movement\footnote{This boycott, which developed soon after the incident, arguably has a greater impact upon station owners than BP itself. See http://www.motherjones.com/blue-marble/2010/06/should-you-boycott-bp, accessed on 14 August 2011.} but the related Facebook group has over 800,000 members.\footnote{http://www.facebook.com/pages/Boycott-BP/119101198107726.} BP likely felt a need to generate positive PR and improve its image, as shown by its publications on its contributions to the clean-up. BP’s website, at the one year anniversary of the incident, features a bright red link, as opposed to the green and yellow colour scheme used elsewhere, to the ‘Gulf of Mexico Restoration’\footnote{See BP Website}; the linked page features beautiful images of local wildlife and discusses in general terms the company’s involvement in ‘restoring the environment’ and ‘restoring...
the economy. BP also took an effort to issue ads in The Economist and various newspapers on the progress made in cleaning the Gulf. Consumer opinion is an important factor to keep in consideration when analysing the disaster and so is the perception of talented future personnel. Possible theories of the case for litigation are limited. Due to the location of the disaster and victims, one would have to look at the duty of the US to protect its citizens against human rights violations, including those of third parties such as companies. As discussed in section 2, there exist assorted international treaties setting out human rights that are violated in similar cases. The US has not ratified the majority of these treaties and, indeed, opposes some of the concepts contained in it. It maintains its persistent objector status. Hence, theoretically, the US cannot be said to have violated any of the third generation rights. Thus, for example, Louisiana fishermen may not argue that their right to earn a livelihood has been threatened by the oil spill. The American Convention on Human Rights does recognize a ‘right to the environment’ in Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights. However, the US has not ratified this treaty and hence is not bound by it. Furthermore, in Medellín v. Texas the Supreme Court of the United States held that international commitments such as treaties are not binding domestically absent implementing legislation or indication that the treaty was meant to be “self-executing.” As such, one may not bring suit in the US against the US on the basis of international obligations absent this narrow criteria.

US Domestic law - Case Theories: non-tort damages and Collective Action

As a general rule, American jurisprudence revolves around an individual, rather than collective theory of rights. As such, the human rights framework is difficult to apply directly to the oil spill litigation. As discussed above, American jurisprudence does not recognize a right to the environment, to make a living, or to clean water. One does see human rights abuses directly addressed in the case of civil rights suits, but for the most part legal responses are in the realm of torts. While violation of rights widely accepted under an international framework (though not in the US) has occurred, torts theory proves the most practical means of achieving recompense in domestic courts.

284 J. Quinn, Telegraph.co.uk, BP to admit $1 m—a-week advertising spree, 28 August 2010 at: http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/7969586/BP-to-admit-1m-a-week-advertising-spreee.html, accessed on 13 August 2011.
285 See supra note 155.
287 Medellín v. Texas, 552 U.S. 491 (2008). This case involved a Mexican national, Medellin, convicted and sentenced to death for the rape and murder of two individuals in the state of Texas. Medellin was not informed of his right to contact the Mexican consulate as required under the Vienna Convention. Mexico brought this issue before the International Court of Justice. The Supreme Court of the United States determined that the international court’s ruling was not legally enforceable in the United States, as none of the relevant treaties had implementing legislation or were deemed to be self-executing.
288 Defined as when the “treaty has automatic domestic effect upon ratification.” Idem., at FN 2.
289 Note that the Clean Water Act does set out water quality standards and allows for citizens to bring suit over violation. 33 U.S.C. § 13655 However, such suits are not brought under a rights based framework, as in a right to clean water, but as violation of a statute which prohibits, for example, discharge of pollutants into a water supply. Furthermore, the OPA does permit recovery for environmental damages though not at the individual level: “resources ’include […] land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, or otherwise controlled by the United States, “state or local governments or Indian tribes, or foreign governments.” Designated trustees are the only parties that may recover for the natural resource damages.” S.A. Millan, “Escaping the ‘Black Hole’ in the Gulf” 24 Tul. Envtl. L.J. 41 (2010) at 43, citing the Oil Pollution Act 33 U.S.C. § 2702(b)-(f).
Note that the US Department of Justice is still pursuing criminal investigation. While the federal government has not filed criminal charges, the ongoing investigation suggests that such a case is a reasonable possibility.

