

Compensating for the Government's Failures?

NGOs and the Civil Regulation of Shell in Nigeria

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Abstract

This paper aims to enhance the understanding of the extent to which non-governmental organisations (NGOs) are able to shape the *civil regulation* of transnational corporations (TNCs), in addition to civil regulations' potential to compensate for failed state-regulations. For this purpose, the paper examines the case of Shell's civil regulation in Nigeria, where the oil-industry is effectively left unregulated by the state. The paper is informed by social-constructivist theories, which are rather optimistic of NGOs' and civil regulations' capabilities, but also by more critical approaches. The study is based on NGO-reports and interviews which are analysed with qualitative research methods. It is found that although NGOs can force Shell to address certain negative externalities to its operations, the company is largely able to control the extent of NGO-influence and *how* the externalities are regulated. While Shell allows for some NGO-influence, it neither lets NGOs co-determine the concrete regulation of its operations, nor monitor them. Moreover, Shell's civil regulation is found to be highly unreliable in mitigating harmful operation-externalities. The reasons for this seem to be Shell's rather instrumentalist conception of civil regulation, its lack of accountability to NGOs and its unwillingness to take over responsibilities it assumes to be lying with the state.

Key words: corporate social responsibility, civil regulation, NGOs, Shell, Nigeria

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Abbreviations

CSCR	Centre for Social and Corporate Responsibility
ECCR	The Ecumenical Council for Corporate Responsibility
EIA	Environmental Impact Assessment
FDI	Foreign Direct Investment
GMOU	Global Memorandum of Understanding
ILO	International Labour Organization
IOGP	Integrated Oil and Gas Gathering Project
JIT	Joint Investigation Team
MOSOP	Movement for the Survival of the Ogoni People
MOU	Memorandum of Understanding
NGO	Non-governmental organisation
NNPC	Nigerian National Petroleum Company
NPF	Nigerian Police Force
OECD	Organisation for Economic Co-operation and Development
SDN	Stakeholder Democracy Network
SPDC	Shell Petroleum Development Company of Nigeria
TMII	Trans-Border Missionaries and Interface Initiative
TNC	Transnational corporation
VPSHR	Voluntary Principles on Security and Human Rights

1 Introduction

1.1 Research problem

The notion that economic globalisation has changed the balance of power between nation states and the private sector in favour of the latter is one of the most debated in globalisation-related research. Nation states' traditional authority is declining, it is argued, since they increasingly depend on *transnational corporations* (TNCs) which operate in more than one country and possess the assets and resources crucial for a state's economic wealth (Dicken 2007). The reason that globalisation, understood as the technologically facilitated worldwide expansion of social interactions, especially the streams of goods, capital, persons and information (Schmidt 2004: 283) is said to have aggravated this dependency, is that it has made most TNCs more territorially flexible and mobile which allows them to shift production and assets to countries in which they find the most favourable conditions for increasing profits (Dicken 2007).

In the 1980s, a general shift of liberal market-based policies away from state intervention and strong regulation took place in both developed and developing countries and further improved the conditions for TNCs. In the governments of the developing countries of the South, the attitude shifted dramatically towards attracting, rather than regulating TNCs and foreign direct investment (FDI) (Jenkins 2001: 3). In many of the poorest countries, attracting FDI by deregulated markets is said to have caused reduced social standards, a reduction of labour and environmental standards, and a diminished ability of the state to tax corporate profits and regulate capital generally (Milberg 1999: 101). Thus, it can be maintained that economic globalisation has endowed TNCs with an unprecedented power which also means that their actions and decisions have superior influence on domestic labour practices, environmental quality, and human rights conditions, especially in developing countries (Vogel 2008: 266).

Moreover, structural reasons impede the effective regulation of markets and the cushioning of the adverse domestic affects of market exposure in the global South: the majority of the developing countries lack the resources, institutional capacity, international support and in some cases the political will on the part of the governments required to perform this task (Ruggie 2003: 94). They are thus largely unable and/or unwilling to effectively perform one of the essential task of states: to regulate their national markets in order to deal with key market failures

and externalities and to tax business in order to provide public investment and welfare to address issues of poverty, equity and security (Bendell 2000: 19). It is claimed that these constraints posed by global competitive pressures on the willingness and capacity of states to effectively regulate both global and domestic firms are responsible for a democratic deficit from which the global economy suffers (Vogel 2008: 266).

Attempts to address the problem of largely unregulated TNCs in a global market through binding regulations at the international level have not been successful. International agreements designed for this purpose have proven to be unfit because they are often vaguely worded, slow to negotiate and difficult to enforce (Newell 2000: 33). The two major international codes which survived from the 1970s (developed by the ILO and the OECD) are both voluntary in nature and have no enforcement mechanisms (Jenkins 2001: 4). At the same time as rules that favour market expansion have become more robust and enforceable in the last three decades, rules for promoting social concerns such as labour standards, human rights, environmental quality or poverty reduction, lag behind substantially (Ruggie 2003: 97). Thus, there is a lack of adequate international state mechanisms which could compensate for the governance failures especially of developing countries to regulate global business. This imbalance between globally potent TNCs and non-existing global mechanisms to regulate them, is also referred to as a *governance gap* (Vogel 2008: 266).

Against this background the phenomenon of *civil regulations* of TNCs emerged. Civil regulations consist of voluntary codes and standards addressing TNCs' social and environmental impacts which these subscribe to mainly because of the pressure of non-governmental organisations (NGOs) (Vogel 2008: 262). The acceptance of civil regulations becomes manifest in TNCs' *Corporate Social Responsibility* (CSR) strategy which comprise actions that appear to minimise negative externalities on society and environment and to further some social good, independent of low legal requirements (Roberts 2003: 159). As I will present, many scholars see civil regulations as increasingly able to compensate for the above outlined governance gaps and failures.

The outlined research problem is relevant to the field of political science since the regulation of markets is a question of governance and an integral part of social and economic policies aiming to mitigate the high social costs open markets impose on societies (Schmidt 2008, Jenkins 2003: 1). In addition, dealing with the conditions under which corporations operate is a political affair since their production affects the world economically, ecologically and socially and their strategies to engage with these economic and political structures affect the relative position and privilege of actors (Levy/Newell 2002: 93-94). In this thesis, I will examine the expedience of civil regulation for regulating oil and gas TNCs in developing countries whose governments are failing to effectively do so. Concretely, the civil regulation of Shell in Nigeria will be analysed in a case study. The wider context of this case will be described in the next section.

1.2 Context of the research

Watts (2005) classifies Nigeria as a typical *petro-state* (Watts 2005: 379): it depends largely on its abundant oil resources for creating public revenues¹ and has major oil-producing communities. These are located in the *Niger Delta*, a wetland-area constituting nine states of the Nigerian federation (Ite 2007: 1). Further, as in all petro-states, Nigeria's Federal Government has a strong control of all mineral oils and natural gas, regulation of corporations and oil fields and taxation of income profits (Iledare/Suberu 2010: 2). Together with Nigeria's highly central fiscal system, a lack of transparency of tax-revenue spending and accountability of sub-national governments this has meant that although in 2007, the Niger Delta accounted for over 90% of Nigeria's export earnings and up to 70% of revenues accruing to the Federation Account, it remains largely underdeveloped and marked by extreme poverty (Ite 2007: 2). As all petro states, Nigeria lacks the capacities needed to translate oil to cash yielding assets and depends on foreign oil-TNCs who possess the required skills and financial power needed in this respect (Nwete 2007: 319). Through the state-owned oil company Nigerian National Petroleum Company (NNPC), the Nigerian state is in the joint venture Shell Petroleum Development Company of Nigeria (SPDC) whose technical operator and biggest shareholder Shell Nigeria is² which thus considers it to be a "Shell-run-company" (Emmanuel 2010: 31, 51; ECCR 2010: 12).

The dependency of the Nigerian state on oil-TNCs and the fear of disinvestment promotes the "capture" of its regulatory agencies, if not government by oil TNCs and leads to the avoidance of strict regulation (Oshionebo 2007: 109-110). Moreover, the insufficient capacities and corruption of regulatory agencies and the shallow rule of the law context mean that even the regulatory laws which exist remain largely unenforced which leaves the oil industry in Nigeria largely self-regulated or frequently unregulated (Iledare/Suberu 2010: 5; Amnesty International 2009: 41).

A better regulation of the extractive sector and oil industry is however of superior importance, as it has a great potential of severe environmental pollution and destruction of livelihoods of (indigenous) people, and worldwide, 3.5 billion people are affected by energy and mining projects in emerging markets (Nwete 2007: 319-321). Moreover, especially petro-states are prone to conflict and human

1 In 2008, total oil exports constituted about 98.8% of Nigeria's total exports for the year (Iledare/Suberu 2010: 3)

2 The parent company of Shell is the Royal Dutch Shell plc which is incorporated as Shell International. Shell Nigeria is a subsidiary of Royal Dutch Shell and the biggest private owner and technical operator of SPDC (Royal Dutch Shell 2010a). In this thesis, where no useful purpose is served by distinguishing Royal Dutch Shell and SPDC, the company is referred to as Shell/SPDC. Where a distinction is important, only the respective specific company is mentioned.

rights abuses and particularly to “preemptive repression” as they repress civil insurgencies with violence since they appear to threaten the governments’ key resource (Watts 2005: 383). Oil-TNCs are quickly entangled in these human rights concerns because their benefits may in part reflect the benefits conferred by state violence (such as displacement, scorched earth policies and suppression of dissent) (Watts 2005: 390). Typically for a petro-state, Nigeria’s state security-personnel is commonly being used to protect SPDC’s oil production facilities (SPDC 2009a).

Through its potentially highly negative externalities, the oil industry makes the need for some kind of effective regulation which does not stop at states’ borders, obvious. At the same time, analysing Shell in Nigeria serves as a prime case for assessing to what extent civil regulation and CSR are able to perform this task: Shell is considered to be one of the industry-leaders in CSR (c.f. Wheeler et al. 2002) and operates in a country that leaves it largely effectively unregulated.

1.3 Previous research

There is an extensive literature about the phenomenon of civil regulation, most of which is however heavily theoretical which is why some of the relevant contributions will be discussed in the theoretical part. A large part of the research analyses industry codes and focuses on their scope and the issues they address (e.g. labour and environmental practices) and on their monitoring (c.f. Utting 2001, Vogel 2008). This theoretical focus means that there is relatively little known about the vast majority of other civil regulations and how well they are working since “[t]here are few scholarly studies of the effectiveness of most civil regulations” (Vogel 2008: 275). Also, there is little evidence of how NGOs have actually been able to influence corporations and their practices through civil regulations (Vogel 2008: 267).

Nonetheless, there has some research been conducted about the civil regulation of Nigeria’s oil industry. Oshionebo (2007) analyses NGOs’ possibilities of influencing oil-TNCs in the Niger Delta and focuses on deficiencies of the Nigerian civil society and on internal problems of NGOs but does not examine the concrete influence a certain NGO was able to exert on a certain company. Idemudia (2009a) identifies three reasons why CSR is a limited concept for solving oil-related conflicts in the Niger Delta: first, general structural factors (such as the limited employment opportunities the oil-industry provides for locals), second TNCs’ CSR-agendas’ focus on conflicts on the micro-level, and third, TNCs’ neo-liberal worldview which dictates profit maximisation. The analysis is however quite broad and not substantiated with insight-knowledge about single oil-TNCs. Wheeler et al. (2001) analyse the evolution of Shell’s strategic approach to CSR from the mid-nineties to 2000 and focus on its potential for promoting sustainable development in the Niger Delta (Wheeler et al. 2001).

Similarly, Ite (2004) provides a more updated analysis and preliminary assessment of Shell's/SPDC's development-strategy in Nigeria as manifested in its 2004 launched "Sustainable Community Development" approach (Ite 2005). Idemudia (2009b) remarks that this focus on CSR's and civil regulation's function of supporting local development, i.e. the focus on TNCs' *affirmative duties* is problematic (Idemudia 2009b: 107). The reason is that the essential elements of civil regulation and CSR are those that are supposed to prevent and mitigate direct and indirect negative externalities to TNCs' operations; their so-called *negative injunction duties* (Idemudia 2009: 94).

1.4 Purpose and structure of the thesis

As will be shown, there is a widely held theoretical proposition that NGOs are able to prompt TNCs to accept civil regulation which in turn is able to compensate for governance failures especially in developing countries. However, more critical approaches challenge this view and suspect that NGOs do not truly exert meaningful influence on business and are hardly able to challenge its dominance. The purpose of this thesis is to increase the knowledge about NGOs' influence on TNCs with regards to their civil regulation and the ability of this regulation to compensate for governmental regulation failures. This will be done through a case study which naturally limits the generalisability of the results which can, however, as will be argued, nonetheless be valuable and useful. The case analysed is Shell/SPDC and its CSR-strategy, respectively *civil regulation regime* in the Niger Delta, Nigeria. The term civil regulation regime refers to Shell's/SPDC's body of rules, procedures and practices which are supposed to prevent respectively mitigate direct and indirect negative externalities to SPDCs' operations and to promote the socio-economic development of the society it is operating in. Shell's/SPDC's civil regulation regime is largely informed by the principles and norms comprising Shell's CSR-strategy.

The research questions of this thesis are:

1. To what extent are NGOs able to influence Shell/SPDC and shape its civil regulation in the Niger Delta?

2. To what extent is the civil regulation of Shell/SPDC in the Niger Delta able to compensate for the governance failures of the Nigerian state to regulate the oil industry?

The purpose of this thesis is *not* to answer the question who the *legitimate* responsibility for the current socio-economic and ecological situation in the Niger Delta lies with. In relation to previous research, I will focus on the capability of Shell's/SPDC's civil regulation regime to prevent and mitigate the negative externalities, SPDC's operations have on the environment and people, i.e I focus on SPDC's *negative injunction duties* instead on its *affirmative duties*. Further, the thesis will use more insight information from NGOs and Shell than previous studies in order to improve the understanding of the nature of NGOs' influence on a oil TNC such as Shell and its conception of CSR and civil regulation.

