DOES THE APPLICATION OF THE POLLUTER PAYS PRINCIPLE IN NIGERIA'S HYDROCARBON INDUSTRY PROMOTE ENVIRONMENTAL JUSTICE?

OKECHUKWU CHIMENEM AHOLU

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ABSTRACT

The hydrocarbon industry is one of enormous complexity and reward. As an industry central to security, prosperity and the very essence of civilization it offers conflicting possibilities. Though the economic prospect of the industry remains significant, the hydrocarbon industry impacts the environment in a manner that triggers externalities (the impact of a transaction on those who do not participate in them). The Niger Delta (ND) region of Nigeria epitomizes the scale of the impacts of hydrocarbon industry on soil and groundwater, vegetation, aquatic life, public health and jobs. The social and economic costs of these impacts are enormous. The polluter pays principle (PPP) emerged as a principle designed to allocate these costs and ensure that they are borne by multi-national oil companies whose activities generate the cost. The principle simply demands that the polluter should bear the social cost of pollution prevention, control and remediation. However, despite the good intentions of the principle, the question whether the allocation of environmental cost under the hydrocarbon laws of Nigeria had fulfilled the objectives of the principle remains contested. Where allocation of environmental cost is effective, the end product would be a realization of environmental justice (EJ) in the diversity of its forms. Deploying a socio-legal method to legal inquiry, this thesis examines the extent to which the application of the PPP under the hydrocarbon laws of Nigeria promotes EJ. The thesis develops an EJ framework for the application of the PPP in the hydrocarbon industry and on the basis of this framework, conclude that while laws and regulations which apply the PPP under Nigerian law have the potentials to promote EJ, in reality they do not do so. The thesis reveals gaps in legislations and regulations which make it difficult for the application of the PPP to internalize environmental costs and prescribe recommendations on how those gaps can be closed. The thesis argues that to guarantee incremental improvement in laws which apply the PPP, Nigeria should draw lessons from some jurisdictions on how this can be done. This would involve a remodeling of legislative and regulatory provisions to address suboptimality, constitutionalizing environmental rights, creation of special environmental costs, introduction of environmental Business Case amongst a host of other solutions.

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ACHPR	African Charter on Human and Peoples Right
AGRA	Associated Gas Reinjection Act
API	American Petroleum Institute
BAT	Best Available Technology
BCM	Billion Cubic Metres
CA	Court of Appeal
CBDR	Common but Differentiated Responsibilities
CCR	Command and Control Regulations
CCS	Carbon Capture and Storage
CDM	Clean Development Mechanism
CFRN	Constitution of the Federal Republic of Nigeria
CJ	Corrective Justice
CWA	Clean Water Act
DGF	Dubai Green Fund
DJ	Distributive Justice
DPR	Department of Petroleum Resources
DPSP	Directive Principles of State Policy
EBC	Environmental Business Case
EC	Environmental Cost
ECA	Excess Crude Account
ECJ	European Court of Justice
EEZ	Exclusive Economic Zone

EGASPIN	Environmental Guidance and Standard for the Petroleum Industry
EMS	Environmental Management system
EI	Economic Instruments
EJ	Environmental Justice
EJM	Environmental Justice Movement
ECLAC	Economic Commission for Latin America and the Caribbean
ELP	Environmental Liability Principles
EO	Executive Order
EPA	Environmental Protection Agency
EPI	Environmental Performance Indicators
ESRC	Economic and Social Research Council
ET	Environmental Tax
EU	European Union
FDI	Foreign Direct Investment
FDP	Field Development Plan
FEPA	Federal Environmental Protection Agency
FG	Federal Government
FJ	Food Justice
FOA	Freedom of Information Act
FREP	Fundamental Rights Enforcement Procedure Rules
GB	Green Budgeting
GCS	Government Crediting Systems
GDP	Gross Domestic Product
GHG	Green House Gases

IBETS	Installation-Based Emission Trading Schemes
ICC	Indonesian Constitutional Court
ICJ	International Court of Justice
IMF	International Monetary Fund
ILC	International Law Commission
IOGP	Association of Oil and Gas Producers
IPCC	Intergovernmental Panel on Climate Change
ISO	International Standard Organization
JCA	Justice of the Court of Appeal
JSC	Justice of the Supreme Court
JVA	Joint Venture Agreement
LUA	Land Use Act
MERS	Maximum Economic Recovery Strategy
MHIC	Mutual Hold-harmless Indemnity Clauses
MNOC	Multinational Oil Companies
MOSR	Mineral Oil Safety Regulation
NA	National Authorities
NCS	Norwegian Continental Shelf
ND	Niger Delta
NDDC	Niger Delta Development Commission
NEITI	Nigeria Extractive Industries Transparency Initiatives
NESREA	National Environmental Standard Regulation and Enforcement Agency Act
NLNG	Nigeria Liquified Natural Gas
NNPC	Nigerian National Petroleum Corporation

NOSDRA National Oil Spill Detection and Response Agency

NPV Net Present Value

NREEP National Renewable Energy and Energy Efficiency Policy

NSIA Nigeran Sovereign Investment Authority

NSWLEC New South Wales Land and Environment Court

OECD Organization for Economic Cooperation and Development

OGA Oil and Gas Authority

OPA Oil Pipeline Act

OPA Oil Pollution Act

OPEC Organization of Petroleum Exporting Countries

OSLTF Oil Spill Liability Trust Fund

OSOWMR Oil Spill and Oil Waste Management Regulation

OSRCRDA Regulation Oil Spill Recover, Clean up Remediation and Damage Assessment

OSPAR Oslo Paris Convention (for the Protection of the Marine Environment of the North-East Atlantic).

PA Petroleum Act

PBR Performance-Based Regulation

PDPR Petroleum Drilling and Production Regulation

PEJ Procedural Environmental Justice

PFD Permanent Fund Dividends

PFM Public Financial management

PORR Petrol Oil Refining Regulation

PPC Pollution Prevention Capacity

PPMC Pipelines and Products Marketing Company

PPP	Polluter Pays Principle
PPPRA	Petroleum Product Price Regulatory Agency
PSC	Production sharing Contracts
PSNR	Permanent Sovereignty over Natural Resources
PSTS	Project Specific Tax System
RBS	Race to the Bottom
RCT	Rational Choice Theory
RD	Research and Development
REFIT	Renewable Energy Feed in Tariff
RR	Regulatory Regime
SCF	Standard Cubic Feet
SD	Sustainable Development
SDG	Sustainable Development Goals
SEC	Special Environmental Court
SLR	Social Legal Research
SPCCP	Spill Prevention and Counter Measure Plan
TIS	Tradable Intensity Standards
TP	Tradable Permit
TSC	Technical Service Contract
UAE	United Arab Emirate
UKCS	United Kingdom Continental shelf
UN	United Nations
UNGD	Unconventional Gas Development
UNECE	United Nations Economic Commission for Europe

UNEP	United Nations Environmental Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
WB	World Bank
WHO	World Health Organization
WTO	World Trade Organization

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International Convention on Civil Liability for Oil Pollution Damage 1969

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971

International Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matters 1972

International Convention on Oil Pollution Preparedness, Response and Co-operation 1990
Treaty on the Functioning of the European Union (TFEU) 1993

International Covenant on Civil and Political Rights 1966

OECD Recommendation of the Council Concerning International; Economic Aspects of Environmental Policies, C (72) 128, (OECD 1972)

OECD Recommendation on the I3 Implementation of the Polluter-Pays-Principle C (74) 223/Final OECD 1974 (OECD Implementation) The Polluter-Pays Principle: OECD Analysis and Recommendations OECD? GD (92) 81 (OECD Paris 1992).

OECD, Recommendation of the Council Concerning International; Economic Aspects of Environmental Policies, C (72) 128, (OECD 1972).

OECD, Recommendation on the Implementation of the Polluter-Pays-Principle C (74) 223/Final OECD 1974 (OECD Implementation); the Polluter-Pays Principle: OECD Analysis and Recommendations OECD? GD (92) 81 (OECD Paris 1992).

OECD, Council Recommendation on the Application of the Polluter-Pays Principle to Accidental Pollution, Doc. C (89)88 Final (1989), reprinted in 28 ILM 1320 (1989)

Oslo Paris Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) Convention 1992

Paris Convention on Third party Liability in Field of Nuclear Energy 1960

Protocol on Liability and Compensation for Damage from Transboundary Movement of Hazardous Waste and their Disposal 1999 (Basel Liability Protocol)

Protocol on Liability for Oil Pollution Damage 1992

Protocol to the Paris Convention on Third Party Liability in the Field of Nuclear Energy 2004

Rotterdam Convention on the Protection of Rhines 1998

Stockholm Declaration of the United Nations Conference on the Human Environment (1972), UN Doc. A/Conf.48/14 reprinted in ILM, 1416

Treaty on the Functioning of the European Union 1972

UNECE Convention on Transboundary effects of Industrial Accidents, 1992

United Nations Convention on the Law of the Sea 1982

United Nations Declaration on the Environment and Development 1992.

UN Declaration on the Right of Development 1986

United Nations Framework Convention on Climate change 1992

United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly Resolution 61/295 on the 13 September 2007.

United Nations Framework Convention on Climate Change 1992

United Nations World Charter for Nature', GA Res. 37/7, UN Doc A/37/51 (1982)

Universal Declaration on Human Rights 1945.

Vienna Convention for the Protection of the Ozone Layer 1985

World Heritage Convention 1972

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"A man can receive nothing except it is given him from heaven…" (John 3:27)

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DEDICATION

This thesis is dedicated to the loving memory of my grandmother**, Mrs Pricilla Aholu** (deceased) for seeing me through school and teaching me values that have kept me afloat in the scheme of things.

CHAPTER 1:

INTRODUCTION

1.1 GENERAL INTRODUCTION AND BACKGROUND

The oil and gas industry is one of enormous complexity and reward. Because the industry is central to security, prosperity and the very nature of civilization,[1] most oil extracting countries are very eager to start profiting from the product.[2] Oil makes a difference on a nation's balance of payment.[3] With a scale up in global demand and an annual global investment approaching $1 trillion, it offers the potential for rapid infrastructure development, structural transformation and job creation especially in developing economies like Nigeria.[4] With proven oil reserves of 28.2 billion barrels and a natural gas reserve totaling, 165 trillion standard cubic feet (Scf), including 75.4 trillion Scf of non-associated gas[5] Nigeria is one of the largest oil producers in Africa and has earned a fortune from oil sales.[6] The Nigerian hydrocarbon industry accounts for about 35 percent of Gross Domestic Product (GDP), and petroleum exports

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[1] Daniel Yergin, The Prize, the Epic Quest for Oil, Money and Power (Free Press 2008) xvi.

[2] Environmental Regulation does not always feature in the imagination of policy makers at the early periods of oil exploitation. See L. Havemann, *Environmental Law and Regulation in the UKCS* in G. Gordon, J Paterson and Emre Usenmez (ed), *Oil and Gas Law Current Practice and Emerging Trends* (Dundee University Press 2011) 231.

[3] In 2015, the US Energy Information Administration (EIA) estimates that members of the Organization of Petroleum Exporting Countries (OPEC) earned about $404 billion in net oil export revenues (unadjusted for inflation). Although this represents a 46% decline from the $753 billion earned in 2014. See US Energy Information Administration, OPEC Revenue Fact Sheet, updated, June 14, 2016 available on http://www.ieee.es/Galerias/fichero/OtrasPublicaciones/Internacional/2016/EIA_OPEC_revenuesFactSheet_14jun2016.pdf (last accessed on the 23rd of March 2017).

[4] N. H Barma, *The Political Economy of Natural Resource-Led Development* (World Bank Publication 2012) 1 available on https://openknowledge.worldbank.org/bitstream/handle/10986/2381/659570PUB0EPI10737B0Rents0to0Riches.pdf?sequence (Last accessed on the 23rd of March 2017).

[5] Nigerian National Petroleum Corporation (NNPC), *Oil Production factsheet* available on < http://www.nnpcgroup.com/nnpcbusiness/upstreamventures/oilproduction.aspx> last accessed on 30/08/2017.

[6] Production of crude oil including Lease Condensate 2016, U.S Energy Information Administration Retrieved 27 May, 2017, available on https://www.eia.gov/beta/international/data/browser/#/?pa=0000000000000000000000000000000002&c=ruvvvvvfvtvnvv1vrvvvvfvvvvvfvvvou20evvvvvvvvvvvvuvo&ct=0&tl_id=5-A&vs=INTL.57-1-AFG-TBPD.A&vo=0&v=H&start=2014&end=2016; According to the International Monetary Fund (IMF), oil and natural gas export revenue, which was almost $87 billion in 2014, accounted for 58% of Nigeria's total government revenue in that year. Oil and natural gas revenue is the country's main source of foreign exchange, making up more than 95% of Nigeria's total exports to the world in 2014. See International Monetary Fund, *Nigeria*, IMF Country Report No. 15/84, (March 2015), pages 28-30.

revenue represents over 90 percent of total export revenue.[7] In 2015, Nigeria exported 1.98 million b/d of crude oil and condensate and earned about $52 billion from oil and gas exports.[8] The hydrocarbon deposits of Nigeria are located mainly in the Niger Delta (ND) where well over 600 oil fields, 5, 284 on and offshore oil wells, 10 export terminals, 275 flow stations, 3 refineries and a Liquefied Natural Gas (LNG) plant exists.[9]

The ND mangrove swamp is the largest in Africa and is the natural spawning ground and nursery for thousands of marine species.[10] It is important as a flood defence for rising sea levels and is an essential source of drinking water, fuel, timber, building materials, food, fruits and medicines for the Niger Delta People. The enormous financial value for such wide-ranging and essential ecosystem services is only just beginning to be estimated and calculated.[11]

Despite the economic significance of hydrocarbons to Nigeria as the primary source of energy and revenue, hydrocarbon production in the ND region of Nigeria holds major environmental consequences that are well documented.[12] Since the environmental impacts of oil exploitation are subject to the imperatives of geology and site-specific factors,[13] every stage of hydrocarbon extraction in the ND region (from Seismic survey of oil production and refining) results in a considerable impact on the environment.[14] Some of these impacts includes but are not limited to physical smothering effects on flora and fauna, physical and chemical alteration of natural habitat, lethal or sub-lethal toxic effects on flora and fauna, changes in biological

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[7] OPEC, Nigeria Facts and Figures available on http://www.opec.org/opec_web/en/about_us/167.htm last accessed on the 28th of August 2017.
[8] See IMF Report No. 15/84, pages 28-30.
[9] B.A Ugbomeh and A.O Atubi, *The Role of the Oil Industry and the Nigerian State in Defining the future of the Niger Delta Region of Nigeria*, (2010) vol. 4, IMDJ, 103-112.
[10] Stakeholders Democracy Network (SDN), *'Addressing the South South's Environmental Emergency, the Vital Importance of Environmental Issues in Securing Stability and Prosperity in the Niger Delta'*, (roundtable held in Abuja on the 20th of October 2015) 3.
[11] SDN, 3
[12] See the United Nations Environmental Programme (UNEP), Environmental Assessment of Ogoniland (2011).
[13] Some of these factors include nature of land (plain, mountains, and hills); location of rivers, (access to sea); climate: (rainy, arid); transportation infrastructure, (Rivers, roads, railway), water protection area, (rainforest, pasture) etc. See T.W Walde, *Environmental Policies Towards Mining in Developing Countries,* (2006) OGEL, 328-329.
[14] O.C.D Anejionu, *Hydrocarbon Pollution in the Niger Delta: Geographies of Impacts and Appraisal of Lapses in Extant Legal Framework*, Resource Policy 45 (2015) 67-68 available on Science Direct.

communities resulting from oil effects on key organisms, damage to soil productivity, damage to crops, depletion of fish population in the water bodies and water contamination.[15] Other effects are water and air quality degradation and loss of the aesthetic values of natural beaches due to oil slicks.[16] Most often than not, these impacts are the direct consequences of oil infrastructure construction, reoccurring oil spills[17] and atmospheric emissions and other oil industry activities.[18] The impacts of oil industry activities on the people of the ND and businesses have also received extensive research and administrative consideration.[19]

Hydrocarbon activities, therefore, exert a considerable social cost on the Nigerian state and its population, especially the 33 million inhabitants that make up the Niger Delta. The damage to the ecosystem caused by hydrocarbon activities levies a reparation and sustenance cost which the state will ordinarily have to deal with. The state depletes financial and material resources in the process of monitoring and controlling the pollution which hydrocarbon activities generates. It does so by virtue of legal guarantees, which place a burden on public authorities to secure rights and preserve lives and properties.[20] The proper allocation of these costs underlies the theory of externalities on which the Polluter Pays Principle (PPP) is anchored. The extent to which the laws, regulations and hydrocarbon policies of Nigeria internalize these costs is questionable and is open to debate.

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[15] E.O Ekhator, *Environmental Protection in the Oil and Gas Industry in Nigeria: The Role of Government Agencies* (2013) 5 I.E.L.R, 196-203

[16] N. De Sadeleer, *Environmental principles, from Political slogans to Legal Rules* (Oxford University press 2002) 67.

[17] Although the estimate of oil Spilled into the Niger Delta environment is disputed between oil companies and environmental rights activists, it is estimated that well over 13 million barrels of oil have been spilled in the Niger Delta since 1958 when oil exploration started in Nigeria; since 2014, a total of 1, 879 spills have been reported to the National Oil Spill Detection and Response Agency (NOSDRA).

[18] According to the EIA, Nigeria flared 379 Bcf of its associated gas production in 2014 a figure, which equals 12% of its gross production. See the US EIA, country analysis Brief: Nigeria, last updated 2016; see also Secretariat of the Organization of the Petroleum Exporting Countries, *OPEC Annual Statistical Bulletin 2015*; Cedigaz, Statistical Database, September 2015.

[19] O. A. Odiase-Alegimenlen, *Environmental and other issues relating to oil Pollution in Nigeria* (2004) OGEL, 3.

[20] For example, the Constitution of the Federal Republic of Nigeria in Section 14 (2) provides that the security and welfare of the people shall be the primary purpose of government.

1.2 AIM AND OBJECTIVE OF RESEARCH

This thesis explores several hypotheses. The central hypothesis of this thesis is that construed broadly, Nigerian hydrocarbon laws applying the PPP can arguably pass as promoting environment justice (EJ). However, in reality, there are substantive legal gaps and barriers which prevents it from doing so. The thesis argues that legislation and regulations applying the PPP in Nigeria's hydrocarbon industry are not designed in manner that effectively promotes environmental justice even if it has potentials to do so.

Secondly, the thesis examines the PPP as a principle of international law. This thesis argues that although the principle enjoys great environmental value, international legal orders and instruments applying the principle do so in a language of compromise that leaves the principle at the slope of the discretion of national authorities. This thesis maintains that this language of compromise makes the full internalization of environmental cost more a matter of academic prophecy than reality.

Thirdly, the thesis critically evaluates the current legal and regulatory framework for the application of the PPP in the hydrocarbon industry of Nigeria. The thesis also identified legal and regulatory gaps capable of encouraging a sub-optimal internalization of environmental cost in Nigeria's hydrocarbon industry. It then argues that innovative legislations anchored on a robust institutional capacity are critical to maintaining a healthy PPP regime in Nigeria's hydrocarbon industry.

Fourthly, this thesis examines the literature of environmental justice (EJ) and argues that the notion of EJ will justify an improved version of the PPP in Nigeria's hydrocarbon industry owing to the latter's potential to address the concerns of several stakeholders. The thesis argues that only the distributive, corrective, substantive and procedural strands of EJ enjoy the closest proximity with the PPP as applied in the hydrocarbon industry. The thesis notes that there are sound justifications for examining the EJ through the lens of the PPP as applied in the hydrocarbon industry. First, Nigerian hydrocarbon industry accounts for a sizable percentage of historic

pollution in the ND.[21] Second, environmental laws applying the PPP in Nigeria's hydrocarbon industry offers residents in the ND little or no protection from environmental despoliation. Third, examining EJ through the lens of the PPP will help stakeholders properly measure legitimate expectations and where necessary make trade-offs that benefits a wider range of stakeholders. Finally, examining EJ through the lens of the PPP not only enjoys the prospects of giving the law a human face but also is more likely to address the social issues that emanates from suboptimal environmental cost obligations in environmental legislations. This by extension could be a worthy route to assuring stability in industrial relations between major stakeholders and reduce address poverty in all its dimensions. The thesis makes the case that an effectual application of the PPP under national law must reflect some EJ principles. To achieve the objectives of EJ a legal framework must possess a pollution prevention capacity and a strong right component; impose and redistribute environmental taxes proportionately, possess potential for reparation and a pathway to state responsibility and accountability.

Finally, this thesis examines the lessons that Nigeria can learn from other jurisdictions in order to position its hydrocarbon laws to properly apply the PPP in a manner that promotes EJ. The thesis argues that how to maintain and control the integrity of licence operations, build through legislation a robust system for quantifying externalities and accommodate a change in regulatory orientation are some lessons that Nigeria can learn from the United Kingdom, Norway, USA and Indonesia. The thesis makes a set of recommendations that can help strengthen the application of the PPP in a manner that promotes EJ. To achieve EJ in the application of the PPP this thesis advocates the need to remodel hydrocarbon laws of Nigeria to address sub-optimal environmental obligations and introduce Environmental Business Case (EBC) in Nigeria's oil industry. The thesis also makes a case for advanced financial guarantees, greening the budget, a project-specific tax system, creation of special environmental courts and changes in both judicial attitude and regulatory orientation. It is argued that these recommendations are vital to achieve EJ in the application of the PPP.

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[21] For the meaning of Historic pollution see F. Centonze and S. Manacorda, *"Historic Pollution Comparative Legal Responses to Environmental Crimes"* (Springer Publishing, 1st Edition 2017) 21-22

1.3 LIMITATION OF RESEARCH

While this thesis notes the expansive nature of EJ in theoretical depth, the thesis explores only the theories and elements of EJ that can be linked with the PPP. The thesis notes that only distributive justice, corrective justice, procedural and substantive justice meet this quality. While this thesis alludes to the application of the PPP in other sectors, it does not address the application of the PPP in all resource sectors but specifically in Nigeria's hydrocarbon industry.

1.4 RESEARCH QUESTIONS

This research will address the following questions:

1.4.1 Key Research Question:

To what extent does the application of the PPP in the hydrocarbon industry of Nigeria promote the principles of environmental justice? This question is the fulcrum of this research.

1.4.2 Subsidiary Research Questions

In order to answer the key research question, the thesis will examine the following subsidiary research questions:

1. What is the conceptual framework of PPP and EJ in the context of the Nigerian hydrocarbon industry? [discussed in Chapter one]
2. Through what legal and regulatory framework is the PPP applied in the Nigerian hydrocarbon industry? [Discussed in chapter two and three].
3. Are current legal and regulatory frameworks in the hydrocarbon industry of Nigeria sufficient to guarantee optimal internalization of environmental costs in the oil and gas industry? [Discussed in chapter three and five].
4. What Framework can help bring the PPP close to the ideals of EJ? [Discussed in chapter four and chapter 5].

5. What are the main theorizations of environmental justice? [Discussed in chapter five].
6. What lessons can Nigeria learn from the manner in which the PPP is applied in other jurisdictions, (especially hydrocarbon jurisdictions) like Australia, India, Indonesia, Norway, United Arab Emirate (UAE), the United kingdom and the United States of America (USA) ? [Discussed in chapter 6].
7. How can existing legal and regulatory instruments of applying the PPP be structured to guarantee optimal internalization of pollution costs in Nigeria in a manner that promotes EJ.? [Discussed in chapter six].

1.5 THESIS STRUCTURE

This research is divided into six unequal chapters. Chapter one (conceptual analysis) explores how the PPP is understood as a principle of international environmental law. The aim of this chapter will be to link the concept of the PPP to environmental regulation in the hydrocarbon industry of Nigeria and attempt to provide explanation supported by legal literatures, of how the application of the principle in the hydrocarbon industry affects the principles of environmental justice.

Chapter two of this research addresses the application of the PPP in the hydrocarbon industry. This chapter evaluates and critically analyses the instruments through which the PPP is applied in the hydrocarbon industry. It shall discuss the underlying philosophy behind these instruments and assess the extent to which they have measured up to the task of internalizing environmental cost in the hydrocarbon industry and whether they are abused by state authorities in the guise of internalizing environmental cost. The chapter provides a comprehensive commentary of the advantages and disadvantages of these instruments and an analysis of whether they live up to their label. It emphasises the need for a rigorous, comprehensive, flexible, and pro-active policy of cost internalization that responds to the complexity and manifold risks in the hydrocarbon industry in order to ensure optimal internalization of environmental cost in the hydrocarbon industry.

Chapter three of this research explores the legal and regulatory framework for applying the PPP in Nigeria's hydrocarbon industry. Particularly, this chapter shall examine the sufficiency of existing constitutional, statutory and regulatory guarantees relating to environmental cost internalization. The contents of the Revised National

Environmental Policy of Nigeria, the environmental Guidelines and standard for the petroleum industry (EGASPIN) 2002 shall all be reviewed. The chapter shall also give an overview of environmental regulation in Nigeria's oil sector and the issues and challenges confronting the internalization of environmental externalities in Nigeria's hydrocarbon industry.

Chapter four of this research conceptualizes the principles of environmental justice and establishes a link between the regulation of environmental externalities and environmental justice principles. This chapter aims to evaluate the long and complex evolution of environmental justice and its metamorphosis from a racial nomenclature to a principle of environmental interrogation. This chapter shall consider the many ramifications of environmental justice and the relevance of the concept in modern international environmental law. This chapter also establishes the environmental justice principles compatible with the PPP and reason why they are so.

The remit of chapter five of this research addresses the principal question of this research: 'whether the application of the PPP in Nigeria's hydrocarbon industry promote environmental justice'? This chapter critically captures the imperfections of the instruments of environmental externality management in Nigeria and measure the extent to which they are sculptured in the progressive images of environmental justice. The chapter examines the policies that keeps the full internalization of environmental cost out of the reach of law. Since this chapter flows from criticisms generated from preceding chapters, its paragraphs shall flow from comprehensive research findings.

Chapter six considers best practices on the application of the PPP from other hydrocarbon and non-hydrocarbon jurisdictions (Australia, India, Indonesia, Norway, United Kingdom and United States of America). This chapter recommends a remodelling of legislative provisions to address sub-optimality and the introduction of advance financial guarantees to bear future environmental costs and an inflation-sensitive liability regime. This chapter also recommends the constitutionalizing environmental rights to promote accountability, the creation of specialized environmental Courts and a new legislation to introduce the requirements of environmental business case. Finally, the chapter recommends a limit to government participation in hydrocarbon commerce, a greening of Nigeria's fiscal expenditure framework, a project-specific tax system and a change in regulatory orientation. The

Chapter concludes that while these recommendations offer a pathway to incremental improvement in the application of the PPP in the hydrocarbon industry, hydrocarbon laws in Nigeria on current analysis do not apply the PPP in a manner that promotes EJ.

1.6 METHODOLOGY

The research methodology for this study shall be socio legal methodology, which is explained below.

Socio-legal research (SLR) is a research model with a rich layer of dimensions.[22] SLR reinstates the centrality of social scientific approaches using both qualitative and quantitative research methods to investigate the impact of law in action and the key role played by ideological factors, including public policy.[23] A study based on SLR is concluded by examining government policy, economics, culture, criminology, ethics and the enforcement of law.

The Socio-legal Studies Association [24] identified three component of socio-legal work to include: higher level social theories of law disconnected from empirical studies; studies grounded in the findings of empirical research to test the validity of theoretical claims or promote further empirical research; and policy-driven empirical projects with little or no connections with prior written theoretical reflections.[25] SLR places legal analysis and legislation within a societal context and examine the law in operation to determine whether the reasons for law's existence have been achieved.[26] Thomas and Wheeler evaluates SLR as a research type where law interfaces within a sociological, historical, economic, geographical or other context.[27]

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[22] B. Hunter and S. Llyods-Bostock (ed), 'Law's relationship with social science: The Interdependence of Theory, Empirical Work and Social Relevance in Socio-legal Studies' in K. Hawkins, 'The Human Face of Law: Essays in Honour of Donald Harris (Oxford: OUP, 1997) 20.

[23] M. Salters and J. Mason, 'Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research' (Pearson Education Limited 2007) 119.

[24] An Association founded in the UK in 1990 to provide a forum for socio-legal scholars to meet and disseminate their work.

[25] M. Salters, (note 23) 123.

[26] C. Morris and C. Murphy, Getting a PhD in Law (Hart Publishing 2011).

[27] S. Wheeler and P. Thomas, 'Socio-legal studies' in D. Hayton (ed), Law's Futures, Oxford: Hart Publishing 2000), 271.

This strand of research reinforces ‘an approach to the study of legal phenomenon that is multi or inter-disciplinary in its approach’.[28] Rather than been cocooned in the theoretical examination of law as it exists on paper, socio-legal theorists travel outside the parameters of law to examine why law works in particular ways and whether the dead letters of law as it exists in books enjoys life in practice. They explore law’s relationship with broader social and political forces-international and otherwise and through such exploration, obtain perspective on culture, identity and social life. The Economic and Social Research Council of the UK refers to SLR as an umbrella term for what is now an exciting, wide-ranging and varied area of research activity; an approach to the study of law and legal processes which covers the theoretical and empirical analysis of law as a social phenomenon. In a report published in 1994 they noted rather explicitly that socio-legal research displays:
“Considerable eclecticism in the subject matter, theorizing and methodology, ranging from macro-theoretical scholarship through empirical scholarship through empirical analyses designed to test and generate theoretical prepositions to experimental designs and small-scale case studies.”[29]

As can be seen from the Report of the ESRC, socio-legal research has both an empirical, contextual and theoretical focus intended to provide as Bradshaw noted, ‘a wholly necessary complement to descriptions and analyses of the positive law’.[30] The choice of SLR demands a focus not only on the content of legal rules but also on the social nature, functions and implications of these rules. Research predicated on this methodology seeks to conceptualize law in one or more of its various contexts of emergence and operation.[31] The research demands an identification of contextual factors that affects law in operation and a critical analysis of the impacts and importance of these factors on the observation of law.[32] It also requires a prediction of how current development impacts on contextual factors that forms the basis for the plural complexion of SLR. SLR also demands an examination of new legal

[28] S. Wheeler, 127
[29] ESRC, Review of Socio-Legal Studies: Final Report, (1994) 2
[30] Alan Bradshaw, ‘Sense and Sensibility: Debates and Developments in Socio-Legal Research Method’s in P. Thomas (ed), ‘Socio-Legal Studies, (Aldershot: Ashgate-Dartmouth, 1997) 312
[31] Alan Bradshaw, 312.
[32] M. Slaters (note 23), 138

developments and their impacts especially on the quality of law and the formulation of solutions where prediction reinforce a bleakness that puts society in danger.[33]

The deployment of SLR in this thesis is justified on several basis. The PPP as a central conceptual focus of this research is not a principle original to law. The principle is one greatly rooted in economics. The economic connections of the principle could explain patterns in its implementation both at international and local levels and help to judge how modern law accords with its original formulation. This greatly accords with the interdisciplinary posture of SLR. Similarly, this research as one premised on Nigeria law would require a consideration of cultural factors that arrests or captures laws and regulations applying the PPP. Policy implementation and enforcement is a function of robust institutional posturing. There is therefore a need to examine the roles which Nigerian institutions play on the quality and design of legislation and the implications which they hold for the society. Institutional culture plays an important role in understanding the challenges of natural resources governance and enforcement of regulations. Corruption is a threat to regulatory efficiency and has often been fingered as the leading cause of 'regulatory capture'. The role, which it plays in shattering environmental tranquility from the devaluation of the amenity value of the environment, is worth attention.

This thesis adopts a formalistic socio-legal posture and emphasis is on formal justifications explaining the law and policy of Nigeria within official documentations and the implications, which they hold for the society. This approach is not empirical, although the analysis does address secondary literature as to the results of empirical studies into how the PPP is applied in practice within the hydrocarbon industry. In particular, this research project draws from scientific studies by the United Nations Environmental Programme (UNEP)[34] and other Non-Governmental Organizations and studies commissioned by government agencies like the Nigerian National Petroleum Corporation (NNPC) and the Nigerian Extractive Industries Transparency Initiative (NEITI). The reference to these studies provides a rich complement to the analysis of the law applying the PPP in Nigeria's hydrocarbon industry as examined

[33] M. Slaters, 312.
[34] The United Nations Environmental Programme Assessment Report on Ogoniland 2011.

in chapter 3 of this thesis using principally the doctrinal method. The studies also share sufficient nexus to the contextual rhythm of this thesis since they are all relevant to the hydrocarbon industry of Nigeria.

The greatest expression of SLR in this thesis is found in the sections dealing with environmental justice. As a subject with social dimensions, environmental justice has become the philosophical mandate of modern social institutions. Since law is a social experiment administered by social institutions for the benefit of a wide- constituency of social actors, the thesis undertakes an investigation into how the laws that apply the PPP in Nigeria's hydrocarbon industry depicts environmental justice concerns in practice. The thesis also considers in chapter five whether law can meet environmental justice concerns in a manner that appeals to all stakeholders in the industry and notes the tensions that may arise from modeling PPP laws after abstract theoretical formulations like environmental justice. The manner in which cultural and economic factors affects the enforcement of these laws are also considered in passing in this thesis.

The deployment of socio-legal research expectedly will allow for a determination of how Nigerian laws applying the PPP affects a greater constituency of legal actors. It can also help predict and explain the responses of social actors to law and possibly nib negative aspects of regulatory behaviour in the bud. SLR in this thesis is expected to also help policy makers formulate a more acceptable regime of PPP that meets the multifarious interest of all stakeholders in the hydrocarbon industry.

However, the point must be made that there are criticisms against SLR. SLR has been accused of being unrefined taking into account the diversity and fluidity of its methodology leading to the production of poor quality data and problematic analysis.[35] Fiona Cownie argued that the unsophisticated nature of SLR is particularly accurate of socio-legal researchers with legal background since doctrinal law is shy of multidisciplinary engagements.[36] While this shortcoming is acknowledged, it is important to make it further clear that the role of SLR in this thesis is complementary.

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[35] Nicola Lacey, 'Normative Reconstruction in Socio-Legal Theory' (1996) 5 Social & Legal Studies 131

[36] Fiona Cownie, *Legal Academics: Cultures and Identities* (Hart Publishing 2004), 54-58.

Given the fact that the methodology shall be deployed together with the doctrinal method, hope exists that the research will achieve a greater clarity and appeal to a wider constituency of audience.

1.7 MODE OF DATA COLLECTION

This research shall rely heavily on primary and secondary sources of law. In particular, the Laws of the Federation of Nigeria (LFN) and regulations made pursuant to them shall be relied upon. The thesis shall also rely on reports, policy documents and guidance notes relevant to the application of the PPP in Nigeria's extractive industry. This thesis also relies on library and online sources such as Westlaw international, Lexis Library international, Willey online library and other E-journals exploring the works of experts in subjects relevant to this thesis.

1.8 LITERATURE REVIEW

The literature review is a pivotal part of the research process and has been described as 'the foundation and inspiration for substantial useful research'.[37] The literature review involves the identification and evaluation of existing research in a subject area that may be relevant to the research aspiration of a particular research project. Arlene Fink champions the view that 'a research literature review is a systematic, explicit and reproducible method for identifying, evaluating and synthesizing the complete body of recorded works produced by researchers, scholars and practitioners.[38] The literature review of this thesis establishes the key research output inscribed in two subject strands and identify the gaps in research where a contribution to knowledge is essential. First, it considers research outputs initiated on the subject of PPP as a principle of international environmental law and then narrow it down to how it is applied in Nigeria's hydrocarbon industry. Second, it also considers research tending to judge the PPP using the standards of environmental justice in Nigeria. No attempt is made to explore the entire literature of the PPP on a global scale. The literature of environmental regulation in Nigeria's hydrocarbon industry is vast and accommodates

[37] David N Boote and Penny Beile, 'Scholars Before Researchers: On the Centrality of the Dissertation Literature Review in Research Preparation' (2005) 34 Educational Researcher 3.
[38] Arlene Fink, *Conducting Research Literature Reviews: from the Internet to Paper* (Sage Publications 2013) 3.

implications relevant to the PPP. This literature review shall identify those literatures relating to the application of the PPP in Nigeria's hydrocarbon industry even if no express mention of the PPP is made in them. The essence of this approach is to ensure that no relevant literature is lost in consideration. The evaluation of this literature shall be done with one aim in mind; to show how this thesis differs from the literatures and how it makes an original contribution to knowledge.

The next paragraph of this review explores the commentaries of scholars as they relate to the PPP.

1.8.1 Commentaries on the Polluter Pays Principle as a Principle of International Law

Extensive literature exists on the PPP and its application as a principle of international environmental law. Most of the literatures acknowledge the philosophical origins of the PPP, which is academically underscored by references to old philosophical texts. Plato for example, was credited with the saying that 'If anyone intentionally spoils the water of another…let him not only pay damages but purify the stream or cistern which contains the water…'[39] Mathew construes this statement as recognition that water could be both privately and commonly owned and as evidence that the PPP can find a source far back in legal history. [40] According to him, the PPP finds parallels with legal philosophies long predating theories of market economics and modern property concepts.[41] As a principle targeted at arresting environmental pollution, Dupuy, describes the PPP as one with foundations rooted in theory of externalities, a theory popularized by the economist Pigou in the twentieth century in his seminal work *'the Economics of Welfare'*.[42] Van Den Berge considers external cost as the most rational way to look at the problem of environmental pollution.[43] Hardin also considers

[39] Plato. 'The Dialogues of Plato', the Laws, Vol. 4 book 8, section 485 (e), translated by Jowett B, (4th Ed, Oxford Clarendon Press 1953).
[40] M. Humphrey, 'The Polluter Pays Principle in transport Policy' (2001) 26 (5) E.L Rev., 451-467, 452
[41] M. Humphrey, 453
[42] "Externalities" are reckoned with as the impact of a transaction (or more generally, of an economic activity) on the third parties that do not participate in it. See P. Dupuy and J. Viñuales, *International Environmental Law* (Cambridge University Press 2015) 71; See A.C Pigou, 'The Economics of Welfare' (1920).
[43] C.J.M Van Den Berge, 'Handbook on Environmental and Resource Economics' (Edward Edgar Publishing) 2009) 197

accountability for externalities a desideratum for fixing the tragedies associated with the communal ownership of property.[44]

The meaning and specific content of the PPP is not the subject of smooth academic debates. As Troman noted, the PPP trips nicely off the tongue but is difficult to unpack.[45] Grossman considers the principle to be an adage rather than a legal principle.[46] While Sands reflects very correctly, that 'the meaning of the principle and its application to particular cases and situations remains open to interpretation, particularly in relation to the nature and extent of the cost included and the circumstances in which the principle will perhaps exceptionally, not apply'.[47]

Gains stated that the PPP 'recalls well established precedents that hold the polluter who creates an environmental harm liable to pay compensation and cost to remedy the harm.'[48] He quickly adds that 'to think of the principle as a simple affirmation of such a liability declaration will be to misunderstand the principle from the outset.[49] Perhaps, Gains' assertion underscore Dupuy' arguments that 'such an interpretation would 'appear pedestrian' and glean the principle of its notional self-sufficiency since other principles of international environmental law holds the promise of similar interpretations.[50] For Schwartz, 'the polluter pays principle was borne out of the need to find a global strategy for pollution control that will minimize the regulatory burden on states.[51] Schwartz opines that the Stockholm Declaration, which called on states to take measures against environmental pollution and to corporate on liability regimes, laid the foundation for the modern reformulations of the PPP.[52]

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[44] Garrett Hardin, 'The Tragedy of the Commons' (1968) 167 Science New Series

[45] S. Troman *High Talk and Low cunning: Putting Environmental Principles into Legal Practice* (1995) Journal of Planning and Environmental Law, 779-96

[46] M.R Grossman (2007) *Agriculture and the Polluter Pays Principle* (2007) Electronic Journal of Comparative Law, 24

[47] Sands P. and Peel J. with Fabra A. and Mackenzie R, *Principles of International Environmental Law* (Cambridge university Press 3rd edition) 228

[48] S. Gaines*, the Polluter Pays Principle: From Economic Equity to Environmental Ethos* (1991) 26 Tex. Int'l LJ. 463.

[49] S. Gaines (note 48)*,* 463.

[50] P Dupuy (note 42) 72

[51] P Schwartz, 'The Polluter Pays Principle' in J.E. Viñuales (ed.) 'Rio Declaration on Environment and Development, a Commentary' (Oxford university Press 2015) 429; See also P. Schwartz, 'Polluter Pays Principle', in Fitzmaurice, M., Ong. D and Merkouris, P (eds.), *'Research Handbook on International Environmental Law* (Edward Elgar 2010) 243.

[52] Stockholm Declaration of the United Nations Conference on the Human Environment (1972), UN Doc. A/Conf.48/14 reprinted in ILM, 1416, Art. 7

Vicha like many other scholars, credits the OECD with the modern reformulation of the principle.[53] He describes how formulations of the principle have evolved from what he styles 'a no subsidy approach' towards an approach advocating full internalization of environmental costs.[54] He also argues that the PPP in OECD and EU countries represents a long recognized practically applied economic and legal principle leading to the internalization of cost for environmental protection, a cost transferred from government to actual polluters who contaminate the environment through production or other activities.

Like Ondrej, De Sadeleer gave an account of the PPP's dynamism. Tracing the historical emergence of the PPP, De Sadeleer notes that the PPP is one of the environmental principles that emerged from the wombs of the post-industrial risk era.[55] He notes that PPP applied first to preventive measures by polluters it extended to cost of government administrative actions occasioned by pollution and then acquired a curative posture which involves the payment of compensation for injurious damage to land and remediation.[56]

Fisher offers a simple definition for the PPP. According to her, the PPP is understood as a principle that seeks to remedy market failures by internalizing the costs of environmental pollution.[57] Fisher argues that the PPP requires in broad terms, that the polluter should pay for the harm they cause.[58] Sunkin argues that the PPP in its true essence demands that all economic activity, which impinges upon the environment, should be fully accounted for in the pricing system of the goods and services produced by such activities.[59]

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[53] O. Vicha, 'The Polluter Pays Principle in OECD Recommendations and its application in International and EC/EU law' (2011) CYIL 2, 57-58; seen also Recommendation of the Council Concerning International; Economic Aspects of Environmental Policies, C (72) 128, (OECD 1972); Recommendation on the I3 implementation of the Polluter-Pays-Principle C (74) 223/Final OECD 1974 (OECD Implementation); The Polluter-Pays Principle: OECD Analysis and Recommendations OECD? GD (92) 81 (OECD Paris 1992).

[54] Vicha (ibid) 57.

[55] N. De Sadeleer, *Environmental principles, from Political slogans to Legal Rules* (Oxford University Press 2002) 3-4

[56] De Sadeleer, 3-4.

[57] E. Fisher, B. Lange and E. Scotford, 'Environmental Law, Text, Cases and Materials' (Oxford University Press 2013) 413.

[58] E. Fisher, 413.

[59] M. Sunkin et al., 'Sourcebook on Environmental Law' ((London: Cavendish Publishers 2002) 53

There has also been extensive academic commentary on the significance of the PPP as a principle of international environmental law. Humphrey maintains that making the polluter pay damages links the legal enforceability of a penalty with the economic imperative of efficiency, which implies that no one should get something for nothing.[60] Troman argues that the PPP is critical to the prevention of trade distortion since its aim is to limit the availability of subsidies in the international trade arena.[61] Wilkinson notes that the principle is handy for use as a principle of rectification and liability in line with the principle of tort and delict.[62] For De Sadeleer, the 'internalizing, redistributive, preventive and curative functions of the PPP combines different objectives- economic, social and environmental in a manner that makes the principle an invaluable tool for sustainable development.[63] Stewart argues that the mechanism deployed by the PPP provide for proper cost allocation, encouraging polluters to reduce pollution. Stewart also argued that the mechanisms could promote sustainable development by providing increased flexibility and incentives for business innovation in less polluting, more resource-efficient technologies and methods.[64]

Other literatures document the drawbacks of the PPP. De Sadeleer notes that the PPP attaches a price to the right to pollute, an endorsement of immoral behaviour that sales the indulgence to pollute.[65] Bugge argues that the flexibility, which the instruments implementing the PPP offer, is a disadvantage in dealing with localized pollution impacts that threaten serious damage if health and ecological thresholds are exceeded.[66] Huber and Wirls also argue that the allowances made for mitigation is incapable of resulting in what they describe as 'the perfect social optimum', since the principle offers benefits for pollution.[67] Finally, Sumudu Atapattu, notes that the

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[60] M. Humphrey (note 40), 453
[61] S. Troman (note 45), 776-796.
[62] Wilkinson David, 'Environment and Law' (Routledge Publishers 2012) 121.
[63] De Sadeleer (note 55), 34-37.
[64] R.B Stewart, 'Economic Incentives for Environmental Protection: Opportunities and Obstacle' in R. Revesz et al., (eds) Environmental Law, The Economy and Sustainable Development, (Cambridge University Press 2000) 171-224.
[65] De Sadeleer (note 55), 35
[66] H.C Bugge, 'Environmental Justice and Polluter Pays Principle, in the Stockholm conference on environmental Law and justice (2006), accessible on, http://www.juridicum.su.se/smcenvjusticeconf/abstracts/HansChristainBugge.htm>
[67] Huber C. and Wirls F. 'The Polluter v the pollute Pays Principle Under Asymmetric information (1998) 35 Journal of Environmental Economics and Management, 69-87

principle remains controversial 'particularly in developing countries where the burden of internalizing environmental costs is perceived to be too high.[68]

This thesis argues that while the PPP remains valuable in the context of international environmental law, the principle has through a process of metamorphosis aided by national discretion acquired meanings not necessarily compatible with its true essence. The thesis notes that the imprecise language of international treaties putting the principle under the firm grips of national discretion endangers the full realization of environmental costs.

1.8.2 A Note on the application of the PPP in Nigeria

Although enormous literature exists exploring the laws and regulation dealing with environmental regulation in the hydrocarbon industry, only a few have considered the legal framework dealing with the application of the PPP in the industry. The first ambitious attempt to do so was in 2008 when Okanabirhie conducted an inquiry into the question whether the application of the PPP in Nigeria's hydrocarbon industry was a mere rhetoric or reality.[69] Okanabirhie deployed a methodology, which she described as comparative, analytical and descriptive. She concludes that the PPP was not meant to change behaviour of operators in the oil sector but is used to enhance the bureaucratic and financial burden on commercial enterprises and that 'reports of the supposed implementation of the PPP in Nigeria's hydrocarbon sector seem more like tales by moonlight.[70]

Another consideration of the PPP under Nigerian law was that undertaken by Gina Elvis-Imo.[71] Elvis-Imo examines the implementation of the PPP in Nigeria and observed that for an effective application, the PPP must answer questions of what amounts to pollution and how much the polluter should pay. The research offers an

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[68] S. Atapattu 'The significance of International Environmental Law Principles in Reinforcing or Dismantling the North-South Divide' in S. Alam, S. Atapattu, C.G. Gonzalez and J. Razzaque (eds.) 'International Environmental Law and the Global South' (Cambridge university Press 2015) 106
[69] Okenabirhie TO, *Polluter Pays Principle in Nigerian Oil and Gas Industry: Rhetorics or Reality?* (2009) CEPMLP Annual Review (Environment and Social Issues in Energy Industry) 1-21
[70] Okenabirhie, 17
[71] Gina Elvis-Imo, 'An Analysis of the Polluter Pays Principle in Nigeria (2010) University of Ibadan Law Journal, 1-39

analysis of the PPP under the NESREA Act and an elementary analysis of how the principle applies in the Nigerian oil industry. Gina then concludes that the PPP in Nigeria is rather weak and ineffective. Tawfiq carried out a much more generic study that emphasized the importance of environmental governance planning.[72] The article notes the danger of a poor regime of compliance monitoring in Nigeria and concludes that the protection of the environment and the proper management of natural resources is a key priority for sustainable development.

Current scholarship on the application of the PPP under Nigerian law have tended to be generic, statute-specific or examined through the lens of liability for oil pollution. Olaniyan examined the role, which the polluter pays principle in oil spill clean-up in Nigeria in a very compelling piece.[73] The kernel of his inquiry was to consider whether the PPP serves as a deterrence to oil spills in the Niger Delta. The research identifies lack of effective penalties, comprehensive spill cleanup law, insecurity and inefficiency of monitoring agencies in addition to other concerns as the challenges militating against the PPP's ability to rise to the responsibility of deterrence.