**Cultural Losses**

Putting a price tag upon the damage, as typically required in torts or property based action, will be difficult. While one may compensate fishermen for a lost season’s catch, it is difficult to even contemplate a legal remedy for the loss of one’s way of life. This is particularly problematic among the Cajuns of Louisiana, a unique culture dependent upon the rapidly decreasing wetlands of Louisiana, already suffering from devastation caused by Hurricane Katrina. The additional impact of the oil spill has resulted in further damage to these communities. There is currently little recourse for cultural losses as experienced by Louisiana communities.

One sees an analogy in the Exxon Valdez case. This 1989 incident, the worst oil spill in American territory prior to the Deepwater Horizon incident, occurred when an oil tanker called Exxon Valdez ran into a reef and, due to the resulting damage to the vessel, released its cargo of oil into the Alaskan waters. Due to post Exxon Valdez legal developments which will be discussed below, the Exxon Valdez incident is of limited interest when discussing the current litigation. However, one case theory is of interest. A group of Amerindians brought suit for cultural losses, arguing that due to the environmental damage caused by the oil spill, they could no longer practice traditional hunting and fishing. The court did not find a ‘special injury’ to the cultural group as it determined that fishing and hunting disruptions resulting from the oil spill were not considered unique to the group. The court seemingly fails to take into account the cultural relevance of hunting and fishing as practiced by the Amerindians, as opposed to the mere financial losses of commercial hunting and fishing organizations. However, the court did find a general “right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual, and psychological benefits in pristine natural surroundings.” While there is some right to enjoy the environment, one must show special damages for the right to be actionable. This is a high bar; it is difficult to see what, if any, damages would be sufficient to meet it and the court does not elaborate.

Indeed, it appears difficult to distinguish the Deepwater Horizon case from precedent. Some hope appears when one takes into account that recent years have seen a change in attitudes towards protection of native peoples. The US has recently announced an intention to sign the Declaration on the Rights of Indigenous Peoples. This document, while non-binding, does provide a basis for recognition of the right to native lands and traditional practices and demonstrates a greater willingness on the part of the administration to take into account indigenous concerns. Whether this increased regard extends to the judiciary is yet to be seen. Additionally, one would face the problem of defining traditional Louisiana cultural groups as indigenous peoples; such protection may be deemed to be limited to tribal groups formally registered as such. It remains to be seen if lawyers will even


292 Courselle, D. “We (Used to?) Make a Good Gumbo: The BP Deepwater Horizon Disaster and Heightened Threats to the Unique Communities Along Louisiana’s Gulf Coast” 24 Tul. Env’t. L.J. 19 (2010).

293 Case, infra note 295.

294 Catan and Chazan, loc.cit. (note 291).


297 For example, the Atakapa Ishak, traditionally subsistence fishermen living in a ’water village’ in the wetlands of Louisiana, were significantly impacted by the incident. One tribal member refers to the incident as precipitating “cultural genocide”, at: http://news.nationalgeographic.com/news/2010/06/100608-us-oil-gulf-indians-video/, accessed on 14 August 2011. No suit on behalf of the tribe has been filed at the time of writing.
attempt to revive this theory of cultural losses or will instead focus upon less complex, economically provable damages.

**Class Action Fairness Act**

A class action suit is perhaps the most likely means of receiving compensation for individuals with injuries not recognized or denied by the OPA (see below in section 3.3.7). Many lawyers have engaged in advertising practices regarding class action suits and the individual seeking redress outside the Oil Pollution Act will find him or herself confused by the wealth of preliminary information inviting them to join a class. While class action suits allow for recompense of claims that are impractical to pursue on an individual basis, individuals in the Gulf Region will have some difficulties pursuing this litigation. The US Class Action Fairness Act of 2005 provides further difficulties for individuals seeking damages. This Act requires such class action suits to be removed to federal district courts whenever certain criteria apply: an amount over $5 million in controversy or parties from different states. This avoids forum shopping and allows for greater federal scrutiny. However, this can result in more costly litigation especially here when a case is removed from Louisiana as the victims will be dealing with unfamiliar law (and thus may not be using a local lawyer who is easily accessible and familiar with community standards). Furthermore, the case will be placed at the mercy of the busy federal docket. For example, BP litigation has so far been hindered by the fact that seven judges at the federal level have disclosed conflicts of interest, recusing themselves for reasons such as owning shares of BP stock. Some scholars argue that the Class Action Fairness Act and its automatic removal is inappropriate for environmental issues. As one critic put it, environmental damage “usually causes a small amount of harm to a large number of people.” Environmental disasters as compared to, for example, class action suits against an unsafe vehicle sold countrywide, disproportionately impact a particular community. By moving the suit out of the community, the judge is removed from the true impact of the disaster. Furthermore, the Supreme Court of the United States ruled on 20 June 2011 that female employees of Wal-Mart could not constitute a class in a case involving gender discrimination, due to the sheer size of the class. It remains to be seen what affect this have upon class certification in general, but one can expect to see greater scrutiny in certifying a class. This is a potential problem for class made up of, for example, fishermen who may be spread geographically across the region.

