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Selling out the Niger Delta

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The sale of Shell Petroleum Development Company of Nigeria and legacy oil pollution

Last week UK oil giant Shell confirmed it has found a buyer for its Nigerian subsidiary, the Shell Petroleum Development Company of Nigeria (SPDC). It will sell SPDC to a consortium going by the name of Renaissance Africa Energy Company (see box 1), a group of oil investors about which relatively little is known. Renaissance itself is a newly created company. Its CEO is a former Shell Nigeria executive, Tony Attah.

Box 1: Who is Renaissance?

Renaissance Africa Energy Company is a newly created consortium, essentially a special purpose vehicle (SPV). SPV is corporate-speak for a company created for a specific investment or transaction purpose. The companies behind Renaissance are ND Western, Aradel Energy, First E&P, Waltersmith and Petrolin. These are the same companies behind OML 34, which SPDC divested from in 2011.

ND Western was itself set up as an SPV in April 2011. Just two months later, Shell sold OML 34 to ND Western. The company described itself as “a consortium of four companies; Niger Delta Petroleum Resources Limited (NDPR), Petrolin Trading Limited (PETROLIN), FIRST Exploration & Petroleum Development OML 34 Limited and Walter-Smith Exploration and Production Limited.”

NDPR became Aradel in 2023. Aradel Holdings, which owns Aradel Energy, is itself a ‘portfolio’ company of African Capital Alliance, a private equity and asset management company (meaning African Capital Alliance is invested in Aradel).

Petrolin is involved in oil and gas investing in several countries in Africa. Petrolin also “holds significant interest in Tullow Oil, Vivo Energy, Seplat, Aradel and ND Western.”

FIRST E&P was set up in 2011, just before the purchase of OML 34 by ND Western (in which it then invested).

Waltersmith Petroman Oil Limited was incorporated in 1996 as a Joint Venture between Waltersmith & Associates Limited, a Nigerian company and Petroman Oil Limited of Calgary, Canada, to operate as a Petroleum Exploration and Production company. In 2001, Waltersmith Petroman Oil Limited became a wholly Nigerian owned company with the divestment of Petroman Oil Limited.

The sale of SPDC is momentous. For decades, Shell’s wholly-owned Nigerian subsidiary has dominated onshore oil extraction in the Niger Delta, as well as the lives of the hundreds of thousands of people who live in and around the oil fields. The region is synonymous with the company and the unparalleled levels of environmental devastation it has caused. The Niger Delta is frequently described as one of the most oil-polluted regions on earth. It certainly holds the record for the number of oil spills, with thousands occurring annually. Shell’s operations have been by far the largest source of pollution over the years. The company’s claims that it cleans up oil spills have been repeatedly debunked, as has the credibility of regulatory certification of clean up.

For communities and civil society organisations (CSOs) in Nigeria, the paramount concern with the sale of SPDC is what will happen to the company's liabilities and the vast oil pollution caused by Shell's operations. Environmental and social activists in the Delta have already called on the federal government to "immediately place a moratorium on all oil company divestment (or sale of assets) ... pending the ascertaining of issues of community concern." This call follows the launch, in December 2023, of the National Principles for Responsible Petroleum Industry Divestment. This Nigerian civil society initiative focuses on the impact of divestment on communities and the environment.

This briefing looks at the potential to hold Shell Plc and SPDC liable for past oil pollution, based on the currently available information on the deal.

What is Shell selling?

Shell's press release and other statements do not provide much detail on the exact nature of the transaction. What the company said publicly has generated some confusion. Shell has stated that Renaissance will be the new owner of SPDC but also that "the proposed transaction keeps SPDC intact." What we understand from Shell's public statements is that:

- SPDC's owners (shareholders), Shell Plc and Shell NV, are selling their shares in SPDC, without dissolving the company.
- SPDC's new owner (shareholder) is Renaissance.
- SPDC will continue to exist as SPDC but under new ownership.
- The SPDC that continues to exist will not be a subsidiary of Shell Plc.

Box 2: Asset sale versus share sale: selling OMLs versus selling shares in SPDC

An asset sale involves the purchase of assets owned by a company. The purchase of an OML or a pipeline is an asset sale by SPDC to a new owner (usually a domestic oil company in the Niger Delta context).

