



The Nigerian oil spill compensation regime: obstacles and opportunities





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SDN supports those affected by the extractives industry and weak governance. We work with communities and engage with governments, companies and other stakeholders to ensure the promotion and protection of human rights, including the right to a healthy environment. Our work currently focuses on the Niger Delta.

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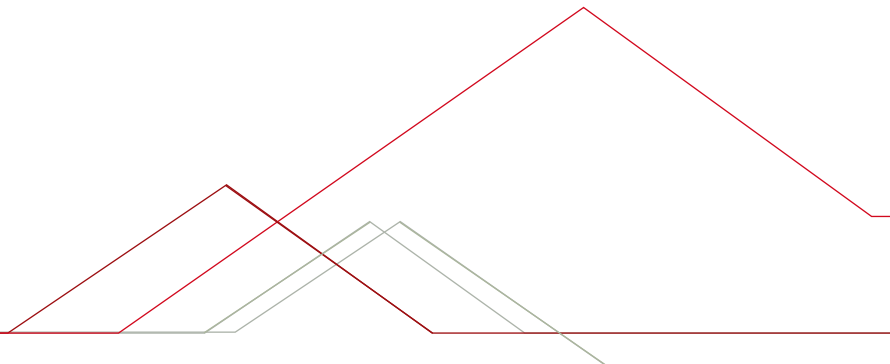
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Executive Summary

The history of oil pollution in Nigeria is long and traumatic. The Nigerian oil industry, which has produced and exported high quality crude for over 50 years, drives the Nigerian economy. The inhabitants of the Niger Delta, the country's principal oil-producing region, have suffered the impact of oil spills for almost as long.

Host communities and settlements where oil pipelines and other industry infrastructure are sited have documented the impact of these spills on their land and livelihoods. The problem is severe: according to the Nigerian National Oil Spill Detection and Response Agency (NOSDRA), nearly 37,000 barrels (approximately 5.8 million litres) of crude oil were spilled in Nigeria in 2019.¹ This is a huge amount, by any standard, and is likely to be an underestimate.²

When a spill takes place, the oil is supposed to be removed and the natural environment restored to its pre-spill state, in a process called clean-up and remediation. Those affected by the spill (for example, because their farmland has been polluted, and crops will no longer grow) should, in theory, also be able to claim compensation for damages caused. This is provided for in different ways in Nigerian legislation, and there are a number of impact assessment and claims procedures which are supposed to be followed when a new spill is reported. Together, these are known as the oil spill compensation system.

However, the system is convoluted, slow, and rarely resolves compensation claims to anyone's satisfaction, if at all. In short, it is not fit for purpose. This is deeply concerning: decades of damage to human and environmental health without remedy have been documented by researchers in the Niger Delta. Meanwhile, the Nigerian state oil company (through which all oil production is ultimately organised) has made clear its intention to aggressively expand the oil industry, with a goal of increasing production by a third to three million barrels a day by 2023.³ This means there is the potential for significant further damage.

As such, as well as a major improvement in the prevention of oil spills in the first place, the compensation system needs to be made to work much more effectively. Based on interviews with more than 30 stakeholders directly involved in oil spill compensation processes, this report identifies a number of barriers to the implementation of the compensation system.

Barriers to the implementation of the compensation system include:

1 The multiple legal and policy frameworks for compensation processes. Almost every aspect of the oil spill compensation system is governed by unclear or contradictory guidance. This stems from the lack of overarching legislation to address oil-related environmental issues, which are treated separately from other concerns in Nigerian environmental law. One infamous problem which flows from this is the frequent reliance

¹ <https://nosdra.oilspillmonitor.ng>

² SDN 2018 Environmental Performance Index (forthcoming).

³ <https://uk.reuters.com/article/nigeria-oil/nigeria-state-oil-firm-eyes-3-mln-barrels-per-day-oil-output-by-2023-nnpc-idUKL8N25B5R7>

on the Land Use Act to assess the value of land—guidance which is 40 years old, and intended to be used when land is acquired by compulsory purchase. This is fundamentally unfit for purpose.

2 The logistics of organising oil spill site visits and impact assessments. The mangrove terrain of the Niger Delta is difficult to travel through, and the region’s infrastructure is in serious disrepair. The security situation is also frequently unstable. Organising an oil spill assessment is therefore a physically and politically complex task, which can involve hiring boats and liaising with the security services, and incur significant accommodation and other costs. Given that fees from any successful compensation claim may take years to be awarded, some assessments therefore never take place. If they do take place, there may also be local access problems to negotiate with some communities suspicious about the intent of outsiders; this region has seen considerable violence in the past—and there can be demands from groups such as ‘area boys’ to receive a share of compensation money.

3 The operational procedures used to carry out oil spill assessments are technically deficient and insufficiently precise. There is no agreed standard for how an oil spill is to be measured; areas impacted downstream of an immediate spill site are frequently not taken into account; and the final details of a spill are effectively subject to compromise among those present. This problem is compounded by a lack of funding and logistical capacity for NOSDRA to carry out independent assessments.

Related to these challenges is the problem of sabotage. If an oil spill is ruled to have been caused by a third party (and hence not the responsibility of an oil company), then oil producers are in general exempted from providing compensation, although this may be a misunderstanding of the polluter-pays principle. This means the classification of the cause of a spill is a frequent source of dispute, given the widespread practice of crude oil theft by tapping pipelines in the Niger Delta which can result in pipeline damage and oil leaks. Some oil companies claim that communities may try to have the cause of a spill attributed to operational error (as opposed to sabotage or theft), when this is not the case. However, other communities demonstrably suffer damage from spills and do not receive compensation when they are entitled to it.

4 If oil spill assessment procedures themselves are deficient, the way in which they are implemented may not meet stakeholder expectations or acceptable standards. For example, those who implement them are sometimes unqualified. Although there is a body of professional estate valuers and compensation assessors in Nigeria, such as the staff of the Federal and State Ministries of Land, Housing and Urban Development, they can be sidelined in the compensation process. Instead, some allege that assessors favoured by oil companies can be appointed in an apparent attempt to minimise potential liabilities.

5 Local communities rarely have the expertise to negotiate effectively with oil companies on compensation claims, as some of the legislation implies they ought to. This means that pursuing damages often means doing so through the courts. But this implies being able to access the system itself, which requires financial resources many communities do not have, in the context of the widespread poverty in the Niger Delta. They will need to cover, for example, legal fees and the cost of transporting community members to court—potentially for an extended period of time. Because of the lack of clarity in the legislative

framework, the initial stage of many claims is a game of procedural ‘ping pong’, during which alleged spillers seek to have cases ruled out of jurisdiction before they can be judged on their merits. The time this takes can exhaust the limited resources available to a host community. Some, therefore, may be tempted to try to settle out of court, behind the backs of others. This can break down community relations.

Related to this, the Nigerian appellate system is also overburdened, partly as a result of the fact that many cases are subject to numerous procedural appeals. Because of this, and the frequency of out-of-court settlements, oil spill case law in Nigeria is not as well developed as it should be. The precedents that would be derived from this could help overcome some of the gaps in the legal framework. Nigerian jurisprudence instead sometimes turns to English case law (in particular) when a precedent is required, even though this may not be suitable.

6 Assuming a case is successful, and compensation is awarded, distributing the money is then a challenge. Traditional governance structures in the Niger Delta are commonly hierarchical and patriarchal, and as such male elders often act as gatekeepers through which monies must be disbursed. This means that local politics may determine who actually receives compensation, as those who support particular leaders are rewarded, and those who do not are punished. The majority of economic activity in the Niger Delta is informal and many rural community members do not have bank accounts, which facilitates the practice of appropriating funds.

7 The compensation system sits within broader structural issues relating to Nigeria and its oil industry. Nigeria has well documented governance challenges: for example, relating to corruption, and a lack of transparency in politics. Its economic reliance on the oil industry, which produces huge wealth that can easily be concentrated in the hands of a small number of people, means the impact of these is amplified. Improving the compensation system is only one aspect of making Nigeria’s natural resources deliver more for the people of the Niger Delta.

The challenges above, and the others we document in this research, are not news to the inhabitants of the Niger Delta. However, this report is an attempt to systematically document the practical barriers to the implementation of the oil spill compensation system, such as the logistical complexity of organising oil spill site assessments. In response to these barriers, we have developed a number of policy recommendations and practical steps which would help bring about change. These are outlined in the accompanying report, *The Nigerian oil spill compensation system: a framework for change*.