**Alternate theories: Crime Victims Rights Act**

Some scholars have suggested that current legal frameworks are insufficient for environmental damages. In recent years, one sees the creative application of the Crime Victims Rights Act as a vehicle for pursuing redress against corporate caused environmental damages. The Act requires victims to be granted a “reasonable procedure” for pursuing claims and, if granted status as a ‘victim’ the injured party has greater status in pursuing compensation for the environmental crime, as application of the Act grants these individuals a voice in criminal proceedings.

---

298 For example, it is conceivable that a subsistence fisherman would have difficulty producing sufficient documentation for recovery from the fund. A class action suit which focuses upon the damage to the community might be a more effective vehicle for litigation.


300 Class Action Fairness Act. *Idem.*


302 *Idem.*

The Crime Victims Rights Act of 2004\(^{305}\) defines the applicable victim as “a person directly and proximately harmed as a result of the commission of a Federal offense\(^{306}\) and guarantees individual several rights such as the “right to be reasonably heard at any public proceeding”\(^{307}\). The vagueness of these rights and broad application means that courts have struggled\(^{308}\) over whether this Act applies to victims “harmed as a result of the commission of a Federal offense” related to environmental crimes (for example, improper disposal of chemical waste). However, jurisprudence in this field is still growing and it is difficult to predict whether a given court will apply the Crime Victims Rights Act to victims of a particular case. The people of the Gulf region have and continue to suffer as a result of the Deepwater Horizon spill. As such, if criminal proceedings occur, one hopes that those truly affected will be involved.

### 3.3.7 Settlements: A Commitment to ‘All’ Legitimate Claims?

The Ruggie Framework represents a unique cooperation between states and companies to protect the human rights. The Fund, though it does not explicitly discuss the influence of the Ruggie Framework, takes this a step farther. From the Ruggie perspective, the Fund is a mix of company and state efforts to offer a remedy to victims. This legal and practical scheme allows for the reparation of individual damages in a timely fashion, rather than through lengthy litigation. The authors did not find any non-judicial remedies\(^{309}\) on the part of BP, though that is likely due to the US legal culture which may interpret apologies as an admittance of fault. Additionally, the need for a coordinated response across multiple states means that the federal government needed to take the lead in environmental rebuilding efforts.

**Oil Pollution Act of 1990**

A vast number of claims against BP will fall under the framework of the Oil Pollution Act of 1990.\(^{310}\) The Act, created in the aftermath of the Exxon Valdez oil spill\(^{311}\) exists to “establish limitations on liability for damages resulting from oil pollution, to establish a fund for the payment of compensation for such damages…”\(^{312}\) It limits the liability of oil companies to “the total of the liability of a responsible party under section 1002 and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed…[formula that gives particular dollar amounts as determined by the size of the oil tanker or offshore platform]”\(^{313}\) There are exceptions to this limitation on liability in the case of gross negligence or wilful misconduct of, or (B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party[…]\(^{314}\)

This provides an overarching framework for evaluating fault, and rapidly distributing compensation. Thus this Act simplifies the recovery process for the victims.\(^{315}\) The OPA also benefits affected communities, as it requires oil companies to have both a plan to prevent spills and a plan in case of accidents. In addition to the plans required by the OPA, the federal government oversees the National

---


\(^{307}\) Idem.


\(^{309}\) For examples of potential non-judicial remedies, see supra section 2.

\(^{310}\) Act of 1990, see Ronen infra note 311.


\(^{312}\) Idem.

\(^{313}\) OPA S 1004.

\(^{314}\) Idem.

