

# Mechanisms used by multinational oil companies to derail human rights and environmental litigations arising from the Niger Delta.

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# Mechanisms Used by Multinational Oil Companies to Derail Human Rights and Environmental Litigations Arising from the Niger Delta

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## Abstract

Multinational oil companies (MNOCs) usually claim that they have several obligations to protect human rights and the environment where they operate and to resolve any disputes with local communities arising from their operations in the shortest possible time. However, the combative approach taken by MNOCs (e.g. several interlocutory appeals, challenging the legal standing of plaintiffs) during human rights and environmental litigations undermines these obligations because it continually denies, delays, and derails justice for the local communities. The aim of this paper is to discuss the mechanisms used by MNOCs to derail human rights and environmental litigations arising from the Niger Delta. This paper uses a comparative legal approach combined with a cross-case analysis of a selection of transnational litigations to highlight several mechanisms that fall into eight (8) categories related to oil operations – transparency, disclosure, bribery and corruption, labour/employee rights, safety and security, delays in litigations, pollution, remediation and compensation. The paper concludes that mechanisms used by MNOCs (e.g., Shell), as indicated in recent litigations arising from

the Niger Delta, are at odds with their human rights obligations, thus affecting effective remedies for the people whose human rights have allegedly been affected by corporate conduct.

## Keywords

human rights – environmental rights – litigations – obligations – violations – derail – multinational oil companies – Niger Delta

## 1 Introduction

The objective of any company in business is to resolve the substantive dispute at stake as quickly as possible. This objective is in line with the human rights obligations of most parent companies and their subsidiaries.<sup>1</sup> However, the mechanisms used by the MNOs (e.g., Shell), as shown in recent litigations arising from the Niger Delta, are at odds with their human rights obligation relating to effective remedies for individuals whose human rights have allegedly been violated by corporate behaviour. One of the most common mechanisms used by MNOs that conflicts with their human rights obligation is to deny all allegations and prevent the case from being heard in court. This should not be a concern for MNOs if there are no issues with human rights and environmental violations. It should not also be an issue if MNOs are committed to resolving the dispute by providing a suitable remedy, including apologies, rather than being defensive and calculative on how to get away with the allegations. Even when the litigation is cleared to be heard, they still initiate actions to delay further and prolong the litigation.

Let me give an example to illustrate this point. In the *Oguru v Shell* case,<sup>2</sup> Shell had unsuccessfully challenged the standing of Milieudefensie, a well-known Dutch environmental NGO which was one of the initiators and backers of these proceedings and a member of Friends of the Earth. The Dutch court ruled in favour of Milieudefensie based on Article 3:305a of the Dutch Civil Code, which allows an association or a foundation to file a claim if it aims to protect similar interests of others and provided it represents these interests

1 Cees van Dam, 'Enhancing Human Rights Protection: A Company Lawyer's Business' (Rotterdam School of Management Erasmus University, 2015).

2 *A F Akpan v Royal Dutch Shell, plc*; *E Dooh v Royal Dutch Shell, plc*; *F A Oguru v Royal Dutch Shell plc* (18 December 2015) Court of Appeal of the Hague.

according to its constitution.<sup>3</sup> Shell continued its battle at the procedural level by arguing that the standing of the individual claimants (that is, Fidelis Ayoro Oguru, Alali Efanga, and Friday Alfred Akpan), needs them to be the exclusive owners of the affected grounds and fishing ponds. Shell further argued that claimants had not provided evidence to this effect. This was not all; Shell demanded that it be allowed to challenge the preliminary judgement of the Court of Challenge before the Dutch Supreme Court (Hoge Raad), rather than waiting for the Court of Appeal's decision on the merits. The court rejected this request. Many scholars have concluded that such a mechanism is an indication that Shell is not interested in finding a realistic solution to the conflict in the shortest possible time.<sup>4</sup> Shell's intention was instead to use all available mechanisms to give the plaintiffs a hard time and to deplete their financial resources as much as possible. For example, as Cees van Dam pointed out, the dispute over the standing of the individual claimants and the arguments Shell chose to use in this regard tend to contribute little to the long-term resolution of the case (over seven years).<sup>5</sup>

The aim of this paper is to investigate the mechanisms used by MNOCS to derail human rights and environmental litigations arising from the Niger Delta. The main contributions of this paper are:

- explaining the concept of derailments, the different phases of derailments, and the associated mechanisms for derailing human rights and environmental litigations;
- evaluating four (4) transnational litigations arising from the Niger Delta to identify how MNOCS violate their human and environmental obligations; and
- analysing eight (8) types of mechanisms used by MNOCS to derail litigations and how MNOCS exploit these different mechanisms to derail human rights and environmental litigations arising from the Niger Delta.

This paper uses comparative analysis to evaluate four (4) transnational human rights and environmental litigations (that is, *Wiwa v Shell*, *Bodo v Shell*, *Oguru v Shell*, and *Bowoto v Chevron*) to analyse how MNOCS exploit different mechanisms to derail human rights and environmental litigations. The four litigations cut across three jurisdictions – the US, UK (England), and the Netherlands – all arising from the Niger Delta.

3 Lee James McConnell, 'Establishing Liability for Multinational Corporations: Lessons from Akpan' (2014) 56 IJLMA.

4 Cees van Dam, 'Preliminary Judgments Dutch Court of Appeal in the Shell Nigeria Case' (Rotterdam School of Management, Erasmus University 2016).

5 *ibid.*

This paper argues that mechanisms used by MNOCS (e.g., Shell), as indicated in recent litigations arising from the Niger Delta is at odds with their human rights obligations, thus affecting effective remedy for the people whose human rights have allegedly been affected by corporate conduct. This paper recommends that resolving disputes within the shortest possible time and developing a legal framework to address the derailments in litigations will improve human rights and the environment in the Niger Delta.

The rest of the paper is organised as follows. Section two discusses the background of the study. Section three discusses derailments of human rights and environmental litigations, the types of human rights violations and associated mechanisms used by MNOCS to derail litigations. Section four discusses four (4) transnational human rights litigation arising from the Niger Delta. Section five is the discussion, and Section six concludes the paper with future work.

## 2 Background

MNOCS have been involved in oil and gas operations since the 1950s. The oil operations have impacted communities in the Niger Delta, and MNOCS have been accused of violations of human rights and the environment (torture, victimisation of employees and local communities, oil spill, destruction of land and water bodies).<sup>6</sup> Multinational oil companies are increasingly facing litigations from victims due to reoccurring incidences of human rights and environmental violations (e.g., oil spills, clean-up and remediation) in the Niger Delta. There are several difficulties in holding parent companies to account in Nigeria.<sup>7</sup> Peter Nygh<sup>8</sup> and Gwynne Skinner<sup>9</sup> have discussed some of these difficulties, including weak and ineffective judicial systems in the host countries; difficulty in knowing the entity to sue due to the company's complex corporate structure; subsidiaries pursuing a policy of delay; denial and derailment of

6 Smith I Azubuike and Ondotimi Songi, 'A Rights-Based Approach to Oil Spill Investigations: A Case Study of The Bodo Community Oil Spill in Nigeria' (2020) 1 *Global Energy Law and Sustainability*. See also Amnesty International, 'Bad Information Oil Spill Investigations in The Niger Delta' (Amnesty International Publications 15–65 2019) <<http://www.amnesty.org>> accessed 21 November 2019.

7 Fasken Martineau DuMoulin LLP, 'Corporate Parental Liability: Litigation Risk for Resources Companies' (4 December 2018).

8 Peter Nygh, 'The Liability of Multi-National Corporations for The Torts of Their Subsidiaries' (2002) 3 *EBOR*.

9 Gwynne Skinner and others, 'The Third Pillar Access to Judicial Remedies for Human Rights Violations by Transnational Business' (The International Corporate Accountability Roundtable (ICAR), CORE, The European Coalition for Corporate Justice (ECCJ) 2013).

justice; and subsidiaries being underfunded and thus not being able to pay any damages (including compensation and remediation).