In a share sale, the buyer purchases shares in the company rather than just the assets. The transaction is between the company's shareholders (in this case, Shell Plc and Shell NV) and the buyer of the shares (Renaissance). By purchasing all the shares in SPDC, Renaissance has purchased the company, which is a separate legal entity. Usually, the company continues to retain its assets and liabilities, meaning the SPDC that Renaissance will own after the deal will retain SPDC's assets and liabilities.

It might be expected that SPDC would cease to exist as an entity after the Renaissance deal. However, Shell's media materials suggest SPDC will remain, albeit an SPDC that is no longer a company within the Shell group of companies. One can imagine a renaming of SPDC, or a merger with Renaissance, will follow at some point after the completion of the current deal. A company called the 'Shell Petroleum Development Company of Nigeria' can hardly continue to be so named when Shell Plc has no stake in it and is 100% owned by another company (Renaissance).

Whatever the confusion, what is clear is that SPDC will cease to be a subsidiary of Shell Plc when the deal is completed.

Box 3: Shell, SPDC and the 'SPDC Joint Venture' in Nigeria

According to Nigeria's Beneficial Ownership Registry, SPDC's current owners are The Shell Petroleum Company Limited of the UK (99.9%) and Shell Petroleum NV of the Netherlands (0.01%). SPDC's operations in the Nigeria Delta are done via what is known as a joint venture (JV). The SPDC JV is sometimes confused with SPDC, the company, but they are different entities. SPDC is a company currently 100% owned by Shell (and will be owned by Renaissance if the deal goes through). The SPDC JV is an unincorporated consortium of companies that has involved SPDC, Agip Nigeria (100% owned by Italian company ENI, via ENI companies registered in the Netherlands) and Total Nigeria (which is 100% owned by the French company TotalEnergies), as well as the Nigerian state-owned oil company, Nigerian National Petroleum Company (NNPC). Within the JV, Shell holds a 30% interest, Total 10%, Agip 5% and NNPC 55%. The JV is called the 'SPDC JV' because SPDC is the operator, meaning it runs the day-to-day JV operations – oil extraction – on behalf of the other members. The 30% stake of every OML that SPDC operates on behalf of the SPDC-led JV will be part of the sale to Renaissance.

The sale of SPDC comes after more than a decade of gradual divestment of assets by SPDC in the Niger Delta. The company has been exiting onshore Niger Delta oil production since 2010, selling its interests in some oil mining leases (OMLs) that it operates to a variety of companies and investors. As of today, SPDC still holds interests in 15 onshore OMLs, all of which would transfer to Renaissance as part of the deal, along with, presumably, all other assets owned by SPDC (given Renaissance is buying all of the shares in SPDC, this would be the case, unless SPDC has transferred assets from SPDC to another Shell entity prior to the sale of SPDC shares to Renaissance, about which there is no information).

The transfer of ownership cannot be completed until the Federal Government of Nigeria approves it. There is no set timeframe for this approval, but it is unlikely that Shell and the backers of Renaissance would have announced if there was not a good likelihood of moving forward relatively soon. Last year, the main regulator, the Nigerian Upstream Petroleum Regulatory Commission (NUPRC), held up the sale of US oil company Exxon assets to Seplat Energy following political and communication challenges between Exxon and the Nigerian state-owned oil company. Shell will doubtless have learned from this, and it is far better embedded politically in Nigeria than the US oil major. A big upset to the completion of the sale is unlikely. A statement by a Nigerian official at the World Economic Forum in Davos, just days after Shell's announcement, appears to confirm the sale will be concluded quickly.

Liability for past oil spills

As noted above, Shell has been selling OMLs for a decade or more. There are many unresolved oil spills across the OMLs that Shell has divested and in the OML areas it will effectively transfer to Renaissance with the sale of SPDC. There is, from a legal perspective, a difference between SPDC selling its stake in a specific asset, such as an oil lease and Shell selling the company, SPDC.

Where SPDC has divested from an OML up to now, any legal liability for damage to individuals and communities by oil spills that happened *before* the divestment remains with SPDC. Shell Plc, as the parent company, can also be held legally liable for oil spill damage caused by SPDC's operations in a range of circumstances.

The law in this regard is governed by various Nigerian statutes and/or common law torts (wrongful acts) of negligence and nuisance, applicable in both Nigeria (the "host state") and the UK (Shell's "home state"). In general, proving liability rests on showing that the defendant (the oil company) owed the plaintiff (the community or individuals affected) a duty of care, that the defendant breached that duty, and that the breach resulted in damage to the plaintiff. This has been the basis of legal claims against Shell in Nigeria and the UK over oil spills.