\(^{315}\) Oil Pollution Act, Bill Summary and History ,at: http://thomas.loc.gov/cgi-bin/bdquery/z?d101:HR01465:@@@@@L&summ2=m&., accessed on 14 August 2011.
Oil and Hazardous Substances Pollution Containment Plan, in which the federal government, companies, and regional authorities work together to formulate contingency plans in the case of oil spills.\(^{316}\) Thus the US government is ultimately responsible for clean-up plans, but the responsible company is required to be involved in the process. Costs are managed through the Oil Spill Liability Trust Fund, funded by a tax per oil barrel, and repaid by the responsible company.\(^{317}\) Most notably, the OPA places a $75 million cap upon damages as applicable to this incident.\(^{318}\) Again, this is particularly interesting when considering that BP has promised to pay “all legitimate claims”;\(^{319}\) and it will be some time before it is clear what BP’s promise actually means for the victims. All claims must first be submitted to the $75 million fund\(^{320}\), which will be quickly exhausted by the volume of claims. Note that the $75 million cap is not absolute; determining the maximum financial contribution is somewhat more complex in practice. Oil companies are responsible for “clean-up costs” (precisely where the line between clean-up and compensation falls is unclear. Is this limited to the direct impact of the oil spill, or is the oil company financially responsible for farther reaching impacts along the food chain?) Additionally, there is still the possibility of additional damages in the case of “gross negligence” or criminal action. Furthermore, the Act “provides that if a responsible party can establish that the removal costs and damages resulting from an incident were caused solely by an act or omission by a third party, the third party will be held liable for such costs and damages.”\(^{321}\) As discussed previously, Transocean is thought to bear some of the responsibility for the incident. Unsurprisingly, BP has filed suit against Transocean and Halliburton (responsible for pouring the concrete that may have buckled and contributed to the disaster).\(^{322}\) Whether this will be sufficient to significantly reduce BP’s liability and or allow it to recover from Transocean and Halliburton under the theory of joint liability remains to be seen. At the time of the incident there was discussion in Congress over raising the cap on damages.\(^{323}\) This was ultimately unsuccessful for reasons best summed up by Senator Landrieu (Democrat, Louisiana): “We want to be careful before we change any of these laws that we don’t jeopardize the operations of an on-going industry, because there are 4,000 other wells in the Gulf that have to go on.”\(^{324}\) Other congressmen more vehemently opposed greater contribution: Representative Barton (Republican, Texas) stated that “it is a tragedy of the first proportion that a private company can be subjected to what I would characterize as a shakedown, in this case a $20 billion shakedown.”\(^{325}\) One may conclude that any legislative change in favour of the victims of the oil spill is unlikely. If BP intends to pay the full $20 billion or more, it will be of its own free will (absent a judicial finding that BP engaged in gross negligence, resulting in punitive damages).

The Gulf Coast Claims Facility

Claims against BP are filed through the ‘Gulf Coast Claims Facility’\(^{326}\) under administrator Kenneth Feingold.\(^{327}\) This facility was jointly created by BP and the US Department of Justice and the funds are

\(^{316}\) National Oil and Hazardous Substances Pollution Containment Plan, at:
http://www.epa.gov/emergencies/content/lawsregs/ncpover.htm, accessed on 13 August 2011.

\(^{317}\) Oil Spill Liability Trust Fund, at: http://www.epa.gov/emergencies/content/learning/oilfund.htm, accessed on 14 August 2011

\(^{318}\) Oil Pollution Act of 1990 at §1004, supra note 313.

\(^{319}\) Idem.

\(^{320}\) Ibidem, at §2713

\(^{321}\) Ibidem, at §1002(d). See also 24 Tul. Envtl. L.J. 41 2010


\(^{323}\) See H.R. REP. No. 111-521, at 6 (2010).

\(^{324}\) Lerer “Effort to Raise Oil-Spill Liability Fails in Senate”, 14 May 2010, at:


administered by appointed trustees Kent Syverud, Dean of Washington University in St. Louis School of Law, and John S. Martin Jr., a retired federal judge.  

This facility is “the official way for Individuals and Businesses to file claims for costs and damages incurred as a result of the oil discharges due to the Deepwater Horizon Incident on April 20, 2010 ("the Spill")… [The Administrator] and the GCCF are acting for and on behalf of BP Exploration & Production Inc. in fulfilling BP’s statutory obligations as a “responsible party” under the Oil Pollution Act of 1990.”  

Eligibility for the claims fund is dependent upon:

- Property damaged by the oil spill or the clean-up efforts (example: damage to a boat)
- Loss of income/earning capacity (example: Lost your job or had your hours cut because of the spill — fishermen, workers in seafood industry, workers in hotels or restaurants)
- Net loss of profits or earnings from a business you own (example: boat owners, hotel owners, restaurant owners)
- Subsistence loss (example: can no longer catch fish to feed your family)
- Approved Removal and Clean-up Costs (example: removal activities that are approved by the Federal On-Site Commander or are consistent with the National Contingency Plan)
- Physical injury or death (injury to the body proximately caused by the Spill or the explosion and fire associated with the Deepwater Horizon oil spill, or by the clean-up of the Spill)  

As previously discussed, BP has stated that it is “committed to paying all legitimate claims,”  

Lawsuits currently pending exist under a variety of categories, ranging from simple actions for calculable damages to civil rights violations.  