The thesis starts out by explaining the concepts of civil regulation and CSR, and the definitive characteristics of NGOs, more detailed. I will then present the analysis-guiding theoretical approaches of the thesis and thereafter motivate the methodological choices I made and present concrete methods I have used for the analysis. The subsequent section comprises the analysis which starts with a brief introduction to the local context which Shell/SPDC is operating in, and a description of its CSR-approach and civil regulation regime. The main findings of the paper are then discussed before finally summarised in the conclusion.

2 Theoretical framework

2.1 Civil regulations and the significance of NGOs

Economic globalisation, a lack of adequate national and international state mechanisms of regulation, the democratic deficit of the global economy and the associated widening of a governance gap have promoted the recent emergence and significant expansion of civil regulations of global business and markets. Closely associated with the concept of CSR, civil regulations are constituted of codes, regulations and standards that are neither developed, nor enforced solely by states and address the social and environmental impacts of TNCs and global markets, especially in developing countries (Vogel 2008: 262). Civil regulations are *soft laws* because compliance with them depends on the voluntarily supplied participation, resources, and consensual actions of corporations and/or governments instead of the legal enforcement of *hard laws* (Vogel 2008: 264).

It is widely acknowledged that civil society, and in particular NGOs, are crucial actors for the construction and functioning of civil regulations (Vogel 2008; Ruggie 2004; Bendell 2000). In this thesis, I make interchangeable use of the terms “NGOs” and “civil society”. Although there are other actors belonging to civil society, for the case in hand, NGOs are key actors and “NGOs are now widely regarded as nodes of civil society” (Bendell 2000: 17). Civil society has been identified as the sector which is distinct from the state and the market, as its actors are focused on social systems and networks based on values (Bendell 2000: 17). NGOs can be defined as

[...] groups whose stated purpose is the promotion of environmental and/or social goals rather than the achievement or protection of economic power in the marketplace or political power through the electoral process (Bendell 2000: 16).

Acknowledging today’s power of TNCs over nation states and the failures to establish globally binding rules for business, NGOs have increasingly turned to the private sector itself in order to improve its global regulation. NGOs are often one of TNCs’ key *stakeholders*. Stakeholders have been defined as “[...] any group or individual who can affect or is affected by the achievement of an organizations’ purpose” (Freeman 1984: 52, ac cited in Bendell 2000: 16), and as those “[...] who have a ‘stake’ or vested interest in the firm (Carroll 1992: 22, as

cited in Bendell: 2000: 16). NGOs are stakeholders of a corporation when they are formed by people who are immediately or in a broader context affected by that corporation's operations, or when they articulate on behalf of other people or the environment that are affected by that corporation (Bendell 2000: 16). The pressure NGOs exert in their role as stakeholders is considered to be the most important factor prompting TNCs to subscribe to civil regulations (Vogel 2008: 268).

Concrete tactics and actions employed by NGOs to influence companies' behaviour have traditionally been "confrontational", including the initiation of litigations, the advocacy of government-imposed standards, calls for boycotts of company products or disinvestment of stock and the documentation of abuses and moral shaming (Winston 2002: 77; Vogel 2008: 266-268). The ability of NGOs to employ these tactics on a transnational or even global scale has been dramatically improved by the development in telecommunications and information technology and the entailing process of globalisation. The internet allows NGOs to spread information about corporations' ecological and socially harmful behaviour around the world and to co-ordinate transnational campaigns against them. Global media further enhances the potential of confrontational tactics. When it takes up issues raised by NGOs, these flash around the globe, potentially making millions of people and consumers aware of them (Bendell 2000: 21). The actual leverage of campaigns lies in the perceived potential threat they pose to a targeted company's financial performance, which in most cases is based on the potential to tarnish its brand (Spar/La Mure 2003; O'Rourke 2005). In cases where campaigns appear to have led to the establishment of a civil regulation regime, this usually becomes manifest in a company's CSR-strategy. The concept of CSR will be introduced in the next section.

2.2 Civil regulation as Corporate Social Responsibility

As a result of the various above outlined pressures executed by NGOs, companies have increasingly accepted new corporate social responsibilities or have at least realised that civil society expects this from them. As a consequence, the majority of the world's largest companies has nowadays incorporated the concept of CSR into their overall business-strategy (Farnsworth 2008: 85). CSR has been defined as "[...] actions which appear to further some social good, beyond the interests of the firm and what is required by law" (Roberts 2003: 159) and as

[...] a range of business initiatives and policies that contribute positively to the welfare of a company's stakeholders, whether employees, consumers or their communities, while maintaining the interests of another set of corporate stakeholders – its shareholders (Farnsworth 2008: 85).

For TNCs, the subscription to civil regulation and acceptance of certain responsibilities is most often a reaction to a perceived threat on their reputation and/or brand which they fear to affect their economic performance. Thus, for most TNCs, CSR is seen as promoting profit-making, i.e. as a “business case”, a dimension which is also stressed by most business writing on CSR (Vogel 2008: 268). Although there is no proven correlation between CSR- and financial performances to date, many TNCs act as if a good CSR performance was beneficial for profits (Vogel 2008: 268). The business-case conceptualisation of CSR inheres the problem that for companies, it is primarily important to be *perceived* as environmentally and socially responsible which means that some corporations seek to improve their financial performance by being publicly associated with CSR and principles of responsibility, without actually putting them into practice. This utilisation of CSR as a public relations gimmick which implies no real mitigation of a TNC’s negative social and ecological externalities is also referred to as “greenwashing” (Nwete 2007: 313).

The recent phenomenon of civil regulation and CSR associated with an increased significance of NGO-activities has been prominently taken up and analysed by social constructivist approaches. Some of them, which make significant assumptions about the potential of civil regulation and the roles NGOs play in this context, will be presented in the next section.

2.3 Social-constructivist approaches to civil regulations and NGOs

What social constructivist perspectives in political science and international relations (IR) unites is their basic assumption that “reality” is not directly accessible for us. Rather, the “social world” as we perceive it, is constructed through the way we interact with others, what shared understandings and ideas we have about the “world” and how we experience our environment (Ulbert 2001: 391). In IR, constructivist approaches emphasize the intersubjective quality of the social world and the reciprocal constitution of actors and structures which occurs through rules and norms. In their analysis, constructivist approaches give prominence to the role of ideas, constitutive social rules and norms as well as to the endogenous development of interests and identities (Ulbert 2001: 394). Central to social constructivism is also the notion that all knowledge is “theory-laden”, i.e. embedded in a specific linguistic frame of reference or a *discourse*, which is also characterised by certain social practices. Thus, language becomes a central medium through which “reality” is accessible *and* at the same time constructed (Ulbert 2001: 408). The following approaches emphasize these or one of these aspects and can thus be categorised as being social-constructivist in terms of IR-theories.

In their seminal analysis of “transnational advocacy networks” Keck and Sikkink (1998) contend that NGOs’ ability to create information quickly and accurately, and to deploy it strategically and effectively, lies at the heart of their power because it allows them to create new issues and categories and to persuade, pressure, and gain leverage over much more powerful organisations and governments. Further, they promote norm implementation by pressuring target actors to adopt new policies, and by monitoring compliance with international standards, as in the civil regulation of global business (Keck/Sikkink 1998: 2-10). The authors hold that NGOs can operate strategically within the more stable universe of shared understandings but are at the same time able to reshape certain contested meanings (Keck/Sikkink 1998: 5). Keck and Sikkink acknowledge that the possibility to influence targeted companies depends on the availability of leverage and the target’s sensitivity to leverage, or, vulnerability. If either one is missing, efforts to change a corporations behaviour through campaigning might fail.

Although adversarial relationships between NGOs and TNCs continue, an increasing engagement of NGOs in collaboration and partnerships with TNCs has been witnessed in which NGOs use more “engaging” tactics such as dialogue aimed at promoting the adoption of voluntary codes of conduct and the advocacy of social accounting and independent verification schemes (Vogel 2008: 267; Winston 2002: 77). Business-NGO partnerships are by some seen as being capable of changing structures in commercial, political and societal areas. It is asserted that, when companies collaborate with NGOs, the different value systems and objectives of NGOs make companies begin to critically assess their routine actions who have so far only been present in their “practical consciousness” (Schneidewind/Petersen 2000: 220-221). Collaboration with NGOs is thus said to bring a corporation’s routinised practices into its “discursive consciousness” which makes it reflect upon its actions and become aware of the unintended and formerly unacknowledged consequences of these, which is a prerequisite for change. This growing reflexivity is then assumed to affect a corporation’s norms and behaviour (ibid.).

Crucial for gaining insight about a company’s potential for change is the understanding that its actions are on the one hand – like those of all societal actors – constrained by social structures but that on the other hand, companies can also change those structures. The “operating environment” of companies – markets, political arenas and public discourses – are then understood as produced structures which are in turn constituted by reproduced rules and resources. “Rules” exist in the form of interpretative schemes and norms while resources can be allocative (material, giving power over nature) or authoritative (giving power over others) (Schneidewind/Petersen 2000: 218). Thus, a company whose reflexivity about the rules has been increased through a collaboration with a NGO has the ability to change the social and economic structures within which it operates (Schneidewind/Petersen 2000: 219). Keck and Sikkink remark, however, that it is not given that such engaging tactics are completely unproblematic since any

[n]ormative change is inherently disruptive or difficult because it requires actors to question their routinised practice and contemplate new practices (Keck/Sikkink 1998: 35).

Similarly to the above presented approaches, John Dryzek sees the biggest strength of civil society actors in their ability to challenge certain dominant discourses. A discourse can be defined as

[...] a shared set of concepts, categories, and ideas that provides its adherents with a framework for making sense of situations, embodying judgements, assumptions, capabilities, dispositions and intentions (Dryzek 2006: 1)

Advocating the view that discourses such as “globalisation” and “market liberalism” can be contested, Dryzek identifies “anti-corporate globalization” as an “[...] emerging counter-discourse that challenges economic globalization, incorporating a variety of local and justice concerns (Dryzek 2006: 2). Dryzek views NGOs as being capable of affecting the content and relative weight of global discourses and as constituting a global public sphere (which they are also part of) which can reach into corporations and influence international outcomes (Dryzek 2006: 113, 154). Curiously, Dryzek uses the boycott-campaign against Shell in the 1990s (which problematised Shell’s/SPDC’s behaviour in the Niger Delta) as an example for the influence NGOs can have on the behaviour and strategies of TNCs, stating that: “Shell undertook a major repositioning exercise in response to these shocks” (Dryzek 2006: 100). Dryzek holds that novel problems such as a global market produce “institutional voids” (what I refer to as “governance gaps” in this thesis), but the novelty of the problem means also that traditionally powerful actors have not had time to set up exclusionary arrangements, meaning that NGOs and other actors can advance their own definitions and interpretations on a situation.

Others see collaboration between TNCs and NGOs to be mainly about legitimacy, i.e. about the

[...] generalised perception [...] that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs and definitions (Suchman 1995: 574, as cited in Rodgers 2000: 40).

Traditionally, legitimation for corporate behaviour has been derived from states’ regulation of it. However, due to the above outlined phenomenon of governance gaps and a concomitant loss of public faith in states’ abilities to regulate TNCs, these face a crisis in legitimising their operations. In addition, governance gaps mean that demands regarding the mitigation of corporate harms on environment and society are increasingly directed to companies themselves which essentially make them political actors. Since as Rodgers holds, TNCs are now publicly judged by their social and environmental as much as by their economic performance, companies look for endorsement and acceptance from their major stakeholders in order to prevent challenges to their reputation and public standing (Rodgers 2000: 41). Because the public generally perceives NGOs as “good and worthy causes”, they are able to confer legitimacy on TNCs through collaboration (Rodgers 2000: 47). One important reason for this is also that the

majority of TNCs is arguing and working on the basis of scientific facts. However, as Rodgers points out, there is a growing concern that, stakeholders' beliefs, norms and values have to be taken into account by TNCs as well if they want to be accepted by them.

'Facts' derived from Western rationalistic perspective are often elusive and cannot be sufficiently corroborated to hold sway. In their place, expressions of values are becoming significant inputs [...] (Rodgers 2000: 44).

This holds especially for stakeholders which come from a non-Western cultural background and do not share the understanding of meaning and "truth" based on scientific facts. As Wheeler et al. show in their analysis of Shell's initial ways of addressing stakeholders' demands in the Niger Delta, disagreements over presented "scientific truths" are not necessarily the cause of conflict, nor means of resolving it. Instead, different stakeholder's perceptions, beliefs and the "perceptual truths" of local communities are important for understanding causes of conflict and finding possible solutions and have thus to be valued more (Wheeler et al. 2002: 305). In order to gain legitimacy within their wider stakeholder audience and the society they operate in, alert TNCs are assumed to encourage partnerships with NGOs (Rodgers 2000: 41). Although Rodgers acknowledges the danger that TNCs capture NGOs as much in the same way as they dominate regulators in a "regulatory capture", he concludes that civil regulation

[...] appears to be effective. The power and pressures brought to bear by consumers mean that changes demanded in corporate behaviour are occurring far more rapidly and are more widespread than those that could be forced by the command-and-control style of legislation (Rodgers 2000: 43).

In spite of the problems that exists with the voluntary nature especially of CSR, Ruggie (2003) envisions a new mode of governing global capital and holds that the corporate sector has become a key in bridging the governance gap between national communities and global markets (Ruggie 2003: 95). He asserts that TNCs have been pulled into this role by NGOs which play increasingly important roles in generating, deepening and implementing transnational norms (through the strategies outlined above) and manage ever more to engage TNCs in civil regulation and CSR (Ruggie 2003: 106-107). Ruggie sees potential for these soft law-arrangements to be effective and evolving into hard law as industry leaders might push for this as they are seeking to lock in their first mover advantage or establishing a level playing field vis-à-vis CSR-laggards in order to create a competitive advantage (Ruggie 2003: 116). According to Ruggie "[...] a fundamental recalibration is going on of the public-private sector balance [...]" (Ruggie 2003: 118) and significant institutional developments are taking place at the global level. As one of these he identifies the emergence of a "global public domain" which he defines as

[...] an institutionalized arena of discourse, contestation, and action organised around the production of global public goods. It is constituted by interactions among non-state actors as well as states (Ruggie 2004: 519).