As a result of the difficulty in holding the oil companies liable in Nigeria, the oil spill victims decided to sue the parent companies of these oil companies abroad. Recently, there has been an increase in transnational litigations arising from the Niger Delta, which individuals and communities have brought against parent companies in England, the Netherlands, and the US, where most of the parent companies of multinational oil companies operating in Nigeria are based.<sup>10</sup> These litigations include – *Wiwa v Shell*, *Kiobel v Shell*, and *Bowoto v Chevron Corp* in the United States; *Bodo v Shell/SPDC* and *Okpabi v Shell* in the United Kingdom; and *Oguru v Shell* and *Kiobel v Shell*<sup>11</sup> in the Netherlands. Esther Hennchen concludes that the modest success recorded in some aspects of these litigations shows that legal borders become permeable, especially when liability is at stake.<sup>12</sup> Liesbeth Enneking has discussed several transnational human rights and environmental litigations related to Shell in Nigeria. The discussion of these litigations focused on the key factors determining the outcome of the foreign direct liability cases – jurisdiction, applicable law, the legal basis for corporate liability, and procedural rules and liabilities. This paper focuses on the mechanisms of MNOs in human rights and environmental litigations that conflicts with their human rights obligations in the Niger Delta.

It has been highlighted that the mechanisms used by MNOs to derail human rights and environmental litigations, especially in developing countries, conflict with their human rights obligations. Cees Van Dam, in his commentary on the preliminary judgments on the Dutch Court of Appeal in the Shell Nigeria Case, concluded that Shell's request to be allowed to challenge the preliminary judgement before the Dutch Supreme Court (Hoge Raad), rather than waiting for the Court of Appeal's decision on the merits was intentional to "cause further delay to the procedure, increasing the time, efforts and costs for the claimants."<sup>13</sup> Van Ho et al, in their work, have also stated there is a disconnect between what Shell documents regarding its Human Rights obligations on websites, newspapers, annual reports, code of conduct, etc, and the way

10 Liesbeth Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case' (2014) 10 Utrecht L Rev 44–50.

11 *Oguru v Shell* [2011] District Court of The Hague.

12 Esther Hennchen, 'Royal Dutch Shell in Nigeria: Where Do Responsibilities End?' (2014) 129 J Bus Ethics.

13 van Dam, 'Preliminary Judgments Dutch Court of Appeal in the Shell Nigeria Case' (n 4).

it handles legal disputes with victims of Human Rights and environmental violations.<sup>14</sup>

It is important to note that MNOCS have violated several areas of their human rights and environmental obligations. These include non-transparent and non-disclosure information required to support plaintiffs during litigations; employing various delay tactics during litigations (e.g., interlocutory appeals); and disputing information related to the cause of oil spill, remediation, and compensation. Many of these mechanisms impact human rights. When MNOCS employ several mechanisms to delay the litigations, they do so to exhaust the plaintiffs' time and effort and deplete their resources during litigations. For example, the Oil Pipeline Act 1990,<sup>15</sup> which states that oil companies are not liable for remediation and compensation for oil spills caused by sabotage, is usually exploited cited by MNOCS during litigations to avoid responsibility for numerous oil spills in the Niger Delta.

### 3 Derailment of Human Rights and Environmental Litigations

This section discusses derailments in litigations, phases of mechanisms for derailments in litigations, and the types of human rights with associated mechanisms for derailing litigations.

#### 3.1 *What Is Derailment in Litigations*

The term 'derailment' in this paper's context means 'to prevent a litigation process from succeeding'.<sup>16</sup> In other words, it means the obstruction of a litigation process by diverting it from its intended course, which is to obtain remediation and compensation for victims of human rights and environmental violations. Litigation is a highly structured process of dispute resolution that invokes the power of the state, or a contractually agreed-upon private decision-maker, to provide a means to authoritatively adjudicate a dispute between two or more parties. Litigation is typically conducted through agents (lawyers) with their own incentives. The methods, rules and laws governing the litigation process (e.g., filing complaints, motions, petitions, interrogatories) could be exploited by MNOCS to derail the litigations. This paper refers to such acts as 'mechanisms

14 T Van Ho and others, 'Corporate Liability in a New Setting: Shell and the Changing Legal Landscape for the Multinational Oil Industry in the Niger Delta' (2011) Essex Business and Human Rights Project 53–57.

15 The Oil Pipeline Act 1990.

16 'Derail' Merriam-Webster Dictionary <<https://www.merriam-webster.com>> accessed on 3 March 2021.

for derailment’ in litigations.<sup>17</sup> Human rights and environmental litigations initiated against multinational oil companies are frequently criticised as costly and slow, resulting in violations of human rights and the environment.

3.2 Phases of Derailment in Litigations

The phases of derailment in the Human rights and Environmental Litigations process are divided into three phases: before the court hearing, during the court hearing and after the court hearing. The phases of the human rights and environmental litigation process are depicted in Figure 1. The characteristics of the three phases of the ligation process are summarized in Table 1.

3.2.1 Before the Court Hearing

This phase involves all mechanisms before the plaintiffs’ claims are finally heard in court. This is a very important stage in the overall litigation process because it is common for the defendant to engage in various kinds of practices to prevent the court from hearing the merits of the plaintiff claims. A very good example of mechanisms that undermines the human rights and environmental obligations of MNC is that of multiple petitions to prevent the court from hearing the plaintiffs claim. The Center for Constitutional Rights (CCR) and co-counsel for EarthRights International filed the *Wiwa v Shell* litigation in 1996. The litigations were heard in May 2009 after 12 years of Shell petitioning the court not to hear the plaintiffs claim.

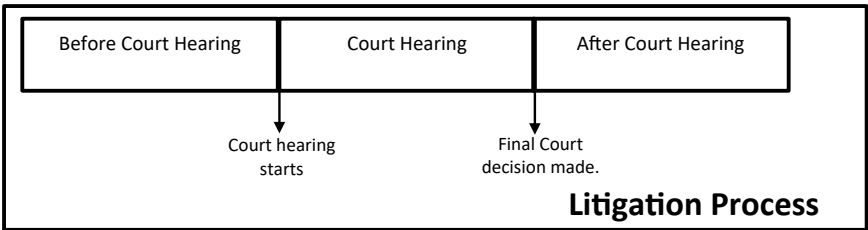


FIGURE 1 Different phases in the human rights and environmental litigation process (SOURCE: PREPARED BY THE AUTHOR)

17 Mechanisms for derailment include – filing complaints, answers and demurrers, serving documents on the opposition, setting hearings, depositions, motions, petitions, interrogatories, preparing orders, giving notice to the other parties, the conduct of trials, and all the rules and laws governing that process.



TABLE 1      Characteristics of the three phases in the litigation process

SN	Before the court hearing	During the court hearing	After the court hearing
Timeline	Practices taking place before the court hearing	Practices taking place during the court hearing and up to the final court decision on the matter	Practices after the court decision
Reasons for practice	– prevent the case from being heard on its merit	– delay the case – withhold evidence	– prevent the plaintiffs from going back to court to resume the claim
Examples	– Defendants petitioning the court not to hear the cases	– Defendants filing several interlocutory appeals	– Defendants filing a case to deny plaintiffs the right to resume the claim should the clean-up be inadequately conducted

3.2.2      During the Court Hearing

This phase involves all mechanisms during the court hearing, that is, from the time the court starts hearing the plaintiffs’ claims up to the time when the final court decision is made, for example, by the court (e.g., Supreme Court) or if the settlement has been agreed by the parties outside of the court.