Note that there is some debate over the use of the term ‘neutral’ in that BP was involved in the creation of the fund and Mr Feingold may be “publically perceived” to be acting as BP’s counsel as BP is paying him for his role as administrator.  

Ethics experts debated this characterization but Judge Barbier ruled that “BP has created a hybrid entity, rather than one that is fully independent of BP.” Thus the Feingold is “independent” in the sense that BP does not control Mr Feinberg’s evaluation of individual claims… [but] cannot be considered “neutral” or totally “independent” of BP.”  

The court criticizes Mr Feingold’s misleading behaviour, including “publicly advising potential claimants that they do not need to hire a lawyer and will be much better off accepting what he offers rather than going to court.” Mr Feingold was instructed to identify his relationship to BP and advise claimants that they had an attorney. The claims website homepage states that “You have the right to consult with an attorney of your choosing before accepting any settlement or signing a release of legal rights.” The claims facility is still referred to as ‘independent’ on US government
website restorethegulf.org and confusion is likely to continue. Furthermore, claimants have criticized the claims process for its lack of transparency.

Filing Process
In contrast to the complex calculations of liability set out in the Oil Pollution Act, the filing process itself is fairly simplistic. An injured party need only visit gulfcoastclaimsfacility.com which instructs them to file a claims form and supporting documentation by email, fax, or postal service. The claim is reviewed by the administrator and the trustees distribute the funds. BP or the claimants, if the amount in controversy is over $250,000, may appeal. At this point the claim is reviewed by the Appeals judges. The simplicity of the process, as outlined by the Oil Pollution Act, allows the injured party to recover without the cost of a lawyer and the associated litigation fees. Theoretically, this process is also faster as it bypasses crowded dockets. BP also benefits from the fund in that individuals choosing to settle now are later prohibited from bringing suit at a later point in time where the long term damage of the oil spill is more apparent. Some damage resulting from the oil spill may take time to become visible.

The Gulf Coast Claims Facility faces further criticism related to the claims. Debate rages over whether the affected parties are receiving appropriate compensation; while some parties such as fishermen claim that their losses are not being fully compensated, there also exist cases of fraud. As a result, the Department of Justice has called for an audit of the facility and the state of Mississippi has filed suit alleging that the lack of transparency in the claims process constitutes failure to comply with state consumer protection laws. As such, one cannot help but question the effectiveness of the claims facility.

Other Aid

343 See supra note 325, Claims process for Individuals and Business.
344 Most claims that have been granted thus far are in the $5,000 range and so would not be eligible. However, it is unclear if the claims granted thus far are indicative of the overall makeup of claims; claims regarding larger
345 The Claims Administrator appointed an Appointing Authority who appointed the Appeals Judges, who are a variety of legal scholars from across the affected region. http://www.gulfcoastclaimsfacility.com/faq#Q14.
346 See supra note 328, Claims process for Individuals and Business.
347 For example, Dr Lichtveld of the Tulane University School of Public Health and Tropical Medicine has just begun a five year study on the effects of the oil spill on women’s health. See at:
349 Nola.com article on oyster fishermen

50
In addition to the compensation discussed above, individuals have additional options for assistance.\(^{353}\) Federal Disaster Assistance has proven instrumental in providing aid for communities devastated by the incident in the form of food assistance and environmental monitoring. The Small Business Administration also made low interest loans available to small businesses affected by the disaster.\(^{354}\)


\(^{354}\) Idem. The SBA is a government agency that addresses the interests of small businesses.
Table 3.3.8 presents an overview of actions in the BP case. The authors have come to the following observations regarding the remedies offered by BP in response to the Gulf Spill:

(i) The Deepwater Horizon incident represents a failure of safety standards, a fact recognized both by BP itself and the preliminary investigation team.

(ii) BP engages in a number of corporate grievance mechanisms, as discussed in 3.3.2.

(iii) BP also provides remedies to victims of the Deepwater Horizon incident in the form of its mandatory contribution to the Fund.

(iv) The Fund has garnered criticism for its lack of transparency.

(v) Thus while the Fund is a step towards providing remedies as discussed in the Ruggie framework, it is not sufficient.