Key messages:

- The Nigerian oil spill compensation system is not delivering for the inhabitants of the Niger Delta. A legacy of historic spills, combined with ongoing pollution, means the environment remains an ecological disaster zone. But the lack of effective legal redress means that as well as suffering from the direct impact, communities are sometimes unable to receive financial compensation or support to address the long-term consequences for years after the initial spill—if at all.

- Adequate compensation needs to be accompanied by an effective and properly implemented system to ensure the remediation and restoration of polluted land. Compensation awards are currently based on damage from spills which, in an ideal world, would not occur in the first place, and which should be effectively cleaned up when they do.
- The principle of compensation is based on the rights of Nigerians in law to a healthy environment, and for damage to be remedied when it takes place. As such, no discussion of compensation can be divorced from the legal system which is supposed to protect and promote these rights. This system is broken, principally because it does not properly exist: there is no unified set of policies to guide the process of assessing the damages caused by an oil spill, or implementing compensation in turn. From this, flows multiple problems—most obviously that everyone involved in a compensation claim has a number of different ‘reference’ frameworks to choose from when working on an oil spill case. This means there are multiple areas for dispute over policies and procedures to be followed, which is one of the reasons progress is frequently slow.
- However, there are a number of other practical problems inherent to the system, many of which relate to broader structural issues in the Niger Delta. Many communities live in entrenched poverty, and do not have the financial and logistical resources to pursue lengthy legal cases. The process of appointing oil spill assessors is open to abuse. The court system which manages appeals is overburdened, and has a backlog of cases which it will struggle to clear. The informal nature of the economy means some intended beneficiaries of oil spill compensation do not have bank accounts, and so compensation cannot be paid directly to recipients, which means the money can be diverted. Pessimism in some quarters is deeply entrenched and so overcoming political inertia and other inertia to address the problems will be difficult.
- This report, and the accompanying policy framework, document these social, political, technical and economic issues, and make practical suggestions for how they might be addressed.
 - A primary focus should be on generating political momentum to pass the NOSDRA Amendment Bill into law. This long-awaited NOSDRA reform would achieve two outcomes, amongst others:
 - First, it would provide NOSDRA with increased funding and a stronger statutory basis for investigating and ruling on oil spill compensation issues.
 - Second, it would signal the intent of the Nigerian government to deliver change on this issue, which is particularly important in light of its plans to expand the industry.
- In addition, the government should establish a commission which will report on options for an alternative dispute resolution mechanism that can operate outside of the court system to resolve oil spill compensation cases. Alongside measures taken to resolve the practical issues, this would help support a more just and equitable oil spill compensation system. Note that this should not be at the expense of ensuring environmental protection standards to prevent spills are properly enforced in the first place.
- We explore these and other measures to address the practical problems in our accompanying report, *The Nigerian oil spill compensation system: a framework for change*.

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1. Introduction

The Nigerian oil industry produces around two million barrels a day of high-quality crude oil. This has formed the backbone of Nigeria's economy for the last 50 years. However, the impact on the ground in Nigeria's main oil-producing region, the Niger Delta, has been severe. This is, in particular, a result of oil spilled from the extensive pipelines and other infrastructure which crosses the area. Oil spills are caused by operational error, faulty or badly maintained equipment, and from pipelines tapped for oil to sell internationally and to the local 'artisanal' refining industry.

Decades of these spills have ruined land and water resources, in the context of a region where many are dependent on fishing and agriculture for their livelihoods. The environmental damage also has disturbing health implications. For example, one study indicates that infant mortality rates double for children whose mothers lived near an oil spill prior to conception.¹ Other research has shown a correlation between the proximity of gas flares and respiratory problems.

In principle, the objective of the Nigerian oil industry is not to spill oil in the first place. However, Nigeria has a number of mitigation measures for when oil spills do occur. These include provisions in law intended to ensure local communities can claim for, and receive, compensation when they are affected by a spill. These are notably supposed to provide economic support where livelihoods are impacted, such as where crop-land is rendered unproductive because of the toxic effects of oil. Collectively, the framework through which these claims are made and adjudicated is known as the oil spill compensation system.

However, the system is notoriously ineffective, and in many cases fails to accomplish its purpose. For example, communities sometimes do not receive compensation for damage to their land or property at all, because the cost and complexity of the system can exhaust their resources. When they do, it may only be after years of litigation. In the meantime, apart from the health and environmental consequences, they can suffer serious economic harm. This is often permanent, while compensation can be limited to a year or less.

This report documents and explains some of the legal, technical, administrative, and socio-political barriers to the effective implementation of the compensation system. The purpose of doing so is to help identify a practical plan and realistic approach to change the system for the better. The research for this report included desk-based policy and legal research, and a series of interviews and other discussions carried out with more than 30 stakeholders involved in the oil spill compensation system. These include oil spill compensation assessors and valuers, lawyers, civil servants from relevant government agencies (notably the Ministry of Land, Housing and Urban Development), academics, State and Federal-level politicians involved in environmental issues, staff from civil society organisations, and members of the public from host communities.

¹ Bruederle, Anna, and Hodler, Roland (2017) The Effect of Oil Spills on Infant Mortality: Evidence from Nigeria. CESifo Working Paper Series No. 6653. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3043605 (Accessed: 13 April 2020). This is discussed in detail at www.stakeholderdemocracy.org/moremoneyproblems

This report is divided into three main sections:

1 The report provides an up-to-date analysis of the legal and policy issues. The premise on which all compensation is awarded is that Nigerians have rights in law to have damage caused by oil operations made good. As such, no discussion of the issues can be divorced from the legal framework which provides for these rights to be enforced.

2 The report examines how the legal problems are amplified by practical considerations. One example is the logistical challenge of organising the necessary site visit to inspect and assess damage caused by an oil spill. There is necessarily some overlap between the stage of a compensation claim when these issues are relevant, but they are discussed according to the approximate sequence of events through which a compensation claim proceeds: from the notification of an oil spill and initial impact assessment, through accessing the justice system and pursuing a claim through it, and then the difficulties in ensuring compensation, if it is awarded, is actually received by its intended beneficiaries.

3 The report summarises the discussion, and highlights key conclusions. We make a series of detailed recommendations in our separate report, *The Nigerian oil spill compensation system: a framework for change*. If implemented, these could form the basis of practical action to help overcome some of the barriers identified.

The oil spill compensation process

1. An oil spill takes place: for example, because a corroded pipeline breaks, or is vandalised by artisanal oil refiners or an unknown agent (mystery spills).
2. The relevant company or community raises the alarm with the National Oil Spill Detection and Response Agency (NOSDRA).
3. A Joint Investigation Visit (JIV) is organised to determine the cause and assess the impact of the spill.
4. The local host community, often supported by civil society organisations, professional valuers and lawyers, will seek compensation from the company concerned. This will include a visit by relevant professionals to assess losses and damage caused by the spill.
5. If the company and community cannot agree on a compensation figure, the community may pursue the case in court under the relevant legislation.

2. The legal and policy context

It is the law that grants to Nigerians the right to be compensated for damage caused by an oil spill. The Nigerian oil industry is governed according to a series of Acts, debated and passed as primary legislation by the Nigerian National Assembly. These include provisions for oil spill prevention, clean-up, and compensation procedures.

However, there is no overarching framework for what this means in practice, in particular related to what is a valid compensation claim, how much compensation should be awarded, and what procedures should be used to determine these and other issues. This is at the heart of many of the issues in the compensation system.

This section outlines these problems by first describing a number of conceptual problems with how oil spill compensation is conceived in Nigerian legislation, and treated in practice. Many of these flow from the ultimate problem outlined above—that there is no single piece of legislation covering environmental damage from the oil industry, which is explicitly excluded from Nigeria’s broader environmental legislation. The second part of this section then provides an overview of the key pieces of legislation which do in some way treat compensation issues, and how these conceptual problems are reflected in each.

2.1. Issues in Nigerian oil spill legislation

2.1.1. Overlapping frameworks and the hierarchy of legislation

The principal problem with the Nigerian oil spill compensation system is the lack of an overall framework. Oil spill claims are not processed and awarded by reference to a standard guide on how to measure, evaluate and award compensation for environmental damage arising from oil industry operations. Instead, there are a number of pieces of legislation which in some way identify and address aspects of compensation, some of which include provisions for damage to be made good.