Ezeanokwasa offers both a specific and generic appraisal of the PPP under Nigerian law in two of his articles. First, he appraises the conformity of the PPP with the 2007 edition of the Nigerian Mineral and Mining Act.[74] His article analysed the operation of the PPP in the solid mineral sector and concludes that the capacity of the civil service is below what is needed to guarantee the functionality of the PPP in that sector. In another article, which is more generic in posture, he attempts an examination of the major challenges confronting the principle as a principle of environmental regulation in Nigeria.[75] Ezeanokwasa links the difficulty in identifying polluters, widespread ignorance about environmental degradation, inefficient enforcement agencies and other factors as the challenges militating against the smooth functioning of the

[72] L.M Tawfiq, 'Recent trends in Environmental Regulation in Nigeria' (2014) 44 Envt', Poly and Law Journal, 461-482
[73] A. Olaniyan, 'Imposing liability for oil Spill Clean-ups in Nigeria: An Examination of the Role of the Polluter Pays Principle' (2015) 40 Journal of Law, Policy and Globalization, 73-85
[74] J. Ezeanokwasa, 'An Appraisal of the Conformity of the 2007 Nigerian Mineral and Mining Act to the Polluter Pays Principle' (2017) 64 Nnamdi Azikiwe University Journal of International Law and Jurisprudence, 64-73.
[75] J.O Ezeanokwasa, 'Polluter Pays Principle and the Regulation of Environmental Pollution in Nigeria: Major Challenges (2018) 70 Journal of Law, Policy and Globalization, 45-53.

principle under Nigerian law. This inquiry centered more on the NESREA Act 2007, EGASPIN, Environmental Impact Assessment Act (EIA) and the NOSDRA Act.

Finally, one piece of work bears relevance on the PPP as applied under Nigerian law. Osamuyimen conducted a study which he entitled "oil pollution and the polluter pays principle: the Nigerian experience".[76] As he notes in the thesis, the study is "concerned with enhancing environmental protection and management in Nigeria's oil and gas industry by exploring the PPP". Even if there is a subtle reference to EJ in the study, there is no express reference to EJ and any attempt at establishing any basis for compatibility between the two principles. Similarly, the work does not attempt in any way to suggest or theorize an environmental justice framework for the application of the PPP. This thesis fills this gap.

1.8.3 A Note on Environmental Justice

The subject of environmental justice (EJ) has grown beyond a singular meaning and has built for itself a strong bank of divergent commentaries. Scholars have all attempted with different degrees of success, to link environmental justice to equal distribution of environmental harm,[77] procedural correctness with emphasis on public participation in environmental decision-making[78] and social conditions on minority people.[79] Other scholars have linked environmental justice to the substantive rights to

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[76] Osamuyimen Enabulele, "Oil Pollution and the Polluter pays Principle: The Nigerian Experience" (2018) Thesis submitted to Glasgow Caledonian University in partial fulfillment of the requirement for award of Doctor of Philosophy.

[77] R.D Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* (Westview Press: Boulder, Colorado, 2000) 116

[78] K. Shradder-Frechette, *Environmental Justice, Creating Equality, Reclaiming Democracy* (Oxford University Press: Oxford 2002) 27; and L.A. Binder, *'Religion, Race and Rights: A Rhetorical Overview of Environmental Justice Disputes'* (1999) 6 Wis. Envt'l. L.J, 4; see also J. Razzaque, *Participatory Rights in natural Resource Management: The Role of Communities in South Asia,* in J. Ebbesson and P Okowa (eds.), *Environmental Law and Justice in context* (Cambridge university press 2009) 123

[79] D. Schlosberg, *Environmental Justice and the New Pluralism: The Challenge of Diversity for environmentalism* (Oxford University Press 1999) 6 Wisconsin Environmental Law Journal 1 at 24-27; D. Schlosberg, *'Reconceiving Environmental Justice: Global Movements and Political Theories'* Journal of environmental Politics (2007) 517-540. In this article, the author noted that "demands for the recognition of cultural identity and for full participatory democratic rights are integral demands for justice as well and they cannot be separated from distributional issues"- 537; S. Foster, *'Justice from Ground Up'* (1998) 86 Cal. L. Rev. 775.

be safeguarded from environmental degradation,[80] and productive justice, which extends the principle to non-human spheres of the environment and animals.[81]

At the level of international law, there have been several attempts to use environmental justice principles as a means of measuring the application of environmental principles like the PPP in practice, but two are worthy of mention. The first was in 2009 when Bugge offered a highly persuasive commentary on the PPP and dilemmas of justice in national and international contexts.[82] The conclusion from his commentary is that the PPP raises issues of justice of both distribution of environmental quality and corrective nature in several relations. In 2010, Pederson analysed the compatibility between the emerging concept of environmental justice and a number of well-established environmental principles.[83] He concludes that in comparison with EJ, the PPP gives raises some confrontation as well as reconciliation with environmental justice.[84]

At the level of Nigerian law, literatures exist which consider EJ especially in relation to restiveness, petroleum politics, pollution in the Niger Delta. [85] Douglas and others x-rayed the connection between EJ and poor governance infrastructures.[86] Ako also offered a highly compelling commentary that suggested alternatives to restiveness for host communities.[87] He argued that the laws operating in the Niger Delta are drivers of conflicts with particular emphasis on the laws regulating access to environmental decision-making and access to justice in environmental matters.

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[80] R.D Bullard, '*The Quest for Environmental Justice, Human Rights and the Politics of Pollution (Sierra Club Books*: San Francisco, 2005) 25; See also R.D Bullard, *'Levelling the Playing Field through Environmental Justice'* (1999) 23 Vt. L. Rev 454

[81] D. Faber, *The Struggle for Ecological Democracy, Environmental Justice Movements in the United States* (Guilford Press: New York 1998) 15.

[82] C. Bugge, *the polluter Pays principle: Dilemmas of Justice in National and International context* in J. Ebbesson and P Okowa (ed), *Environmental Law and Justice in context* (Cambridge university press 2009) 412.

[83] O. W Pedersen, *Environmental Principles and Environmental Justice* (2010) 26 Env.L.Rev, 1

[84] Pederson, 9.

[85] O. Douglas, D. Von Ikemedi, I. Okonta and M. watts, 'Alienation and Militancy in the Niger Delta: Petroleum, Politics, and Democracy in Nigeria' in R. Bullard (ed), 'The Quest for Environmental Justice: Human Rights and the Politics of Pollution' (1st ed, Sierra Club Books 2005) 239-254

[86] O. Douglas, 239-254

[87] R. Ako, 'Environmental Justice in Nigeria's oil Industry: Recognizing and embracing Contemporary legal developments' in R. Percival, J. Lin and W. Piemattei (eds), 'Global Environmental Justice at a Crossroad' (Edward Edgar Publishing 2014) 160-176

1.8.4 Gaps in the Literature

This section considers the gaps in literature of the PPP under International law, Nigerian law and recent attempts to examine the principle through the lens of environmental justice.

Concession must be made to the fact that the literature of the PPP under International law is robust and almost irreproachable. The attempt to rationalize the PPP and analyse its performance at the international arena remains top-notch and this thesis would rely on some of the justifications, means of implementation, functions of the principle in international literatures to gauge the performance of the principle under Nigerian law. The thesis however, notes three gaps in the international literature on the PPP. The first is the inability of existing literatures to reference the role, which the PPP plays in global energy security.[88] The second is the effect of the language of compromise on the poor application of the principle under national law.[89] The third is the role, which the principle plays in promoting corporate governance. [90]This research shall cover these gaps.

Similarly, while the conclusions in the current literature of the PPP under Nigerian law enjoy some merits, the literature falls short in many respects. First, the literature failed to consider the role, which the operation of a typical Nigerian oil and gas license plays in the internalization of environmental cost. Although there was a reference in some of the studies to EGASPIN, Petroleum Act, EIA and other legislations operating in the hydrocarbon industry, most of the analysis were cursory and failed to consider how an operation of the license affects the principle. This thesis aims to fill these gaps.[91]

Second, the literature offers no analysis of constitutional provisions and how they help the cause of environmental cost internalization. Given the role, which the Constitution plays in every legal system as the highest law in the land, an analysis in this regard

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[88] See the discussion on the implications of the PPP in paras. 2.5.2, especially at page 50 of this thesis.
[89] See the discussion on the adoption and implementation of the PPP in international law in paras. 2.5.1, pages 33-43 of this thesis.
[90] See page 51 of this thesis.
[91] See pages 153-176 of this thesis.

will enrich the discussion of the PPP as it applies in the Nigerian Oil industry. This research will therefore offer a commentary of the roles which constitutional rights, jurisdiction, the exercise of legislative powers plays in the internalization of environmental cost in Nigeria's hydrocarbon industry.[92]

Third, there was also no attempt by the literature to consider the role which regulatory orientation plays in the ability of Nigerian regulators to carry out oversight responsibilities. The subject of regulatory orientation is topical in discussions bordering on environmental regulation and has led to transitions in regulatory regimes.[93] Although most of the literatures emphasize the need for greater penalty, there was no articulation of how the prescriptive posture of regulation could defeat the aspiration for a worthwhile preventive mentality on the part of industry. Olaniyan's piece on deterrence effect of the PPP fell short of this consideration particularly. This thesis would also cover this gap.[94]

Fourth, no attempt was made to examine the connections between stabilization clauses in Nigeria's oil and gas contracts and how they affect the internalization of environmental cost in Nigeria's hydrocarbon industry. Stabilization clauses have become part and parcel of international investment agreements and they are reflected in almost all production-sharing agreements contracted with foreign investors.[95] None of the literature examines the role, which they play in the sub-optimal internalization of environmental cost in the hydrocarbon industry. This thesis shall also cover this gap. [96]

Fifth, there is a gap in the literature as to whether attempts at redistribution under Nigerian law are in tandem with theoretical foundation of the principle. In all the

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[92] See the discussion in Section 3.7.2 of this thesis, pages 104-136

[93] Paterson J., *The Significance of Regulatory Orientation in Occupational Health and Safety* (2011) Boston College of Environmental Affairs Law Review, 369

[94] See the discussions on regulatory regimes in section 2.8.1, pages 68-76 and the discussions on the preventive dimension of the PPP under Nigerian law in Paras 3.7.4, pages 152-161.

[95] For an excellent discussion on stabilization clauses see 'P. Cameron, 'In Search of Investment Stability' in K. Talus (ed) 'Research Handbook on International Energy Law' (Edward Edgar Publishing 2014) 124-148; See also P. Daniel and E.M. Sunley, 'Contractual Assurance of Fiscal Stability' in P. Daniel, M. Keen and C. McPherson (eds) in 'The Taxation of Petroleum and Minerals: Principles, Problems and Practice' (Routledge Publishers 2010) 405-424

[96] See the discussion on redistribution under the NDDC Act in Section 3.7.3.2 especially at pages 145-151 of this thesis.

literature examined, the redistributive ability of the PPP under Nigerian law was not measured. This research shall accordingly cover this gap.[97]

Sixth, the literatures do not consider the role, which economic incentives play in the internalization of environmental cost. While the literatures made references to economic instruments, the attempt to identify these instruments especially incentives and the role, which they play in Nigerian law, were at best, cursorily examined. This research shall also cover this gap.[98]

Seven, in relation to environmental justice, although the first two literatures considered offers some analysis on the conflict that arise from an application of the PPP under international law, none of the literatures attempt to particularize the conflicts and relate them to Nigeria. The two other pieces of literatures, which consider environmental justice in relation to Nigerian law limits discussions only to access to justice. No analysis was carried out on key legislations through which the PPP is applied. This thesis would offer an analysis of the compatibility between the PPP as a principle of international law with Nigerian law and close the gap that exist in this regard under Nigerian law. [99]

The role of EJ in this research will be one of great introspection, to measure how the PPP have been able to index the externalities, which arise from hydrocarbon exploration in Nigeria and their impacts on the people of the Niger Delta. EJ will be used to determine whether the burdens and benefits of hydrocarbon activities are equitably distributed in a manner that accounts for environmental externalities. While recognizing that the concept of EJ is a concept with extended importations, this thesis only considers the distributive, substantive and procedural aspects of EJ. [100]Through an EJ analysis of the PPP as applied in Nigeria's hydrocarbon industry, hopes to ensure that laws applying the PPP in Nigeria's hydrocarbon industry have a human face and

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[97] See the discussion on redistribution under the NDDC Act in Section . 3.7.3.2, pages 141-151

[98] See the discussion on redistribution under the NDDC Act in Section 3.7.3.2, pages 145-147; see also the discussion on poor design of environmental incentives in section 5.4.2. of this thesis, pages 264-265.

[99] See discussions in Chapters, 3, 5 and 6 of this thesis.

[100] See chapter four of this thesis, 187-235.

a posture of applicability that will accommodate the interest of several stakeholders in the hydrocarbon industry.

Finally, the thesis explores learning points from different developed and developing countries.[101] Some of the countries considered are the UK, Norway, United Kingdom, United Arab Emirates and Indonesia. The choice of these countries as learning centers for Nigeria is underscored not only by their historical and political affinity with Nigeria but also because they have made enormous progress in relation to the pricing, taxation and regulation of externalities in their resource sectors.

1.9 SIGNIFICANCE OF THE RESEARCH

This study is significant in many respects and makes an original contribution to knowledge.

The study reveals gaps in the legal and regulatory instruments of Nigeria that will help policy makers make appropriate arrangements for the optimal internalization of environmental costs. Secondly, a study of how the PPP justifies the internalization of cost under international and municipal law will help multinational oil and gas companies in Nigeria appropriately measure legitimate expectations given the fact that hydrocarbon investments are made on the basis of net present value (NPV). Thirdly, the study will help Nigerian policy makers strike a healthy balance between the paradoxical objectives of maintaining a healthy balance of payment and protecting the environment. Fourthly, the study will help ensure that the liability regime in Nigeria properly index the cost of environmental damage. Fifthly, the study will also help to guarantee some measure of macro-economic and political stability. Finally, the study will help share and analyze best-practice notes on how to internalize environmental cost in the oil and gas industry in a manner that meets the expectations of several stakeholders.

This study is unique in the sense that it will be contributing to the question as to how environmental cost can be internalized in a manner that promotes equity and sustainable extraction of hydrocarbon resources. This study can provide a template for

[101] See chapter 6 of this thesis.

developing countries to adapt regulation in a manner that advances EJ. At a time when nations are shifting their focus on net zero and environmental systems which guarantees the safety of local communities, this thesis offer directions on how this can be achieved. Although several scholarly works exist which thoroughly explore the PPP and environmental justice, none has considered in detail how the application of the principle in Nigeria affects EJ. The originality of this study is predicated on the specific measurement of the effectiveness of PPP in the hydrocarbon industry of Nigeria using the ideological gauge of environmental justice gaps identified in the literature. The strength of this procedure resides in its ability to help policy makers build fit-for-purpose legal instruments for the internalization of environmental cost in a way that meets the expectation of many stakeholders. In this regard, the study makes an original contribution to knowledge.

CHAPTER 2

POLLUTER PAYS PRINCIPLE AS A PRINCIPLE OF INTERNATIONAL ENVIRONMENTAL LAW

2.1 INTRODUCTION

The PPP emerged out of the need to find a global blueprint for pollution control that will ameliorate the regulatory burden on states.[102] With an old origin and a philosophical shade underpinned by economics,[103] the foundation for the modern reformulation of the principle was laid by the Stockholm Declaration of 1972.[104] The Stockholm Declaration called on states to take 'all possible steps to prevent pollution of the sea by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with the legitimate uses of the sea'.[105] The Declaration also mandated states to 'co-operate to develop further the international law regarding liability and compensation for victims of pollution and environmental damage.[106] Almost immediately, the Organization for Economic Cooperation and Development (OECD)[107] heeded the call for further international co-operation on liability when it adopted the PPP in the same year as an economic principle for allocating the cost of pollution control.[108] The OECD noted that the objective of the PPP is 'to encourage the rational use of scarce environmental resources and to avoid distortions in international trade and investment'.[109] A further recommendation of the OECD in 1974 required that 'the expenses for implementing

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[102] P Schwartz, 'The Polluter Pays Principle' in J.E. Viñuales (ed.) 'Rio Declaration on Environment and Development, a Commentary' (Oxford university Press 2015) 429; See also P. Schwartz, 'Polluter Pays Principle', in Fitzmaurice, M., Ong. D and Merkouris, P (eds.), *'Research Handbook on International Environmental Law* (Edward Elgar 2010) 243.
[103] See the seminal work of Pigou, *'The Economics of Welfare*, (Cambridge University Press 1920) which popularized the economic principle of externalities upon which the PPP is built.
[104] Stockholm Declaration of the United Nations Conference on the Human Environment (1972), UN Doc. A/Conf.48/14, reprinted in ILM, 1416.
[105] See Art. 7
[106] Art. 22
[107] The OECD was formed in 1961 with a mission to promote policies that will improve the economic and social wellbeing of people around the world. See OECD, '*Our Mission'* available on http://www.oecd.org/about/, last accessed on the 21/10/2018; See also O. Vicha, 'The Polluter Pays Principle in OECD Recommendations and its application in International and EC/EU law' (2011) CYIL 2, 57-58
[108] OECD, Recommendation of the Council Concerning International; Economic Aspects of Environmental Policies, C (72) 128, (OECD 1972).
[109] Ibid.

the pollution prevention and control measures that are introduced by public authorities in its member countries must be borne by polluters.[110]

The PPP has also been recognized in the Rio Declaration on Environment and Development in a more generous but imprecise language and a host of other international instruments.[111] The principle has also acquired meanings under international jurisprudence suggesting that it has a role in promoting state responsibility in an environmental context.[112] Although the principle has an attractive nomenclature, a number of uncertainties have been associated with it.[113] The questions ‘who is a polluter’, ‘how much should the polluter pay and for what should he pay’ and ‘what sort of instruments are more in sync with the true spirit of the PPP’ all come within the umbrella of the uncertainties associated with the PPP.[114] This chapter introduces and explains the PPP as a principle of international environmental law. It discusses the character of the principle, the many reformulations by scholars and the functions, which it performs as a principle of international environmental law. This chapter also considers the contents of the PPP and the instruments through which it is applied under international environmental law and municipal law. While noting the multiplicity of instruments available to regulatory authorities for applying the PPP, the chapter concentrates on those economic instruments that aid the internalization of environmental cost. Finally, a critical appraisal of the PPP is undertaken. The chapter then concludes that the PPP has travelled a long road and in the process of its journey to self-realization has acquired diverged importations not necessarily compatible with its nomenclature. The chapter further notes that while the PPP enjoy great environmental value, the quality of cost internalized will lie at the discretion of National Authorities (NA) The chapter concludes that while the existence of the

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[110] Recommendation on the Implementation of the Polluter-Pays-Principle C (74) 223/Final OECD 1974 (OECD Implementation); the Polluter-Pays Principle: OECD Analysis and Recommendations OECD GD (92) 81 (OECD Paris 1992).
[111] Rio Declaration on the Environment and Development 1992, Principle 16.
[112] See for example Directive of the European Parliament and of council on Environmental Liability with Regards to the Prevention and remedying of Environmental Damage PE-CONS 3622/04, 2004 (hereinafter referred to as ‘Environmental Liability Directives 2004); Convention on the Protection of the Marine Environment of the North East Atlantic, 1992: Art. 2 (2) (b) (hereinafter referred to as the OSPAR Convention 1992) and the European Union Council Directive 96/61/EC Concerning Integrated Pollution Prevention and Control.
[113] E. Fisher, B. Lange and E. Scotford, ‘Environmental Law, Text, Cases and Materials’ (Oxford University Press 2013) 413.
[114] E. Fisher (note 113) 413.

discretion by NA to apply the PPP raises hope that some costs may be internalized, the discretion in itself, creates a possibility that full internalization of environmental costs is more a matter of academic prophecy than reality giving the fact that NA weigh the decision to internalize environmental cost against broader considerations of the economic effects of such internalization.

2.2 UNDERSTANDING THE PPP AS A PRINCIPLE OF INTERNATIONAL ENVIRONMENTAL LAW

The PPP assumes a central place in international environmental law. The principle is an economic rule of cost allocation with an old origin[115] whose foundation lies exactly in the theory of externalities.[116] The principle is intended to fix the common tragedy associated with the communal use of environmental resources, what Garret Hardin, referred to as the 'tragedy of the common'. [117] It requires the polluter to take responsibility for the external costs arising from his pollution. The PPP is understood as a principle that seeks to remedy market failures by internalizing the costs of environmental pollution. In broad terms, it requires that the polluter should pay for the harm they cause.[118] It places a burden on the polluter to bear the expenses of preventing, controlling and cleaning up pollution. Its main function is to ascribe the social cost borne by public authorities for pollution prevention and control to the polluter.[119] Albeit, the principle enjoys a melodic rhythm, it does not have a straightforward application.

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[115] Plato stated in his book, *The Dialogue of Plato*: *The Laws*, (4th ed. Translated by Benjamin Jowett, Oxford: Clarendon Press 1953 vol. 4) made the following remarks about the PPP "if anyone intentionally spoils the water of another…let him not only pay for damages, but purify the stream or cistern which contains the water"; For a historical discussion of the PPP see M.R Khan, *Polluter-Pays-Principle: The cardinal Instrument for Addressing Climate Change*, (2015) vol. 4 MPDI open access Journal, 634-653, available on < http://www.mdpi.com/2075-471X/4/3/638>; see also B. Luppi, Francesco Parisi, and Shruti Rajagopalan, '*The Rise and Fall of the Polluter Pays Principle in Developing Countries',* International Review of Law and Economics 32 (2012) 135-144.

[116] "Externalities" are reckoned with as the impact of a transaction (or more generally, of an economic activity) on the third parties that do not participate in it. See P. Dupuy and J. Vinuales, *International Environmental Law* (Cambridge University Press 2015) 71; for an economic explanation of the principle of externalities see R. L. Revesz, '*Foundations of Environmental Law and Policy'* (Foundation Press 1997) 1-18; See also K. Turner, D. Pierce and I Bateman, 'Environmental Economics': An Elementary introduction' (Harvester Wheatsheaf Publishers 1994) 13-54; and P. Preiss, 'Externality Research' in J. E Milne and M.S. Anderson (eds) 'Handbook of Research on Environmental Taxation' (Edward Elgar Publishing 2012) 139-160

[117] Garrett Hardin, 'The Tragedy of the Commons' (1968) 167 Science New Series

[118] E. Fisher, (note 57) 413.

[119] P. Dupuy (note 42) 7.

It has been said that the PPP trips nicely off the tongue but can be dauntingly difficult to unpack and apply.[120] Another commentator rather comically described the PPP as an uncertain principle sometimes viewed as an adage rather than as a legal principle.[121] Irrespective of the fact that it postures itself as a mere version of the duty to repair the damage caused to others as applied in an environmental context, it does not harbour such a limited connotation. For such an interpretation would as some learned authors noted, 'appear pedestrian' and glean the principle of its notional self-sufficiency since other principles of international environmental law holds the promise of similar interpretations.[122]

Perhaps, the tricky nature of the PPP is locked in its historical emergence and dynamism. As one of the environmental principles that emerged from the wombs of the post-industrial risk era; the PPP applied first to preventive measures by polluters, it extended to cost of government administrative actions occasioned by pollution.[123] Later, the principle metamorphosed from a principle of partial internalization to one of full internalization, lengthening its size to cover liability for unintended pollution.[124] The first formalization of the principle is credited to the Organization of Economic Co-operation and Development (OECD).[125] The principle started off as a set of recommendations and later grew to become a legal principle. The metamorphic nature

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[120] S. Troman *High Talk and Low cunning: Putting Environmental Principles into Legal Practice* (1995) Journal of Planning and Environmental Law, 779-96

[121] M.R Grossman (2007) *Agriculture and the Polluter Pays Principle* (2007) Electronic Journal of Comparative Law, 24; See also J.E Hoitink, *Het beginsel devervuiler betaalt: 'reviva' van een milieubeginsel*, (2000) 27 (2) Milieu en Recht, 30

[122] P. Dupuy (note 42) 72.

[123] N. De Sadeleer, *Environmental principles, from Political slogans to Legal Rules* (Oxford University Press 2002) 3-4

[124] N. De Sadeleer (note 123) 3-4.

[125] See OECD council of 26 May 1972 on Guiding Principles Concerning International Aspects of Environmental Policies, Doc. C(72) 128 available on http://webnet.oecd.org/oecdacts/Instruments/ShowInstrumentView.aspx?InstrumentID=4&Lang=en&Book= ; and OECD, Recommendation of the Council on the Implementation of the Polluter-Pays Principle, Doc. C(74)223 (1974) reprinted in 14 ILM 234 (1975); available on http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=11&InstrumentPID=9&Lang=en&Book=False ; According to the 1972 recommendation, "the principle to be used for allocating cost of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so called 'polluter pays principle. This principle means that the polluter should bear the expenses of carrying out the above mentioned measures decided by public authorities to ensure that the environment is an acceptable state. In other words, the cost of measures should be reflected in the cost of goods and services, which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in International trade and investments"

of the PPP qualifies it as a travelling concept with imprecise destinations. As Sands noted, *'the meaning of the principle, and its application to particular cases and situations remains open to interpretation, particularly in relation to the nature and extent of the cost included and the circumstances in which the principle will perhaps exceptionally, not apply'.*[126] Nothing can be closer to the truth. Not only do we have different versions of the principle in international conventions, the wordings expressing the principle have been far from inspiring. Even its inclusions in national legislations are done subject to political compromises that allows for a less-than acceptable internalization of environmental cost.[127] The PPP at international level exists in the form of binding declarations or loosely worded principles intended to expose NAs to the direction of International environmental regulation especially as they relate to the duty of prevention and ex post environmental liability. The fluidity in which the principle is expressed and the variety of instruments for its application most times slams on NAs the onerous burden of balancing the principle's environmental potentials against trade potentials. This burden gives rise to essential trade-offs that leaves its aspiration of environmental sustainability Unattainable. While the PPP shows great promise in the hydrocarbon sector, its reliability would depend on the words expressing it.

2.2.1 Adoption and Implementation of the PPP in International Law

Several international and regional instruments have adopted the PPP as a standard principle of environmental policy.[128] Evidence from these instruments suggests however that the PPP enjoys diverse application in these instruments. Endorsing its

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[126] Sands P. and Peel J. with Fabra A. and Mackenzie R, *Principles of International Environmental Law* (Cambridge university Press 3rd edition) 228; The views of Sand was supported in D. Bodansky, J. Brunnee, E. Hey, '*The Oxford Handbook of International Environmental Law'* (Oxford University Press 2007) 441.

[127] For example, under the Associated Gas Re-injection (Continued Flaring of Gas) Regulations of Nigeria 1984, although the main conditions upon which a certificate for the continued flaring of gas can be issued are contained in Regulation 1 (a) - (d) Regulation 1(e) provides that the minister in appropriate circumstances can order the production of oil from a field that does not satisfy any of the conditions specified in this regulation. This gives the government control over the issuance of certificates to flare gas. This legislation is considered in chapter 3 of this thesis.

[128] In international Conventions adopting the PPP, a distinction is drawn between conventions that proclaim the principle in their preambles (in this case the role of the PPP is merely to interpret the more precise norms contained in the convention) and those conventions that affirm the principle in an operative provision (in which case, the principle is binding). See N. De Sadeleer, (note 16) 23-26.

application in 1972, the OECD Guiding Principles[129] contemplated the PPP as 'the principle to be used for allocating costs of pollution prevention and control measures to encourage the rational use of scarce environmental resources and to avoid distortions in international trade and investment.'[130] Another Recommendation of the OECD in 1974 proposing mechanisms for implementing the PPP recommended that 'the polluter should bear the expenses of carrying out the pollution prevention and control measures introduced by public authorities in member countries to ensure that the environment is in an acceptable state.'[131] To put it differently, this means that the cost of pollution prevention and control measures should be reflected in the cost of goods and services, which cause pollution in production and/or consumption.[132]

In 1989, the OECD extended the PPP to matters relating to accidental pollution from hazardous installations.[133] According the 1989 Recommendation, the cost of measures to prevent and control accidental pollution should be borne by the potential polluters whether taken by them or by the competent authorities including the cost of environmental rehabilitation. The rationale behind this Recommendation is that accident prevention will be more effective when the polluter has to bear the cost of all measures required to be taken due to an accident.[134] The Recommendation created exceptions to the principle as it applies to accidental pollution. It required the polluter to only bear the cost of 'reasonable measures' so as to adopt a responsible approach and make the most cost-effective decisions.[135]

In addition to the recommendations detailed above, the OECD has also made recommendations relating to the use of 'Economic Instruments in environmental Policy concerning circumstances under which financial assistance may be given to

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[129] OECD Recommendation 1972 (note 108).
[130] Ibid.
[131] OECD Recommendation on the Implementation of the Polluter Pays Principle 1974 (note 110) Paras. 2.
[132] Ibid.
[133] Council Recommendation on the Application of the Polluter-Pays Principle to Accidental Pollution, Doc. C (89)88 Final (1989), reprinted in 28 ILM 1320 (1989) available on < http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=38&InstrumentPID=305&Lang=en&Book=False
[134] ibid.
[135] O. Vicha, 'The Polluter Pays Principle in OECD Recommendations and Its Application in International and EC/ EU Law (2011) 2 CYIL, 61

polluters[136] and Environmental strategy for the first decade'.[137] The latter recommendation advocates that 'policies and measures for environmental sustainability should be implemented in a cost-effective manner and contribute to the full and consistent application of the PPP'.[138]

The 1992 Rio Declaration on the Environment and Development provides a contextually extensive definition of the principle.[139] Principle 16 of that declaration declares that *"national authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of the pollution, with due regards to public interest and without distorting international trade and investment"*.

From the tenor of the Declaration, four points are worthy of note. First, national authorities are encouraged to promote the internalization of environmental cost. To internalize environmental cost is *'to incorporate (costs) as part of a pricing structure, especially social cost resulting from products manufactured and used'*.[140] The OECD Glossary of Statistical Terms put the definition of 'cost internalization more legibly. It provides that '*cost internalization is the incorporation of negative external effects, notably environmental depletion and degradation into the budget of households and enterprises by means of economic instruments, including fiscal measures and other (dis) incentives'*. [141] By extension, this will mean allocating through law, the everyday cost of pollution in the hydrocarbon industry to those who are responsible for the pollution in a manner that ensures that those cost forms part of the everyday expenses of the business. What this means is that all economic activity which impinges upon the environment should be fully accounted for in the pricing system of the goods and services produced by such activities.[142] Cost internalization begins with the integration

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[136] Recommendation of the OECD Council on the Use of Economic Instruments in Environmental Policy, of 31s January 1991 [C90) 177/Final].
[137] OECD (2001), Environmental Strategy for the first Decade of the 21st century.
[138] Paras 6.
[139]United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, UNCED Doc. A/CONF.151/5/Rev. 1, 31 ILM 874 (1992) [hereinafter Rio Declaration].
[140] Oxford English Dictionary, *the Definitive Record of the English Language* (3rd Edition 2015). Available on < http://www.oed.com/viewdictionaryentry/Entry/98066> Accessed 23/06/2018.
[141] OECD, Glossary of Statistical Terms, Cost Internalization (2001), available on https://stats.oecd.org/glossary/detail.asp?ID=458
[142] M. Sunkin et al., 'Sourcebook on Environmental Law' ((London: Cavendish Publishers 2002) 53

of the cost of prevention, reduction and control in planning, processing and production and is complete when the polluter takes responsibility for all the cost arising from pollution.[143] This point is important since it affords environmental theorist the treaty tool of measuring how well national authorities, especially in countries like Nigeria (who pledged commitment to the implementation of the Rio Declaration and more recently, the binding Paris Agreement on Climate Change)[144] have fared in promoting the internalization of environmental cost.[145]

Secondly, there is an admonition to use 'economic instruments' in the process of internalizing these costs. Economic instruments are *'fiscal and other economic incentives and disincentives that incorporate environmental costs and benefits into budgets of households and enterprises'*.[146] The use of economic instruments is principally predicated on the fact that most regulations in the hydrocarbon industry applicable at state level have not resulted in environmentally cleaner behaviour, technologies or products.[147] At best, regulations have sort to impose financial sanctions, which are sometimes too minimal and ineffective to encourage a transition to cleaner technologies. For example, the Associated Gas Re-injection Regulation of Nigeria prescribes a fine of 2 kobo (less than 2 pence) for every one thousand standard

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[143] P. Schwartz (note 102) 250; R.B Steward, 'Economic Incentives of Environmental Protection: Opportunities and Obstacles', in Revesz et al., (eds), 'Environmental Law, The Economy and Sustainable development, (Cambridge University Press 2000) 171-244

[144] In its first Nationally Determined Contribution to the implementation of the Paris Agreement on Climate Change Nigeria pledged to reduce its emissions by 20 percent in 2030 from its below business as usual levels and by 40 percent with international support. See Federal Republic of Nigeria (FRN), Nigeria's Intended Nationally Determined Contribution 2014, available at <Microsoft Word - Approved Nigeria's INDC_271115.docx (unfccc.int)> last accessed on the 24/09/2021; FRN, Nigeria's First Intended Nationally Determined Contribution Update July, 2021, available at <2021 FINAL - NDC.pdf (unfccc.int)> last accessed on the 24/0/2021.

[145] Nigeria has taking several actions to meet its obligation under the Paris Agreement as contained in the Agreement. See generally, Lois Barber and Ron Israel, "A check up on Country Efforts to Implement the Paris Agreement (2017) Climate Scorecard Report, 19; LSE Grantham Research Institute on Climate Change and the Environment, "Climate Change Laws of the World: Nigeria Climate Targets, available on < https://climate-laws.org/cclow/geographies/nigeria/climate_targets?from_geography_page=Nigeria> last accessed on the 15th of September, 2020; See also Zahar, Alexander, 'The Polluter-Pays Principle in International Climate Change Law: Are States Under an Obligation to Price Carbon Emissions? (November 9, 2018). Available at SSRN: https://ssrn.com/abstract=3281677 or http://dx.doi.org/10.2139/ssrn.3281677; See also

[146] OECD, Glossary of Statistical Terms, Economic Instruments (Environmental Protection Policy) (2001), available on https://stats.oecd.org/glossary/detail.asp?ID=723 accessed 23/06/2018.

[147] P. Sand (note 126) 125.

cubic feet of gas flared, creating an advantage for gas processing companies to flare gas rather than invest in re-injection facilities.[148]

Thirdly, the polluter is expected to bear any cost directed at pollution prevention and control and remediation measures. The obligation to bear the cost of pollution prevention, control and remediation measures connotes a responsibility on the part of national authorities to design a statutory system for allocating those responsibilities.[149]

Fourthly, the system of allocation must not overlook public interest nor distort international trade or investments.[150] What this means in effect is that for purposes of public policy and international trade the law may sometimes make an exception for a strict application of the PPP for transitional periods to help polluters transit to new methods of pollution abatement.[151]Also this caveat, sought to recognize the variations in the levels of countries' development, their trade and investment capabilities, the capacity to investment or subsidize technology development or ownership and diffusion, and the nature of business generally.[152] The caveat thus, captures the expectations of the framers of the declaration that the deployment of economic instruments to address the cost of pollution given the disparity in the wealth of nations is bound to have implications for public interest at a great cost to the economy. By prohibiting distortions, Principle 16 of the Rio Declaration impresses the need to secure a competitive environment between varying polluter-business types who may seek to internalize their environmental cost or use economic instruments through international trade and investment.[153] The reference to 'public interest' is used in relation to schemes, which has the potentials of cushioning the effect, which an allocation of environmental pollution cost would have on the public. However, public interest can be tricky to define.[154]

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[148] G. Adenji, 'Approaches to Gas Flare Reduction in Nigeria, Global gas Flaring reduction Forum: London (October, 24th and 25th 2012) p. 4.
[149] OECD, Recommendation of the Council on the Implementation of the polluter Pays Principle, Doc. C (74) - 234.; See also M.R Grossman, 'Agriculture and the Polluter pays Principle' (2007) 11 Electronic Journal of Comparative Law, 5-6
[150] Trade distortion is used to describe a tax or action that changes the normal characteristics of trade.
[151] Grossman (note 46) 6.
[152] P. Schwartz, 'the Polluter Pays Principle' in J. E. Vinuales (ed.) 'the Rio Declaration: A Commentary' (Oxford University Press 2015) 433.
[153] Schwartz, 433.
[154] The balance between individuals and social interests, the possibility of individuals reaching decisions that best advance the moral health of the public are the main reasons why public interest is

In terms of linguistic coverage, Principle 16 is an improvement on the original formulation of the PPP by the OECD, which prohibited governmental subsidies for pollution control equipment to guarantee that the price of manufactured goods would reflect the cost of pollution abatement.[155] Even when the use of the expression 'endeavour' betrays the exhortation to national authorities, there is a mandate to promote the internalization of environmental cost and make the polluter pay. Another positive highlight of the Rio Declaration is that it encouraged the use of economic instruments as a strategy of cost internalization. Not only is this likely to strengthen a pollution prevention mentality on the part of industry, it may also incentivize corporate responsibility in a way that benefits the environment by adding a layer of financial burden that links profitability to the exercise of tact.[156]

While the cost internalization aspirations of the Rio Declaration are noble, its soft law[157] approach to implementation leaves it at the mercy of critics. Principle 16 is neither absolute nor obligatory because it lacks the normative stamp of law. Albeit, the definition appears encyclopedic, it cannot be applied in all situations.[158] Another problem with the Rio Declaration is that its emphasis on conditioning application to 'public interest' and trade and investments objectives creates a problem of balancing in regulatory instruments.[159] This problem of balancing is caused by the perennial conflict between environmental regulation and foreign direct investments (FDI). More often than not, for the later to materialize a spiral adjustment of general regulatory burden (environmental regulation inclusive) is sort by the investors to guarantee a fair return on their investments. And since investments in the hydrocarbon industry are done on the basis of Net Present Value (NPV),[160] a hefty regulatory burden would

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tricky to define. See Stephen M. King, Bradley S. Chilton and Gary E. Roberts, "Reflections on Defining Public Interests" (2010) 41 (8) Journal of Administration and Society, 954-978, 956-958.

[155] S. Gaines, *the Polluter Pays Principle: From Economic Equity to Environmental Ethos* (1991) 26 Tex. Int'l LJ. 463.

[156] N. De Sadeleer (note 16), 35.

[157] A soft law is a potential law that is morally but is not legally binding. See F.K Boon, The Rio Declaration and its influence on International Environmental Law S.J.L.S (1992) 3; see also P. Dupuy, Soft Law and International Law on the Environment (1990-1991), 12 Mich. J Int'l L, 420-435.

[158] Edie E. and Van Der Bergh R., Law and Economics of the Environment, Oslo: Jurdisk Forlag (1996)

[159] E. Vinuales, *The Rio Declaration on Environment and Development, A Commentary* (Oxford University Press 2015) 432.

[160] In environmental economics, NPV is a method of determining the current value of all future cash flows generated by a project after accounting for the initial capital investment. See < http://www.investopedia.com/ask/answers/032615/what-formula-calculating-net-present-value-

almost certainly mean that investors may look elsewhere if the burden of internalizing environmental cost is huge. This point is particularly relevant in developing countries where the burden of internalizing environmental cost is perceived as being too high.[161] A spiral adjustment of general regulatory burden is what regulatory experts refer to as 'the race to the bottom syndrome' (RBS) and considered by several scholars as a recipe for poor environmental regulation.[162] This syndrome can manifest when 'a country lowers its standards in order to gain competitive advantage over a foreign exporter'.[163] RBS also occurs when a country has a weak regulatory regime that is incapable of controlling foreign investment or the activities of multi-national corporations in a manner that sustains poor labour standards.[164] Where the RBS exists, regulatory capture is imminent as institutional controls which exists to check environmental irresponsibility are sacrificed on the altar of an arbitrary expectation of economic boom by national authorities.

The compromising language of Principle 16 of the Rio Declaration exhorting states to apply the principle 'without distorting international trade and investment' suggests that where a likelihood exists that the application of the PPP would distort international trade and investment the principle shall play second fiddle. This limitation is somewhat incoherent as the PPP is specifically intended to prevent trade distortions arising from disparate environmental policies among countries by requiring the internalization of environmental cost through the harmonization of environmental policy.[165] It suggests that environmental costs are to be internalized in a manner that keeps international trade and investments safe and free from harm. Not only does this water down the effects of the principle and the international agenda to harmonize it

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npv.asp>; for an excellent analysis of NPV in the petroleum sector see H. Lax, *Political Risk in International oil and Gas Industry (IHRDC, publishers 1983)* 163-173.

[161] D. Hunter, J. Salzman and D Zaelke, 'International Environmental Law and Policy' (4th ed., New York Foundation Press, 2011) 484; see also S. Atapattu 'The significance of International Environmental Law Principles in Reinforcing or Dismantling the North-South Divide' in S. Alam, S. Atapattu, C.G. Gonzalez and J. Razzaque (eds.) 'International Environmental Law and the Global South' (Cambridge university Press 2015)106

[162] See E.O Ekhator 'Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation' (2016) 21 Annual Survey of International & Comparative Law, 48

[163] Kofi Addo. 'The Correlation between Labour Standards and International Trade (2002) 36 Journal of World Trade, 285-291.7

[164] E.O Ekhator ''Regulation of Labour Standards: An International */Perspective (2009) 2 Journal of Globalization and Development in Africa, 11.

[165] D. Wirth, '*the Rio Declaration on the Environment and Development: Two Steps Forward and One Back or Vice Versa'* (1995) 29 Georgia Law Review, 643.

globally, but also it provides a leeway for national authorities to justify its poor implementation. The admonition to states not to distort trade and investment overlooks the fact that by reducing the potential for substandard environmental policies to serve as de facto export subsidies, an affirmative requirement for cost internalization also tends to minimize, not exacerbate trade distortions.[166] The value of the innovation, which, a strong cost internalization burden creates for companies from research and development investments expands the frontiers of trade and investment rather than distort them.[167] Since the philosophy behind the Rio Declaration is to redesign the global outlook of the earth as the home of man and to establish an anthropocentric focus on environmental regulation with man at the 'center of concerns for sustainable development',[168] a linear preservation of trade and investment at the expense of cost internalization is bound to shift the focus of the declaration.

Aside the Rio Declaration, other international instruments have made extensive provisions adopting the PPP as a principle of environmental policy though with varying applications. Some instruments require the principle to be deployed as a mandate-fulfilling vehicle to prompt state guidance in an environmental context especially in relation to the allocation of environmental cost.[169]

For others, it applies as an indication of responsibility and commitment by states for polluting activities and their probable consequences. For instance, the Kyoto Protocol to the 1992 Climate Change Convention applies the principle through responsibility and commitments by states to take measures through schemes of emissions trading, join implementation and clean development mechanisms all aimed at reducing specific

[166] See also D. Wirth, The International Trade Regime and the Municipal Law of Federal States: How Close a Fit? (1992) 49 WASH. & LEE L. REV. 1389, 1400.
[167] Ibid; imposing environmental tax for example on polluting activities is likely to increase efforts to generate new ideas about abatement options, subsequent filings of new patents, pilots of new technologies, change in process and product characteristics and a reduction of emission in lower cost. See H. Vollebergh, 'The Role of Environmental Taxation in spurring Technological Change' in J. E. Milne and M.S. Anderson (ed.) 'Handbook of Research on Environmental Taxation' (Edward Elgar Publishing 2012) 360-376
[168]The last statement of the preamble to the Rio Declaration portrays the Declaration as 'recognizing the integral and interdependent nature of the earth as our home'. Principle 1 of the Rio Declaration provides that 'human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature''. For a comprehensive discussion on the philosophy of the Rio Declaration, see J. Vinuales, (note 53) 65-73.
[169] P Schwartz (note 1) 245; See also The Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea 1992: Art. 2: 5 and the Rotterdam Convention on the Protection of Rhines 1998:

greenhouse gases leading to minimal climate change.[170] Both the OECD Recommendations and the Rio Declaration on the Environment and Development 1992 made references to 'national authorities' and 'public authorities' as the rallying point of cost allocation and internalization. The nudge to national authorities to internalize environmental cost is in itself a recognition of state sovereignty. It is an express statutory realization that the sovereign authority of state together with the law-making powers that come with it is critical to internalizing environmental cost and making the polluter pay. The Principle of State Sovereignty allows states within limits established by international law to conduct or authorize such activities as they choose within their territories.[171] An alternative argument, however, is that by admonishing national authorities to internalize environmental cost the PPP encroaches into the space of state sovereignty. The only consolation against this argument is that most instruments applying the PPP are tender and admit of a discretion that puts national authorities in charge in matters of policies.[172]

Given the criticality of state commitments as it concerns environmental pollution, there has been a call for environmental rights emanating from international instruments (including remedial rights like the rights to compensation and reasonable reinstatement) to be accommodated in the Constitution of nations not as social rights but as fundamental rights.[173] This call is predicted on the ubiquity of environmental problems, the prime position of the Constitution amongst legal norms and the tendency to promote the coordination of environmental protection measures.[174] Other reasons include the need to promote environmental protection measures amongst states, the need to isolate environmental issues from legislative exuberance especially in liberal democracies and the promise which such constitutional inclusion hold for citizen involvement in environmental protections measures.[175]

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[170] Art. 2 (1) (a) (i)-(viii) of the Kyoto Protocol to the United Nations Framework Convention on Climate Change 1992.
[171] See Principle 21 of the Stockholm Declaration 1972.
[172] See for example, Principle 16 of the Rio Declaration on Environment and Development.
[173] T. Hayward, 'Constitutional Environmental Rights' (1st ed. Oxford University Press 2005) 5-7.
[174] T. Hayward, 5-7.
[175] T. Hayward, 5-7.

Other instruments recognize the PPP as a general principle of International law. [176] Art. 38 of the Statute of the International Court of Justice (ICJ) mandate the court to apply in addition to other principles listed 'general principles of law recognized by civilized nations'. A principle qualifies as general if it is potentially applicable to all members of the international community across the range of activities that they carry out or authorize and in respect of the protection of all aspects of the environment.[177] Some of the general principles and rules relating to the PPP are the responsibility not to cause damage to the environment of other states or of areas beyond the limits of their national jurisdiction[178] and the principle of preventive action.[179] Other general principles include, the principles of good neighbourliness,[180] sustainable development with its subsidiary principles like,[181] intergeneration equity,[182] sustainable use of resources,[183] and the principle of equitable use of natural resources.[184]

A number of cases illustrate the application of the PPP as a general principle of international environmental law. In the *Trail Smelter Case,*[185] a dispute arose out of

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[176] See also the preamble to the UNECE Convention on Transboundary effects of Industrial Accidents, 1992

[177] Sand (note 126) 187.

[178] Principle 2 of the Rio Declaration on Environment and Development.

[179] The principle of preventive action is the principle requiring the prevention of damage to the environment, and otherwise to reduce, limit or control activities that might cause or risk such damage. See Sand (note 126) 200

[180] See Art. 74 of the United Nations Charter; Principle 24 of the Stockholm Declaration and Principle 27 of the Rio declaration. See also the *Lac Lanoux Case* (Spain v France), 12 RIAA, 285.

[181] See the Report of the World Commission on Environment and Development: Our Common Future 1987, 43; See also the *Pacific Fur Seal Arbitration*; *Gabicikovo-Nagymaros Case* [1997] ICJ Reports 78, para. 140; and the *Shrimp/Turtle Case,* 38 ILM 121 [1999], para. 129 where the WTO Appellate body noted that the Preamble to the WTO Agreement clearly recognizes 'the objective of sustainable development' and characterize it as a concept that 'has been generally accepted as integrating economic and social development and environmental protection.

[182] See the preamble to 1968 African Nature Convention; Art. 4 of the World Heritage Convention 1972; Principle 1 of the Stockholm Declaration 1972; Art. 4 of the Rio Declaration which associated the concept of intergenerational equity to the right to Development; and E. Brown Weiss, *'In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (1989)

[183] Art. 1 of the African Nature Convention 1968; See also Principles 3 and 5 of the Stockholm Declaration which calls for the non-exhaustion of renewable natural resources and the maintenance and improvement of the capacity of the earth to produce vital renewable resources'; and Principle 27 of the Rio Declaration.

[184] See Principle 3 of the Rio Declaration on Environment and Development invokes 'the right to development as a means of equitably meeting the developmental and environmental needs of future generations; see also Art. 3 (1) and 4 (2) (a) of the Climate Change Convention where all parties undertake to be guided by guided on 'the basis of equity in their action to achieve the objectives of the convention and where parties also agree to take into account the need for 'equitable and appropriate contributions' by each of them to the global effort regarding the achievement of the objective of the convention; and the *Pulp Mill on Rivers Uruguay (Argentina v Uruguay),* Order of 13 July 2006, para.177.

[185] Trail Smelter Case, 16 April 1938

damage done to crops, pasture land, trees and agriculture in the United States for sulphur dioxide emission from a smelting plant at the Consolidated Mining and Smelting Company of Canada at Trail, in British Colombia. The arbitral Tribunal to whom the dispute was submitted for arbitration held that under the principle of international law no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein where there is a likelihood of serious consequence or injury.