(vi) This demonstrates the need for community interaction for the creation of effective remedies.

While BP is to be lauded for its paper commitment to stakeholder interests and sustainable practices, the lack of practical application as regards preventing and remedying is problematic. The combination of this general disconnect between corporate policy and the enforcement of such policies concerned with stakeholder interests is worrying. In combination with the limitations placed upon recovery by the OPA and the class action process, one must wonder what BP’s commitment to “paying all legitimate claims” truly entails and it remains an open question whether it is even possible for the injured parties to receive adequate compensation at all under this system of remedies.
4. CONCLUDING COMPARATIVE ANALYSIS CORPORATE REMEDIAL RESPONSES OIL POLLUTION INCIDENTS

Having discussed the remedies undertaken in three separate cases, the writers now analyse the actions taken by the companies using the Ruggie Framework. As discussed in section 2.2, the GP discuss standards for determining the effectiveness of remedies, such as legitimacy, accountability, predictability, equitability, transparency, rights compatibility and the application of lessons learned. Table 4 illustrates the findings when applying these standards to the three cases at hand.

<table>
<thead>
<tr>
<th>Accessibility</th>
<th>Transparency</th>
<th>Effectiveness (effective remediation to people, environment, society)</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Cooperation and engagement with the already established and recognized effective grievance mechanisms such as: NCPs, Ombudsman-Like Shell, BP and Chevron could have done.</td>
<td>• Active participation of the parties to the available remedy processes-Like all three could have done.</td>
<td>• Apology. Recognition of the harm-Like all three could have done and especially Chevron when it was asked by the Ecuadorian Court.</td>
</tr>
<tr>
<td>• Development of the already established corporate grievance mechanisms such as OpenTalk Lines and employee Hotlines-Like all three companies could have done</td>
<td>• Promoting awareness of the benefits and the advantages of the remedy process-Like all three could have done.</td>
<td>• Building trust with the harmed and society-Like all three could have done.</td>
</tr>
<tr>
<td>• Establishment of local access points as common places for companies, victims and third parties to develop and provide non-judicial remedies to the victims or to commence negotiation processes-Like Shell, BP, Chevron could have done.</td>
<td>• Development of process standards and principles for the remedy-Like especially BP and Chevron could have done.</td>
<td>• Physical compensation-remediation and reparation of the environment. Repair natural landscape as it was before the harm-Like especially Shell and BP could have done and Chevron did it inadequately. The UNEP Report also emphasised the importance of a full restoration of the environment.</td>
</tr>
<tr>
<td>• Participation and active cooperation with the public sector in developing mediation and arbitration institutes that provide non-judicial access to remedies-Like all three could have done.</td>
<td>• Avoidance of corruption and establishment of clear processes by advanced public disclosure -Like all three companies could have done.</td>
<td>• Financial compensation to victims: Introduction and establishment of remediation funds.1. Proactively - they can be used as the ‘just in case’ funds. 2. - Retroactively they can be used to compensate the victims-Like BP did and the UNEP Report proposed for the Ogoni victims.</td>
</tr>
<tr>
<td>• Avoidance of any accessibility barriers for remedy such as local illiteracy, physical or natural barriers, lack of financial means, voluntary legal aid-Like Shell, BP, and Chevron could have done</td>
<td>• Promotion of the adequate and effective information and risk assessment mechanisms for the victims towards remedy; sharing information about environmental assessments, both before and after spills-Like Shell, Chevron and especially BP could have done.</td>
<td>• Avoidance of the disadvantages of the adversarial legal system by providing sharing information processes and disclosure between the parties-Like especially Shell could have done under Dutch Law.</td>
</tr>
<tr>
<td>• Access points that are culturally adjusted to the victims’ and their cultural and educational background-Like especially Chevron could have done.</td>
<td>• Avoidance of the disadvantages of the adversarial legal system by providing sharing information processes and disclosure between the parties-Like especially Shell could have done under Dutch Law.</td>
<td>• Dialogue-based approach, alleviation of conflicts of interest between the parties to achieve a final consensus-Like all three could have done.</td>
</tr>
<tr>
<td>• Helping victims to assess, and understand their options for accessing remedies and help them connect the remedies to the necessary and available resources-Like Shell, BP, Chevron could have done.</td>
<td>• Specific determination of the role of the third parties in the remediation processes such as government and NGOs to assist victims, and mediators and arbitrators to serve as neutral intermediaries-Like especially Chevron could have done with the Ecuadorian Government and the Amazon Defense</td>
<td>• Mandatory participation of the companies to public initiatives compensating victims-Like BP could have done with the Gulf Claims Facility.</td>
</tr>
<tr>
<td>• Community education</td>
<td></td>
<td>• Alternative and Community Dispute Resolution Mechanisms Mediation-Arbitration Initiatives</td>
</tr>
</tbody>
</table>
programmemes regarding the access to the remedies. Like all three should have done

Coalition and Shell could have done by accepting the role of Milieudefensie in the Dutch tort litigation.