The major and obvious problem with this is it creates almost limitless opportunity for dispute. Without an agreed benchmark for what compensation should be granted for, and how it should be assessed, it is difficult to establish even what the formal procedure should be to decide the benchmark to solve the dispute. The result is compensation cases which are almost impossible for a local community and oil company to resolve between themselves. As such, they must be settled in court. But this can take years to do so, as a case is repeatedly assessed for its relevance to multiple and overlapping pieces of legislation, on a procedural basis, before it can be tested on its merits.

This issue is acknowledged in later pieces of legislation, which attempt to get round this problem by deferring, where possible, to the 1978 Land Use Act. This is unfortunate, because the Land Use Act provides compensation for improvements to land being acquired as part of a compulsory purchase for overriding

public interest such as infrastructure development: for example, where a building has been constructed. This is fundamentally different from assessing the value of land in terms of its potential to generate income indefinitely—for example, from crops—and so the Land Use Act is not fit for the purpose of assessing damage from an oil spill.

Legislation that does attempt to directly address compensation issues nonetheless has critical gaps. For example, the Oil Pipelines Act does not cover offshore spills. Where a spill affects a shore-based community, but the spill itself is judged to have taken place offshore—or it cannot be proven to have taken place onshore—it can therefore be ruled out of jurisdiction. This is a good example of how a case can be struck down before being tested on its merits.

Another way in which Nigerian courts may attempt to resolve these problems is by looking elsewhere. This sometimes includes looking for a precedent in English law, if the court can be persuaded that the jurisprudence is relevant. But it may only be tangentially so, and this should be no substitute for the creation of a Nigerian compensation framework that properly addresses local issues.

2.1.2. Third-party spills

The next key issue—directly related to whether a spill can be ruled ‘justiciable’—is what caused the spill. This is a topic of fundamental importance in Nigeria because of the prevalence of the artisanal oil industry. This industry refines stolen crude oil, in camps hidden in the Niger Delta mangroves, into fuel for the local black market.¹ Artisanal refiners frequently cause spills when they tap pipelines to siphon oil, and so this is a major source of pollution in the region. However, if causal responsibility for a spill is attributed to artisanal refiners—or another ‘third party’—then the oil company operating the relevant infrastructure cannot be held liable for compensation (although it is still liable for the clean-up operation).

This is an extremely contentious topic in Nigeria. The present situation departs from the ‘polluter pays’ principle, which makes the liability to pay dependent on if the contents of a pipeline escape, and not on who was responsible for the escape. Some say it creates an incentive for oil companies to interfere in the oil spill assessment process, and do all they can to ensure that spills are attributed to third parties. The companies say that it is not in their interest to lose oil from their pipelines in the first place—it is lost revenue, and spills jeopardise their social licence to operate—and that they do all they can to prevent sabotage. Oil company staff interviewed also say that local communities sometimes prevent them from accessing spill sites, apparently with the intention of increasing any damage and hence the potential value of a compensation claim. Those staff added that although Non-Governmental Organisations (NGOs) often challenge oil company data, which says that most spills are due to sabotage, this is the reality.

The question of where and how responsibility should be attributed will continue to provoke further discussion. What is clear is that all compensation legislation is premised on the polluter being an identifiable entity, such as an oil company or a third party. But there is no statutory procedure to determine a responsible party, and

¹ This is discussed in detail at www.stakeholderdemocracy.org/moremoneymoreproblems

where it is not possible to attribute responsibility to such an identity—often because of the inability to reach consensus—there is no recourse to secure compensation. This is one of the major reasons why compensation claims in Nigeria fail, and addressing this gap should be a major priority for Nigerian legislators.

2.1.3. The concept of compensation: one-off payment or indefinite damages?

There is a major conceptual flaw at the heart of compensation awards in Nigerian law. This relates to the nature of how compensation itself is understood.

The idea of compensation is to provide a substitute for income and other value lost as a result of an oil spill. In the Niger Delta, this value will generally relate to land and water resources. This is significant. The majority of inhabitants in the Niger Delta rely on farming and fishing for their livelihoods. The land, rivers, and creeks that make up the region are their source of food and income, on an ongoing basis: each new growing season delivers a new crop to eat or sell, or a new catch of fish. When farmland or water is poisoned by an oil spill, the damage is likely to be long-term. Unless and until the land is fully restored to biological health—which can take years—the land has ceased to be a source of food and income.

It is impossible to overstate the importance of this. Many communities in the Niger Delta live in poverty, and there is little to no social safety net provided by the state. An oil spill can literally destroy a business, not to mention the potentially disturbing health impacts for those who must continue to live on poisoned land and water. However, the general way in which a compensation payment is conceived is as a *one-off* payment: for example, to address the present cash value of a particular crop, such as the total quantity of plantain grown per hectare of land affected by an oil spill. This fundamentally does not reflect the fact that undamaged, the land would generate that value on a *recurring* basis.

Furthermore, those affected by the loss of productive capacity are not just the farmers whose crops grow on it, or the landowner to whom they pay rent, but also those who transport the goods, process them, and sell them. The goods produced on a piece of land are at one end of a supply chain which supports multiple livelihoods. These are rarely all captured in the economic assessment of oil spill impacts.

This glaring problem is a major issue. It might be argued that the compensation payment provides the capital necessary to restart business activities. But actual compensation awards for small cases can be extremely low—as little as a few thousand US dollars—for an area on which multiple families depend. And this also assumes that the land itself is properly restored to productive health; there are hundreds of historic oil spills in the Niger Delta which have never been cleaned up.

Some aspects of compensation legislation do attempt to capture these issues. For example, the Petroleum Act mandates a lessee or licensee of an oil block to pay “*fair and adequate compensation for the disturbance of surface or other rights to any person who owns or is in lawful occupation of the licensed or leased land*”.

The obligation created to pay compensation for surface disturbance—that is, damage to the land—is good. However, the failure of the Act to define or interpret what is meant by “*fair and adequate*” is an example of the lack of precision in compensation legislation, and this opens up the compensation claim to endless dispute. The consequence of this is that where a community and oil company cannot agree on compensation—which is almost certain—the award must be determined by the courts, on a case-by-case basis. This is how compensation claims become a battleground for lawyers.

2.1.4. Heads of claim and the basis of valuation

One of the ways in which compensation legislation is insufficiently precise is in delineating what can be compensated for. These are described in legal parlance as ‘heads of claim’, which refers to the headings under which a claim for compensation is described (such as ‘crops’ or ‘property’).

The list of ways in which land and water sources support economic and other activity is long, and it might not be feasible, or desirable, to describe them all in compensation policy. This would lead to attempts to exclude particular items that did not fit a precise description. However, the current situation is far too vague, with a lack of guidance on rates, methods, and processes used to evaluate what can be claimed for. Different pieces of legislation describe different heads of claim, while others are silent on heads of claim that are included in others. As such, it is rare for a compensation claim to come close to evaluating the ‘total economic value’ (TEV) of all losses from an oil spill. These would generally include, but not be limited to, losses relating to:

- Disturbance of surface and sub-surface activity by damage to land.
- Personal injury and medical expenses.
- Equipment and other capital costs.
- Loss of produce.
- Loss of retail profits.
- Travel, legal, and other expenses.
- Nuisance and miscellaneous losses.

These in turn ought to be calculated to cover immediate and then short, medium and long-term losses, and, crucially, to take account of inflation and other market forces. If not, then even if in principle compensation is determined and awarded correctly, it will be based on historic rates, and its real value is likely to have eroded significantly.

Specifying losses would help overcome the vague language used in compensation frameworks, which tend to state solely that compensation should be ‘fair’, ‘adequate’, or ‘just’, without explaining what these terms mean.

2.1.5. Summary

There needs to be a unified framework to evaluate oil spill compensation claims. The current legislation does not provide a clear reference framework for how these should be assessed and awarded. Multiple legal texts provide overlapping guidance. This makes it difficult for parties to agree between themselves, and so compensation cases tend to end up in court. There, the cases are only tested on their merits after what can be years of debate over jurisdictional issues, such as whether a spill took place onshore or offshore. When they are tested on their merits, the lack of a harmonised system of heads of claim means that spills are determined on a case-by-case basis that leaves everyone unsatisfied.

