

Social and environmental litigation against transnational firms in Africa

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ABSTRACT

As elsewhere in the world, Africa has experienced a rise in litigation against transnational corporations for adverse environmental and social impact. Cape plc and RTZ have been sued in British courts for environmental damage and for breach of employment rights in Africa. Companies which sold products to South Africa's former apartheid regime, such as Fujitsu and IBM, are now being sued in US courts. Shell and Chevron are being sued in US courts for human rights abuses in Nigeria. At the same time, foreign firms have been successfully sued in African courts for social and environmental damage. This article outlines the main relevant court cases and attempts to assess the significance of this litigation. The discussion of litigation in this article is divided into three parts: court cases filed in English, American and African (mainly Nigerian) courts. This is followed by an explanation of the triggers of legal change, a discussion of the impact of litigation and the conclusion.

INTRODUCTION

As elsewhere in the world, Africa has experienced a rise in litigation against transnational corporations (TNCs) for adverse environmental and social impact. Cape plc and RTZ have been sued in British courts for environmental damage and breach of employment rights in Africa. Companies which sold products to South Africa's former apartheid regime, such as Fujitsu, UBS and IBM, are now being sued in US courts. Shell and Chevron are being sued in US courts for human rights abuses in Nigeria. At the same time, foreign firms have been successfully sued in African courts for social and environmental damage (see Table 1).

This rise should be seen in the context of changing global governance and the rise of corporate social responsibility (CSR). As Newell (2001) has

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TABLE I
Summary of the most important Africa related lawsuits against TNCs

Start of Court Action	Companies Sued	Place of Injury	Forum of Litigation	Cause of Action	Outcome
1989	Royal Dutch/Shell	Nigeria	Nigeria	Damage from oil well blowout	Claimants won in 1994
1994	RTZ	Namibia	England	Damage from uranium	Action allowed in English court, but claimant lost in 1999
1994	Thor Chemicals	South Africa	England	Damage from mercury	Out-of-court settlements in 1997 and 2000
1996	Royal Dutch/Shell	Nigeria	United States	Complicity in human rights abuses by government security forces	Pending
1997	Cape plc	South Africa	England	Damage from asbestos	Out-of-court settlements in 2001 and 2003
1999	Chevron	Nigeria	United States	Complicity in human rights abuses by government security forces	Pending
2001	Talisman Energy	Sudan	United States	Complicity in human rights abuses by government security forces	Pending
2002	Citigroup, Deutsche Bank, Ford, Fujitsu, General Motors, ICL, IBM and others	South Africa	United States	Complicity in human rights abuses by government security forces	Pending
2002	Gencor	South Africa	South Africa	Damage from asbestos	Out-of-court settlement in 2003

suggested, litigation can assume a role 'in creating checks and balances on the activities of global corporations where globalization creates opportunities for exploiting the lack of protection of the poor and their environment'. In other words, litigation presents a strategy to hold TNCs accountable for adverse environmental and social impact in the absence of effective international policing.

As Dicken (1998: 271) observed, one of the most striking developments in international business in the last few decades has been an intensification in competitive bidding between states (or between communities within states) for internationally mobile investment. TNCs can exploit regulatory differences between states by re-locating some of their manufacturing plants from one country to another, or by shifting the sourcing of their supplies to a different country with a more advantageous regulatory regime; this is termed 'regulatory arbitrage' (Leyshon 1992). TNCs may be able to play off one government against another, as states compete against each other to attract foreign investment by offering the best incentive packages. In addition to providing financial aid or favourable taxation rates for foreign investors, national governments may also be reluctant to impose environmental and social regulations on firms.

Like national governments, intergovernmental organisations are also reluctant to impose regulations on firms. The United Nations Centre for Transnational Corporations (UNCTC) was set up in 1973, and embarked on formulating an international code of conduct to regulate the activities of TNCs. But the Centre was closed in 1993 after twenty years of failed negotiations. In place of binding international commitments, intergovernmental organisations focused on voluntary agreements, self-monitoring by firms and social audits performed by external consultants (Newell 2000). The European Commission Communication of July 2002, which forms the basis for the European Strategy on CSR, has firmly rejected a regulatory approach to CSR (website: EC). It makes clear that it does not at present intend to impose responsible behaviour on companies by regulation or directive.

It should be noted that there are clear international standards and even binding international law in a number of areas such as labour rights (notably the International Labour Organisation conventions) or human rights generally (e.g. UN International Covenants), but their enforcement is at best patchy. As Meyer (2003: 43) has argued, 'The hardest job in creating an effective [international normative] regime for TNCs remains to be done.' The world's most powerful global economic institutions – the International Monetary Fund, the World Bank and the World Trade Organisation (WTO) – have contributed much towards creating more

freedom for TNCs in international trade and investment, inter alia, by forcing nation-states to open up their economies, to change legislation to offer equal treatment to TNCs or (in the case of the World Bank) channelling capital directly to firms (Mellahi *et al.* forthcoming). At the same time, these institutions have done little to strengthen environmental or labour rights regimes; indeed, they (notably the WTO) have undermined the right of nation-states to impose environmental or labour rights provisions (Korten 1995: 174–9).

As a consequence of regulatory arbitrage and the absence of effective global institutions to enforce standards, firms may re-locate to other countries because of lower legal social and environmental standards (e.g. Thor Chemicals' re-location of mercury-related processes from the UK to South Africa). Even when such threat is not imminent, the executive branch of the government may be reluctant to implement its own social and environmental provisions and to prosecute corporate offenders (e.g. in the case of asbestos mining in South Africa) (Ward 2002). Therefore, litigation presents victims of corporate crime with an avenue for holding firms accountable for their actions. In this context, the enthusiasm of individuals and non-governmental organisations for using litigation against firms cannot come as a surprise.

This article outlines the main relevant court cases at present, and attempts to assess the significance of this litigation. The discussion of litigation in this article is divided into three parts – court cases filed in English, American and African (mainly Nigerian) courts. This is followed by an explanation of the triggers of legal change, a discussion of the impact of litigation and the conclusion.

LITIGATION IN ENGLISH COURTS¹

The 1990s saw a rise in litigation in English courts against large TNCs for social and environmental damage caused during business operations in African countries. I shall start by summarising the relevant cases.