It is driven mainly, as Ruggie argues, by the interplay between global business and NGOs. Since nowadays TNCs have global reach and capacity and are capable of implementing decisions quicker than governments, NGOs are trying to use this leverage to help fill governance gaps and compensate for governance failures (Ruggie 2004: 514). Ruggie argues that the new global public domain will not replace states but rather embed systems of governance in broader global frameworks of social capacity and agency that did not previously exist (Ruggie 2004: 519).

It can be summarised that social-constructivist approaches generally view NGOs as global business' antagonists which are endowed with a high public credibility and legitimacy. They also share the contention that NGOs possess a certain degree of power and influence over TNCs. This is supposed to enable them to challenge certain discourses, pressure TNCs and influence their behaviour by threatening their financial performance but also increasingly by changing their attitudes, increasing their reflexivity and redefining the meanings of their actions. However, this depiction of NGOs as an independent and radical-emancipatory antagonist of global business is being challenged by more critical approaches which will be presented in the next section.

2.4 Critical approaches to NGOs, civil regulations and CSR

Whereas social constructivist approaches focus rather on processes of action and bargaining between different actors on the micro- and meso-level, more critical approaches have argued that existing macro-structures of production relations and ideological formations are often left out in the analysis of civil regulation regimes (Levy/Newell 2002: 85). These critics emphasise that structures and traits of civil regulation regimes and CSR-principles as well as negotiations about them reflect the power, resources, preferences, and strategies of the various actors involved, an aspect which is largely neglected by social constructivist approaches (Levy/Newell 2002: 94-95; Blowfield 2005: 182, 186). Further, the concept of CSR is criticised for being largely blind to the conditions and structures that cause the very socio-economic conflicts which it pretends to solve (Blowfield 2005: 183).

Levy and Newell (2002) spotlight the question what TNCs' true interests in supporting civil regulation and CSR might be. In their view, corporations do not only need legitimacy for themselves, but also society's support for a

liberal-capitalist organised economy in order to prevent social conflicts which could undermine this political-economic status-quo which is in TNCs' interest. Thus, civil regulation and CSR are seen as "accommodationist" strategies which have the goal to absorb and sedate social pressures and conflicts in order to prevent a fundamental disruption of their underlying causal political-economic structures (Levy/Newell 2002: 96). For this purpose, it is suspected, TNCs seek to forge coalitions with NGOs which are not the independent actors, social-constructivist approaches present them as. In fact, they are viewed as being largely co-opted by the TNCs they cooperate with in partnerships (Levy/Newell 2002: 94; Blowfield 2005: 178). The co-opted NGOs, on their part are then seen as supporting the market-based solutions of civil regulation and CSR to social and environmental problems, thus advocating the preferences of TNCs for non-state regulations (Levy/Newell 2002: 90).

Moreover, the critique has been formulated that the question of the actual impact and effectiveness of CSR and civil-regulation as new regulative means to address social and ecological problems is largely left out by most accounts of the topic. Blowfield (2007) deplores that what is known about CSR's impact is largely being told from within an established business discourse which dictates a focus on the economic impacts of CSR on companies, which is also reflected in most CSR-theories' scope. Thus, most available knowledge about CSR concerns its effectiveness as a business case, company attitudes, awareness and practices, while little is known about its effectiveness in protecting society and environment from harmful externalities to production-processes and its contributions to social justice in developing countries (Blowfield 2007: 687, 693). Further, it is doubted that TNCs' CSR-strategies include and address the priority issues for the people in the developing world, where many are poor, marginalised and thus hardly capable to make their claims being heard (Blowfield 2007: 686).

Another point of critique is that the concept of CSR treats social and ecological conflicts as something that can be solved through stakeholder partnerships but is at the same time ambiguous about the question towards which stakeholders TNCs bear responsibilities. This, it is asserted, gives TNCs the freedom to chose their stakeholders based on rational-economic considerations rather than on moral grounds (Blowfield 2005: 181). This view stands in sharp contrast to the social constructivist-informed theoretical approaches which view NGOs as so powerful that TNCs are *nolens volens* forced to accept them as stakeholders and to integrate their demands into business practices and strategies. Further, the question to what extent civil regulation and CSR-policies actually benefit the people and the environment they are supposed to serve, is not adequately addressed by social constructivist approaches. These different and potentially complementing theoretical approaches will guide and inform the analysis of the case in hand. In the next section, I will present the methods that have been chosen for doing this and discuss the motivation for their choice.

3 Methodology

3.1 Epistemological background

The theoretical framework of this thesis is based on approaches which are united in the notion that socio-economic realities are the products of social constructs. Choosing such a theoretical background is also tied to a certain epistemological stance for it implies that scientific knowledge must be socially constructed as well: since facts as a scientific foundation must always exist in the form of statements, that is, in language, or (scientific) discourse, linguistic and conceptual influences from interests, social and cultural backgrounds are virtually impossible to avoid in research and its findings. This makes the formulation of objectively “true” scientific statements impossible (Flick 2006: 14, Sayer 2000: 41). This notion stands in stark contrast to an “empiricist” or “positivist” epistemology and quantitative research, which seeks to clearly isolate causes and effects, properly operationalise theoretical relations, measure and quantify phenomena and generalise findings in order to formulate general scientific truths (Flick 2006: 12).

3.2 Research methods

The extent to which NGOs are able to influence Shell’s/SPDC’s civil-regulation and its impact on people and the environment exists in the form of statements, estimations, understandings, interpretations and opinions, i.e. they are rather *intangible* objects of study which cannot be neatly measured and quantified. As Oshionebo (2007) emphasises, the nature of the objects of study means that it is impossible to measure with precision the impacts of NGOs on the regulation of a particular TNC. A plethora of context factors (such as the kind of pressure applied by NGOs and their capacities in the specific context) is likely to influence the outcome in the single case (Oshionebo 2007: 115). This great importance of context factors means also that a general law-formulation based on the results will not be feasible. Further, due to the complexity of the processes involved, their interconnectedness and the significance of the contexts in which they are embedded, they cannot be explained in isolation (Flick 2006: 15). It follows from this that a quantitative research approach would be inappropriate and not conducive for this study. Instead, I will use qualitative research methods which

allow to formulate empirically well founded subject- and situation related statements (Flick 2006: 14).

It is in line with qualitative research's aim of formulating subject- and situation related statements, to start with the analysis of a single case as "[q]ualitative research is oriented towards analysing concrete cases in their temporal and local particularity [...]" (Flick 2006: 30, 74). The case is, however, not selected with the intention to construct a statistically representative sample of a phenomenon or to arrive at wider empirical conclusions (Flick 2006: 98). This thesis aims at capturing the uniqueness of the case of Shell/SPDC in the Niger Delta which, however, does not rule out the interest in contributing to general knowledge about the topic. This is tried by means of inferences from what is found in this particular case and not through the selection of the case in order to explicitly test a hypothesis (Hammersley 2004: 92). Instead, the thesis is rather guided by theories and deals with the case in hand as an instance of a certain type of cases and examines it in terms of the theoretical framework presented.

Shell's/SPDC's operations and its civil regulation in Nigeria are judged to be typical for the category of cases in which oil and gas TNCs operate in petro states of the global South, and the socio-economic and ecological problems this entails. The conditions of oil production and the structure of petro states render the conditions of oil TNCs' engagements in developing countries similar (Watts 2005: 376): they are characterised by the operation through joint or consortial ventures in petro states whose structures produce the problems of environmental despoliation, corruption and fraud, lack of transparency and accountability, violation of indigenous rights, and security issues associated with militarisation, oil theft and human rights violations (Watts 2005: 387-390). Oil TNCs generally respond to these conditions by having civil regulation regimes in place, manifested in CSR strategies – often established as a reaction to NGO-pressures – which mostly address the corporation's approach to community development and environmental responsibility (Watts 2005: 394; Frynas 2005: 581).

Although context factors make a wider generalisation of this thesis' results unfeasible, not least informed by the critical theories presented, I believe nonetheless, that certain structures and power relations exist which overarch the cases in their respective contexts. Thus, I view similar outcomes and situations in cases of the same category (i.e. the outcomes of civil regulation of oil TNCs in petro states of the South) only as partly coincidental. Rather, I see them and the corresponding socio-economic situations as dependent on context factors *and* on the overarching political economical structure in which these factors are embedded. Insofar, I believe that this case study can be

[...] of value in refining theory, suggesting complexities for further investigation as well as helping to establish the limits of generalizability (Stake 2005: 460).

According to Flick, a rapid social change is “[...] increasingly confronting social researchers with new social contexts and perspectives” (Flick 2006: 12). The emerging phenomena are of such novelty that traditional quantitative deductive methodologies are failing due to the differentiation of objects. Thus, research is increasingly forced to make use of inductive, rather qualitative research strategies (Flick 2006: 12). As has been mentioned above, the concepts of civil regulation and CSR are relatively new phenomena, as they are developments corresponding to the unfolding of new socio-economic affairs and new constellations of power-relations presented by globalisation. As a result, theories as well as the examination of their accurateness are yet relatively underdeveloped. Following the course of a qualitative research process, the theories presented are thus seen as rather preliminary versions of understanding this relatively new topic. The research process is then supposed to contribute to a potential reformulation, refinement and elaboration of these theories (Flick 2006: 101-102).

As a qualitative research design suggests, the study in hand is guided and informed by theories, rather than testing them in an empirical sense (Flick 2006: 98). However, this does not rule out the possibility of learning something about their accurateness. Pursuant to the concept of theory triangulation, I approach “[...] data with multiple perspectives [...] in mind. Various theoretical points could be placed side by side to assess their utility and power (Denzin 1989: 239-240, as cited in Flick 2006: 389-390). The value of the critical theoretical approaches presented is that they point to controversies and questions which are not or hardly addressed by social-constructivist approaches, which is in line with qualitative research’s use of theories (Flick 2006: 59). Throwing light at the object of study from a different theoretic angle serves – like theory triangulation – the purpose of extending the possibilities for further enriching and completing knowledge (Flick 2006: 390). Such a use of theories also

[...] implies the abandonment of the *ex ante* formulation of hypotheses. In fact, the research question is outlined under theoretical aspects [...] but the elaboration does not culminate in [...] the set of hypotheses (Hoffman-Riem 1980: 345, as cited in Flick 2006: 99).

I use this research approach because I believe it prevents me from applying a narrow, theoretically defined focus which might impair my awareness for outcomes which do not fit previously established theoretical expectations (Flick 2006: 99).

Firstly, this thesis seeks to examine the influence NGOs have on the civil regulation of Shell/SPDC in the Niger Delta. As has been explicated in the theoretical part, a Western TNCs’ perceptions and notions about the appropriateness and effectiveness of certain solutions are likely to differ from those of their stakeholders, especially if these do not share the same cultural background. Therefore, particularly the analysis of NGOs’ influence on Shell’s civil regulation in Nigeria has to include the subjective viewpoints of the involved

actors. Since interviews provide the most direct access to these, I have conducted an interview with Boniface Dumpe, the director of the Nigerian NGO Centre for Social and Corporate Responsibility (CSCR) which has been pressuring Shell and SPDC “[...] for positive change in the company policies and practices [...]” in the Niger Delta for years (Dumpe 2010, personal communication). Although I sent interview inquiries to nine other NGOs, even after writing follow-up e-mails, CSCR was the only one which responded, respectively agreed to an interview. This might however not be seen as a too severe limitation, as Kvale and Brinkmann (2009) remark that it is better to use the available time to carefully prepare and analyse interviews instead of trying to increase their usefulness by conducting a large number of them (Kvale/Brinkmann 2009: 113). In addition, I will also use a comprehensive study of the relationship between Shell/SPDC and the NGO Living Earth which is largely based on interviews with Shell and Living Earth. In order to understand Shell’s perception of the influence, NGOs have on its CSR-practices and civil regulation regime, I have interviewed Shell International’s Head of Social Performance Management Unit Barnaby Briggs, who also deals with Shell’s stakeholder relations on a local level.

The interviews are semi-structured, i.e. consisting of openly designed questions since these are more likely to reveal interviewees’ subjective viewpoints than closed questions in a structured interview or a questionnaire (Flick 2006: 149). Further, they involve purposive formulated questions based on the study’s theoretical framework which corresponds to the adopted theory-guided research approach (Flick 2006: 157). The interviews are *expert interviews*, which basically means that the main interest in the interviewees lies in their capacities of being an expert of the studied topic (Flick 2006: 165). Semi-structured interviews allow the researcher also to elicit the interviewees’ stock of knowledge on the topic which is of high relevance for the study in hand because the interviewed persons offer a valuable source of knowledge about organisation-internal processes and perceptions. (Flick 2006: 155).

Secondly, for assessing to what extent Shell’s/SPDC’s civil regulation regime and CSR-strategy are capable of protecting the people and the environment in the Niger Delta from its operations’ negative externalities, I will use mainly reports and case studies by NGOs as well as publications and responses to these reports by Shell/SPDC. Concretely, the used NGO-composed material is: a report by The Ecumenical Council for Corporate Responsibility, comprising five (and arguably the most updated) case studies about SPDC, conducted by Nigerian NGOs. The contributing NGOs are: Movement for the Survival of the Ogoni People (MOSOP), Centre for Social and Corporate Responsibility (CSCR), Stakeholder Democracy Network (SDN) and Trans-Border Missionaries and Interface Initiative (TMII) (ECCR 2010). Further, an Amnesty International report about oil-related pollution of the Niger Delta and SPDC’s role in this (Amnesty International 2009), a Christian Aid report about the impact of oil-TNC’s CSR-strategies in the Niger Delta (Christian Aid 2004), a Amnesty International report about the human rights situation in Nigeria (2008), a Human Rights Watch report

about the human rights situation in Rivers State, Niger Delta (Human Rights Watch 2005) and a Human Rights watch report about political violence in Nigeria (Human Rights Watch 2003) are used.