Similarly, in the *Iron Rhine Case,*[186] the arbitral Tribunal declared that 'the duty of prevention is now a principle of general international law that applies not only in autonomous activities but also in activities undertaken in the implementation of specific treaties between parties'.[187] Also, in the *Pulp Mills Case,*[188] the ICJ clarified that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a state in its territory.[189] Establishing the interconnection between the obligation to prevent harm and the requirement to exercise due diligence, the ICJ identified the obligation 'to act with due diligence' as 'an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators'.[190]

While the above decisions strengthen the international attention, continuously placed on the principle of prevention (an integral part of the PPP) as a means of strengthening state obligation in an environmental context, there is nothing in the decisions which suggest that the due diligence of states demand a total prevention of significant harm.[191] Again, the decisions have no direct application on municipal law where the

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[186] Iron Rhine Case Arbitration, Belgium v. Netherlands, Award, ICGJ 373 (PCA 2005), 24th may, 2005, Permanent Court of Arbitration, Paras. 59 and 222, Paras. 59 and 222.
[187] Ibid.
[188] Note 64,
[189] *Pulp Mills Case,* paras. 101.
[190] Ibid; see also Certain Activities Carried out by Nicaragua in the Border Area (Nicar. v. Costa Rica) and Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica), Separate Opinion of Bhandari, J., 2015 I.C.J. 796 (Dec 16).
[191] Commentaries on the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Yearbook of International Law Commission (2001) II, Part 2, and Paras. 7.

PPP is expected to find the greatest expression. Preventive obligations would therefore exist only within the limits to which they are permitted by national authorities.

Despite the seeming posture of the PPP as a general principle of international law, there are instances where International Tribunals have refused to recognize it as such. In the *Rhine Chlorides Case,*[192] while noting that the PPP features in several international instruments and operates at various levels of effectiveness, the Tribunal disagreed with the view that the principle is a part of general international law. With the greatest respect to the Tribunal, this view stands against conventional realities. It is doubtful whether there is any country in the world that does not apply the PPP in one form or the other across different range of nationally authorized activities in relation to the protection of different aspects of the environment. Major oil producing countries like US,[193] Russia[194] and Norway[195] all have provisions applying the PPP in one form or the other across different aspects of the environment. While the quality of cost internalization varies amongst countries, such variation does not erode the general application of the PPP either as rules relating to prevention or rules allocating rights and liabilities with respect to environmental despoliation.

Other legal orders that have applied the PPP include the Convention for the Protection of the North-East Atlantic,[196] the International Convention on Civil Liability for Oil

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[192] Case Concerning the Auditing of Accounts Between the Kingdom of the Netherlands and the French Republic pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine Against Pollution by Chlorides of 3 December 1976, Netherlands v France, Award, ICGJ 374 (PCA 2004), 12th March 2004, Permanent Court of Arbitration [PCA], Paras. 103.

[193] Under the US Oil Pollution Act 1990 'a responsible party is liable for total clean-u cost of an oil spill plus $75 million liability limit to cover economic damage resulting from oil spill from offshore oil and gas activities, see s 1002 (b) (16); See D W Robertson 'Criteria for recovery of economic Loss under the Oil Pollution Act 1990' (2012) 7 Texas Journal of Oil, Gas and Energy Law, 241; See also Andrew B Davis, 'Pure Economic Loss Claims under the oil Pollution Act: Combining Policy and Congressional intent' (2011) 45 Columbia Journal of Law and Social problems.

[194] Art. 7.2 of the Russian Federation law on Production Sharing Agreement (PSA) No. 225-3, Economic Law of Russia, provides that a PSA must obligate the investors to 'take measures at preventing harmful impact of the said operations upon natural environment, as well as remedy the consequences of such impact'.

[195] Section 5-4 of the Petroleum Act of Norway 1996 provides that 'whoever is under obligation to implement a decision relating to disposal is liable for damage or inconvenience caused willfully or negligently in connection with disposal of the facility or the implementation of the decision'.

[196] See Article 2 (2) (b) of the Convention for the Protection of the Marine Environment of the North-Atlantic (1993) 32 ILM 1069 (hereinafter referred to as the OSPAR Convention) provides as follows: "The Contracting parties shall apply the polluter pays principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by the polluter".

Pollution Damage 1969,[197] WTO law[198] and European Union (EU) law.[199] The PPP has also been adopted either explicitly or implicitly as part of the legal system of several countries.[200]

2.2.2 The Implications of the Polluter Pays Principle

The PPP holds a lot of implications that cling to justifications rooted in efficiency, equity, and judicial and pedagogical arguments. This section explains the principles associated with the PPP and the breadth and depth of the principle.

The idea that the 'polluter' shall 'pay' precludes the victims of pollution, society at large, nature and future generations from paying for the polluter's own misdeeds.[201] Not only does the PPP lay the burden of pollution at the doorsteps of the polluter, it ensures that taxpayers do not shoulder such a burden for the polluter. The principle

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[197] See Articles 3 (1) and 4 of the Convention. Article 3 (1) provides that "except as provided in paragraphs 2 and 3 of this Article, the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for the pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident". Article 4 relates to liability for two or more ships. It provides thus; "when oil has escaped or has been discharged from two or more ships, and pollution damage results therefrom, the owners of the ships concerned, unless exonerated under Article III, shall be jointly and severally liable for such damage which is not reasonably separable." The UK implemented this Convention in the form of the Merchant Shipping (Oil Pollution) Act 1971 now the Merchant Shipping Act 1995. See D.J Cusine, *The International Pollution Fund as Implemented by the United Kingdom* (1977-1978) 9 J. Mar.& Com 495; In Nigeria the International Convention on Civil Liability for Oil Pollution Damage (Ratification and Enforcement) Act 2006 Laws of the Federation of Nigeria (LFN) Chapter 129 2004.

[198] In *United States-Taxes on Petroleum and Certain Imported substances [1987]* the WTO dispute settlement body held that the PPP was compatible with GATT rules on tax adjustment.

[199] Article 191 (2) of the Treaty on the Functioning of the European Union (TFEU) provides that "Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."; See also the EU liability Directive and Directive 2008/99/EC on the Protection of the Environment through Criminal Law.

[200] Nigeria is one of the countries that have accepted the PPP through a cocktail of different legislations; In the UK, the PPP underpin the regulatory regime such as the Contaminated land regime under Part 2A of the Environmental; Protection Act 1990, see P. Stookes, *'A Practical Approach to Environmental Law'* (2nd Ed, Oxford university press 2011) 29; In the US, the PPP is imposed by the 1980 Comprehensive Environmental Response, Compensation and Liability Act; the Indian Supreme Court in *Indian Council for Enviro-Legal Action v Union of India* (2011) 8 SCC, 161, held that the PPP extends to compensating the victims of pollution and that remediation of damaged environment is part of the process of sustainable development and as such, the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology; for further examples, see notes 89 and 90 of this chapter in relation to Russia and Norway.

[201] C. Bugge, *The polluter Pays principle: Dilemmas of Justice in National and International context* in J. Ebbesson and P Okowa (ed), *Environmental Law and Justice in context* (Cambridge university press 2009) 412.

implies that as much as possible, the social cost of pollution should be assigned exclusively to the polluter in a manner that makes it an integral part of the polluter's production cost.[202] This is known as the principle of full cost pricing.[203] What this means is that the otherwise free services of the natural environment are valued and regarded as if they are comparable to labour or capital cost.[204] This has several effects. Cost assignment to the polluter can trigger a rise in production cost that can decline the output of the polluting product. The polluter may pass on part of the increased cost of production to the consumer or may alter his choice of products to less polluting ones.[205] In a way, the PPP is an efficient strategy for regulating the liability for environmental pollution by ensuring that the social costs that emerge from the polluter's industrial activities are fully borne by him in order to incentivize corporate practices that can help him evade the financial cost of those burdens and keep his business on the tracks of profitability.[206] This implication of the PPP is designed to foist a cardinal obligation on a polluter to avoid pollution or bear the consequences of its occurrence.[207] Its intendment is to create a built-in incentive for Research and Development (R & D) for new pollution abatement technology.[208] Since the essence of every business is to make profit, industrial processes that perpetuate pollution cannot but strengthen an operator's losses. To avoid such unhealthy losses, obsolete industrial processes will have to give way for new pollution abatement processes. It will therefore be in the operator's interest to fund pollution abatement research especially where it opens a new vista of business opportunity for it since the PPP requires him to bear the cost of pollution prevention, abatement and control measures exclusively.[209]

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[202] C. Bugge, 412.

[203] See C. Cleveland, & C. Morris (Eds.), *Dictionary of energy* (2nd ed.). Oxford, UK: Elsevier Science & Technology. Retrieved from http://search.credoreference.com/content/entry/este/full_cost_pricing/0; See also D. M Hansman and P Mongin 'Economists' Responses to Anomalies: Full-Cost pricing versus Preference Reversal'; J. Netzer and J. Thepit 'Full cost Pricing and Market Structure' (2004) Universite Locus Pasteur, 1-2 and E. Bellino 'Full Cost Pricing in the Classical Competitive Process: A model of Coverage to Long-run Equilibrium' (1997) 65 (1), Journal of Economics, 41-54.

[204] D. Pearce, *the Polluter Pays Principle, Briefing Papers on key Issues in environmental economics* (1989-2003) Gatekeeper series No. LEEC 89-03] 2.

[205] D. Pearce, 2.

[206] D. Pearce, 2

[207] Sometimes, the consequences of pollution can include bankruptcy proceedings where the net worth of the company is far below the cost of meeting obligations for pollution.

[208] Mizan R Khan, 'Polluter-Pays-Principle: The Cardinal Instrument for Addressing Climate Change' (2015) 4 (3) MDPI Law Journal, 640

[209] Mizan R. Khan, 640

The above logic will therefore demand that the polluter will not be entitled to any form of indemnity from the state for restricting or prohibiting his pollution activities. State aids[210] and subsidies that tend to limit the polluter's obligation are prima facie inconsistent with the PPP and limit its application.[211] Since the PPP requires polluters to bear the cost of their pollution prevention and control measures, the idea of state aids sits awkwardly with the PPP.[212] State aids also undermine the system of free and non-distorted competition and destroys the state's image of neutrality as an arbiter of equal treatment.[213]

The PPP also holds the implication that nature and the victims of pollution should not bear the burden of the polluter's overreaching industrial activities.[214] In this sense, the PPP wears a preventive mien that shields nature from the possibilities of occurring pollution by ensuring that the polluter is allocated the burden of meeting the technological needs of safe operations.[215] It also ensures through a string of legal provisions and guarantees, that where the limits of scientific and technical progress

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[210] Article 107 of the Treaty on the Functioning of the European Union provides subject to exceptions listed in the same article that "any aid granted by a member state or through state resources in any form whatsoever which distort competition by favouring certain undertakings or the production of certain goods shall insofar as it affects trade between member states, be incompatible with the internal market"; the European Court of Justice (ECJ) laid down four conditions that a measure must satisfy to qualify as a state aid tow it; (a) an advantage must be conferred on the recipient of the aid measure; (b) the advantage must be of state origin (c) the aid must have a selective nature and (d) The aid must be liable to affect trade between the member states. See *Belgium v Commission ('Tubemuse')* [1990] ECR 1-959, paras. 25.

[211] That said, State aids continue to form the fulcrum of national environmental policies the world over. Some traditional justifications for resorting to state aids includes (a) the need to limit the investment burden of the private sector in other to comply with environmental regulations (b) the need to compensate for costs incurred by the implementation of -harmonized standards (c) the need to encourage undertakings at the forefront of technology innovation in pollution abatement. State aids can take the form of subsidies, loans, direct investments, tax relief, preferential tariffs, tax remission, and exemptions from the obligations to pay fines or other pecuniary penalties. See the following articles and books for excellent discussions on state aids and their effects on environmental protection; N.de Sadeleer, *State Aids and Environmental protection: Time for Promoting the Polluter pays Principle,* (2012) NELJ, 4; G. Van Calster, ' *Greening the EC's State Aid and Tax Regimes'* (2000) 21 ECLR 294; H. Vedder, *Competition Law and environmental protection in Europe: Towards sustainability* (Groningen, Europa Law Publishing, 2003; P. Eeckout, J. Flynn (eds.), *The Law of State Aid in the European union* (Oxford University Press 2004) 245-264; A. Kliemann, *'Aid for Environmental Protection*', in M.S Rydelsky
(ed.), '*the EC State Aid Regime: Distortive Effects of State Aids on Competition and Trade* (London, Cameron & May, 2006) 315-346.

[212] N. de Sadeleer, Environmental Principles (Oxford University Press, 2002) 21-60.

[213] Ibid.

[214] H. C Bugge, (note 201) 412.

[215] H.C. Bugge, 412.

justifies pollution and consequent environmental damage, nature should not be made worse off and that the polluter should pay to restore nature to its original productive state.[216] What this means in effect is that damage to nature has to be compensated or repaired irrespective of the consequences of the pollution for people or society.[217] The PPP therefore becomes a tool through which responsibility is imputed directly or indirectly to dealing with hazardous or dangerous substances, requiring them to take preventive or remedial action. International legal instruments that apply the PPP in this posture have been notable in the context of oil pollution, sea transfer of hazardous substances, waste exports, industrial accidents or transboundary watercourses, carriage of dangerous goods, nuclear pollution and a general system of liability resulting from activities dangerous to the environment.[218] Some of these liability trends in international legal instruments have been effectively localized and have far reaching financial implications under municipal law. A classic illustration of how far a state authority can go in the preservation of nature was demonstrated by the US government in relation to the Gulf of Mexico oil spill.[219]

Although, this implication sits well with the 'curative dimension' of the PPP as it relates to remediation of the ecosystem and its sustaining abilities, practical realities sometimes reveal the limit of this approach. One weakness of this curative theorem of the PPP is that the intervention of state authorities is limited especially where the intervening authority can very well pass for the polluter.[220] In the hydrocarbon industry, most intervening state authorities participate in oil and gas activities through

[216] H.C. Bugge, 412.
[217] H.C. Bugge, 412.
[218] See the Convention for an International fund for Compensation for Oil Pollution Damage, 1971 (Replaced by Protocol of 1992) ((The Fund Convention); Protocol on Liability and Compensation for Damage from Transboundary Movement of Hazardous Waste and their Disposal 1999 (Basel Liability Protocol); Paris Convention on Third party Liability in Field of Nuclear Energy 1960 (as amended by the 2004 Protocol); Convention on Liability for Damage Resulting from Activities Dangerous to the Environment, 1993 (Lugano Convention) and international Convention on Civil Liability for Oil Pollution Damage 1969 (replaced by Protocol of 1992).
[219] For spilling well over 4 million barrels of hydrocarbons into the Gulf of Mexico, BP was made to pay a total of $20.8 billion covering penalty under the Clean Water Act ($5.5 billion), liability for natural resources damages ($7.1 billion), initial commitment for early restoration ($1 billion), liability for unknown injury and adaptive management ($700 million), liability under the False Claims Act for royalties on oil and other claims ($250 million) and liability for state and local economic claims ($5.9 billion). See the United States Department of Justice Factsheet of proposed Consent Decree with BP for Deepwater Horizon/Macondo well oil spill available on < file:///F:/BP%20FACESHEET%20OF%20LIABLE%20MONETARY%20COMPENSION%20FOR%20THE%20MACONDO%20SPILL.pdf>.
[220] N. de Sadeleer, (note 20) 37.

national oil companies that hold equity interest on the state's behalf.[221] Although these companies are registered under laws, which guarantee their autonomy from state control, the substance of their day-to-day engagement betrays any form of autonomy.[222] The implication is that where pollution occurs as a result of their activities, it becomes difficult for the regulator as the intervening authority to prevail on another state entity to become subjected to a burden of reparation which may clearly be outside the scope of its approved budget.[223] A common problem that runs through many national oil companies is their inability to honour cash calls most of which are intended for environmental remediation.[224]

The PPP also entails that future generations shall not pay for the pollution of today's generation. What this means is that the cost of preventive, compensatory and restoring measures must be covered by the present polluter and the present generation and not be left to the future generation.[225] This implication connote that the polluter should internalize the cost of pollution within a reasonable time from when the act of pollution occurs. In a sense therefore, the PPP incorporates the principle of intergenerational equity.[226] This principle requires that the environment should be protected for the benefit of the present and the future generation.[227] Often criticized as having a narrow

[221] The Nigerian National Petroleum Corporation (NNPC) is the organization saddled with responsibility of managing Nigeria's interest in joint venture agreements with international oil companies. See NNPC joint Venture operations available on < http://nnpcgroup.com/NNPCBusiness/UpstreamVentures.aspx>.

[222] For Example although the Nigerian National Petroleum Corporation (NNPC) by virtue of Section 1(1) (2) of the NNPC (Establishment) Act 1977 is declared as a body corporate with perpetual succession, a common seal and a board to run its affairs, subsection 3 of the same section makes the minister of petroleum resources (an authority appointed by the president by virtue of section 5 of the Constitution of the Federal Republic of Nigeria 1999) the chairman of the board. This firmly puts the board under the government's control.

[223] For example, since the UNEP Report on Ogoniland came out in 2011, no amount of money has been budgeted by NNPC to fulfil its own obligation of the minimum clean up expenditure of $1 billion recommended by UNEP. Rather, the NNPC questions the authenticity of the Report and its finding. See Vanguard Newspaper of 6th August 2011 available on https://www.vanguardngr.com/2011/08/uns-niger-delta-report-ogoni-era-mitee-reject-un-report/ last accessed on the 5th of October 2017.

[224] Nigeria presents a unique example. With respect to the clean up of Ogoni land, it holds 51% controlling shares of Joint venture agreement that pulls together the string of companies participating in the operation. The implication is that the country shall bear a lion share of the burden required to clean up the land when the operator makes a cash call.

[225] D. Shelton, *Describing the Elephant: International Justice and environmental Law* in J. Ebbesson and P Okowa (ed), *Environmental Law and Justice in context* (Cambridge university press 2009) 62-63.

[226] D. Shelton (note 225) 62-63.

[227] E. Brown Weiss, 'In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity (1989) 2; See also D. Tladi, 'Strong Sustainability, Weak Sustainability, Intergenerational Equity and International Law: Using the Earth Charter to Redirect the Environmental Ethics Debate (2003) 28 S. Afr. YB Int'l L, 200-210.

anthropocentric focus, the principle of intergenerational equity holds three implications: first, that each generation is required to conserve the diversity of the natural and cultural resource base so that it does not unduly restrict the options available to future generations to satisfy their values and needs.[228] Second, that the quality of ecological processes passed on should be comparable to that enjoyed by the present generation.[229] Third, that the past and present national heritage should be conserved so that future generations can have access to it.[230]

Two recent cases in the United States and Netherland illustrates the modern operation of the principle of intergenerational equity. In *Juliana v United States,*[231] the plaintiffs approached a District Court in the US to rule that the Federal Government (FG) have violated the plaintiff's fundamental rights' to 'a climate system capable of sustaining human life' and the 'public trust doctrine'[232] under US law. The Plaintiff alleged that the US government has supported fossil fuel development through Federal permits, leases, subsidies, approvals for fossil fuel exports and other actions even though the government have known for more than 50 years of the risk of climate change to present and future generation. The Plaintiff argued by supporting activities which trigger climate change and endanger lives, the FG has acted with 'deliberate indifference to the peril it has created'. In response to the plaintiff's claim the FG filled an objection for the early termination of the case on the grounds that the public trust doctrine (being one of the grounds upon which the case was premised) is not justiciable in federal courts. The Court while rejecting the argument of the FG, held agreeing with the plaintiffs that the attitude of the US towards climate change violated human rights and the government's public trust obligations. The Court also held embracing a fundamental notion of public trust obligation, that the US government has a fiduciary duty to manage public trust resources for present and future

[228] E. Brown Weiss (note 227) 200-210.
[229] E. Brown Weiss (note 227) 200-210.
[230] See generally D. Shelton (note 85), 62- 63
[231] *Juliana v the United States* [2016] F Supp. 3D, 217, 1224; Juliana v the United States Appeal No 18-36082 DC No 6:15-cv-01517
[232] The Court observed that public trust doctrine in the broadest sense refers to 'the fundamental understanding that no government can legitimately abdicate its core sovereign powers'. Applying this broad definition, the Court held that public trust doctrine prevents a sovereign from 'depriving a future of the natural resources necessary to provide for the wellbeing and survival of its citizens'. See paras. 1253

generations.[233] While this case represents a forward thinking judicial approach in climate matters, the extent to which it will shape climate policy in the US will depend on whether sufficient proof is supplied at the trial to show that the US government has breached its fiduciary duties in relation to the preservation of trust resources.[234] However, the ninth circuit Court of Appeal in Oregon United states has dismissed the case on grounds of what it termed "a lack of Article III standing".[235] The Court held that " it is beyond the power of an Article III Court to order, design, supervise, or implement the plaintiff's remedial plan."[236] While the decision of the Court of Appeal on standing represents a discouraging development for anti-climate change activists and for public interest litigation, the court accepted the fact that climate change poses an existential treat to human life.[237]

Similarly, in *Urgenda v Netherlands,*[238] in relation to the question whether the failure of the state to take reasonable measures to diminish the risk of climate change is a breach of the state's duty of care, the Court concluded that to prevent hazardous climate change, Netherlands must take reduction in accordance with the 2 o C limit in order to protect the climate system for the current and future generations.[239] The case has been commended as a progressive attempt to marry civil law, human rights and climate change together.[240] But the environmental destiny of future generations still

[233] See M. Powers*, 'Juliana v United States: the next Frontier in US Climate Mitigation?* (2018) 27 RECIEL, 199-204, 202.
[234] It has been argued that under the 'atmospheric trust doctrine', the air and atmosphere like other natural resources 'are within the *res* of the public trust and governments are public trustees that must manage the resources in the trust for present and future generations'. See MC Blumn and MC Wood, *'No Ordinary Lawsuit: Climate Change, Due Process and Public Trust Doctrine'* (2017) 67 American University Law Review, 23
[235] Juliana v the United States Appeal No 18-36082 DC No 6:15-cv-01517, page 19-25; For an analysis of the Court of Appeal decision see Joel A. Mintz, *"They threw Up their Hands: Observation on the US Ninth Circuit Court of Appeal's Unsatisfying Opinion in Juliana v United States'* (2020) 38 (2) Journal of energy and Natural Resources Law, 201-204.
[236] Juliana V The United States Appeal (note 221) 25 ("Any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the legislative and executive branches").
[237] Joel A. Mintz, "They threw Up their Hands (note 221) 203.
[238] *Urgenda v the State of Netherlands*, [2015] Case no. C/09/456689/HA ZA 13-1396.
[239] See paras. 4.56-4.59; For a more general analysis of the case, see M. Peters, 'Case note: Urgenda Foundation and 886 Individuals v the State of Netherland: Dilemma of More Greenhouse Gas Reduction Action by the EU member States' [2016] RECIEL 25: 1, 123-124; See also E Stein and A Geert Castermans, '*Urgenda v Netherlands: The Reflex Effect-Climate Change, Human Rights and the Expanding Definition of Duty of Care'* (2015) 13 MJSDL-RDDDM, 305-324
[240] Stein, (note 239) 324.

remains bleak by reason of the fact that the case is yet to find a worthy certainty that can start a judicial revolution across the globe in favour of future generations.

More noble as the principle of intergenerational equity appear, it exists more in the imagination than in reality. Hydrocarbon pollution and its many disadvantages have formed the fulcrum of man's bequest to the future generation.[241] Therefore, the extent to which this is possible would depend on the integrity of a liability regime and its enforcement mechanisms. In countries like Nigeria, decades of oil exploitation have left the future generation with the less than acceptable gift of having to fix an environment which they did not destroy.

From the point of view of governance, the PPP serves two important functions. It promotes energy security and enhanced corporate governance in firms. Energy security has been defined as 'a condition in which a nation and all, or most, of its citizens and businesses have access to sufficient energy resources at reasonable prices for the foreseeable future free from risk of major, disruption of service'.[242] Energy security has also been defined a tripartite concept which captures a balance of 'physical' 'price' and geopolitical' security which energy policies must aim at achieving.[243] In keeping faith with these tripartite constructs, an energy policy must avoid involuntary interruptions of supply, provide energy at reasonable prices to consumers and ensure that a country retains independence in its foreign policy through avoiding dependence on particular nations.[244] Energy security has also been defined as a triad consisting of the security of supplies, security of infrastructure and security of demand including thereafter, the issues of access to resources, infrastructure and markets.[245] From the point of view of supply disruptions, the PPP acts to incentivize firms to assume preventive obligations that ensures not only that such disruptions do

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[241] J. Anstee-Wedderburn, 'Giving a Voice to Future Generations to Come and the Challenge of Planetary Right' (2014) 1 AJEL, 40-42;

[242] E. Usenmez, J. Cowie and G. Gordons, 'The Uk's Energy Security' in G. Gordon, J. Paterson and U Usenmez, 'UK Oil and Gas Law: Current Practice and Emerging Trends' (3rd Ed, Edinburgh University Press 2018) 43.

[243] M. Wicks MP, Energy Security: A national challenge in a Changing World (5 August 2009), available at < http://130.88.20.21/uknuclear/pdfs/Energy_Security_Wicks_Review_August_2009.pdf> (last accessed 15/11/2018), p 8.

[244] M. Wicks, 8

[245] A. Konoplyanik, *'Energy Security: the Role of business, governments, international Organisations and International Legal framework'* (2007) (6), IELR, 85.

not occur but that they are controlled and remedied after they occur. This obligation is in keeping faith with the original idea behind the PPP, which is to 'promote rational use of scarce resources'.[246] It will therefore be safe to conclude that a weak PPP regime that fails to internalize environmental cost adequately is more likely to promote a culture of unsustainable resource use that relaxes corporate accountability in a manner that can produce unsavoury environmental outcomes.

In relation to corporate governance, the imposition of preventive, control and curative obligations on firms motivates them to be environmentally responsible in other to avoid responsibility under applicable environmental laws.[247] The possibility that the full cost of environmental externalities can be associated with environmental irresponsibility is more likely to tilt the firm into enhanced corporate governance that is sensitive to the environment as a necessary stakeholder.[248] This could lead to enhance environmental diligence that could spark investments in environmental management systems, maintenance hardwares and critical workforce capacity.[249]

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[246] OECD, Guiding Principles 1972 (note 108) at 1172.
[247] Zondorak, *'A New Face in Corporate Environmental Responsibility: The Valdez principles'* (1991) 18 College Environmental Affairs Law Review, 457-500, 457.
[248] A primary goal for corporate governance reform is the perceived need to widen the scope of corporate accountability to include within its remit all relevant 'stakeholders' identified as having interest in the company. See D. M Ong, *'The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives'* (2001) 12 (4) EJIL, 685-726, 689; T. Burke and J. Hill, *'Ethics, Environment and the Company: A Guide to Effective Action'* (1990) 4, where the authors noted that 'the debate on corporate environmental responsibility is also taking place as part of a broader debate about corporate responsibility towards all the stakeholders in the society.
[249] For example, in *Miliedefensie v. Royal Dutch Shell (RDS)* [The Hague Court of Appeal 2021],
ECLI:NL-GHDHA:2021, 132., the Hague Court of Appeal ruled that Royal Dutch shell , shell's parent company,
must reduce CO_2 emissions from shell's activities by 45% (net) by the end of 2030 compared to its emissions in
2019 through its corporate strategy; See Virginie Rouas, 'Killing two Birds with One Stone:
Milieudefensie v RDS, a Game Changer for Climate Change and Corporate Accountability' (2021) IALS, Legal
News, Publications, available at< Killing two birds with one stone: Milieudefensie v RDS, a game changer for climate change and corporate accountability - The IALS Blog (sas.ac.uk)> last accessed on the 27/09/2021; Milieudefensie v Shell: Do Oil Corporations Hold a Duty to Mitigate Climate Change?' (2021) Blog of European Journal of International Law (Ejiltalk), 1-4, available on < Milieudefensie v Shell: Do oil corporations hold a duty to mitigate climate change? – EJIL: Talk! (ejiltalk.org)> last accessed on the 27/09/2021; Otto Spilkers, *'Public Interest Litigation Before Domestic Courts in Netherlands on the Basis of International Law: Article 3:305a Dutch Civil Code'* (2020) Ejiltalk, 1-4, available on <Public Interest Litigation Before Domestic Courts in The Netherlands on the Basis of International Law: Article 3:305a Dutch Civil Code – EJIL: Talk! (ejiltalk.org)> last accessed on the 27/09/2021, Cf: Lucas Roorda, *'Broken English: a Critique of the Dutch Court of Appeal Decision in Four Nigerian Farmers and Milieudefensie v Shell'* (2021) 12 (1) Journal of Transnational Legal Theory, 144-150.

The conclusion to be drawn from the section is that the requirement that the polluter should pay precludes the victims of pollution, society at large, nature and future generations from paying for the polluter's own misdeed. The PPP is relevant to pollution prevention, control and the remediation of environmental harm. The PPP also have implications touching on energy security and corporate governance. While these implications are at various levels of maturation, the ties between the PPP and intergenerational equity is beginning to yield fruits. Recent case laws now reveal that the state can be compelled to enforce an aggressive policy of pollution cut-back where a poor system of regulation threatens human rights and the survival of the Climate system.[250] The state therefore, has a primary role to play in the application of the PPP.

2.2.3 The PPP and State Responsibility

Giving the implications considered in the last paragraph, the state has a responsibility to ensure that environmental cost is allocated to polluters. The principle of state responsibility dictate that states are accountable for breaches of international law.[251] It has been observed that 'responsibility is the corollary of international law, the best proof of its existence and the most credible measure of its effectiveness'.[252]

State responsibility hinges on several factors. First, the existence of an international legal obligation between two or more states.[253] Secondly, that there has occurred an act or omission which violates that obligation, and which is imputable to the state responsible and finally, that loss or damage has resulted from the unlawful act or omission.[254] Several leading international cases and international instruments clarify these requirements.[255]

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[250] See for example *Urgenda v the State of Netherlands*, [2015] Case no. C/09/456689/HA ZA 13-1396 and *Juliana v the United States* [2016] F Supp. 3D, 217, 1224; Juliana v the United States Appeal No 18-36082 DC No 6:15-cv-01517.

[251] M.N Shaw 'Shaw 'International Law' (6th ed, 2008) 851.

[252] Alan Pellet, 'Definition of Responsibility in International Law' in James Crawford, Alan Pellet and Simon Olleson (eds), 'The Law of International Responsibility' (Oxford University Press, 2010), 3

[253] M.N Shaw (note 141) 781

[254] M.N Shaw

[255] The Spanish Zone of Morocco Claims, 2 RIAA, p. 615 (1923) 2AD, 157; Chorzow Factory Case, PCIJ, Series A, No.17, (1928) 29, 4AD, p. 258; The Corfu Channel Case, ICJ Reports, 4, 23; 16 AD, p. 155; See also the International Law Commission's Articles on State Responsibility, Art -12 of the

Within the context of environmental law, the responsibility of state can include, the obligation to protect the marine environment[256] and obligation to take measures necessary to ensure that activities under a state's jurisdiction and control are conducted as not to cause damage by pollution to other states and their environment.[257] Others include obligation to draw up regulations to prevent pollution of the sea, [258] conservation of the living resources of the high sea[259] and state obligation to take measures to eliminate danger to their coastline.[260] In relation to the UN Convention on Climate Change, the responsibilities of states include, the obligation to protect the climate system for the benefit of present and future generations and obligation to take precautionary measure to anticipate, prevent or minimize the cause of climate change and mitigate its effects.[261] Other international conventions that have made provisions for similar responsibilities of states in relation to environmental regulation are The Vienna Convention on the Protection of the Ozone Layer 1985,[262] Kyoto Protocol[263] and the OSPAR Convention 1982.[264] Others are the Bamako Convention on the Movement of Transboundary Waste,[265] the Convention on Biodiversity,[266] and the recently contracted Paris Agreement 2015.[267]

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document stipulate that there is a breach of an international obligation when an act of the state is not in conformity with what is required of it by that obligation regardless of its origin or character.

[256] Art. 192 of the united Nations Convention on the Law of the sea (UNCLOS) 1982

[257] Art. 194 UNCLOS 1982; In relation to this obligation the Stockholm Declaration 1972 provides that states have 'the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limit of national jurisdiction; see also Art. 2 of the Rio Declaration.

[258] Art. 24 of the Convention of the law of the Sea 1958.

[259] Art. 1 of the Convention on the Fishing Conservation of the Living Resources of the High Seas 1958

[260] Art. 194 UNCLOS 1982.

[261] Art. 3 (1) (3); the preamble to the Convention also provides that states have responsibility to "enact effective environmental legislation, that environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply, and that standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing nations".

[262] Art. 2 (2) (b)

[263] Art. 2(1) (a) (viii).

[264] Art. 2 (1) (a) (b) (c).

[265] Art.-4 (1)- the need to take appropriate legal, administrative and other measures to stop the movement of waste.

[266] Art. 4-8

[267] Art. 5 (1) and (2) provides that parties are encouraged to take action to implement and support including result-based payments…(4) (b) incentivize and facilitate participation in the mitigation of greenhouse gas emissions by public and private entities authorized by a party.

The role of the state within the context of environmental law is predicated on several factors. First, the fact that environmental problem by their peculiar nature generates a form of politics that demands response which may have political implications.[268] Secondly, as a principle of public international law, it is the state that has responsibility to take formal actions in relation to the environment.[269] In relation to this responsibility, the state assumes the role of an ecological trustee protecting genuine public goods.[270] According to Eckersley:

> *The state is a social institution with the greatest capacity to discipline investors, producers and consumers…The state also has capacity to redistribute resources and otherwise, influence life opportunities to ensure that the move towards a more sustainable society is not a socially regressive one. The states capacity arises because it enjoys the means of legitimate coercion and therefore the fine adjudicator and guarantor of positive law.*

Going by the above justifications, the thesis takes the position that states that are signatories to environmental treaties (whether binding or non-binding) have the responsibility to apply the PPP whether or not the instrument makes a reference to the PPP. One common thread that runs through the international instruments mentioned above is their continued reference to "the need to take appropriate, legal, administrative and other measures".[271] States are therefore mandated to structure their laws, regulations and institutions in a manner responsive to the spirits and intendments of the instruments.[272] State also to ensure that they take all measures necessary to ensure that activities under their jurisdiction or control are conducted as not to cause damage by pollution to other states.[273] States are also to ensure state aids are tied to commitments of emission reduction so as to effectively prevent pollution.[274] While the exercise of responsibility may give rise to liability under International law especially in cases where the action of one state causes injury to the environment of another

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[268] E. Fisher (note 57) 56
[269] Fisher, 56.
[270] Fisher, 56
[271] See Art. 4 (1) of the Bamako Convention 1979.
[272] This obligation runs through most environmental instruments in the form of commitments to the objectives of the instruments. See Art. 3 of the Paris Agreement on Climate Change 2015; Arts 3-8 of the Convention on Biological Diversity 1992 and Article 139 of the UNCLOSE 1982.
[273] See Art. 194 (2) and (3) of the United Nations Convention on the Laws of the Sea 1982.
[274] Art. 107 (1)-(3) of the TFEU; See also the EU Guidelines on State Aids for Environmental Protection and Energy 2014-2020, available on < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0628(01)> last accessed on the 22/09/2020.

state,[275] the extent to which liability is permitted under municipal law will depend the specific guarantees available and the readiness of Courts to green the interpretation of these guarantees to accommodate local claims.

2.3 THE FUNCTIONS OF THE PPP

As a principle of environmental regulation, the PPP performs several functions and its history reflects an incremental budge in meaning. Early recommendations of the OECD[276] referred to the principle as a means of preventing unfair competition (instrument of harmonization intended to ensure the smooth functioning of the common market); later it metamorphosed into a plank both for preventing (instrument of prevention) perennial pollution as well as guaranteeing the atonement of damage -(curative instrument). These functions are essential in analyzing the PPP because they symbolize the basis upon which the polluter assumes the responsibility to bear the cost of pollution regulation for environmental protection.

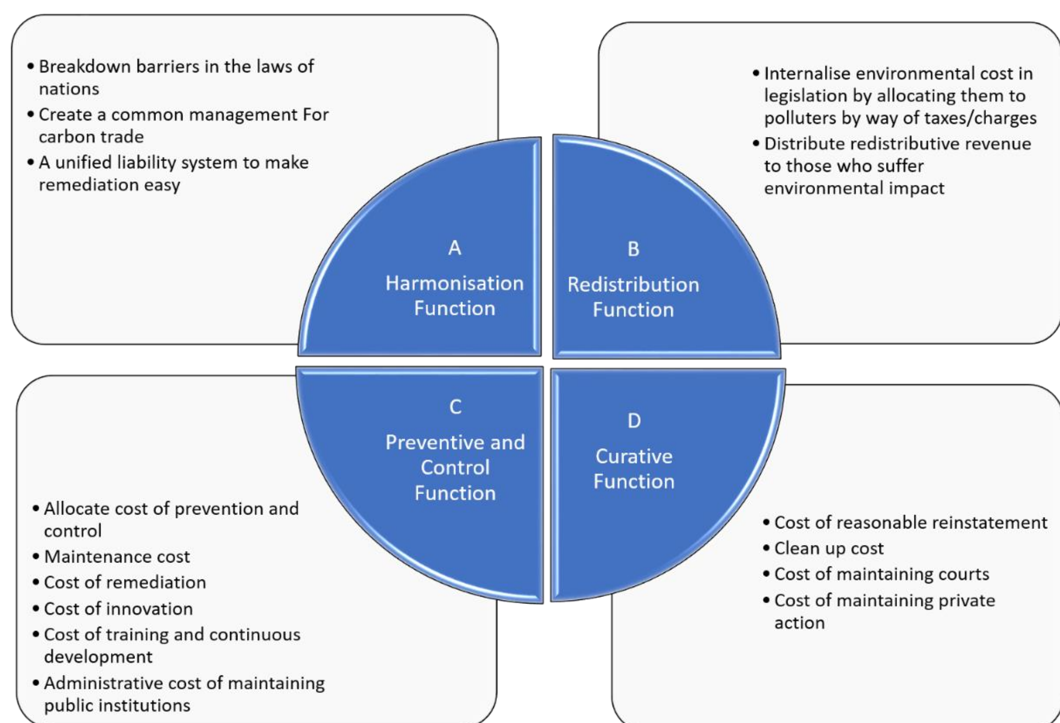

Figure 1. Illustration of the functions of the polluter pays principle.

[275] Trail Smelter Case, 16th April, 1938; see also Iron Rhine Case (2005).
[276] OECD, Recommendation 1972 (note 96), Paras 4; OECD Recommendation 1974 (note 98) Paras 1-3.

2.3.1 Instrument of Trade Harmonization

The first Recommendation of the OECD drafted in 1972 provided that the PPP was to be applied to 'avoid distortions in international trade and investment'.[277] What this means is that the PPP is a means of achieving a unified trade policy where enterprises are not to be offered advantages that gives one market a competitive edge over the other to encourage uniform intolerance of polluting activities. Distortions to trade and investment could arise through various forms of differentiation existing in environmental policies, which introduce differential treatments by, for example, taxing carbon-intensive activities or end products and providing subsidies to carbon-efficient activities or climate-friendly technologies.[278] Distortion can also arise from qualitative restrictions on trade volumes.[279] It is the PPP's function of harmonization that bars or limits the operation of state subsidies. *The WTO China-Raw Material Case*[280] demonstrates how domestic pollution regulatory measures especially export/ production restrictions on minerals could be viewed as trade distortive unless, the WTO member ensures that such measures enjoy both domestic and international consent.[281]

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[277] Paras 4 of the 1972 OECD Recommendations clearly provide that 'such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment'.

[278] Vinuales J., 'Foreign Investment and the Environment in International Law (Cambridge University Press 2012) 253-4, 267; Kym Anderson and Signe Nelgen, 'Agricultural Trade Distortions During the Global Financial Crisis' (2012) 28 (2) Oxford Review of Economic Policy, 235-260 and R.K. Edeme, E.B Aduku, E.S Nwokoye and N.C Nkalu, 'Impact of Trade Restrictions in European and Sub-Saharan Regions' (2020) 12 (1-2), Review of Market Integration, 35-50.

[279] K. Anderson, 'Measuring Effects of trade Policy Distortions: How Far we come?' (2003) 26 (4) Journal of World Economy, 413-440, 414; For a more general reading on International Trade and environmental Regulation see Y. Selivanova, 'The WTO Agreements and Energy' in K. Talus, 'Research Handbook on international Energy Law' (2014) 275-307; J.E. Vinuales, 'The Environmental Regulation of Foreign investment Schemes under international Law (2012) The Graduate Institute, Geneva Centre of environmental studies Research paper no. 9,

[280] See the Appellate Report, China – Measures related to the importation of Rare Earths, Tungsten, and Molybdenum, DS431 (US), DS432 (EU), DS433 (Japan) (March 13, 2012).

[281] See Matsushita, M., 'A Note on the Appellate Body Report in the Chinese Minerals Export Restrictions Case' (2012) 4 (2) Trade Law and development, 400, 419-20; See also China-Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum, DS431 (US), DS432 (EU), DS433 (Japan) (March 13, 2012); *Reformulated Gasoline Case* –United States-Standards for Reformulated and Conventional Gasoline, Report of the Panel, 29th January 1996, WT/DT/DS2/ R/ (Reformulated Gasoline Panel Report); cf: United States –Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body, 29th April, 1996, WT/DS2/AB/R (Reformulated Gasoline, Appellate Body Report), 35 ILM 603 (1996); See also the Shrimp Turtle Dispute (1998-2001).

While the dangers of subsidies are well noted they have also been known to be essential to promoting positive externalities such as reduction in the price of essential commodities, job creation increased revenue from taxation.[282] Again, the extent to which the PPP has functioned as an instrument of harmonization is questionable. For example, under the Rio Declaration, although all state parties have an obligation to co-operate in a spirit of global partnership to conserve, protect and restore the health and the integrity of the earth's ecosystem, their responsibilities under the declaration are common but differentiated in view of the disparities of their contribution to global environmental degradation.[283] While the differentials in obligations is one borne out of the need to sustain global partnership and equity arising from the vulnerability of developing countries to a uniform, international environmental obligation with developed countries, it does little to promote the harmonization of environmental policy globally. Although, it can be argued that the discrepancy in obligation sits well with the true spirit of the PPP, which requires polluters to bear the cost of pollution proportionately. However, it is not certain whether the allocation of responsibility to developed countries properly index the full cost, which trade activities generated in these countries exerts on the environment and the economies of developing countries.[284]

2.3.2 The Function of Redistribution

The redistributive function of the PPP lives in its main intendment, which is to internalize the cost borne by public authorities for pollution prevention and control. The PPP therefore serves as an economic rule according to which a quantum of the

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[282] See notes OECD Recommendation 1972 (note 108) and the OECD Recommendation on the Application of the PPP 1989 (note 133); Positive externalities are policies or activities that promote public good.

[283] See principle 12 of the Stockholm Declaration of 1972; See also Articles 7 of the Rio Declaration; the 1972 OECD Recommendation in Section B captures the seeming impossibility of a harmonized environmental standard. While Paras 7 recognizes that a very high degree of harmonization of environmental policies will be difficult to achieve in practice, Paras 6 provides that differing national environmental policies are justified by a variety of factors including among other things different pollution assimilative capacities, different social objectives and priorities and different degrees of industrialization and population density. Paras. 10 of the recommendation provides that where products are traded internationally and where there could be significant obstacles to trade, government should see common standards for polluting products and agree on the timing and general scope of regulation for particular products.

[284] For a comprehensive assessment of the principle of Common but differentiated responsibility see P. Cullet, 'Common but Differentiated Responsibilities' In J. E Vinuales (ed.) 'The Rio Declaration on the Environment and Development: A commentary' (Oxford University Press 2015) 229-241

profits due to polluters as a result of their activities is returned to public agencies accountable for scrutinizing, observing and steering the pollution these activities generate.[285] The idea behind redistribution is to promote the division of social goods through custom, opinion, informal decisions and formal allocative mechanisms like command and control, economic instruments like taxation and charges.[286] Through the principle of redistribution, a tax levy on the activities of polluters is deployed towards ensuring that those who bear the burden of pollution receive extra support to balance out the impact of the burden they bear.

The redistributive function of the PPP is often criticized as offering the environment as a ransom for a right to pollute.[287] It is seen as accepting environmental pollution as an unavoidable aspect of human development with the policy of prevention shaded off relevance.[288] Another criticism is that the charges burdened on polluters merely represents a supplementary tax which may well be passed unto consumers and insurance companies.[289] Not only does this defies the ideological matrix of the PPP but also renders its application incoherent and self-conflicting.

2.3.3 The Preventive Function of the PPP

Where the state bears the responsibility of pollution prevention, monitoring and control, through a limited polluter responsibility or the availability of subsidies, little incentives exist for polluters to prevent pollution. *The 1992 OECD Analysis and Recommendation*, states that pollution prevention and control cost is one of the costs, which a polluter must bear.[290] There are several ways in which the PPP performs a preventive function but two are worthy of mention. The first is to set emission

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[285] N. De Sadeleer (note 16), 35.
[286] D. Shelton (ed), (note 85), 61; See also Garcia, F., *Trade Inequality and justice: Towards a Liberal Theory of Just Trade* (Transnational Publishers 2003) 53.
[287] De Sadeleer, 35.
[288] De Sadeleer, 35.
[289] De Sadeleer, (note 55) 35.
[290] See Paragraph 1 of the OECD Analysis and Recommendations OCDE/GD (92) 81 available on < http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(92)81&docLanguage=En>; In furtherance of this function, the recommendation states that ‘’…aside from exceptions listed by OECD (1) (2), a polluter should not receive assistance of any kind to control pollution (grants, subsidies or tax allowances for pollution control equipment, below-cost charges for public services, etc.)

thresholds beyond which no operator is expected to pollute.[291] This is a command and control approach to the application of the principle. The second is to levy a tax proportionate to the pollution generated.[292]

The preventive function of the PPP enjoys a legal as well as an economic justification. While the legal justification strives to bring the PPP in harmony with the preventive principle, the economic justification ties profitability to the exercise of tact.[293] To the extent that charges increase in proportion to the seriousness of the pollution, it will be in the interest of polluters to reduce their emissions. The true aim of the PPP is therefore to institute a policy of pollution reduction by encouraging polluters to reduce their emission rather than pay charges.[294] In *R. v Secretary of State for the Environment ex parte Standley and Metson,*[295] Pott. J., stated that the PPP must be understood as requiring the person who causes the pollution and the person alone to bear not only the cost of remedying pollution but also those cost arising from the implementation of the policy of prevention.

The main problem with this preventive character of the PPP is that its effect is contingent upon the extent to which national authorities design pollution charges. Both the Rio Declaration and the OECD Recommendation makes reference to 'measures decided by public authorities to ensure that the environment is in an acceptable state'.[296] The economic realities of a nation may therefore justify a hortatory emission standard, a lower charge and a continuation of pollution as a rebate to lure investors.

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[291] An example of an emission threshold is the World Bank General Environmental Health and Safety Guidelines, available on https://www.ifc.org/wps/wcm/connect/532ff4804886583ab4d6f66a6515bb18/1-1%2BAir%2BEmissions%2Band%2BAmbient%2BAir%2BQuality.pdf?MOD=AJPERES

[292] An example of this tax in Nigeria is that provided under Regulation 42 of the Petroleum (Drilling and Production) Regulation1969, which stipulates a penalty fee of $3.5 dollars per standard cubic feet of gas for gas flaring. See generally, KPMG, Nigeria Oil and Gas Industry Brief, June 2014. Available on http://www.blog.kpmgafrica.com/wp-content/uploads/2016/10/Nigerias-oil-and-gas-Industry-brief.pdf accessed on the 6th of November 2017.

[293] De Sadeleer (note 55), 36.

[294] Ibid.

[295] (1997), Env. LR, 589.

[296] OECD, Guiding Principles (note 108) at 1172-73.

2.3.4 *The Curative Function*

Liability for loss or damage remains an important part of most systems of environmental law even when supplemented or superseded by regulatory regimes or risk avoidance procedures.[297] The purpose of a liability regime in the implementation of the PPP is to consolidate the polluter's responsibility and accountability to the victims.[298] More often than not the success of emission thresholds rests on the assumptions that polluters behave rationally. This is seldom the case. The curative dimension of the PPP is principally a response to the inadequacies of discharged thresholds established by public authorities. Principle 22 of the Stockholm Declaration and principle 13 the Rio Declaration requires national authorities or states to develop international and national law regarding liability and compensation for victims of pollution and other environmental damage. Pursuant to this mandate, the International Law Commission (ILC)[299] drafted a series of environmental liability principles (ELP) which pursues the objective of ensuring prompt and adequate compensation for natural or legal persons including states that are victims of transboundary damage.[300] Amongst several provisions, some of the ELPs captured the essence of the curative definition of the PPP in its definition of damage and restorative measures. More particularly, the ILC draft articles proposed by the Special Rapporteur on *Liability for the injurious Consequences Arising out of Acts not Prohibited by International Law* defined 'damage' generally to accommodate loss of life, impairment of health or any personal injury; damage to property; detrimental alteration of the environment.[301] The draft article also mandated that corresponding compensation in these situations would

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[297] Boyle A.E, ''Globalizing Environmental Liability: The interplay of National and International Law' (2005) 17 (1) JEL, 3.

[298] P. Schwartz, Research Handbook on International Environmental law (note 1) 251

[299] The International Law Commission was established by the General Assembly, in 1947, to undertake the mandate of the Assembly, under article 13 (1) (a) of the Charter of the United Nations to "initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification".