Connelly v. RTZ (1994–1999)

This case involved a Scottish man who had worked for RUL – a subsidiary of RTZ – at their uranium mine in Namibia. He contracted laryngeal cancer aged 32 and underwent a laryngectomy. This case went to the House of Lords where it was held in 1997 that, while Namibia was a more appropriate venue for the claim, it would not be in the interests of justice to make Mr Connelly litigate his claim in Namibia because there was no funding for his case in Namibia (website: House of Lords).

Lawsuits against Thor Chemicals (1994–2000)

In this instance, seventeen South African workers, and the representatives of three workers who had died by the start of proceedings in October 1994, sued Thor Chemical Holdings and its chairman in an English court in two lawsuits. The workers claimed to have suffered from mercury poisoning and demanded compensation from the company. In April 1997, the claims were settled out of court for £1.3 million. A third claim was filed in February 1998 by a further twenty-one workers; this was settled for £240,000 in October 2000 (see Ward 2002).

Lubbe v. Cape plc (1997–2003)

This case concerned thousands of former Cape plc workers in South Africa who suffered from asbestos-related illnesses. Cape plc has had no presence in South Africa since 1989. A claim was brought to an English court by two former Cape plc workers and three residents living nearby exposed to asbestos, who were able to obtain legal aid in the UK. In 1999 further claims were issued by over 1,500 claimants; by the time the judgment was handed down from the House of Lords in July 2000, over 3,000 people were part of the suit and about 100 had already died. The House of Lords stated that the suit should be tried in England, as ‘the plaintiffs would have no means of obtaining the professional representation and the expert evidence’ in South Africa (website: House of Lords; Ward 2002). In December 2001, the claimants (over 7,500 people by now) agreed on a settlement whereby Cape plc was to pay £21 million into a trust fund, but the company failed to honour the settlement. Further litigation ensued and the South African mining company Gencor was added as a defendant alongside Cape (Gencor had acquired assets that were previously owned by Cape). In a new settlement in March 2003, Cape and Gencor agreed to pay a total of £7.5 million and £3.21 million respectively in compensation to the 7,500 registered claimants.²

Whilst the number of court cases has so far been relatively limited, this litigation was significant in that English courts allowed claimants to use their forums for adjudicating disputes between Africans (including African claimants and African subsidiaries of foreign firms) for injuries suffered in Africa. The House of Lords focused on the question of ‘a denial of justice’ (website: House of Lords). While the judges did not argue that the claimants could generally bring cases to English courts if justice could not be obtained in their home country, the finding that the

claimants in these specific circumstances could sue in the UK was significant.

Beyond allowing some types of cases to be brought to English courts, the litigation has challenged the received wisdom on how firms may escape transnational litigation. The legal structure of companies tends to protect parent companies from claims brought against affiliates, since separate companies are regarded as being separate legal entities and their financial liability is limited up to the amount of the parent company's investment in the affiliate's shares (cf. Magaisa 2001). But the English courts have now and again worked around this old doctrine, which has enormous implications. Nor can firms necessarily protect themselves against lawsuits by going out of business or limiting the parent–subsidiary links. By the time the third court case against Thor Chemicals had been filed, the Thor Group had conducted a de-merger and all except three affiliates had been transferred to a new parent company. Thor Chemicals Holdings was left with three companies and only Thor South Africa – now renamed Guernica SA – was still trading several years later. Yet, the Court of Appeal ruled in September 2000 that the 1997 demerger may have been initiated to put the group's assets beyond the reach of claimants; subsequently, Thor Chemicals Holdings was forced to disclose documents on its de-merger and to pay £400,000 into court if it wanted to continue being part of the action (Ward 2002). Certain previous business strategies, which relied on complex organisational structures to escape legal liability for damage, may thus no longer be as effective as they used to be.

Nonetheless, litigation in the UK against firms operating in Africa or other regions has certain limitations. There are limitations on class action suits, the type of claims that can be brought, and the type of claimants who can bring cases. The legal outcome is highly uncertain, and claims can only be brought against companies domiciled in the UK. Finally, the awards of compensation are not always very high, especially when compared with the United States. It is therefore perhaps not surprising that the focus of transnational litigation shifted from the UK towards the United States in the late 1990s.

LITIGATION IN USCOURTS

Beginning with a case against Royal Dutch/Shell in 1996, a number of high profile cases have been brought against TNCs in US courts for injury caused during African operations. I start by summarising the most important US cases.

Wiwa v. Royal Dutch/Shell (ongoing since 1996)

A lawsuit was filed by relatives of the murdered Ogoni leader Ken Saro-Wiwa and other Nigerians, alleging Shell's complicity in the hanging of Ken Saro-Wiwa and John Kpuinen, two leaders of the Movement for the Survival of the Ogoni People (MOSOP), and the torture and detention of Owens Wiwa. The suit was amended in 1997 to include another claimant who alleged, amongst others, that she was shot by Nigerian troops called in by Shell while she was peacefully protesting the destruction of her crops. A second case was also filed against the former head of Shell's Nigerian subsidiary (website: CCR).

Bowoto v. Chevron (ongoing since 1999)

In this instance, representatives of several Nigerian communities are suing Chevron for the company's alleged involvement in three machine-gun attacks on unarmed environmental protesters and people in their homes in Nigeria between May 1998 and January 1999. Chevron is alleged to have provided helicopters and various large boats, along with pilots and other crew, for use by the Nigerian military on two separate occasions. The alleged Chevron-aided intervention by the Nigerian military is said to have resulted in unarmed protestors being killed and injured (website: CCR).

Presbyterian Church of Sudan v. Talisman Energy (ongoing since 2001)

In November 2001, the Presbyterian Church of Sudan and three individual plaintiffs filed a lawsuit against the Canadian oil company Talisman Energy, alleging the company's complicity in ethnic cleansing of non-Muslim minorities by the Sudanese government in Southern Sudan, where Talisman had been exploring for oil. The suit alleges that the military campaign against the local population was 'possible only through Defendant's collaboration', that Talisman requested military intervention, and that the firm provided the military with logistical support (such as Talisman-built or maintained roads and airfields) and financial support (such as funds for the training of government security personnel in Canada and more indirect payments to the government) (website: iAbolish).