For taking Shell's/SPDC's view of the allegations made in the reports into account, their comments on them (which have been added to the reports by the respective NGO) have been included in the analysis. Further, there is one response on Shell Nigeria's homepage to allegations made by NGOs (SPDC 2010) and one response letter to Amnesty's 2009 report (SPDC 2010b). The criteria for selecting the material were which material promised the greatest insights into the topic under investigation. This is in line with the concept of theoretical sampling which is appropriate for qualitative research and aims, unlike statistical sampling, not at statistical representativeness (Flick 2006: 126, 129).

As Flick points out, analysing documents is a fruitful and enlightening method for understanding social realities in institutional contexts, if the contexts of their production and use are taken into account (Flick 2006: 252). The reason for this is that documents are always produced for some form of use (which also includes who is granted access to them) (Flick 2006: 248). Thus, the documents analysed are seen as representing a specific version of realities, constructed for specific purposes and a way of contextualising information (Flick 2006: 249).

3.3 Quality of the research

The quality of qualitative research can hardly be assessed using the traditional criteria of "reliability", "validity" and "objectivity" developed for quantitative research. This corresponds to the general different views of empirical and constructivist approaches and the fundamental differences in their notions of "reality" (Lüders/Reichertz 1986: 97, as cited in Flick 2006: 375). Instead, the quality of qualitative research is assessed on the level of research planning and process evaluation which includes the indication of research designs and the justification of used methods as well as a quality management (Flick 2006: 384). In the above justifications of my choices of certain methods and the explanation of my research's indication, I have thus addressed the degree of quality of the paper's results. Further, I have explained to what extent the results can and should be seen as a basis for generalisations. Finally, this thesis has been subject to some kind of quality management which involves a definition of goals, documentation of process and problems, and a regular joint reflection about processes and problems (Flick 2006: 396). This has been guaranteed through numerous seminars prior to which respective sections of the paper had been handed in. The sections were then peer-reviewed by fellow students, read by the academic supervisors and subsequently, problems and suggestions were discussed in the seminars. Further,

the entire research process was attended and supported individually by my academic thesis supervisor.

3.4 Limitations of the research

The basic material of this research are texts, which are a substitute for the reality under study (Flick 2006: 83). A limitation of all qualitative research is thus that it cannot claim to neutrally reflect whatever it is studying, i.e. it cannot be ensured that individual's experiences, opinions and interpretations of situations, which are object of this study, are directly captured and neutrally reproduced in texts. This limits the research's ability to be representative of the objects under study (Flick 2006: 84). Further, the representation of the "reality" of the object under study is highly limited, since the interpretation of texts and the writing process in research on behalf of the researcher is the construction of a partly new reality as well (Flick 2006: 84).

A limitation of studying documents such as case studies and reports is that they might give a very specific approach to experiences and processes (Flick 2006: 252). Further, because documents are communicative devices which are produced by certain actors for a specific purpose, they can hardly be seen as bias-free data (ibid.). The documents which are studied in this thesis are composed by NGOs and Shell, SPDC respectively. In the analysis, I acknowledge that the purpose of the Shell-publications and -documents is to legitimise its operations in the Niger Delta and to bear testimony to Shell/SPDC being a socially and ecologically responsible corporation. I see the purpose of NGO-reports as to challenge the accuracy of the information provided by Shell and to confront the statements of Shell's/SPDC's documents with the local reality of the communities in the Niger Delta. Their goal is further to alarm a wider public about Shell's/SPDC's – in their view – deficient regulation of its operations and activities. In order to verify to some degree the accuracy of the NGOs' allegations, I cross-checked them, where possible, with responses formulated by Shell/SPDC.

The use of documents is also somewhat selective, since reports and the like always cover only a certain region or certain communities, projects and problems. Especially in different industries and structurally very different countries, civil regulation and CSR might yield very different results, which is why I do not aim to make statements about their impact in general. However, the formulation of empirically founded subject- and situation-related statements is possible on the basis of the studied material which endows the results with some value for understanding civil regulation and CSR of oil-companies operating in similar environments.

What is problematic regarding the method of interviewing, is to ensure that the interviewee actually gives answers that deliver the information, the interview is supposed to elicit (Flick 2006: 168). Unfortunately, CSCR was only able to respond to the interview questions via e-mail which increased this problem as it did not allow to ask second questions. Moreover, because there are no explicit suggestions for how to interpret the verbal data, this again depends on the subjective perception of the researcher (Flick 2006: 160-161).

3.5 Ethical considerations

I have abided to ethical research principles in order to avoid harming the participants involved in the research (i.e. the interviews) (Flick 2006: 45). I have informed the interviewees about the purpose of the study and about how the interviews will be used (Flick 2006: 49). Further, the verbal data are very unlikely to harm the interviewees' privacy as they consist of professional rather than personal information. Nonetheless, the confidentiality in writing about the research is guaranteed by having the consent of all potential interviewees for mentioning their names in this thesis and to record the interview. Lastly, I will try to do justice to the participants in analysing data and will not take quotes out of their contexts to intentionally distort their meanings (Flick 2006: 50).

4 Analysis

4.1 Background: Shell in Nigeria

The Royal Dutch Shell Group is a true TNC comprising more than 300 individual companies in 100 countries (Murphy/Bendell 2002: 223). As the largest oil company in Nigeria, Shell operates through the joint venture SPDC (Emmanuel 2010: 51). In the mid-1990s, Shell became under increasing pressure by a media and civil society campaign which accused it of having degraded the Niger Delta for 40 years while providing little or no economic and social benefits (Wheeler et al. 2002: 300). Further, Shell regularly sought protection from Nigerian security forces which violently put down demonstrations by affected communities, violating human rights and killing various people. Severely threatening Shell's reputation and consequently profitability, the campaign prompted Shell to reinvent its corporate strategy in line with principles of sustainable development, explicitly supporting human rights and emphasizing the orientation towards stakeholders' interests (Wheeler et al. 2001: 301). In 1997, the company published its first public report on community and environmental issues (Murphy/Bendell 2002: 227).

Today, more than ten years after Shell's repositioning, the Niger Delta is ridden by oil-related conflicts including increased militancy, politically sponsored violence and crime (SDN 2010: 40). As mentioned, the Niger Delta is producing the bulk of Nigeria's oil- and gas-wealth: between 2005 and 2008, the Federal Government has received more than US\$ 34 billion in taxes and royalties from SPDC alone (SPDC 2009b). In spite of this huge Federal revenues, the Niger Delta is suffering from administrative neglect, poor social infrastructure and services, abject poverty and a precarious environmental situation (Amnesty International 2009: 9; Oshionebo 2007: 119). Life expectancy in the Niger Delta, once just below 70 years, is now around 45 (ECCR 2010: 10).

Frustrated by a lack of benefits from the enormous revenues, oil-production in the Niger Delta creates, youth and ethnic militia outfits have emerged and repeatedly kidnapped SPDC-staff, physically disrupted or shut down production, vandalised production facilities, sabotaged pipelines and thieved crude oil (locally called "bunkering") (Oshionebo 2007: 119, SPDC 2009a). As SPDC reports, the security situation in the Niger Delta has worsened over the last few years and

violence and criminality has resulted in two-thirds drop of oil production in 2008 compared to maximum outputs (SPDC 2009a; SDN 2010: 40).

4.2 Shell's/SPDC's CSR and civil regulation regime

The repositioning of Shell's corporate strategy in the late nineties has been widely acknowledged and today, Shell is considered one of the most responsible oil and gas TNCs and as a CSR-leader (Watts 2005: 396, Wheeler et al. 2002: 313). This reputation appears to be backed up by leading private indices that assess companies' economic, environmental and social performance on behalf of investors. Shell has been included in the sustainability indices Dow Jones Sustainability Index (DJSI)³ since it started in 1999, remaining in the top 10% of the oil and gas sector, and in the FTSE4Good Index⁴ every year between 2001 and 2009 (DJSI 2010, Royal Dutch Shell 2010b). Shell is also a member of the United Nation's Global Compact which has set up ten principles in the areas of human rights, labour, the environment and anti-corruption⁵ (Fritsch 2008). Further Shell has reported on its environmental and social performance since 1997 in its sustainability reports, using The Global Reporting Initiative's (GRI)⁶ guidelines. Shell's 2008 sustainability report has been checked by GRI and received the best possible grade (Royal Dutch Shell 2009).

The civil regulation regime of Shell/SPDC is grounded in its CSR-policies. The foundation of Royal Dutch Shell's CSR-strategy is its Business Principles which include the groups' commitment to sustainable development and govern how each of its subsidiaries – i.e. also Shell Nigeria as the operator of SPDC -

3 The DJSI is a market initiative that identifies and ranks companies according to their corporate sustainability performance. The concept of sustainability captures qualitative information about criteria such as reputational risks, stakeholder relations and corporate social responsibility. Out of the 2000 largest capitalized companies it identifies and ranks the top 10% in each of 64 industry groups with regards to performance in corporate sustainability and includes them in the index on the basis of a yearly review. The assessment criteria (which are general as well as industry specific) include among many more responsibility for environmental performance and social issues, child labour and occupational health and safety (for a detailed description see Knoepfel 2001)

4 Companies must meet the index's criteria on the environment, relationship with interested parties, supply chain labour, bribery, and human rights to be included. There is no ranking within the index (Shell 2010a).

5 Participants of the compact are required to send in "Communication on Progress" reports to the UNGC which are composed by the corporations themselves.

6 The Global Reporting Initiative is a network-based organization that has developed the world's most widely used framework for reporting on sustainability and CSR (Global Reporting Initiative 2010).

conducts its affairs (Royal Dutch Shell 2005). Some of the fundamental responsibilities set out by the Business Principles are

- [...] to support fundamental human rights [...] and to give proper regard to health, safety and environment.
- [...] manage all social impacts of our business activities carefully and work with others to enhance the benefits to local communities, and to mitigate any negative impacts.
- [...] to make sure that our employees understand the principles and confirm that they act in accordance with them (Royal Dutch Shell 2005).

Based on the Business Principles is Shell's Code of Conduct which has the purpose of enabling its employees to put the Principles into practice and to ensure that Shell's subsidiary companies "do no harm to people and protect the environment" (Shell International Limited 2006). The code must be followed by every employee in every Shell company, joint venture company under Shell control and must be applied in all joint operations where Shell is the lead operator (Shell International Limited 2006). However, compliance with the code is not monitored by an external party and violations can only be reported by employees of Shell companies (ibid.).

As has been pointed out, the oil-industry in Nigeria is factually largely unregulated. Instead of regulating the oil industry better and more effectively, the Nigerian state has increasingly handed the obligation of providing remedies for oil industry-caused harm to the oil companies themselves (Amnesty International 2009: 78). Against this background, Shell's/SPDC's civil regulation regime in Nigeria emerged, consisting of rules, procedures and practices which are on paper in line with Shells Code of Conduct and in parts developed jointly with the Nigerian Government and NGOs. Although Nigerian law actually obligates oil companies to some of the practices which are part of Shell's/SPDC's system of civil regulation, the non-enforcement of most of these laws by the state means – as will be shown – that in reality SPDC is largely free in deciding to comply with them or not.

In the next section, I will examine to what extent NGOs have been and are influencing and shaping the civil regulation of Shell/SPDC in the Niger Delta. Subsequently, I will analyse to what extent certain elements of Shell's/SPDC's system of civil regulation actually protect the environment and people of the Niger Delta from its operations' direct and indirect harmful externalities. Due to space limitations, not every element of the civil regulation regime will be analysed. Further, as explicated, the analysis will focus on those elements which aim at preventing and mitigating direct and indirect negative externalities to SPDC's operations in the Niger Delta, i.e. on *negative injunction duties*. The

procedures and practises analysed refer to the remediation of oil spills, the information of stakeholders about SPDC's project's negative impacts and the protection of human rights and are introduced in the respective sub-sections. The development-work-related *affirmative duties* of the civil regulation regime will not be examined. One of these will nonetheless be addressed, as it has been brought up by the interviewees: *Global Memoranda of Understanding (GMOUs)* are agreements between SPDC and Niger Delta-communities through which SPDC provides multi-year funding for communities' own development projects (SPDC 2009b).

4.3 NGOs' influence on the civil regulation of Shell/SPDC

As presented in the theoretical part, while social-constructivist approaches view NGOs as capable of considerably influencing and regulating TNCs, critical approaches suspect that TNCs have the power to select only certain NGOs as stakeholders and to co-opt these, thus allowing only particular issues to be addressed, limiting the potential for change and regulation.

CSCR states that it feels recognised as a stakeholder by Shell/SPDC and

[...] gained the recognition through collaboration with the company shareholder group ECCR and sustained advocacy especially at the international level (Dumpe 2010, personal communication).

In fact, Shell is unable to simply ignore certain NGOs as stakeholders and states: "Stakeholders self-identify themselves. We can analyse that and try to make head or tail of it, but we as a company don't get to choose who our stakeholders are (Briggs 2010, personal communication). Rather, Shell/SDPC has some criteria for deciding to *what extent* it cooperates with certain NGOs:

[...] We are far more inclined to take seriously points made by people who have experience in the Delta and experience of actually implementing any activity in the Delta and who know what they're talking about. We're not going to say we're never going to talk to so-and-so but on the other hand, if a group is insisting on criticising us and won't go to the Delta, we're less inclined to spend much time talking to them (Briggs 2010, personal communication).

Nonetheless, all NGOs which campaign against Shell and potentially tarnish its brand are perceived to possess a certain leverage over the company:

[...] They have leverage over us. You can influence Shell by standing in a street corner [...] with a picture of an oil spill saying this is Shell in Nigeria [...]. And that has an influence on Shell because we don't like that and we mind about that [...]. We are a very big brand. So anyone can influence us by affecting our brand – whether you like it or not (Briggs 2010, personal communication).

With regards to actually changing Shell/SPDC, campaigning appears however not to be the most influential tactic:

I would say that other ways of doing it [influencing Shell, author's note] are more influential than the campaigns. [...]. There is a way that Shell does community development in the Delta. There is a technique called GMOU. That project has been hugely influenced by an NGO called Pro-Natura. Pro-Natura is a very small NGO, has never campaigned on anything and has a material influence on how that program is run because [...] we have to say 'You know a lot about the Niger Delta, you might be right'. [...] So they've had a bigger effect on Shell than a big campaign, I would argue (Briggs 2010, personal communication).