[300] ILC, 'International Law Commission Draft Principles on Environmental Liability' (2005) 17 (1), JEL, 155-7; See also ILC Draft Principles on the Allocation of Losses in cases of transboundary harm arising out of hazardous activities with commentaries (2006); United Nation, 'International Liability for Injurious Consequences Arising out of Acts not prohibited by International law (International Liability in case of loss from transboundary Harm Arising out of Hazardous Activities, UN Doc. A/CN4/566; For an academic consideration of these instruments see C. Foster 'The ILC Draft Principles on the Allocation of Loss in case of loss from Transboundary Harm Arising out of hazardous Activities: Privatizing Risks? (2005) 14 93), RECIEL, 265-282.

[301] UN General Assembly Document A/CN.4/443, 15 April 1992, at 32; For a comprehensive discussion of this draft principle see J. Barboza, 'The ILC and Environmental Damage' in Peter Wetterstein (ed) 'Harm to the Environment' (Clarendon Press Oxford 1997) 73-81.

comprise in addition to loss of profit, the cost of reasonable reinstatement or restorative measures actually taken or to be taken and the cost of preventive measures and additional harm caused by such measures.[302] While these principles represents a response to an international call to compensate victims of environmental pollution, the reference to 'reasonable reinstatement'[303] introduces the possibility of a compromise that can encumber a comprehensive internalization of the harm emanating from pollution. This in itself makes the aspirations of full internalization of environmental harm unrealistic.

At other levels of international law, the application of the PPP as a compensation regime takes several forms. It could be expressed through the principles of state responsibility for breach of general environmental obligations under the rule prohibiting transboundary harm. This include the rule to take preventive measures and the principle according to which a legally unauthorized act or omission require compensation corresponding to the damage or loss incurred.[304] Sometimes it involves the obligation to canalize liability along fault-based or strict liability routes.[305] An extensive version of the PPP in the international liability system implicates society by making it accountable for the collective choices it makes to undertake dangerous activities and the benefits and costs emanating from such activities.[306]

At the national level, civil liability provides a prolific base for vitalizing the evolution of the curative facet of the PPP most often than not. Under this branch of law, the law of negligence, nuisance and strict liability are quite handy in dealing with the enforcement of recompense with statute providing coverage of guarantees with

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[302] J. Barboza, 73-81.
[303] J. Barboza, 73-81.
[304] See the *Trail Smelter Case; Chorzow Factory Case, 1928 and the Corfu Channel Case, (1949) 39-40*
[305] N. De Sadeleer, *Case Note Preliminary reference on Environmental Liability and the Polluter Pays Principle: Case C-534/13, Fipa*, (2015) RECIEL 24 (2), 232; see also R. Churchill, 'Civil liability Litigation for Environmental Damage by means of Treaties: Progress Problems and Prospects' (2001) 12 YBIEL, 3-41; for a much more general discussion on liability under international environmental law see B. Sandvik and S. Suikkari, 'Harm and Reparation in International Treaty regimes: An Overview in Peter Wetterstein (ed.) 'Harm to the Environment: The Right to Compensation and the Assessment of Damages' (Clarendon Press Oxford 1997) 57-72.
[306] P. Schwartz, (note 51) 252.

varying degrees of implications.[307] More recently, liability has acquired a transnational reach that allows victims of pollution subject to certain conditions, to pursue recompense even outside the jurisdiction where the pollution occurs.[308]

For many reasons, the curative posture of the PPP does not sit well with critics. The first is that the quantum of compensation to be paid by the polluter is almost certainly a disputed concern. Even in climes with robust liability regimes, the extent to which the regime levies reparation cost is always a contentious issue.[309] The question of how much the polluter should pay enjoys popularity even amongst academics and has implications bordering on the effectuality of a state's pollution management and prevention policy and the balance between trade and investment. Another criticism of this approach is that it is a reactive strategy to environmental regulation and one that accepts pollution as an incurable product of human existence. It is merely 'an *a posteriori* response to a social

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[307] See generally I.T Amachree, *Compensation Claims Relating to Crude Oil spillage and Land Acquisitions for Oil and Gas Fields in Nigeria, a suggested Practical Guide* (Pearle Publishers 2011) 15-17

[308] See for instance, *Okpabi and Ords v Royal Dutch Shell* Unreported case number [2015] EWHC-HT-2015-00241&HT-2015-00043 of the Technology and Construction Court of the High Court of justice Queens, Queens Bench Division, 1-45 available on https://www.leighday.co.uk/LeighDay/media/LeighDay/documents/Corporate%20accountability/Judgment-26-Jan-17-FINAL.pdf last accessed on the 06/11/2017; See also *Bodo Community v Shell Petroleum Development Company of Nigeria* [2014] EWHC 1973 (TCC), 1-82 available on < http://www.hendersonchambers.co.uk/wp-content/uploads/2014/06/Bodo-jment-prelim-issues.pdf> last accessed on 6/11/2017; Akpan v. Royal Dutch Shell & SPDC, District Court of the Hague, LJN:BY9854, C/09/337050/HAZA-09-1580 available at: <http://www.milieudefensie.nl/publicaties/bezwaren-uitspraken/finaljudgment-akpan-vs-shell-oil-spill-ikot-ada-udo>; Dooh v. Royal Dutch Shell & SPDC, District Court of the Hague, LJN:BY9854, C/09/337058/HAZA 09-1581 available at http://www.milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-dooh-vs-shell-oil-spill-goi ; Efanga & Oguru v. Royal Dutch Shell & SPDC, District Court of the Hague, LJN:BY9850, C/09/330891/HAZA 09-0579 available at <http://www.milieudefensie.nl/publicaties/bezwaren-uitspraken/finaljudgment-oguru-vs-shell-oil-spill-goi>
for a comprehensive analysis of transnational environmental litigation see the following articles: V. Heywaert, 'Trans nationalization of Law through transnational environmental regulation' (2017) LSE Research online, 1-32; U. Grusic, 'International Environmental Litigation in EU Courts: A Regulatory Perspective' (2016) 35 (1) Yearbook of European Law, pp 180-228 and J.G. Frynas 'Social and Environmental Litigation Against Transnational Firms in Africa' (2004) 42 (3) Journal of Modern African studies, 363-388; see also E. Blanco and B. Pontin, 'Litigating Extra-Territorial Nuisances Under English Common Law and Statute Law" (2017) 6 (2) Cambridge Journal of Transnational Environmental Law, 285-308.

[309] In most liability regimes, although those who suffer harm as a result of oil pollution get compensated, the amount received is barely equal to the amount lost. For instance, under the 1990 Oil pollution Act (OPA) of the United States, compensation is capped at $75 dollars. This has led to calls that punitive damage be activated under the American maritime Law. See C.B Anderson, *Marine Pollution and the polluter pays principle: Should the Polluter also pay Punitive Damages*? (2012) 43 J. Mar. L & Com. 43, 43-44.

problem' with no correlative balance of dissuasion.[310] In other words, the polluter only compensates after damage has occurred and have been seen to be excessive. Considerations of environmental liability always give rise to several challenges. The first is that the PPP may be incapable of offering succour to victims of ecological damage that inevitably confronts attempts to obtain compensation for ecological damage without completely distorting civil liability.[311] Secondly, the PPP may not be effectual in a fault-based liability regime where remediation proceeds on the basis of fault lines given the difficulty associated with establishing fault and the limitation posed by express statutory provisions containing exonerating justifications.[312] Thirdly, although strict liability regimes seem more compatible with the PPP, a liability regime may not be canalized in a manner that maintains a fair balance between international trade and investment and ecological responsibility.[313] It has been argued that strict liability will only have optimal legal effectiveness when the harm is assessed in line with welfare and economic concepts and valuation techniques.[314] Although it is also often argued that fault-based liability guarantees compensation for ecological damage less effectively than a strict-liability regime, an alternative argument has emerged to the effect that it is not possible to deduce from the PPP that liability for damage exist even in the absence of fault.[315] The idea that the polluter should pay is in itself a legal recognition that liability should be the probable consequence of fault and not otherwise. Another problem with fault –based liability regimes is that environmental

[310] N. De Sadeleer (note 55) 16
[311] De Sadeleer, (note 55) 16.
[312] De Sadeleer, (note 55) 16.
[313] De Sadeleer, (note 55) 50.
[314] Some examples of these valuation techniques are (a) Contingent valuation method which allows individuals to state their preferences in hypothetical or contingent markets while allowing analysts to estimate goods and services that are not traded in the market ; (b) Habitat Equivalency method, an approach based on restoration cost; and (c) Life Cycle Assessment Method, aimed at quantifying environmental impacts with the life cycle of a product or service; See also TaeGeoun Kim, James Opaluch, D Song-Hyok and D.R. Petrolia, "Natural Resource Damage Assessment for the Hebei Spirit Oil Spill: An Application of the Habitat Equivalency Analysis (2017) 121, Marine Pollution Bulletin, 183-191; William H Desvousges, N Gard, H.J Michael and Arine D. Chance, "Habitat and Resource Equivalency Analysis : A Critical Analysis (2018)143, Journal of Ecological Economics, 74-89; Donald R. Deis and Deborah P. French, " The Use of Methods for Injury Determination and Quantification from Natural Resources Damage Assessment in Ecological Risk Assessment (2010) 4 (4), Human and Ecological Risk Assessment International Journal, 887-903; Frances Verones, Stefanie Hellweg, Assumpcio Anto et al "LC-Impact: A Regionalized Life Cycle Damage Assessment Method (2020) 24 Journal of Industrial Ecology, 1201-1219; E. Stavang, 'Two challenges for the ECJ when Examining the Environmental Liability Directive' (2010) 5 Env. Liability Journal, 198; See also European Union (EC), 'Implementation Challenges and Obstacles of the Environmental Liability Directive: Legal Analysis of the National Transposing Legislation', publication of 16th May, 2013;
[315] L. Kramer, *The Polluter Pays Principle in Community Law: The Interpretation of Art. 130r of the EEC Treaty' in Focus on European Law* (London, Graham & Trotman, 1997) 25.

impact will only give rise to financial compensation to the extent that it generates damage. Ecological damage does not easily fit into the traditional legal system since the victim of pollution in this second category is the environment. This prevents the reparation of 'res communes'[316] or res nullius,[317] which may appear unjustifiable.[318] Finally, attempts to recover compensation and enforce restoration of contaminated environment are most often confronted with the problem of access to justice where the barrier of *locus standi* operate in most cases to frustrate rectification.

This section has recounted how the PPP performs a medley of responsibilities ranging from harmonization, redistribution, prevention and control of oil pollution and the curative function of remediation. Although these functions are well intended, factors ranging from differentiation in obligations and poor environmental governance orientation (prescriptive regulation) have posed a challenge to their effective implementation. Other challenges likely to impair the performance of these functions are the problems associated with the definition of polluters and determination of how much polluters ought to pay. These are considered below.

2.4 THE CHALLENGES OF THE PPP

Although the PPP has a sonorous nomenclature, certain challenges make its implementation herculean. Apart from the conceptual ambiguity attendant to the notion of polluter and payer, there is also a difficulty in delimiting the boundaries of the polluter's financial responsibility and the challenges relating to the allocation of charges.

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[316] Things own by no one or incapable of exclusive appropriation. See the Black's Law Dictionary 9th Edition.

[317] A thing that can be owned but is not yet the subject of rights. See the Blacks Law Dictionary 9th edition.

[318] N. De Sadeleer (note 16) 49; Cf: The situation will be different in those instances where nature is accorded legal personality; See for example Articles 10 and 71-74 of the Ecuadorian Constitution of 2008 which recognizes the inalienable rights of ecosystems and gives individuals the inalienable rights to petition on behalf of ecosystems; See also the New Zealand Case of Whanganui River Management Trust Board, Record of Understanding in Relation to Whanganui Iwi and the Crown (signed 13th October 2011) where a New Zealand Tribunal established the legal personality for a River with the Rivers' right to be enforced through judicial action by appointed guardians.; Robinson Township et.al. V. Commonwealth of Pennsylvania, 52 3d, 463 (pa.Conwlth 2012); See also C.D. Stone, "Should Trees Have Standing: Towards Legal Rights for Natural Objects (1974) 45 (450) California Law Review, 8; Dinah Shelton "Nature as Legal Person" (2015) 22 Vertigo, 1-17. 7.

2.4.1 Conceptual Ambiguity associated to the Notion of 'Polluter' and 'Payer'

One of the problems of the PPP is that it has never been easy to ascribe a comprehensive meaning to the term polluter. Neither is it a simple task to determine the precise extent of what the polluter should pay. Though the rhythmic qualification of the principle tries to harmonize the relationship between both words, it by no means makes these challenges less elusive.

2.4.2 Who is The Polluter?

In the 1974 Recommendation of OECD, the word 'polluter' was defined as persons engaged in activities that contaminate the environment whether through industrial emissions in excess of legally binding stipulated thresholds: or whether damage resulted from polluting activities regardless of whether the conduct was lawful or not. [319] However, as broad as the above definition appears, the meaning of the concept of 'polluter' has widened considerably under international treaties and declarations, resonating adjustability and restraint in meaning.[320]

The concept of polluter emerged first from categorizations based on personality to cover states, corporations, industries and individuals.[321] The second augmentation in the meaning of polluter was in relation to the nature and effects of the conduct or activity, extending this to include natural resource use for economic or social purposes and attaching liability to direct or indirect environmental consequences.[322] Under this categorization, the 'polluter' is used not essentially in relation to polluting activities but broadly in relation to any activity that supports the deterioration of the environment, such as the use and management of water resources, the handling and disposal of waste or enjoyment of environmental quality.[323] The third category of 'polluter' that emerged is that predicated on stretching the sphere of responsibility to include offering aid, technology transfer or emission reduction programmes by developed countries to developing countries as an incentive to preserve or improve their environmental quality through the principle of common-but-differentiated

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[319] OECD, Recommendation on the Implementation of the Polluter-Pays-Principle C (74) (note 110).
[320] H. Smet, 'The Polluter Pays Principle in Early 1990s' (Westport, CT: Greenwood Press).
[321] P. Schwartz, (note 102) 247.
[322] See Chapter 8, Paras. 28 of the United Nations Conference on Environment and Development, Rio de Janeirio, Brazil of 3-14th June 1992 which spotlighted the resource-user concept as an adjunct of the PPP.
[323] Ibid.

responsibilities (CBDR).[324] Polluter responsibility can be individual, collective, fractional or full, actual or potential so as to avoid only charging the physical polluter.[325]

The above categorization represents an attempt to bridge the complexity associated with pollution regulation in recognition of the fact that the effects of pollution are not always linked to human activities. It also provides some sort of fluidity that enables adaptability to a multiplicity of circumstances or activities where environmental culpability demands apportionment. Though the enlargement of the concept of polluter remains a noble gesture pursued in good faith, it runs the risk of contravening the original idea behind the principle by fixing blame where it should not lie. This thesis takes the view that a polluter is any person or authority whose actions are directly or indirectly responsible for deterioration or contamination of the environment. This definition is broad and should accommodate all concerns of pollution.

2.4.3 How Much Should the Polluter Pay?

The question of how much the polluter should pay revolves around the extent to which cost should be internalized. Over the years, the content of the cost, which the polluter should bear, has diverged considerably. It now covers cost of prevention, control and mitigation measures.[326] This category of cost will include regulatory cost or cost of administrative measures taken by public authorities in response to pollution, including the cost of implementing anti-pollution technologies and grant for reindustrializing out-of-date plants.[327]

There is also a reference in the Rio Declaration for the polluter to bear 'environmental cost'.[328] Environmental costs are those costs connected with the actual or potential

[324] Art. 7 of the Rio Declaration; See also P. Cullet, 'Common but Differentiated Responsibilities' in E. Vinuales (ed.), *the Rio Declaration on Environment and Development: a Commentary* (Oxford University Press 2015) 229-241.
[325] OECD Recommendation 1972, 26.
[326] OECD Recommendation 1972 (note 108).
[327] OECD, Recommendation 1974, (note 110), 26
[328] See Principle 16 of the Rio Declaration on Environment and Development 1992.

deterioration of natural assets due to economic activities.[329] This type of cost is divided into two categories. The first category is 'caused costs' which refers to cost associated with economic units actually or potentially causing environmental deterioration by their own activities.[330] The second category is 'costs borne', an expression used to refer to those costs incurred by economic units independently of whether they have actually cost environmental impact.[331] Other costs expected to borne by the polluter include the cost of exceptional measures needed to protect human health and the environment, social costs,[332] external cost of investment in technology, indemnity costs, operational costs which include the loss of present and future expenditure and costs of and cost of moratorium on polluting activities.[333]

The extensive nature of the above costs raises a question that has proved problematic in the application of the PPP. This question is whether cost internalization should be complete or partial? While there is absolutely no doubt that full internalization of all the cost that arise from the activities of the polluter is more in sync with the original idea behind the emergence of the PPP, there are situations under which a comprehensive package of cost internalization may be outside the spectrum of the polluter's affordability. In the hydrocarbon industry for example, there are instances where those who work in oil platforms are lower-level contractors who may not have the financial capital to internalize the risk that arises from the possibility of catastrophic pollution even if they might have caused it. The limited financial capacity of these contractors is more likely to leave an extensive catalogue of environmental cost uninternalized if nothing is done to reallocate environmental cost arising from their operations. In the hydrocarbon industry, the standard practice in situations like this is to fix the cost on the operator of the installation since the operator is in a position to control the activities of the contractors hire to work on the platform. Not only is the

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[329] OECD, Glossary of Environmental Statistics, Studies in Methods, Series F. No. 67, United Nations, New York, 1997, available on https://stats.oecd.org/glossary/detail.asp?ID=572 , last accessed on the 9/11/2018.
[330] Ibid.
[331] Ibid; for a scholarly consideration of the literature of environmental cost see H. Timothy and McConnel Kenneth 'Valuing Environment and Natural Resources: the Econometrics of Non-Market Valuation' (Edward Edgar Publisher 2005); See also S. Rakos and A Antohe 'Environmental Cost: An Environmental Management Accounting Component' (2014) 4 (4), International Journal of Academic Research in Accounting, Finance and management, 166-175.
[332] An example of this cost is the loss of the amenity value of the environment.
[333] M. Goransson 'Liability for Damage to the Marine Environment', in Boyle and D. Freestone (eds) 'International Law and Sustainable Development' (Oxford University Press 1999) 345-358.

burden of internalizing environmental cost allocated to the operator, but regulator also ensures that he is in good stead to meet the burden and discharge it through provisions like mandatory insurance or advance financial guarantees.[334] Allocation of environmental cost here will be more in sync with the principles of agency, which permits vicarious liability. Some jurisdictions like the UK resort to contractual mechanisms like 'mutual hold harmless indemnity clauses' (MHIC), a sort of arrangement where the operator agrees to hold the contractor harmless from all obligations while working on the platform except those giving rise to liability to the contractors own employee.[335] A major criticism of this approach in the UK is that it stands against the provisions of the Unfair Contract Terms Act given its propensity to relocate liability from the original culprits.[336]

Another factor, which makes full cost internalization more unlikely in the hydrocarbon industry, is the pursuit of foreign investors for stability and the willingness of host governments to downscale general regulatory burden as an additional incentive to lure investors.[337] The incorporation of stabilization clauses[338] in International Energy Investment contracts ties the hands of the host state from enforcing a brand of environmental regulation different from the one entered by the foreign investor.[339]

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[334] For example, in relation to the UK see Farstad Supply AS v. Enviroco Limited [2010] UKSC 18, 2010 SCLR 379; See also Oil and Gas Authority , 'Financial Guidance', 7-19 8th August 2018, available on < https://www.ogauthority.co.uk/media/5003/financial-guidance-august-2018.pdf> last accessed on the 03/05/2021.

[335] For a good analysis of how 'mutual hold harmless indemnity clauses' work in the hydrocarbon industry see P. Cameron, 'Liability for catastrophic Risk in the Oil and Gas Industry' (2012) 6 IEL, 207-218; See also Aholu O.C. 'Risk Allocation in the United Kingdom Continental Shelf: The Continued Relevance of Mutual Hold Harmless Indemnity Clauses in the era of Judicial Suspicion' (2012), 1-11, available on http://www.academia.edu/27874304/RISK_ALLOCATION_IN_THE_UNITED_KINGDOM_CONTINENTAL_SHELF_UKCS_THE_CONTINUED_RELEVANCE_OF_MUTUAL_HOLD-_HARMLESS_INDEMNITY_CLAUSES_IN_THE_ERA_OF_JUDICIAL_SUSPICION ; See also G. Gordon, 'Risk Allocation in Oil and Gas Service Contracts' in G. Gordon, J. Paterson and E. Usenmez (eds) 'United Kingdom Oil and Gas Law: Current Practice and Emerging Trends: Vol. II, Commercial and Contract Law Issues (3rd Ed, Edinburg University Press 2018) 175-234.

[336] Aholu O.C (note 335); See the Unfair Contract Terms Act UK 1977.

[337] See the discussion on the race to the bottom syndrome (notes 161 and 162).

[338] Stabilization clauses are clauses used in international investment contracts to address political, fiscal, legislative and regulatory risk and regulatory risk by freezing future obligations capable of interfering with the interest of investors. See A.F.M Maniruzzaman, 'Drafting Stabilization Clauses in International Energy Contracts: Some Pitfalls for the Unwary' (2007) 5 (2) OGEL, 1; see also N.D Dias 'Stability in International Contracts for Hydrocarbon Exploration and some of the Associated General Principles of Law: from Myth to Reality' (2010) 8 (4) OGEL, 1-3

[339] Ibid.

Stabilization contracts have lengthy durations and insist on low-premium environmental obligations that overlook full internalization of environmental costs.[340]

Another problem that is more likely to injure the aspiration of full internalization of environmental cost is the problem that arises from natural resources valuation.[341] Inputting value to natural environmental resources is one problem that law has been unable to solve. There is a clear difficulty on the part of policy makers to quantify the riches of the environment in monetary terms with precise exactitude.[342] This difficulty arises from attaching a price to environmental commodities like air, water, plants and non-domestic animals. The destruction of wild herbs and species for instance, does not constitute a damage that can reasonably be quantified in monetary terms.[343] While full internalization of environmental costs holds a lot of promises that may be in the interest of sustainability and prudent resource use, the factors inhibiting it are not easily wished away. The next section shall consider the means through which the PPP is applied both under international and municipal law.

2.5 APPLICATION OF THE PPP IN THE HYDROCARBON INDUSTRY

Like other principles of international environmental law, the manifestation of the real substantive ingredients of the PPP will depend on an effective procedural and institutional framework within which law and policy operates. The procedural and institutional frameworks for applying the PPP are those mechanisms through which

[340] For an excellent discussion on stabilization clauses see P. Cameron, 'In Search of Investment Stability' in K. Talus (ed) 'Research Handbook on International Energy Law' (Edward Edgar Publishing 2014) 124-148; See also P. Daniel and E.M. Sunley, 'Contractual Assurance of Fiscal Stability' in P. Daniel, M. Keen and C. McPherson (eds), '*The Taxation of Petroleum and Minerals: Principles, Problems and Practice'* (Routledge Publishers 2010) 405-424.
[341] De Sadeleer, (note 16) 43-44 (The author noted rightly, " full compensation of for ecological damages raises the question of calculating its values, a calculation rendered even more delicate because attributing a market value has a determining effects on the scope of liability"); For the problems associated with natural resources valuation see P. Soderholm and T. Sunquist, "Measuring Environmental Externalities in the Electric Power Sector" in David Pearce (Ed) 'Environmental Valuation in Developed Countries, Case Studies (Edward Edgar Publishing 2006) 148-180.
[342] De Sadeleer, (ibid: 44); See also The New Economic Foundation (NEF), "Valuing the Environment in Economic Terms", Economics in Policy-making 2013, available onhttps://www.nefconsulting.com/wp-content/uploads/2014/10/Valuing-the-environment-in-economic-terms-briefing.pdf , last accessed on the 03/05/2021 ('Considering the complex, non-linear nature of ecosystems, valuing the worth of non-environmental goods can be an imprecise exercise'); and G. Bright, E. Connors and J. Grice "Measuring Natural Capital: Towards Accounts for the UK and a Basis for Improved Decision-making' (2019) 35 (1) Oxford Review of Economic Policy, 88-108.
[343] ibid.

law holds the polluter accountable for his acts of pollution.[344] They are translated through specific techniques for cost internalization and are effective and a good means of assessing the effectiveness of the PPP in practice especially at the level of municipal law. There are about four categories of implementation methods through which the PPP is applied. The PPP is applied through either a regulatory regime, the use of economic instruments, through a system of liability and through the co-operative method. Having briefly considered the systems of liability in the preceding section, attention shall only be centered on the first two methods since they find the greatest expression in the hydrocarbon industry.

2.5.1 Regulatory Regimes (Prescriptive and Performance-based Regulations).

Regulatory regimes (RR) are arrangements of steering and control mechanisms that profoundly influence the operation of a particular sector.[345] A regime comprises of an institutional structure, which assigns responsibilities for carrying out regulatory actions or achieving regulatory goals.[346] The institutional structure is made up of rules, which prescribe expected behaviour or outcome, standards that are benchmarked against which compliance can be measured, a mechanism for determining the degree of regulatory compliance and sanctions for failure to comply with rules.[347]

A RR can take different forms. It could take the form of prescription (Command and Control Regulation also referred to as CCR in this thesis) where the essence of regulation is to exercise influence by imposing standards backed by sanctions.[348] It could take the form of voluntary approaches under which regulators work with industry in developing codes and practice.[349] It could also take a self-auditing posture

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[344] C. Coffey and J. Newcombe, 'The Polluter Pays Principle in Fisheries: The Role of Taxes and Charges' (London: Institute for European Environmental Policy 2001) 5-6
[345] Max Plank Institute for European Legal History, *'Regulatory Regimes'*, available on < https://www.rg.mpg.de/research/regulatory-regimes> last accessed on the 10/ 11/ 2018.
[346] P.J May, 'Regulatory Regimes and Accountability' (2007) 1 Journal of Regulation and Governance, 8-26, 8
[347] ibid.
[348] R. Baldwin, M Cave, M Lodge, 'Understanding Regulation: Theory, Strategy and Practice' (2nd Ed, Oxford University Press 2012) 106
[349] T.P Lyon and J.W Maxwell, 'Voluntary Approaches to Environmental Regulation' in M. Frazini and A. Nicita (eds), 'Economic Institutions and Environmental Policy' (Ashgate Publishing, Aldershot UK 2001) 75-120

where regulated entities assess the level of their own compliance.[350] There is also a management approach to regulation where greater emphasis is placed on corporate governance systems to enable firms adhere to plans that limits regulatory harms.[351] The difference between the voluntary approach and the management approach is that while the former applies industry-developed codes, the latter relies on the private corporate governance ingenuity of firms to limit environmental harm.[352] Finally, there are performance-based regulations (PBR) that emphasize regulation for results rather than specific actions or technologies.[353] Although these different forms of regulations have their relative advantages, the one, which enjoys widespread applicability in the implementation of the PPP is the command and control approach where emphasis is on imposing standards and enforcing rules and performance-based regulation. Only these two forms of regulations are discussed in this thesis. This is because they are the two main types of regulatory strategies deployed in the hydrocarbon industry.

2.5.1.1 Command and Control (Prescriptive) Regulations (CCR).

In relation to pollution control, Hilson captures the essence of CCR. He wrote as follows:

> *But what is meant by command-and-control regulation? For present purposes, the regulatory process can be divided up into three stages: first, the setting of general policy; secondly, the setting of ambient targets and national waste or energy reduction targets; and finally, the setting of mandatory individual standards, company waste, or energy reduction targets, and product standards…Strictly speaking, the term command and control should be used only in relation to these individual plant standards, reduction targets and product standards, for it is individual companies or products specifications and framework and uses that are being commanded and controlled.*[354]

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[350] P.M Prakash, 'the Regulation Dilemma: Cooperation and Conflict in Environmental Governance' (2004 Public Administration Review, 227-238.

[351] C. Coglianese and C. Lazer 'Management-Based Regulation: Prospects and Limitation in Health, Safety and Environmental Regulation' (2003) Administrative Law Review, 705-729.

[352] C. Coglianese, 709-711.

[353] For a comprehensive discussion on PBR, see C. Coglianese, J Nash and T. Olmstead, 'Performance-based Regulation: Prospects, Limitations in Health and Safety and the environment' (2002) Regulatory Policy Centre for business and government publication 02138, 3-4; C. Coglianese 'The Limits of Performance-Based Regulation' (2017) 50 (3) University of Michigan Journal of Law Reform, 525-563; and B.M Hutter, 'The Attraction of Risk-Based Regulation: Accounting for Emergence of Risk ideas in Regulation (2005) LSE Centre for Analysis of Risk and Regulation Discussion Paper No. 33 of March 2005, 1-16.

[354] Chris Hilson, 'Regulating pollution: A UK and EC Perspective (Hart Publishing 2000)

This thesis aligns with the view as expressed by Hilson. International environmental standards enforced as part of domesticated national command and control regimes applicable to the energy industry mirrors the perceptions of professional bodies such as International Association of Oil and Gas Producers (IOGP)[355], American Petroleum Institute (API)[356] and International standard Organization (ISO)[357]. Others include the United Nations (UN) and Multi-national financial institutions like the World Bank.[358]

How CCR works in practice is that government departments through primary and secondary legislation sets standards within rules involving some form of licensing process to screen entry to an activity and set out controls not merely of the quality of service or manner of production but also the allocation of resources, products or commodities.[359] The standards could relate to specification or design where the focus is on the prevention and control of the processes that give rise to dangerous situations. For instance, the CCR could demand that industrial activities conform to specification

[355] Some examples of IGOP standards (a) Principles for impact Assessment: The Environment and Social Dimensions (b) Decommissioning, Remediation, and Reclamation Guidelines for Onshore Exploration and Production Sites (C) Exploration and Production Waste Management Guidelines and (d) Oil Industry operating Guideline for Tropical rainforests, all available on < https://www.iogp.org/international-standards/> last accessed 8/01/2019.

[356] API maintains about 685 standards and in relation to upstream activities, its standards cover, offshore structures and floating production systems, tabular goods, valves and wellhead equipment, drilling and production equipment. In the downstream segment, API publications address marketing and pipeline operations, and refinery equipment including storage tanks, pressure-relieving systems, compressors, turbine and pumps. API also have a number of publications relating to fire and safety, environmental practices and petroleum measurement. See API, 'Publications Programs and services' (API, 2016) available at http://www.api.org/products-and-services/standards/~/media/Files/Publications/Catalog/2016%20Catalog_Full%20final.pdf?la=en. last accessed 9/10/2019; See also the API Environmental and Safety Mission Guiding Principles

[357] ISO, 'ISO 14000 family-Environmental Management', at <http://www.iso.org/iso-14001-environmental-management.html> (23/6/17).

[358] See the World Bank Pollution Prevention and Abatement Handbook 1998, available on < http://documents.worldbank.org/curated/en/758631468314701365/pdf/multi0page.pdf>; on a general note, International environmental standards generally address three broad issues that assist in protecting the environment. They include (a) standard for Equipment and products, such as, construction requirements for well drilling, storage and pipeline facilities etc., as poorly designed, constructed or outdated equipment may pose a greater threat to the environment (b) Environmental practices, including the observance of environmental standards such as limits on emissions, waste disposal, gas flaring, and toxic drilling etc. (C) and Environmental performance, including adopting environmental management procedures and systems. See generally, I.L Worika, 'Environmental Law and Policy of Petroleum development: Strategies & Mechanisms for sustainable Development in Africa (Port Harcourt: ANPEZ CED, 2002) 233-278; Z. Goa, 'International Petroleum Contracts: Current Trends and New Directions (London: Graham & Trotman 1994) 217-220; A.S. Wawryk, 'International Environmental Standards in the Oil Industry: Improving the operations of Transnational Oil Companies in Emerging Economies' (2003) 1 (1) OGEL, 16.

[359] R. Baldwin (note 348) 106-107

on plant construction, equipment to be used or modes of operations to guarantee environmental protection.[360] The standard can also relate to performance or the measuring of output where regulation demands a level of performance without specifying the means through which the performance will be undertaken.[361] The standard could also relate to the realization of a set of targets or outcome where the purpose of the CCR is not to prescribe processes or level of risk creation but to call for the avoidance of certain harmful consequences (e.g. allowing the escape of oil fluid from an installation operated by the polluter).[362] In this latter form of standardization, the cost of calculating how to achieve the stipulated target is borne by the industries [363]

The traditional justifications for CCR are legion. The first is that CCR regulation enjoys the force of law as evidenced by designating some forms of behaviour as unacceptable, the breach of which sanction may follow. The second is that CCR is essential to protecting public interest.[364] Thirdly, it is justified on grounds of market failure as supported by the public choice doctrine.[365] The public choice doctrine is the doctrine that presupposes that different interest groups in the society would most likely

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[360] An example of this regulation in the UK is the Offshore Installations (Construction and Survey) Regulations 1974 (SI 1974/289) made under the Mineral Working (Offshore) Installation Act 1971; Section of the Regulation required a certificate of fitness with respect to all floating or fixed installations.

[361] Baldwin, (note 348) 106-107.

[362] Baldwin, 298.

[363] For a general discussion on regulatory standard setting see C. Scott, *'Standard-setting in Regulatory Regimes'* in R. Baldwin, M. cave and M Lodge (eds*), 'The Oxford Handbook of Regulation'* (Oxford University Press 2010) 104-119; see also A Gouldson and J. Murphy *'Regulatory Realities: The Implementation and Impact of Industrial Environmental Regulation'* (Earthscan publication Limited, 1998) 103-127; for other forms in which a command and control Regulation may take, see S. Smith, ' Environmental Economics: A short Introduction' (Oxford University Press 2011) 40-42; M Lodge and K. Wegrich, 'Managing Regulation: Regulatory Analysis, Politics and Policy' (Palgrave Macmillan 2012) 47-55.

[364]Public interest has been defined as the best possible allocation of scarce resources for individual and collective good. See J.A Den Hertog, 'Public and Private Interest in Regulation: Essays in the Law and Economics of Regulation' (1955) Utrecht University Repository, 9 , available on < https://dspace.library.uu.nl/bitstream/handle/1874/724/full.pdf> (9/01/2019);The Public interest justification is criticized on the grounds that regulation often fails to deliver public interest outcomes. See generally, M. Feintuck, *'Regulatory Rationales beyond the Economic: in Search of the Public Interest'* in R. Baldwin, M. cave and M Lodge (eds), *'The Oxford Handbook of Regulation'* (Oxford University Press 2010) 43.

[365] The Public choice theory is the theory that justifies regulatory intervention where there is need to correct market failure or ensure the proper operation of the market. See A. I. Ogus, 'Regulation: Legal Forms and Economic theory (Oxford university Press 1994) 58-59

favour outcomes which maximizes their utility.[366] The pursuit of utility maximization would most likely stimulate actions in regulatory forms to obviate the dangers which a failure of the market would do to their individual and collective interest. Fourthly, there are right-based rationales, which justify CCRs on the grounds that they are essential for human rights protection[367] and the furtherance of social solidarity.[368] A good example of this regulation in the United Kingdom is the Climate Change Act 2008.[369]

The main criticism of the CCR is that it is easily amenable to regulatory capture.[370]. There are different theories of capture. The first is the 'life circle explanation' which suggests that agencies metamorphous through various stages until they graduate to the point when they become the protectors of the regulated industry rather than public interest.[371] 'Interest group' accounts of capture stress the extent to which regulators can be influenced by claims and political interest of different groups and 'private interest or 'economic analyses' see regulation as a purchasable commodity liable to come under the influence of the economically powerful.[372] Asides capture, regulatory regimes have also been criticized for reasons relating to the problem of information asymmetry, the fact that RRs imposes uniform requirements on the population as a

[366] See D.C Mueller, *'Public Choice II'* (Cambridge University Press 1989) 320; See also M.D wright, 'A Critique of Public Choice theory Case for Privatization: Rhetoric and Reality' (1993) Ottawa Law Review, 5

[367] R. Brownsword, '*What the World Needs Now: Techno- Regulation, Human Rights and Human Dignity'* in R. Brownsword (ed), 'Global Governance and the Quest for Justice' (Oxford University Press 2004) 203-235

[368] T. Prosser, 'The Regulatory Enterprise: Government Regulation and Legitimacy' (Oxford university Press 2010) 11-20.

[369] Sections 11-15 of the Climate Change Act 2008 imposes a lot of duties on the secretary of state (SS) in relation to Climate change. These duties are the duties to set limit on use of carbon units, duty to provide indicative annual ranges for net UK carbon account, the duty to prepare proposals and policies for carbon budgets; duty to have regards to need for domestic action on climate change.

[370] The regulator's pursuit of the interest of the regulated enterprise rather than the interest of the public, exemplifies capture R. Baldwin (note 177) 107; For a more detailed research on capture see, C. Hood, 'Explaining Economic Public Policy Reversals (Bukingham, 1994) 21; for a captivating discussion on capture see D. Moss and J. Cisternino, 'New Perspectives on Regulation' (2009) 13-26; see also W.J Novak, 'A revisionist History of Capture' in D. Carpenter and D. Moss (eds) 'Preventing Regulatory Capture: Special Interest Influence and how to Limit it' (Cambridge University Press2014) 23-56.

[371] M.H Bernstein, 'Regulating Business by Independent Commission' (New York 1955).

[372] R. Posner, 'Theories of Economic Regulation' (1974) 5 bell Journal of Economics, 335; See also G. Stigler, 'the Theory of Economic Regulation' (1971) 2 Bells Journal of Economics, 3.

result of regulation-information gaps and therefore treat people standing in different legal positions equally.[373]

Other criticisms include the fact that RRs lack the incentives to reconcile private interests with collective preferences, the static nature of RRs, its lack of dynamism that barricades innovation essential to environmental protection and the high administrative cost needed for enforcement.[374] While these concerns are valid, the point must be made that in the application of the PPP, the use of RRs in most jurisdictions is mainly complementary and it is used in cocktail with other methods (i.e. economic instruments and the cooperative methods) which are considered later in this thesis. .[375]

2.5.1.2 Performance-Based Regulation (PBR)

PBR as observed earlier is a type of risk-based regulation where the focus is on result as opposed to complying with processes and standards set in regulations.[376] PBR typically identify functions for regulated entities but will allow them decide how the functions will be achieved.[377] To put it differently, 'performance-based standards, specify the performance of a good or service, but do not specify how the performance is to be achieved'.[378] PBR represents a shift away from reliance on prescriptive rules towards broadly stated rules and principles which regulated industries are required to observe. Coglianese, Nash and Olmstead capture the nature of PBR in regulatory instruments as follows:

> *A regulatory regime that is performance-based can be thought of as one in which performance is used (1) as the basis for the legal command find in*

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[373] C. D. Soares 'Earmarking Revenues from Environmentally Related Taxes' in J. E. Milne, M. S Anderson, (eds) 'Handbook of Research on Environmental Taxation' (Edward Edgar Publishing 2012) 114.
[374] R. Baldwin (note 333) 107-108.
[375] A consensus now exist that environmental policy objectives, including innovation, can only be achieved through the interaction of different policy instruments. See Y. Fukasaku, 'The Need for Environmental Innovation Indicators and Data for a Policy Perspective' in M. Weber and J. Hemmelskamp (eds), 'Towards Environmental Innovation Systems (Berlin, 2005) 258; see also M. Rodi, *'Innovation, Technological, and Environmental Fiscal Reform'* in J. Cottrell, J. E. Milne and Ors (eds), 'Critical Issues in Environmental Taxation: International and Comparative Perspectives' (Oxford university Press 2009) Vol. VI, 21.
[376] See (note 224).
[377] The Pembina Institute, 'Comparing the Offshore Regulatory Regimes of Canadian Arctic, the US, the UK, Greenland and Norway' (June 2011) 14
[378] Jeroen van der Heijden, 'Urban Sustainability and Resilience' in Peter Drahos (ed) Regulatory Theory: Foundations and Applications (Australian National University Press 2017) 727.

regulatory standards. (2) A criterion for allocating enforcement and compliance resources. (3) A trigger for the application of differentiated standards. (4) A basis for evaluating programs and agencies.

While the above observation captures the essence of PBR, the reference to PBR being 'a trigger for differentiated standard' although one with potentials to promote the sort of proportionality which the PPP encourages, has the propensity to damage the objectives of the PPP especially in relation to harmonization.

In relation to risk-based industries like the hydrocarbon industry, PBR has a lot of central elements that has been captured in scholarly works.[379] Under this sector, its principal aim is to control risk whether in the form of accidents of environmental disasters.[380] They clearly establish priorities and aim to provide logical structures within which decisions can be understood and explained. [381] They demand that regulator should clearly identify the objectives and risks that the regulated organization may present to achieving those objectives.[382] There is also an expectation on the part of the regulator to develop a system for assessing such risk and scoring these.[383] Such mechanisms conventionally treat the level of risk as the product of the gravity of a potential harm or impact and the probability of its occurrence.[384] Another element of the PBR as applied in the hydrocarbon industry is the linkage between scoring mechanism, or risk evaluation and the allocation of resources.[385]

An example of PBR as applicable in the hydrocarbon industry is the safety case regime in the United Kingdom offshore industry and the Safety Case Directive introduced in

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[379] J. Black and R. Baldwin, 'Really Responsive Risk-Based Regulation' (2010) 32 Law and Policy Journal, 181-213; For a comprehensive discussion on PBR, see C. Coglianese, J Nash and T. Olmstead, 'Performance-based Regulation: Prospects, Limitations in Health and Safety and the environment' (2002) Regulatory Policy Centre for business and government publication 02138, 3-4; C. Coglianese 'The Limits of Performance-Based Regulation' (2017) 50 (3) University of Michigan Journal of Law Reform, 525-563; and B.M Hutter, 'The Attraction of Risk-Based Regulation: Accounting for Emergence of Risk ideas in Regulation (2005) LSE Centre for Analysis of Risk and Regulation Discussion Paper No. 33 of March 2005, 1-16

[380] Baldwin (note 348) 281.

[381] Baldwin, 281.

[382] Baldwin, 281.

[383] Baldwin, 281.

[384] Baldwin, 281.

[385] Baldwin, 281.

the EU following the Gulf of Mexico spill in 2010.[386] The UK Safety Case regime was introduced after the Piper Alpha accident in the North Sea which claimed 168 lives.[387] The regime is regulated by the Offshore Safety Case Act 1992, the Safety Case Regulation 1992, the Offshore Installations (Safety Case) Regulation 2005 and more recently the Offshore Installations (Offshore Safety Directive) (Safety Case etc.) Regulation 2015.[388] A safety case is a document that gives confidence to both the duty holder and the Health and Safety Executive (HSE) that the duty holder has the ability and means to control major accident risk effectively.[389] The Safety Case Regulation does not set standards for control of major accidents risks, it only requires duty holders to reduce the risk as low as reasonably practicable'.[390] The duty holder now chooses the means through which the standard is achieved. After the Gulf of Mexico oil spill, this regulatory system became the basis of academic debate. Commentaries as to its suitability remain divided.[391]

PBR enjoys some benefits over CCR. First, a petroleum regime structured in line with performance-based standards is more likely to respond to new issues as they arise.[392] Secondly, PBR offers hydrocarbon firms flexibility and provide an avenue for such firms to adopt low-cost means in achieving the stated level of performance.[393] The flexibility which PBR offers can be utilized to balance the competing objectives of

[386] National Commission on the BP Deepwater Horizon oil Spill and Offshore Drilling, "The Gulf Offshore Disaster and the Future of Offshore Drilling Report", 2011, available on < https://www.govinfo.gov/content/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf> last accessed on the 03/05/2021.

[387] Lord Cullen, 'The Public Inquiry into the Piper Alpha Disaster (cm 1310 Nov. 1990) (hereinafter referred to as the Cullen Report).

[388] The Offshore Installations (Offshore Safety Directive) (Safety Case etc.) Regulations 2015, Statutory Instrument (S.I) no. 398.

[389] See HSE, 'A Guide to the Offshore Installation (Safety Case) Regulation 2005, 6 available on < http://www.hse.gov.uk/pUbns/priced/l30.pdf> last accessed 10/01/2018.

[390] Andrew Hopkins, 'The Need for a General Duty of Care' (2015) 37 HJIL, 841 842; In the case of *Edwards V National Coal Board*[390] the court stated that: "Reasonable practicability is a narrower term than physically possible'… a computation must be made by the owner in which the quantum of risk is placed on scale and the sacrifice involved in the measure necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it is shown that there is a gross disproportion between –the risks being insignificant in relation to the sacrifice-the defendants discharge the onus on them'

[391] J. Paterson, 'The Significance of regulatory Orientation in Occupational Health and Safety Offshore' (2011) 38 BC Envt. L Aff. L. Rev., 369; see also R. Steinzor, 'Lessons From the North Sea: Should Safety Cases Come to America? (2011) 38 BC Envt. L Aff. L. Rev., 417.

[392] T. Hunter 'Legal and Regulatory Frameworks for the Sustainable Extraction of Offshore Petroleum Resources: A Critical Functional Analysis' (PhD Thesis University of Bergen 2010) 180; Terrence Daintith, Discretion in the Administration of Offshore Oil and Gas: A Comparative Study (AMPLA Ltd, Melborne 2005) 175.

[393] Cary Coglianese, Jennifer Nash and Todd Olmstead, (note 250) 729.

internalizing environmental cost and attracting investments giving the importance of both objectives the realization of sustainable development. Thirdly, the reliance on PBR leads to the simplification and clarification of regulation. This is because PBRs are written based on the objectives to be achieved and not on specifically detailed standards.[394] This simplicity is more likely to lead to better compliance with regulation and strengthen the preventive dimensions of the PPP. Fourthly, PBR also accommodates technological changes and anticipates new challenges or hazards that may arise unlike CCR.[395] Not only does this allow for the cost of these equipment to be borne by operators as potential polluters, a demonstration of the readiness to assume those cost is the yardstick upon which regulatory performance is measured. Finally, PBR allocates the cost of identifying, reducing or eliminating risk to operators (potential polluter) and by so doing ensure that they internalize the environmental cost associated with their operations.

However, PBR are often criticized for the following reasons. First, the enforcement of PBRs entails higher regulatory costs and they also have potential transparency issues.[396] Taking into cognizance the fact that operators as potential polluters are expected to bear this cost through taxation, this may limit the possibility of using regulation to achieve balance between internalizing cost and promoting other economic objectives that are useful to a hydrocarbon jurisdiction. Another problem with PBR is that the interpretation of the expected performance levels as set out in the regulation may prove to be onerous.[397] Smaller businesses may also prefer CCR to PBR because the latter imposes greater responsibilities on small businesses to develop strategies on how they will comply with the regulation and leads to uncertainty on what should be done to achieve compliance.[398] Regulatory firms may also prefer a situation where they are informed on exactly what they required to do rather than going out of their way to identify the steps that should be taken to meet performance standards, incurring additional cost in the process.[399] As with any regulatory

[394] OECD, Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance (OECD 2002) 135.
[395] Ibid.
[396] The Pembina Institute (note 248) 21.
[397] Ibid.
[398] OECD (note 263) 135.
[399] Cary Coglianese et. al, 'Performance-based Regulation: Prospects, Limitations in Health and Safety and the environment' (note 379) 712.

instruments that is deployed effectively, implementing PBR wrongly will cause them to function poorly.[400] It has been observed that PBR is not "a magic bullet" or "one size fits all", applicable in all situations.[401]

While there is a need to move towards the adoption of more performance-based regulations, this does not mean that CCR have no validity as they are applicable 'where best practices can be defined, there is need or potential for innovation and where deviation from requirements could create unacceptable risks to the environment or human health.'[402] CCR and PBR should thus be seen as opposing ends along a spectrum between both ends, which will depend on the level of discretion that each regulatory entity is entitled to.[403] Regulators therefore have the task of searching for the particular mix of regulatory strategies that meets desired objectives.

This thesis takes the view that PBR is more suited to task of internalizing environmental cost given the importance of that role to overall sustainability. It has been earlier stated that CCR promotes 'compliance mentality' (creative compliance) where regulated enterprises circumvent the scope of a rule while defiling the essence of the rule.[404] However, if the internalization of cost is only seen as a set of indicators, regulated enterprises may deploy superficial ways of meeting the regulators requirements and this may have an effect on the quantum of environmental cost internalized and security implications.[405] There is a nexus between the internalization of cost and regulation. It has been argued that 'regulation represents an important tool in safeguarding the interest of unborn citizens and those who are too young to stand up for themselves 'when the temptation [by Government] to favour short-term benefits may be most acute'.[406] The failure to internalize cost using a regulatory strategy that best meet that purpose can lead to a poor assumption of maintenance cost that may not properly lead to the control of pollution. The assumption of these duties is also more likely to make the proof of rights emanating from its breach easy.