Lawsuits against foreign firms in South Africa (ongoing since 2002)

Two sets of lawsuits were filed against numerous US, Japanese, German and other companies on behalf of South Africans who faced persecution

under apartheid. The claimants allege that the companies, which include well-known names such as Fujitsu, Citigroup and Deutsche Bank, acted in defiance of international law and participated in crimes against humanity when supporting South Africa's apartheid regime. The lawsuits seek for those firms to invest in and to develop disadvantaged communities, to pay billions of dollars in compensation to individuals, and to cancel debt inherited from the apartheid era. Firms are alleged to have ignored United Nations appeals to shun the apartheid regime and to have sustained the regime by providing loans, goods and export markets. For instance, ICL and IBM are named in the lawsuits because they allegedly supplied computers which tracked apartheid's opponents, while the car makers Ford and General Motors are said to have sold armoured vehicles which patrolled townships and from which police shot unarmed protesters.³

Litigation against corporations in the United States has grown quickly since 1996, owing largely to the successful application of an ancient legal statute called the Alien Tort Claims Act (ATCA), which was originally passed as part of the 1789 Judiciary Act to allow victims of offshore piracy to sue onshore. Whilst previously ATCA had been used to sue individuals in US courts with regard to human rights abuses, the case of *Doe v. Unocal* pioneered the use of the statute to sue corporations for social and environmental damage committed outside the United States. In that case, a US court ruled in 1996 that the US firm Unocal could be sued in US courts for complicity in human rights abuses committed by Burmese authorities. In both the *Wiwa v. Royal Dutch/Shell* and the *Bowoto v. Chevron* cases, the courts have already affirmed that ATCA applies and that both companies can be sued over their complicity in human rights abuses in Nigeria (both cases are still pending).

As with cases brought to English courts, the litigation in the United States is significant in that it has challenged the received wisdom on how firms may escape transnational litigation. In the *Wiwa v. Royal Dutch/Shell* case, Shell lawyers initially submitted hundreds of pages of evidence which aimed to demonstrate that Shell's US subsidiary was autonomous from its parent companies in the UK and the Netherlands.⁴ Indeed, Shell's US subsidiary has had more autonomy from the parent companies than Shell subsidiaries in other countries (although it was still 100% owned by the parent companies). Yet Shell's corporate structure could no longer protect Shell from the suit.

From a corporate perspective, American cases present a greater threat to corporations than English cases. The law appears to provide greater remedies and the potential compensation awards are much larger.

Furthermore, unlike in the UK where only UK-based TNCs were affected, claimants can sue non-American firms in US courts, so that any TNC with sufficient presence in the United States could be exposed to legal claims arising anywhere in the world.

LITIGATION IN AFRICAN COURTS

At the same time as transnational litigation has developed in the UK and the United States, some domestic courts in Africa have begun to broaden the legal liability of corporations. In the 1990s, a large number of court cases were brought against transnational oil corporations including Shell, Total (formerly Elf), Chevron and others in Nigerian courts. Unlike lawsuits in English and American courts, where we could discuss each individual lawsuit, the court cases in Nigeria can be counted by the dozens or even the hundreds. During the period 1981–86, twenty-four compensation claims against Shell went to court in Nigeria (Adewale 1989: 93). In early 1998, Shell was reportedly involved in over 500 pending court cases in Nigeria, of which 70% or roughly 350 cases dealt with oil spills, the other 30% or 150 cases mostly with other types of damage from oil operations, contracts, employment and taxation. Chevron, which reportedly only had up to 50 court cases in Nigeria in the whole of the 1980s, was in early 1998 involved in over 200 cases, of which 80–90% or roughly 160–180 cases dealt with oil spills, other types of damage from oil operations, or land acquisition for oil operations.⁵ The following two court cases serve as examples.

Shell v. Farah (1989–94)

In this instance, several families sued Shell for compensation from an oil well blowout in 1970. It took the oil company several weeks to bring the situation under control. Meanwhile, oil and other substances had polluted the adjoining land. Crops and trees were destroyed, while the farming land was rendered infertile. Shell had promised to rehabilitate a land area of 13.2 hectares and to hand the land back to the community afterwards. To facilitate land rehabilitation, the community vacated the land. Some 18 years after the blowout, in March 1988, Shell wrote a letter to the claimants' solicitor claiming that the land had already been rehabilitated and 'handed back' to the claimants (NWLR 1995). Moreover, Shell claimed that it had paid £22,000 in compensation for damaged crops, trees and other objects and another £1,000 for damage to the land. However, the company had broken its promise and rehabilitation had not been carried

out. In the meantime, the local people could neither farm nor use the land in any other way. The claimants alleged that they had never received any compensation for damage to the land. The families involved finally engaged in litigation in 1989 and the Court of Appeal awarded them *c.* 4.6 million Naira (*c.* US\$210,000 at the official exchange rate) in 1994.

Shell v. Tiebo VII (1987–96)

In this suit, representatives of a Nigerian community sued Shell for damage from an oil spill in 1987. The oil spill polluted a river, which had previously been used as a source of fresh water and for fishing. Members of the community who drank the water after the spill suffered from water-borne diseases. In addition, the oil spill damaged swampland, streams, fishponds and religious shrines. Shell did not deny the oil spill, but claimed that it had only affected an area of about 2.3 hectares of seasonal swamp and fish flats. It offered the community 5,500 Naira as ‘fair and adequate compensation’ (NWLR 1996). The Court of Appeal awarded the claimants 6 million Naira in compensation (*c.* US\$275,000 at the official exchange rate).

Litigation against oil companies in Nigeria has quickly grown since 1994, owing partly to the legal precedent created in the *Shell v. Farah* case, which significantly increased the quantum of compensation awarded to claimants in suits against oil companies. A comparison of compensation awards before and after the *Farah* case tentatively illustrates the rise in compensation payments (see Table 2). The *Farah* case helped to justify higher compensation payments, but it was accompanied by other developments such as slightly relaxed rules of evidence, amongst others. As analysed elsewhere (Frynas 1999; Frynas 2000: ch. 6), the *Farah* case was part of a more general legal change in Nigeria’s tort law, which rendered it easier to successfully sue oil companies.