One such mechanism includes interlocutory appeals and injunctions to delay the litigation from moving forward. It also depletes their resources from wasting time for the plaintiffs to seek remedy. For example, the UK Supreme Court in January 2021 ruled that the claimants in the *Okpabi v Shell* litigations can continue with a claim that the UK-domiciled parent of a multinational group (that is Shell) owed a duty of care to those allegedly harmed by the acts of a foreign subsidiary (that is Shell Petroleum Development Company (SPDC) of Nigeria). Every mechanism used by the defendant to derail the litigation process when the court starts hearing the plaintiff’s claim would fall under this phase.

3.2.3      After the Court Hearing

This phase involves all mechanisms used to derail the litigation after the court’s final court decision has taken place. The final court decision could happen in

various ways such as the case being decided in the highest court which means that there can be no more appeal. In a situation where the defendant accepts the decision of the lower court, and does not appeal the decision, then the final court decision becomes the decision of that lower court. In other cases, the defendant may decide to withdraw the case to settle out of court. An example could be when the defendant approaches the court to modify the final court judgement. In *Bodo v Shell*, the defendant approached the court to set aside the judgement if the local residents disrupted the clean-up operation. The court rejected this request.

#### 4 Transnational Human Rights Litigations Arising from Niger Delta

This section summarises three transnational human rights litigations arising from the Niger Delta.

##### 4.1 *Wiwa v Royal Dutch Shell*

The Wiwa family litigation against Royal Dutch Shell were three separate lawsuits filed in the United States District Court for the Southern District of New York by the Wiwa family against Royal Dutch Shell (RDS), its subsidiary Shell Nigeria (SPDC), and the subsidiary's CEO Brian Anderson, alleging violations of the Alien Tort Statute, the Torture Victim Protection Act of 1992, and the Racketeer Influenced and Corrupt Organizations Act (RICO) Act (Center for Constitutional Rights, 2010).<sup>18</sup>

The plaintiffs sought to hold two Shell holding companies – RDS and SPDC liable for complicity in the human rights abuses perpetrated by the Nigerian military junta against two of the environmental activists who had been executed in November 1995. The defendant submitted a variety of grounds for dismissal of the case, including whether the US court seized of the matter and could exercise personal jurisdiction over the defendant's holding companies, which were based in England and the Netherlands (*Wiwa v Shell*, 2009a).<sup>19</sup>

There were two main issues for determination: (i) whether the court could exercise personal jurisdiction over the defendants – Shell and SPDC, which were based in England and the Netherlands, and (ii) whether the human rights abuses in the litigation fall within the scope of the authority of the federal court based on the Alien Tort Statute (ATS). The Court of Appeals for the Second Circuit agreed with the lower court's finding of personal jurisdiction

18 *Wiwa et al v Royal Dutch Petroleum Co*, 96 Civ 8386 (SDNY 1998).

19 *Wiwa et al v Royal Dutch Petroleum Co*, 226 F 3d 88 (2nd Cir. 2000) (hereinafter: *Wiwa v Shell*).

but disagreed with its dismissal of the case based on *forum non-conveniens* by stating that the litigation can be held in the US on the grounds that two of the plaintiffs were lawful US residents and conducting the litigations in England and Netherlands would be expensive and inconvenient to the plaintiffs. On 8 June 2009, Shell settled the case by awarding \$15.5 million to the people of Ogoni land, with \$4.5 million of the pay-out going to a trust to benefit the Ogoni people (*Wiwa v Shell*, 2009b).<sup>20</sup>

#### 4.2 *Bodo v Shell*

In 2008 and 2009 two oil spills took place in the Bodo Community of Niger Delta which affected the day-to-day life of the people in the community, their property and the land. The people in the Bodo community filed a legal suit against Royal Dutch Shell (RDS) and Shell Petroleum Development Company (SPDC) for the oil spillage. The villagers claimed that the spill was a result of poorly maintained 50-year-old pipelines and that Shell had been initially warned about the damaged pipelines. (Business & Human Rights Resource Centre, 2021). Shell negotiated to accept liability and jurisdiction of the English on condition that no further claims would be pursued on the matter against it, this failed and the case went to court (Leigh Day, 2021a).<sup>21</sup>

The main issue raised was that of negligence on the part of SPDC and whether the parent company owes a duty of care to the subsidiary company in Nigeria. Documents produced in the UK High Court in November 2014, revealed that Shell had been warned about the 'risk and hazard' of the pipeline before the oil spill that affected the Bodo community.<sup>22</sup> The court ruled on 20 June 2014, that Shell could be held responsible for spills from pipelines if the company failed to take reasonable measures to protect them from malfunction or oil theft (*Bodo v Shell*, 2014a). While the case was expected to go to trial in mid-2015, Shell agreed to a £55 million out of court (Leigh Day, 2021b).<sup>23</sup>

20 *Wiwa v Royal Dutch Petroleum Co*, Earthrights International <[https://earthrights.org/wp-content/uploads/legal/Wiwa-Original-Complaint\\_o.pdf](https://earthrights.org/wp-content/uploads/legal/Wiwa-Original-Complaint_o.pdf)> accessed 1 October 2018.

21 Leigh Day, History of the Bodo Litigation, <<https://www.leighday.co.uk/International/Furtherinsights/Detailed-case-studies/The-Bodo-claim/History-of-the-Bodo-litigation>> accessed 1 October 2018.

22 *The Bodo Community and others v The Shell Petroleum Development Company of Nigeria Ltd* [2014] EWHC 1973 (TCC) [9].

23 *The Bodo Community and others v The Shell Petroleum Development Company of Nigeria Ltd* [2014] EWHC 1973 (TCC).

### 4.3 *Oguru v Shell*

In this litigation, the plaintiffs filed three different lawsuits against SPDC to address the impact of the spill in the Oruma community. Pipelines that were restored after the civil war were not properly fixed, and as a result of that oil flowed through plaintiff farmland, lakes, fishpond, and their immediate environment where they live to make it unfit to earn a livelihood. The plaintiff also stated that SPDC were negligent in their duties by allowing the oil spill to have occurred and also did not make any attempt to prevent it nor limit the spill and did not do a proper clean-up of the spill in the community (*Milieudefensie*, 2014).<sup>24</sup>

Specifically, in May 2009, the defendant filed a motion stating that the Dutch court lacked jurisdiction over the plaintiff claim (*Oguru v Shell*, 2010a). They also claimed that they were not liable for the spill in the community. They said it was due to sabotage and theft.

The main issues for determination were whether the Dutch court could assume jurisdiction over the claims against the Nigerian subsidiary. Another issue for determination was whether the oil spills were caused by faulty maintenance or sabotage and whether, under Nigerian law, the parent company owed a duty of care to the claimant. In December 2015, the Hague Court of Appeal confirmed the District Court's findings that jurisdiction existed not only concerning the claims against Shell but also those against the subsidiary and that the claims against Shell were not evidently without merit (*Oguru v Shell*, 2015b).<sup>25</sup>

On 29 January 2021, the Dutch Court of Appeal held that Shell Nigeria was responsible for two oil spills in Niger Delta and liable to pay compensation. The court held that Royal Dutch Shell owes a duty of care to the villagers affected by the oil spill and is liable (together with Shell Nigeria) for any failure to prevent future oil spills and was ordered to install leak detection equipment in its pipelines.<sup>26</sup>

### 4.4 *Bowoto v Chevron*

The plaintiffs charged Chevron under the Alien Tort Statute with human rights abuses arising from collaboration with the military against members of the Ilaje community of Niger Delta that were protesting against environmental

24 *Akpan et al v Royal Dutch Shell and Shell Petroleum Development Company of Nigeria* [2010] District Court of The Hague ECLI:NL:RBSGR:2010:BM1469 [3.1]–[3.8].