The table below summarises some of the ways in which compensation issues are treated in compensation-relevant aspects of legislation as it stands.

Heads of claim	Relevant legislation or regulation	Specified method of assessment
Disturbance of surface rights	The Petroleum Act	Not specified
Damage to the surface of the land	The Petroleum Act	Refers to the Land Use Act
Damage to crop, economic trees, buildings and works	Oil Pipelines Act Land Use Act	As per the Land Use Act
Loss in value of the Land	Oil Pipelines Act	Not Specified Refers to the Land Use Act
Damage to the environment	National Oil Spill Contingency Plan	No method of assessment is provided

2.2. Key legislation and policies

This section identifies key aspects of six main pieces of legislation and regulation that attempt to deal with compensation issues, and how these illustrate some of the problems outlined above.

2.2.1. The Nigerian National Petroleum Corporation Act

The Nigerian National Petroleum Corporation (NNPC) is Nigeria's state-owned oil company. Via the joint-venture and other agreements through which the Nigerian oil industry is structured, it is effectively involved in almost all oil production in Nigeria, including upstream exploration and production, as well as downstream refining, marketing, and sales.

In terms of environmental responsibility, the NNPC Act 2004 makes clear that NNPC will not be exempt from paying compensation where damage may be due to oil production activities:

“...The provisions of this Act shall not be construed so as to exclude... the payment of compensation in respect of any loss or damage that may have been suffered in consequence of the operation of the provisions of this Act.”

However, this does not provide any clarity on the specific heads of claim (category) under which compensation can be sought. Nor is the method for the valuation of land damaged by an oil spill specified. The Act discusses compensation in the context of Nigeria’s 1978 Land Use Act. However, the Land Use Act was designed for compensation awarded for the compulsory purchase of land for development—not for damage by the oil industry. As such, it is fundamentally unsuited to the task.

2.2.2. The Petroleum Act

The Petroleum Act establishes the principal framework for companies to be able to hold and exercise the rights to explore for, and produce oil in, a given lease area. Amongst other language on compensation, it also provides for those holding oil licences to *“be liable to pay fair and adequate compensation for the disturbance of surface or other rights to any person who owns or is in lawful occupation of the licensed or leased lands.”*

As such, the Petroleum Act does establish the principle that those who are affected by the activities of the oil industry are entitled to compensation in return. However, as with other legal texts, it does not provide sufficient guidance on the method of assessment of such compensation, who should carry out this assessment, or who should settle disputes arising in the event that parties should fail to agree on the compensation value. As such, reference to the Act in connection with compensation matters is often meaningless.

2.2.3. The National Oil Spill Contingency Plan

The National Oil Spill Detection and Response Agency (NOSDRA) was established in 2006 to help address oil industry pollution, as a federal agency with the power to coordinate the National Oil Spill Contingency Plan (NOSCP). This is a major piece of policy intended to ensure that Nigeria’s oil spill response policy is in line with international best practice.

The NOSCP is comprehensive in its scope, and provides for NOSDRA’s participation in the assessment of damage caused by spill, as well as referencing the need for ‘restoration and compensation of the environment.’ It also notes that NOSDRA should assist in mediating between affected communities and the oil spiller.

However, as with other policies, the NOSCP is silent on actually identifying the types of damage that can be caused, an appropriate mechanism to assess these, and what ‘compensation of the environment’ means in financial or technical terms. Also unspecified is the manner in which local communities or others are expected to negotiate directly with oil companies or those who spill oil. As such, this opens the process up to dispute, and ultimately failure to reach a resolution.

2.2.4. The Oil Pipelines Act

The 2004 Oil Pipelines Act covers those with a licence to site and operate oil pipelines, and makes provisions for those with such a licence to pay compensation as a consequence of pipeline breakage or oil leakage. These provisions include determining any loss between the original and post-spill value of land.

However, this implies the existence of a pre-spill assessment of the land's value, including all relevant heads of claim. But there is no provision in this or other relevant legislation for this assessment to be carried out as part of the process for awarding an oil mining lease. Without this point of reference, the provision is functionally useless.

The Act also calls upon licence holders to take reasonable steps to avoid unnecessary damage, and to compensate the owners or occupiers of damaged land, crops, or buildings, where that damage is not “*made good*”. However, what constitutes ‘reasonable steps’—or what ‘making damage good’ means—is not clear. As such, this legislation effectively specifies the areas on which people should disagree, without explaining how they should resolve the disagreement.

2.2.5. The Land Use Act

The Land Use Act does not address compensation in the case of damage. Instead, it addresses compensation in the event of the compulsory purchase of land or property by a developer. As noted, other legislation frequently makes reference to the Land Use Act for oil spill matters, because it attempts to specify compensation values. But these are for a fundamentally different purpose, and not suited to the nature of oil spill damage.

A further problem with the Land Use Act is that it stipulates that assessments carried out under its remit are to be conducted by the ‘appropriate officer’. In theory, this is commonly the Chief Lands Officer. However, in practice, the official or person engaged to carry out oil spill assessment can be drawn from many different roles—often without formal training in assessing oil spill damage. This opens the system up to abuse, a problem discussed later.

2.2.6. EGASPIN

The DPR is domiciled in the Ministry of Petroleum Resources. DPR is responsible for regulating and supervising all operations carried out under the licenses and leases granted to the oil and gas industry. It oversees the exploration, production, and marketing of crude oil and refined petroleum products, and is mandated to ensure compliance with the regulations.

DPR also oversees a number of policies collectively known as the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN). EGASPIN outlines environmental and safety standards for oil

operators in Nigeria. They are intended to prevent, minimise, and control pollution from various aspects of petroleum operations.

EGASPIN, in principle, uses methods and guidelines that are consistent with international best practice. However, their main focus is in ensuring that polluted sites are remediated to acceptable standards—not determining how damage assessments for compensation should be calculated.

It is also unclear whether the provisions in EGASPIN are recommendations or obligations. This limits their enforceability, and is made worse by the fact that EGASPIN sits at the heart of a notorious regulatory overlap. DPR, as the business-focused regulator, has a mandate to maximise industry revenues for the Nigerian treasury. However, the fact that it also issues and, in theory, oversees EGASPIN means that it is also responsible for regulating the industry's environmental and social impact. This is a glaring conflict of interest, which must be addressed.

2.2.7. Regulators in compensation

The Nigerian oil industry is structured according to legislation passed by the Nigerian parliament, the National Assembly.

Operationally, the industry is overseen by a number of regulatory agencies and bodies. These include the Ministry of Petroleum, which includes the Department of Petroleum Resources (DPR), the business regulator, and the Ministry of Environment, which includes the National Oil Spill Detection and Response Agency (NOSDRA), a key pollution-monitoring agency. NOSDRA's role includes identifying and reporting on oil spills, and taking action to clean them up.

Another government department relevant to oil spill compensation issues is the Ministry of Lands, Housing and Urban Development. Civil servants from this Ministry are responsible for assessing the value of improvements made to land, should this be acquired as a compulsory purchase under the Land Use Act. Although it is not necessarily suitable to do so, this Act is frequently used to help determine the value of land affected by an oil spill. As such, its officials can play an important role in compensation claims.

3. The oil spill assessment process

This section details how it translates into practical problems on the ground. It outlines key challenges which occur during different phases of an oil spill compensation claim: site access and assessment, progress through the courts in which most cases end up, and the disbursement of damages, if awarded.

3.1. Site access: terrain, transport and security

Organising an oil spill site visit is a physical and politically complex task. The first challenge is the terrain which needs to be accessed. The Niger Delta is primarily composed of mangrove swamps, and basic transport infrastructure such as roads and bridges in the region is often in disrepair. Physically getting to an oil spill site—many of which are in remote or rural areas and may, for example, only be accessible by water—therefore entails organising a number of logistical issues.

This might involve hiring a boat for travel through the area's creeks and rivers. These are often also patrolled by the Nigerian Navy, as part of its work to counter the artisanal oil refining industry—the illegal refining of crude oil by local criminal groups—and so organising a site visit might also entail liaising with the military, police and other security agencies to secure passage. The Niger Delta sees a lot of criminal and other organised violence, and checkpoints are common.