At this stage, it should be pointed out that Nigeria is not alone in pioneering social and environmental litigation against TNCs. Developments in South Africa are also notable. In early 2003, South African miners suffering from exposure to asbestos accepted a 418 million rand (over US\$ 63 million at March 2004 rates) settlement from Gencor, which had been sued in South African courts (*FT* 14.3.2003). Another asbestos-related case was *Manchonyane v. Duiker Mining* launched in 2003, in which a former worker of Duiker Mining (affiliate of the Swiss mining firm Xstrata) sued the firm alleging a work-related illness due to asbestos exposure.⁶ Further South African lawsuits were launched or planned.

TABLE 2
Compensation awards in selected oil-related lawsuits in Nigeria

Year of Judgment	Court Case	Payment Awarded (000s Naira)	Payment Awarded (US\$)	Payment Awarded as Share of Claim (%)
1972	<i>Mon v. Shell-BP</i>	0.2	304	0.1
1975	<i>Umudje v. Shell-BP</i>	12	19,481	24
1978	<i>Fufeyin v. Shell-BP</i>	56	88,189	100
1978	<i>Shell-BP v. Cole</i>	35	55,118	n.a.
1994	<i>Shell v. Farah</i>	4,621	210,084	17
1996	<i>Shell v. Tiebo VII</i>	6,000	274,173	9
1996	<i>Shell v. Udi</i>	39	1,782	78
1997	<i>Geosource v. Biragbara</i>	197	9,001	10
1997	<i>Shell v. Isaiah</i>	22,000	1,005,208	100

Source: Field work in Nigeria; official currency exchange rates were derived from *IMF International Financial Statistics* (various years).

The rise of litigation against TNCs in African courts is less significant than transnational litigation in the sense that African compensation awards are considerably smaller than potential awards in English or US courts. While several of the pending Nigerian and South African cases have a prospect of obtaining millions of dollars in compensation, court cases in the United States could potentially lead to compensation awards in the range of billions of dollars. Therefore, corporate managers tend to perceive US litigation as much more threatening than domestic litigation in Africa, and, to a lesser extent, English or Australian. In an attempt to avoid litigation in the UK, Cape lawyers approached a law centre in Johannesburg asking whether the centre would be interested in co-ordinating litigation in South Africa on behalf of the claimants, and indicated that Cape might be willing to make money available to fund a lawsuit against itself in South Africa (Ward 2002).

Nonetheless, litigation in African courts is significant, demonstrating that social and environmental litigation is not solely a Western phenomenon. The liability of TNCs seems to be on the minds of African lawyers and African judges, and we are likely to witness more attempts to sue corporations in African courts.

LAW AS SYMPTOM OF SOCIAL CHANGE

The growth of litigation against TNCs suggests that courts have become more responsive to those affected by corporate acts. As one observer

remarked with regard to English litigation, ‘Certainly after *Connelly* case and now the landmark *Lubbe* judgment, one can safely say that the House of Lords has been positively victim-friendly’ (Magaisa 2001). Yet little attempt has been made by either academics or journalists to explain why this has come about.

Based on extensive fieldwork on Nigerian litigation, I have identified two key factors, which help to explain this change in legal approach: the increased professional ability of legal counsel working for claimants, and the impact of changing social attitudes on judges. These factors also help to explain litigation in English and US courts.

First, one can detect an increased professional ability of legal counsel in both Western and African litigation against TNCs. A key law firm in the English cases against Thor Chemicals and Cape was Leigh, Day & Co., a London-based firm with considerable experience in public interest litigation and a commitment to social justice aims. The landmark case against Unocal in the United States, as well as the Nigeria-related cases against Shell and Chevron, were brought by the Centre for Constitutional Rights, a New York based pressure group devoted to new ‘progressive’ approaches to law, which has distinguished American lawyers aiding its work. One set of the anti-apartheid lawsuits in US courts was filed by the Khulumani Support Group, which formed part of Jubilee SA, the local affiliate of a global pressure group campaigning for the cancellation of Third World debt. In turn, the anti-apartheid suits were aided by US lawyers Michael Hausfeld and Ed Fagan,⁷ who were previously involved in suits that won a US\$1.25 billion claim against Swiss banks for victims of the holocaust, and a US\$5 billion claim to compensate slave labourers in Germany during the Second World War. In other words, the rise of anti-corporate litigation was greatly helped by expertise and support from non-governmental groups, law chambers and individuals committed to a remaking of the law with regard to greater corporate liability.

The African cases can be partly explained on those grounds. The South African cases mentioned earlier were brought by Richard Spoor, a South African public interest lawyer who previously worked with Leigh, Day & Co. on the Cape suit in the UK (Ward 2002). The landmark case *Shell v. Farah*, which opened the doors for larger compensation awards in Nigeria, was brought by Ledum Mittee, a Port Harcourt based lawyer and one of the principal leaders of the Movement for the Survival of the Ogoni People (MOSOP), which campaigned against Shell in Nigeria.⁸ One must add that the vast majority of the Nigerian court cases against transnational oil companies were brought by lawyers attracted by the financial rewards of oil-related litigation. Lawyers in anti-corporate cases in Nigeria work on

a contingency fee; they work for 'free' for their client during the legal proceedings, but in return demand a high share of the compensation payment (which can be as much as half of it), if the suit succeeds (cf. Frynas 2000: 109). Nonetheless, whether individuals have been driven by their moral principles or the prospect of financial rewards, social and environmental litigation against TNCs has come to attract lawyers who are both highly motivated and experienced in their profession.

The cumulative effect of the involvement of pressure groups and reward-seeking lawyers is that lawyers in anti-corporate lawsuits are more innovative and pro-active in court proceedings. Lawyers attempt new tactics to bring corporations to court, notably the successful pioneering attempt by the Centre for Constitutional Rights to use ATCA for suing corporations in US courts. It is not entirely clear to what extent the legal innovations in the 1990s have been induced or aided by the sophisticated and innovative use of legal rules by lawyers working for the claimants. But there are examples which indicate that the judge's views on the legal issues involved in a case and expressed in a court judgment reflect arguments in the lawyer's brief.