25 *Akpan et al v Royal Dutch Shell and Shell Petroleum Development Company of Nigeria* [2010] District Court of The Hague ECLI:NL:RBSGR:2010:BM1469.

26 *ibid* [4.26]–[4.34].

and economic damage caused by Chevron's oil-producing activities in their community.<sup>27</sup>

The plaintiffs sought compensation for the murders and the injuries suffered by the victims of Ilaje Community in the Niger Delta by Chevron during the peaceful protest of the people.<sup>28</sup> The defendants brought a motion to dismiss the plaintiff's claims under the Torture Victim Protection Act, Alien Tort Claims Act, and crimes against humanity. The defendants also filed a motion for summary judgment to dismiss claims under the Racketeer Influenced and Corrupt Organizations Act (RICO).

The main issue was for the court to determine whether the United States-based defendants could be held liable for the wrongful actions allegedly committed by their Nigeria-based subsidiary. The court ruled that Chevron was not liable for any of the numerous allegations. The US federal court granted the defendants' motion to dismiss the claims under the Torture Victim Protection Act and the Alien Tort Claims Act in 2006.<sup>29</sup>

## 5 Discussion

MNOCS use several mechanisms to derail human rights and environmental litigations from the Niger Delta. This paper considers Royal Dutch Shell and Chevron as a case study for two main reasons. The first is that RDS and Chevron are two of the largest and oldest MNOCS operating in the Niger Delta, and the second is that most of the high profile transnational human rights and environmental litigations arising from the Niger Delta have been initiated against these two companies.

### 5.1 *Mechanisms used by MNOCS to Derail Human Rights Litigations*

This section discusses mechanisms used by MNOCS to derail human rights and environmental litigations arising from the Niger Delta. Table 2 summarizes the mechanisms used by MNOCS to derail human rights and environmental litigations from the Niger Delta.

27 Center for Constitutional Rights, *Bowoto v Chevron* (New York 2020) <<https://ccrjustice.org/home/what-we-do/our-cases/bowoto-v-chevron>> accessed 20 September 2020.

28 Braden Reddall, 'Burden of Proof at Issue at Chevron-Nigeria Appeal' (Reuters, 14 Jun 2010).

29 *Bowoto v Chevron Corp.*, No. C99-02506SI, 2006 WL 2455752 (ND Cal Aug 22, 2006).

TABLE 2 Mechanisms used by MNOCS to derail litigations and their relationship to human rights and the environment

SN	Mechanisms used by MNOCS to derail human rights and environmental litigations	Examples of how MNOCS use these mechanisms to derail litigation	Impact on human rights and the environment
1	Non-transparency	Refusal to be transparent – incorrect, misleading information.	Violates rights to an effective remedy and <sup>a</sup> fair trial
2	Non-disclosure of evidence	Refusal to disclose evidence to victims to pursue their case (e.g., MNOCS relationship with their affiliates)	Violates rights to an effective remedy and <sup>b</sup> fair trial, and as a result, victims cannot get remediation and compensation for oil spills.
3	Bribery and corruption	Inducements to communities. Bribing individuals to testify against local communities.	Violates rights to an effective remedy and fair trial
4	Victimisation and restriction of employee's rights	Intimidate employees against testifying in court cases.	Violates employees' right to freedom of expression. MNOCS have infiltrated government ministries in Nigeria. Shell and the government of Nigeria are two sides of the same coin. <sup>c</sup> Speaking against Shell means speaking against the Nigerian government. Employees cannot freely express concerns about harmful practices of the company.

a EU Charter of Fundamental Rights <<https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial>> accessed 23 September 2022.

b *ibid.*

c David Smith, 'Wikileaks Cables: Shell's Grip on Nigerian State Revealed' (The Guardian, 2010) <<https://www.theguardian.com/business/2010/dec/08/wikileaks-cables-shell-nigeria-spying>> accessed 4 June 2021.

TABLE 2      Mechanisms used by MNOCS (*cont.*)

SN	Mechanisms used by MNOCS to derail human rights and environmental litigations	Examples of how MNOCS use these mechanisms to derail litigation	Impact on human rights and the environment
5	Threats and intimidation of witnesses	Arming militants through third parties to threaten and intimidate residents from testifying against MNOCS	Violates rights to liberty and security
6	Delays in litigation	Interlocutory appeals, change of forum, motion to dismiss litigations	Violates rights to an effective remedy and fair trial <sup>d</sup>
7	Disputing information that influences the cause of oil spill	Providing incorrect data about oil spill (e.g., when oil spill started and when contained, volume of oil spilt, area affected, etc), condition of oil pipeline. Refuse to accept the cause of oil spill	Violates rights to life. Victims source of livelihood is destroyed.
8	Disputing information that influences remediation for oil spill	Providing incorrect data about condition of oil pipeline; and data about when oil spill started and when it was contained. Refusal to clean-up contaminated area	Violates rights to life. Victims source of livelihood is destroyed.
9	Disputing information that influences compensation for oil spill	Providing incorrect data about volume and area affected by oil spill condition of oil pipeline. Refusal to pay compensation to victims	Violates rights to life. Victims source of livelihood are destroyed, and no compensation to victims.

d EU Charter of Fundamental Rights (n 30).

5.1.1            Non-transparent Provision of Information on Oil Operations  
Transparency entails presenting accurate and complete information about the operations of the company during litigation in a way that is easy for others to see what actions are performed. Transparency can be practised in organisations by issuing regular transparency reports (i.e., a statement issued regularly

by a company; disclosing a variety of statistics related to requests for user data, records, or content. For example, transparency reports could describe how often, as a result of government action or under copyright provisions, the content was removed.

There are several aspects of the oil operations in the Niger Delta that lack transparency. These include serious flaws within Shell's post-2011 oil spill investigation process, weaknesses in the underlying evidence used to attribute spills to sabotage and the fact that Shell fills out the JIV reports after the joint investigation process – not as part of the joint investigation process. There is, consequently, a lack of transparency and oversight in terms of what is recorded on the new JIV reports. The implementation of the JIV reporting process is based on the legislative backing of Nigeria's 1990 Oil Pipeline Act, and the recommendations set down in the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN). Therefore, if victims of the oil spill cannot claim remediation and compensation due to incorrect and misleading information on the JIV forms or lack of transparency, this is a human rights violation.

Several other practices of MNOs related to lack of transparency undermine their human rights obligations. These include providing misleading information about the cause of the oil spill (whether caused by sabotage of an oil pipeline or by a poorly maintained oil pipeline), providing incorrect data on the volume of oil spilt and the area affected to avoid liability or paying large compensation.<sup>30</sup>

It is important to note that when MNOs provide information about their oil operations that is not transparent (e.g., outdated, incomplete or inconsistent data about oil spill) this will derail the human rights and environmental litigations. Specifically, the litigation will be delayed since the plaintiffs will spend a lot of time, effort, and resources to gather evidence to provide information that are accurate, complete and consistent on the subject matter.

For example, in *Bodo v Shell* litigation, the villagers claimed that the spill resulted from poorly maintained 50-year-old pipelines and that Shell had been initially warned about the damaged pipelines. Senior employees also warned the company about the damaged pipeline, which could result in a serious spill in the community but was ignored by the company. They also claimed that Shell made an inaccurate assessment of the spill. Shell claimed that they initially cleaned up the spill, but when Amnesty International did some

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30 Amnesty International, 'Bad Information Oil Spill Investigations in The Niger Delta' (n 6).



investigation of the spill, they found that the spill was worse than stated; Shell had made an inaccurate judgement regarding the spill.<sup>31</sup>

#### 5.1.2 Non-disclosure of Evidence

Disclosure entails a refusal to release evidence during litigations that will be useful to the plaintiffs to pursue their case in court. This evidence is usually not available in the public domain but is in the sole custody of the MNOCs and can only be disclosed by them. The disclosure of evidence required for litigations is significant for plaintiffs to access remedies. Therefore, refusal to release such information in the court during litigation conflicts with their human rights obligations. One notable example is a refusal to disclose information related to the condition of the oil pipeline even as the oil companies claim that is committed to providing necessary information to support its claim in several channels including its annual sustainability reports that its oil infrastructure is properly maintained.