1. Governance by a diverse multi-stakeholder advisory body or governing board to enhance credibility and confidence-Institutional cooperation and affiliation.
2. A networked structure approach is appropriate for an international mediation facility.
3. Building the capacity of mediators.
4. Building a clearinghouse for case stories.-Like Chevron did and BP, Shell could have done.
   • Avoidance of costly litigation and emphasis in the actual compensation of victims.-Like all three could have done.

Table 4.1. Overview of elements of effective remediation

Interestingly, in the three cases the companies rely heavily upon existing judicial remedies as has been demonstrated in the previous sections and in Table 4.2. The Remedies Chart [see Excel doc to be inserted here]. Alternative dispute mechanisms are almost wholly unconsidered, as one sees in Table 4.1, except in the case of the arbitral tribunal in the Chevron case. While it is understandable that such a framework may be preferred by victims due to the (theoretical) neutrality of the court system, corporate involvement is also necessary. Such initiatives must be of a complementary character without undermining the legal and judicial existing mechanisms. Their form is of a hybrid character that stands between formal litigation and ad hoc public consultation or mediation.

Looking at the solutions offered by all companies, one sees as a common thread the lack of transparency. There exists a lack of coherent information to citizens about oil operations and potential health risks as the right to a healthy environment requires. Those affected by the disasters are both uncertain about their options for recompense and whether the actions taken by companies are sufficient (consider the cases of BP and Chevron and contradictory evidence regarding the presence of toxic chemicals). Further transparency regarding both the relief procedure and the facts of the incident would go a long way towards assisting victims in rebuilding their lives. Unfortunately the current litigation system does not encourage such transparency; due to the adversarial process companies have every incentive to keep disclosure limited to the minimum required by law. The adversarial process also negatively affects community relations; an apology and recognition of the harm caused by oil spills would be beneficial in building the trust necessary to work together to rebuild affected communities. For liability reasons, however, companies are reluctant to apologise or otherwise admit fault. While judicial remedies are a necessary part of the remedy process, one must be aware that their existence and the process of trial preparation may impede other efforts.

The Ruggie Framework provides for the interaction of State and company forms of remediation. One sees an example in the case of BP, where BP created the Fund at the behest of the US government. As discussed in section 3.3.7, this Fund is not without problems but represents an attempt to make victims whole without requiring lengthy litigation. Interestingly, the Fund is available to victims even without a direct finding of fault on the part of BP. BP may, if it successfully brings suit against a subcontractor and is found not liable, recover these costs. In the meantime, however, fishermen can use the funds compensating for a lost season to outfit their boats and attempt to return to normalcy. Again, the Fund does raise concerns as discussed in section 3.3.7 (many of these concerns related to a lack of transparency), but it represents the most successful melding of state and corporate remedy procedures. From the cases, one sees an evolution of remedy procedure, moving from the minimal public involvement in the Texaco settlement, to the NGO cooperation in the Shell case, and finally to BP’s

355 See supra note 7.
356 Idem.
Fund. These steps toward a fully effective remedy show the vital importance of involvement by the company, community, and government, as well as the need for transparency through the entire process. It is only by learning from the and partial successes of the past that a fully effective remedy procedure can be created and implemented. Interestingly, the recent UNEP Report on human rights, pollution and the lack remedies in the Nigerian Ogoni Delta, also suggests to establish a remedy fund, governed by neutral fund managers and to set up various board(s) to supervise the envisaged remediation process. The Report recommends that the oil companies and the Nigerian government contribute the money to this fund.

It is only by learning from the and partial successes of the past that a fully effective remedy procedure can be created and implemented. Interestingly, the recent UNEP Report on human rights, pollution and the lack remedies in the Nigerian Ogoni Delta, also suggests to establish a remedy fund, governed by neutral fund managers and to set up various board(s) to supervise the envisaged remediation process. The Report recommends that the oil companies and the Nigerian government contribute the money to this fund.