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[400] Cary Coglianese, (note 379) 708.
[401] Cary Coglianese (note 379) 711.
[402] The Pembina Institute (note 248) 21
[403] Cary Coglianese (note 379) 713.
[404] R. Baldwin, M Cave and M Lodge (note 363) 232
[405] A Coote, C Dunlop and O. James, 'Better regulation for sustainable Development, 5, available on < https://www.researchgate.net/publication/38415161_Better_Regulation_for_Sustainable_Development/download> accessed 11/01/2019.
[406] A Coote, 5

2.5.2 Economic Instruments (EI)

As noted earlier, EIs are 'fiscal and other economic incentives and disincentives that incorporate environmental costs and benefits into budgets of households and enterprises'.[407] The use of economic instruments is predicated on general regulatory failures and the fact that they offer incentives that encourage environmental protection.[408] International environmental law instruments emphasize the importance of EIs as a means of securing environmental protection. The Brundtland Report 1987 stated that environmental regulation must move beyond the usual menu of safety regulation, zoning laws and pollution control enactment to one built into a system of taxation.[409] Agenda 21 refers to developing economic instruments especially in the area of energy transportation and waste.[410] The 1992 Biodiversity Convention beckons on parties to adopt economically and socially sound measures that incentivize the conservation and sustainable use of components of biodiversity.[411] The 1992 Climate Change Convention requires developed parties to co-ordinate relevant economic instruments.[412]

Economic instruments can be characterized by types as we have in the OECD Council Recommendation on the Use of Economic Instruments[413] and by their functional objective in the marketplace.[414] According to UNEP, EIs serves three objectives. First, they address problems with property rights that contribute to pollution or poor stewardship of resources.[415] Second, they establish and enforce prices for resources consumed and environmental damage associated with production.[416] Third, they

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[407] OECD Glossary of Statistical Terms, (note 146).
[408] For a general discussion on economic instruments see P. Sands (note 22) 125-134; A.I. Ogus (note 188) 243-256; See also R. K Turner, D Pearce and I. Bateman, 'Environmental Economics: An Elementary Introduction' (Prentice Hall/ Harvester Wheatsheaf 1994) 141-181; R. B Stewart, 'Economic Incentives for Environmental Protection: Opportunities and Obstacles' in R. L Revesz, P Sand and R. B Stewart 'Environmental Law, The Economy and Sustainable Development' (Cambridge University Press 2000) 171-243;
[409] Brundtland G.H 'World Commission on environment and Development: Our Common Future' (Brundtland Report) (Oxford university Press 1987) 108.
[410] Paras. 4.2.
[411] Art. 11
[412] Art. 4 (2) (e).
[413] Paras. 1 (i) - (iii).
[414] UNEP, the Use of Economic Instruments in Environmental Policy: Opportunities and Challenges (2004) 25.
[415] UNEP, 25
[416] UNEP, 25

subsidize the transition to preferred behaviour.[417] It is against these objectives that the effectiveness of EIs shall be assessed in this thesis.

Some examples of EIs are charges and taxes, marketable permit schemes, enforcement incentives, liability and compensation for damage, subsidies, trade measures and investment incentives.[418] For the purpose of this thesis, only charges, taxes and tradable permits shall be briefly considered below since they are the main EIs widely used in environmental regulation.

2.5.2.1 Charges and Environmental Taxes (ETs)

It is generally recognized that PPP implies setting up a system of charges by which polluters help finance public policy to protect the environment.[419] Environmental taxation embodies the concept of using the tax system to adjust prices in a way that will influence behaviour in an environmentally positive manner.[420] To be able to achieve this objective, or correct misallocations arising from externalities the amount of a charge or tax should be equal to the marginal damage, which the individual or firms inflicts on others.[421] ETs and charges perform important incentive function when they are imposed upon contravention of CAC standards (specification, performance, and target).

Environmental taxation is useful in many respects. It is essential to the equalization of private and social marginal costs.[422] Environmental taxation also generates welfare gains especially by increasing taxes on externalities.[423] More particularly, ETs and charges are critical to persuading firms to adhere to corporate governance policies that promotes 'ecological sustainable development.[424] In the hydrocarbon industry, ETs

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[417] UNEP, 25
[418] See P. Sand (note 126) 125-134
[419] De Sadeleer (note 55), 44.
[420] J.E. Milne and M.S Anderson, *Handbook of Research on Environmental Taxation* (Edward Elgar Publishing 2014) 15.
[421] Piguo (note 103); A.I. Ogus (note 365) 246.
[422] See the seminal work of Piguo *'The Economics of Welfare*, (Cambridge University Press 1920) which popularized the concept of externalities and introduced the idea of using taxes to internalize externalities.
[423] See European Environment Agency, *Market-based Instruments for Environmental Policy in Europe* (2005) 84.
[424] A. Mortimore, 'Use of taxation Policy in encouraging Ecological Sustainable Development: The Australian Tax treatment of Environmental Impact Assessment Expenditure' in H. Ashiabor, K.

and charges are essential means of promoting energy stewardship and efficient resource use.[425] ETs and charges have also been argued to be critical means of achieving eco-justice.[426] Environmental taxes are promoted as a means of overcoming the shortcomings of the regulatory (command and control) approach to environmental protection. Environmental taxes apply to a responsive, flexible market economy that does not suffer from significant distortions. They are also said to offer 'dynamic efficiency' (i.e. they provide a permanent incentive to pollution abatement through a reduction in pollution cost and a charge on innovation). [427]Environmental taxes are also said to make a difference on the balance of payment thus, promoting economic growth.[428] Taxes and charges also require less information than regulation and thus may entail lower administrative and compliance cost.[429]

However, environmental taxes are often criticized for the following reasons. Identifying environmental taxpayers is a problem that law in its many imperfections has not been able to completely solve. Another problem with environmental taxes is that determining their basis involves rigorous determinations of economic matrix often outside the intellectual reach of non-experts. Despite the documented success of environmental charges, the rate of such charges remains low as a stimulus to attract investors.[430] They are also criticized because their administration carries the

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Deketelaere, L Kresiser and J. Milne (eds) 'Critical Issues in Environmental Taxation: International and Comparative Perspective', Vol II (Oxford university Press 2005) 422.

[425] M. D'Ascenzo, 'Taxation and Environment: The Challenges for Tax Administration (the Australian Perspective), in H. Ashiabor, K. Deketelaere, L Kresiser and J. Milne (eds) 'Critical Issues in Environmental Taxation: International and Comparative Perspective', Vol II (Oxford university Press 2005) 364.

[426] J. A Lockhart, 'Environmental Taxation: A tool to Advance Eco-Justice' in K. Deketelaere, J. Milne, L. Kreiser and H. Ashiabor (eds), 'Critical issues in Environmental Taxation: International and Comparative Perspectives', Vol. IV, (Oxford University Press 2007) 491-508.

[427] H. Ashiabor, K. Deketelaere, L Kresiser and J Milne (note 264) 422.

[428] A.K. Reichert, 'The impact of Environmental Taxes and Regulatory Policies and Economic Growth' in H. Ashiabor, K. Deketelaere, L Kresiser and J. Milne (eds) 'Critical Issues in Environmental Taxation: International and Comparative Perspectives' (Oxford university Press 2005) 293-304.

[429] K. Kosonen and G. Nicodeme, 'The Role of Fiscal Instruments in Environmental Policy' in C. D. Soares, J. Milne, H. Ashiabor, L. Kreiser and K. Deketelaere (eds) 'Critical Issues in Environmental Taxation: International and Comparative Perspectives', Vol. VIII, (Oxford University Press 2010) 5; While Administrative costs is the full resource costs to the public sector of operating each tax (e.g. wages, salaries of staff, accommodation and materials used by staff etc.), compliance cost is the cost of complying with the requirement of a tax but includes not only money spent on accountants and tax guides but also taxpayer's time spent in completing returns. See S. James, 'the Economics of Taxation' (16th Ed, EP Fiscal Publications 2016/17) 39-40

[430] For example, Reg. 42 of Nigeria's Petroleum (Drilling and Production) Regulation1969, which stipulates a penalty fee of $3.5 dollars per standard cubic feet of gas for gas flaring, has never been enforced in Nigeria. The government still charges the old rate of N10 per 1,000 Scf, which was supposed to run from 1998-2008. According to a report, the lack of political wills on the part of the Federal

possibility of immoderate dissuasive effect that might do great injury to the principle of proportionality, which the PPP recognizes.[431] It is for these reasons that environmental taxes are considered the most emblematic instruments of simultaneous intervention of the PPP and preventive principles.[432] Another criticism with environmental taxes is the difficulty in locating genuine EIs within the mass of fiscal provisions.[433] Most often than not, some of the instruments are intended as revenue taxes or charges to cover administrative expenditure. Even when they have incentive effects, they are dominated in practice, by administrative or revenue considerations. Another problem with charges or ETs is that since the relationship between the use of a product and its external cost is imprecise, the amount levied may be arbitrary relative to the harm actually caused.[434]

The allocation of charge revenue is also a problem, which has been at the forefront of national instability in many countries. With respect to allocation of charges, a major concern arises. There is the concern regarding whether the funds generated for charges and taxes be set aside in a special fund for financing environmental policy or be used to administer the general state budget. While the former approach will appeal more with the intendments of the PPP, the extent to which that will be implemented will also lie at the discretion of national authorities and where implemented by national authorities would operate against the taxation policy of universality which supports the practice that tax revenues should be held in a universal pool. [435]

2.5.3 Tradable Permits (TP)

Tradable permits are based on the idea that allocative efficiency can be achieved by allowing pollution rights to be traded.[436] Marketable permits operate differently from ETs and charges. They take the standard and translate it into 'pollution permits' equal

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Government to enforce its own laws on gas flaring penalties have cost the country $14.298 billion between April 2008 and October 2016. See *Nigeria Extractive Industries Transparency Initiative (NEITI), Oil and Gas Industry Audit Report 2014*, 1-321

[431] De Sadeleer (note 55), 47

[432] De Sadeleer (note 55) 47

[433] J. Opschoor and H. Vos, *'Economic Instruments for Environmental Protection'* (1989) 13-14.

[434] De Sadeleer, (note 55) 49;

[435] Ibid.

[436] Allowing pollution rights is an instance of offering the environment as ransom for industrial profit. A.I. Ogus (note 365) 249-250.

in aggregate value to the amount of emissions allowed under the standard. Firms are then allotted the permits and the issuing authority receives revenue for them after which the firms become free to buy and trade the permits.[437]

Under this system, a public agency would set an absolute limit to the amounts to be discharged into a given airshed or watershed, derived from its perception of optimal ambient quality, and through an auction process sell rights to emit portions of that total to the firms which bid the highest price for them.[438] Once acquired, the rights would be freely tradable between firms, so that eventually, the firms that would value them the most would own them, since they have the highest cost of pollution abatement.[439]

The Kyoto Protocol to the UNFCCC exemplifies the use of the TP approach as a means of implementing the PPP. Under the protocol, the parties can meet their commitments to reduce GHG emissions either by transferring or purchasing GHG emission reductions from other parties through emission trading; or increasing their removal by sinks through emissions reduction obtained via investments in clean development projects in developing economies (e.g. through Clean Development Mechanisms) or a combination of these mechanisms.[440] The EU uses the ETS to meet obligations under the Kyoto Protocol. The ETS allows regulated entities to use carbon credits and projects to reduce their global warming GHG emissions.[441] In addition to

[437] Schwartz, The Rio Declaration on the Environment and Development (note 102) 438-439.
[438] Schwartz, 438-439
[439] Schwartz, 438-439.
[440] Schwartz, 'Rio Declaration on the Environment and Development: A Commentary' (note 102) 239.
[441] Directive 2003/87/EC of the European parliament and of Council of the 13 October 2003, establishing a Scheme for Greenhouse Gas Emission Allowance Trading Within the Community and Amending Council Directive 96/61/EC; the Paris Agreement on Climate Change 2015 established a new regime requiring all parties (not only developing countries) to set caps under a new Global Emission Trading Scheme Contemplated by Article 6 of the Convention. However, the details of the global ETS is yet to be agreed. See Kathryn Khamsi, 'Emissions Trading: As COP26 is Delayed by COVID-19, Some Thoughts on the International Linking of Domestic Schemes' (2020) Ejil:Talk, 1-4, available on < Emissions Trading: As COP26 is delayed by COVID-19, some thoughts on the international linking of domestic schemes – EJIL: Talk! (ejiltalk.org) > ;Gao Shuai, Li Meng-Yu, D. Mao-Sheng and Wang Can, 'International Carbon Markets under the Paris Agreement: Basic Form and Development Prospects' (2019) 10 Journal of Advances in Climate Research, 21-29; S. Fujimoni I. Kubota et.al, 'Will International Emissions Trading Help Achieve the Objectives of the Paris Agreement?' (2016) 11 Environ. Res Lett., 104001; Weifeng Lui, Warwick J. Mckibbin, Adele Morris and Peter J. Wilcoxen, 'Global Economic and Environmental Outcomes of the Paris Agreement' (2019) Climate and Energy Discussion Paper, available on < Microsoft Word - Global Outcomes of Paris Brookings Jan 7 2019 > last accessed on the 28/09/2021; Raymond Clemencon, 'The Two Sides of the Paris Agreement: Dismal Failure or Historic Breakthrough?' (2016) 25 (1) Journal of Environment and Development, 3-24 and Chitzi Ogbumgbada, 'The Paris Agreement: An Imperfect but Progressive Document' (2016) 8 Int'l Energy L Rev., 320-323.

the ETS, other new market mechanisms for emission trading exists in the form of Government Crediting Systems (GCS), Tradable Intensity Standard (TIS), Installation-Based Emission trading Scheme (IB-ETS), Carbon Capture and Storage (CCS) Instruments.[442]

The attraction of this approach is that it tends to force polluters with high cost of abatement to buy the permit while those with low cost of abatement will make gains from selling and abating pollution, thus, promoting allocative efficiency.[443] Marketable permits has a built-in incentive to promote research and development for pollution abatement. It is also minimizes the cost of compliance. [444]

In addition to the TPs, other EIs, which also aid the implementation of the PPP, include subsidies,[445] Investment incentives,[446] Deposit-refund systems, trade measures, environmental agreements[447] and Renewable energy feed in tariff schemes (REFit).[448]

A major observation in the literature survey so far is that the choice of economic instruments through which the PPP is applied, the language in which these instruments are couched and the constitutional and statutory foundations upon which they are built affect to a great extent the application and implementation of the PPP.

2.6 CONCLUSION

This chapter has traced the origin of the PPP from the reflections of Aristotle through it Pigouvian routes where the doctrine of externalities emerged to its modern reformulation by the OECD in 1972. The doctrine has not only become a delight to

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[442] Schwartz, The Rio Declaration on the Environment and Development (note 102) 438-439.
[443] Schwarz, 438-439.
[444] G. Hester, '*the market for bad Regulation'.* (1987) No. 3/4, 4.
[445] Subsidies represent a system where payments are made to individuals and firms as an inducement to reduce undesirable environmental behaviour. One major criticism against subsidies is its potential to distort competition, which is against the PPP. See P Sand (note 22) 128.
[446] An example of this incentive is the Clean Development Mechanism (CDM), which provides credits to states whose companies invest in certain Greenhouse Reduction activities in developing countries; Sand (note 126) 129.
[447] Voluntary agreements between industrial undertakings aimed at supplementing regulatory requirements.
[448] This is a kind of financial incentive in the energy sector to encourage uptake of renewable electricity-generating technologies. See Boyle, 'Globalizing Environmental Liability: The Interplay of National and International Law (2005) 17 (1) JEL, 3, 3.

environmental pundits but had also shown a sort of dynamism and a propensity to claim new territories of meanings.

The PPP has shown strength in the battle to confine its space to its original character. However, it has broken free from a 'confined originality' to a principle of extensive responsibilities. From the shy principle first applied to preventive measures by polluters, it extended to cost of government administrative actions occasioned by pollution and later metamorphosed from a principle of partial internalization to one of full internalization, lengthening its size to cover liability for unintended pollution. The PPP has also demonstrated an ability to input responsibility to states to act with due diligence and has shown relevance in sustainability, improved corporate governance energy security and renewable energy where it provides incentives to stimulate environmentally responsible technology.

While the wide adoption, which the principle enjoys in the international corridor, is a testament that the principle has not lost its sheen, the fact that the principle is expressed in a language of compromise diminishes its promises. Observations at the international level reveal that there is a deliberate attempt to trade-off concerns that will promote a uniform application of the principle across board. Developing countries are suspect that the application of the principle is targeted at keeping them within the precincts of underdevelopment. They are scared that while an adoption of a 'bare-knuckle approach' to cost internalization holds the promise of improved environmental quality, that improvement would only come at the cost of diminished trade, which is more a matter of competitiveness than environmental purity. As more often than not, the PPP offers national authorities a choice between variables of costs internalization that leaves an enormous category of environmental cost uninternalized. This gives rise to unsustainable resource use that makes the aspirations of energy security a promise of tomorrow rather than today. The compromise, which arises from the discretion to internalize environmental cost, is more likely to fuel crisis between several categories of stakeholders in the hydrocarbon industry and arrest the global aspiration of internalizing the full cost of environmental externalities.

The instruments, through which the PPP is applied, are not less problematic. The possibility of capture occasioned by the use of CAC regulations endangers a smooth

sail for the principle. Although charges and taxes are useful means of switching focus to environmentally responsible behaviour, their existence operates within the realms of the discretion of national authorities which is more likely to keep them below the threshold of environmental responsibility, given the fact that trade concerns remain top on the agenda of nations. While trade concerns are equally important, they reveal the difficulties of applying a brand of PPP at the international level built on an unqualified discretion. The existence of that discretion gives rise to outcomes incompatible with sustainability and makes the performance of the functions of the principle (more in sync with a comprehensive internalization of environmental cost) a post-poned promise. Upon these findings, it will therefore be safe to conclude that while the full internalization of environmental cost remains a fine sentiment worthy of academic vocation, the realities of the language of compromise in which the PPP is expressed makes it more of a wish list item than a realistic ambition. Similarly, it may also be worthwhile to conclude that the regulatory strategy deployed in implementing the PPP determines to a large extent how costs are internalized. In the Nigerian hydrocarbon industry, these facts are easily discernable and provide an explanation of why the PPP is poorly applied in Nigeria.

CHAPTER 3

LEGAL AND REGULATORY FRAMEWORK FOR APPLYING THE POLLUTER PAYS PRINCIPLE IN NIGERIA'S HYDROCARBON INDUSTRY

"If anyone intentionally spoils the water of another…let him not only pay damages, but purify the stream or cistern which contains the water…" Plato[449]

3.1 INTRODUCTION

Nigeria is a top oil-producing nation in Africa. Oil makes a difference on the nation's balance of payment in addition to accommodating potentials for industrialization and job creation.[450] Oil was first discovered in commercial quantities in Nigeria at Oloibiri in the current Bayelsa State Nigeria in 1956 with first production commencing in 1958.[451] Nigeria has earned a fortune from oil[452]which continues to play an important role in its economic survival.[453] Despite the economic importance of hydrocarbons to Nigeria, its exploitation is a known harbinger for environmental concerns.[454] Since environmental impacts are subject to the imperatives of geology and site-specific

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[449] . Plato, 'the Dialogues of Plato', The Laws, vol. 4, book 8, section 485 (e), translated by Jowett B, (4th Ed., Oxford: Clarendon Press 1953).

[450] N. H. Barma, *The Political Economy of Natural Resource-Led Development* (World Bank Publication 2012) 1 available on https://openknowledge.worldbank.org/bitstream/handle/10986/2381/659570PUB0EPI10737B0Rents0to0Riches.pdf?sequence (Last accessed on the 23rd of March 2017); see also See L. Havemann, *Environmental Law and Regulation in the UKCS* in G. Gordon, J Paterson and Emre Usenmez (ed), *Oil and Gas Law Current Practice and Emerging Trends* (Dundee University Press 2011) 231.

[451] E.L. Wifa and M. Amakoromo, *A Comparative analysis of the Health and Safety Regulatory Regime for Offshore Oil and Gas Workers in Nigeria and the United Kingdom* (2017) 1 African Journal of International Energy and Environmental law, 77, 77-94. For an excellent history of the Nigerian Oil industry see Y Omoregbe, *Oil and Gas Law in Nigeria* (Malthouse Publishers 2001) 16-29; G. Etikerentse, *Nigerian Petroleum Law* (2nd Edition Dredew Publishers) 6-8 and O. Fagbohun, *Oil Pollution and Environmental Restoration, A Comparative Review* (Odade Publishers 2010) 153-168.

[452] It is estimated that Nigeria earned about N77. 348 (the equivalent of $211.603 billion US dollars) from 1999 to 2016. See the Centre bank of Nigeria, Fourth Quarter Report 2017 available at < http://www.cbn.gov.ng/out/2018/rsd/cbn%20economic%20report%20fourth%20quarter%20%20%20%202017%20published.pdf> last accessed 31/05/18

[453] For instance, the oil sector accounted for about 80 percent of government revenue and more than 90 percent of export and foreign exchange earnings in 2015. See Pricewaterhousecoopers, 'Nigeria's 2015 Budget Fiscal and Macroeconomic analysis' (Pricewaterhousecoopers Ltd., 2015) 4, available at < https://www.pwc.com/ng/en/assets/pdf/pwc-nigerias-2015-budget-bulletin.pdf> last accessed 31/05/2018

[454] I. Worika and U. Etemiri, *'Developing and Enforcing International Environmental Standards in Oil and Gas Operations'* (2017) 1 African Journal of International Energy and Environmental Law, 2, 1-31.

factors,[455] the benefits of hydrocarbon exploitation are always matched against the risk of pollution, catastrophic or otherwise.[456] The complexities of the hydrocarbon industry, its technical sophistication that remains the exclusive preserve for specialists in the field, the intricate technology required to explore and extract oil under miles of ocean depth all bear testament to a high possibility that oil-related pollution will occur.[457] Every stage of hydrocarbon extraction results in considerable impact on the environment.[458] Some of these impacts include, but are not limited to, physical smothering effects on flora and fauna, physical and chemical alteration of natural habitat, lethal or sub-lethal toxic effects on flora and fauna, changes in biological communities resulting from oil effects on key organisms, damage to soil productivity, damage to crops, depletion of fish population in the water bodies and water contamination.[459] Other effects are water and air quality degradation and loss of the aesthetic values of natural beaches due to oil slicks.[460] Oil infrastructure construction, reoccurring oil spills and atmospheric emissions are the major culprits of these lethal environmental impacts.[461]

The Niger Delta as the principal base of Nigeria's oil industry operations has been at the receiving end of the environmental disasters associated with the oil industry in Nigeria. Although the figures of pollution are disputed, it has been estimated that 11 million gallons of crude oil (the equivalent of the Exxon Valdez Spill of 24th March 1989 in the United States)[462] is spilled in the Niger Delta every year.[463] A recent report

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[455] Some of these factors include nature of land (plain, mountains, and hills); location of rivers, (access to sea); climate: (rainy, arid); transportation infrastructure, (Rivers, roads, railway), water protection area, (rainforest, pasture) etc. See T.W Walde, *Environmental Policies Towards Mining in Developing Countries,* (2006) OGEL, 328-329.

[456] Paterson J., '*The Significance of Regulatory Orientation in Occupational Health and Safety'* (2011) Boston College of Environmental Affairs Law Review, 369.

[457] Paterson J., 369.

[458] O.C.D Anejionu, '*Hydrocarbon Pollution in the Niger Delta: Geographies of Impacts and Appraisal of Lapses in Extant Legal Framework'*, (2015) 45 Journal of Resource Policy, 67-68.

[459] E.O Ekhator, *Environmental Protection in the Oil and Gas Industry in Nigeria: The Role of Government Agencies* (2013) 5 I.E.L.R, 196-203

[460] N. De Sadeleer, *Environmental principles, from Political slogans to Legal Rules* (Oxford University press 2002) 67.

[461] De Sadeleer (note 55) 67.

[462] See the Exxon Valdes Oil Spill Restoration Project Final Report 1995 available on < http://www.evostc.state.ak.us/Store/FinalReports/1995-95027-Final.pdf> last accessed 31/05/2018; See also the Niger Delta Natural Resource Damage Assessment and Restoration Project, Federal Ministry of Environment Abuja, 31st May 2006.

[463] A. Maitland and M. Chapman, Oil Spills in the Niger Delta: Proposal for an Effective Non-Judicial Grievance Mechanism, a Report produced for Stakeholder Democracy Network (2014) 3, available on

asserts that *'oil exploration has resulted in the estimated spillage of 13 million barrels of crude oil in the Niger Delta since 1958'*.[464] In addition to this, hundreds of gas flares burning continuously for decades have contributed to the localized acidification of the soil and waters.[465] Data from the World Bank estimates that of the global total of 147.3 billion cubic meters (Bcm) of associated gas flared in 2016, 7.7 Bcm of associated gas (representing 19.1% of the global figures) were flared in Nigeria, making the country the seventh most flare jurisdiction in the world.[466] Gas flaring has many effects, one of which is the emission of carbon dioxide, the main greenhouse gas that triggers a change in climatic conditions.[467] The Inter-governmental Panel on Climate Change (IPCC) estimates that a 2m sea level rise (potentially within 50 years) will displace 10 million people in the southern coastlines of Nigeria as a consequence of climate change powered by oil industry activities.[468] Several other reports documents the devastation, which pollution from oil operations, routs on the Niger Delta region.[469] These reports paint a gory picture of significant environmental harm[470], ecosystem jeopardy[471] and an unprecedented tragedy of human rights in the Niger Delta.[472] Specifically, the UNEP Report on Ogoniland concludes that *'there are in a significant number of locations, serious threats to human health from contaminated drinking water to concerns over the viability and productivity of*

<http://www.stakeholderdemocracy.org/wp-content/uploads/2016/06/JULY-2014-OIL-SPILLS-IN-THE-NIGER-DELTA.pdf> last accessed 31/05/2018.

[464] Stakeholders Democratic Network, Addressing the South South Environmental Emergency, The Vital Importance of Environmental Issues in Securing Stability and Prosperity in the Niger Delta (2015) 3, available on < http://www.stakeholderdemocracy.org/wp-content/uploads/2016/06/Addressing-the-South-Souths-Environmental-Emergency.pdf> (1/6/2018).

[465] Ibid.

[466] World Bank, Gas Flaring Data (2013-16), available on http://www.worldbank.org/content/dam/photos/419x440/2016/oct/flaring_data.JPG

[467] K. Ebeku, *'Constitutional Right to a Healthy Environment and Human Rights Approaches to environmental Protection in Nigeria: Gbemre v. Shell Revisited'* (2007) 16 (3) RECIEL, 317.

[468] Inter-governmental Panel on Climate Change, Climate Change Synthesis Report 2014 on Impacts, Adaptation and Vulnerability Part A: Global and sectoral Aspects, 1039-1100, available on < https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartA_FINAL.pdf> last accessed on the20th January 2021; see also IPCC, Global Warming of 1.5o C Report, available on < https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_Low_Res.pdf> last accessed on the 20/03/2021.

[469] United Nations Environmental Programme (UNEP), Environmental Assessment of Ogoniland (2011).

[470] ibid.

[471] P.C. Williams, '*The Effects of Oil Companies' activities on the environment, Health and Development in Sub-Saharan Africa: The case of the Niger Delta*, (2012), being a presentation made at the Public hearing Organised by the European Parliament Committee on Development titled: *'Environmental Degradation and its impact on Poverty* held on the 26th of February 2012.

[472] Amnesty International, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta* Report 2009.

ecosystems'.[473] The cumulative impact of decades of contamination makes the Niger Delta region one of the most polluted places on earth.[474]

Since the productive ecosystems of the Niger Delta forms the basis of important economic activities and constitutes a capital of vital importance to the Nigerian nation and the region, its destruction or degradation as a result of oil industry activities levies both a social and economic cost on the local people and the Nigerian nation in general. This situation burdens the Niger Delta with death, despair, poverty and unemployment and robs the Nigerian nation of vital capital to meet the needs of her people. Recent environmental and scientific assessment of the Niger delta region has made it clear that *'decades of oil production had made the once fertile soil of the Niger delta largely unusable for agriculture, alongside broader trends of land degradation and toxicity of groundwater reserves with hydrocarbons and carcinogens such as benzene'*.[475]Another study conducted by researchers from the University of St. Gallen in Switzerland, shows that oil spill occurring within 10km of mother's place of residence doubled neonatal mortality rates and impairs the health of surviving children.[476] On the economic side, it is estimated that Nigeria loses about N868 million naira (the equivalent of about $2.3 million American dollars) daily to gas flaring, a sum which approximates to about N316 billion naira (the equivalent of about $839.5 million American dollars using current exchange rates) yearly.[477] According to the draft National Policy on Gas recently released by the NNPC, 'billions of cubic metres of natural gas are flared annually at oil production locations resulting in atmospheric pollution severely affecting hosting communities. Gas flaring affects the environment and human health, produces economic loss, deprives the government of tax revenues and trade opportunities and deprives consumers of a clean and cheaper energy

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473 UNEP Report on Ogoniland, 38

474 Amnesty International, Negligence in the Niger Delta: Decoding shell and Eni's Poor Record on Oil Spills (2018) 4, available on < https://www.amnestyusa.org/wp-content/uploads/2018/03/DecodersReport.pdf> last accessed on the 5/6/2018.

475 The United Nations Environmental Programme, *Environmental Justice, Comparative Experiences in Legal Empowerment* (2014) 19, available on < http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Environmental-Justice-Comparative-Experiences.pdf> 4/6/2018

476 A. Bruederle and R. Hodler, *'The Effect of Oil Spills on Infant Mortality: Evidence From Nigeria'* (2017) CESifo Working papers 6653, 1-40, available on < https://www.cesifo-group.de/DocDL/cesifo1_wp6653.pdf> last accessed 4/6/2018

477 M. Eboh, '*Nigeria losing N868 Daily to Gas Flaring-NNPC'*, Vanguard newspaper of 6th March 2018. Available on < https://www.vanguardngr.com/2018/03/nigeria-losing-n868m-daily-gas-flaring-nnpc/> last accessed

source'.[478] There is therefore, a compelling need for legal instruments applicable to the extractive industry to properly index the social and economic cost arising from negative environmental externalities from oil industry operations.

International law shapes the framework of the international system for allocating resources by establishing circumstances under which nations can assert property rights in resources and delimiting the boundaries of those rights.[479] It also recognises the rights of nations to permanent sovereignty over natural resources, a principle which acknowledges the right of a state to dispose freely of its natural resources in the interest of national development and the wellbeing of its people and set conditions for resource exploitation.[480] The principle of international law particularly relevant to the allocation of environmental cost and for which several countries including Nigeria has made a condition for resource exploitation is the PPP.[481]

Since the discovery of oil in 1956 Nigeria has taken steps to erect a number of government laws, to regulate the extractive industry and its impacts, including oil spill and other contingent environmental hazards associated with the oil industry operations.[482] The laws have also sort to establish governance institutions to moderate and oversee oil industry operations.[483] But in the hurry to express the appetite of government for oil revenue, environmental regulation did not principally feature in the

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[478] Draft National Gas Policy*, Nigerian Government Policy and Acti*ons 2016, 55.

[479] R.B. Builder, *International Law and Natural Resources Policies* (1980) 20, Natural Resources Journal, 451

[480] See the United Nation's General Assembly Resolution 1802 (xvii) of 14th December 1962, Permanent Sovereignty Over Natural Resources; for an excellent exploration of this subject see L.A Miranda, *'The Role of International Law in Interstate Natural Resource Allocation: sovereignty Human Rights and people-Based development'* (2012) 45 Vanderbilt journal of Transnational Law, 798; N. J. Schrijver, *self-Determination of peoples and sovereignty over natural Wealth and Resources: In: Office of the High Commissioner (OHCHR) (ed.) Realizing the Right to Development, Essays in Commemoration of 25 years of the united nations Declaration on the Right to Development* (2013 United Nations) 95-107 and R. Pereira and O. Gough, *'Permanent Sovereignty Over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples Under International law* (2013) 14 Melbourne Journal of International law, 452-461

[481] See pages 28-83 of this thesis.

[482] See for example the Associated Gas Reinjection Act 1979 and the Oil Pollution Act Cap. 07 LFN 2004

[483] See for example the Nigerian National petroleum Act and the National Oil Spill and Response Agency (NOSDRA) Establishment Act 2006, CAP N34 LFN 2004.

imagination of policy makers as early Petroleum laws sort principally to reinforce ownership and other production concerns.[484]

The PPP was adopted into mainstream Nigerian law through a variety of constitutional and legislative provisions setting broad compliance agendas, creating rights and signposting state obligations and policy directions, setting standards, stipulating fines and imposing liability for environmental degradation. Although these provisions appear robust in terms of their breadth and reach and in terms of having an identifiable measure of assessment,[485] they have been criticized as being plagued by such concerns as causation, conflict of interest, poor institutional posturing and a poor compensation and penalty regime and for being a reaction to condemnable environmental pollution or international obligation of state on the part of the Nigerian nation.[486] Matched against the environmental aspirations set out in the Constitution of the Federal Republic of Nigeria and other policy documents,[487] the extent to which these laws applies the PPP is a matter of doctrinal controversy given the fact that scholars hardly agree as to the extent that these laws applies the PPP. More recently, a deluge of legislative activities by the Nigerian National Assembly directed towards the amendment of the NOSDRA Act 2006,[488] the Niger Delta Development Commission (NDDC) Act 2000,[489] and the passage of the Nigerian Oil Industry Governance and Institutional Framework Bill 2015[490] have reincarnated debates as to how compatible Nigerian laws are with the PPP.[491]

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[484] See Section 44 (3) Constitution of the Federal Republic of Nigeria (as amended) 1999; see also Sections 1 (1) (2) and (3) of the Petroleum Act and sections 1 and 28 of the Land Use Act CAP. L5 LFN 2004.

[485] The identifiable measure of Assessment the non-justiciable fundamental objectives and directive principles of State Policy, the National Energy Policy and the National Environmental Policy 2016 together with Principle 16 of the Rio Declaration on Environment and Development 1992.

[486] G. Elvis-Imo, *An Analysis of the Polluter Pays Principle in Nigeria* (2017) University of Ibadan Law Journal, 23.

[487] See Sections 16 (2) and section 20 of the CFRN (as amended) 1999.

[488] The National Oil Spill Detection and Response Agency (Establishment) Act 2006 (Amendment) Bill 2018, available at https://nass.gov.ng/document/download/9637 last accessed 7/6/2018.

[489] See the Niger Delta Development Commission Act 2000 (Amendment) Bill 2017, available on https://nass.gov.ng/document/download/9626 , last accessed 7/6/2018.

[490] Petroleum Industry Governance and Institutional framework Bill 2015, available at http://pwcnigeria.typepad.com/files/pigif-bill-2015.pdf , last accessed 7/6/2018.

[491] Stakeholder Democratic Network, A closer look at the Petroleum Industry Bill (PIB) (September 2015) Spotlight Issue, 5, available at < http://www.stakeholderdemocracy.org/wp-content/uploads/2015/09/V2-28.9.15-SPOTLIGHT-ISSUE-THE-PIB.pdf>

This chapter critically evaluates the current legal and regulatory framework for the application of the PPP in the Nigerian hydrocarbon industry and identify legal and regulatory gaps capable of strengthening a sub-optimal internalization of environmental cost in Nigeria. The chapter is divided into two parts. The first part deals with the legislative history of environmental regulation in Nigeria. This part traces environmental regulation from 1884 to 2018. The second part examines the key instruments through which the PPP is applied or with potentials to affect the internalization of environmental cost in Nigeria's hydrocarbon industry. The chapter concludes that innovative legislation anchored on improved institutional capacity is critical to limiting the consequences which a weak PPP regime could have on the Niger Delta region of Nigeria.

3.2 A LEGISLATIVE HISTORY OF ENVIRONMENTAL REGULATION IN NIGERIA

Environmental regulation in Nigeria, like most other jurisdiction,[492] is not the product of a systematic effort directed towards a progressively inclusive framework for managing natural resources.[493] For a sizeable number of years after the nation's independence in 1960, Nigeria was preoccupied more with providing social amenities and advancing national economic development.[494] Environmental concerns did not therefore feature in the imagination of policy makers and were considered a luxurious and abstract preoccupation that posed a threat to advancing industrialization.[495] This policy inactivity manifested a neglect of Nigeria's environmental resources and

[492] For instance, in both the United Kingdom and the United States, environmental regulation was principally, a response to crisis, particularly a grass roots movement urging the government in the US to do something about the deteriorating conditions of water, air and land. See P. Wiseman, EPA History (1970-1985) U.S. Environmental Protection Agency, available on < https://archive.epa.gov/epa/aboutepa/epa-history-1970-1985.html> last accessed 10/06/2018; See also See L. Havemann (note 1) 231

[493] A. Ogunba, *'An Appraisal of the Evolution of Environmental Legislation in Nigeri*a (2016) 40 Vermont Law Review, 674.

[494] Ogunba, 674.

[495] A. Adegoreye, *'the Challenges of Environmental Enforcement in Africa: The Nigerian Experience, in J Gerardu and C. Wasserman (eds), The Third International Conference on Environmental Enforcement'* (1994). Conference Proceedings 43, 43; this perception has been attributed to the convenient relationship between oil and government revenue since oil has long been seen as a lucrative source of revenue and a catalyst for national growth. See C. Cragg, Environmental Regulation: Pollution Control in the Global Oil Industry in relation to Nigeria (2016) A Report Prepared for Stakeholder Democracy Network, 6, available on < http://www.stakeholderdemocracy.org/wp-content/uploads/2016/06/Environmental-Regulation-and-Pollution.pdf> 10/06/2018.

environmental problems of staggering proportions.[496] Although Nigeria participated in a flurry of international discussions concerning marine and coastal environment, the conservation of natural resources and the management of trans-boundary hazardous waste within the African sub-region, the legal regime for environmental regulation in Nigeria remained illustriously feeble until the Koko incident of 19th September 1987.[497]

The trajectory of environmental legislation in Nigeria follows a growth order that has been classified into four distinct phases.[498] These phases include the colonial period (1900-1956), the era of petroleum-focused environmental legislation (1957-early 1970), the era of rudimentary and perfunctory legislation (1970- pre 1987 crisis) and the contemporary period (post 1987 period till present).[499]

3.2.1 The Colonial Period (1900-1956)

The Partitioning of Africa at the 1884-85 Berlin Conference[500] consolidated Great Britain's hold on the area now called Nigeria.[501] Preoccupied mainly by the pursuit of her political and economic interest and a relentless search for raw materials and cheap labour to sustain burgeoning British industrialization, the colonial administrators made very little effort to enact laws protecting the environment or the natives from the polluting effects of their sustained economic activities.[502] Although the General Act of the Berlin conference mandates 'powers exercising sovereign rights and influence' to watch over native tribes and care for their material wellbeing,[503] environmental

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[496] W.L. Andreen, *'Environmental Law and International Assistance: The Challenge of Strengthening Environmental Law in developing World'* (2000) 25 Colum. J. Envt'l. L. 17, 18
[497] Ogunba, (note 493) 675
[498] Ogunba, 675.
[499] Ogunba, 675.
[500] The Berlin Conference was a meeting of 14 nations to manage the process of colonization in Africa (the scramble for Africa) so as to avoid the outbreak of armed conflict between rival colonial powers. Its outcome was the conclusion of a 'General Act' ratified by all major colonial powers including the US. See M Craven, *Between law and history: The Berlin Conference of 1884-1885 and the Logic of Free Trade* (2015) 3 (1), London Review of International law, 32; see also M. Mulligan, *Nigeria, the British Presence in West Africa and International Law in the 19th Century* (2009) 11 Journal of the History of International law, 273-301
[501] See the General Act of the Berlin Conference on West Africa, 26 February 1885 (General Act) available at < https://loveman.sdsu.edu/docs/1885GeneralActBerlinConference.pdf> 11/06/2018; See also E. Herslet, *the map of Africa by Treaty*, (vol. 2 3rd ed. HMSO publishers 1909) 128.
[502] K.C. Nnadozie, *'Pollution Control in Nigeria: The Legal Framework'* (April 1994) cited in Ogunba, (note 496) 676
[503] See Art. 6.

regulation during this period only took the form of skimpy provisions in public health legislations and in torts and nuisance law. Two legislations were particularly noteworthy during the colonial period. They are the Criminal Code Law of 1916 and the Public Health Act of 1917.[504]

With focus on public health violations, the 1916 Criminal Code forbids the selling of noxious food or drink and the degradation or poisoning of any article or drink meant for sale.[505] It also have provisions outlawing the conveyance of dead animals into slaughter houses,[506] the fouling of water,[507] the burial of corpses in houses and other prohibited areas without the consent of the president or governor,[508] the noxious vitiation of the atmosphere,[509] acts capable of dangerously spreading infections[510] and the sale of matches made with white phosphorous.[511] The Public Health Act 1917 on the other hand, was broad in scope but contained provisions relating mainly to sanitation but irrelevant to land, air and water pollution.[512] Despite having public health implications, these provisions have been dismissed as 'unserious environmental legislations'.[513]

Before the passage of the Public Health Act and the Criminal Code, the colonial authority at the wake of affluent expectations for mineral discovery following the renewed search for mineral deposits, passed the Mineral Oils Ordinance.[514] The Ordinance was intended to regulate the right to search for, mine and work minerals.[515]

One weakness of environmental legislations during the colonial era was the dearth of specific environmental remedies. This gap justified resort to the English common law

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[504] The Public Health Act 1917 is no longer in force but the Criminal code is still a valid federal law.
[505] S. 243 (1).
[506] S. 244 (1) and (2).
[507] S. 245.
[508] S.246.
[509] S.247 (a).
[510] S. 247 (b).
[511] S. 248 (a) and (b).
[512] H. Ijaiya and O.T Joseph, *'Rethinking Environmental Law Enforcement in Nigeria'* (2014) 5 Beijing Law Review, 306.
[513] Ogunba, (note 493) 677.
[514] Mineral Oil Ordinance 1914.
[515] See the long title; see also A. Raji and T.S Abejide, *The British Mining and oil Regulations in Colonial Nigeria C. 1914-1960: An Assessment* (2014) 2 SING. J BUS. ECON. & MGMT. STUD., 62, 74

remedies like the tort of negligence, strict liability, public nuisance and trespass.[516] Considering that common law principles were not designed with environmental cases in mind, they consolidated the accidental character of environmental regulation and its weaknesses during the colonial period.

3.2.2 Petroleum Focused Environmental Legislation (1956-early 1970s)

This era of environmental regulation in Nigeria was characterized by a pervasive national engagement in the petroleum sector following Nigeria's transition to oil as a new foreign exchange earner.[517] Environmental legislations during this period concentrated on the many dimensions of petroleum exploration activities and aimed towards moderating the pollution that resulted from these activities.[518] Some of the legislations and regulation were enacted in response to international obligations to which Nigeria has become subject as a result of its new status as an independent nation and as a player in global energy sector.[519]

The Pipelines Act 1965,[520] Oil in Navigable waters Act 1968,[521] Nigerian Mining Corporation Act 1972,[522] Hydrocarbon Refineries Act 1965,[523] Exclusive Economic Zone Act 1978,[524] and the Territorial waters Act 1967,[525] as products of this era, made provisions regarding the protection of the environment.[526] These legislation have provisions creating civil liability for discharge of oil from pipelines[527], making the grant of pipeline licenses contingent upon public safety, prevention of land and water pollution[528] and prohibiting the discharge of oil from a ship into territorial waters or shorelines.[529] Others have provisions criminalizing the exploitation of natural

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[516] See for instance Ryland v Fletcher (1868) L.R. 3 37 L.J. Ex. 161
[517] S. G. Ogbodo, *'Environmental Protection in Nigeria: Two Decades After Koko Incident'* (2010) 15 Ann Surv. Int'l & Comp.L., 1.
[518] O.A Ogunba, EIA systems in Nigeria: Evolution, Current Practice and shortcomings (2004) 24 Envtl. Impact Assessment Rev., 643, 647.
[519] G. Etikerentse, Nigerian Petroleum Law (2nd Edition Dredew Publishers 1985) 10.
[520] now CAP. O7 L.F.N. 2004. (Later complemented by the Oil & Gas Pipelines Regulation No. 14 of 1995)
[521] now CAP. O6 L.F.N. 2004.
[522] now CAP. N120 L.F.N. 2004.
[523] now CAP. H5 L.F.N 2004.
[524] now CAP. E17 L.F.N 2004.
[525] now CAP. T5 L.F.N 2004.
[526] A detailed consideration of some of these legislations shall be dealt with in the next part of this chapter.
[527] Section 11 (5) Oil Pipelines Act.
[528] Section 17 (4) Oil pipelines Act.
[529] Section 1(1) Oil in Navigable Waters Act.

resources within the exclusive economic zone,[530] creating civil liability for physical or economic damage arising from mining activities,[531] control of refining activities and the maintenance of pollution prevention equipment in refineries.[532] There were also provisions determining the limits of territorial waters of Nigeria for purposes of the exercise of legislative powers. [533]

Although these provisions appeared robust, they were sectoral and circumscribed to the petroleum and mining sector with the exception of a few legislation, which were peripheral and varied in subject matter.[534] This sectoral outlook robbed environmental regulation during this era of a comprehensive posture. The sectoral outlook of environmental regulation during this period was both a consequence of the colonial realities and the economic vulnerabilities of Nigeria as a new nation with a huge appetite for petroleum dollars.

3.2.3 The Period of Rudimentary and Perfunctory Legislation (1970s to 1987 crisis).

This period in Nigeria's environmental legislative history signaled an era of poor public and government awareness in environmental matters. Technical issues like effluent limitation and pollution abatement were outside the preoccupation of policy makers. The laws which existed during this period were at best fragmentary, rudimentary and had little or no bearing on the environment.[535]

The Factories Act 1987, [536] The Land Use Act (LUA) 1978,[537] and Energy Commission of Nigeria Act 1979[538] are some of the legislations which existed during this period. Others include the Endangered Species (Control of International Trade

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[530] Sections 2 (1) and 3 (3) of the Exclusive Economic Zones Act.
[531] Section 16 Nigerian Mining Corporation Act.
[532] Sections 1 and 9, Hydrocarbon Oil Refineries Act.
[533] Section (1) and (2) of the Territorial Waters Act.
[534] See for example, the Agricultural (Control of Importation) Act 1964 now CAP. A13 L.F.N 2004; Amongst other provisions, this law allows an authorized officer power to destroy any imported sand, seeds, soil, containers and straw suspected to be infected with any disease or pest. See S. 6; See also Ogunba (note 493) 679.
[535] See for example the Bees (Import Control Management) Act 1970 now CAP.
[536] C.A.P F1 L.F.N 2004.
[537] C.A.P. L4 L.F.N 2004.
[538] C.P.A. E10 L.F.N. 2004.

and Traffic) Act 1985,[539] the Sea Fisheries Act 1971[540] and the River Basin Development Authority Act 1986.[541] These acts contain environmental provisions that are as varied as they are vestigial.

The 1987 Factories Act made primarily to provide for the registration of factories and the safety of workers exposed to occupational hazards,[542] also have provisions requiring availability of sanitary conveniences for workers of both sexes[543] and the adequate supply of drinking water.[544] The Act also made provisions relating to washing facilities, accommodation for clothing, first aid and the removal of dusts and fumes.[545] As wide ranging as this law appears, it is clearly, more concerned with staff welfare and hygiene than environmental security.

The Land Use Act 1978 on the other hand was passed to unify land use policy in Nigeria.[546] The LUA nationalized all lands in the country due to increasing difficulty experienced by private and government institutions in acquiring land for development.[547] The Act vested all lands[548] in the state governments to be held in trust for the common benefits of all Nigerians and as a component of this investiture, the

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[539] C.A.P. E9 L.F.N 2004.
[540] C.A.P S4 L.F.N 2004.
[541] C.A.P R9 L.F.N 2004.
[542] See the long title. Section 1 requires the Director of factories to keep a register of factories in which he shall cause to enter, such particulars in relation to every factory required to be registered while Section 1(2) mandates companies to apply for registration one month after commencement.
[543] Section 12 (1) and (2).
[544] Section 40 (1) (2) and (3).
[545] See Sections 41, 42, 43, 45 and 56.
[546] Before the advent of the Land Use Act, Nigeria operated a dual system of land holding. While the southern part of the country operated a system of customary ownership, the Northern part of the country operated under a system that effectively granted only the right of occupancy to the northern land holders under the Native Rights Ordinance. See A. Mabogunje, *Land reform In Nigeria: Progress, problems and Prospects* (2007) World Bank. Site Resources, available on http://siteresources.worldbank.org/EXTARD/Resources/336681-1236436879081/5893311-1271205116054/mabogunje.pdf Accessed 18/06/2018
[547] R. T. Ako, *Nigerian Land Use Act: An Anti-thesis to Environmental Justice* (2009) 53 (2) Journal of African Law, 294; For an excellent examination of the Land Use Act 1978 see also S.I. Nwatu, Applicability of the consent Requirement of the Nigerian Land Use act to the Asset Management Corporation of Nigeria Act (2016) 60 (2) Journal of African law, 173-189; R. Nwabueze, Alienation under the Land Use Act and express declarations of Trust in Nigeria (2009) 53 (1) Journal of African Law, 59-89.
[548] Land is essential for delivering all ecosystem services like food, energy, timber, clean water as well as carbon sequestration. See Institute for European Environmental; Policy, Land as an environmental Resource, final Report, February 2013 EnV. B.1/ ETU/2011/0029, 1-262, available on https://ieep.eu/uploads/articles/attachments/356527cc-fad2-4d6d-b437-41e0d1b4e4dc/LER_-_Final_Report_-_April_2013.pdf?v=63664509811 accessed 19/06/2018.

power to issue and revoke certificates of occupancy.[549] While the LUA succeeded in unifying land use policy in Nigeria, it has been criticized as an antithesis of environmental justice for extinguishing customary land holding and legitimizing land appropriation.[550] By vesting all land on the state, the LUA abrogated the land rights of host communities from any legal claims to land rich in petroleum deposits while simultaneous subjecting them to the adverse impacts of oil exploitation.[551]

The Energy Commission Act 1979 established the Energy Commission to strategically plan and coordinate national policies and to systematically develop the various energy resources of Nigeria.[552] Pursuant to its remit, the Nigerian Energy Commission published the Nigerian Energy Policy in 2003.[553] Amongst a litany of objectives, the policy with respect to crude oil as an energy source provides that *'the nation shall encourage the adoption of environmentally friendly oil exploration methods'*.[554] The extent to which this aspiration has been met is yet to be seen.