Road travel is also complicated. Much of Nigeria's onshore oil production lies west of Port Harcourt, in western Rivers State, as well as Delta State and Bayelsa State. For lawyers, civil society members, and oil spill assessors heading out of Port Harcourt city—which is Nigeria's oil hub, and the location of much professional expertise—any journey will involve taking the East-West trunk road, which tends to have numerous checkpoints and is slow to transit. Travel at night in the Niger Delta is also dangerous, and so visits to oil spill sites in Bayelsa and Delta states, even close to major settlements, therefore imply expenses and delays, while the logistics for multi-day journeys are organised.

3.2. Site access: community liaison

Assuming the broader logistics have been organised, access at the actual point of entry to a community can also be a barrier. The Niger Delta has a long history of social conflict, including periods of armed political and militant violence, and communities may be suspicious of outsiders. There is also a serious problem with cult groups—criminal gangs—and 'area boys', another type of organised gang—who may control physical access to a town or village.

Given their position of influence, these groups may be able to dictate financial terms to outsiders—such as compensation assessors—or refuse entry. One respondent interviewed for this report told us they often operate on the principle of 'matching ground,' which involves allowing access to an oil spill site only if promised

the same amount, effectively in entrance fees, as whatever compensation might ultimately be awarded. This is a near-impossible situation for oil spill assessors, not least because, prior to the assessment, the assessors will have no idea of what compensation may later be awarded. In some cases, the financial request may be made of the oil company, whose staff are often on the assessment team—including threats, according to participants we interviewed for this research.

To avoid this situation, oil spill assessors can organise a preliminary ‘visit to organise a visit’ to explain the purpose of the spill assessment. This will likely involve meeting with traditional and other leaders to ensure safe and free passage, and ensure local politics are negotiated to obtain freedom to operate from community chiefs before assessment. However, this implies further logistical expense, as well as a method of initiating contact with the community in the first place.

3.3. Site access summary

Site access challenges mean the speed of responding to an oil spill can be slow, and so vital information may not be captured, or assumptions are made later, such as relating to the quantity of oil spilled. This can make it more difficult to quantify the extent and impact of a spill: significant dispersion may already have taken place, but it may not be obvious that the effects of the spill reach beyond the immediate area. This means that communities elsewhere—notably downstream, in riverine areas—may suffer from the impact of an oil spill, but do not even get contacted about the potential for compensation. Those communities, in turn, will not be able to provide any evidence of where the spill originated, making it unlikely that if they lodge a case, they will ever receive compensation for damages.

These are some of the barriers of securing access to, or even identifying, an oil spill site—the initial task which must be completed as part of a compensation claim. The next section describes barriers to compensation assessments once access has been secured.

3.4. Impact assessment procedures: the Joint Investigation Visit

The Joint Investigation Visit (JIV) is the cornerstone of oil spill data in Nigeria. It is the principal mechanism for determining the extent and impact of an oil spill, and hence also a key part of the compensation process.

The significance of the JIV relates in particular to the legal issue identified in section two, of attributing responsibility for a spill to a particular party. If the JIV determines that a spill is caused by operational failure, such as a pipeline breaking because of poor maintenance—in other words, that it is the fault of the company that owns the asset—then a compensation process can be initiated.

However, if the cause is determined to be ‘third-party interference’—sabotage or theft—then the company that operates the infrastructure is exempt from paying compensation, and the communities will not receive

compensation. This sets up the possibility of serious dispute: for example, because oil companies have an incentive to ensure that the outcome of the JIV is the attribution of an oil spill to a third party. Oil company staff we spoke to said that this also creates the opposite incentive: for communities to try and classify sabotage or theft incidents as the fault of companies in order to seek compensation. They also said, for example, that spill containment equipment (such as booms spread across rivers to prevent the flow of oil downstream) is sometimes dislodged, in an attempt to increase damage and hence the potential value of compensation.

The way in which this responsibility is actually attributed is via a physical inspection of the pipeline break. Visual assessment and discussion by those present of the evidence at site—such as the presence of hacksaw marks—are commonly used to agree a cause. But this means that the process is fundamentally subject to a political process of negotiation, and the different resources available to those who take part is one of the reasons why the JIV process has been criticised. Most obviously, this relates to the fact that NOSDRA must sometimes rely on boats and other logistical arrangements organised by oil companies to attend an oil spill site.

This could hardly be more inappropriate, but it is the reality for a regulator which is chronically under-funded. One interviewee we spoke to for this report made this plain: *“There is nothing like the JIV in the UK or the US. It is the responsibility [in those countries] of the regulatory equivalent of NOSDRA to identify contaminated sites. Then it is the duty of the environmental agency to carry out remediation.”* The lack of a fully-funded independent environmental monitoring agency is therefore a key barrier to the effective operation of the oil spill compensation system.

The Joint Investigation Visit

The Joint Investigation Visit (JIV) is the formal process through which the cause and impact of an oil spill is assessed. A JIV is initiated when the National Oil Spill Detection and Response Agency (NOSDRA) receives a report of an oil spill. After this happens, NOSDRA organises a visit to the site of the spill. This is known as the JIV. It is intended to include NOSDRA staff members, oil company staff, and representatives of local communities affected. Together, these people are known as the Joint Investigation Team (JIT). The JIT determines and signs off on a record of the spill, including its precise location, the estimated volume of oil spilled, any containment measures taken, and the company whose infrastructure the spill came from.

This data is logged and uploaded onto NOSDRA’s online database of oil spills, the Oil Spill Monitor. The information can form a key part of any oil spill compensation claim, although the JIV has faced criticism for the way it is organised. Disputes sometimes arise, for example, over the quantity of oil which is reported as being spilled, while in some cases it is not possible to carry out a JIV at all—which means there is no formal record of an oil spill, and hence basis for a compensation claim.

The Oil Spill Monitor is available at www.nosdra.oilspillmonitor.ng

3.5. Impact assessment procedures: operational deficiencies

Further to the JIV, a separate compensation assessment visit may be carried out in an attempt to determine the value of losses caused by an oil spill. This is a formal valuation process, but it is compromised by the legal imprecision and other issues discussed previously.

Compensation estimates are based on calculations that are made without reference to guideline rates for damage to crops, land, and water resources, or income forgone. They may not include the full area of land or water affected, because oil has dispersed downstream, and they may not include an accurate assessment of the severity of pollution, because of the time and expense required, for example, to drill soil samples and conduct laboratory analyses to determine the level of clean-up and remediation activity required. Some assessors will calculate the number of individuals who derive income from a particular area—such as the number of fisherwomen and men who use a stretch of water on a weekly basis—while others will only include those who directly live on the waterfront.

All these issues, and many more, flow from the lack of precision in the legal framework determining how the total economic value of losses caused by an oil spill should be calculated. There can be no clearer example of how legal imprecision translates into practical problems on the ground.

3.6. Impact assessment procedures: baseline surveys and community evidence

A further problem with compensation assessments is they rely in principle on determining the loss in value of an area of land or water after an oil spill. This presupposes that the value of the area of land or water *before* the spill is known: an assumption implicit in the Land Use Act, to which many compensation procedures defer. But this requires host community land to have been surveyed, for which there is no legal obligation, and which communities are unlikely to be able to afford themselves.

As such, assessing any loss in value is extremely challenging. To get around this, losses are sometimes evaluated based on discussions with community members about the crops, goods, property, and equipment present in an area prior to a spill. However, this means relying on community members to provide this information, which creates a problem in terms of the evidence trail, and also relies on community members having a formal understanding of the financial value of what has been lost. But farmers and fishermen and women who grow crops or fish on a subsistence basis may not necessarily know the formal value of what they have lost, at least to the degree that can be substantiated for a compensation claim.

Inadequate documentation of land ownership boundaries further complicates this problem, by making it difficult to determine who compensation should actually be awarded to. First, who actually has title to the land? Second, if this land is leased to others—for example, tenant farmers—who should receive the compensation: the owner whose rental income is damaged, or the farmer whose crop income is damaged, or both?

All these questions could—in part—be resolved with a formal assessment of host communities and their land and property, but these have not generally been carried out. The lack of documentation of crops, property, goods, and land users in an area prior to a spill means it is difficult to prove the existence of loss. This is a barrier to securing compensation.