There has long been concern that the poor pipeline condition is the reason for the high number of oil spills in the Niger Delta. Friends of the Earth reviewed all available evidence on pipeline replacement, and it would appear that the Bomu-Bonny pipelines have not been replaced since the early 1960s.<sup>32</sup> As noted by UNEP, the pipelines running through Ogoniland have not been 'maintained adequately'. The combination of these factors – old pipes, not properly maintained, and in an environment that would expose them to corrosion – raise very serious questions about Shell's due diligence in preventing harm to the environment and human rights.<sup>33</sup>

In the litigations that we have reviewed, it is easy to see that MNOCs are generally reluctant to disclose relevant evidence to plaintiffs to prove their case. MNOCs are only willing to do so when it is inevitable, for example, when courts force parent companies to disclose evidence.<sup>34</sup> For example, in the *Oguru v Shell case*, the plaintiff faced an enormous challenge in putting forward their allegations due to difficulty obtaining internal information – both from Shell and Shell Nigeria – concerning the business' operations. The court initially dismissed the claimants' request to order Shell to disclose documents that could prove their case. On appeal, the Court of Appeal ordered RDS to disclose specific audit reports, letters of assurance, incident reports, and documents

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*

<sup>33</sup> Amnesty International, 'Oil Spill Investigations in The Niger Delta Amnesty International Memorandum September 2012' (*Amnesty International*, 2012) <<https://www.amnesty.org/download/Documents/16000/afr440422012en.pdf>> accessed 27 December 2019.

<sup>34</sup> van Dam, 'Preliminary Judgments Dutch Court of Appeal in the Shell Nigeria Case' (n 4).

regarding the oil pipelines. The court also ruled that these documents will not be handed over to the claimants but will be available for inspection at a notary's office by legal representatives of the claimants and court members.<sup>35</sup>

During the *Bodo v Shell* litigation, Shell repeatedly refused to release evidence required by the plaintiff to prove that the oil spill was due to poor maintenance of the oil pipeline. Specifically, Shell refused to disclose communication (via several emails) between Shell employees in Nigeria and their colleagues in the headquarters (Netherlands) regarding the poor condition of oil pipelines which needed adequate maintenance. After many years of delay and denial in the court, Shell eventually decided to settle the litigation out of court when they learnt that the plaintiff was to present the emails in the court showing that the parent company were warned about the poor condition of the pipelines in Bodo which could lead to an oil spill in the community.<sup>36</sup>

### 5.1.3 Bribery of Witnesses to Testify in Litigations

Bribery and corruption entail any unlawful or improper behaviour that seeks to gain an advantage through illegitimate means. The mechanisms of MNOCS that are related to bribery and corruption are mostly centred on their relationship with witnesses either called by the plaintiffs to testify against the defendants (i.e., the multinational oil companies) or called by the defendants to testify against the plaintiffs (i.e., victims of human rights violations).

Allegations of bribery and corruption have been featured in several human rights and environmental litigations arising from the Niger Delta. In the case of *Wiwa v Shell*, the plaintiff claimed that the defendant was liable for complicity in the human rights abuses perpetrated by the Nigerian military junta against two environmental activists who had been executed in November 1995. They claimed that the executions were part of a pattern of bribery, collaboration and conspiracy between the two Shell companies and the Nigerian military junta, aimed at suppressing opposition to the exploitation by Shell of oil and gas resources in the Ogoniland region and the Niger Delta more generally. Shell was also accused of bribing and arming militants and government troops to forcefully stop any form of protest against the defendant company.

35 Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law', *Washington & Lee Law Review* 72 (2015), 1808. See also van Dam, 'Preliminary Judgments Dutch Court of Appeal in the Shell Nigeria Case' (n 4).

36 Amnesty International, 'Bad Information Oil Spill Investigations in The Niger Delta' (n 6).

The plaintiffs allege that Shell was actively involved in the tribunal, bribing and preparing witnesses.<sup>37</sup>

In their defence in the *Wiwa v Shell* litigation, Shell the multinational oil companies engaged in several practices during the litigation that conflicts with their human rights obligations. Amnesty International, in their report, alleged that witnesses were bribed to testify against claimants – witnesses were promised employment and contracts with the company, and those in employment are promised promotions and awards.<sup>38</sup> Amnesty International concluded that bribing some witnesses to testify against the plaintiff during the court process proved Shell's intentional corruption of the Ogoni 9 trial via bribery and witness coach. These prove Shell was hell-bent on ensuring a guilty verdict. In the *Kiobel v Shell* litigation, it was alleged that Shell, through its Nigerian subsidiary Shell Petroleum Development Company of Nigeria (SPDC), provided transport to Nigerian troops, and allowed company property to be used as staging areas for attacks against the Ogoni and provided food to the soldiers and paid them.<sup>39</sup>

#### 5.1.4 Victimisation and Restriction of Employee's Rights

Respect for employee rights (that is, a group of legal and human rights related to labour relations between employers and employees, codified in national and international labour and employment law<sup>40</sup>) is essential to running oil and gas operations, especially in the developing countries. The International Labour Organization (ILO) and the UN have established international labour standards to create legal rights for workers worldwide.<sup>41</sup> This is to ensure that employees hired by multinational corporations enjoy the right to freedom of association and the right to collective bargaining to improve working conditions. Some of the ways that labour rights have been violated by multinational

37 'Bribery' (*Legal Information Institute*, 2020) <<https://www.law.cornell.edu/wex/bribery>> accessed 26 March 2020.

38 John Zadkovich, 'International Commercial Arbitration and the Bribery Act 2010 (United Kingdom): A Matter of Common Sense' (2011) 14 Int ALR.

Jacinta Anyango Oduor and others, *Left out Of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (International Bank for Reconstruction and Development, 2014).

39 'Corruption and Human Rights' (Ohchr.org, 2020) <<https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/CorruptionAndHRIndex.aspx>> accessed 26 March 2020.

40 'Labour Rights Are Human Rights: UN Report' (*IndustriALL*, 2018) <<http://www.industriall-union.org/labour-rights-are-human-rights-un-report>> accessed 17 March 2020.

41 The UN itself have backed labour rights by incorporating several laws into two articles of the United Nations Declaration of Human Rights- that is, Article 6–8 of the International Covenant on Economic, Social and Cultural Rights.

oil companies operating in Nigeria are the victimisation and restrictions of employee movement and expression and the threat to change employee contracts from permanent/full-time to casual/temporary contracts. This is called casualisation – a term used to connote how companies hire employees on a temporary, casual/contract basis.<sup>42</sup>

Victimisation and restriction of employees are very common during human rights litigations. There have been cases of prevention of labour activities during the litigation process to prevent shell workers from giving out important information to the courts or NGOs in order not to be used against them in court. This could be in the form of restricting employees and contractors from belonging to human rights organisations, and even granting interviews to the media.

For example, during the *Oguru v Shell* case, the lawyers (and NGOs) had to make several trips to Nigeria to interview witnesses, and many often were Shell workers. Shell has in some case, through middle players and or senior managers have, engaged in wrongful labour rights activities to subvert justices. There were allegations that Shell told witnesses not to grant interviews to Amnesty International or cooperate in the investigations.<sup>43</sup>

#### 5.1.5 Threats and Intimidation of Witnesses

Safety and security issues during litigations are some of the most contentious issues during human right and environmental litigation arising from the Niger Delta. Activities such as living in an unsafe environment, an unsafe operating environment for the employees, torture, detentions, killings and payments to armed groups, and threats and intimidation of witnesses contribute to a lack of security and safety.