Pro-Natura is promoting development in the Niger Delta through a partnership with SPDC (Pro-Natura International Nigeria 2010). It appears, that NGOs that are engaged in such partnerships with Shell/SPDC have a bigger influence on the company than those that campaign. And NGOs seem especially to be able to influence Shell's/SPDC's development-related procedures, such as GMOUS. CSCR stated that their main demands from Shell/SPDC are and have been their implementation of GMOUs to improve their community development performance, their compliance with applicable Nigerian laws and regulations and relevant international standards in sustainable environment management practices, the remediation of oil spills and polluted sites and the immediate ending of gas flaring in the Niger Delta (Dumpe 2010, personal communication). Asked about which of these demands have been partly or fully fulfilled by Shell/SPDC, CSCR stated:

Implementing contents of some of the [...] GMoUs and other agreements with the communities or recommendations of the Federal Ministry of Environment have at least been partially fulfilled (Dumpe 2010, personal communication).

Asked whether any of CSCR's demands have been integrated into Shell's/SPDC's system of civil regulation, Boniface Dumpe replied:

Yes, they have progressively reviewed their community engagement strategy to the present GMoU approach (Dumpe 2010, personal communication).

However, it appears that CSCR's GMOU-related demands are also the only ones which have been satisfactorily integrated into Shell's/SPDC's system of civil regulation and that CSCR is less content with SPDC's implementation of demands which relate to the regulation of its operations:

We are not satisfied [with the incorporation of our demands into SPDC's civil regulation regime, author's note]. More institutional improvement needed in response to oil spill management and implementation of environmental impact assessment [...] (Dumpe 2010, personal communication).

This lack of influence on regulative measures is also reflected in CSCR's statement not to be satisfactorily included in the monitoring of SPDC's operations and compliance with its civil regulation regime. Further, CSCR stated that in a case of a violation of Shell's/SPDC's CSR-policies and civil regulation regime

(e.g. human rights violations), there are no adequate means for the NGO to ensure redress of the misdemeanour (Dumpe 2010, personal communication).

In trying to assess the accuracy of the assumption that in a regulatory void, NGOs can advance their own solutions for the most pressing problems (Dryzek 2006: 110), I asked Barnaby Briggs what influence NGOs had on SPDC's current CSR-strategy and system of civil regulation, and to what extent they were based on NGO-input:

[...] We're very focused on trying to enhance development. So inside Shell, we're not experts at how to run Nigeria. So a lot of the expertise comes from the outside but I cannot emphasize enough the fact that the company is interested in hearing that external expertise. As well as the expertise being outside, there is a receptive audience inside the company and has been for fifty years (Briggs 2010, personal communication).

It is remarkable, that Briggs points out Shell's focus on development work, and does not include regulative aspects, i.e. negative injunction duties. Further, asked about an example of important changes within SPDC that occurred as a reaction to NGO-pressure, Briggs cites Shell's/SPDC's support for GMOUs (Briggs 2010) which is again related to development-projects. Briggs does not mention any concrete regulative, negative-injunction duties. Interestingly, CSCR is least satisfied with SPDC's integration of demands relating to such negative injunction duties (Dumpe 2010, personal communication). It appears thus that Shell/SPDC is less inclined to be influenced and changed with regards to regulating its operations than to its development-efforts.

Asked whether NGOs have – according to the theoretical assumption – prompted Shell/SPDC to critically assess and change their routine actions, Briggs replied:

No, I don't think that's fair actually, I think that Shell has been agonising about our [sic!] operations and social performance for a long time. [...]. So no, [...] on that one in terms of managing our operational impact, I think that we all know that we have an operational impact and we are always trying to seek better ways, different ways of doing things. Think about, who you're asking that question of. These are Nigerians in the main, 95% Nigerian staff members [...]. They're sitting there thinking 'This is my country and I want to do it [the work, author's note] to the best of my professional ability'. So, that's the reason I would say the NGO-voice in that operational performance aspect you're asking about, is only *one* of the voices. (Briggs 2010, personal communication).

Curiously, CSCR stated that there have been incidents where it has made SPDC aware of the negative externalities to its practices, citing as an example an incident, where SPDC has taken back its allegation that an oil spill had been caused by sabotage instead of equipment failure (Dumpe 2010, personal communication).

The suspicion formulated by some critical approaches that NGOs generally advocate market based solutions for regulating TNCs and thus serve their preferences cannot be corroborated by the interview with CSCR as it stated to

engage government regulatory and development agencies as well for a better regulation of the oil and gas industry (Dumpe 2010, personal communication). Another critical assumption was that NGOs might be co-opted by TNCs in partnerships and used to appease social conflicts which arise out of the companies' operations. With regards to Shell/SPDC and its civil regulation in the Niger Delta, this question is analysed by using a study which analyses the relationship between Shell and the NGO Living Earth.

In 1998, Shell International and Living Earth UK planned a cooperation regarding development-work in communities in the Niger Delta. This resulted in Living Earth UK founding a sister organisation in Nigeria which Shell International then introduced to SPDC for commencing the cooperation in Nigeria (Shah 2000: 1, 18). Other NGOs that were engaging Shell over its operations in the Niger Delta, becoming aware of the cooperation warned Living Earth, that Shell would use it for "greenwashing" and attacked them for letting themselves being co-opted (Shah 2000: 13). As it became clear that SPDC saw Living Earth Nigeria rather as a sub-contractor who would carry out a development-project for them, instead of a partner from whom to learn, Living Earth was willing to pull out of the project in order to maintain its independence of SPDC. Thus, instead of a contract, a memorandum of understanding (MOU) was signed between the organisations which established the relationship as a "partnership" which Living Earth hoped to mean that it would be able to some extent promote changes within SPDC (Shah 2000: 12, 20). Further, Living Earth was given some control over Shell-publications concerning the partnership to ensure that it was not used for greenwashing (Shah 2000: 13). However, as a representative of Living Earth UK confessed, the partnership did not enable Living Earth to substantially influence SPDC internally:

[W]e had written in the MOU that Shell would play an active part in using [...] our reports by Living Earth as learning documents with which to change the way the programme worked. [...]. Now the reality has been very, very different. Once we got the money from Shell, Shell were no longer interested (Shah 2000: 17).

Shah concludes that one of the main reasons of this shortcoming is SPDC's understanding of a NGO-partnership. Shell International's motivation for initiating the cooperation was to maintain a good corporate image among Western societies. For SPDC, however the merits of the cooperation were much more functional as it saw the relationship with Living Earth as a key in appeasing community conflict and securing operations (Shah 2000: 18, 21). This resulted in the relationship to be a sub-contracting of development work in the Niger Delta which meant that Living Earth Nigeria has not been able to trigger meaningful change within SPDC (Shah 2000: 20). Although admitting that it would be easy to speak of a co-optation of a NGO here, Shahs argues that the reasons for the outcome are that the involved organisations do not yet share the same understanding of what a truly engaging partnership means (Shah 2000: 22).

The study points out SPDC's ability to determine the extent of NGOs' influence on the regulation of its operations. Secondly, it highlights discrepancies in understandings and interpretations between Shell International and SPDC. The study suggests also that SPDC mainly sees cooperation with NGOs as a means of appeasing socio-economic conflicts in order to maintain the security of their operations. From the cited study as well as my own research it appears further that the subject of Shell/SPDC-NGO partnerships are heavily focused on development-work. Of twelve NGOs that were examined in the context of the research, ten are engaging Shell/SPDC in campaigns and two are in a partnership⁷. The subject of both partnerships is development work.

As presented in the theoretical framework, Rodgers argues that one of the main merits for TNCs in cooperating with NGOs lies in their ability to confer legitimacy (Rodgers 2001: 41). Instead of legitimacy, Shell International and especially SPDC, seem mainly to be interested in NGO-cooperation for preventing and curtailing violent conflict in the Niger Delta which could disrupt its operations:

I think the less Shell works in partnership with NGOs [...] and governments, we haven't got a chance [sic!]. [...] So we have to recognise that our actions can create conflict and so if we take the wrong action, you create conflict, and conflict in Nigeria means bombs and guns, not people being cross and shouting at you. So this is really, really serious. And those bombs and guns can have a material effect on our operation as a business (Briggs 2010, personal communication).

The last sentence corroborates the indication that Shell's/SPDC's NGO-cooperation, civil regulation and CSR-policies in the Niger Delta ultimately serve the safeguarding of its operations and the maintenance of oil production. Shah concurs with this and sees it as SPDC's initial motivation to embrace a comprehensive CSR-approach in the Niger Delta (Shah 2000: 6). In the next section, I will analyse to what extent this indication substantiates and how well selected elements of Shell's/SPDC's civil regulation regime are capable of preventing or mitigating its operation's direct and indirect harmful externalities.

⁷ The NGOs Living Earth Nigeria and Pro-Natura International Nigeria.

4.4 The effectiveness of the civil regulation of Shell/SPDC

As has been shown, the presented social-constructivist approaches are by and large rather optimistic of NGOs' capability of obligating TNCs through civil regulation and CSR to compensate for governance failures (Ruggie 2004: 514). Further, civil regulation regimes are viewed as "effective" as changes demanded in corporate behaviour are said to take place quicker and more widespread than those that could be forced by legislation of states (Rodgers 2000: 43). The goal of this section is to analyse whether these assumptions can be corroborated in the case of Shell's/SPDC's civil regulation regime and CSR in the Niger Delta, and to assess its "effectiveness" in terms of regulating SPDC's operation's impacts on the people and environment of the Niger Delta. The case studies comprising the ECCR-report were made available to SPDC which was invited to comment on it (ECCR 2010: 8). SPDC also formulated a response to the Amnesty International report which is another main source for the analysis. Where specific allegations and descriptions of incidents made in the reports were asserted by Shell/SPDC, this is mentioned in the analysis.

4.4.1 Oil spills

First, it will be examined how effective Shell's/SPDC's civil regulation regime is regarding the prevention and remediation of oil spills. The Niger Delta is a productive ecosystem and thus a so-called High Consequence Area for oil spills (Amnesty International 2009: 60). In addition, much of the oil infrastructure runs close to homes, farms and water sources which 60 per cent of Niger Delta-residents fundamentally depend on for their livelihoods (ibid.). In the Niger Delta, oil spills destroy crops, quality of soil for farming, damage fisheries and contaminate drinking water (Amnesty International 2009: 14) thus affecting "man's environment [...]" which is "[...] essential to his well-being and to the enjoyment of basic human rights [...]" (Declaration of the United Nations Conference on the Human Environment, as cited in Amnesty International 2009: 12). The amount of oil that has been spilled in the Niger Delta since production commenced amounts to the volume of oil spilled by the Exxon Valdes disaster, *every year* (SDN 2010: 43). As of April 2008, the National Oil Spill Detection and Response Agency had identified 2000 spills which needed remediation, of which the majority is supposed to be SPDC-sites (Amnesty International 2009: 16).

Under Nigerian law, companies are not obliged to pay compensation to affected parties when spills are caused by sabotage (Pyagbara 2010: 23). SPDC claims that over the last five years 70, and in 2008, 85 percent of the volume of oil spilled in 2008 was due to sabotage, mostly by armed gangs stealing crude oil or

blowing up pipelines (Pyagbara 2010: 23/SPDC 2009c). According to SPDC, in 2008, saboteurs spilled almost 48,000 barrels of oil, whereas “[...] 8,325 barrels (about 15% of the total volume spilled) were the result of the failure of equipment, corrosion or human error” (SPDC 2009c). However, as Amnesty International holds, the proportion of oil spills caused by sabotage, as opposed to corrosion and equipment failure, cannot really be determined because the causes of oil spills in the Niger Delta have not been subject to any independent assessment or verification (Amnesty International 2009: 17). SPDC states that oil spills also often unnecessarily increase in volume because communities frequently delay SPDC-staff’s access to the sites (SPDC 2009c).

In the absence of effective state capacities to manage oil spills, Nigerian law obliges oil companies to clean up and remediate affected areas themselves, and clean-up should commence within 24 hours after occurrence of the spill (Amnesty International 2009: 65). Through joint investigation teams (JIT), comprising representatives from the affected community, the government and the respective oil company, oil TNCs are also greatly involved in the estimation of oil spills. The JIT-investigations are an integral part of SPDC’s civil regulation regime as it finances those that are investigating spills related to SPDC-facilities (Pyagbara 2010: 24). This, it is argued, also gives the company the control over investigations and their outcomes (ibid.). When an oil spill occurs at one of SPDC’s production facilities, a JIT is mobilised and

[f]or all spills that are within our [SPDC’s, author’s note] control to prevent, the JIT assesses the extent of damage and negotiates compensation between the company and affected landowners. Nigerian law discourages payment of compensation in cases of sabotage (SPDC 2009c).

It follows from this, that it is in SPDC’s interest that incidents of oil spills are officially attributed to sabotage acts. According to TMII, most spills are contested as sabotages by SPDC, except those in flow stations or terminals, the latter being hardly reported or investigated (Emmanuel 2010: 62). In spite of SPDC disputing this (SPDC 2010a), there are incidents suggesting that oil spills caused by old and poorly maintained SPDC-facilities are a severe problem in the Niger Delta. Although it is acknowledged that SPDC has made some progress in pipeline replacement, SDN states that much of its oil still flows through pipes up to 40 years old (SDN 2010: 43). In addition, there is no independent assessment of pipeline maintenance and integrity in Nigeria and SPDC admits that its own current Pipeline Integrity Management System is under-funded and behind schedule (Amnesty International 2009: 59). Professor Richard Steiner concludes in his analysis of Shell’s practices, that in Nigeria it is operating “far below commonly accepted international standards used elsewhere in the world” (Steiner 2008, as cited in: Amnesty International 2009: 59).