3.7. Impact assessment procedures: who assesses what?

As with the JIV, a further key question for an oil spill compensation assessment is who carries it out. In theory, this should be a properly qualified professional. For example, the Land Use Act—to which much compensation legislation ultimately defers—vests significant power in the ‘appropriate officer’ to determine methods to be adopted in the assessment of compensation. These must ultimately be guided by professional and approved standards.

However, this makes compensation subject to the interests of the person who appoints the surveyors, which opens up a route to interference. For example, one person interviewed for this report alleged that some oil companies have a pool of valuers who they will seek to appoint to oversee the assessment of an oil spill. The incentive is clear: if a lenient assessor is appointed, this means that compensation claims can be weakened, such as by excluding particular damages, or restricting the physical area or number of people deemed to have been affected by an oil spill.

There are other mechanisms for interference. For example, participants in this research said that even if a competent and accurate technical assessment is conducted, field visits by professional staff can end with them having a compensation figure for an oil spill site dictated to them by others above them in the compensation process. As such, compensation in some cases is literally predetermined by the willingness of companies to pay. This is a total contradiction of the principle reflected in international guidance on business operations, which imply that compensation should reflect the actual losses incurred by a particular oil spill. For example, the UN’s Guiding Principles on Business and Human Rights say that:

“As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.”

3.8. Survey costs

Another reason why an oil spill assessment may not take place, even if site access and a qualified surveyor can be secured, is because of the costs involved in organising one. Survey fees may eventually be paid by spillers, or deducted from compensation awards. But this means they are paid in arrears, and so the survey must in the first instance be self-financed, either by the community or the surveyor. As such, if the likely cost of a survey

¹ www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf

in travel, equipment, accommodation, and other expenses exceeds the fee proposed for carrying it out, it may never happen in the first place.

This leads to the problem where a compensation assessment may be carried out by local professionals who do have relevant expertise—they may be an engineer, for example—but are not properly qualified in land valuation or assessment. Although their assessment may not necessarily be carried out in bad faith, it will not capture losses in a professional manner, and cannot be presented in a court of law. It also runs the further risk of setting inaccurate precedents for other compensation claims.

With so much legal, technical, and civil service expertise based in Port Harcourt, Yenagoa, and other major settlements in the Niger Delta, civil society organisations do what they can to support communities to initiate and pursue compensation cases. But they cannot reach everywhere. The cost of organising an oil spill assessment is therefore an obstacle to the compensation system delivering on its remit.



Visiting oil infrastructure in the Niger Delta creeks with a security escort. © Stakeholder Democracy Network

4. Access to justice

The previous section outlines some of the barriers to carrying out a reasonable oil spill impact assessment. But assuming this is successful, there are then a number of barriers to accessing the formal compensation process itself, which likely means the court system. The next section outlines some of these challenges.

4.1. Corporate accountability in Nigeria

The specific legal challenges of the oil spill compensation system are outlined in this report. But they sit within a broader legal environment in Nigeria which is not conducive to corporate accountability. Nigeria has well-documented governance issues, in particular related to transparency and corruption. These interact, and are influenced by, the nature of the extractives sector, which generates huge profits but involves a relatively small number of people. In the absence of an effective system of checks and balances on resource distribution mechanisms, a number of cases have illustrated how this can lead to alleged grand corruption.¹

Faced with this, some communities, often with the support of civil society organisations, have had their cases taken on by international law firms, with the intention of seeking remedy in foreign jurisdictions. This has been based on an attempt to demonstrate that the global parent companies of oil firms have ultimate responsibility for the actions of their subsidiaries, and so can be held to account in the jurisdiction of the parent company.

Nigerian oil spill, international justice?

The frustrations of the Nigerian legal system means some communities in the Niger Delta have sought compensation in foreign jurisdictions, where it might be possible to demonstrate a specific country's courts have a role to play.

For example, one case which has nearly concluded its passage through the English court system concerns the communities of Bille and Ogale, in Rivers state.

The communities' case concerns the impact of years of oil spills by the Shell Petroleum Development Company (SPDC). Bille and Ogale have taken the case to London on the grounds that Royal Dutch Shell (RDS), the Anglo-Dutch oil giant which is SPDC's parent company, is legally responsible for the actions of its subsidiary in Nigeria. At group level, RDS is listed on both the London and Amsterdam stock exchanges.

The English supreme court is likely to rule on whether RDS can be held responsible for the conduct of SPDC in 2020. This will be the final judgement possible in the English court system on this case.

¹ This includes, most notoriously, the 'Malabu' case. See www.globalwitness.org/en/campaigns/oil-gas-and-mining/opl-245-shell-and-enis-nigeria-deal

This may be an option for major spills, and is not without merit. In particular, it can help focus international attention on corporate behaviour in Nigeria, and the inability of its domestic justice system to provide redress for local communities. If, as a result, Nigeria strengthens environmental regulation and enforcement—and if communities are able to secure compensation from companies in Nigeria as a result of decisions from abroad—this is to be welcomed in and of itself.

However, the reality is that this is not a feasible option in the majority of cases, which may relate to relatively small spills. Pursuing international legal action is not a feasible course of action for a community which has seen a spill of 25 barrels. This is the maximum size of a ‘minor’ spill in inland waters, according to the official classification—but still equivalent to nearly 4,000 litres, enough oil to poison the land and water on which an entire community depends. These spills also need to be addressed. But the low-level corruption, lack of transparency, and bureaucratic obstacles which characterise the Nigerian business and legal environment still require time, money, and specialist understanding to negotiate. As a symptom of the broader challenges of the Nigerian business environment, these also constitute a barrier to securing compensation for an oil spill.

4.2. The overburdened court system

The Nigerian justice system has a lack of capacity to deal with compensation cases. The court system is, very simply, overburdened. This is another function of the convoluted legal framework, which incentivises those trying to avoid liability for an oil spill to appeal a case on every possible procedural basis, to avoid it being judged on its merits. One Port Harcourt-based respondent with experience of oil spill litigation explained:

“The appeal process is thoroughly broken. The volume of cases is far too much for the number of judges available, particularly in Rivers. You file an appeal, and for you to even get a hearing date, you will wait at least a year. Any adjournment will add another seven or eight months.”

The process through which this repeats itself means that appeals can in total take five or six years. The frustration, time, and expense this imposes on local communities is one of the reasons why they may end up settling out of court. This ensures that spillers evade the ultimate liability for their spills, as well as preventing the development of a body of case law on oil spill issues that would help fill the legal gaps in the first place.

4.3. The resources for a legal fight

Directly related to the burden on the court system is the financial burden on those trying to negotiate. Communities must either try to negotiate directly with spillers—in which case, they will often be presented with an inadequate compensation sum, which they can do little to contest—or pursue the case in the courts.

As noted, the complexity of the system means that one way in which oil companies can avoid paying compensation is to try and have an oil spill case ruled out of jurisdiction. But this also means that those seeking

to have a compensation case dropped can achieve the same outcome by turning it into a legal war of attrition. Repeatedly appealing the case on procedural or jurisdictional grounds can simply exhaust the financial resources available to a community to fight the case. This is an example of how the structural context—the poverty in which many live in the Niger Delta—means the compensation system, in which successful claims are usually the result of a formal, and expensive, legal process, is weighted against local communities.



Exposed pipelines near dwellings in the Niger Delta. © Stakeholder Democracy Network

5. Distributing compensation

The previous sections describe some of the barriers to organising an oil spill assessment and having it agreed to by an oil company or confirmed in a court of law. This section describes some of the challenges in ensuring that compensation actually reaches its intended beneficiaries if it is awarded—namely, community members who have lost land and livelihoods to the spill.

5.1. Local politics

Rural and host communities in the Niger Delta are often structured around hierarchical systems of governance. These commonly include a traditional leader at the head of the community, frequently a male elder. One of the roles of these leaders is to consult with, and then act on behalf of, the communities.

However, this means that they occupy a gatekeeper role, which places them in a position of power when it comes to the dispersal of compensation funds if a community is seeking compensation as a whole. They can therefore use the award of compensation money to promote factional interests or settle scores within the community, by gifting money to their supporters, and withholding it from their rivals. There may therefore be a political process to negotiate for community members who have been impacted by an oil spill to receive money awarded to them.

This can manifest itself in a number of ways. One is that the money may be awarded as intended, but reclaimed later. This functions through the links of gatekeepers to cult groups or area boys. These groups may control entrance to the community, as discussed previously, and maintaining these links is one way in which local leaders maintain their status in the first place. As such, even if they appear to oversee the distribution of compensation monies as intended, cults or other gangs acting on their behalf may later intimidate beneficiaries into giving them some or all of the compensation award.