The second crucial explanation for a changing legal approach rests with the judicial officers, who pronounce judgments against corporations. A reading of court transcripts reveals a greater willingness by judges to re-interpret legal statutes and case law to the detriment of corporations. In the Nigerian cases against oil companies, the Nigerian Court of Appeal broadened the interpretation of the principle 'restitutio in integrum' (i.e. the principle of restoring the claimant to the position he/she enjoyed before the injury occurred) by awarding the claimants certain compensation payments, which would not have been awarded only a few years earlier (cf. Frynas 2000: 211–13). In the English cases discussed earlier, the House of Lords put a greater emphasis on the issue of access to courts when ruling on claims brought by claimants who were injured in Africa. It is unlikely that this shift is purely accidental; I suggest that it reflects the impact of changing social attitudes on the judges.

Campaigns by non-governmental organisations (NGOs), media reports about the damage inflicted by corporations, and social change more generally, have made judges more responsive to those injured by corporate acts. As the public has increasingly come to accept that corporations should pay greater attention to and be responsible for the effects of their operations, judges have inevitably been affected by this shift. For instance, in the Nigerian context, media reports and activist campaigns related to the Ogoni people made judges more aware of the plight of local communities affected by oil operations and affected the outcome of oil-related

litigation. This insight was greatly helped by M. B. Belgore, Chief Justice of Nigeria's Federal High Court (interview 1998), who said:

Judges of today have seen a lot more development than twenty years ago. They are more aware now of oil industry problems than thirty years ago ... As one American jurist said, the current affair doesn't pass by the judges. The judge cannot be isolated from what is currently going on in society in line with a particular subject.

The changing social attitudes of judicial officers can directly affect court judgments. They can, for instance, help to explain the higher compensation payments awarded to those affected by oil operations in Nigeria. Said Belgore, CJ:

While the law is there, the human element counts in the judge's discretion. If there is compensation and maybe the plaintiffs claim 5 million Naira, you cannot award 5 million but, at the same time, you cannot award 500 Naira. You go in-between and that's where the discretion and the sympathy of the judge comes in.

Changing social attitudes are probably the key explanation for legal change. As Kermit Hall (1989: 245–6) observed, the business of the courts mirrors the economic and social changes brought by economic development, while judges play a part in allocating the costs, risks and benefits of this development. Even if the skill of legal counsel improves or government regulations change, a judge will not use his or her discretion in favour of one party unless he or she is convinced of the merits of a particular allocation. In that sense, legal change in litigation against TNCs has to be ultimately rooted in social attitudes towards the allocation of the social costs and benefits arising from corporate acts.

THE IMPACT OF LITIGATION

Litigation against foreign firms has potential repercussions for Africa's economic development as well as for its societies at large, so it becomes instructive to assess its costs and benefits. At this stage, an assessment of the impact of social and environmental litigation is very difficult, if not impossible. As Ward (2003) pointed out, 'the legal signals are by no means always clear – particularly where frontier legal actions are concerned'. There have been only a limited number of court judgments until now, and their future interpretation by judges takes us even further into the realm of speculation. None of the high-profile cases in the US courts (where the potential compensation payments are much higher than elsewhere) have yet been decided, so the potential impact of litigation cannot be gauged in its entirety. Furthermore, since litigation frequently forms part of a larger

activist campaign against a specific company, it is often impossible to disaggregate the impact of litigation from the impact of other forms of activist campaigning on the firm's public perception or its share price. For instance, Talisman's decision to sell its Sudanese assets in late 2002 may have been partly influenced by the lawsuit in the United States, but activist campaigns and political risk (and the firm's lower share value related to investments in Sudan) were other compelling influences, whilst top management is unlikely to ever disclose its precise motivations. Finally, the impact of litigation may differ widely, notably between different firms (e.g. due to industry sector or nationality).

Keeping in mind the above caveats, I concentrate on outlining the *potential* impact of litigation and try to identify some key factors which may affect the intensity of that impact. In order to structure this discussion, I distinguish between the economic and the developmental impact of litigation. This analysis considers the pros and cons of litigation from four different perspectives: the affected firms, the represented claimants, the national economy, and the society as a whole. The discussion reveals that the cons of litigation far outweigh the pros.

The potential *economic impact on firms* is largely negative, as litigation creates commercial risks and costs for foreign firms, which have invested or are planning to invest in Africa. Litigation creates a legal liability risk, i.e. the risk of becoming liable for social and environmental damage. In extreme cases, this risk can prevent a potential investor from committing funds to an African country. More typically, a liability risk can increase costs in terms of higher insurance premiums or higher cost of capital. The capital markets react speedily to legal outcomes. On the day when the House of Lords judgment against Cape was made, Cape's shares dropped to £0.405, down from £0.550 the evening before (Ward 2001).

The potential impact of transnational litigation can be deduced from past experience of social and environmental litigation in the United States. As *The Economist* (24.3.2001) reported, Moody's credit-rating agency downgraded twenty-two US companies in 2000 alone, at least in part because of litigation risk involving claims related to issues such as asbestos and anti-trust allegations. Even the largest corporations may be affected; for instance, the chemical company Dow Corning filed for bankruptcy in 1995 under the weight of litigation related to breast implants. 'Because litigation risk is difficult to analyse, when the financial markets do wake up to these concerns they often panic', *The Economist* continued. The development of US litigation with regard to domestic legal claims is perhaps a warning to corporate managers with regard to transnational claims.

Nonetheless, the liability risk in Africa should not be exaggerated, as the number of cases is relatively small and the chances of success for firms are high (especially in the transnational litigation in US and English courts). Most of the cases – except for the anti-apartheid lawsuits in the United States – have focused on ‘dirty industries’ which cause above-average pollution, including oil, mining and chemicals. The litigation risk for a European brewer or an Asian textile manufacturer in Africa appears to be insignificant at the moment.

Given the publicity that litigation generates, a much more important issue appears to be reputational risk, i.e. the risk of damage to reputation. As Newell (2001) pointed out, the ‘impact of bringing or threatening to bring cases will often be more important than the legal outcome’. NGOs, local community groups and individuals are often less interested in winning the legal arguments, but rather pursue litigation as a means to an end. Newell (2001) indicated that litigation has sometimes been brought against TNCs in order to buy time to mobilise resistance around a project, to demonstrate inequities in existing laws, or to seek official acknowledgment of crimes, which otherwise would not be acknowledged.