The Endangered Species Act 1985 puts emphasis on the protection and management of Nigeria's wildlife and some of the nations' species in danger of extinction.[555] The Act makes provisions prohibiting hunting and trading in wild animals and the regulation of animals in danger of extinction.[556] The River Basin Authorities Act 1986 on the other hand, created 11 River Basin Development Authorities across Nigeria to handle the development of water resources for domestic, industrial and other uses and

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[549] Section 1; See also section 5 (1) (a) to (d) dealing with the power of the governor to grant certificate of occupancy; See also section 28 dealing with revocation of statutory rights of occupancy.
[550] Ako (note 547) 296. See also *Abioye v. Yakubu* [1991] 5 NWLR (pt. 190) 130 at 223 paras (d)–(g) per Obaseki JSC.
[551] For a detailed analysis of this argument see, R. Ako, 'Resolving the Conflicts in Nigeria's Oil Industry: The Role of Public Participation, PhD thesis submitted to the University of Kent at Canterbury 2008; see also generally, R. Ako, 'Environmental Justice in Nigeria's Oil Industry-Recognizing and Embracing Contemporary Legal Developments' in R. Percival, J. Lin and W. Piemattei (eds), 'Global Environmental Law at Crossroads' (Edward Edgar Publishing 2014) 164-165
[552] Section 5 (a) - (k).
[553] Federal Republic of Nigeria, National Energy Policy April, 2003, available on http://www.energy.gov.ng/index.php?option=com_docman&task=cat_view&gid=34&Itemid=49 accessed 19/06/2018.
[554] See page 11.
[555] See the long title to the Act defines the Act as "an Act to provide for the conservation and management of Nigeria's wildlife and the protection of some of her endangered species in danger of extinction as a result of over-exploitation, as required under certain international treaties to which Nigeria is a signatory."
[556] See sections 1 and 2 of the Act.

the control of flood and erosion.[557] Under section 2 (1) of the Act, one of the functions of each River Basin Development Authority is *'the control of pollution in Rivers and likes in the Authority's area of acceptance with nationally laid standards'.* The Sea Fisheries Act contains provisions for the conservation and protection of sea fishes,[558] prohibiting unlicensed operations of motor fishing boats within Nigerian waters using explosives[559] and the destruction of fishes.[560]

As can be seen from the nature of these legislations, they are highly fragmentary and have meager environmental worth in practice. These limitations notwithstanding, Nigeria participated in both regional and international environmental conferences and as a consequence of a higher level of environmental awareness,[561] established the Federal ministry of environment in 1988.[562]

3.2.4 The Contemporary Period (After the 1987 Koko Crisis Until Present).

The Koko incidence of August 1987 invigorated attempts to enact sustainable environmental legislation in Nigeria.[563] The facts giving rise to this environmental renaissance are straightforward. An Italian company imported several tons of toxic industrial waste and dumped it in the Koko Delta state, formerly Bendel State, Southern Nigeria. The waste escaped into the surrounding environment and became a source of danger to some residents of the community. Piqued by the potential of the waste traffic to escalate environmental problems in Nigeria, an Italian journalist name *Ra Caelli Gonalli* published the story in a leftist provincial newspaper named *Unita*,

[557] See sections 1 and 4.
[558] Section 14 (2).
[559] Section 1.
[560] Section 10.
[561] L. Egunjobi, *Issues in Environmental management for Sustainable Development* (1993) 13 Environmentalist, 33.
[562] M. Adeyinka, P.O Bankole and O Solomon, *Environmental statistics: Situation of the federal Republic of Nigeria* (2005), being Country Report presented at the Workshop on Environmental statistics held in Dakar Senegal, Available on http://mdgs.un.org/unsd/environment/nigeria.pdf accessed 19/06/2018.
[563] For an excellent account of the koko incidence, the following articles are instructive; G. Ogbodo, *'Environmental Protection in Nigeria: Two Decades After the koko incident'* (2009) 15 (1) Annual Survey of international and Comparative Law, 1-18; B. J. Ayobayo, *'The Koko Incident: The Law of the Sea and Environmental Protection'*, (2014) Paper presented in Partial Fulfilment of the Award of Master of Laws (LLM), 14-17 and U.J. Orji, *'An Appraisal of the Legal Frameworks for Control of Environmental Pollution in Nigeria'* (2012) Commonwealth Law Bulletin, 326

from where the incident gained media visibility.[564] The incident became a turning point in Nigeria's environmental history and provoked a cocktail of government responses at enriching environmental regulation in Nigeria.

The first of these attempts was the enactment of the Harmful Waste (Special Criminal Provisions) Act 1988.[565] The Act prohibits the carrying, depositing and dumping of harmful waste on any land, territorial water, or contiguous zone or exclusive economic zone (EEZ) of Nigeria or its inland waterways.[566]

The second response was the enactment of the Federal Environmental Protection Agency (FEPA) Act 1987.[567] The FEPA Act has been described as the only comprehensive and non-sectoral environmental protection law in Nigeria.[568] The Act established the Federal Environmental Protection Agency with a wide-range of functions and powers.[569] Some of the functions of the Agency are the preparation of environmental and conservation policy, development of environmental science and technology and promoting cooperation in environmental science and conservation technology.[570] The Act in a provision that reinforced the new environmental consciousness of policy makers, prohibited the discharge of harmful quantities of any 'hazardous substance'[571] into the air, upon land and the water of Nigeria or adjourning shorelines except where such discharge is permitted or authorized by any law in force in Nigeria.[572] It also prescribed a criminal penalty for any breach committed by an individual or corporate body and a monetary fine for the breach.[573] The FEPA Act gave the Agency broad enforcement powers to enter premises without warrant, inspect and seize property and arrest offenders who obstruct enforcement officers in the

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[564] Ayobayo (note 563) 14.
[565] Cap. H1 L.F.N, 2004.
[566] See Section 1 (2) (a-d).
[567] Decree No. 58 of 1987 amended in 1992; The Federal Environmental Agency Act (1987) was repealed by the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act No. (25) 2007
[568] K. Ebeku, *'Judicial attitudes to Redress for oil-related Environmental Damage in Nigeria'* (2003) 12 (2) RECIEL, 200.
[569] Sections 1, 5 and 6 of the Act.
[570] Section 5 (a) (b) and (c).
[571] The reference to 'hazardous substance' includes crude oil. See Y. Omoregbe *'Pollution and the Nigerian Oil Industry', in W. Owboye and O. Abiodun (eds.), Report of National workshop on Petroleum and Industrial Law* (University of Lagos Press, 1992) 25.
[572] Section 21 (1).
[573] Section 21 (2) and (3).

discharge of their duties.[574] Pursuant to its remit and powers, the Agency formulated the National Policy on Environment 1989,[575] the National Environmental Protection (Effluent Limitation) Regulation 1991, and the National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Waste') Regulation 1991.

Although the FEPA Act was a comprehensive piece of legislation, it is criticized for not having the character of a consolidating legislation since it did not abrogate pre-existing sectoral legislations relating to the environment in Nigeria.[576] This situation gave birth to a conflict of jurisdiction between the Federal ministry of environment and the Petroleum ministry over the protection of the environment, a conflict that sustained poor environmental protection and human right abuses.[577]

Apparently, in order to cure the challenges arising from the FEPA Act, the National Environmental Standards and Regulations Enforcement Agency (NESREA) Establishment Act was enacted in 2007. The Act established the National Environmental Standards and Response Agency as the enforcement Agency for environmental standards, regulations, rules, policies and guidelines.[578] The Agency has responsibility for the protection and development of the environment, biodiversity conservation, sustainable development of Nigeria's natural resources and environmental technology.[579] Section 35 of the Act preserved the various guidelines and standards made by FEPA, which apply generally to all sectors including pollution from oil and gas.[580] However, in a curious twist, Sections 7(h), 8 (k) and 29 of the NESREA Act effectively restrict the Agency from regulating the oil and gas sector. This was done by providing that the duty to conduct environmental audits and to

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[574] Sections 26 and 27.

[575] The 1989 version of the National Policy on Environment was revised in 2016. The current version is available on http://environment.gov.ng/media/attachments/2017/09/22/revised-national-policy-on-the-environment-final-draft.pdf accessed 20/06/2018.

[576] K. Ebeku (note 467) 200.

[577] S.C Dike, *'Nigeria's Petroleum Industry, International Oil Companies and Human Rights Concerns: Need for Operational Due Diligence'* (2017) African Journal of International Energy and Environmental Law, 44

[578] Section 1 (1) and (2). For a detailed explanation of the role of NESREA the following see O. Fagbohun, *'The Law of Oil Pollution and Environmental Restoration'* (1st edition Odade Publishers 2010) 328-333;

[579] Section 2.

[580] See for example the National Guidelines for Environmental Management System in Nigeria made pursuant to the defunct FEPA Act; see also FEPA's Guideline for Exploration and Production (E&P) Projects 1994.

establish data bank on regulatory and enforcement mechanisms, do not extend to the oil and gas sector. The expression *'other than the oil and gas industry'* was the ouster language used to circumscribe the jurisdiction of NESREA in oil and gas matters. This restriction has been attributed to the conflicts arising from the joint regulation of the sector which reinforced regulatory inefficiency.[581] Since DPR laboured under the weight of a dual status (Regulator of petroleum development and operations), there are heightened concerns that its interest will be tilted more to profit maximization from hydrocarbon development than environmental protection.[582]

Another legislative response to the Koko incident was the enactment of the Environmental Impact Assessment (EIA) Act 1992.[583] The law requires that projects belonging to both the public and private sectors must undergo an environmental impact appraisal where they are likely to significantly affect the environment.[584] The Act also provides that information provided as part of the EIA shall be impartially examined by the Agency before any decision is made.[585] There is also another provision requiring public participation in the impact assessment of the activity or project under review.[586] However, failure to allow public participation does not give rise to public rights seeking judicial review of a decision of the Agency on environmental impact assessment.[587] In *Oronto Douglas V. Shell*,[588] the plaintiff sought a compliance with the provision of the Environment Impact Assessment (EIA) Act in relation to the Liquefied Natural gas project at Bonny (in southern Nigeria) being executed by the defendants. The Court held that the plaintiff had no standing to institute the action since he had demonstrated no prima facie evidence that his right was affected or any direct injury caused to him, or that he suffered any injury more than the 'generality of the people'.[589]

[581] Fagbohun (note 578) 329.
[582] Fagbohun (note 578) 329
[583] Cap. E12 LFN 2004.
[584] Sections 1 (a) (b) and (c), 2 (1) and (2) of the EIA.
[585] Section 6 EIA.
[586] Section 7.
[587] N. Ojukwu-Ogba*, 'Legal and regulatory Instruments on environmental Pollution in Nigeria: Much Talk, Less Teeth'* (2006) 8/9 International Energy Law and Taxation Review, 3.
[588] [1998] LPELR-CA/L/143/97.
[589] Ibid.

While the above decision reinforces the affection of Nigerian courts for claims with sufficient causes of action and has been justified on grounds of public policy,[590] the judgment has the effect of adulterating the integrity of the EIA process. It is difficult to see how authorities and private corporations will take the EIA processes seriously if they are not held to some form of accountability. More so, the decision is unjustifiable considering the fact that the statutory direction mandating public participation was couched in mandatory terms. The express use of the word 'shall' means that an obligation which cannot be waived was created in section 7 of the EIA Act. However, as can be seen from the complexion of the decision, a person who has suffered harm as a result of the failure to comply with the EIA process will have enough cause to approach the Court setting it aside. But where he refuses to do so, the public will have to live with whatever form of compliance midwifed by public authorities irrespective of whether the public was consulted.

A host of other legislations have been enacted in response to the Koko incident and the improved environmental awareness which the tragedy exposed policy makers to. Even in their many imperfections, environmental regulation in Nigeria has travelled a long road. But one question which pops up for consideration is the extent to which these statutes and regulations index environmental cost? This shall be considered in the next section.

3.3 KEY LEGAL FRAMEWORK FOR APPLYING THE PPP IN NIGERIA'S HYDROCARBON INDUSTRY

As a principle of environmental regulation, the PPP performs several functions and its history reflects an incremental budge in meaning.[591] As noted in chapter two, the PPP performs the functions of harmonization, prevention, control and curative functions.[592] The PPP is also considered as imposing obligations on states to take steps to prevent environmental harm and internalize environmental costs arising from such harm.[593] This obligation has been construed as an obligation, which entails not only the

[590] Ojukwu-Ogba (note 587) 3.
[591] N. De Sadeleer, *Environmental principles, from Political slogans to Legal Rules* (note 16) 3-4.
[592] See Section 2.6. of chapter 2 of this thesis.
[593] See Section 2.6.3 of chapter of this thesis.

adoption of appropriate rules and measures but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators.[594]

Although, Nigeria has taken steps to build legal infrastructure for pollution prevention, control and the allocation of rights in relation to pollution, the extent to which these instruments have aided the impactful internalization of environmental cost is unclear. While most of the laws remains aspirational, others reveal the deep-seated preference by Nigerian authorities for prescriptive legislation and its community of unsustainable effects. In relation to environmental rights flowing from the cost of externalities, opinions are divided as to whether constitutional and statutory provisions support an interpretation that advances the internalization of environmental cost. This section, through the lens of these functions and definitions, attempts to identify the legal instruments through which the PPP is applied in Nigeria's hydrocarbon industry.

3.3.1 The Form of Legal Instruments Applying the Polluter Pays Principle in Nigeria's Hydrocarbon industry

Cost internalization in the Nigerian hydrocarbon industry is done through a complex cocktail of country-specific instruments. First, it could take the form of constitutional and statutory provisions, regulations, policies, guidelines and other economic instruments with different legal postures and effects. Second, it could take the form of general laws or policy[595] protecting the major environmental media (air, water, and

[594] *Pulp Mill on Rivers Uruguay (Argentina v Uruguay),* Order of 13 July 2006, para. 101.
[595] See the Revised National Environmental Policy 2016. Paragraph 3.1 of the Revised National Environmental Policy of the Federal Republic of Nigeria 2016 provides that the goal of the National Policy on environment is to "ensure environmental protection and conservation of natural resources for sustainable development". More particularly, Paragraph 3.3 (IV) specifically lists the polluter pays principle as one of the principles central to the attainment of the strategic goal and strategic objectives listed in Paragraph 3.1 and in Paragraph 3.3. It defined the PPP as the principle 'which prescribes that the polluter should bear the cost of preventing and remediating pollution".; see also Section 20 of the CFRN 1999 (as amended); see also Section 16 (2) of the same constitution, which provides that "the state shall direct its policy towards ensuring the promotion of a planned and balanced economic development. Section 17 (2) (d) CFRN 1999 (as amended) also provides that "in furtherance of social order, exploitation of human or natural resources in any form whatsoever for reasons other than the goal of the community shall be prevented"; See also Section 1 of the Oil in Navigable Waters Act CAP O6 LFN 2004 which protects a prohibited sea area from any mixture containing more 100 parts of oil into a prohibited sea area. By Section 3 (1) (a) (b) and (c), the owner or master of a vessel, the occupier of the place from where the vessel is discharged, the person in charge of an apparatus used for transferring oil from or to vessel if the discharge is from that apparatus, can all become liable for an offence which on conviction carries a fine of N2, 000 naira.

land) and prescribing limits for air and water pollutions and penalty for infractions.[596] Third, it could take the form of statutory provisions stipulating response and further obligations when pollution occurs.[597]Fourth, the instrument can take the form of regulation made pursuant to powers prescribed in general laws stipulating obligations to prevent pollution of air, land and water.[598] Fifth, the instrument can also take the form of insurance obligations or legal obligations to post a restoration or reclamation bond. Sixth, it most times, takes the form of fees, taxes, permits,[599] prohibitions,[600] limitations, and charges (economic instruments) with consequences for failure to comply.[601] Seventh, it could also take the form of law imposing civil liability for environmental damage.[602]Eight, the instrument sometimes takes the form of extra constitutional or statutory redistribution or allocation of additional revenue to meet the peculiar needs of States in the Niger Delta people as sole bearers of the environmental burdens of oil exploitation.[603] Nine, the instrument can also take the

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[596] See for instance the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) 2002.

[597] See the NOSDRA Act, section 5 and 6.

[598] Section 9 of the Petroleum Act CAP P10 LFN 2004 empowers the minister to make regulations for safe working; Conservation of Petroleum Resources, Prevention of Pollution of Watercourses and the atmosphere. Pursuant to these regulatory powers, the Petroleum (Drilling Regulation and Production) Regulation was made. By Regulation 25 of the Regulation, there is an obligation on the part of the operator not to pollute or to "prevent the pollution of inland water courses, the territorial waters of Nigeria or the high sea by oil, mud or other fluids or substances which might contaminate the water, banks or shore line or which might cause harm or destruction to fish water or marine life, and where such pollution occurs or has occurred, shall take prompt steps to control and if possible, end it".

[599] Section 3 (2) of the Associated Gas Re-Injection Act 1979 (AGRA) permits the minister in charge of Petroleum Resources to issue permits to companies operating in the oil and gas industry to flare gas upon payment of prescribed fees in circumstances stipulated by Regulation; The Associated Gas Reinjection (Continued Flaring of Gas) Regulations 1984, which were enacted under to the Act, specify various conditions that qualify the Minister's power to issue certificates under s.3 (2).

[600] In Nigeria for instance, Section 3(1) of the AGRA1979 prohibits companies operating in Nigeria from flaring gas after 1st January 1984 without the consent of the minister as confirmed in a permit duly issued.

[601] Section 4 of AGRA 1979 stipulates a penalty of loss of concession rights where a company flares gas without ministerial approval; Regulations 31 of the Petroleum (Drilling and Production) Regulation 1969 provides that no person can carry out seismic data surveys in any concession areas without a permit issued by the Director of Petroleum Resources; By the combined provisions of Sections 8 (1) (g) of the Petroleum Act and section 25 (1) of the schedule to the same Act, the minister is empowered to revoke or suspend petroleum Operations where any party concerned has not complied with good oil field practice.

[602] Section 11 (5) (a) (b) of the Nigerian Oil Pipelines Act, CAP 07, Laws of the Federation of Nigeria (LFN) 2004 stipulates that a license holder shall pay compensation to any person whose land is injuriously affected by the exercise of the rights conferred by the license or any person who suffers damage by reason of any neglect on the part of the holder of the license or his agents.

[603] Section 162 (2) CFRN 1999 (as amended) provides that the principle of derivation (the principle by which Niger Delta States gets 13% additional revenues from the Federal Republic of Nigeria) shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from natural resources. Similarly, Section 14 (2) of the Niger Delta Development Commission (NDDC) (establishment) Act Cap. N. 86 LFN 2004 stipulates

form of transitional subsidies aimed at driving firms to fund researches relevant to the discovery of pollution abatement technologies.[604] Finally, Nigeria's judicial policy of constitutional and statutory interpretation determines the extent of cost internalization.[605]

While exploring the different forms of the various instruments implementing the PPP under Nigerian law, this section examines the implementation of the PPP in Nigeria based on three categories. The first category shall identify the provisions of the Constitution of Nigeria that aid the internalization of environmental cost in addition to the principle of redistribution both under the Constitution and under the Niger Delta Development Commission (NDDC) Act. The second category shall examine the preventive and control dimensions of the PPP under Nigerian law with references to controls under a typical production licence or one exercised through ministerial supervision. Finally, the last category shall explore the curative dimensions of the PPP under Nigerian law with emphasis on traditional common law and statutory remedies. Some of these instruments are considered below.

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that 15 percent of the total statutory allocation due to member states of the Commission from the Federations Account, 3 percent of the total annual budget of any oil producing company operating onshore and offshore, in the Niger Delta Area including gas processing companies and 50 percent of monies due to member states of the commission from the ecological fund be paid to the commission for purposes of performing the functions listed in Section 7 (1) (a) - (f).

[604] For instance the Nigerian Liquefied Natural Gas (Fiscal Incentives Guarantees and Assurances) Act CAP N87 LFN 2004 was enacted to provide incentives to businesses wishing to invest in the economic utilization of flared associated gas; In *Niger Delta Development Commission (NDDC) v. Nigerian Liquefied Natural Gas Ltd.* (unreported suit No. FHC/PH/CS/313/2005, the Federal High Court in response to the question of whether or not the Nigeria LNG Ltd is statutorily obliged to pay 3% of its annual budget to the NDCC as provided under the NDDC Act held that the Nigeria LNG by virtue of the Act establishing it is excluded from the ambit of the NDDC Act and is not obliged to contribute to the statutory funds of the NDDC; See also the Petroleum Profit Tax Act, S.11

[605] See for example the case of *Gbemre v. Shell Petroleum Development Corporation of Nigeria Ltd.* (2005) A.H.R.L.R. 151 (Fed H.C (Nigeria), a High Court in Nigeria held that section 3 (2) (a) and (b) of the Associated Gas Re-injection Act and section 1 of the Associated Gas Re-injection Regulations were inconsistent with the applicant's right to life and/or dignity to human person as guaranteed by sections 33 and 34 of the CFRN 1999 (as amended) and Articles 4, 16 and 24 of the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act CAP. A9 L.F.N 2004.

3.3.2 Constitution of the Federal Republic of Nigeria 1999 (as amended).

The current Constitution of Nigeria was introduced by the military at the twilight of Nigeria's transition from military to democratic rule. The Constitution replaced the 1979 constitution and is referred to as the 'grundnorm'.[606]

There are several ways in which the Constitution helps in the quest to internalize environmental cost. First, the Constitution clarifies the environmental agenda of government with respect to environmental protection so that no one is left in doubt as to what policy drives government actions. Secondly, it delimits the jurisdiction for environmental disputes, fixing the judicial venues where those disputes are to be heard. Thirdly, the Constitution can highlight the conditions relevant for domesticating international environmental treaties. Fourthly, it catalogues a community of fundamental human rights relevant to environmental protection and the remedy for their breach. Fifthly, it prescribes ownership of natural resources and the right to determine the conditions for its exploitation. Sixthly, the Constitution can be the basis for redistributing revenue to meet the peculiar needs of those who bear beyond-normal ecological burdens. [607]

3.3.2.1 The Constitution and the Clarification of Environmental Agenda and Policy

As it relates to the clarification of environmental agenda, the 1999 Constitution of the Federal Republic of Nigeria is the first Constitution in Nigeria's constitutional history

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[606] The Kelsenian German term 'grundnorm' is used to qualify the Constitution as 'the highest law of the land, the *fons et origo.* See N. Tobi, Presentation of the Report of Nigerian Constitution Debate Coordinating Committee (CDCC), being a text of speech delivered by the chairman of the CDCC, Justice Niki Tobi, while presenting the committee's Report to the Head of state, General Abdulsalami Abubakar; Section 1 (1) provides that ' this constitution is supreme and its provisions shall have binding force on authorities and persons throughout the Federal Republic of Nigeria; (3) provides that 'if any law is inconsistent with the provisions of this constitution, this constitution shall prevail and that other law shall to the extent of its inconsistency be void'. For the Supremacy of the Constitution see the following cases; Attorney General of Abia State v Attorney General of the Federation [2002] 6 N.W.L.R (pt.764) 542

[607] Zanab Emitareye Atiri, Niger Delta Minoritites and the Quest for Social justice (2014) Thesis submitted in partial fulfilent for the requirement of the award of Doctor of Philosophy at the University of Ibadan, 122-146; Ako, Rhuks, et al. "The Niger Delta Crisis: A Social Justice Approach to the Analysis of Two Conflict Eras." (2009) 11 (2) *Journal of African Development*, pp. 105–122, available on <www.jstor.org/stable/10.5325/jafrideve.11.2.0105. Accessed 20 Mar. 2021>; Olakunle Michael Folami, "*Ethnic-conflict and its manifestations in the politics of recognition in a multi-ethnic Niger delta region"*, (2017) 3 (1) Cogent Social Sciences, 1-17.

to accommodate direct environmental provisions.[608] These direct environmental provisions are highlighted in chapter two of the Constitution dealing with Fundamental Objectives and Directive Principles of State Policy.[609] While Section 16-(2)--(a) provides that *'the state[610] shall direct its policy towards ensuring a planned and balanced economic development*, section17-(2)-(d) provides that '*in furtherance of social order, the exploitation of natural resources in any form whatsoever for reasons other than the good of the community shall be prevented'.[611]*Another important provision is section 20 of the Constitution which is more compelling in its linguistic tenor. It provides that *'the state shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria'.* More categorically, Section 13 of the Constitution provides that *'it shall be the duty and responsibility of all organs of government and all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this chapter of the Constitution.'*

Perhaps, certain terms used in relation to directive environmental principles in chapter two of the Constitution needs clarification. While the reference to a 'planned and balanced economic development' and 'social order' contains a constitutional pointer to the principles of sustainable development,[612] the directive 'to protect and improve

[608] E. Okon, '*The Environmental Perspective in the 1999 Nigerian Constitution*' (2003) 5 (4) Env. L. Rev., 8

[609] The Constitution Drafting Committee (CDC) defined Fundamental objectives and Directive Principles of state Policy in the following manner: 'by fundamental objectives we refer to the identification of the ultimate objectives of the Nation whilst Directive Principles of State Policy indicate the path which leads to those objectives. Fundamental Objectives are ideals towards which the Nation is expected to strive whilst Directive Principle lay down the Policies which are expected to be pursued in the efforts of the Nation to realize the national ideals." See Report of the Constitution Drafting Committee 1978-1979, Vol. 1 page v; See also the following articles, B.O Okere, *'Fundamental Objectives and Directive Principles of State Policy Under Nigeria Constitution'* (1983) 32 International and Comparative Law Quarterly, 214; G.N Okeke, *'Fundamental Objectives and Directive Principles of State Policy: A viable Anti-Corruption Tool in Nigeria'* (2011) 2 Nnamdi Azikiwe Journal of International Law and Jurisprudence, 175-184; T. A Olaiya, 'Interrogating the Non-justiciability of Constitutional Directive Principles and Public Policy Failure in Nigeria' (2015) 8 (3) J. Pol. & L, 23-35

[610] Section 318 of the Constitution of the Federal republic of Nigeria 1999 (as amended) provides that the word 'state' when used otherwise than in relation to one of the component parts of the Federation, includes government and the word 'government' includes the Government of the Federation, or of any State, or Local Government Council or nay person who exercises power or authority on its behalf.

[611] Section 17-(3)-(b) also provides that "the state shall direct its policy towards ensuring that the health and safety and welfare of all persons in employment are safeguarded and not endangered or abused.

[612] Sustainable development has been defined as the 'Development that meets the needs of the future without compromising the ability of future generation to meet their own needs.' See the Report of the World Commission on Environment and Development: Our Common Future (OUP: Oxford 1987) available on , http://www.un-documents.net/our-common-future.pdf accessed 27/06/2018

the environment is an implied reference to the principles of prevention[613] and the PPP. Since a cardinal objective of the PPP is to allocate the social cost arising from pollution control and prevention measure, the obligation to safeguard and improve the environment arguably, connotes an implied duty to properly allocate the cost arising from pollution. This duty subject to provisions relating to justiciability has a certain consequence, which lies in the effect of an omission on the part of government to allocate cost for pollution prevention and control measures. This omission can mean that government itself can legitimately be ascribed the status of a polluter and actions can be maintained based on 'social order' to cure the laxity arising from putting in place an appropriate legislation to safeguard and improve the environment. That this represents an effectual policy can be gleaned from the very nature and justification of the Fundamental objectives and Directive Principles of State Policy.[614] The Directive Principles of State Policy (DPSP) provides a yardstick for measuring the performance of government and is imperative to the governance system of any country where it has been introduced.

It has been argued that the use of the word 'fundamental' underscores from the outset that the provisions in chapter two of the constitution are important in the life and governance of the citizens of Nigeria.[615] In the interpretation of statutes in general (the Constitution inclusive), the heading or title clause is reckoned with as part of the interpretation.[616] Accordingly, the central importance of the environmental objectives provided in chapter 2 of the Constitution crystallizes from the title of chapter designated as 'Fundamental Objectives and Directive Principles of State Policy'.[617] The use of the words 'duty' and responsibility' in section 13 of the Constitution were

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[613] Under international law, the duty to prevent harm to the territories of other states manifests itself in a duty of due diligence that requires states to introduce policies, legislation and controls aimed at preventing harm and minimizing the risk of transboundary harm. See Principle 2 Rio Declaration, Article 3 of the UN Framework Convention on Climate Change (UNFCCC), Article 2 of the OSPAR Convention and Article 14 of the Convention on Biological Diversity; See Generally, O. W Pedersen, Environmental Principles and Environmental Justice (2010) 12 Env. L Rev., 35-38

[614] L.O. Nwauzi, '*How Fundamental are the Fundamental Objectives and Directive Principles Under Chapter II of the Constitution of Nigeria 1999'* (2017) Donnish Journals of Law and Conflict Resolution, 31.

[615] Ibid: 33;

[616] In N.C Dhondial v. Union of India [2004] AIR (1271/1278) Paras. 15,

[617] Nwauzi (note 614) 32.

intended to lay emphasis on the fundamental and imperative character of fundamental principles.[618] Nwauzi argues that:

'…they did not only impose a duty or obligation on the organs of Government, they wanted them to be accountable to the citizens (I suppose) for the objectives and principles that is why the word 'responsibility' was added…'[619]

According to Salmond,

'A duty is an act the opposite of which would be wrong…to ascribe a duty to a man is to claim that he ought to perform a certain act… When the law recognises an act as a duty, it commonly enforces the performance of it…A duty is legal because it is legally recognized, not necessarily because it is enforced or sanctioned".[620]

Salmond asserts further that where a duty exists, a corresponding right crystallizes. He expostulated as follows:

'We have seen that in the strict sense a duty is something owed by one person to another. Correspondingly, the later has a right against the former. But the term right like duty can be used in a wider sense. To say that a man has a right to something is roughly to say, that it is right for him to obtain it. This may entail that others ought to provide him with it, or that they ought not to prevent him getting it, or merely that it would not be wrong.'[621]

Flowing from the exposition of Salmond, it is clear that the complexion of chapter II reinforces the mandate provided in Section 13 as a tall order for government institutions to be guided by the directives in every transaction of their constitutional business. It is a constitutional instruction to government institutions that the wellbeing of citizens ought to form the fulcrum or basis for the exercise of their executive, legislative and judicial authority. The specific use of the word 'shall' in section 13 of the 1999 Constitution implies that it is mandatory for all organs of government to conform to, observe and apply the provisions of chapter II.[622] Consequently, the duty

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[618] Ibid.
[619] Ibid.
[620] P.J. Fitzgerald (ed), Salmond on Jurisprudence (Sweet & Maxwell Publishers, 12th edn. 1966) 216-217
[621] Ibid.
[622] Okon (note 608) 11.

contemplates an obligation to allocate environmental cost in a manner that stimulates a corporate attitude to adjust industrial processes innovatively to safeguard the environment. The exercise of this duty is wide. But its direction is circumscribed and ought to appeal to a reasonable man as capable of safeguarding and improving the environment or one capable of propelling the exploitation of natural resources for communal benefit.

Regrettably, the provisions of chapter II of the Constitution relating to Fundamental Objectives and Directive Principles of State Policy in its character as a pack of social rights is not justiciable. The concept of justiciability centers around two primary concerns, namely, the legitimacy of judicial intervention and the competence of courts to adjudicate issues in the sphere of socio-economic rights, to which the environmental principles and directives under examination falls under.[623] Nwabueze puts it rather succinctly. He defines justiciability as "*a combination of judicial power and duty bestowed constitutionally on the courts to adjudicate violations of the law*".[624] Section 6 (6) (c) of the 1999 constitution puts the character of DPSP rather lucidly, *'the judicial powers vested in accordance with this section shall not, except as otherwise provided by this constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the fundamental objectives and directive principles of state policy set out in chapter II of this constitution.*'

Several Nigeria cases shade light on the precise nature of DPSP. In *Archbishop Anthony Okogie (Trustees of Roman Catholic Schools) and Others v. Attorney – General of Lagos State*[625] Mamman Nasir, President of the Court of Appeal (PCA), explained the rationale for DPSPs. He clarified that the essence of DPSP is to identify

[623] S. Ibe, *'Beyond Justiciability: Realising the Promise of Socio-Economic Rights in Nigeria'* (2007) 7 African Human Rights Law Journal, 230.
[624] B. Nwabueze, *'Judicialism in Commonwealth Africa: The Role of the Courts in government'* (New York St. Martin's Press 1977) 21; It has been argued that the definition of Nwabueze aligns with the idea that it is not primarily the nature of socio-economic rights that denies judicial enforcement of these rights, but the lack of competence or willingness of the adjudicating body to entertain, examine and pronounce on the claims affecting these rights. See United Nations, 'Economic, Social and Cultural Rights- Handbook for national human rights institutions, publication of the Office of the united Nations High Commissioner for Human Rights (2005), available on < https://www.ohchr.org/Documents/Issues/ESCR/HR_P_PT_12_NHRI_en.pdf> accessed 28/06/2018
[625] [1981] 2 NCLR 337 CA.

the ultimate objectives of the nation and lay down policies, which should be encouraged in the nation's quest to realise its objectives. Explaining the rather contradictory posture of the constitution he deduced that: '*While section 13…makes it a duty and responsibility to conform to and apply the provisions of chapter II, section 6 (6) (c) the same Constitution makes it clear that no court has jurisdiction to pronounce any decision as to whether any organ of government has acted or is acting in conformity with the fundamental objectives and Directive Principles. It is clear that section 13 has not made chapter II justiciable'*.[626] Explaining the role of the judiciary as it concerns DPSP he expressed the view that '*the obligation of the judiciary to observe the provisions of chapter II is limited to interpreting the general provisions of the constitution or any statute in such a way that the provisions of the chapter are observed…subject to the express provision of the constitution.*'[627] Nasir puts it beyond dispute that the 'arbiter for any breach of and guardian of the DPSP is the legislature itself or the electorate,'[628] since it is clear from the provisions of section 4-(2) and item 59 - (a)[629] of the Exclusive Legislative List in the second schedule of to the Constitution that the National Assembly 'has a duty to establish authorities which shall have power to promote and enforce the observance of chapter II of the Constitution'.[630] He concluded on the basis of the above that in the absence of such authorities, it will amount to 'mere speculation to say which functions they may perform or in which way they be able to enforce the provisions of chapter II'.

Similarly, in *Attorney-General of Ondo State of Ondo State v. Attorney-General of the Federation and ors,*[631] the Supreme Court per Uwaifo JSC restating the position of Mamman Nasir in relation to Section 6 (6) (c) stated rather unequivocally that '*as to the non-justiciability of the Fundamental Objectives and Directives Principles of State*

[626] Okogie Case (625) 350 Paras 1-2.
[627] Okogie's Case (note 625) above, paras 2-3.
[628] Okogie's Case (note 625), paras 7-8.
[629] Now Item 60 (a) of the Exclusive Legislative List.
[630] Section 4-(2) provides that the ' National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the exclusive legislative list set out in Part 1 of the second schedule to the constitution.; While Item 59 (a) provides that the National Assembly shall have power to make laws for the establishment and regulation of authorities for the Federation or any part thereof (a) to promote and enforce the observance of Fundamental Objectives and Directive Principles contained in this constitution.
[631] [2002] Federation Weekly Law Report (FWLR) Part III p. 1972 subsequently referred to as *Attorney-General of Ondo State's Case*

Policy in Chapter II of our Constitution, section 6 (6) (c) says so. While they remain mere declarations, they cannot be enforced by legal process…[632]

It has been argued that the judicial attitude of Nigerian Courts in relation to socio-economic rights of the kind that accommodates environmental principles and directives are attributable to judicial precedents which by their very nature, evokes a legally compulsive obeisance on the part of lower courts.[633]

The non-justiciable status of chapter II of the Constitution of the Federal Republic of Nigeria 1999 (amended) brews controversy amongst academics and has been described as 'one of the tragedies of modern constitutional history'.[634] Adeoye, describes DPSP as revolutionary initiatives, which qualifies as 'mere unattainable utopia'.[635] In An apparent burst of frustration regarding the toothless nature of chapter II, G.N Okeke argued that 'the 1999 constitution has packaged a parcel of good for Nigerians only to keep it out of reach from those for whom it has been made'.[636] Reinforcing the non-justiciable complexion of chapter II, the full Assembly of CDC (1978-79) contended that making fundamental objectives justiciable would lead to a consistent sword confrontation between the different arms of government.[637] They argued that *'fundamental objectives and directive principles relate to policy goals or direction rather than to the existence or extent of legal right vested in any individual or group, which is subject to the jurisdiction of the court of law'*.[638] Ghai and Cottrell justify courts incapacities to enforce socio-economic rights on the basis that they do not have the capacity to make well-informed decisions about methods of implementation of their decisions especially where constitution makers decide for policy reasons, to exclude the jurisdiction of courts in this regards.[639] It has also been

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632 Ibid. at 2135; see also

633 Ibe, (note 623) above, 243; See also Attorney General of Borno State & Ors v. Adamu & ors [1998] I NWLR (pt.427) 681-687

634 Ibid.

635 A. Akinsanya, *'Fundamental Objectives and Directive Principles of State Policy in Nigerian Constitution'* (1993) 46 (2) Pakistan Horizon, 23-41; this position has been criticized as non-sequitur for failing to realize that non-justiciability does not amount to unattainability. See Nwauzi, note 168, 32; See also D.M Jemibewon, *'The Military, Law and Society: Reflections of a General'* (Ibadan Spectrum Books Ltd 1998) 109.

636 Okeke, (note 609), 179-180

637 The Constitution Drafting Committee (1978-79) Report Vol. 1, P. viii

638 Ibid.

639 S. Muralidhar 'Economic, Social and Cultural Rights: An Indian Response to the Justiciability Debate' in Ghai & J. Contrell (eds) Economic, Social and Cultural Rights in Practice' (2004) 23.

argued that 'the non-enforceability of chapter II makes these objectives a dicey and tricky instrument of state policy.'[640] Irrespective of the arguments advanced in favour of the weak legal status of these objectives the fact remains that their enforceability would have been a potent sentinel for keeping sustained vigilance over the integrity of these objectives. It is difficult to see how government can remain faithful to these ideals if no right of action crystallizes based on their sub-optimal implementation.

The point must be made however, that the non-justiciability of chapter II is neither sacrosanct nor final. The Supreme Court in the *Attorney-General of Ondo's Case*[641] rejected the argument that 'the duty and responsibility of all organs of government and all authorities and persons exercising legislative, executive or judicial powers to conform to, observe and apply the provisions of the Chapter II of the Constitution (S. 13) is limited by S. 6 (6) (c) of the Constitution which bars the Court from determining any issue or question as to whether any law or judicial decision is in conformity with DPSP.[642] Ogwuegbu Justice of the Supreme Court (JSC), dismissing the argument held that 'the argument …is limited to the extent that Courts cannot enforce any of the provisions of Chapter II of the Constitution until the National assembly has enacted specific laws as has been done in Section 15 (5) of the Independent Corrupt Practices and other Related Offences Act 2000'.[643]

The above decision is explainable upon no other hypothesis than the fact that a community consideration of Section 4-(2) and 6-(6)-(c), Chapter II and item 60-(a) of the Exclusive Legislative List of the Constitution will justify a law made by the National Assembly for the purpose of breathing enforceable life on the DPSP. The implications of this interpretation are twofold. First, it means that only the National Assembly can make laws to enforce the environmental principles listed in chapter II. In *Attorney-General of Lagos State v. Attorney-General of the Federation and 35*

[640] A. A. Odike, 'Incorporation of fundamental Objectives and Directive Principles of State policy in the Constitutions of Emerging Democracies: A Beneficial Wrong Doing or Demagoguery?' (2016) 7 Beijing Law Review, 273.
[641] Attorney General of Ondo's Case (note 631) above.
[642] Ibid. at 2102-3.
[643] Repealed and re-enacted as the Corrupt Practices and Other Related Offences Etc. act CAP. C31 LFN 2004; the court held that the Act was the first effort to activate just one aspect of the objective in order that there may be good and transparent government throughout the Federation of Nigeria. Paras 2136.

ors,[644] the Supreme Court held that since section 20 of the 1999 Constitution falls under the chapter II, the legislative competence of which resides with the National Assembly by virtue of item 60 (a) of the Second schedule to the Constitution, it can only be legislated by the National Assembly of the Federal Republic of Nigeria. The importance of this power is that it is critical to the actualization of the responsibilities of the Nigerian state in relation to environmental regulation. The PPP itself is promoted as a principle that places a responsibility on states to take steps to prevent environmental pollution.[645] This obligation has two important ramifications. It involves the adoption of appropriate measure and the establishment of institutions for vigilance, enforcement, and administrative controls. The relevance of this power is that it can be deployed towards securing a quality legislative framework that guarantees optimum internalization of environmental cost associated with hydrocarbon pollution. It can also be deployed as a transitional route to make the non-justiciable provisions of chapter II of the Constitution justiciable. Not only does this hold the promise of enhancing liability, but it could also provide a means of fine-tuning judicial interpretations relevant environmental costs and secure the full prospects of environmental rights considered essential for actualizing the curative and preventive facets of the PPP.

Secondly, any new enactment on the environment by the National Assembly or existing Federal Government legislation has the status of a regular law and can only create ordinary rights that fall short of constitutional quality.[646] Rights created in Statutory instruments are subservient to constitutional provisions. The Constitution remains the best turf to secure optimum internalization of environmental cost given its primacy amongst legal documents. The risk that statutory provisions made pursuant to Item 60 (a) could become unenforceable where they contradict constitutional provision may hold a bitter prospect for environmental cost internalization. It may also relax preventive obligations of hydrocarbon companies and supply industrial impetus for a minimal assumption of statutory obligations. It can also become a means for encouraging 'consequential capture' whereby obligations which contradict the Constitution are intentionally accommodated in other statutory provisions in the

[644] [2003] MJSC 1.
[645] See the discussion on state responsibility in chapter two of this thesis, 18-19.
[646] E. Okon (note 608) above, 15.

knowledge that when they are called to question, they would most likely remain unenforceable for running contrary to the Constitution.

While environmental directives contained in chapter II remains non-justiciable until any legislative activity directed towards enforcement crystallizes, the same cannot be said of other provisions of the Constitutions like fundamental human rights, the breach of which will necessarily give rise to legal action.[647] As discussed below, fundamental human rights provisions of the Constitution are very useful to securing the internalization of environmental cost given the nexus that exist between environmental impacts and human rights.

One question that arises from a consideration of environmental principles accommodated under the Constitution is whether the National Assembly can be compelled to make desirable environmental legislation where such legislation is absent or where an enactment is of poor constitutional quality. This is a recondite point that has not been considered by courts in Nigeria. This thesis takes the view that subject to certain considerations, the National Assembly can be compelled by any citizen of Nigeria with sufficient interest to make legislation capable of encouraging peace, ecological order and environmental governance. By extension, these laws can force polluters to assume obligations of pollution prevention and control measures in a manner that protects the environmental order since the original idea behind the PPP is to promote rational use of scarce resources. This is because, Section 4-(2) allows the National Assembly to make law for the 'peace order and good governance of the Federation with respect to any matter included in the Exclusive Legislative List.[648]

The reference to 'peace, order and good governance' can be said to equate with the sort of responsibility contemplated in section 16-(2) of the Constitution relating to 'planned and balance economic development'. Since by virtue of Section 4 (8), the exercise of legislative power is subject to the jurisdiction of Courts, there is no reason why that section cannot provide a solid legal ground to compel the passage of a

[647]. See Generally T.A Olaiya, 'Interrogating the Non-justiciability of the Constitutional Directive Principles and Public Policy Failure in Nigeria (2015) 8 J. Pol. & L., 23-34 and *Gbemre v. Shell Petroleum Development Corporation of Nigeria Ltd.* (2005) A.H.R.L.R. 151 (Fed H.C (Nigeria).
[648] Exclusive Legislative List means part 1 of the Second Schedule of the Constitution of the Federal Republic of Nigeria. See Section 318 of the 1999 Constitution.

desirable environmental legislation or challenge sub-optimal environmental legislations, especially the ones that threaten ecological order and environmental governance. The oxford dictionary of English language defines 'order' as *'the logical or comprehensible arrangement of separate elements*.[649] The black's law dictionary defines peace as *'a state of public tranquility; freedom from civil disturbance or hostility'*.[650] The word 'good' is defined by the Black's law dictionary as *'sound and reliable…valid, effectual, and enforceable; sufficient under the law'*.[651] Government on the other hand, is defined as *'an organization through which a body of people exercises political authority; the machinery by which sovereign power is expressed'*.[652]

Going by these definitions, the reference to peace, order and good governance of the Federation in relation to environmental legislation will mean a legislation that serves the developmental needs of the current generation without compromising the ability of future generations to meet their own needs or one that offers the 'common good'[653]. This thesis argue that the idea that underpin the common good is well reflected in Nigeria's Constitution by reference to 'good governance' as a condition which a law should satisfy. The concept of good means that legislation must promote sustainable development (SD).[654]The concept of good also reinforces a constitutional expectation that legislations must be of fine quality, a quality sufficient enough to maintain and sustain public sequence, tranquility and political institutions responsive to these

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[649] H. A Sydney, *'Oxford Advanced Learners Dictionary'* (Oxford University Press 2015) vol. 1.
[650] Bryan A. Garner, *'Black's Law Dictionary'* (10th ed, 2014) 1311
[651] Ibid: 807
[652] Ibid: 810
[653] 'Common Good' is defined as the sum total of social conditions which allow people, either as groups or as individuals to reach their fulfilment more fully and more easily. G. Morris, 'Recovering the Common Good' (2013) 44 Victoria U. Wellington L. Rev.,313; most times the 'common good' is associated with public interest, public good, common interest etc., See S. Iniogbong 'What is the Common Good?' (2017) 94 Law & Justice Christian L. Rev., 99; see also L. Green 'Law, Co-ordination and the Common Good' (1983) 3 Oxford J. Legal studies, 229-324.
[654] See also the Report of the World Commission on Environment and Development (WCED) 1987 titled 'our common future' which defines sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'; for an exploration of under Nigerian law see U.J Orji, 'Enhancing Sustainable Development in Nigeria: A discourse of the Legal basis and proposals to strengthen Legal and Policy Strategies for its implementation (2012) 39 (1) Commonwealth Law Review, 163-197; S.O Oyedepo *'On Energy for Sustainable Development in Nigeria'* (2012) 16 Renewable and sustainable Energy Reviews, 2583-2598 and B.U Ihugba and S.N Okoro *'Evaluation of the Legal Framework for Promoting Sustainable Development in the Extractive Host Communities in Nigeria'* (2017) 8 J. Sustainable Dev. L & Pol'y, 354.

concerns. The reference to those expressions will therefore, demand that economic instruments ought as a matter constitutional necessity, to index the social and external cost arising from oil exploitation. Legislations must have the tendency to promote peace and promote it effectively. Legislations must also ensure that the architecture of government is responsive to the common good (environmental legislation that properly accounts for externalities) as a principal machinery for expressing sovereign power.[655]

Most items in the Exclusive Legislative List other than fundamental objectives, have enough environmental implications to prompt legislative action capable of promoting, peace, public order and good governance. The subjects of fishing and fisheries, treaty implementation, insurance, maritime shipping and navigation, meteorology, maintenance of national parks, nuclear energy all fall within the legislative corridors of the National Assembly requiring legislative action directed at public peace, public order or good governance.[656]

More specifically, Item 39 of the Exclusive Legislative List bequeath the National Assembly with exclusive powers to make law in relation to mines and minerals, including oil fields, oil mining, geological surveys and natural gas. Similar jurisdiction exists in relation to taxation of incomes, profits and capital gains.[657] These exclusive powers are where the regulation of polluter pays principle in the oil and gas industry finds the most expression. For example, the power to make laws with respect to oilfields, will include the power to set appropriate conditions for the extraction of petroleum resources including the rights and obligations arising with respect to the impact of exploitation. The power will also extend to using statutory instruments to internalize externalities in a manner that promotes peace, public order and ecological

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[655] See Eric Beerbohm and Ryan W Davis, “The Common Good: A buck-Passing Account” (2017) Journal of Political Philosophy, 1-20 (“The common good represents a way of rising above private or parochial interests, setting aside politica posturing or gamesmanship, and working towards goals whose value non can deny”); See also Dominique Leydet, “Partisan Legislatures and Democratic Deliberation” (2014) Journal of Political Philosophy, 22. Also, Eric McGhee, Seth Masket, Boris Shor, Steven Rogers and Nolan McCarthy “A primary Cause of Partisanship? Nomination Systems and Legislator Ideology” (2013) 58 American Journal of political Science. 58.