In Yenagoa, Bayelsa state, a SPDC maintenance contractor damaged a pipe carrying oil on 23 September 2003, causing an oil spill that was stopped 24 hours later by SPDC. According to the NGO Christian Aid, as of mid-December 2003,

clean-up had not commenced. Shell cited a disagreement with the Nigerian Environment Ministry over which contractor to use as the reason for this (Christian Aid 2004: 28-29). In the case of the Goi oil spill incident in Ogoni in 2004, Shell attributed the spill to sabotage which meant that it remained for three months before any containment was undertaken and this only happened after European Union ambassadors had intervened (Pyagbara 2010: 24).

There are indications that SPDC has repeatedly been intransparent in establishing the official cause of oil spills. In a major oil spill of 16,000 barrels in Ogbodo in 2001, which affected some 42 communities, SPDC claimed sabotage as the reason. A later investigation by ECCR discovered however a JIT-report which showed that the real cause of the spill was poor asset integrity and pipeline corrosion (Emmanuel 2010: 57). What is more, SPDC refused to show the remediation contract documents for a third-party assessment, and the area where remediation was claimed to have taken place remained secret. TMII concludes hence that little or no remediation took place (Emmanuel 2010: 58).

In the context of an oil spill at Batan in 2002, SPDC wrote a letter to the Governor State, naming sabotage as the cause of the spill. The letter was dated two days *before* the actual JIT-investigation took place. The JIT only conducted the investigation five days after the spill began and unambiguously concluded that it was caused by equipment failure. The following day, this was repudiated in a letter from SPDC to the Batan community, stating the cause was sabotage and the cause established by the JIT was coerced by the community, which could however be disproved by video footage of the investigation (Amnesty International 2009: 47).

On 22 July 2007, an oil spill occurred in Ikarama/Bayelsa State as a result of a fault with oil infrastructure (Amnesty International 2009: 67). Although the JIT-report cites a leaking valve as being responsible for the leakage it *also* states that the cause of the spill was to be established in the SPDC-office (Amnesty International 2009: 68). According to Amnesty International, the site had not been cleaned by March 2008 (*ibid.*). As of March 2008, Amnesty states further, a second spill which took place in the area in 2006 when a SPDC-contractor ruptured a pipeline, had not been cleaned up. Confronted with this situation, SPDC replied that the spill had been cleaned up 2006 without further addressing the current state of the site (*ibid.*). Based on anomalies in data on remediation by SPDC, Amnesty further formulates concerns that the certification of SPDC-sites may not have involved a site level inspection and scientific analysis in all cases (Amnesty International 2009: 69).

On 28 August 2008, a burst pipeline caused a significant oil spill into Bodo Creek, Ogoniland, killing a considerable number of fish that locals depend on for their food and livelihood (Amnesty International 2009: 46). Reportedly, SPDC refused to sign the JIT-report – which stated the cause of the spill – on site and failed to send the community a copy of the report, although it had promised to do

so (ibid.). The leak was not stopped by SPDC until 7 November 2008, and as of May 2009, the site had not been cleaned up. Moreover, reportedly a second spill occurred in the same area on 2 February 2009 (Amnesty International 2009: 7-8). These incidents point also to severe deficiencies in SPDC's information practices: apparently, SPDC has rarely made JIT-reports available to the public, and there have been allegations of corruption associated with the reports (Pyagbara 2010: 24). Likewise, Amnesty International reports that several communities have stated to not have received copies of JIT-reports (Amnesty International 2009: 62).

According to SDN, SPDC's policy of responding to oil spills also allows unscrupulous actors to exploit them: SPDC often hires community contractors for the clean-up of oil spills. Together with community proxies who are part of a JIT, they provide access to the spill, personal security and a cover for delays that result in clean-ups being overly expensive. On occasions, individuals identified as responsible for damaging pipelines are said to have become directly involved with clean-up or surveillance contracts (SDN 2010: 43). It appears that for some people in the Niger Delta, causing oil spills and getting compensation or clean-up contracts is the only possibility to benefit from the oil production. Moreover, the community-contractors appear to be mostly not adequately qualified for conducting clean-ups of spills (Amnesty International 2009: 67). Community members have reported that the standard exercise of remediation often involves a superficial process of scooping up the surface oil and covering the area with sand to mask contaminated sites. These reports are confirmed by the NGO Centre for Environment, Human rights and Development (CEHRD) (SDN 2010: 43). The scooped-up soil is then either buried in pits or burnt, generating other health concerns (Pyagbara 2010: 24). In fact, an internal SPDC report points out the company's failure to redress poor clean-up performances out of fear of conflict with communities (Amnesty International 2009: 67). In its case study, MOSOP concludes that

[c]leanup exercises carried out by Shell in Ogoni and other parts of the Niger Delta generally fall well below internationally accepted standards and are completely different from what the company does in other parts of the world (Pyagbara 2010: 24).

SPDC's practice of responding to oil spills and a lack of transparency in the award of clean-up contracts are said to have lead to subcontractor exploitation and mistrust on behalf of the communities which is cited as the reason why communities often deny SPDC-personnel and subcontractors immediate access to oil spills (SDN 2010: 43-44). In fact, this lack of transparency in its operations is highlighted by an internal SPDC report (Amnesty International 2009: 62). According to Amnesty International, SPDC treats communities as a "risk" to be pacified, rather than as stakeholders whose concerns are seriously taken into account (Amnesty International 2009: 13).

In a response to Amnesty International's report, SPDC defends itself against a number of allegations but only indirectly addresses its dealing with oil spills by

stating: “Militant activity creates the environmental damage that threatens their [the people in the Niger Delta, author’s note] lives and livelihoods” (SPDC 2010b). SPDC commented on the ECCR-report’s case studies’ allegations that it had repeatedly determined the official cause of oil spills covertly that

[d]eliberate damage to oil wells and pipelines caused by armed militant groups and criminal gangs [...] has become the leading cause of oil spills [...] 85% of the volume spilled in 2008 was due to sabotage of our facilities (Mutiu Sunmonu, Managing Director SPDC as cited in Pyagbara 2010: 23).

In this statement, SPDC does not address its contended way of determining official causes for oil spills but recites the amount of oil spills which it claims to be not responsible for. This figure, however, is based on SPDC’s contested way of establishing oil spill-causes. The fact that SPDC does not explicitly dispute Amnesty’s and the ECCR-reports’ descriptions of how oil-spills were dealt with in the single incidents, supports the accuracy of the accusations.

4.4.2 Gas flaring

Gas flaring is a process in which associated gas that comes out of the ground during the production of oil is burnt off (SPDC 2009d). According to the World Bank and others, gas flaring has released more greenhouse gases than all other emissions sources in sub-Saharan Africa combined (SDN 2010: 45). Friends of the Earth International states that

[...] the flares contain a cocktail of toxins that affect the health and livelihood of local communities, exposing Niger Delta residents to an increased risk of premature deaths, child respiratory illnesses, asthma and cancer (Friend of the Earth international 2005: as cited in SDN 2010: 45).

In spite of gas flaring being officially illegal in Nigeria since 2004, as of today SPDC (as every other oil TNC in Nigeria) continues to flare gas (SDN 2010: 45). This stands in contrast to SPDC’s in 2000 stated goal “[...] to eliminate continuous flaring at our Nigerian operations by the end of 2008” (SPDC 2009d). The reason that SPDC can afford to ignore the law is that fines for gas flaring are fixed at insignificant rates (Idemudia 2009: 7). Although the practice of flaring gas contravenes Shells principle to “[...] give proper regard to health, safety and environment” (Royal Dutch Shell 2005) and its goal to “[do] no harm to people” (Shell International Limited 2006), and the ending of gas flaring is one of NGOs most important and frequent demands (see ECCR 2010), Shell’s/SPDC’s civil regulation regime includes no instrument to regulate this practice. Instead, SPDC/Shell claims to reduce gas flaring by constructing gas gathering plants which will allow to utilise and sell the associated gas instead of burning it (SPDC 2009d). However, this strategy has so far not lead to a significant drop in flaring (SDN 2010: 46). As reasons for this, SPDC cites the security situation in the

Niger Delta and a lack of funding from the Federal Government of the gas gathering projects. (SPDC 2009d). Further, as addressed in the next sub-section, the implementation of these projects is associated with potentially negative impacts itself and thus also subject of regulation.

4.4.3 Informing about project-impacts

The Gbarain-Ubie Integrated Oil and Gas Gathering Project (IOGP) is currently SPDC's largest project of gas utilisation and flaring reduction (SPDC 2009e; Ereba/Dumpe 2010: 30). Nigerian law requires all oil and gas projects to be passed through a so-called *Environmental Impact Assessment* (EIA)-process (Emmanuel 2010: 55; Ereba/Dumpe 2010: 32). Against the background of poor enforcement of Nigerian environmental laws, Shell/SPDC has explicitly integrated the requirement to carry out EIA-studies for all of its operations in its civil regulation regime (Ereba/Dumpe 2010: 31). As Amnesty International points out, the UN Committee on Economic Social and Cultural Rights has established that access to health-related education and information is an integral component of the right to health and should thus be guaranteed (Amnesty International 2009: 49). The conduction of EIAs is supposed to ensure the inclusion and participation of potentially affected communities in the design and implementation of projects and allow for their informed consent (Pyagbara 2010: 23).

It is true that SPDC commissioned an EIA for the drilling of two new appraisal wells before the development of the IOGP. However, CSCR has established that this EIA process did not provide for public scrutiny. Local community representatives reported that copies of the EIA report were not made publicly displayed in the Bayelsa state capital Yenegoa or in Okolobri, headquarters of the local government area, as statutorily required. SPDC commented on this that "EIAs have been – and are being – completed in compliance with regulations and in accordance with SPDC's own standards" (Mutiu Sunmonu, Managing Director of SPDC, as cited in Ereba/Dumpe 2010: 33). However, SPDC made no specific comment about the reported failure to comply with statutory requirements (Ereba/Dumpe 2010: 33).

Further, the EIA seems to have been carried out incorrectly and failed to consider one community altogether which resulted in the construction of an access road to the IOGP cutting through a biodiverse community forest (Ereba/Dumpe 2010: 33). In addition, it appears that parts of the report have been copied from an older EIA-report of a saltwater case (Ereba/Dumpe 2010: 33). SPDC has also commenced laying pipelines for the IOGP without carrying out a second EIA, although Nigerian law requires each major project activity to be subject to a separate EIA with local stakeholder involvement (Ereba/Dumpe 2010: 35).

As a consequence of these procedural failures, the affected communities rejected the EIA, claiming to not have been included adequately and thus demanding a new EIA (Ereba/Dumpe 2010: 34). As a reaction to these demands, SPDC apparently turned to the Governor of State which informed the communities that work on the IOGP would commence and urged them to cease any agitation for a new EIA. CSCR sees this as SPDC resorting to government coercion and the suppression of legitimate community demands for a proper EIA (Ereba/Dumpe 2010: 34) and concludes that SPDC “[...] still excludes legitimate community participation in contravention of legal and regulatory provisions” (Ereba/Dumpe 2010: 35). Likewise, TMII states that EIAs have been undertaken without the due consultation with primary stakeholder communities impacted by projects and MOSOP criticises that even where SPDC claims to have undertaken environmental impact assessments, the reports are almost impossible to access and confirm (Emmanuel 2010: 62; Pyagbara 2010: 23).

4.4.4 Human rights

As has been pointed out, in the Niger Delta, SPDC operates in a highly conflictual and violent-prone environment which means that security issues are an essential part of its operations. Handling these issues is potentially linked to violence and human rights⁸ abuses and thus an indirect negative externality to SPDC’s presence in the Niger Delta. SPDC claims that it “[...] believes in using peaceful means to resolve issues with host communities” (SPDC 2009a). As the history of interventions by Nigerian security forces in the Niger Delta shows, the Nigerian state cannot be counted on to abide by and protect the human rights of its citizens. In fact, Nigerian security forces have often been among the worst oppressors of their own people (ECCR 2010: 9). As a way of addressing this governance deficiency, Shell and SPDC have subscribed to the Voluntary Principles on Security and Human Rights (VPSHR), a set of guidelines developed in 2000 by governments, extractive industry companies and human rights organisations (SPDC 2009a). The VPSHR are thus a typical case of civil regulation but not subjected to any kind of monitoring and compliance mechanism (Zalik 2004: 111). SPDC claims that:

SPDC applies to these principles in the [Niger, author’s note] delta and engages various government agencies [...] and security authorities about how it could contribute to implementing VPSHR in the country (SPDC 2009e).

⁸ The term “human rights” here refers to those established in the United Nations Declaration of Human Rights, of which especially Article 3 (right to life, liberty and security of person) and 5 (protection from torture, cruel, inhuman or degrading treatment or punishment (United Nations 1948) apply in this section.

In order to protect its facilities, SPDC has been assigned Nigerian Police Force (NPF) personnel which SPDC claims to be “mostly unarmed” (SPDC 2009a). Further, SPDC provides training on human rights to the NFP-personnel which is seconded to SPDC “[...] so that they can work according to the United Nations Code of Conduct for Law Enforcement Officials” (SPDC 2009a).

However, according to a 2008 Amnesty International report, NPF-personnel continues “[...] to commit human rights violations with impunity [...]”, including extra-judicial executions, torture in police custody and rape both on and off duty (Amnesty International 2008: 2-5). Although it singles out no concrete incidents of human-right violations by NFP-staff assigned to SPDC, TMII states that SPDC’s use of Nigerian security forces is seen as imposing its will, “[...] resulting in human rights violations and loss of life and property” (Emmanuel 2010: 63). In a similar vein, SDN concludes that “[i]n practice, disproportionate use of force by state security operatives [...] remains a destabilising factor” (SDN 2010: 41) and Amnesty International affirmatively writes that

[p]rotests by local communities about the oil industry (including peaceful protests) [...] are frequently met with reprisals characterized by excessive use of force and serious human rights violations (Amnesty International 2009: 13).

Thus, SPDC’s cooperation with Nigerian security forces remains problematic, and the potential of the VPSHR to end human rights violations committed by the NFP immediately seems slim in a society in which

[p]rolonged years of military [...] entrenched a culture of disregard for human life, particularly on the part of security and law enforcement agencies. This attitude has largely remained unchanged, seven years after the advent of democracy (National Human Rights Commission, as cited in Amnesty International 2008: 3).