The issue of security and safety has featured in several high-profile human rights and environmental litigations from the Niger Delta. For example, in the *Bowoto v Shell*, the U.S. District Court allowed a complaint brought against Chevron by victims and their relatives, alleging that there could be evidence that Chevron had recruited, supervised, and/or shipped the Nigerian military forces notorious for their widespread violence and abuse.<sup>44</sup> The plaintiffs sought compensation for the murders and the injuries suffered by the victims

42 As of 1991, there were estimated 14559 casual workers and contract workers as opposed to 23065 junior works in permanent jobs or positions in the Nigerian oil and gas industry. Oil companies are still adopting casualization as the dominant form of employment out of the need to avoid obligations imposed by labour laws and international labour standards.

43 'Labour Rights Are Human Rights: UN Report' (n 44).

44 Reuters, 'Burden of Proof at Issue in Chevron-Nigeria Appeal' (Reuters, 2010) <<https://www.reuters.com/article/chevron-nigeria-idUSN1424424620100614>> accessed 20 June 2022.

of Ilaje Community in the Niger Delta by Chevron during the peaceful protest of the people.

One of the mechanisms MNOCS use to derail litigations is to threaten witnesses either not to testify against Shell or to testify against the plaintiff. In the *Kiobel v Shell* (Netherlands), the court ordered that the claimants' lawyers call witnesses and provide further evidence as to whether Shell bribed individuals to testify against the Ogoni 9, and whether these testimonies contributed to human rights violations against the claimants or their husbands.<sup>45</sup> This was based on the claimants' allegations that witnesses were intimidated into testifying against the Ogoni 9 leaders, which may have resulted in their conviction and eventual hanging, including Ken-Saro Wiwa.

#### 5.1.6 Delay of Litigation

One of the most damaging mechanisms used by MNOCS to derail litigations is to cause further delay to the litigations, increasing the time, efforts and cost for the claimants. Delaying litigations is a breach of MNOCS human rights obligation which is to resolve any substantive legal dispute in the shortest possible time so that victims can have access to remedy for human rights and environmental violations.

Delaying litigations has serious consequences for the local communities. For example, while the litigation is ongoing, the area affected by the oil spill may still not be cleaned, which could cause more damage to the local environment. Furthermore, MNOCS may refuse to compensate victims while the litigation is ongoing to avoid appearing to accept liability for the oil spill. With the source of livelihood of the local community destroyed, local protests, demonstrations and serious violence will inevitably erupt in the local communities. Such trends of incidences and violations of human rights and the environment have been blamed for violence and unrest in the Niger Delta region of Nigeria.

The mechanisms used by MNOCS to delay litigations include: avoiding service of process change of forum, interlocutory appeals, stay of execution, motion to challenge the legal standing of plaintiffs, motion to strike out litigations, and motion to modify court judgement and allowing plaintiff to sue the wrong entity.

##### 5.1.6.1 Avoiding Service of Process

Service of process is the procedure by which a party to a lawsuit gives an appropriate notice of initial legal action to another party (e.g., defendant), court or

45 Amnesty International, 'Nigeria: 2020 Could be Shell's Year of Reckoning' (Amnesty International Publications) <<https://www.amnesty.org/en/latest/news/2020/02/nigeria-2020-could-be-shell-year-of-reckoning/>> accessed 3 October 2021.

administrative body to exercise jurisdiction over that person to enable that person to respond to the proceeding before the court, body or another tribunal. Notice is furnished by delivering a set of court documents to the person to be served.

The mechanism related to 'service of process' means that Multinational Oil Companies are avoiding places where they may be served notification of the lawsuit. This mechanism played out in the *Wiwa v Shell* case in New York, USA. The plaintiffs sought to hold two Shell holding companies liable for complicity in the human rights abuses perpetrated by the Nigerian military junta against two of the environmental activists who had been executed in November 1995.<sup>46</sup>

In response to these claims, the defendant companies attempted to avoid service of process by moving to dismiss the case on the grounds that it would violate the fairness requirement of the Due Process Clause for a New York court to exercise personal jurisdiction over them. The District Court held that the holding companies could be said to be doing business in New York, as they were listed on the New York stock exchange and had an investor relations office there.

The multinational oil companies were attempting to avoid New York and the USA and instead preferred to be served notification of the lawsuit in other jurisdictions that would have been a disadvantage to the plaintiffs in terms of financial resources and convenience. In short, Shell believed that the trial going on in the US would not be to their advantage because of reasons of proximity as some of the plaintiffs were living in the United States and not in England or the Netherlands.

#### 5.1.6.2 *Change of Forum*

This mechanism involves a situation where the defendant seeks a change in the forum or venue, thereby delaying or derailing the litigation. This was the case in *Wiwa v Shell* litigation, where the district court firsts granted the defendants' motion to dismiss the case on the basis of forum non-conveniens, holding that England was an adequate alternative forum in which to conduct the litigation and that this would be preferable because the case had only a few connections to the US legal order or the New York forum. However, the district court's decision was reversed in 2000 by the Court of Appeals for the Second Circuit, which agreed with the lower court's finding of personal jurisdiction but disagreed with its dismissal of the case on the basis of *forum non-conveniens*.

46 Center for Constitutional Rights, *Wiwa et al v Royal Dutch Petroleum et al* <<https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al>> accessed 18 January 2021.

The appellate court held that in balancing the different interests at stake, the district court had given insufficient weight to the choice of the New York forum by the plaintiffs, two of whom were lawful US residents. Another factor that is considered to be relevant was the expense and inconvenience that dismissal of the case in favour of a British (or Dutch) forum would impose on the impecunious plaintiffs, as weighed against the minimal inconvenience to the defendants, also given their vast financial resources- of retaining the case in the New York forum.

#### 5.1.6.3 *Interlocutory Appeals, Injunctions, and Postponements*

This is one of the most damaging mechanisms used by MNOCS to intentionally delay litigations. When a verdict has been made, the defendant may file an appeal in which the judgment may be 'stayed' until a decision of the appeal has been made. There are different types of appeals – stay of execution, interlocutory appeals, and interim injunction. A stay of execution is a court order to temporarily suspend the execution of a court judgment or other court order. It is similar to an injunction.

A stay can be granted automatically by operation of law or conventionally when the parties in a civil or criminal case agree that no execution shall occur for a certain period. If a party appeals a decision, any judgment issued by the original court may be stayed until the appeal is resolved. For example, in the *Oguru v Shell* litigation, Shell initiated several interlocutory appeals. In one of the interlocutory rulings in September 2011, the court determined, among other things, that the applicable law on the basis of which the claims were to be adjudicated was Nigerian tort law and dismissed a request made by the plaintiffs for Shell to provide exhibits of certain key evidentiary documents.

Another mechanism used by MNOCS to delay litigations is to postpone litigation on the grounds of *lis pendens*, which is a doctrine that allows the court to stay proceedings due to ongoing litigation in another jurisdiction. For example, in the *Oguru v Shell* litigation, Shell requested to allow it to appeal the court of appeal's preliminary judgement before the Dutch Supreme Court (*Hoge Raad*), rather than waiting for the decision of the court of appeal on the merits. The court rejected this request.