As a result, other community members are very careful not to tread on the toes of local leaders, because they do not know who they are linked to—which prevents them from raising concerns about the issue of politicised leadership in the first place. This is especially true in public, because it risks putting a target on their head. As such, the situation perpetuates itself.

Oil company staff we spoke to also said that when it appears likely that a compensation award may be made for an area impacted by an oil spill, disputes over land ownership can suddenly surface. This further illustrates the political dynamics which must be negotiated in the settlement of compensation claims, which can be complicated by factors such as the customary land tenure system which may apply.

The oil company staff told us that as part of assessment procedures, they carry out a delimitation survey with other parties to determine how far a spill has spread, and generate a map based on this which informs their

position on compensation. They also said that the underlying issue is mistrust, and so when they encounter a community challenge, they write to the regulators and explain that they are encountering problems at a particular site, while trying to continue to engage amicably.

5.2. Financial structures and local employment

One respondent involved in organising the distribution of community compensation for an oil spill in Rivers State told us that many people in rural areas do not have formal involvement in the financial system—so, for example, they do not have bank accounts. They therefore rely on the distribution of cash payments, which for practical reasons is why compensation may end up being disbursed via a traditional or other leader. Once established as the designated community liaison for an oil company, this relationship will likely continue. This is one way in which the gatekeeper position is entrenched.

A potential solution to the capture of funds is to organise a joint, or foundation, account for local communities from which all beneficiaries can be paid. This has been tried in some compensation cases. However, it runs the same risk of ultimately being controlled by an individual who may have a vested interest in diverting funds elsewhere.

This dynamic also plays out in broader clean-up processes. For example, to support local employment, the remediation of large oil spills often involves providing contracts to community members to work on the actual clean-up itself. This is an alternative to providing direct cash payments in compensation. One interviewee involved in organising an ongoing clean-up in Rivers State said that:

“You might ballot 30 villagers to come to a central gathering space to help identify relevant workers who can take part in the clean-up. But local leaders will hijack this, and try to ensure their supporters are allocated the most slots. Those who do not have anyone in a position to speak on their behalf will not get any work.

The political bigwigs in the community will always end up cornering some of the funds, by claiming their supporters are vital stakeholders—and if not, then via the area boys and others, they will prevent access to contractors and others who do receive the funds.

Even if a ballot is allowed to take place and the compilation of community workers properly, then sometimes names will end up being removed and replaced by people who were not even there.”

Women, in particular, often do not have a voice in these political dynamics. They are rarely in positions of leadership, and may be physically excluded from formal and informal discussions around compensation payments, such as the JIV. As such, gender discrimination is built into the framework for the disbursement of compensation.

5.3. Refusal to comply

At different stages in a compensation claim, some oil companies may simply refuse to comply with compensation awards, or renege on promises made as part of the informal negotiations which communities sometimes engage in an effort to secure some kind of redress (see *Community-company relations*). It is important to note that this may be unethical, but it does not necessarily constitute illegal behaviour. It may simply reflect the broader issues relating to how compensation processes are frequently informal, poorly documented, and not subject to any kind of independent arbitration mechanism. The potential for this to cause conflict is nonetheless clear. Oil company staff we spoke to said that, as with any negotiation, spill compensation discussions can sometimes break down, but that they always aim to settle compensation claims amicably. They added that they prefer not to litigate, and do not aim to make unreasonable payments.

Community-company relations

As part of the research for this report, we visited a community in Bayelsa State which has seen frequent oil spills over the last few years. The community, which is situated around one of the rivers that criss-cross the Niger Delta region, is host to a manifold—equipment that gathers and then distributes oil from all the pipelines in the area.

The community most recently saw a major spill in the middle of 2019. After the initial assessment of the spill—the Joint Investigation Visit—community members wrote to the oil company involved to say that it did not properly reflect the value of their losses. The community said this included, in particular, damage to a plot of land with cassava crop which had not grown back.

The oil company invited family members affected to discuss the spill in Port Harcourt city—the capital of Rivers State, and the hub for Nigeria’s oil industry—in January 2020. The community members we spoke to said that at the meeting they were verbally offered 200,000 Naira (around USD\$500) in compensation for the cassava not included in the JIV. This was in addition to a total of just over two million Naira (USD\$5,100) previously offered for various damages and loss of income from the land.

At the time of writing, the spill had occurred more than six months previously, but according to the community the land had still not been properly remediated. And the compensation figure was simply dictated to the community, with no opportunity for local input on the losses. The community say they do not know what the compensation rates used were, or how they were calculated, but that the compensation is very low—and supposed to cover an ever-increasing period of time during which the land has not been able to support crops.

The January meeting, they say, was for show, and the company has since denied the offer of an additional 200,000 Naira for their cassava. Because there was no written agreement, it will not be included in the compensation claim. The community say that if they dispute the sum, the company will send representatives

to try and pay off individual families directly, knowing they may be tempted to settle behind the backs of others.

This case demonstrates how the compensation system is open to abuse. Without a clear system for valuing and awarding compensation, oil spill-affected communities can be faced with a take-it-or-leave-it offer from oil spillers. And without the financial or legal resources to challenge this, internal disputes can emerge among community members keen to secure any kind of compensation, however small, for lost livelihoods.

The local youth leader summarised his view on the situation: *“We are dying in silence.”*



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6. Prospects and barriers to change—the broader context

6.1. Political inertia

One potentially under-appreciated barrier to change in the compensation system is the attitude reported by some that because the situation has been so bad for so long, nothing can be changed to improve it. This then becomes a self-fulfilling prophecy, as limited time and resources are allocated to new initiatives to overcome long-standing problems.

There is some evidence to support this. For example, the passage of key legislation through the Nigerian National Assembly intended to bring about major reform of the Nigerian oil industry has been notoriously slow. This legislation includes the NOSDRA Amendment Bill—the objective of which is to provide NOSDRA with some of the support from which it would benefit, as outlined in this report—as well as the Petroleum Industry Governance Bill, intended to reorganise the commercial structure of the industry, which was first drafted nearly two decades ago.

One interviewee noted that in discussions of compensation issues and legislation, some oil companies will seek instead to talk about the Petroleum Host and Impacted Communities Development Bill¹. This is an important piece of legislation, which provides for the joint use of oil industry infrastructure by local communities, where possible. However, conceptually this is different from providing compensation to make good damage incurred as a result of oil industry operations. The Host Communities Bill is about maximising benefit from the industry for local communities. Oil spill compensation is about minimising the negative impact. These two issues should not be conflated.

Caution should always be taken when discussing the likelihood of progress on the NOSDRA Amendment Bill and related pieces of legislation. However, as of early 2020, the opportunity for political progress may be promising. Nigerian President Muhammadu Buhari was re-elected for a second, and what will be final, term in 2019. After six months of delay, relevant committees in the National Assembly on oil and environmental issues were constituted towards the end of that year, and, with the next general elections not due until 2023, there is now a window to initiate political action on these issues.

Progress does not need to be total. But it does need to happen. Any kind of action on legislation that focuses on compensation would signal that the political process can be unblocked. This is especially important given the Nigerian government's stated goal of increasing oil production by a third, to three million barrels daily, by 2023. Even if they do not have the expertise to document the specifics, members of host communities are perfectly capable of assessing the fact that they are frequently under-compensated for major environmental harm as the result of oil spills.

¹ See www.stakeholderdemocracy.org/wp-content/uploads/2018/12/HCB-11.12.18-JB.pdf

This legitimate grievance feeds into broader concerns around the functioning of the oil and gas industry, and the perception among some in the region that the Nigerian government is not interested in the Niger Delta beyond its status as the motor of the Nigerian economy. The relationship between state and society is in danger of being permanently damaged in the Niger Delta, which does not bode well for long-term peace and prosperity.

Furthermore, the Nigerian National Petroleum Corporation is also prospecting for oil in the Lake Chad Basin. Repeating the mistakes made in the Niger Delta in the north-east, in an area already facing a security and humanitarian crisis, including the activity of terror group Boko Haram, would be a recipe for disaster.