Moreover, there appears to be a rather structural reason which lets SDN judge that the VPSHR alone are inadequate to solve the issues of violence and human rights abuses in the Niger Delta (SDN 2010: 42): besides NPF-personnel, SPDC is also using civilians from the communities, so-called community-contractors, for securing its operations. These in turn employ community surveillance guards to watch over SPDC facilities and, where necessary, alert the company and law enforcement agencies to sabotage, theft and spills (Pyagbara 2010: 26). What seems to be most problematic about this practice is that community-contractors are often local violence-prone power-brokers. According to SDN, the purpose of this is to co-opt these “strongmen” which would otherwise themselves pose a threat to SPDC’s operations (SDN 2010: 41).

In 2002, a leader of the Nigerian People’s Democratic Party in Rivers State who was a SPDC community-contractor at that time, did grievous bodily harm (including cutting the ankle tendons) to a member of a oppositional political group (Human Rights Watch 2003: 15). In 2005, the armed thugs of that same contractor beat a Chief in Tai local government area, Rivers State, who was trying to take pictures of an SPDC-oil spill unconsciously, requiring his hospitalisation

(Pyagbara 2010: 26). In 2007, the military Joint Task Force (a.k.a. Warri Brigade), which was requested by SPDC to secure its operations, shot two youths which were protesting at a flow station in Eleme, Ogoni (SDN 2010: 44).

The fact that SPDC, which had the option to comment on statements made in the reports, does not dispute these incidents, supports their authenticity. According to SDN, SPDC has classified these surveillance-arrangements as falling outside its formal security system, distancing implementation from Shell's security principles which include championing the VPSHR. Further, the system of sub-contracting allows SPDC to distance itself from responsibility for the human rights-violations (SDN 2010: 42). Human Rights Watch reports that all oil companies operating in the Niger Delta

[...] continue to fail to monitor closely security force activity at or near their facilities or where work is being carried out on their behalf, or, in many cases, to intervene with the authorities when abuses are committed (Human Rights Watch 2002: 3).

Another practice by SPDC that promotes the violation of human rights in the Niger Delta and that is not addressed by the VPSHR are the customary and statutory payments SPDC makes to "host communities," or those who own the land where SPDC's operations take place. Being designated as a host community brings significant benefits in the form of compensation, community development funds and promises of labour and security contracts. SPDC negotiates such agreements and contracts notably with the top traditional leaders or chiefs whom they give the status of community representatives. By handing large quantities of money to the tribal leaders, many of whom fail to share the benefits with their community, SPDC has indirectly fuelled inter-communal conflict (Human Rights Watch 2005: 6).

In some areas in the Niger Delta, youth groups who did not benefit from SPDC's payments compete with the tribal elders for control of the cash fees (Human Rights Watch 2005: 7). SPDC is said to try to appease these youths by making so called "stay-at-home payments" to them – often in the guise of surveillance-contracts (Idemudia 2009: 9). It has been reported that in many cases, the youths are using this money to buy weapons and ammunition to finance their violent struggle for personal benefits from the oil production and terrorise their communities (Pyagbara 2010: 25, Human Rights Watch 1999 and 2003, as cited in Zalik 2004: 119). It appears that SPDC does not monitor appropriately the use of their payments to communities and individuals, in particular to ensure that it is not used for financing violent intra- and inter-community conflict (SDN 2010: 50).

4.5 Discussion of the findings

On the basis of the analysis, some light can be shed on the question of the extent of NGOs' influence on Shell/SPDC and its civil regulation regime. Firstly, a globally well-known oil TNC like Shell has a brand-value that it perceives to be vulnerable to campaigning NGOs. This means that Shell is unable to choose which NGOs to accept as stakeholders. Being accepted as a stakeholder does, however, say nothing about the actual *influence* a NGO can exert on Shell/SPDC respectively. It appears that NGOs with which Shell/SPDC engages in a partnership have a significantly greater influence on the company than campaigning NGOs. Nonetheless, as the case of the SPDC-Living Earth Partnership demonstrated, even in such partnerships, the company seems to be able to govern the extent of NGO-influence – without necessarily having to co-opt the NGO.

Moreover, it appears that subjects of such partnerships are largely development-related aspects of Shell's/SPDC's civil regulation regime and CSR-strategy, i.e. concerning affirmative duties. It follows that NGOs' concrete influence on specific harm-regulating practices, i.e. on negative injunction duties, seems to be very limited. A case in point here is the fact that despite massive NGO-campaigns demanding the immediate end of gas flaring, Shell/SPDC is still completely in control of designing solutions for this issue, namely the slow and utilising method of gas-gathering projects.

It has been theoretically suggested, that through partnerships, NGOs are able to increase corporations' reflexivity about their operations' impacts and change their norms, and consequently behaviour. However, Shell/SPDC does not see a great need to increase its reflexivity and does not appear to engage in partnerships which have the regulation of its operations as the main subject. Further, at Shell International, it is assumed that the Nigerian staff of SPDC is already highly sensitive to these issues. This corroborates the finding that Shell/SPDC is not inclined to allow significant NGO-influence regarding the regulation of their operations. It seems thus that Keck and Sikkink's suspicion (Keck/Sikkink 1998: 35), that a normative change in company is difficult and disruptive is more valid and important than most social-constructivists account for: this disruption appears to constitute a significant barrier for NGOs' opportunities to influence TNCs.

The capability of Shell's/SPDC's civil regulation regime to protect people and environment in the Niger Delta from its operations' externalities can at best be called inadequate. In the absence of effective state inspections and verifications of oil-production facilities, SPDC appears to be operating below commonly accepted international standards in Nigeria and struggling to maintain its pipelines. SPDC further increases mistrust by being intransparent in determining the causes of oil spills by JITs which obscures the true conditions of its pipelines and facilities. The

analysed NGO-case studies allow the conclusion that SPDC is at best unreliable in performing the state-conferred task of cleaning-up and remediating oil spills. Moreover, the use of community-contractors to perform this task is highly critical, as this does not guarantee an adequate remediation and potentially serves as an incentive for contractors to deliberately cause spills. It is true that criminality and community action is a big factor in causing oil spills. However, as Amnesty International concludes:

[...] as long as companies such as SPDC continue to see community hostility as a problem apart from them rather than one they have helped to create, and which they continue to feed through poor practices [...] the situation will not improve (Amnesty International 2009: 74).

SPDC's information policy about its projects' (potentially) harmful externalities is criticisable too: it appears that SPDC is carrying out EIAs rather pro forma without always giving due appraisal to its projects' negative impacts and that affected communities are sometimes not adequately included in the project implementation.

Further, the VPSHR as an element of Shell's/SPDC's civil regulation regime to prevent human rights violations do not solve the problem, as NFP-personnel seconded to SPDC continues to violate human rights, and SPDC is also using human rights-violating sub-contractors outside its formal civil regulation regime. The contracting of host-community members for cleaning-up oil spills and surveillance, and the benefits associated with being designated as a host community and a "community-representative" emanate as some of the most counterproductive practices to Shell's/SPDC's civil regulation regime: as this creates practically the only individual and communal benefits from the oil production for many of the people in the Niger Delta, it fuels violent struggles for them between and within communities. Attempts to appease these, e.g. through "sit-at-home" payments are financing, instead of pacifying conflicts.

The analysis leads to the view that Shell and especially SPDC consider their CSR-policies and civil regulation regime in the Niger Delta to be instruments of conflict-appeasement in order to maintain their operations. This setting of priorities of purposes could be part of the reason why Shell's/SPDC's CSR and civil regulation regime are so limitedly effective in regulating its operations. This utilisation of CSR and civil regulation as an appeasement-strategy is one of the allegations formulated by critical approaches. The ongoing and currently exacerbating violence in the Niger Delta shows, however, that CSR and civil regulation allow at least Shell/SPDC only very limitedly, if at all, to appease conflicts.

As has been pointed out in the methodological part, the case studies which provide the empirical material for this thesis cannot be taken to be representative for the overall impact of Shell's/SPDC's civil regulation regime. It cannot be ruled out that in the majority of incidents, the analysed regulative procedures

successfully mitigate or prevent harmful externalities to SPDC's operations. However, the studies point to regular failures in implementation and application of the procedures which SPDC can afford because it is not effectively being held accountable for them. Contravening theoretical assumptions, NGOs appear to be unable to force SPDC to include them in the monitoring of their operations and ensure adequate redress of misdemeanours. Truly holding SPDC accountable, would require Shell/SPDC to operate with transparency and

[...] allow independent monitoring of activities, [...] independently funded verification, by national and international NGOs and other appropriate bodies, of company compliance with international human rights and environmental standards (Ereba/Dumpe 2010: 39, personal communication).

The perception that Shell/SPDC would have to "allow" for these procedures, again bears testimony to NGOs' limited influence on its regulative procedures, or negative injunction duties. The repeatedly poor implementation of the practices and procedures, Shell's/SPDC's civil regulation regime prescribes, also means that its fundamentals, i.e. Shell's Business Principles and Code of Conduct are not successfully implemented and complied with by SPDC-staff. In its case study, SDN concludes that

Royal Dutch Shell itself appears to have lost much control over SPDC's operations and with it the capacity to act in accord with its own standards of best practice (SDN 2010: 47).

However, this view is not shared by Shell International which sees the external conditions in the Niger Delta as the main obstacle for the successful implementation of its Business Principles

I suppose if you want to narrow it down it's militancy, poverty, corruption. It's a very, very tough working environment. [...]. I don't hear enough NGOs understanding the real implications of the corruption, militancy, and poverty. Most of the NGOs seem to assume, if only Shell was better, then the whole country would be better. Nigeria is a tough place to do business (Briggs 2010, personal communication).

Nonetheless, the analysed reports suggest that there are also problems with SPDC-employee's conceptions and practical implementation of Shell's CSR-policies and practices, and SDN recommends Shell to "[s]et up effective internal mechanisms for monitoring SPDC's middle level managers, who are central to the current problems" (SDN 2010: 49). However, Shell International completely disagrees with this:

[T]he country chairman of the Shell business in Nigeria is Nigerian [...]. To assume that he doesn't understand the importance of Corporate Social Responsibility to the long-term business in Nigeria is wrong. They completely get that. We're part of an international oil-business and Shell has been under international pressure in Nigeria for twenty, thirty years, so they all completely understand the connection between corporate-promises in head-quarters and corporate-delivery in the field. The challenge is delivery in a place that's very, very difficult to deliver in. [...]. (Briggs 2010, personal communication).

For Shell/SPDC, the reason why its Business Principles and civil regulation regime is often implemented so poorly in the Niger Delta is solely the local social and political conditions, which in its eyes, the Nigerian state is exclusively responsible for. In a comment on the ECCR-report, SPDC writes:

The report acknowledges but does not address the context of governance: [...]. Blaming SPDC [...] for that matter, for problems where solutions lie with others is not helpful (ECCR 2010: 13).

In its comments on the ECCR-report, SPDC emphasises that it is being held responsible for problems which should be addressed by the state but hardly disputes the shortcomings of its civil regulation regime in place. Shell's/SPDC's perception of its role is expressed more precisely by Basil Omiyi, the Shell country chair in Nigeria:

Some of our critics seem to believe that because the oil companies are the avenues through which the central government company gets its oil revenue, we are therefore party to the dispute – which we're not. What they forget is that companies like Shell have to abide by the laws of the country. A company can create employment [...], produce oil [...], pay its taxes and levies [...]. That is the legitimate role of oil and gas companies. It's not their role to replace government (Royal Dutch Shell 2008).

This quote makes obvious that Shell is not willing to be viewed as being responsible to compensate governance failures through its civil regulation regime – unlike some scholars envision. At the same time, however, SPDC challenges the allegation to exploit the weak regulation in Nigeria:

SPDC seeks quite the reverse – a regulatory framework that effectively permits business activities to be carried out in a commercially sustainable way, but which also provides a safe and secure enabling environment for the communities where the company operates (SPDC undated, as cited in Amnesty International 2009: 60).

It may be argued that Shell/SPDC is interested the most in a state regulation which provides it with a secure operating environment – something which SPDC is to date trying to achieve itself through its CSR-approach and civil regulation regime. Further, Shell states that it would favour an evolution of certain elements of its civil regulation into hard law:

Well there's a balance between what should be legally binding and what should be delivered through voluntary standards. [...]. [W]e've argued in terms of carbon dioxide for example that you need legal standards and you need [...] the most effective transparent systems to do it. So it depends on what the issues are: sometimes yes, sometimes no. [...]. But there is a very good reason [for legal standards, author's note]. [...]. We are a much smaller player in the global oil industry than we used to be. And we feel, that every company, that's trying to do these big hydrocarbon-projects, should come under the same sort of scrutiny. Because we feel we will have an advantage if that's applied fairly because we feel that our technical and non-technical skills are better than of the competitors'. So that's why we will push for good regulation because we believe that we can outcompete the competition (Briggs 2010, personal communication).

This corresponds to the theoretical assumption that TNCs which are CSR-leaders, seek to establish a level playing field in order to create a competitive advantage (Ruggie 2003: 116) but also suggests that Shell would be particularly

interested in a legal regulation of areas in which it feels to be more advanced than its competitors. Another theoretical assumption that has been presented is that certain civil regulation-elements (i.e. soft law) have the potential to evolve into hard law or at least inform state regulation. Asked whether any parts of Shell's/SPDC's civil regulation regime have informed state regulation in Nigeria, Barnaby Briggs cited the advocacy and compliance with the VPSHR by Nigerian Governments on all levels as one of the most important examples (Briggs 2010). To date, this does not seem to have substantially improved the human rights situation in Nigeria (Amnesty International 2008) which does, however, not rule out the possibility that the implementation of the principles needs a longer time-horizon to bring about meaningful changes.

5 Conclusion

This thesis set out to answer the following questions: firstly, to what extent are NGOs able to influence Shell/SPDC and shape its civil regulation in the Niger Delta? And secondly, to what extent is the civil regulation of Shell/SPDC in the Niger Delta able to compensate for the governance failures of the Nigerian state to regulate the oil industry?