#### 5.1.6.4 *Motion to Challenge the Legal Standing of Joint/ Collective Claimants*

Class settlement proceedings allow the parties to a collective settlement agreement jointly and can ask the court to declare the settlement binding on all class members. In doing this, the court assesses, among other things, that the reasonableness of the agreed compensation is likely to be successful. This is a

threat to the defendant, which is why they have always challenged it. The collective action is more efficient and effective than bringing an individual claim, that is, that: the questions of law and fact are sufficiently similar; the class of claimants is sufficiently large; and in a damages action, the class members individually and jointly have a sufficiently large financial interest. For example, in the *Oguru v Shell litigation*, Shell argued that Friends of the Earth Netherlands did not have sufficient standing to bring the case, but again the court found otherwise.<sup>47</sup> The representative entity meets the standing requirements of Article 3:305a, Civil Code.

#### 5.1.6.5 *Motion to Strike out the Litigation or Modify Court Judgement*

MNOCS can also derail litigations by trying to change the settlement terms or change certain aspects of the court judgement. For example, in the *Bodo v Shell* case, Shell sought to prevent the community from going back to court by requesting to include a clause in the settlement according to which any disruptive act by any resident of the Bodo community would lead to termination of the lawsuit. In May 2018, the court ruled that the Bodo community should retain the right to revive the claim for another year with no conditions attached if the clean-up is not completed to an adequate standard.

#### 5.1.6.6 *Allowing Plaintiffs to Sue the Wrong Entity*

Another mechanism used by MNOCS is to be silent about the identities of the entity involved in the litigations. This seems unusual, but it was actually the case in *Bowoto v Chevron* litigation where the defendant knew in advance that the plaintiff was suing the wrong entity but decided not to disclose it but allowed the litigation to continue for several years. The litigation started in 1999, but it was not until 2005 that the plaintiff knew that they were suing the wrong entity (i.e., Chevron Overseas Petroleum Inc instead of Chevron USA). Presiding Judge Susan Illston of the United States District Court for the District of Columbia chastised Chevron's attorneys for remaining silent, implying that they may have done so on purpose to delay or obstruct the plaintiffs' claim.<sup>48</sup> Oil companies that are subsidiaries of multinationals are usually part of a large and complex structure that can sometimes be very difficult to understand.

This mechanism implies that if the case is decided against the MNOCS, then the court decision would not be binding on it. This would be a double blow

47 *Milieudefensie v Royal Dutch Shell* [2010] District Court of The Hague ECLI:NL:RBSGR:2010:BM1470. See also *Barizaa Manson Tete Dooh v Royal Dutch Shell* [2013] District Court of The Hague C/09/337058/HA ZA 09-1581.

48 Pamela A MacLean, 'Lawyers Rebuked in Human Rights Case' (1996) *The Nat'l L.J.* 4.



to victims who would have to endure a whole lot in terms of time, effort, and financial resources to mount a legal challenge against a multinational company, only for it to discover that the decision is not binding on the defendant.

5.1.7        Disputing Information That Influences the Cause of Oil Pollution  
Disputing information that influences the cause of the oil spill is one of the mechanisms MNOCs to derail litigations directly related to oil pollution. For example, in the *Ejama-Ebutu* litigation, Shell raised an initial objection based on the status of limitation, arguing that the incidence was caused by nuisance dating back to 1970 but has long since been discontinued. Shell did not put forward any evidence against the allegations raised by the plaintiffs regarding its misconduct during the oil spill. The only response by Shell to the claims was a denial of responsibility, pointing instead to local rebel activities. In other litigation, Shell would point to sabotage and oil theft from local communities.

Another mechanism of MNOCs related to pollution is accepting responsibility but presenting incorrect information in court regarding oil pollution based on an internal methodology for inspection and assessment of oil spills. Several experts and international human rights and environmental agencies, including Amnesty International, have long raised concerns about the robustness and validity of the methodology underlying this process. For example, in the *Bodo v Shell* litigation, Shell claimed that its information was based on a process it calls Joint Inspection Visit (JIV) process which it uses to determine 'the spread, the volume and the cause' of hundreds of other spills in Nigeria. Despite Amnesty International providing Shell with considerable evidence that these statistics were inaccurate, the MNC had previously and publicly defended its figures.<sup>49</sup>

In 2022, Amnesty International conducted an impartial review of the video footage of the first oil spill and estimated that the overall volume of oil spills alone surpassed 100,000 barrels. In addition, the expert evidence obtained from the Bodo Community estimated that the volume of oil spilt was 500,000 barrels, suggesting that Shell's methodology is completely flawed and unreliable. Shell eventually acknowledged in documents submitted to the court that its estimates were incorrect and had underestimated the amount of oil spilt in both Bodo cases.

49 Van Ho, T., Yilmaz Vastardis, A., Leader, S., Michalowski, S., Netto, U., Danesi, R., Ong, David & Wlodarczak, B. (2011). Corporate liability in a new setting: shell and the changing legal landscape for the multinational oil industry in the Niger Delta (School of Law, University of Essex 2015).

### 5.1.8 Disputing Information That Influences Remediation

A multinational oil company may try to change the terms of settlement or change certain aspects of the court judgement. There are several kinds of information that MNOs can dispute in court to influence remediation and, if it inevitably takes place, how it is carried. This type of information includes the volume of oil spilt and the area affected by the oil spill. In the *Bodo v Shell* litigation, Shell initially denied responsibility for the 2008 and 2009 Niger Delta oil spill of 560,000 barrels. It claimed that these were caused by illegal pipeline tapping and sabotage. However, an investigation conducted by Amnesty International revealed that the oil spills were caused by neglect and poor maintenance.

In November 2014, documents produced in the UK High Court suggested that Shell had been warned about the pipeline's 'risk and hazard' prior to the oil spill that affected the Bodo community. If Shell could prove this, then they would not be liable to carry out remediation and clean-up of oil spills in the Bodo community. Shell accepted responsibility in January 2015 and agreed to a £55 million out-of-court settlement to cover the spill's cost. The Dutch government also established an internationally recognised clean-up operation, the Bodo Mediation Initiative.<sup>50</sup>

### 5.1.9 Disputing Information That Influences Compensation for Oil Pollution

In the *Bodo v Shell* litigation, one of the main issues for determination was whether Shell has an obligation to take appropriate measures to protect its facilities to avoid leaks from its pipelines, whether due to operational failure or oil theft (bunkering). Shell has consistently maintained that it was only liable to pay compensation if the spills were caused by the failure of its pipelines to work and that, in the event of spills caused by bunkering, it had no such responsibility. The court disagreed with Shell's position by claiming that if it failed to take appropriate measures to secure, maintain or fix its facilities, it might be legally liable to pay compensation for spills resulting from bunkering and illegal bunkering of pipelines.<sup>51</sup>

<sup>50</sup> Mutiu Sunmonu, 'An Open Letter on Oil Spills from The Managing Director of The Shell Petroleum Development Company of Nigeria Ltd' (*Shell.com.ng*, 4 August 2011) <<https://www.shell.com.ng/media/2011-media-releases/open-letter-04082011.html>> accessed 10 January 2020.

<sup>51</sup> 'The Bodo Community v Shell Claim' (*Leighday.co.uk*, 2020) <<https://www.leighday.co.uk/International/Further-insights/Detailed-case-studies/The-Bodo-community-shell-claim>> accessed 18 January 2020.

The court's position was captured as follows in paragraph 92(g):<sup>52</sup>

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

The court judgement represents a strong rebuke at the practices of Shell and many other MNOs operating in the Niger Delta and guarantees that possibilities the victims will get larger compensation pay-outs than what would have been if MNOs provided the oil spills data was relied on.