A legal victory by a company several years down the line may not compensate for the adverse publicity generated by a lawsuit. Media publicity is the key weapon in the armour of pressure groups, with litigation being a vehicle for mobilising the media for a given cause. In an age where corporate brand reputations are crucial for firm success, adverse publicity has the potential to inflict major damage on the brand name. Therefore, the impact of litigation on firms is multidimensional. But it should be pointed out at this point that reputational risk may vary by firm size, brand importance or nationality. A large firm with a major brand name from the UK or the United States is likely to be more exposed than a small and relatively unknown Malaysian or Chinese firm.

The potential *economic impact on national economies* is also largely negative, as litigation (via either legal liability risk or reputational risk to firms) could result in a reduced flow of investment to African countries in certain sectors. The current litigation in African as well as British and US courts focuses on extractive industries including oil and mining, which are Africa’s key attraction to foreign investors. Of the court cases discussed, most are related to the oil industry which attracts the biggest share of Africa’s foreign investment. From this perspective, African economies with their high dependence on raw material exports have potentially more to lose than Asian or Latin American countries, which have more diversified economies and sources of foreign investment.⁹

Even if successful litigation were not to result in lower absolute levels of investment, it may deter the most technically competent or experienced firms from investing in a country. The Sudanese oil industry offers an example. While we do not know to what extent litigation prompted Talisman to sell its Sudanese assets, activist campaigns against Talisman and other Western firms have deterred other experienced oil firms from investing in the Sudan. At present, no Western oil company operates in Sudan, having been replaced by less experienced Malaysian, Chinese and Indian oil firms (Human Rights Watch 2003).

At a minimum, litigation could render commercial operations more costly, for instance, through higher cost of capital for infrastructure projects such as hydroelectric dams or other projects which may be considered risky from a legal or 'ethical' perspective. African economies already suffer from high transaction costs (poor infrastructure such as transportation, underdeveloped capital markets etc.), so the risk of litigation would not pose a new economic barrier; yet it could potentially aggravate already existing problems. Nonetheless, the potential impact of litigation on African economies is likely to be small. Countries with high dependence on oil or mineral investment could be more affected. However, the examples of Nigeria and Sudan demonstrate that investment in extractive industries may continue unabated despite very serious political and social instability, and despite considerable international public pressure to divest.

While the economic impact of litigation is largely negative, litigation can bring benefits to the represented claimants and the society as a whole. The *developmental impact on represented claimants* has many positive facets. Claimants may obtain financial compensation for past injuries and losses. Those claimants who require continuous medical attention (e.g. those who suffer from asbestos-related illnesses) may obtain funds for the medical treatment they require. Claimants may also get the mental satisfaction of obtaining 'justice' by having the corporate 'wrongs' acknowledged in public. But the remedies available to courts may not always satisfy the claimants. Lawsuits brought under tort law reduce social issues to questions of compensation, but sometimes this is not entirely appropriate. For example, if a company destroys a religious shrine in the course of its business operations, the injury may not be easy to compensate; indeed, what is the monetary value of a shrine?

The ultimate weapon of courts is to order an end to a harmful activity, but courts have been reluctant to use that weapon. Nigerian courts forced oil companies to make sizable compensation payments to claimants, but failed to put any injunctions in place in order to stop harmful gas flaring,

or to force firms to upgrade their facilities before resumption of oil production (Frynas 1999). In extreme cases, the costs of potential future litigation could discourage firms from continuing with a harmful activity in a community and prompt a firm's withdrawal. But the local community may often want the company to stay rather than withdraw, given its reliance on an offending firm in the absence of alternative jobs and income opportunities. Nor does litigation help to improve the relationship between the company and its stakeholders, so the hostility between the local community and the company may render future business operations more difficult, if not impossible. Litigation thus has some potentially negative effects even for the very claimants it is designed to help.

It must also be remembered that there are considerable barriers to justice for claimants, which result from the nature of the modern legal process. As a survey of 154 Nigerian lawyers has shown elsewhere, claimants in Africa are prevented from instituting a valid claim by the lack of funds, ignorance of legal rights and intimidation by public bodies and defendants (Frynas 2001). Lawsuits are also slow and the outcome is uncertain; for instance, the two Nigerian cases mentioned earlier took five and nine years respectively from the start of the case until the final appeal, while many cases take much longer. The nature of the legal process may therefore dissuade potential claimants and limit the potential benefits of litigation.

Litigation has an even more ambivalent *developmental impact on society as a whole*. On the positive side, litigation (or rather the threat of litigation) can pose a deterrent to potential future offenders. If successful, litigation can discourage harmful practices in the absence of strict government regulations in the area of environmental and labour rights. As the international law expert Michael Anderson (2002) noted, the award of damages 'offers the prospect of a systemic effect that should help to protect the environment by fulfilling the same function as regulation'. For example, asbestos-related litigation – notably the large sum involved in the Gencor settlement and the litigation in English courts – provides a much more effective deterrent to future offenders than the entire South African regulation. Indeed, successful and enforceable court judgments may be the most effective deterrent against the worst offenders, who are less responsive to activist campaigns and reputational risks (e.g. smaller Western firms or China-based firms). In other words, litigation can help in situations where voluntary CSR initiatives are ineffective. In theory, members of the society could then hope that firms will behave more responsibly in future.

In practice, the potential for the beneficial developmental impact of litigation is limited. In cases involving tort law, courts focus on

compensation payments to injured individuals, not on remedying long-standing social and environmental problems. For example, the site of former Thor Chemicals facilities in South Africa still houses some 3,500 tonnes of mercury wastes (Ward 2002), despite the successful litigation against the company in the UK. Anderson (2002) argued that litigation against TNCs could take into account environmental costs, 'if the compensation is properly assessed and awarded'. The firm could be forced to pay for environmentally damaging activities and could discourage similar damaging activities elsewhere. But even if courts were to impose additional costs on the defendants such as by the use of punitive damages, they do not tend to look at the larger picture of environmental and social damage, and do not investigate the necessity for clean-up operations or the costs to future generations. Therefore, while claimants may obtain individual compensation payments, society as a whole must still pay for environmental or health-related remedial costs.