Unlike suggested by some critical approaches, globally known TNCs with a high brand-value such as Shell do not get to choose which NGOs to accept as a stakeholder and cannot afford to ignore demands of particular NGOs. However, being accepted as a stakeholder cannot be equated with having meaningful influence on a TNCs' concrete integration, and especially implementation of specific demands. A large TNC like Shell seems to be able to steer NGO-influence and to allow for it where it is interested in it, and to stop it where it deems it undesirable. It appears that Shell is therefore largely in control of the *way* in which it addresses the issues brought up by NGOs, i.e. it is extensively able to decide which practices and procedures to include in its CSR-approach and civil regulation regime. In the case of the Niger Delta, Shell appears to allow for some influence on development-work-related procedures but has largely blocked NGOs' influence and engagement regarding specific procedures aimed at regulating negative externalities to its operations. This also means that Shell/SPDC has been able to prevent NGOs from being officially involved in an independent monitoring of its operations and being equipped with effective institutionalised means for ensuring redress of violations of the civil regulation regime. As a result, SPDC is effectively not being held accountable by NGOs for non-compliance with, respectively the ineffectiveness of its civil regulation regime.

SPDC appears to be seeing its CSR-strategy and civil regulation mainly as a tool for appeasing conflict and violence in the Niger Delta with the objective to secure its operations. It is true that this finding corroborates suspicions articulated by critical approaches, however, as the ongoing raging oil-related conflicts in the Niger Delta show, this strategy can hardly be called successful.

Shell's/SPDC's civil regulation is not capable of adequately compensating for governance and regulatory failures of the Nigerian state: it is highly unreliable as in several incidents, regulative or harm-mitigating procedures have been implemented incorrectly, negligently or not at all, without any possibilities of redress. Due to sub-contracting, some procedures may even be permanently improperly implemented. For a civil regulation regime in the oil-industry to be

able to compensate for governance failures, it is fundamental that oil-TNCs accept their role as compensating for governance gaps. As long as their focus is set on pointing to incapable or unwilling governments instead of prioritising the effectiveness of their own regulation mechanisms, their CSR and civil regulation regimes are unlikely to make up for governance failures. Once Shell or any TNC is genuinely interested in an effective civil regulation and compliance with its CSR-policies by its subsidiaries, it has to allow for more NGO-influence, independent monitoring of its actions and institutionalised mechanisms of ensuring redress of breaches.

Although NGOs have been able to force Shell/SPDC to address certain externalities to its operations in the Niger Delta, they have not yet achieved to change SPDC's mindset which seems necessary for pulling it into the role of compensating for Nigeria's Government's governance failures to adequately regulate the oil industry. Shell and SPDC still defend themselves against being pushed into this role and persistently point to the responsibilities and failures of the Nigerian state. It can thus be inferred that Shell as well as SPDC are not interested in contributing to the construction of a "global public domain" and are unwilling to be part of any new system of meaningful governance.

Nevertheless, it has to be said that without NGO-pressure, the regulation of the oil industry would be worse in Nigeria as it would be completely left to a regulation-unwilling and -incapable government. A unreliable civil regulation is arguably better than a factual non-existing state regulation. However, since an oil company like SPDC can still afford to let its operations harm people and the environment in the Niger Delta frequently and unduly, it cannot be said that the civil regulation fully *compensates* for the government's failures. Further, the apparent exclusion of citizens and stakeholders by SPDC from decisions about the regulation of projects that severely affect their livelihoods means that Shell's/SPDC's civil regulation regime is rather undemocratic – which is not acceptable for any system of governance.

The analysis raises also the question, to what extent the concept of civil regulation can actually be expected to fill governance gaps. If NGOs manage to further enhance their influence, civil regulation definitely has the potential to make up for state-failures in the regulation certain industries. It appears however, that the underdevelopment of certain regions and the absence of even a minimum welfare, accounted for by governments which have failed to efficiently use revenues from taxes and royalties, amount to gaps which are too big to be completely filled by civil regulations. This holds particularly for the entailing social unrests and conflicts which cannot be solved by civil regulations. Further, civil regulation will naturally only make up for governance failures when *every* TNC of the same industry in the country has a working civil regulation regime in place. It is NGOs' merit, that today, the majority of oil TNCs can at least not afford to not have some CSR-strategy in place.

The findings of this thesis suggest also, that TNCs might promote the evolution of elements of their civil regulation regime into hard law if they feel that this would give them a competitive advantage. However, this also requires a perceptive state which is capable of enforcing hard laws. And in order to promote a comprehensive regulation, a sustained pressure or other incentives for TNCs to develop socially and ecologically sound ways of production which eventually might give them a competitive edge, is also likely to be needed.

Future research would be especially fruitful if it addressed the question how NGOs might further increase their influence in concretely shaping and monitoring civil regulation regimes. This also implies research aiming at enhancing the knowledge of how NGOs could be able to make TNCs understand that in order for civil regulation regimes to be effective, the companies partly have to take over regulative tasks which are traditionally presumed to lie with governments.

6 Executive summary

This paper examines the extent to which non-governmental organisations (NGOs) are able to shape the civil regulation of transnational corporations (TNCs), and the potential of civil regulations to compensate for development countries' governments' failures to regulate TNCs. In a broader context, this is linked to the research problem that globally operating TNCs remain widely unregulated in many developing countries. The reasons for this are a general global shift of liberal market-based policies away from state intervention and strong regulation over the last decades which meant that the policies of developing countries' governments shifted dramatically towards attracting, rather than regulating TNCs and foreign direct investment (FDI) which entails severely negative consequences for their people and the environments. Moreover, structural reasons often impede the effective regulation of markets and the cushioning of the adverse domestic affects of market exposure in the global South: the majority of the developing countries lack the resources, institutional capacity, international support and in some cases the political will on the part of the governments required to perform this task.

Attempts to address this problem through binding regulations at the international level have not been successful. International agreements designed for this purpose have proven to be unfit because they are often vaguely worded, slow to negotiate and difficult or impossible to enforce. There is thus a lack of adequate international state mechanisms which could compensate for the governance failures especially of developing countries to regulate global business. This imbalance between globally potent TNCs and non-existing global mechanisms to regulate them, is also referred to as a *governance gap*.

Especially social-constructivist informed theoretical approaches see civil regulations as a promising new mode of governance with the potential to compensate for governance failures and gaps. Civil regulations consist of voluntary codes and standards addressing TNCs' social and environmental impacts which the corporations subscribe to mainly because of the pressure of NGOs. The acceptance of civil regulations becomes manifest in TNCs' *Corporate Social Responsibility* (CSR) strategies which comprise actions which appear to minimise negative externalities on society and environment and to further some social good, independent of low legal requirements.

Social-constructivist theoretical approaches argue that NGOs are able to pressure, influence and even change TNCs and move them to subscribe to, and abide by civil regulations. However, more critical approaches challenge this view

and suspect that NGOs do not truly exert meaningful influence on TNCs and are used by TNCs for their interests of untroubled profit-maximisation. The purpose of the thesis is thus, to increase the knowledge about NGOs' influence on oil-TNCs with regards to their civil regulation and the capability of this regulation to compensate for governmental regulation failures. This is supposed to be achieved through a case study of Shell's, respectively its Nigerian subsidiary SPDC's (Shell Petroleum Development Company of Nigeria) *civil regulation regime* in Nigeria. The "civil regulation regime" refers to Shell's/SPDC's body of rules, procedures and practices which are supposed to prevent respectively mitigate direct and indirect negative externalities to SPDCs operations and to promote the socio-economic development of the society it is operating in. The thesis' analysis focuses on the regulative, harm-preventing elements of Shell's/SPDC's civil regulation regime (also referred to as *negative injunction duties*) which are seen as more essential to the regulation of the oil-industry than elements aiming at the development of certain regions (so called *affirmative duties*).

The oil industry in Nigeria is largely and effectively left unregulated: the dependency of the Nigerian state on the abilities and capacities of foreign oil-TNCs to convert oil into cash-yielding assets, and its fear of TNCs' disinvestment promotes the "capture" of Nigerian regulatory agencies, if not its government by oil TNCs and leads to the avoidance of strict regulations. Where regulatory laws do exist, the insufficient capacities and corruption of regulatory agencies and the shallow rule of the law context, mean that they remain unenforced and are thus in reality without any effect. Further, Nigeria's highly central fiscal system, a lack of transparency of tax-revenue spending and accountability of sub-national governments has meant that the Niger Delta, the region in which Shell/SPDC operates and which creates massive tax revenues, remains largely underdeveloped and marked by extreme poverty.

These socio-economic conditions have lead to protests and increasingly violent conflicts in the Niger Delta. The Nigerian state has repeatedly put these insurgencies down violently, frequently violating human rights. Oil-TNCs are quickly entangled in these human rights concerns because their benefits may in part reflect the benefits conferred by state violence (such as suppression of protests which disturbs oil production). Nigeria's state security-personnel which is known for notoriously violating human rights is used by SPDC to protect its facilities. The above outlined structures and problems are constitutive features of so called *petro states* a term which refers to developing countries that are highly dependent on their oil resources. The purpose of the thesis is *not* to answer the question who the *legitimate* responsibility for the current socio-economic and ecological situation in the Niger Delta lies with.

The research questions of the thesis are:

1. To what extent are NGOs able to influence Shell/SPDC and shape its civil regulation in the Niger Delta?

2. To what extent is the civil regulation of Shell/SPDC in the Niger Delta able to compensate for the governance failures of the Nigerian state to regulate the oil industry?

The analysis of the first question is mainly based on interviews that have been conducted with the director of the Nigerian NGO Centre for Social and Corporate Responsibility (CSCR) which has been engaging Shell/SPDC for years, and with Shell's Head of Social Performance Management Unit. In addition, a comprehensive study of the relationship between Shell/SPDC and the NGO Living Earth which is largely based on interviews with Shell and Living Earth has been used. For answering the second question, a number of reports and case studies by NGOs as well as publications and responses to these reports by Shell/SPDC have been analysed.

Elements of Shell's/SPDC's civil regulation regime which are supposed to prevent and/or mitigate direct and indirect negative consequences of SPDC's operations that have been selected for analysis are: procedures for the prevention and remediation of oil spills, SPDC's approach for ending gas flaring (the harmful burning off of oil production-associated gas), procedures for providing access to health-related education and information for communities affected by SPDC's projects, and SPDC's approach to prevent human rights violations by staff seconded to it.

The thesis finds that although NGOs seem to be able to make TNCs take their demands into account, this cannot be equated with having meaningful influence on a TNCs' concrete integration, and especially implementation of specific demands. An oil TNC like Shell seems to be able to steer NGO-influence and to allow for it where it is interested in it, and to stop it where it deems it undesirable. It appears that Shell is therefore largely in control of the way in which it addresses the issues brought up by NGOs, i.e. it is extensively able to decide which practices and procedures to include in its CSR-approach and civil regulation regime. In the case of the Niger Delta, Shell appears to allow for some influence on development-work-related procedures but has largely blocked NGOs' influence and engagement regarding specific procedures aimed at regulating negative externalities to its operations. This also means that Shell/SPDC has been able to prevent NGOs from being officially involved in an independent monitoring of its operations and being equipped with effective institutionalised means for ensuring redress of violations of the civil regulation regime. As a result, SPDC is effectively not being held accountable by NGOs for non-compliance with, respectively ineffectiveness of its civil regulation regime.

Shell's/SPDC's civil regulation is not capable of adequately compensating for governance and regulatory failures of the Nigerian state: it is highly unreliable as in several incidents, regulative or harm-mitigating procedures have been implemented incorrectly, negligently or not at all, without any possibilities of redress. Due to sub-contracting to unqualified individuals, some procedures may even be permanently improperly implemented.

The thesis concludes that for a civil regulation regime in the oil-industry to be able to compensate for governance failures, it is fundamental that oil-TNCs accept their role as compensating for governance gaps. Once Shell or any TNC is genuinely interested in an effective civil regulation and compliance with its CSR-policies by its subsidiaries, it has to allow for more NGO-influence, independent monitoring of its actions and institutionalised mechanisms of ensuring redress of breaches. Although NGOs have been able to force Shell/SPDC to address certain externalities to its operations in the Niger Delta, they have not yet achieved to change SPDC's mindset which seems necessary for pulling it into the role of compensating for Nigeria's Government's failures to adequately regulate the oil industry. Shell and SPDC still defend themselves against being pushed into this role and persistently points to the responsibilities and failures of the Nigerian state. The paper thus infers that Shell and SPDC are not willing to be part of any new system of meaningful governance which could transnationally regulate industries.

The paper admits that a unreliable civil regulation is arguably better than a factual non-existing state regulation. However, since an oil company like SPDC can still afford to let its operations harm people and the environment frequently and unduly, it cannot be said that its civil regulation compensates for the government's failures. Further, the apparent exclusion of citizens and stakeholders by SPDC from decisions about the regulation of projects that severely affects their livelihoods means that Shell's/SPDC's civil regulation regime is not democratic – which is unacceptable for any system of governance.

The analysis raises however also the question, to what extent the concept of civil regulation can actually be expected to fill governance gaps. If NGOs manage to further enhance their influence, civil regulation is seen to have the potential to make up for state-failures in the regulation certain industries. It appears however, that the underdevelopment of certain regions and the absence of even a minimum welfare, accounted for by governments which have failed to efficiently use revenues from taxes and royalties, amount to gaps which are too big to be completely filled by civil regulations. This holds particularly for the social unrests and conflicts which this entails and seemingly cannot be solved by civil regulation. Further, civil regulation will naturally only make up for governance failures when every TNC of the same industry in the country has a working civil regulation regime in place. It is NGOs' merit, that today the majority of oil TNCs can at least not afford to not have some CSR-strategy in place.

The results of the thesis suggest further, that TNCs might promote the evolution of elements of their civil regulation regime into hard law if they feel that this would give them a competitive advantage. However, this also requires a perceptive state which is capable of enforcing hard laws. And in order to promote a comprehensive regulation, a sustained pressure or other incentives for TNCs to develop socially and ecologically sound ways of production which eventually might give them a competitive edge, is also likely to be needed.

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