Another mechanism used by the MNOs related to compensation is to file a motion to challenge the volume of oil spilt and the area covered by the spill, and the duration of the oil spill. The volume of oil spilt, area affected, and the duration of the spill are all important parameters in calculating compensation that the MNOs will pay to the plaintiffs, that is, the oil spill's victims. It would be unexpected that multinational oil companies with a vast number of financial resources would be interested in disputing these parameters if they are committed to respecting their obligations regarding access to remedy and compensation to victims of human rights and environmental violations.<sup>53</sup>

## 5.2 *Addressing Mechanisms Used to Derail Litigations*

The logical conclusion to be drawn from the preceding discussion is that the mechanisms used by MNOs (e.g., Shell), as indicated in recent litigations arising from the Niger Delta, are in conflict with their human rights obligations,

52 'Bodo Judgment' (Henderson Chambers 20 June 2014) <<http://www.hendersonchambers.co.uk/wp-content/uploads/2014/06/Bodo-jment-prelim-issues.pdf>> accessed 23 September 2020.

53 Amnesty International, 'Oil Spill Investigations in the Niger Delta' [2013] AFR 44/028/2013 <<https://www.amnesty.org/en/documents/AFR44/028/2013/en/>> accessed 23 September 2020.

limiting effective remedy for people whose human rights have allegedly been violated by corporate conduct.

There is, therefore, a need to address the mechanisms used by MNOs for derailing litigations through a legal framework to improve human rights and environmental violations in the Niger Delta. The purpose of the legal framework is to guide victims of human rights abuses, MNOs, governments, investors, and the public (including NGOs) on how to exploit various legal instruments and the very human rights obligations of MNOs to improve human rights and environmental violations in the Niger Delta.

Several legal frameworks, albeit at the international level, such as UNGP, OECD Guidelines on Multinational Enterprises and Global Compact, seek to impose certain obligations on the MNOs to respect human rights.<sup>54</sup> For example, the UN Guiding principles impose on MNOs a duty to provide access to victims to seek remedy for violations of human rights. In situations where legislation is required to address specific human rights and environmental issues (e.g., reforms on sabotage), it may take a long time to have such legislation in place due to long periods of drafting, public consultation and debates.<sup>55</sup> It would be unreasonable for victims of human rights violations to wait a long time to have such legislation while human rights and environmental violations are still occurring.

Also, existing international human rights frameworks do not adequately address legal issues at national levels. Furthermore, when applied alone at the national level, legislation and tort law sometimes do not resolve issues between companies and their victims due to the complex and wide-ranging problems involved.<sup>56</sup> Therefore, in my view, there is a need for a mix of constitutional, legislative, regulatory, and tort law (e.g., nuisance, trespass) and alternative dispute resolution instruments in such a legal framework for addressing the human rights obligations of MNOs to prevent human rights and environmental violations in the Niger Delta.

54 OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011) <<http://dx.doi.org/10.1787/9789264115415-en>>; United Nations Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, (United Nations Publishing 2011) A/HRC/17/31.

55 David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' [2016] 1 (2) BHRJ 203; Oliver de Schutter, 'Towards a New Treaty on Business and Human Rights' [2016] 1 BHRJ 41.

56 Elodie Aba, 'Shell & the Bodo Community – Settlement vs. Litigation' (*Business and Human Rights Resource Centre*, 12 January 2015) <<https://www.business-humanrights.org/en/blog/shell-the-bodo-community-settlement-vs-litigation>> accessed 23 September 2022.

The legal framework will be composed of a combination of different legal instruments/components, including the constitution, legislation, regulatory bodies, tort law, and alternative dispute resolution to improve human rights.

Let me give a simple example related to regulatory instruments of the legal framework to illustrate this point. The Nigerian Oil Pipeline Act (1990) states that a company is not liable to pay compensation for an oil spill caused by sabotage or third-party damage. Section 11(5) of the Oil Pipeline Act states as follows:

The holder of a licence shall pay compensation ... to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good.<sup>57</sup>

This provision in the Oil Pipeline Act has permitted a range of highly damaging practices. As a result, MNOCs usually refuse to accept responsibility for frequent oil spills, clean-up, and pay compensation but instead blame the cause of the oil spill on sabotage and theft.<sup>58</sup> Several scholars and reports in recent times have countered this position by revealing that the most significant cause of oil spills is equipment malfunction and corrosion of pipelines.<sup>59</sup> For example, international human rights and environmental agencies (e.g., Amnesty International) have raised serious concerns about the scale of oil spills in the Niger Delta caused by MNOCs. They have concluded that it is inconceivable that a company can record so many oil spills a year and blame it on sabotage and theft.

Therefore, Nigeria must amend its legislation to address the fact that oil companies face no sanctions for oil spills as long as they are attributed to sabotage or theft. This can be achieved by using a combination of different instruments, including introducing new legislation and amending existing regulations to make it difficult for MNOCs to continue exploiting the Oil Pipeline Act and its connection to sabotage oil pipelines to avoid liability for the oil spill.

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57 The Oil Pipeline Act 1990, Clause 11 (5). See also Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) Part 8 (B) 8.20 ('A spiller shall be liable for damages from a spill for which he is responsible').

58 Frynas J, 'Corporate and State Responses to Anti-Oil Protests in The Niger Delta' [2001] 100 (398) *Afr Aff* 27.

59 Cyril I Obi, 'Globalization and Environmental Conflict in Africa' [1999] 4 *Afr J Polit Sci* 40.

## 6 Conclusion

This paper contributes to the literature on transnational human rights and environmental litigations and the mechanisms MNOcs (e.g., Shell) used to derail litigations, as indicated in recent litigations arising from the Niger Delta. Firstly, derailments in litigations have been discussed, including different types of human rights and environmental violations and associated mechanisms used by MNOcs to derail litigations. This paper has also discussed four (4) transnational human rights and environmental litigations.

Several mechanisms used by MNOcs to derail litigations include a non-transparency provision of information on oil operations; non-disclosure of evidence; bribery and corruption of witnesses to testify; victimisation and restriction of employees' rights; threats and intimidation of witnesses; delay of litigations; disputing information that influences the cause of oil spill; remediation; and compensation for oil pollution.

Mechanisms related to delay in litigations (e.g., interlocutory appeal, motion to challenge the legal standing of joint/collective claimants, allowing plaintiffs to sue the wrong entity) are some of the most damaging mechanisms contributing to derailments in human rights and environmental litigations. In some cases, these delays have added significant delays to litigations, thus contributing to human rights and the environment in the Niger Delta. For example, the *Wiwa v Shell* litigation began in 1996, and Shell continued to urge the court not to hear the case, but it was finally heard on May 26, 2009, after 12 years of failure.

In the *Oguru v Shell* litigation, Shell contended that it was not accountable for the wrongdoings of its Nigerian subsidiary and that the Dutch courts were not an appropriate forum to hear the claim against Shell Nigeria.<sup>60</sup> Shell also claimed that Friends of the Earth Netherlands lacked standing to initiate the action, but the court determined otherwise. The matter was ultimately heard in a Dutch court after nearly four and a half years. These issues alone took almost ten months to resolve – it wasn't until December 2009 that the court ruled that there was justification for a joint hearing of the claims against Shell and Shell Nigeria.

This paper revealed that the mechanisms used by MNOcs (e.g., Shell) in recent litigations arising from the Niger Delta conflict with their human rights obligations, limiting effective remedy for persons whose human rights have

60 *Milieudefensie v Royal Dutch Shell* [2010] District Court of The Hague ECLI:NL:RBSGR:2010:BM1470. See also *Barizaa Manson Tete Dooh v Royal Dutch Shell* [2013] District Court of The Hague C/09/337058/HA ZA 09-1581.

allegedly been violated by corporate activity. This paper recommends developing a legal framework to address the derailments in litigations and be committed to resolving disputes within the shortest possible time to improve human rights and the environment in the Niger Delta.

In future, we plan to develop a legal framework and recommendations for addressing derailment in human rights and environmental litigations in the Niger delta. The legal framework will be composed of a combination of different legal instruments/components, including the constitution, legislation, regulatory bodies, tort law, and alternative dispute resolution to improve human rights.

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