This means that where there has been an oil spill prior to SPDC divesting from an OML, the liability for the damage stays with SPDC, even after it divests. It would be virtually impossible to establish a case against the new company that buys the OML in the Nigerian or UK courts for a spill that happened before it became the leaseholder. The purchaser did not commit the tort or damage and did not owe or breach any duty of care to the plaintiffs, which means that communities can pursue SPDC (and, potentially, Shell Plc) in legal actions after divestment from OMLs.

But if Shell sells its Nigerian subsidiary SPDC, the situation changes.

Can SPDC still be held liable for past oil spills after the sale of all SPDC shares to Renaissance?

If the wrongdoer remains in existence as a company after the corporate restructuring, it will bear the liability. As noted above, based on Shell's press statements, SPDC will remain in existence after the sale of all of Shell's shares in SPDC to Renaissance. In its 'Frequently Asked Questions' document, Shell responds to the question:

"Who will have responsibility for remediating environmental impacts from the SPDC JV's operations? What will happen with historical spills that have not been cleaned up by the time the transaction completes?"

Shell's answer: "SPDC will continue to be accountable for its share of commitments within the SPDC JV, and to conduct any remediation as operator of the joint venture where spills may have occurred in the past from the joint venture's operations." Shell goes on to state that "the transaction has been designed to ensure that the company can continue to perform its role as operator and to meet its share of commitments within the joint venture, including those relating to health, safety, security and environment."

Therefore, legal action can still be brought against SPDC for past oil spills. The sale of SPDC does not terminate any oil spill litigation against it, nor does it prevent the institution of new lawsuits against SPDC for past or new oil spills. However, the SPDC against which such claims are initiated will be an SPDC owned by Renaissance, not Shell. In effect, the legal action will be against a 'new' company, a Nigerian-registered entity, without links to an international oil company. The retention of the name 'SPDC' is a somewhat misleading corporate sleight of hand.

If, in the future, SPDC ceases to exist and is incorporated or absorbed into another company, the acquiring company (e.g., Renaissance), as the successor of the wrongdoer, inherits the liability and can be sued. Some form of merger or acquisition may happen at some point after the completion of the deal between Shell and Renaissance. Should this occur, the legal position is set out in Box 4. But there are other potential futures. Another concern would be if SPDC continued to exist but sold its assets (and not its liabilities) to a new company in the future. If SPDC were to subsequently become insolvent and unable to meet its liabilities, communities could be left without access to remedy. The current share sale is unlikely to be the final chapter in this story, and (if the Renaissance deal goes ahead) activists will closely monitor the evolution of SPDC.

Box 4: Mergers and Acquisitions under Nigerian law

The governing statute on mergers and acquisitions in Nigeria is the Investments and Securities Act 2007. Section 119 (1) of the Act defines a merger as “any amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings or part of the undertakings of one or more companies and one or more bodies corporate.” This definition is broad enough to encompass a future SPDC acquisition (i.e., SPDC merging or being ‘acquired by’ Renaissance or some similar construction that would see SPDC cease to exist). Section 119 (2) of the Act states that a merger “may be achieved in any manner, including through (a) purchase or lease of the shares, interests or assets of the other company in question; or (b) amalgamation or other combination with the other company in question”. Mergers require judicial approval under the statute.

The approving court, under Section 122 (6) (a) is empowered by the Act to make an order providing for “the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company.” Section 122 (10) defines liabilities to include “rights, powers and duties of every description notwithstanding that such rights, powers and duties are of a personal character which could not generally be assigned or performed vicariously.” This definition is quite encompassing.

Clearly, under Nigerian law, an acquisition of a company results in the transfer of all the assets and liabilities of the acquired company to the acquiring company. The Nigerian Supreme Court took this position in **Afolabi v. Western Steel Works Ltd (2012) LPELR-9340(SC)**, where it held: “The purchaser of a company buys its assets and liabilities.” This position was reiterated by the Court of Appeal in January 2021 in **Keystone Bank Limited v. Dr. Vincent O. Ebuh (2021) LPELR-52773(CA)** where the court stated: “In *Afolabi & Others vs Western Steel Works Limited (2012)* ... it was held among others that: “The purchaser of a Company buys its assets and liabilities.”