It is interesting to witness the development that parliamentary hearings were organised (i) in the Netherlands to question Shell’s practices in Nigeria and (ii) in the US to question BP executives about the Gulf accident and oil spill. These companies were publicly requested to explain their corporate policies concerning avoiding environmental pollution and respecting human rights. Also, in 2009 banks were invited by parliaments in various countries to explain their role in the financial crisis of 2008. One could consider this as a way to holding multinational companies publicly accountable for their policies and the ways in which they provide remedies when things go wrong. In the Netherlands, the MPs explicitly alluded to the Ruggie Framework and brought up the question to what extent Shell is remedying the problems connected with the oil exploitation. One could see these new types of hearings as public stakeholder meetings in which companies are questioned about their CSR strategy and policies and in particular which remedies they employ to solve problems.

Retroactively cleaning up and making a restart as a responsible company would in our opinion include allocating part of the profits so as to make a true clean sheet in the area of human rights. Obviously, the shareholders would have fewer dividends this year, but these incidents concern real human rights problems that, while a result of past actions still have significant consequences. This is clear from the continuing protests and litigation. Consequently, remedy requires recompense both for the past and a safer plan for future operations by BP, Shell and Chevron ('We Agree').
<table>
<thead>
<tr>
<th>BP-Shell-Chevron</th>
<th>nature (defining victim/polluter)</th>
<th>MoU: (Before/after pollution incident)</th>
<th>Villagers response</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>BP:</strong> Oil spill in Gulf of Mexico April – September 2010</td>
<td>Run by US gov, BP contribute to Oil Liability Fund n/a</td>
<td>Assorted groups: LEAN, Coastal Birds, etc.</td>
<td></td>
</tr>
</tbody>
</table>

**Shell:** Three cases of oil pollution in 3 villages in Nigeria: Oruma, Goi, Ikot Ada Udo. Each started a tort case together with Friends of the Earth NL and Nigeria – before a Dutch court against Shell Holding and Shell Nigeria. Nigerian law obliges the operator to do so. Various (source: shell report) Have tried for long to solve the problem with Shell Nigeria.

**Chevron:** 1965-1992 extensive oil pollution in the region of Oriente especially in Lago Agrio village:
- Case 1: Aguinda case - tort case (US) 1/3 restoration of the contaminated regions in 1992 after the expiration of the concession contract with the Ecuacorian government n/a
- Case 2: Lagio Agrio tort case (Ecuador) n/a
- Case 3: Arbitration proceedings - BIT Ecuador-US, Hague (NL) n/a
- Case 4: RICO lawsuit against LAP and lawyers – criminal proceedings (US) n/a

Several Demonstrations outside of Chevron’s Building in California by villagers who travelled especially for that reason in the annual shareholders meeting, also in ‘‘Crude ‘‘ documentary, collaboration between NGOs and local people.
<table>
<thead>
<tr>
<th>Mediation</th>
<th>Settlement</th>
<th>Class possibilities</th>
<th>Legal (alternative)</th>
<th>Type of claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>n/a</td>
<td>Oil Pollution Act, most common means of recovering so far</td>
<td>Unclear, due to limitations of Walmart</td>
<td>OPA, court system</td>
<td>See chart</td>
</tr>
<tr>
<td>Not applied</td>
<td>n/a</td>
<td>Not applied</td>
<td>Plaintiffs used Dutch tort law; Shell submitted various technical defences (forum non conveniens, lis pendis, new Shell holding co hence)</td>
<td></td>
</tr>
</tbody>
</table>

**1992**
Settlement agreement between TEXPET and Ecuadorian gov, TEXPET to clean up 1/3 of the contaminated area and release of any future liability for the remediated and/or non remediated areas. Governmental Consent. Allegations for fraud against Chevron in setting up the agreement.

Aguinda case, ATCA dismissed on forum non conveniens, La go Agrio Case EMA and other tort laws, Chevron answered with the Arbitration proceedings and the RICO filing

Tort
Information sharing | Disclosure
---|---
FRE. Adversarial process | FRE no US framework for co-discovery

Shell takes the position that it does not want to share the info requested by the plaintiffs, hence plaintiffs started document disclosure procedure under Dutch law (exhibitie).

By the year 2000 transition from inquisitorial to adversarial processes - Creation of cooperative courts with computerised case tracking, dedicated file rooms, work stations, public counters where information about cases and access to files is provided.

Allegations against the plaintiff’s attorney Steven Donzinger for fraud - Allegation against Amazon Defence Coalition: the trustee of the plaintiffs’ compensation.