[656] See items 29, 31, 33, 36, 37, 40 and 41 of Part to the 2nd Schedule (Exclusive Legislative list) to the constitution of the Federal Republic of Nigeria 1999 (as amended).

[657] See item 59 of Part 1 to the 2nd Schedule (Exclusive Legislative List) Constitution of the Federal Republic of Nigeria 1999 (as amended).

tranquility. The substance of this argument is hinged on the fact that peace, public order and good governance (ecological governance inclusive) may be difficult to attain where existing legislations fail to index environmental costs arising from hydrocarbon activities. Flowing from this legislative obligation, the exclusive legislative power mentioned in item 39 of the Exclusive Legislative list bear environmental implications and any law arising from the exercise of these powers must have the potentials of entrenching, peace, ecological order and environmental governance or fall short of constitutional quality. This is because the exercise of legislative authority in relation to those items is within the jurisdictional reach of courts of law.[658] Accordingly, where through the exercise of these powers, the legislature makes laws which creates weak environmental obligations (especially those relating to the prevention of pollution, attribution of environmental taxes and liability) that escalates externalities, a right of action will emerge from the sub-optimal exercise of that power. A right of action will also emerge where the National Assembly pursuant to this order grants non-transitional subsidies that subsidize the environmental cost of hydrocarbon operations in a manner that puts peace, order and good governance in harm's way.

There are two justifications for this position. The first relates to the linguistic complexion of Section 4 of the Constitution. The use of the word 'shall' in section 4 (2) of the Constitution indicates that the section is obligatory. This is because in general acts of parliament or in constitutions, the word 'shall' is construed imperatively and expansively.[659] The second justification relates to the supreme character of the Constitution itself.[660] In *Attorney –General of Abia State v. Attorney-General of the Federation*, [661] Justice Niki Tobi (of blessed memory) painted a linguistic portrait of the supreme character of the Nigerian Constitution. He enunciated as follows:

> *The Constitution of a nation is the fons et origo, not only of the jurisprudence but also of the legal system of the nation. It is the beginning and the end of the legal system…It is the barometer with which all statutes are measured.*

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[658] Section 4 (8) of the 1999 Constitution provides that 'Save as otherwise provided by this Constitutions, the exercise of legislative powers shall be subject to the jurisdictions of Courts.

[659] David Hay, *'Words and Phrases Legally Defined'* (4th ed, LexisNexis 2007) vol. 2 L-Z, 964

[660] See section 1 (1) and (3)

[661] [2006]16 NWLR (pt. 1005) 265

In line with the kingly position of the constitution, all the three arms of government are slaves of the constitution…In the sense of total obeisance and loyalty to it. This is in recognition of the supremacy of the constitution over and above every statute, be it an Act of the National assembly or a law of the House Assembly of a state…All the arms of Government must dance the music and chorus that the constitution beats and sings, whether the melody sounds good or bad. [662]

From the above decision, we can conclude that the Constitution's reference to peace, order and good government is a good music, which legislators must dance to when considering environmental legislations. A claim predicated on the question whether a legislation meets this quality is justiciable and have implications for the quality of environmental cost internalized and the sort of preventive and curative obligations levied on Multinational Oil Companies (MNOCs.)

3.3.2.2 Jurisdiction over Environmental Disputes in the Hydrocarbon Industry

Jurisdiction is a court's power to decide a case or issue a decree.[663] It is essentially the authority that a court of law has to determine matters or issues, which are litigated before it or to take cognizance of issues presented in a formal way for its resolution. [664] Jurisdiction is fundamental to the life of any dispute and the absence of it brings a fatal end to matters under litigation.[665]

The 1999 Constitution is the basis of jurisdiction for Nigerian Courts. It vests judicial powers on all courts established for the Federation and for the states.[666] Section 251 of the 1999 Constitution vest jurisdiction on the Federal High Court over matters relating to government revenue, taxation of companies in Nigeria, the operations of

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[662] J. Sokefun and N.C Njoku, 'The Court System in Nigeria: Jurisdiction and Appeals' (2016) 2 (3) International Journal of Business and Applied Social Science, 1-27; O.B. Oluwakayode, 'Administration of Justice in Nigeria: Analysing the Dominant Legal Ideology' (2018) 10 (1) Journal of Conflict Resolution, 1-8 and H. Hammed and A Wahab, 'Ensuring Good Governance Through Parliamentary Control and Administrative Agencies: A Critique (2012) NAUJILJ, 68-82
[663] Bryan Garner, (650) 980
[664] J. Sokefun (note 662), 4.
[665] See the following cases *Adam v Umar* [2007] 5 NWLR (pt. 1133) 41 at 71; Osadebe v Attorney-General of Bendel State [1991] 1 NWLR (pt.169) 525-557 and Shelim v. Gobang [2009]12 NWLR (pt. 1156) 403, 455-456
[666] See section 6 (1).

the companies and Allied Matters Act,[667] any admiralty jurisdiction and bankruptcy and insolvency.[668] More specifically, the Constitution vests jurisdiction over mines and minerals (including oil fields, oil mining, geological surveys and natural gas) on the Federal High Court.[669] These law-making powers are the constitutional basis upon which statutory policies relevant to the PPP are nurtured.

It will therefore follow that disputes relating to the application of the PPP as they concern the oil industry in Nigeria will fall within the exclusive jurisdictional borders of the Federal High Court. This is important because where matters appertaining to the extent of cost internalization in relation to mines and minerals, including oil fields and oil mining are filed in wrong judicial venues they may die a premature death and affect the extent of cost internalization.[670] In *Madukolo v. Nkemdilim,*[671] The Supreme Court held that oil spillage from an oil pipeline is a thing associated with, related to, arising from or ancillary to mines and minerals, including oil fields, oil mining, geological surveys and natural gas as provided in section 7 (1) and (2) of Decree No. 60 of 1991 and therefore outside the jurisdictional purview of the state High Court.

Similarly, in *Shell Petroleum Development Company Nigeria Ltd. V Isaiah*[672] the Supreme Court of Nigeria per Mohammed JSC, held as follows:

> *…the installation of pipelines, producing, treating and transmitting of crude oil to the storage tanks is part of petroleum mining operations. Therefore, if an incident happens during the transmission of petroleum to the storage tanks it can be explained as having arisen from or connected with or pertaining to mines and minerals, including oil fields, and oil mining. I therefore agree that the subject matter of the respondent's claim falls within the exclusive jurisdiction of the Federal High Court as is provided under section 230 (1) (a) of the Constitution (Suspension and Modification) Decree No. 107.*[673]

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[667] Companies and Allied Matters Act Cap. C20 LFN 2004.
[668] See Section 251 (1) (a) (b) (c) (e) and (g).
[669] Section 251 (1) (n); this jurisdiction is reinforced in Section 7 (1) (P) of the Federal High Court Act Cap F12 LFN 2004.
[670] Based on the concept of Constitutional Supremacy established in Section 1 (1) and (3) of the CFRN 1999 (as amended).
[671] [1962] 2 SCNLR 341.
[672] [2001] 11 NWLR 168
[673] Now Section 251 (1) (n) of the 1999 Constitution (as amended); The Court of Appeal reached similar decisions relating to oil spillage claims in Barry and 2 Ors v. Obi A. Eric and 3 Ors [1998] 8 NWLR (pt. 562) 404 at 416 and SPDC v. Otelemaba Maxon and Ors [2001] 9 NWLR (Pt. 719) 541.

Similarly, in *SPDC v Maxon,*[674] the Court of Appeal held that any civil cause or mattes arising from or connected with or pertaining to natural gas are within the exclusive jurisdiction of the Federal High Court. A State High Court has no jurisdiction when an action involves such matters in any form or to any degree.[675] Justice Pats Acholonu remarked as follows:

> It is my view that any unsavoury result which is actionable in consequence of the activities of the companies engaged in operations relating to prospecting in oil, mines, minerals, gas exploration and related geophysical works or activities shall come within the jurisdiction of the Federal High Court to adjudicate on.[676]

The implication of the above decisions is that no other Court in Nigeria can hear disputes arising from questions as to whether social and economic costs have been properly internalized in the hydrocarbon industry except the Federal High Court. While this decision reveals the importance of hydrocarbon operations to the Federal Government as a property of national interest, it unduly limits the judicial avenues opened to claimants to ventilate their grievances when the need to do so arises. This jurisdictional limitation can delay claims against polluters in the light of the possibility of case traffic that is most likely to result from the concentration of this vital jurisdiction on the Federal High Court.

3.3.2.3 Constitutional routes to Incorporating International Environmental Treaties in Nigeria

Nigeria has been very active in the international corridors since it gained independence in 1960.[677] As a consequence of this international activities aimed at reinforcing its

[674] [2001] 9 NWLR (Pt. 719) 541
[675] See generally, N. Ayoola-Daniels, Nigerian Laws, Cases and Materials on Oil and Gas (Petgas Global Consulting 2008) 10-19
[676] Ibid.
[677] E Egede, *'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria'* (2007) 51 (2) Journal of African Law, 249

subscription to the international system of governance built around the United Nations, the country had acceded to and ratified several international environmental treaties.[678]

With respect to the ratification of treaties, Nigeria operates a dualist system wherein treaties are not applied domestically unless incorporated through domestic legislation.[679] To wear an enforceable posture under Nigerian law, the National Assembly must enact a Treaty as law.[680] Section 12 (1) of the 1999 Constitution provides that 'no treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'. The requirement that a Treaty be enacted has been described as a relic of colonialism.[681] Apart from legislative enactments other means of domesticating treaty in Nigeria include treaty extension by virtue of colonial authority,[682] and recreating the provisions of Treaties as local legislations.[683]

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[678] Nigeria has acceded to the following environmental treaties: Vienna Convention for the Protection of the Ozone Layer 1985, the Basel Convention on the Control of Transboundary Movement of Hazardous Waste and their Disposal 1995, the United Nations Framework Convention on Climate change 1992; Some of the International Environmental Treaties ratified by Nigeria are, The International Convention for the Safety of Life at Sea (Ratification and Enforcement) Act 2004; International Convention on Civil Liability for Oil Pollution (Ratification and Enforcement) Act 2006; the International Convention on the Establishment of an International Fund for the Compensation of Oil Pollution Damage 1971 as amended (Ratification and Enforcement) Act 2006 amongst others. See generally, A. Ahmed-Hameed, 'The Challenges of Implementing International Treaties in Third World Countries: The Case of Maritime and Environmental Treaties Implementation in Nigeria' (2016) 50 Journal of Law, Policy and Globalization, 27; See also List of Treaties Ratified in Nigeria, available on http://www.placng.org/new/upload/TreatiesRatifiedinNigeria.pdf. Accessed 4/07/2018.

[679] E. O Ekhator, 'The Impact of the African charter on Human and Peoples Rights on Domestic law: A Case Study of Nigeria' (2015) 41 (2) Commonwealth Law Bulletin, 256; See generally, J.O Arowosegbe and R. J Akomolafe, 'The Foreign Relations Powers of the Nigerian National Assembly' (2016) Sage Open Access Journal, 1-7; O.B Oluwene, 'Nigerian Legislature and Public Accountability in Presidential Democracy' (2014) 5 Mediterranean Journal of Social sciences, 1411-1419; B.I. Olutoyin, ' Treaty Making and its Application Under Nigerian Law: The Journey so Far' (2014) 31 (3) International journal of Business and Management Invention, 7-18

[680] This is pursuant to the combined provisions of Section 4 (2) and item 31 of Part 1 to the 2nd Schedule of the Exclusive Legislative List which bequeaths exclusive powers on the National Assembly to make laws with respect to the 'the implementation of treaties relating to matters in the exclusive legislative list'. However, matters outside the exclusive legislative list, a Bill to implement a Treaty shall not be presented to the president for assent, nor shall it be enacted, unless it is ratified by a majority of the legislative houses of the states of the federation. See section 12 (3) of the 1999 Constitution of Nigeria.

[681] Egede (note 224) 251; In *Ibidapo v. Lufthansa Airlines* [1997] 4 NWLR (Pt. 498) 124 at 150, Wali JSC revealed that 'Nigeria, like any other commonwealth country, inherited the English Common law rules governing the municipal application of international law'.

[682] For example, the Warsaw Convention extended to Nigeria by virtue of the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953.

[683] A. Enaubele, 'Implementation of Treaties in Nigeria and the status Question: Whither Nigerian Courts' (2009) 17 AJICL 326.

In *Abacha v. Fawehinmi,*[684] the Supreme Court surveyed the provisions of section 12 (1) in relation to the African charter of Human and Peoples Rights (the African Charter). The Court held that '*…no matter how beneficial to the country or citizenry an international treaty to which Nigeria has become a signatory may be it remains unenforceable, if it is not enacted into the law of the country by the National Assembly'*.[685]

The implication of section 12(1) and the decision of the Supreme Court in Abacha's Case is that international treaties acceded by Nigeria conveying the PPP have effect only at the pleasure of the National Assembly (NA).[686] While this position reinforces the principles of sovereignty under international law and allows the NA to introduce international environmental treaties at the pace of national development, leaving the provisions of international treaties exclusively at the pleasure of legislative will is bound to derogate from the purpose of those treaties, which is intended to offer individuals shield from the excesses of government. The point must be made however, that when domesticated, international treaties do not rank higher than the constitution but have a greater vigour and strength than other domestic statutes in the hierarchy of laws.[687]

Through the provisions of section 12(1) several international instruments conveying the PPP have become part of Nigerian law as they have been ratified by the National Assembly .[688] Two of these instruments vitalize the curative dimensions of the PPP and are worthy of note.

The first is the International Convention on Civil Liability for Oil Pollution Damage (Ratification and Enforcement) Act 2006.[689] The Convention applies exclusively to

[684] [1996] 9 NWLR (pt. 475) 710 at 747
[685] Similarly, in *The Registered Trustees of National Association of Community Health Practitioners of Nigeria & Ors v Medical & Health Workers Union of Nigeria* [2008] 2 NWLR (pt. 107] 575; Several other decision following this decision have been reached in *Comptroller of Nigerian Prisons & 2 Ors v Adekanye & 26 Ors* [1999] 10 NWLR (Pt. 623) 400; See also *Ubani v. Director of State security Services* [1999] 11 NWLR (Pt. 625) 129
[686] Egede, (note 677) 254
[687] *Abacha's case,* per Ogundare, at 289.
[688] See for instance the African Charter on Human and Peoples Right 1981 (Ratification and Enforcement) Act Cap A9 LFN 2004.
[689] CAP 129 LFN 2004.

pollution damage caused in the territory, the territorial sea, the EEZ or an area adjacent the EEZ where none is defined under international law.[690] Specifically, it provides that the owners of a ship shall be liable for any pollution caused by the ship as a result of the incident except where the liability is the resultant effect of any kind of war, a natural phenomenon of an exceptional or inevitable character or negligence of government or other Agency responsible for sea safety.[691] While the domestication of the Act is a visible testimonial on the part of government to internalize post-pollution environmental cost caused by ships, it does little to impose obligations capable of preventing the pollution in the first place from occurring.

The second convention is the International Convention on the Establishment of International Fund for Compensation of Oil Pollution Damage 1971 as amended (Ratification and Enforcement) Act, 2006.[692] The objective of the Convention is to *'provide compensation for pollution damage to the extent that the provision afforded by the 1992 Liability Convention is adequate and to give effects to related purposes*.[693] The Convention established a fund recognized as a legal person under the law capable of assuming rights and obligations in relation to legal proceedings.[694] In relation to the PPP, it provides in Article 4-(1) that the fund shall 'pay compensation to any person to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for the damage under the terms of the 1992 Liability Convention.[695] From the tenor of the Convention, it is intended to act as a counterpart fund meant to reinforce compensation when it is inadequate under the terms of the liability Convention of 1992. Like its counterpart, the International Convention on Civil Liability for Oil Pollution Damage, it does not make any provision for the prevention of oil pollution and is merely a post-pollution measure to index some part of the environmental cost arising from ships at sea.

The conclusion to be drawn from the above is that international instruments relevant to cost internalization will be ineffectual until they are passed into law by the National

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690 Art. 2.
691 Art- 3 (1) (2) and (3).
692 CAP 130 LFN 2004.
693 Art- 2 (a).
694 Art- 2 (1) and (2).
695 Art - (1)-(a).

Assembly. While this holds the advantage of subjecting international treaties to local realities, it can defeat the essence of these international instruments, which is to supply remedies against government arbitrariness.

3.3.2.4 Fundamental Human Rights and the Polluter Pays Principle

Since the future of humanity depends on maintaining a habitable planet, modern environmental law now supports the view that effective measures to protect the environment are crucial to any project for advancing human rights.[696] The Stockholm Declaration 1972 declares that 'man has the fundamental right to live in an environment of a quality that permits a life of dignity and wellbeing and a solemn responsibility to protect and preserve the environment for the present and future generations.[697] Other UN treaties and documents reemphasize the relationship between human rights and environmental quality.[698] A recent UN document declares that 'human beings are part of nature and our human rights are intertwined with the environment in which we live'.[699] The document emphasized that *'environmental harm interferes with the enjoyment of human rights and that the exercise of human rights help to protect the environment and to promote sustainable development'*.[700]

The link between environment and human rights is getting stronger, and the impact of oil industry activities reinforces that linkage.[701] With the revelation that hydrocarbon

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[696] D. Bodansky, J. Brunnee and E Hey (ed), *'The Oxford Handbook of International Environmental Law'* (Oxford University2007) 664; D. Shelton, "Human Rights, Health and Environmental Protection: Linkages in Law and Practice" (2002) Health and Human Rights Working Paper Series No. 1, being a Background Paper for the World Health Organization, 6-10; See also Louise J. Kotze, '*Human Rights, the Environment, and the Global South' in S. Alam, S. Atapattu et al (eds) 'International Environmental Law and the Global South'* (Cambridge university Press 2015) 171-191; Bridget Lewis "Environmental Human Rights and Climate Change: Current Status and Future Prospecs (Springer 2018) 1 -11; Ben Boer, "Environmental Law Dimensions of Human Rights" (Oxford university Press 2015) 1-10 and Linda Hajjar Leib, "Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives" (Martinus Nijhoff Publishers 2011)1-8.

[697] Stockholm Declaration1972, principle 1.

[698] See for example, the UNEP Compendium of Good Practices on Human Rights and the Environment 2016; UNEP, Human Rights and the Environment: Excerpts from Guidance note on Human Rights for Resident Coordinators and UN Country Teams 2017 and Resolution 45/94 of the UN General Assembly.

[699] UN, 'Framework Principles on Human Rights and the Environment' (2018) 1, available on < https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf> last accessed 29/12/2018.

[700] Ibid.

[701] For a more general reading on the linkage between the environment and human rights see A Boyle, 'Human Rights and the Environment: Where next? (2012) 23 (3); EJIL, 613-642; J. H Knox and R. Pejan, 'The Human Right to a Healthy Environment' (Cambridge University Press 2018) 1-16; D.

operations have a wide catalogue of impacts which extends to contamination of drinking water, dislocation of communal habitation and habitats, neonatal mortality, amongst others,[702] doubts about the capacity of hydrocarbon activities to wrought havoc on a litany of human rights are daily been submerged.[703] It has been argued that hydrocarbon activities with its concomitant climate change implications are bound to threaten the right to life[704], the right to the dignity of the human person[705], the right to adequate food and water,[706] the right to health, the right to private and family life and the right to own immovable property.[707] The breaches of these rights have become a world concern.[708]

Several strategies exist for consolidating the connection between human rights and environmental protection. First, it can be done either through the use of constitutional, legal or human right to a healthy/clean environment.[709] Another approach is through the interpretation of existing constitutional rights to reinforce the linkage between human activities with environmental safety.[710] A third approach is the codification of procedural rights, which is promoted as enabling a public interest model of

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Shelton, '*Human Rights and the Environment: Jurisprudence of Human Rights Bodies'*, (2002) Background papers on the Joint-UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 4-16th of January 2002; D. Shelton, *'Human Rights and the Environment: Substantive Rights'* in M. Fitzmaurice, D.M Ong and P. Merkouris (eds) 'Research Handbook on International Environmental Law (Edward Edgar publishing 2015) 265-283 and J. H Knox 'Climate Change and Human Rights Law' (2009-2010) 50 Va. J. Int'l L., 163-218

[702] See introduction to this chapter.

[703] B. Lewis, *'Environmental Rights or a Right to the Environment? Exploring the Nexus Between Human Rights and Environmental Protection'* (2012) 8 (1) MqJICEL, 36-47

[704] In Virender Gaur v. State of Haryana [1995] 2 SCC, 577, the Supreme Court of India held that environment, ecological, air and water pollution amounts to a violation of Article 21 of the Constitution dealing with the right to life; See also Coralie v Delhi [1981] AIR SC, 746, where the same Court defined life to include both physical existence and also quality of life. The Right to life also extends to the maintenance of public health and the preservation of sanitation and accommodate the precautionary and polluter pays principle under Indian law. See Vellore Citizen Welfare Forum v. Union of India [199] AIR, SC, 2715; AP Pollution Control Board v. Prof M.V. Nayudu [1999] SC 812. See generally Gitanjali N. Gill, "Access Rights and the Environment in India: Access through Public Litigation" (2012) Env L. Rev., 200-218, 204-205.

[705] Coralie v Delhi [1981] AIR SC, 746;

[706] Food systems are vulnerable to ongoing climate and environmental changes that threaten their sustainability. See Jessica Fenzo, A.L Bellows and M.L. Spike et.al. (2020) 113 (1) The American Journal of Clinical Nutrition, 7-16.

[707] S. Mclnerney-Lankford, M. Darrow and L. Rajamani, 'Human Rights and Climate Change: A Review of International Legal Dimensions' (World Bank studies 2011) 11-19

[708] Issues of human rights are now regarded as universal; see O.B. Olukoya 'Enforcement and Implementation Mechanisms of the African Human Rights Charter: A Critical Analysis' (2015) 5 (3) AJLC, 85.

[709] K.S. Ebeku, *'Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: Gbemre v Shell Revisited*' (2007) 16 (3) RECIEL, 312

[710] Ibid.

accountability more appropriately in an environmental context.[711] A final approach is to articulate ethical and legal duties of individuals that include environmental protection and human rights.[712] The reasons attributed for these approaches to environment and human rights are the facts that they address environmental impacts on life, health, private rights and property of individual rights.[713] Other reasons include the fact that they secure a higher standard of environmental quality, promote the rule of law in the context of government accountability and broaden economic and social rights to embrace elements of public interest in environmental protection.[714]

The primary responsibility for promoting and protecting human rights lies with the state.[715]According to the United Nations Framework Principles on Human Rights and the Environment 2018, this responsibility includes the obligation to prohibit discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment.[716]

In relation to Nigeria, apart from the environmental rights set out in chapter II of the constitution of the FRN 1999 (as amended), chapter 4 of the Constitution is exclusively dedicated to fundamental human rights.[717] The Constitution guarantee the rights to life[718], the right to the dignity of the human person[719], the right to property[720] and the right to private and family life.[721] These are the rights most likely to be affected by the impacts of hydrocarbon operations. As Judge Weeremantry of the International Court of Justice (ICJ) noted:

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[711] A Boyle, 'Human Rights or Environmental rights? A Reassessment (2007) a paper given at Fordham university law school on March 2 2007

[712] D. Shelton, *'Human Rights and the environment: What specific Environmental Rights have been recognized?'* (2008) 35 (1) DENV. J. Int'L L & Policy, 130

[713] A. Boyle (note 711) 613-614

[714] Ibid.

[715] United Nations Human Rights Council (UNHRC) Res. 17/4 'Human Rights and Transnational Corporations and Business Enterprises of 6 July 2011.

[716] D. Bodansky, J. Brunnee and E Hey (ed), *'The Oxford Handbook on International Environmental Law (*note 696) 1-11.

[717] In *Ransome Kuti &* Ors. *V. AG Federation* [1985] 8 NWLR (pt. 6) 211 noted that 'the idea and concept of fundamental rights both derive from the premise of the inalienable rights of man- life liberty and pursuit of happiness…'; See generally, A. O Nwafor, 'Enforcing Fundamental Rights in Nigerian Courts-Processes and Challenges (2009) 4 African Journal of Legal studies, 3.

[718] Section 33

[719] Section 34

[720] Section 44 (1)

[721] Section 37

> *The protection of the environment is… a vital part of contemporary human rights such as the right to health and the right to health itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the universal Declaration and other rights instruments.*[722]

It is submitted that the provisions of the Constitution relating to the above rights are critical to the internalization of environmental cost especially as they relate to the preventive and curative dimensions of the polluter pays principle. Their protection and enforceability by the Constitution is a reinforcement of the high esteem in which they are held.[723] Rights being accommodated in the highest legal document of Nigeria, a breach of these rights can be reasonably foreseen as capable of giving rise to costs in compensation. Perhaps some examples will reinforce the above position. For instance, it is predictable that a source of drinking water poisoned from chemicals embodied in escaping oil fluids from a poorly maintained pipeline can become a source of death and anguish for the host communities.[724] Similarly, it is also foreseeable that a gas flare can heighten deaths from neonatal mortality, enhance low life expectancy (which lowers the dignity of those affected) and corrode surrounding properties.[725] It is also foreseeable that a poor enforcement of statutory measures aimed at protecting the environment, could destroy farmlands and destroy the livelihood of local people. Finally, it is foreseeable that that a poor allocation of 'redistributive revenue'[726] could incapacitate oil producing states from meeting critical human rights obligations necessary for the survival of the people. Consequently, this may affect access to water and other essential services vital to the survival of the people and erode their dignity as a consequence thereof. This is because the allocation of such revenue is critical to balancing the burden which oil producing communities bear as a result of the impact of hydrocarbon operations on their land. The allocation is also essential to the supply of necessaries like water since the water sources of these communities are more likely

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[722] See Gabicikovo-Nagymaros Project, Hungary v Slovakia [1997] ICJ Rep 3, ICGJ 65; See also A. A. Cancando Trindade, *'The Parallel Evolutions of International Human Rights Protection and of Environmental Protection and the absence of Restrictions Upon the Exercise of Recognized Human Rights'* in A.A.C. Trindade, C.B Leal and Ors (eds) *'Human Rights and the Environment'* (Fortaleza Publishers 2017) 49-92.

[723] Nwafor (note 247) 6

[724] In *Shell v. Tiebo* VII [1996] 4 NWLR (pt.445) 657, the Court awarded general damages

[725] A. Bruederle, 'the Effects of Oil Spill on Infant Mortality' (note 476) above, 1-4.

[726] Redistributive revenue is revenue distributed to help oil producing states manage the cost of environmental externalities associated with oil industry operations in their states.

to be contaminated from hydrocarbon activities.[727] In all these situations, the polluter whether he exists in the form of a Multi-national Oil Company (MNOC) or in the form of a government Agency can be sued for a breach of whatever rights affected.

Section 46(1) of the 1999 Constitution provides that *'any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any state in relation to him may apply to the High court in that state for redress'*. The language of the Constitution in section 46 is indulgent and accommodates not only actual but potential pollution. The provision will apply to a breach, continuing breach and threatened breach. Redress therefore exists for infringements to fundamental human rights arising from hydrocarbon exploitation. How relevant is this right to internalizing environmental cost especially, the cost of curing environmental degradation? The provisions of chapter IV (Fundamental Rights) of the Constitution will justify an action to stop a development project that threatens environmental safety and by extension, the safety and dignity of the persons likely to be affected by that project. Where a breach of environmental obligation relating to maintenance of oil installations is proven to have caused death or damage to property or the collective dignity of a people, it can become a legal plank for securing compensation under Nigerian law especially if the deceased person the bread winner of his family. Chapter IV of the Constitution will therefore, help vitalize the curative dimensions of the PPP under Nigerian law. But the extent to which this spectrum of the PPP is vitalized will depend on a liberal interpretation of the chapter by the judiciary.

In *Gbemre v Shell*,[728] a case brought pursuant to the fast-track procedure in Section 46 of the Constitution dealing with fundamental rights, the Court held that the constitutionally guaranteed right to life and the dignity of human person as guaranteed under the Constitution and Article 24 of the African Charter of Human and Peoples Right, includes the right to poison-free, pollution-free and healthy environment.[729] The court further held that the continuous flaring of associated gas by the defendants in the

[727] UNEP Report on Ogoniland 2011, 38
[728] (2005) A. H.R.L.R, 51 (Fed HC-Nigeria).
[729] At pages 14-15

course of their oil exploration activities violated the applicant's right to life and the dignity of their human person.[730]

While the judgement is a landmark case, it has been criticized for the reasons that the court did not resolve conflicting evidence and had applied the fast-track procedure under section 46(1) of the Constitution.[731] With respect, this criticism defeats the essence of the right to life and the dignity of human person. Construed expansively constitutional right to life cannot be divorced from the right to live. This is because the right to life connotes the right to live and to live, is to have an environment to live in, unpolluted by the chemicals that emerge from hydrocarbon exploitation. Life will have little or no meaning if through the activities of polluters, the free gifts of nature become elusive. Where the air is contaminated, the water despoiled and the ocean resources depleted from pollution, the existential comforts which nature offers freely from the abundance of these resources to make life worthwhile will cease to exist. However, the fact that several years after the Court of first instance determined the *Gbemre*, a determination is yet to be made at both the court of Appeal and Supreme Court supports the fact that environmental human rights in Nigeria is yet to undergo greening.

The decision in Gbemre was re-echoed in the *Ogoniland Case*[732] where the African Commission on Human and People's Right (ACHPR) concluded that 'an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health'.[733] The Commission further held that Art. 24 of the imposed an obligation on the state to take reasonable measures 'to prevent pollution and ecological degradation to promote conservation and to secure ecologically sustainable development and use of natural resources'.[734] As the Commission noted, specific actions required in fulfilment of Articles 16 and 24 of the African Charter include: 'ordering or at least permitting

[730] Ibid.
[731] K.S. Ebeku (note 467) 319.
[732] Communication 155/96, the social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria, Case no ACHPR/Comm/A 044/1, 96 AM. J. INT.L L. 937 (2000).
[733] Paras 12.
[734] Soc. And Econ. Rights Action Ctr., OAU Doc. CAB/LEG/67/3 rev. 5, at ¶ 52-53.

independent scientific monitoring of threatened environments, requiring and publicizing environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'.[735] The final order of the Commission have far reaching environmental rights implications. It calls for a comprehensive clean-up of lands and rivers damaged by oil operations', the preparation of environmental and social impact assessments and provision of information on health and environmental risks and meaningful access to regulatory and decision-making bodies'.[736]

According to Shelton, the decision in the Ogoniland Case offers a blueprint for merging environmental protection, economic development and guarantees of human rights.[737]However, while the *Ogoniland Case* is remarkable for the enormous environmental obligation which it labours upon states, the ACHPR lacks any real enforcement powers or an institutionalized follow-up system to ensure the implementation of its recommendations and decisions.[738] ,

It has been argued that the right to life is dependent to the right to a balanced ecosystem.[739] Okon argues that:

> *The duty of a State to protect the life of its citizens logically creates a duty on the state to protect its citizens from environmental-threatening activities. Correlatively, the duty of a state to protect the environment from threatening activities creates the right to a balanced, clean and healthy*

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[735] Ibid: 54.

[736] Paras 69; similar decision in relation on similar facts was reached by the Inter- American Commission and Court on Human Rights in Maya Indigenous Community of Toledo District v Belize, Case 12. 053, Report no. 404/04, ACHR, OEA/ser. L/V/II.122 Doc.5 Rev.1 at 727, where the court held that 'logging concessions threatened long term and irreversible damage to the natural environment on which the petitioner's system of subsistence agriculture depended'; See Saramaka v Suriname [2008] IACHR, Series C., No. 185, IHRL, 3058, available on <https://www.escr-net.org/caselaw/2014/case-saramaka-people-v-suriname> last accessed on the 20th of March 2021 (the Court ruled that "a non-indigenous community like the Saramakas can enjoy "indigenous rights" if they share some characteristics (spiritual relations with the land, distinct culture, language, traditions, etc.) and considered as a tribal community protected by the international law. In this case, the Saramakas were thus entitled to the recognition of their communal property. The Court once again confirmed the existence of a right to property in some circumstances even if there is no official title.

[737] D Shelton, 'Decision Regarding Communication 155/96 (Social and Economic Rights Action Centre/ Centre for Economic and Social Rights v Nigeria) Case No. ACHPR/Comm/A 044/1[2000] 937.

[738] G.M. Wachira and A. Ayinla, 'Twenty Years of Elusive Enforcement of the Recommendation of the African Commission of Human and Peoples' Rights: A possible remedy' (2006) 6 AHRLJ, 465-493.

[739] Okon (note 608) 16

> *environment for the citizens. As a matter of fact, these basic rights need not even be written in the constitution for they are assumed to exist from the inception of mankind. If they are now explicitly mentioned in the constitution whether as objectives or rights it is only to re-echo their importance.*[740]

Nothing can be closer to the truth. This position is supported by the decisions of the Supreme Court of India and represents a policy that captures the relation between a clean and healthy environment and the right to life.[741] In *T. Damodar Ruo v S.O Municipal Corporation,*[742] Justice Choudhary took the view that

> *It will not be unreasonable to hold that the enjoyment of life and its attainment and fulfillment guaranteed under Article 21 of the Constitution embraces the protection and preservation of nature's gift without which life cannot be enjoyed... The slow poisoning of the atmosphere by environmental pollution and spoliation should also be regarded as amounting to violation of the Constitution.*[743]

Similarly, in the Pakistani case of *Shehla Zia v Water Power Development Authority,*[744] the Supreme Court of Pakistan held that the right to life contained in Article 9 of the Constitution of Pakistan included the right to live in a hazard-free environment devoid of injurious degradation.[745]

This position in the above case represents a broad policy of the right to life worthy of emulation. On this basis, the *Gbemere's Case* is therefore in order. However, the point must be made that redress available would depend upon the conditions attached to the individual rights and the provisions of Section 45-(1) and (2) of the 1999 Constitution.

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[740] Ibid.
[741] See the following cases *Chandra Bharan v State* [1970] 2 SCR 600; State of *Mandras v Champakam* [1951] SCR 252; *Parthaserathi v. Tami Nadu* [1974] AIR 74 where the Supreme Court of India interpreted fundamental objectives as an integral part of fundamental rights (the right to live inclusive); *Doon Valley* [1988] AIR SC 2187, where the Supreme Court expanded the boundaries of the right to life and personal liberty guaranteed under the Article 21 of the Indian Constitution to include environmental protection and *Mehta v. Union of India* [1987] SC 1086, P. 1090 where the supreme Court of India relaxed the requirement of filling formal writs in matters relating to environmental protection and further held that under the epistolary jurisdiction, a court can be moved by merely addressing a letter to it on behalf of a disadvantaged class of persons.
[742] [1987] AIR, AP 171, 181
[743] Ibid.
[744] [1994] PLD, SC, A16
[745] See generally, L. Atsegbua, 'Environmental Rights, Pipeline Vandalization and Conflict Resolution in Nigeria (2001) 5 I.E.L.T.R, 89-92

Section 45 which allows derogation of sections 37, 38, 39, 40 and 41 on the basis of a law reasonably justified in a democracy interest of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights of others.[746] Other factors likely to limit the application of fundamental human rights are procedural impediments, judicial timidity, incompetence and corruption, executive lawlessness and lack of effective enforcement mechanism.[747] That said, chapter IV of the Nigerian Constitution remains a productive avenue for vitalizing the curative facets of the PPP since a breach of fundamental human rights predicated on the activities of polluters will confer a right on those affected or likely to be affected by the breach.[748]

3.3.2.5 The Constitution, Ownership of Petroleum Resources and the Internalization of Environmental cost.

Ownership of hydrocarbon resources both international and national, defines the extent and right that any person, individual or body, has in petroleum resources.[749] Ownership connotes the totality of rights and powers that are capable of being exercised over a thing.[750] To put it differently, 'it is the right to make physical use of a thing, the right to the income from it, in money, in kind or in services, and the power of management, including that of alienation'.[751] In *Abraham v Olorunfunmi,*[752] Niki Tobi JSC, articulated the nature of ownership in the following expressions thus:

> *It connotes a complete and total right over a property…The owner of the property can use it for any purpose; material, substantial, non-substantial, valuable, invaluable, beneficial or even for a purpose which is detrimental to his personal or proprietary interest…*

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[746] For excellent discussions on Fundamental human rights see the following cases; J.A. Dada, *'Human Rights under the 1999 Constitution: Issues and Problems'* (2012) 2, (12), International journal of Humanities and Social Sciences, 33-45; A. Mendie, *'Status and limit of Human Right to Life Under the Constitution, with Focus on Rural Women in Akwa Ibom'* (2017) 5, (26), Mediterranean Journal of Social Sciences, 154-160 and K.S Ebeku, *'Judicial Attitudes to Redress for Oil-related Environmental Damage in Nigeria'* (2003) 12, (2) RECIEL, 199-207

[747] In relation to enforcement the Chief Justice of Nigeria pursuant to Section 42 (2) of the 1999 Constitution issued the Fundamental Rights Procedure Rules 2009 which amongst other things now accommodates purposive interpretation and enhanced access to justice; see E. Nwauche, 'The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A fitting Response to problems in the enforcement of human rights in Nigeria (2010) 10 African human Rights Journal, 502-514.

[748] See Section 46 (1) CFRN 1999 (as amended).

[749] M. T. Otu*, 'Ownership of oil and Gas International and National'* (2017)1 African Journal of International Energy and Environmental Law', 63-77, 63.

[750] B. O. Nwabueze, *'Nigerian Land Law'* (Nwanife Publishers limited: 1982) 7.

[751] Ibid.

[752] [1990] 1NWLR (Pt. 165) 53

According to Salmond writing on the rights and duties of ownership, 'ownership consists of a complex set of rights, all of which are rights in *rem*, being good against all the world and not merely against specific persons'.[753] Some of the rights that flows from ownership according to Salmond, are the right to possession, the right to alter possession in relation to the thing which is owned and the right to use and enjoy the thing.[754]

In relation to natural resources, international law through the doctrine of permanent sovereignty over natural resources (PSNR) recognises the *'inalienable right of all states freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of states'*.[755] Being an incidental part of the concept of ownership, the right[756] to dispose of natural resources is accepted as exercisable by the state subject to certain conditions, given the fact that states remain the primary subject of International law.[757] In addition to disposal rights, states also have rights to grant licenses for the exploitation of natural resources.[758] They have the right to expropriate foreign investment subject to the prompt payment of fair compensation.[759] They also have the rights to supervise the activities of foreign companies to ensure compliance with laws and regulations.[760] Encapsulating these points, Blanco and Razzaque noted that 'sovereignty over natural

[753] P.J Fitzgerald 'Salmond on Jurisprudence' (12th ed., Universal Law Publishing 2013) 246-249
[754] Ibid.
[755] See the preamble to the UN General Assembly Resolution 1803 (xvii) of 14th December 1962, the declaration provides that ' the right of peoples and nations to permanent sovereignty over natural wealth and resources must be exercised in the interest of their national development and the wellbeing of the people of the State concerned.'
[756] One of rights that flow from PSNR is the right to set the conditions for the exploitation of natural resources. See Rio Declaration, UN Doc A/CONF.151/26/Rev.1 (Vol. 1), Principle 2
[757] N.J. Schrijver, *Self-determination of peoples and sovereignty over natural wealth and resources*. In: Office of the High Commissioner (OHCHR) (Ed.) *Realizing the Right to Development. Essay in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (2013 United Nations) 7.
[758] See UNGA Res. 3016 (XXVII), Permanent Sovereignty Over Natural Resources of Developing Countries (1972); see also UNGA Res. 3171 (XXVIII), Permanent Sovereignty over Natural Resources (1973), and Art. 1
[759] Ibid, Paras. 4; see *Ebrahimi v Iran* (1994) Iran-US Claims Tribunal, 12th October 1994, the Hague, p. 189 for the different methods applicable and appropriate under different circumstances.
[760] Ibid.; for a more general discussions on these rights see R.B. Builder, International Law and Natural Resources Policies (1980) 20, Natural Resources Journal, 451; Schrijver N.J., Sovereignty over Natural Resources: Balancing Rights and Duties (Cambridge University Press 2008) 37;

resources involves both rights to possess, use and manage and enjoy the profits arising from the exploitation of those resources'.[761] However, the rights, which flows from PSNR under international law, are not absolute but imposes certain duties and restrictions. The first of these duties and restrictions are the duty of states to prevent transboundary pollution.[762] Others are the facts that PSNR is subject to general limitations of the principles of state sovereignty under international law[763] and does not preclude rules of human rights law as they relate to governance and management of natural resources.[764] These restrictions ensures that the state applies the right to PSNR in manner that does not defeat sustainable development. These restrictions are the main difference between the ownership of resources and the sovereign rights of states to natural resources.[765]

Nigerian law reinforces the international position of states ownership and use of natural resources. Although the 1999 Constitution establishes the right of individual's to own moveable and immoveable properties by providing a guarantee against compulsory acquisition, the right does not extend to hydrocarbon resources.[766] Section 44(3) lends support to this fact in a more explicit tenor. It provides that:

> *Notwithstanding the forgoing provisions of this section, the entire property in and control of all mineral oils and natural gas in, under or upon any land in Nigeria[767] or in under or upon the territorial waters and the exclusive economic zone[768] in Nigeria shall vest in the Government of the Federation*

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[761] E. Blanco and J. Razzaque, 'Globalization and Natural Resources Law: Challenges, key Issues and Perspectives' (Edward Edgar Publishing Limited 2011) 67

[762] See Principle 2 of the Rio Declaration on Environment and Development 1992.

[763] Ibid.

[764] See for instance Art. 1 of the International Covenant on Civil and political Rights dealing with the right to self-determination.

[765] Arthur Ripstein, *"Property and Sovereignty: How to Tell the Difference"* (2017) 18 (2) Journal of Theoretical Inquires of Law, 243-268, ("The most important difference between ownership [or property rights] and sovereign rights is that sovereignty has an internal norm, which restricts the purpose for which it may be exercised, because the sovereign is supposed to rule on behalf of and for the sake of the people; property by contrast, has no internal norm. The owner of property can use it for any purpose whatsoever, subject only to external restrictions"); See also Winston P. Nagan and Craig Hammer, *"The Changing Character of Sovereignty in International Law and International Relations"* (2004) 43 Journal of Transnational Law, 141.

[766] See Section 44 (1)

[767] The term 'Nigeria' when used in a territorial sense, for all purposes extends to twelve nautical miles of the coast of Nigeria (measured from the low water mark) or the seaward limits of the inland waters'. See Section 1 (1) of the Territorial Waters Act Cap T5 LFN 2004.

[768] The phrase 'Exclusive Economic Zone' (EEZ) is an area extending from the limits of the territorial waters of Nigeria up to a distance of 200 nautical miles from the baseline from which the breadth of the territorial waters of Nigeria is measured. See Section

***and shall be managed in such manner as may be prescribed by the National Assembly**.* [769]

Going by this provision, the ownership rights over mineral resources within Nigeria, offshore and onshore territories are vested in the Federal Government.[770] The legal implication of section 44 (3) of the 1999 Constitution is that no state government, local government or any person or group of persons (other than the Federal Government) can exercise sovereign rights over hydrocarbon resources.[771] In *Attorney General of Abia State v Attorney General of the Federation,*[772] the Supreme Court of Nigeria was faced with the question of whether littoral states of Akwa Ibom, Bayelsa, cross River, Delta, Edo, Lagos, Ondo and Rivers have ownership rights over mineral resources located offshore. The Supreme Court held that by virtue of section 44 (3) of the 1999 Constitution, resource control rights vest exclusively on the Federal government. Ogundare JSC re-echoed the sentiments of Section 44-(3) thus:

The Federal Government alone and not the littoral states can lawfully exercise legislative, exclusive and judicial powers over the maritime belt or territorial waters and sovereign rights over the Exclusive Economic subject to universally recognized rights.[773]

The Court also remarked that:

There can be no boundary dispute between the Federation, which consists of all states of the Federation, and individual states whether littoral or otherwise since the boundaries are the same.[774]

The Court further emphasized that:

None of the littoral states is sovereign, despite the historical narration by some of them. They are all part and parcel of the sovereign independent

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[769] The Nigerian system of Petroleum Ownership has been qualified as 'domanial' because it vests ownership rights on the sovereign. See Out (note 24) 71; See also Y. Omoregbe, Oil and Gas in Nigeria (Malthouse Press Limited 2001) 33

[770] This same Constitutional Provision have been reinforced in S.1 (1) of the Petroleum Act Cap. P10 LFN 2004 which provides that '…the entire ownership and control of all petroleum in, under or upon any lands shall be vested in the State'; See also Section 1 of the Exclusive Economic Zone Act Cap E17 LFN 2004; cf section 3(1) of the now defunct Mineral Act of 1946

[771] T. A. Nwamara, 'Encyclopaedia of Oil and Gas Law and Practice vol. 1 (1st ed, Law and Educational Publishers limited 2008) 10.

[772] [2002] 6 NWLR (pt. 764) 542

[773] Pages 652; the Court further held that 'the mere fact that oil rigs/ wells located in the offshore areas bears names of indigenous communities on the coastline adjacent to such offshore areas is of no moment in proving ownership of such offshore areas. Such naming, as well as provisions in the various Acts for registration, etc. to be in the States adjacent to these areas, is only an internal administrative arrangement by the Federal Government of Nigeria'.

[774] Pages 652-653, Paras A-D; See also Section 2 of the 1999 Constitution.

Nigeria…they cannot claim that revenue accruing from mineral resources offshore belongs to any of them. Whatever revenue accrues from drilling offshore belongs to the Federation of Nigeria.[775]

In an apparent twist away from the majority decision in this case, Justice Idris Legbo Kutigi gave a dissenting opinion when he held:

…there is not dispute here in Nigeria with regard to the Right of the Federal Government to the entire property in, control over all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under over the territorial waters and the Exclusive Economic Zone of Nigeria… the only dispute is whether or not the natural resources are derived from littoral states for the purpose of enjoying the benefits of section 162 (2) of the Constitution…I have read through the three enactments referred to above and I am unable to find anything expressly in any of them which shows that the seaward boundary of the Nigerian State or indeed the littoral component states therein, is the low water mark or the seaward limits of inland waters. I have therefore no hesitation in coming to the conclusion that the seaward boundary of a littoral state within the Federal Republic of Nigeria is the sea.

The above dissenting decision could have formed the basis for the enactment of the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act 2004.[776]

With respect to the application of the PPP, the consequences of Federal ownership of petroleum resources are manifold. First, ownership as the basis of the right to determine the conditions for the exploitation of natural resources could have an implication on what category of costs are allowed to be internalized. Section 44(3) makes reference to the '*management of mineral oil in a manner as may be prescribed by the national Assembly'*. To prescribe is 'to establish authoritatively (as a rule or guidance)'.[777]

Although the Constitution is silent as to the purpose for which hydrocarbon resources are to be managed, international law clarifies that purpose.[778] The UNGA, a non-binding instrument, makes reference to the right been exercisable by peoples and

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[775] Ibid.
[776] This Act shall be considered below.
[777] B. A Garner, (note 650) 1373
[778] UN Resolution 1803 (note 758).

nations for national development and the overall wellbeing of the people.[779] To manage something is to 'exercise executive, administrative and supervisory powers' over that thing.[780] It is 'to conduct, control and carry on, or supervise or to regulate or administer a use or expenditure.[781] Since it is clear from the above definitions that both development and sustainable management of hydrocarbon resources are institutional choices of state, there are times when policies in furtherance of both objectives have the potentials of clashing. This is one of the weaknesses of PSNR.

Government needs revenue from hydrocarbon to meet the developmental needs of its citizens. That appetite for revenue could sustain a willingness to attract investments, which in itself, is a positive externality. But the shrewdness of business expediency will mean that MNOCs will pay less tax and their acts of pollution from poor industrial processes only partially internalized. Although this appears to be in sync with a literal construction of section 44(3), it has been argued elsewhere in this chapter that the quality of parliamentary prescription must meet the standard set by the Constitution in section 4(2).[782]

By the same token, the concept of ownership can form the basis for the allocation of redistributive revenue. The saying in law that 'a man cannot give what he does not have' reinforces this argument. [783] For example, it is on the basis of this notion that

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[779] Ibid; however, from a legal perspective, one of the limitations of PSNR is that being declarations of the UNGA they are not legally binding neither are they recognized as formal sources of international law under Art. 38 (1) of the Statute of the International Court of Justice. R. Pereira and O. Gough, *'Permanent Sovereignty over Natural resources in the 21st Century: Natural Resources Governance and the right to Self-Determination of Indigenous Peoples Under International law*, (2013) 14 Melbourne Journal of International Law, 461-464; see also, R. Pereira, 'Exploration and Exploitation of Energy Resources' in K.E Makueh & R. Pereira (eds), 'Environmental and Energy Law' (Blackwell, 2012) 199-207, where the author argued that since the right to PSNR was adopted by most developed and developing states with a few objections and abstentions, it could be argued to reflect the evolution of state practice leading to the recognition of the principle as having the status of customary international law, see page 199; Cf: *The East Timor Case (Portugal v. Australia)* (judgement) [995] I ICJ Rep, 90; see also Armed Activities on the Territory of Congo case (Congo v Uganda) (judgement) [2005] ICJ Rep. , 168.