In the event of any merger or acquisition that would see SPDC cease to exist, pending lawsuits against SPDC can continue as if the acquisition did not occur, or the acquiring corporation may be substituted for SPDC. According to Section 122 (6) (c) of the **Investments and Securities Act 2007**, upon the application of the parties to a merger, the court approving the merger may order “the continuation by or against the transferee company of any legal proceeding pending by or against any transferor company.” If there is no substitution, judgment may be rendered against SPDC, but it will be satisfied by the acquiring company.

What Shell announced does not appear to be a merger or acquisition at this point.

Shell Plc and liability for past oil spills in the Niger Delta

Legal actions against Shell Plc for oil spills in the Niger Delta in the UK and Dutch courts have been welcomed by communities and activists as opening up an important avenue for parent company accountability and remedy. Such legal action against Shell Plc over spills that occurred when it was the owner of SPDC could, potentially, continue to be mounted in the UK after the current deal is completed, and even in the event of further action that would see SPDC dissolved. The legal basis for taking cases in the UK, for example, is based on Shell Plc's direct responsibility for oil spills and impacts in the Niger Delta. Two such claims are ongoing against Shell in the UK over oil spills at Ogale and Bille.

This offers a glimmer of hope for oil-impacted communities in Nigeria and for corporate accountability. The practical challenges will doubtless be even greater than currently, but a door is still open to try and hold the oil major accountable for decades of damage done in the Niger Delta.

Why is this so important?

Nigerian plaintiffs have resorted to foreign courts to seek compensation for oil spill damage caused by Shell's operations in the Niger Delta because it is close to impossible to bring legal action against oil companies in Nigeria. People can only seek redress against oil companies in the Federal High Courts, which are in state capitals, putting them out of reach of many rural communities. The costs of going to court are significant. Critically, very few lawyers are willing to take such cases, and many senior lawyers in Nigeria work for the oil industry. Public interest lawyers have tried to get justice for oil damage in the Nigerian courts only to find cases dragging on for years, and the very few judgements handed down are ignored or further challenged. A case in point is the Ejama-Ebubu community's efforts to get compensation for an oil spill that took place during the 1967-70 Biafran war. In 2010, after years of legal action, a Nigerian High Court ordered Shell to pay compensation of approximately \$100 million. Shell fought the ruling, but in 2020, Nigeria's Supreme Court upheld the award, denying Shell's request to appeal. Shell filed an international arbitration case in the US, using powerful international economic law to challenge the Nigerian state over a decision upheld by the highest court in the country.

The obstacles to legal action in Nigeria are so overwhelming that over the past two decades, alliances of communities, civil society groups and human rights lawyers have collaborated to bring cases to Dutch and UK courts – Shell's home states. And they have begun to achieve important outcomes. In the UK, a legal action by the Bodo community led to a settlement of £55 million in 2015. The case forced Shell to admit it had underestimated the size of the Bodo oil spills for years, and court papers exposed how Shell knew some of its infrastructure was old and dangerous. In 2021, in a case brought by Milieudefensie and four Nigerian farmers against Shell in the Netherlands, a critical element of the court's ruling was that Shell was ordered to install a Leak Detection System on a pipeline. These cases not only led to compensation and some measure of justice for the victims, but also opened up the systemic issues to scrutiny – Shell's old and hazardous infrastructure, the company's low-balling of oil spill damage and its failure to adequately prevent tampering with its pipelines.

More cases like these could see Shell having to carry out significant, and likely costly, work to address shortcomings in infrastructure and clean-up of oil spills. With the sale of SPDC, this is unfortunately unlikely to happen. Even if courts required Shell Plc to take action to address clean-up or pipeline conditions, there is no Shell entity left in the onshore Niger Delta to take action. Divestment, some activists argue, allows Shell to sidestep the efforts of communities and CSOs to hold it to account. For many, the manner of Shell's exit from onshore oil production runs completely counter to any concept of a just energy transition. If the people who suffered the abuses of the fossil fuel era are left with those abuses unremediated, there is no justice.

The long-running saga of Shell in the Niger Delta is not over. However, a new, deeply concerning chapter is opening, one where the already limited chance of seeing the oil giant clean up its horrific mess has been reduced even further. Action by the Nigerian government can address this issue. But sadly, this is unlikely, despite the growing calls from Nigerian civil society to halt the sale or put conditions on it that would ensure SPDC implements proper clean-up and pays adequate compensation before it is able to exit.

Colophon

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Papilou with hand in oil from an oil leak in Ikarama, Niger Delta.

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