6.2. The economics of oil spills

A major structural issue underlying oil spills in Nigeria is that in economic terms, oil pollution is a negative externality. Oil companies produce and sell oil. But the cost of environmental damage is not internalised. Instead, it is borne by the Niger Delta. In practical terms, this means the cost of measures to prevent and clean up spills is not included in the price of a barrel of oil produced in Nigeria.

This is in a sense a problem of regulation, which is not as strong as it should be on mandating the installation of key equipment in Nigeria (such as the technology to shut down a pipeline remotely when an oil spill is reported), falling below international good practice. Doing so would add a premium on the price of Nigerian crude, which would damage the profitability of the industry, and its contribution to the Nigerian treasury. This is a political trade-off which is for Nigerian lawmakers to decide. At the moment, the cost of compensating spills where claims are successfully made is clearly lower than the cost of preventing them in the first place—otherwise the financial incentive would be present to improve infrastructure and measures.

The ‘polluter pays’ principle is generally acknowledged as international best practice. This principle might be implemented in Nigeria in a number of ways to address many of the problems outlined above. This could include, for example, implementing a small industry-wide tax to pay for a general compensation fund. Doing so would mean the cost of clean-up was ‘internalised’ in the economics of oil production. This is discussed in more detail in our accompanying report, *The Nigerian oil spill compensation system: a framework for change*.

6.3. Compensation precedents

Finally, there is both a barrier to, and opportunity for, progress relating to a major oil spill clean-up which recently started work. This is the Hydrocarbon Remediation Pollution Project, or HYPREP. HYPREP is a large-scale clean-up which began operations in 2019 in Ogoniland, a heavily polluted area of Rivers State. It is intended to follow the recommendations of an international report on the damage in the region by the UN Environment Programme (UNEP).

However, the UNEP report was not clear on how compensation should be awarded to the people of Ogoniland, if at all. This is because the terms of reference given to UNEP were very specific in their scope of environmental degradation, and did not include compensation. HYPREP itself does not include funds for compensation because it was established to implement the UNEP recommendations on restoration. As such, decades' worth of environmental damage may be subject to individual and arbitrary compensation claims and awards, where individual Ogoniland communities are able to pursue them. But procedures carried out related to HYPREP will likely be used as a reference point for almost all subsequent compensation claims in Nigeria.

This opportunity cannot be missed. HYPREP has a large budget—the first phase of the project is due to last five years—and the project should support, where possible, the development of a set of transparent and robust procedures for compensation claim procedures, including community and oil company engagement. If the precedents set as part of this flagship project are weak, this will cause problems and be a barrier to fair compensation for years to come. However, if the precedents are strong, and compensation issues are resolved to the satisfaction of all involved, this will be of significant benefit for all future compensation cases.

Decades of damage: oil pollution in Ogoniland

One area which has seen a major impact from oil pollution is the Ogoniland area of Rivers State. Ogoniland was one of the first regions to see large-scale oil production in Nigeria. Decades of pollution led to social unrest and protest among Ogoniland communities, which caused Shell, the main company operating in Ogoniland, to stop operations in 1993.

In response to the unrest, the then-military government of Nigeria responded with violence, including executing nine Ogoni community leaders. Nigeria was expelled from the Commonwealth as a result. Memories of this period continue to inform deep mistrust of the Nigerian government among those living in the region.

The initial pollution in Ogoniland was, and continues to be, devastating—and has never been properly addressed. A UN Environment Programme report published in 2011 documented enormous social, environmental, and economic damage as a consequence of the damage, including groundwater benzene levels in one area which were more than 900 times the safe level recommended by the World Health Organization

The Nigerian government established the Hydrocarbon Pollution Remediation Project (HYPREP) to address the issues raised in the report. HYPREP is a major operation to clean and restore the Ogoniland environment. However, HYPREP has seen significant political and logistical problems, and, as of 2020, only initial clean-up activities are underway—nearly a decade after the UN report was published. In 2019, the Nigerian government announced its intention for oil production to be resumed in the Ogoniland oilfields, prompting major debate.

The UN report on Ogoniland is available at https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf

7. Conclusion

The oil spill compensation system in Nigeria does not work. This report outlines key barriers to its implementation: social, political, practical, and financial challenges at all stages of the compensation process, identified by people involved with historic and active oil spill cases.

These include the convoluted and overlapping legislative framework, which fails to provide a clear basis for anything related to oil spill compensation. The conceptual distinction between a one-off compensation payment, and payment(s) intended to reflect the potentially indefinite loss of income caused by an oil spill, is a glaring problem. Different regulatory agencies have conflicting remits, and the principal environmental supervisory body, NOSDRA, is chronically under-funded.

Organising a compensation claim site assessment is also fraught with logistical complexity, while the core mechanism to decide the validity of a compensation claim—the JIV, with its power to determine if a spill is caused by a third party or not—is deeply contested. The appointment process for oil spill surveyors introduces a potential conflict of interest, and so ensuring a suitably-qualified and independent person calculates the value of losses is difficult. This is made worse by the general lack of site-specific, pre-spill baseline surveys, which are complicated and expensive.

Local communities do not generally have the expertise to negotiate compensation claims with oil companies, so if they wish to pursue a case it will often end up in court. However, they also do not generally have the financial resources to pursue claims through the legal system, where cases will be repeatedly appealed on procedural and jurisdictional issues before they are judged on their merits. The courts themselves are overburdened and lack judges, in particular in Rivers State. Some high-profile cases have been taken abroad, but this is not a feasible option for most cases, nor in the long term. Finally, compensation money may be captured and diverted by unscrupulous local leaders in host communities themselves. Decades of damage and distrust means there is huge inertia in the system. Oil company staff we spoke to said that communities have a right to ask for compensation, but that this should not be misinterpreted, or used as an incentive for false claims.

All of these challenges are amplified by the general poverty in which many communities in the Niger Delta live, slow political progress on legislative reform, and the fact that the best-practice ‘polluter pays’ principle is not fully enshrined in the oil spill value chain in Nigeria.

However, although the system as a whole does not function efficiently, the fact that individual barriers can be identified means that concrete actions can be proposed to address them. We do this in our accompanying report, *The Nigerian oil spill compensation system: a framework for change*. This report provides a number of detailed suggestions that might help initiate change. They would help in their own right—by reducing obstacles at particular phases of the compensation process—but would also signal that progress can be made, despite the fact that the system is seemingly intractable. At the time of writing, in early 2020, the new Nigerian

National Assembly is settling in for its next legislative period, and will have at least 18 months before thoughts begin to turn to the next elections, scheduled for 2023. We suggest that now is the time for lawmakers, civil servants, regulators, civil society, and oil companies to work together to try and improve the system for the benefit of all. SDN will engage constructively with any party wishing so support this goal.

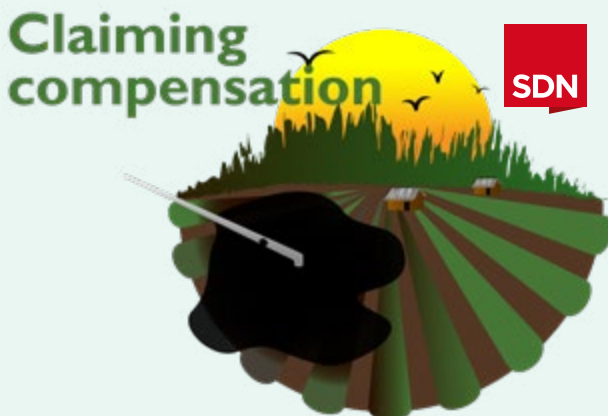
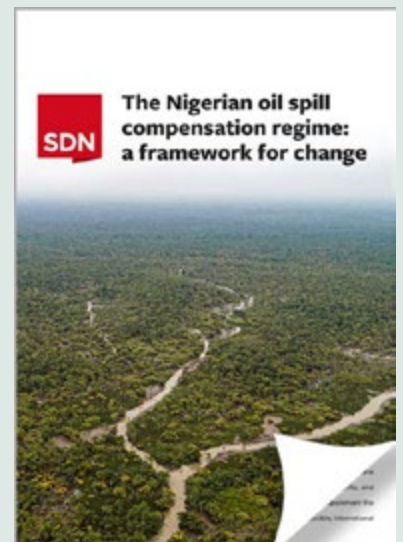
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Disclaimer

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This is part of our *Claiming compensation* project. Click for full details.