Even if legal outcomes were to provide solutions to a society's social and environmental problems (notably through a deterrence effect), legal recourse is limited to groups from selected countries, those with NGO support and financial resources, and crucially depends on available legal remedies. Litigation in Africa has so far focused on a few countries – South Africa, Nigeria, Namibia – rather than the continent's poorest states. The support of international NGOs for litigants has been uneven, focusing on South Africa and Nigeria. The available legal remedies address some wrongs but not others. For example, a Nigerian farmer injured by an oil spill has much better prospects of legal success than a fisherman whose fishing nets were destroyed by an oil company boat, due to the fact that the law applicable to oil spills (notably the strict liability rule) is much more robust than legal rules on negligence (cf. Frynas 2000: ch. 6). In case of diffuse environmental damage which affects many sections of society (e.g. wide-spread air pollution), there is not a single injured party with an economic incentive or the legal standing to bring a lawsuit (Anderson 2002). In other words, litigation has a very uneven reach and does not always address some of the most serious corporate wrongdoings in society.

In sum, the above discussion suggests that the cons of litigation far outweigh the pros (see Table 3 for an overview), although the reality is more complex and this analysis can only serve as a starting point for understanding the role of litigation and different stakeholder perspectives. The potential economic impact of litigation is purely negative. The developmental impact is less clear-cut, but it is remarkable that litigation does not even have unambiguous benefits for the represented claimants themselves. One might cynically conclude that the biggest beneficiaries

TABLE 3
Principal pros and cons of social and environmental litigation

	Impact on affected firms	Impact on national economy	Impact on represented claimants	Impact on society as a whole
Pros			<ul style="list-style-type: none"> ● financial compensation ● satisfaction of obtaining ‘justice’ 	<ul style="list-style-type: none"> ● deterrence effect against future pollution and other adverse corporate acts
Cons	<ul style="list-style-type: none"> ● higher insurance premiums ● higher cost of capital ● risk of lower share price ● risk of damaged brand name and corporate reputation 	<ul style="list-style-type: none"> ● potential for reduced foreign investment 	<ul style="list-style-type: none"> ● threat of withdrawal by the key provider of jobs and income opportunities 	<ul style="list-style-type: none"> ● few provisions for remedying long-standing social and environmental problems ● no legal recourse for many corporate wrong-doings

are the lawyers who often demand hefty fees from their clients, notably in Nigeria where lawyers frequently work on a contingency fee basis. In the *Shell v. Farah* case mentioned earlier, in which the claimants were awarded 4,621,000 Naira by the court in 1994, the lawyers received roughly 2,500,000 Naira or 54 % of the total compensation payment, although one should note that a considerable part of that sum was spent on items such as expert reports and travel (Frynas 2001). The Nigerian lawyers’ fees in oil-related court cases may be extreme, but nonetheless underline an additional drawback of pursuing litigation.



This article investigated the rise in social and environmental litigation against TNCs in both domestic and foreign courts, which presents a significant development for legal systems and the parties involved. The cases discussed above undermine legal doctrines (notably through extraterritorial application of law), which had previously prevented firms from being sued, and lead to a reconfiguration of costs and benefits arising from economic development.

In contrast to previous research on social and environmental litigation against TNCs, this article has considered court cases against TNCs both in

their home countries and in host countries, which are not commonly treated alongside one another. It does not provide a systematic comparison of the two fora, but one could argue that litigation in home countries is perhaps more significant, since compensation payments in US (and, to a lesser extent, English or Canadian) courts tend to be higher than those in host countries' courts, although the Gencor settlement in South Africa suggests that this rule may not always apply. At the same time, there is a need to assess the desirability of litigation in US or English courts from the point of view of Africa's development. Peter Newell (2001: 88) suggested that 'transnational litigation does nothing to build up the capacity of legal systems in the South'. Such litigation also raises uncomfortable questions regarding state sovereignty as well as fundamental principles of company law. A systematic comparison of the significance of the different fora and the desirability of foreign litigation goes beyond the scope of this article, but the importance of these questions calls for further research.

As suggested at the outset, Africa is not unique in terms of the rise in litigation against transnational corporations. But there is one compelling reason why litigation in African courts may become more prevalent than perhaps in Asian or Latin American courts: the British colonial legal heritage. Until now, lawsuits in African courts have almost exclusively focused on Common Law jurisdictions – Nigeria and South Africa – where courts traditionally enjoy more autonomy and have greater power to 'shape law' rather than merely to interpret legal statutes. As a result of colonial rule, much of Africa (as opposed to Latin America or Asia) is covered by former British colonies with Common Law jurisdictions. In addition, governments in African states tend to enjoy lower levels of social and political control than elsewhere, and frequently lack a firm grip over the judiciary (cf. Chazan *et al.* 1988: 58–9). This helps to explain why judges occasionally pronounce judgments contrary to the interests of even the more authoritarian regimes, such as Abacha's Nigeria and Mugabe's Zimbabwe. Judicial pronouncements may have been disregarded by the security forces or government ministers under those regimes, but it is nonetheless significant that they existed, in contrast to, say, Musharraf's Pakistan.

Africa is by no means alone in spearheading social and environmental litigation against private firms in the developing world. For example, India – a stable democracy with a British legal heritage – has enjoyed a long history of judicial activism, with the Indian Supreme Court taking a very active role in spearheading human rights and environmental claims, of which most African legal activists can only dream (Anderson 1998; Jackson & Rosencranz 2003).¹⁰ But, given the British colonial heritage

and the relative autonomy of courts in countries such as Nigeria and South Africa, I would hazard the assertion that the potential for host country litigation against transnational corporations is – at least in theory – greater in Africa (or, more precisely, the former British colonies in Africa) than elsewhere in the developing world. On the other hand, the potential for home country litigation in US or British courts is probably not very different for African or Latin American litigants, as it makes relatively little difference to a US or British court whether a case originated in Africa or Latin America (as opposed to the nationality of the company or the admissibility of the specific claim).

Perhaps the most pertinent question to pose is to what extent the new legal trend towards suing TNCs for social and environmental damage will spread further. Not surprisingly, businessmen oppose any broadening of legal liability for social and environmental damage, most noticeably in the United States. Many business organisations in the United States, including the US Chamber of Commerce, have protested against ATCA, and one observer (Rodman 2001: 225) already predicted the US Congressional repeal of ATCA to prevent future court cases like those outlined earlier.¹¹ Indeed, the US government has already obstructed litigation against TNCs. In July 2002, the US State Department intervened in a lawsuit against ExxonMobil over human rights abuses in Indonesia, alleging that the case could endanger Indonesia's cooperation in fighting terrorism. Several months earlier, a federal judge in California dismissed a lawsuit against Rio Tinto for alleged rights abuses in Papua New Guinea, citing a State Department opinion that the case could adversely affect US foreign policy.¹² In May 2003, the US Department of Justice filed an *amicus curiae* (friend of the court) brief in the *Doe v. Unocal* case, arguing that the case could interfere with US foreign policy (website: HRF). Even if claimants were to succeed in the United States, the South African government has criticised the apartheid-related lawsuits in US courts and has already indicated that it will not enforce judgments made in foreign courts.¹³

These steps taken by governments – often after intense pressure from industry groups and foreign governments – highlight the inherent limitations of current litigation. As suggested earlier, the rise in social and environmental litigation up to this point has been driven by the autonomy of US, English, Nigerian and other courts. The judges have so far used their independent discretion to reexamine existing legislation and case law in favour of claimants; a change in legislation could undermine many of these efforts, just as more robust social and environmental legislation could strengthen them.

Even if the litigation against TNCs were not to be prevented by government action, academics and practitioners should examine the costs and benefits of such a course of action. As suggested earlier, litigation may impose new costs and risks on foreign investors in Africa as well as Africa's national economies and, generally, the cons of litigation far outweigh the pros. And yet litigation can help to create checks and balances on the activities of TNCs and help to deter potential corporate offenders. As stated at the outset, the rise of litigation is related to the absence of effective global institutions, and represents one strategy of NGOs and local communities to hold corporations accountable for the consequences of their actions. In the creation of global governance, firms have so far been assigned more rights than obligations. Until political leaders address this imbalance, calls for further transnational and national litigation against TNCs are inevitable.

Given the use of legal strategies as a means towards corporate accountability, it becomes necessary to reassess the role of litigation in the wider CSR movement. Until now, the primarily business-driven CSR agenda has focused on firms' voluntary measures over and above legal requirements, or 'voluntary restraint of profit maximisation' (to borrow from the business guru Kenneth Andrews 1973), while carefully avoiding any legally binding measures. In a departure from this tradition, Halina Ward (2003) has argued that litigation should be factored into public policy and business strategy on CSR, not least because of the many intersections between CSR and law such as new legislation (e.g. Ghana passed legislation to require logging companies to secure a Social Responsibility Agreement with customary land owners), or the legal nature of some CSR initiatives (e.g. if a code of conduct by a TNC is incorporated into a contract with a supplier, it becomes legally binding) (Ward 2003). At the same time, there are inevitable conflicts between litigation as a CSR tool and the current CSR approaches. For instance, while the current CSR approaches call for openness and transparency of firms in social and environmental reporting, litigation calls for companies to remain silent as any publicly released data could be used against them in a court battle (Ward 2001). Litigation also poses more profound challenges over the standards of behaviour that firms should apply in different countries, given different cultural contexts or different levels of development. This touches on the more fundamental philosophical debates between cultural relativists (e.g. Brown 1999) and cultural universalists (e.g. Donaldson & Dunfee 1999). But whatever one's views, I hope that this article will make a modest contribution towards the debate on the role of social and environmental litigation in today's global governance.

NOTES

1. For historical reasons, the UK has separate legal systems for England/Wales, Scotland, Northern Ireland, the Isle of Man and Channel Islands. This article refers to the 'English' as opposed to the Scottish or Irish legal systems.

2. While the sums involved were smaller than in the 2001 settlement, the compensation offer in 2003 was not necessarily inferior to the previous offer. Above all, the 2003 settlement only applied to the 7,500 claimants registered in the English suit (not future claimants); under the terms of the 2001 settlement, the amount expected to be paid to the existing 7,500 claimants was approximately £9 million.

3. See media reports on the litigation, e.g. 'NGO Launches US Apartheid Reparations Law Suit' (SAPA, 12.11.2002); 'Rights: Apartheid Victims Sue Big Firms For Aiding Regime' (IPS 12.11.2002).

4. Personal communications with Jennifer Green, staff attorney at the Centre for Constitutional Rights.

5. These figures come directly from interviews with senior lawyers working for Shell and Chevron in Nigeria (see Frynas 1999; Frynas 2000: 182).

6. Particulars of claim in the case *Manchonyane v. Duiker Mining*, Johannesburg High Court.

7. The claimants dismissed Ed Fagan as counsel on the eve of a court hearing in November 2003.

8. Personal communications with Ledum Mittee. Following Ledum Mittee's arrest by the security forces, under General Abacha's rule, the Farah case was handled by Lucius Nwosu who has made a living out of oil-related litigation in Nigeria and later obtained a large portion of the final compensation award.

9. This argument relies on the assumption that oil and mining investments are beneficial economically. However, a large literature including quantitative studies demonstrates that states with a high share of natural resource exports have had lower economic growth rates than states without those resources, and suffer from various negative economic and political phenomena under the label 'resource curse' (see e.g. Ross 1999).

10. The author is grateful to one of the referees for pointing this out.

11. The Bush administration has indicated that it would like to limit the ability of foreign nationals to sue in US courts. This was a reaction not merely to lawsuits against US firms but also to human rights allegations against the US government. Notably, ATCA has been employed by a group of Guantanamo Bay detainees captured in Afghanistan. See Dan Eggen & Charles Lane, 'Bush seeks to restrict foreign nationals' suits' (*Washington Post* 2.6.2003). Nonetheless, even if US federal law is altered or repealed, it is still possible that companies could be sued under state law provisions (I am thankful to Halina Ward for pointing this out to me).

12. The case involved alleged human rights abuses by ExxonMobil at its gas fields in the Indonesian province of Aceh. At ExxonMobil's request, the judge in the case asked the State Department whether the case could adversely affect US interests. The Rio Tinto case arose from the company's operations at the Bougainville copper mine in Papua New Guinea. See 'Oily Diplomacy' (*New York Times* 19.8.2002).

13. See South Africa's Trade and Industry Minister Alec Erwin, reported in Ginger Thompson, 'South Africa to Pay \$3,900 to Each Family of Apartheid Victims' (*New York Times* 16.4.2003).

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