[780] B. A Garner, (note 650) 1103-1104

[781] Ibid.

[782] Read together with section 4 (2) and section 13 (1) of the Constitution, section 44 (3) will be construed as demanding that the law prescribing the management of mineral oil must be such as capable of advancing peace, order and good government. They must also mirror the image of sustainable development.

[783] This rule simply states that no one can give a better title than he himself possess. For a thorough explanation of this rule and its application, see D.J Kochan, 'Dealing with Dirty Deeds: Matching *Nemo dat* Preferences with Property law Pragmatism' (2015) 64 KANSAS Law Review, 1-7.

National Assembly passed the Allocation of Revenue (Abolition of Dichotomy in the Application of the principle of Derivation) Act 2004.[784] The Act abrogated the dichotomy between oil and gas resources derived onshore and those derived offshore in the application of the principle of derivation for purposes of revenue allocation to hydrocarbon producing littoral states in Nigeria.[785] The Act was a statutory alteration of the decision of the Supreme Court in *Attorney-General of Abia State v. Attorney-General of the Federation.*[786] The Act in itself ameliorated the effects of the judgement which in practice reduced the revenue and finances of hydrocarbon producing littoral states and was insensitive to the ecological burdens which they bear. The abrogation was a classic demonstration of how legislative prescription could advance the course of peace, ecological order and environmental governance as contemplated by the constitution.

Another environmental consequence of ownership under the 1999 Constitution is that it is relevant to the apportionment of blames especially as they concern environmental regulation. It has been argued that to the extent that all land belong to the state,[787] 'environmental considerations and protection becomes a duty of state.[788] Okonkwo argues that *'Under Nigerian law, ownership is vested in the state and that of natural resources on the Federal Government. The implication for the environment is therefore very obvious, in the activities of the Federal Government and its agencies, which creates environmental problems which impacts negatively on the lives of the citizens'.*[789]

The above observation captures the sentiments of this thesis. Not only is the Federal Government as owner of natural resources responsible for protecting and improving the environment through viable environmental legislations, but any law also made in

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[784] Cap AS7 LFN 2004

[785] Section 1 (1) of the Act provides that 'The Act provides that the two hundred metre water depth isobaths contiguous to a state of the Federation shall be deemed to be part of that state for the purposes of computing the revenue accruing to the Federation account from the state pursuant to the provisions of the constitution of the Federal Republic of Nigeria, 1999 or any other enactment'; See Nwamara, (note 236) 23

[786] Note 237 above.

[787] See section 1 (1) of the Land Use Act 1978

[788] T. Okonkwo, *'Ownership and Control of Natural Resources under the Nigerian 1999 Constitution and its implications for environmental law and practice'* (2017) 6 (1) International law Research published by the Canadian Centre of science Education, 182

[789] T. Okonkwo, 182.

that regards must possess the institutional apparatus to offer such protection. Where a law does not possess the institutional quality to offer environmental protection from the myriad of harm attendant to hydrocarbon exploitation, the implication will be that Federal Government becomes complicit in the polluting activity and can qualify as a polluter for purposes of liability. Behind the right to an unencumbered source of petroleum revenue, there is an obligation to make good the environment. It has been observed, that the dual functions of the Department of Petroleum Resources (DPR) as both the economic and environmental regulator in the Nigerian hydrocarbon industry has the effect of stultifying environmental regulation, compliance and consolidating 'operational paralysis' on the part of MNOCs.[790] The establishment of the Nigerian National Petroleum Corporation in 1977 to prospect, work win, acquire possession of and dispose of petroleum products' reinforces the position that potential pollution could arise from the activities of the corporation.[791] Where this is the case, the Federal government can be referred to as 'the polluter' since it exercises a lot of control in the activities of the board.[792]

As a corollary to ownership of hydrocarbon resources, another way in which the Constitution applies the PPP is through the principle of derivation. This principle shall be considered in the next paragraph dealing with redistributive functions of the PPP under Nigerian law.

3.3.3 The Redistributive Functions of the PPP under Nigerian Law

In its redistributive character, the PPP serves as an economic rule according to which a quantum of the profits due to polluters as a result of their activities is returned to public agencies accountable for scrutinizing, observing and steering the pollution these activities generate.[793] The idea behind redistribution is to promote the division of social goods through custom, opinion, informal decisions and formal allocative mechanisms like command and control or market based regulations, taxations and

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[790] E Wifa, C Amaeze and E Chioma, *'Potential Conflicts of Interest in the dual functions of the Nigerian Department of Petroleum Resources as both economic and environmental regulator'* (2016) 7 International Energy Review, 1-2

[791] See Section 5 (1) (a) - (i) of the NNPC Act Cap. N123 LFN 2004.

[792] Section 1(3) of the NNPC Act provides that the chairman of the board shall be a minister, or a delegated alternate chairman appointed by the president pursuant to section 2 (1) of the Act who may exercise powers general or otherwise vested on him by the minister.

[793] N. De Sadeleer, *Environmental principles, from Political slogans to Legal Rules* (Oxford University press 2002), 35; see also paras 3 of chapter 2 of this thesis; see also paras 3.2 of chapter 2 of this thesis.

charges.[794] This thesis has also argued[795] that the term polluter can be ascribed to the government depending on whether the power to determine the conditions for the exploitation of natural resources are exercised in the interest of public good.

3.3.3.1 The Derivation Principle as a Retributive Function of the PPP

The principle of derivation constitutes a constitutional form of reparation for expropriated interest and the ecological harms resulting from that interest.[796] The principle was a response to the demand of Niger Delta People for 'an equitable portion of the proceeds from rents and royalties from oil located in their land.[797] The rationale for the principle as a mechanism for constitutional allocation is the need to allow littoral states access to some of the proceeds from hydrocarbon resources accruing to the federation account as compensation to address ecological and environmental damage arising from hydrocarbon operations in Niger Delta.[798]

The ratio of derivative revenue accruing from natural resources to states in Nigeria has been on a steady decline. Starting off in 1960 and 1963 from a ratio of 50 percent under the Independent and Republican Constitutions of Nigeria, the ratio declined to 13 percent under the 1999 constitution.[799]

Section 162(2) CFRN 1999 (as amended) provides that the principle of derivation (the principle by which Niger Delta States gets 13 percent additional revenues from the Federal Republic of Nigeria) shall be constantly reflected in any approved formula as being 'not less than thirteen per cent of the revenue accruing to the Federation Account directly from natural resources'.[800]

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[794] D. Shelton (ed), (note 85), 61; See also Garcia, F., *Trade Inequality and justice: Towards a Liberal Theory of Just Trade* (Transnational Publishers 2003) 53.
[795] See Section 3.3.2.1. , especially pages 105 of this chapter.
[796] M. Odje, *'True Federalism and resource Control in Nigeria'* (Quadro Impressions Limited 2002) 370
[797] K. S. Ebeku, 'Nigerian Supreme Court and Ownership of Offshore Oil' (2003) 27 Natural Resources Forum, 293
[798]; See also R.C Nwokedi, *'Revenue Allocation and Resource Control in Nigerian Federation'* (Snap Press Limited 2001) 123-126
[799] See Sections 134 (1) and section 140 (1) of both the Independent and Republican Constitutions of Nigeria; for a historical exploration of oil Revenue allocation see the following articles, C. Uche and O. Uche, 'Oil and Politics of Revenue Allocation in Nigeria (2004), ASC Working Paper, 17-41;
[800] The black's law Dictionary defines 'natural resources' as 'any material in its native state which when extracted has economic value…' The Supreme Court of Nigeria has held that 'the proviso to section 162 (2) applies to 'natural resources' and not to 'minerals' only.

The legislation promulgated to give effect to Section 162 (2) is the Allocation of Revenue (Federation Account) Act 1982.[801] The Act while stipulating the basis upon which revenue from the Federation's account is to be distributed, re-echoed the principle of derivation.[802] Section 2 of the Act provides that two percent of the 56 percent revenue due to the Federal Government from the Federations Account is to be applied to 'general ecological problems'. While this reinforces a minor commitment on the part of the government to tackle general ecological challenges, the sum reserved is too meager to make any meaningful impact in the Niger Delta.

The Supreme Court held in *Attorney General of Abia case*[803] that to qualify for the 13 percent allocation of fund from the Federation Account, the natural resources must have come from the resources of the state.[804] The Court held that 'the proviso to section 162 (2) applies to 'natural resources' and not to minerals only.[805] The court was emphatic that the words natural resources… mean 'those actual and potential sources of wealth supplied by nature as coal, oil, water, power, arable land etc.' Going by this definition, the principles of derivation will therefore mean any monetary payment allocated in a manner provided by the Constitution for the purpose of compensating littoral states of the Niger Delta for the expropriation of their natural resources for the purpose of helping them find alternatives to those resources to assuage the impacts arising from its exploitation. [806]

As can be seen from the linguistic tenor of section 162(2), the expansive definition of the 'natural resources' is sensitive to the ecological burdens which the people of the Niger Delta bear from the effects of hydrocarbon extraction. Not only does the

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[801] Cap A15 LFN 2004

[802] The opening statement of Section 1 reads thus: 'the amount standing to the credit of the Federation account, less the sum equivalent to 13 percent of the revenue accruing to the Federation from natural resources as a first line charge for distribution to the beneficiaries of the derivation funds in accordance with the constitution…'

[803] Ibid:

[804] ibid

[805] Ibid: 868

[806] One of the functions of the NDDC is to tackle ecological and environmental problems that arise from the exploitation of mineral in the Niger Delta and advise the Federal Government and the member states on the prevention and control of oil spillage, gas flaring and environmental pollution, see Section 7 (h) of the NDDC Act 2000; Also, the Niger Delta masterplan identifies 'ecological density' as one of the principles for the distribution of funds in the Federation account, see Niger Delta Regional Development Masterplan, 52.

definition extend to actual but also potential sources of wealth. The extension of the principle to potential sources of wealth allows for a wider constituency of natural resources to be reckoned in the valuation and computation of derivation revenue. The definition of natural resources as including potential sources of wealth is also a pointer to the purpose for which revenue from derivation should be deployed even if this was not expressly mentioned in the section. The people of the Niger Delta live with the adverse realities of oil exploitation which has thrown up the injurious degradation of their land and has greatly poisoned their sources of drinking water.[807] The derivation principle is expected to free up funds for purposes of restoring ecological damage by addressing the direct impacts of oil exploitation on the people.[808] The Nigerian Government as polluter applies the principle for this purpose.

Two questions arise from the application of section 162(2) of the Constitution. The first is whether the National Assembly can in subsequent amendments of the Allocation of Revenue (Federation Account) Act[809] increase the ratio of derivation revenue without the necessity of amending the Constitution. The second question is whether the ratio of derivative revenue from natural resources (13%) is sufficient to assuage the ecological burdens of the people of the Niger Delta from the nature of section 162(2) of the 1999 Constitution.

In relation to the first question, it has been argued that the 13 percent derivation can be increased without resort to constitutional amendment.[810] This thesis aligns with this view and constitutional justifications exist for this position. Section 162 (2) provides for '… not less than 13 percent of the revenue accruing to the Federation Account directly from natural resources'. The expression 'not less than 13 percent represents the minimum amount below which the National Assembly shall not fall when prescribing the formula for the allocation of resources. According to Odje, *"the portion…not less than 13 percent as stated above presupposes and admits of an increase in the derivation percentage which must not fall below 13 percent, but indeed can be increased beyond 13 percent…'*[811]

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[807] Stakeholders Democratic Network, (note 16); see also UNEP Report on Ogoniland 2011, 169-172
[808] See section 7 (h) of the NDDC Act.
[809] See note 345,
[810] Odje (note 796).
[811] Ibid.

That the above observation reflects the intentions of the framers of the Constitution is further given currency by the provisions of Section 32(b) Item F of the 3rd Schedule to the 1999 Constitution. This section provides that Revenue Mobilization Allocation and Fiscal Commission shall *'…review from time to time, the revenue allocation formula and the principles in operation to ensure conformity with changing realities…'*

The reference to 'changing realities' above suggests that there is therefore enough constitutional room for an increase of derivation revenue to littoral states through a Revenue Allocation Act of the National Assembly. The purpose of prescribing a 13 percent minimum sum is because the framers of the Constitution envisaged a situation where the amount will be too meager to meet the challenges of bearing an indiscriminate ecological burden especially one on the basis of which the economic survival of the whole country depends. It will be counter-intuitive to argue in favour of an approach that requires a constitutional amendment to alter the ratio of derivation principle under the 1999 constitution.[812] A law amending the ratio to reflect the realities of low oil prices would be one done in the interest of peace, public order and good government.[813] Doing so would best advance the intentions of the Constitution.

With regards to the second, this thesis argues that given the gargantuan size of environmental degradation in the Niger Delta, 13 per cent of monies accruing the Federation from oil rents and royalties may not be sufficient to ride the Niger Delta out of the dangerous tides of environmental degradation. The UNEP Report on Ogoniland recommends an initial sum of $1 billion dollars as environmental restoration fund[814] only for Ogoniland, which is just a small fraction of the Niger Delta.[815] This reveals that in itself the cost of ecological restoration for the whole of the Niger Delta is a huge project and 13 percent derivation may not be enough to cater of the losses of biodiversity, wide herbs and fauna and unquantifiable species of sea

[812] See section 9 of the 1999 Constitution.
[813] Section 4 (2) of the 1999 Constitution.
[814] In the context of the environmental restoration fund, restoration means that the fund shall be applied towards the clean-up of contaminated soil, groundwater, surface water, new or newly discovered spills and for capacity building, skills transfer and conflict resolution, see UNEP Report on Ogoniland 2011, 226.
[815] UNEP Report on Ogoniland (2011), 15

creatures that have been depleted from the impacts of oil exploration on the people of the Niger Delta.

While the idea behind the principle of derivation is a noble one with plenty of yet-to-be-seen promises giving the generosity of the wording expressing the principle, there are very clear limitations to the good intentions of the constitution. The first limitation is that the Constitution does not stipulate clearly, the purpose for which this fund is to apply. The only reference to ecological problem is in respect of the application of the 56 per cent share of the revenue from the Federation account due the Federal Government.[816] The failure to so stipulate a clear-cut Constitutional purpose for the application of the fund creates a constitutional avenue for the funds to be applied for other purposes unconnected with environmental reparation from oil industry activities. This gap also allows for poor accountability on the part of state governors who may apply the funds for purposes alien to the impacts of oil industry activities giving the fact that the derivation revenue is received together with the general pool of fund meant for each state.

Secondly, the derivation principle is a posterior reaction to a social problem. The absence of a definitive purpose suggests that it may legally be used to address an admixture of concerns including ecological concerns. This can provide a channel for the unjustifiable application of the funds. In this instance, even when potentials exist for funds to be deployed for pollution control projects, the principle does not live up to the expectations of the preventive credentials of the PPP and may be incapable of functioning as a proper instrument of restoration. It has been argued that 'for the principle of derivation to have its desired effect, same must actually restore the owners of expropriated resources back to their viable economic status before the 'unjustifiable acquisition' of their interest, rights and resources by the Nigerian State'. [817] The extent to which the principle has achieved this feat is yet to be seen.

Another limitation to the derivation principle is the Excess Crude Account (ECA), which was established by the administration of President Olusegun Obasanjo in 2004

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[816] Allocation of Revenue (Federation Accounts) Act 1982, section 2 (2).
[817] Odje (note 796) 5-6.

to receive payment above oil benchmark price in the budget.[818] This account reduced the 13% derivation as it retains payments of gross earnings from the sale of crude oil from been paid into the Federation Account in obvious disregard of Section 162(1) of the Constitution. This ECA limit the amount of fund distributed as derivation revenue to solve ecological problems. More so, the ECA does not enjoy any legal backing but became applicable through mere presidential directive. The attempt to legalize the deduction into the ECA was done through the enactment of the Nigerian Sovereign Investment Authority (Establishment, Etc.) Act 2011 (NSIA). The Act established the Nigerian Sovereign Investment Authority[819] and designated a pack of functions for the Authority to discharge.[820] More particularly, Section 28 of the NSIA provides for initial fund for the Authority totalling $1 billion dollars to be contributed by all tiers of government. Future contributions into the fund are statutorily expected to be derived from residue funds from the Federation Account in the manner subject to the derivation portion of the revenue allocation formula.[821] Going by the provisions of the NSIA , the derivation due to Niger Delta States is 13 percent of the gross revenue earned from petroleum resources. While this provision frees up money for Niger Delta States to address the ecological challenges arising from oil exploitation, the extent to which these funds have been managed lives much to be desired.

3.3.3.2 Redistribution under the Niger Delta Development Commission Act (NDDC) 2000 (as Amended)

The NDDC Act came into force on the 6 June, 2000.[822] The Act annulled the Oil Mineral Producing Areas Decree No. 41 of 1998[823] and conferred on the NDDC a legal personality distinct from its governing board.[824] As an intervention project for the Niger Delta,[825] the NDDC and other developmental interventions owe their

[818] Ibid.
[819] Section 1
[820] Section 4
[821] See Section 29 of the NSIA 2011.
[822] A. Ajayi, *'Review of the Niger Delta Development Commission Act 2000'* (2001) 3 International Energy Law & Taxation Review, 1.
[823] S. 28 (1)
[824] S.1 (1) and (2)
[825] The interventionist attempt at setting up agencies for the Niger Delta have been described as paternalistic suggesting that people do not have the capacity to organize their own affair, see Y. Banigo, *'The State, Trans-National Corporations and Indigenous peoples: The Case of the Ijaw-Speaking Peoples'* (PhD thesis, School of Graduate Studies, University of Port Harcourt, Nigeria 2006); and O. Songi, *'Defining a Path for Benefit Sharing Arrangements for Local Communities in Resource*

existence to the recommendation of the Willink's Commission (1958) which advocated for a 'special developmental attention for the Niger Delta.[826] The commission was established amongst other things, to formulate policies and guidelines for the development of the Niger Delta, conceive and implement plans for sustainable development of the Niger Delta and to tackle ecological and environmental problems that arise from the exploration of oil minerals.[827]

The redistributive facet of the PPP finds considerable expression in the NDDC Act through the financial provisions of the Act. While Section 14(1) established a fund from which it is expected that all expenditures of the commission shall be defrayed, subsection two (2) of the same section provides the manner in which the fund shall be credited and the persons whose responsibility it is to credit the fund. From the drift of Section 14(2), the Federal Government of Nigeria contributes the equivalent of 15 Percent of the total monthly statutory allocations due members of states of the Commission from the Federation Account.[828] The Fund also accommodates three percent of the total annual budget of any oil producing company operating onshore in the Niger Delta Area: including gas processing companies and 50 percent of monies due to member states from the ecological fund.[829] Monies granted or deposited by the Federal or State Government or any local or International institution or body and monies raised for the commission through gifts, loans, grants-in-aid or testamentary disposition and proceeds from the Commission's assets are also paid into the fund.[830]

Development in Nigeria: the Foundations, Trusts and Funds' (FTFs) Model' (2015) 33 (2) J. Energy & Nat. Resources L., 8, 1-30.

[826] NDDC, 'Niger Delta Regional Development Masterplan (2006) 102; for a historical examination of the NDDC see K. S. Ebeku, *'Niger Delta and the New Development Initiative'* (2008) Journal of Asia and African Studies, 399-425; K.S Ebeku. 'Critical Appraisal of Nigeria's Niger Delta Development Commission Act 2000' (2003) 6 I.E.L.T.R, 203-204 and N.E. Ojukwu-Ogba, *'Legislating Development in Nigeria's Oil Producing Region: the NDDC Act Seven years on'* (2009) 17 (1) African Journal of International and Comparative Law, 136-149

[827] S. 7 (1) (a) - (j); the mandate of the NDDC entails the fast-tracking of the development of the Niger Delta and pacifying the deeply-ingrained feeling of frustration often exhibited by the people in the region. See Leon Moller, *'The Governance of Oil and Gas Operations in Hostile but Attractive Regions: West Africa'* (2010) 4 International Energy Law Review, 14; the NDDC Act is also seen as a corporate social responsibility legislation, see E. O. Ekhator and L. Anyiwe, *'Foreign Direct Investment and the Law in Nigeria: A Legal Assessment'* (2016), 58 (1) International Journal of Law and Management, 15.

[828] S.14 (2) (a).

[829] S. 14 (2) (b) and (c).

[830] S.14 (2) (d) (e) and (f); In relation to other interventionist agencies around the world, the capital of the NDDC is huge, see Ojukwu-Ogba (note 826) 6.

The Act also makes provisions concerning the expenditure of the Commission which is expected to be directed towards the payment of salaries, payment for contracts, payment for all purchases and for undertaking all or any of the functions of the Commission under the Act.[831] There are also provisions relating to pensionable service for employees,[832] the power to accept gifts,[833] power to borrow,[834] mandate to submit annual estimates and expenditure to the National Assembly and keep proper account.[835] Provisions also exist for the submission of quarterly and annual reports to the president,[836] establishment of a monitoring Committee at the pleasure of the president,[837] power to maintain offices and premises,[838] power of the president to give binding Directives to the board and the service of document.[839] The Act also contains a provision restricting execution against the property of the Commission and a right of indemnity for members of the board concerning criminal or civil judgement given for or against those members of the board in the capacity as Board members.[840]

As can be seen above, the sources of the funds established for the NDDC to meet its statutory responsibilities are wide and represent the contributions of polluters to the sustainable development of the people of the Niger Delta even when there is no express reference to polluters. Although the Act does not refer to oil producing companies operating onshore and offshore as polluters, the reference in section 7(h) to 'ecological and environmental problems arising from exploration of oil minerals' supports that the contribution is one borne out of an obligation associated with pollution. What makes the fund peculiar is that it exists without prejudice to the 13 percent derivation provided under the Constitution and statutory allocation of states of the Niger Delta. The wide net through which the fund is credited propels the regularization of 'social marginal cost'[841] which before the passage of the NDDC Act

[831] S. 15 (a)-(e).
[832] S. 13
[833] S.16
[834] S.17
[835] S.18 (1) and (2)
[836] Sections 19 and 20
[837] Section21
[838] Section 22
[839] Section23
[840] Sections 26 and 27.
[841] Social Marginal cost reflects the impact that an economy feels from the production of one or more unit of a good or service. See David Siegel, 'Investopedia', available on https://www.investopedia.com/terms/m/marginalsocialcost.asp , last accessed on the 13/ 06/ 2018

remained unequalised. Profits from oil exploitation are normally predicated on a weak tax regime and the failure of legal infrastructures to properly index costs arising from environmental externalities. The Act through the expansive pool of funding reinforces the fact that MNOCs as industrial enhancers of ecological degradation must, through the statutory contribution of 3 percent of their annual budget, make good the impacts of their activities on the environment.[842] By the same token, the Federal Republic of Nigeria as a partner in pollution is made to bear the contribution amounting in the altogether to 15 percent of the allocation of all member states of the commission[843]. These financial responsibilities provide a leeway for the commission to meet the objective of tackling ecological and environmental problems through sustainable projects. The point must also be made that the Commission's obligation to tackle ecological and environmental problems as provided under Section 7 (1) of the Act is one hinged on the anticipation of the pollution prevention functions of the PPP. This is because the section give the board wide powers to formulate policies and guidelines for the commission, conceive and implement plans in accordance with set rules and regulation, projects and programmes for sustainable development.[844] The section also provides in a more explicit language that 'the commission shall tackle ecological and environmental problems that arise from the exploitation of minerals in the Niger Delta.[845] The Commission is also to advise the Federal Government and member states on the 'prevention and control of oil spillage, gas flaring and environmental pollution.[846]

The references to 'sustainable development' construed jointly with the advisory powers of the Commission can be taken to mean that while pursuing its development agenda, the commission must ensure that development does not come at the price of environmental despoliation.[847] Accordingly, the Commission can pursuant to its advisory powers, make recommendations to both the Federal and State Government

[842] Section 7 (1) (h).
[843] Section 14 92) (a).
[844] Section 7 (1) (a) (b).
[845] Section 7 (h)
[846] Ibid.
[847] For some insights on the principles of sustainable development see M Maslin, 'Climate Change: A Short Introduction' (Oxford University Press 2014) 1-12111; Report of the World Commission on Environment and Development: Our Common Future(Brundtland Report) 1987 and the UN, Copenhagen Declaration on Social Development A/Conf.166/9 1995; UN Millennium Declaration 2010 and the UN World Submit on Sustainable Development 2002.

on the quality of environmental obligations (including the allocation of environmental costs in new legislations) that can secure premium environmental quality.[848] The power to tackle ecological and environmental problems is an obligation which the Commission can discharge by promoting and executing green projects, energy conservation projects, renewable energy projects, water purification projects or shore protection projects. While these projects may not stop pollution or oil spillages, they are bound to reduce the level of ecological and environmental exposure of the Niger Delta people from hydrocarbon pollution.

Under Section 8 of the Act, the board has powers to enter into such contracts as may be necessary or expedient for the discharge of its functions.[849] This power can be deployed to achieve the objectives of tackling ecological and environmental problems as envisaged under the Act.[850]

However, several issues with potentials to affect the internalization of environmental cost arise from the application of the NDDC Act. The first is whether gas processing companies like NLNG are exempted from contributing 3 percent of their annual budget to the NDDC. Although the NDDC Act provides for 3 percent of the total annual budget of all oil and gas companies operating in the Niger Delta, it would seem that gas processing companies that have received statutory assurances and guarantees as to the sustainability of contractual terms will not be bound to contribute the amount contemplated under the NDDC Act[851]. Specifically, the NLNG is excused from making the contribution of 3 percent of its annual budget to the NDDC. This is because the Nigerian Liquefied Natural Gas (Fiscal Incentives Guarantees and Assurances) Act 1989[852] was enacted to provide incentives to businesses wishing to invest in the economic utilization of flared associated gas.[853] The Act contains guarantees contracted to have legislative authority on the basis of which the conditions for the

[848] Section 7 (h).
[849] S. 8 (e).
[850] The NDDC Act has been said to be better than its predecessors in terms of the composition of its board, planning strategies and funding structure. V. Kalu, 'State monopoly and Indigenous Participation Rights in Resource Development in Nigeria' (2008)26 (3), J. Energy & Nat. Resources L., 7-9.
[851] S. 5 of the First schedule to the Nigeria Liquefied Natural Gas (Fiscal Incentives, Guarantees and Assurances) Act.
[852] Cap N87 LFN 2004.
[853] See Section 11 of the Petroleum Profit Tax Act Cap P13 LFN 2004.

establishment of the company crystallize.[854] Section 1(1) of the Act regards the NLNG as a pioneer company within the provisions of the Industrial Development (Income Tax Relief) Act. Under the Act, the company is granted a tax relief of ten years commencing on the production day of the company and is only subject to Companies Income Tax.[855] Section 2 of the first schedule to the Act also limits the NLNG only to fiscal provisions contained in the Act. More explicitly, the Act provides that neither the company nor its shareholders shall in any way be subject to new laws, regulations, taxes, duties, imposts or charges of whatever nature which are not applicable generally to companies incorporated in Nigeria or to shareholders in companies incorporated in Nigeria.[856] These assurances are the equivalent of stabilization clauses[857] deployed mainly in international oil and gas contracts to arrest changes in law capable of defeating the legitimate financial expectations and projections of MNOCs. It is in the nature of those clauses to arrest environmentally desirable legislations especially those relating to petroleum taxation and fiscal change by freezing future obligations that could interfere with the interest of investors.[858]Where the clause is not adapted to guarantee and accommodate future changes in legislations, it is capable of affecting the extent to which environmental costs can be internalized when situations arise for a change in legislative obligations.

In *Niger Delta Development Commission (NDDC) v. Nigerian Liquefied Natural Gas Ltd.*[859], the Federal High Court in response to the question of whether or not the Nigeria LNG Ltd is statutorily obliged to pay 3% of its annual budget to the NDCC as provided under the NDDC Act held that the Nigeria LNG by virtue of the Act establishing it is excluded from the ambit of the NDDC Act and is not obliged to

[854] S. 5 of the First schedule to the Act
[855] S.2 and 3 of the NLNG Act.
[856] S. 3 of the First schedule to the Act
[857] Stabilization clauses are clauses used in international investment contracts to address political, fiscal, legislative and regulatory risk and regulatory risk by freezing future obligations capable of interfering with the interest of investors. See A.F.M Maniruzzaman, 'Drafting Stabilization Clauses in International Energy Contracts: Some Pitfalls for the Unwary' (2007) 5 (2) OGEL, 1; see also N.D Dias 'Stability in International Contracts for Hydrocarbon Exploration and some of the Associated General Principles of Law: from Myth to Reality' (2010) 8 (4) OGEL, 1-3
[858] See M. Mansour and C. Nakhle, 'Fiscal Stabilization in International Oil and Gas Contracts' (2016) SP 37 Oxford Institute for Energy Studies, 1-36; P. Barnadini, 'Stabilization and Adaptation in Oil and Gas Investments' (2008)
[859] Unreported suit No. FHC/PH/CS/313/2005

contribute to the statutory funds of the NDDC. Nwodo J. while rationalizing the decision quipped as follow:

> *There is no doubt that the Act (Nigerian NLNG Act) was founded on agreement between the defendant and the Federal Government…the NDDC Act cannot be described as a general Act. It is an Act for the benefit of the people of the Niger Delta area and for tackling specific ecological problems arising from the exploration of oil minerals. It is therefore a special Act and not a general Act of general application. Therefore, the rule of construction as regards to general act cannot apply...*

In reaching the above decision, the Court relied on the decision of the Nigerian Court of Appeal in *Ayorinde v Oyo State Government*[860] where the Court of Appeal held that the laws of Nigeria do not permit deprivation of an individual of his vested right, merely because the law existing with the rights vested have been repealed, unless the legislature unambiguously made it clear.[861]The Court however held, that the provisions of paragraph 3 of the Nigerian LNG (Fiscal Incentives, Assurances and Guarantees) Act are unconstitutional to the extent that it violates section 4 of the Constitution by fettering the legislative powers of a sovereign otherwise by the constitution.

It is therefore clear that where a statute creates statutory assurances and guarantees in relation to the exemption of taxes, for a gas processing company pursuant to any prior agreement, the company shall not be liable to make contributions to the funds of the NDDC. While this is capable of limiting the capacity of the commission to tackle ecological or environmental problems, it has a clear-cut advantage. Incentives flowing from assurances and guarantees are essential tools for stimulating investments in pollution abatement technologies. A scary fiscal regime can have the effect of dissuading investors especially in sectors where they are needed to develop critical infrastructures. The dissuasion could lead investors to shop for climes with cheaper regulatory costs of operations. Since oil and gas investments are concluded on the basis of Net Present value (NPVs) jurisdictional comparisons with their neighbourhood effects always throw up cheaper regulatory alternatives. This could

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[860] [2007] All FWLR (pt.709) CA.,

[861] See also *Ibidapo v Lufthansa Airlines* [1997] 4 NWLR (pt. 124) SC, where the Supreme Court of Nigeria held that Courts generally lean against implying the repeal of an existing legislation unless there exist clear proof to the contrary.

deny the nation of critical investment in pollution reduction infrastructure that could potentially compound the environmental woes of the people of the Niger Delta. One of the means in which foreign investments are attracted is to permit in hydrocarbon laws terms which freezes future obligations likely to alter the complexion of the agreement and increase general regulatory burden. Angola's hydrocarbon law accommodates such clauses.[862] The point must be made however, that incentives no matter the form in which they take are traditional exceptions to the PPP.[863] The principle itself is said to bar any form of subsidies except those allowed for transitional periods to enhance pollution abatement technologies by allowing industries transit to modern and better ways of conducting their operations. [864]

Another issue with the application of the NDDC Act is that the Act appears unclear about whether companies that are yet to commence production are liable to contribute to the NDDC fund.[865] This blurriness stems from conflicting provisions in the Act. While the Act makes a distinction between oil and gas 'prospecting' and 'producing' companies, section 14-(2)-(b) makes reference to 'oil producing companies' as those liable to make a contribution to 3 percent to the NDDC fund.[866] It would therefore seem that the intention of the draftsman was to exclude companies involved solely in exploration activities from contributing to the fund. Any contrary suggestion is bound to discourage exploration activities and may likely affect the actualization of future production targets. And because oil is the main stay of the Nigerian economy, this might diminish the funds deductible in derivation revenue and sustain the environmental misery of the Niger delta people.

The NDDC Act does not also make it clear if the 3 percent contribution of the budget of oil producing companies qualify as deductible expenses for the purpose of taxation

[862] Art. 92 of Angola's Hydrocarbon Law 2004 provides that 'Rights acquired under petroleum concessions and temporary prospecting licensing, as well as under agreements relating to existing or future petroleum concessions and temporary prospecting licenses which have been validly entered by the national concessionaire and are effective at the date of the entry into force of this law shall continue to be fully valid and effective, so as to protect contractual stability…'
[863] OECD, 'Recommendation of the Council on the implementation of the Polluter Pays Principle', OECD/LEGAL/0132, Paras 2-3, available on < https://legalinstruments.oecd.org/public/doc/11/11.en.pdf> last accessed 08/01/2019.
[864] Ibid.
[865] A. Ajayi (note 822) 4.
[866] Ibid.

of petroleum profit. Deductible expenses are deductions allowed before tax including outgoings and expenses, which must have been 'wholly exclusively and necessarily incurred by the crude oil producing company'.[867] However, under Nigerian law, statutory obligations are deductible when computing the tax liability of the taxpayer. In *Gulf Oil Co. Ltd v. FBIR*[868] the Court of Appeal in response to the question of whether or not charges paid to the Central Bank are deductible expenses under the Petroleum Profit Tax Act, held that payment of Central Bank charges imposed by the Federal Government is an expense incurred in the course of the appellant's business which is petroleum operations and therefore qualify for deduction under Section 10-(1) of the Petroleum Profit Tax Act.[869] The clarity from the above decision is necessary to ensure that Nigeria is not in breach of any double-taxation agreement with other nations that may end up constituting a cog on foreign direct investment. For the polluter, the fact that these funds are deductible reassures them that while meeting environmental obligations, the law affords them an avenue for ventilating the hopes of profitability.[870] The assurance of deductibility also ensures that payment into the fund is sustained without hassle.

Yet another problem with the NDDC Act is that it fails to delimit time frames within which the contributions due to the Commission are expected to be paid and no penalty for non-compliance is stipulated. However, under the Act, the Commission has the power to make rules and regulations for carrying out its function under the Act.[871] This regulation making power could be deployed towards prescribing the time frame within which the funds can be credited into the account of the Commission since that transaction is critical to the functioning of the Commission.[872] Prescribing a penalty for breach of the obligation to contribute to the fund of the Commission would however, require an amendment to the principal Act.[873] The omission to prescribe a penalty for compliance could be explained as part of a latter day regulatory reluctance to advance prescriptive regulation in view of the negative outcomes arising from such

[867] Section 10 (1) (a) - (c) of the Petroleum Profit Tax Act.
[868] [1997] 7 NWLR 700
[869] See also *SPDC v. Federal Board of Inland Revenue Service* (FBIR) [1996] 8 NWLR (Pt. 466) 256
[870] Cf: D.O, Gbedi, J.F. Adebisi and T. Bodunde, *'The Effect of Petroleum Profit Tax on the Profitability of Listed Oil and Gas Companies in Nigeria*' (2017) 6 (2), American International Journal of Social sciences, 40-46
[871] S. 8 (b).
[872] Ajayi (note 822) 4.
[873] Ibid.

prescription. Any emphasis on sanction could heighten overall regulatory cost and erase the economic benefits of sustained production of hydrocarbons.

Another issue arising from the NDDC Act is that the Act did not delineate any qualification based on knowledge of ecological matters as a condition for board, directorate or committee membership. The Act established a governing board with a qualification hinged principally on tribal connections with an oil producing area of a Niger Delta State.[874] And although it also established a directorate of environmental protection[875] and the management and advisory committees,[876] nothing in the composition of these establishments qualifies the appointments on the basis of ecological knowledge. The closest the Act came in ascribing qualification was in relation to the appointment of the Managing Director (MD) of the Commission. Mention in the Act is made of the fact that the MD is to have 'such qualification and experience as are appropriate for a person required to perform the function of those offices under the Act.[877] While the expression 'such qualification and experience as are appropriate' have sufficient proximity with the functions of the commission, the absence of an express reference to ecological capacity could justify experiences outside core environmental concerns. It is doubtful that an Act enacted as the long title suggests, 'to establish a new Commission with a re-organized management and administrative structure for more effectiveness' is well suited to address ecological problems without an environmentally skilled management. This omission is fundamental and could substantially determine the extent to which ecological cost is internalized and ecological problems resolved. Meaningful sustainable development is principally a function of how people with the right qualifications are deployed in pursuit of articulated societal objectives.[878] A management team devoid of environmental knowledge may not appreciate the need of enhanced public inputs in environmental decision making. It may not appreciate the complex methods and matrix of balancing environmental solutions with the realities of traditional oil and development economics. Not only will this breed substandard institutional responses

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[874] S. 2 (b)
[875] S. 9 (1) (d).
[876] SS 10 and 11
[877] S. 12 (1) (a).
[878] E. Chianu, *'NDDC- Another Shot at infrastructural Development of Nigeria's Oil Producing Areas'* (2001) 9 International Energy Law and Taxation Review, 2, 1-8

to ecological problems but will also have an impact on the discharge of the Commission's ecological mandate.

Another problem with the NDDC Act is the latitude of supervisory powers available to the president under the Act to give directions and moderate controls. The Act provides that the Commission shall be subject to the direction, control and supervision of the president in the performance of its function.[879] There is a further stipulation that the president may give to the Commission subject to the provisions of the Act, binding directions of a general nature relating to matters of policy with regards to the performance of its duty.[880] Similarly the President enjoys the power of appointment with respect to all board members under the Act subject to the confirmation of the senate in consultation with the House of Representatives.[881] The latitude of these presidential powers while providing a check on the Commission, can compromise their independence and expose them to adverse political control. While political amenability can be a useful tool in securing executive buy-in into the activities of the Commission, it could diminish the independence and functionality of the Commission, securing the enforcement of government's intentions whether good or bad on the Commission. The practice of enormous presidential interest on production concerns would mean that even where oil producing companies fail in their financial obligations to the Commission, presidential directives targeted at stalling enforcement may take precedent over Board decisions. The possibility of *malafide* presidential directives may become particularly visible in those cases where the state-owned NNPC is in partnership with other companies or with respect to the activities of its subsidiary companies like the National Petroleum Development Company. While this may be contrary to the spirit of the Act in view of the fact that presidential Directives are subject to other provisions of the Act, the danger of disobeying the directive may well provide an arbitrary caution on the part of the board from embarking on such an exercise. This is most likely to affect the responsibility of the Commission to tackle ecological and environmental problems (preventive obligations) as provided in section 7-(1)-(h) of the NDDC Act.

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[879] S. 7 (3).
[880] S. 23
[881] See sections 2 (2) and 12 (c).

A further concern in the NDDC Act is that it lacks participatory provisions relevant to modern day environmental democracy and the sustainability of development projects.[882] There is no provision in the Act for the representation of local communities[883] for whose benefit the Act was enacted. It has been argued that the provision regarding representation of State members[884] cannot be properly regarded as affording representation of local people since they had no input in their appointment.[885] People appointed see themselves more as appointees of government and may be unfamiliar with the problems and needs of the local people.[886] The lack of provision for the participation of local people in planning and execution of the Commission's projects, is a violation of their right to development, an integral part of which is participation.[887] Orford argues that 'implicit in the right to development is the recognition that 'peoples have the right to determine their model of development'.[888] The implication of the above is that meaningful inputs from the people of Niger Delta on how ecological problems can be tackled are shut out and left at the discretion of the board.

While the NDDC Act holds the advantage of a wide fund pool that can assist optimally in the internalization of environmental cost, the extent to which the management steers the affairs of the Commission and such factors such as corruption and adequate qualification will have an effect on how the provisions of the Act will tackle ecological problems.[889] Unfortunately, scholarly verdicts as to how effectively the NDDC has discharged its statutory remit are less than inspiring.[890]

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[882] Ebeku (note 467) 3.
[883] Ebeku (note 467) 3
[884] S. 2
[885] Ebeku (note 467) 3.
[886] Ibid.
[887] Art. 2 (3) of the 1986 UN Declaration on the Right of Development provides 'the states have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of their peoples, nut only on the basis of their active, free and meaningful participation in development. See also Art. 22 of the African Charter on Human and Peoples Rights 1981 and the decision of the African Commission on Human Rights in *Communication 155/96, The Social Rights/Nigeria,* esp. Paras 53 and 64.
[888] A. Orford, *'Globalisation and the Right to Development'* in P. Alston, (ed), *People's Rights* (Oxford university Press, 2001) P. 139.
[889] See generally, L. Atsegbua*, 'Environmental Rights, Pipeline Vandalization and Conflict Resolution in Nigeria'* (2001) 5 I.E.L.T.R, 6-7
[890] See UNDP-Nigeria, 'Niger Delta Human Development Report (Abuja, 2006), 15; this report concludes that the NDDC as an interventionist agency has not made any positive impression on the people of the Niger Delta.; Ebeku (note 328) 1 concludes that the Ghost responsible for the failure of the OMPADEC is still present in the provisions of the NDDC Act.

3.3.4 The Preventive and Control Dimensions of the PPP under Nigerian Law Applicable to the Hydrocarbon Industry.

In its preventive and control complexion, the PPP imposes the cost of pollution prevention and control on the polluter.[891] There are two ways in which the PPP performs the prevention and control function under Nigerian laws applicable to the hydrocarbon industry. The first is to set an emission threshold beyond which no operator is expected to pollute.[892] This approach is a command-and-control approach to environmental regulation. The second is to levy a tax proportionate to the pollution generated.[893] Irrespective of the method applied, the principal objective of legal instruments seeking to actualize and reinforce the preventive posture of the PPP is to institute a policy of pollution cutback by stimulating polluters to reduce emission rather than pay charges.[894] In its control perspective, the PPP aims to ensure that where pollution occurs, adequate contingency plans exist to ensure that they are swiftly dealt with or arrested to reduce the impact of the pollution on the environment. Several legislations reinforce the preventive and control character of the PPP. These laws prescribe standards and measures to be taken by operators in the industry to prevent and control pollution incidental to petroleum operations.[895] A few examples are the Petroleum Act 1969 and all the associated regulations made pursuant to it, the Associated Gas Re-injection Act 1979, the National Oil Spill Detection and Response Agency (Establishment) Act 2006. Other legislations are Oil in Navigable Waters Act 1968, Oil Terminal Dues Act 1965 and Criminal Code Act of 1964. Some other relevant guidelines and regulations include the Environmental Guidelines and Standards for the Petroleum industry in Nigeria issued by the DPR in 2006, the National Environmental Protection (Effluent Limitation) Regulation[896] and the

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[891] Paragraph 1 of the OECD Analysis and Recommendations OCDE/GD (92) 81 available on < http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(92)81&docLanguage=En>

[892] See the Environmental Guidelines and Standard for the Petroleum Industry in Nigeria (EGASPIN) 2002; See also Reg. 7 of the Oil Mineral Safety Regulation.

[893] The Petroleum (Drilling and Production) Regulation 1969.

[894] N. De Sadeleer, *Environmental principles, from Political slogans to Legal Rules* (Oxford University press 2002) 36.

[895] C. B. Strong, 'The Oil and Gas Law Review' (5th Edition, Law Business Review 2017) 208, available on https://thelawreviews.co.uk//digital_assets/ac9ae5d1-cc3e-45bd-a87d-97815eda8240/OandG.pdf , last accessed 20/07/2018

[896] Statutory Instrument (S.I) No. 8 of 1991

National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Wastes) regulation.[897]Some examples of the cost which these laws impose in this regard include decommissioning cost and the cost of equipment within oil facilities intended to enhance safe operations. Others are cost relative to maintenance of all apparatus and appliances in use in operations and the cost of responding to pollution amongst others.

3.3.4.1 The Preventive Dimensions of the PPP under the Petroleum Act and Associated Regulations

The Petroleum Act was enacted in 1969 and is the main legislation governing petroleum operations in Nigeria. As the long title to the Act suggests, it is 'an Act to provide for the exploration of Petroleum and to vest the revenue from all onshore and offshore petroleum resources on the Federal Government and for all other incidental matters.' The reference to incidental matters is a pointer to those matters necessary to ensure that the primary objectives of the Act are fulfilled. There are three ways in which the Act supports the preventive dimensions of the PPP. The first is through the power of the minister of petroleum resources to grant licenses on terms provided in the Act.[898] The second is through the wide catalogue of supervisory powers available to the minister to monitor petroleum operations.[899] The third is through the powers of the minister to make regulations.[900]

3.3.4.1.1 Environmental Controls through Licenses

Section 2 of the Act provides that the minister may grant either an exploration or oil prospecting license or an oil mining lease to companies registered in Nigeria.[901] A license is a permission that authorizes an activity the conduct of which would otherwise be unlawful.[902] The license itself is a consequence of ownership, which comes with the right to determine the conditions for the exploitation of natural resources. Under the Act, those conditions are the ones provided in the first schedule

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[897] S.I. No. 9 of 1991

[898] S. 1-(1) -(a) -(b) (c) and (3)

[899] S. 8 of the PA.

[900] S. 9 (b) (i) (ii) and (iii).

[901] S. 2(1) and (2); for a full consideration of this power see *South Atlantic Petroleum Ltd. V. The Minister of Petroleum Resources* [Unreported Suit No. FHC/L/CS/361/2006].

[902] G. Gordon, *'Petroleum Licensing'* in G. Gordon, J. Paterson and E Usenmez (eds) *'Oil and Gas Law Current Practice and Emerging Trends'* (2nd Ed Dundee University Press 2011) 67

to the Act or the ones superimposed by regulation made in accordance with the provisions of the Act.[903] What this means is that the conditions upon which a license is created in the Nigerian hydrocarbon industry are statutory. While no environmental conditions are imposed in the first schedule for oil exploration and prospecting licenses, some conditions imposed on oil mining leases are critical to the actualization of the preventive dimensions of the PPP.

One of the conditions relevant to pollution prevention is the restriction on assignment. Paragraph 14 makes ministerial consent upon payment of prescribed fees, a condition precedent for the assignment of interest in oil prospecting license or an oil-mining lease.[904] The minister may refuse consent to assignment unless he is satisfied that the proposed assignee is of good reputation or a member of a group of company that is of good reputation.[905] He may also refuse assignment unless he is satisfied that there is likely to be available to the proposed assignee sufficient technical knowledge and financial resources to enable him to effectually carry out a programme satisfactory to the minister in respect of operation under the license.[906] Until recently, there was controversy as to whether the minister's consent was required for the indirect transfer (via corporate structure) of petroleum interests.[907] However, a Federal High Court decided that such transfer required ministerial consent.[908] The implication of this decision is that the minister now enjoys a wider turf upon which the responsibility of monitoring assignments can be deployed to ensure that only enterprises with good environmental record can be admitted into the Nigerian hydrocarbon industry. This in turn consolidates corporate accountability especially in relation to maintenance and curative obligations and improves general internalization of environmental cost in the hydrocarbon industry.

The reference to 'good reputation,' 'sufficient technical knowledge and financial resources' are all intended to ensure that only assignees with the capacity to bear the

[903] S. 2 (3) of the PA provides that ' the provisions of the First Schedule to this Act shall in so far as they are applicable, have effect in relation to licenses and leases granted under this section'.
[904] Paras 14 Schedule 1 to the PA.
[905] Paras 16 (a) Schedule 1
[906] Paras. 16 (b); there is a further provision that the proposed assignee should in all respect, be acceptable to the federal Government.
[907] C. B. Strong (384) 208.
[908] *Moni Pulo Limited v. Brass Exploration* FHC/L/CS/835/11; See also Section 194 (1) and (2) of the Petroleum Industry Bill (PIB).

environmental obligations imposed by the Act through regulation are allowed into the Nigerian oil industry.[909] The Guidelines and Procedure for Obtaining Minister's Consent[910] issued by the Department of Petroleum resources provides that possible technical and economic value of the assignment to the operation of the license is one of the information that should be provided in the application to secure minister's consent.[911] Restriction on assignment can therefore ensure that the assignees are capable of deploying their sufficient technical knowledge and resources to ensure that current environmental technology is procured to ensure the safety of their operations. While the restrictions enjoy a tasty general appeal, the provisions are unclear as to what indices shall be used to measure good reputation and sufficient technical knowledge and financial resources. This omission, it would seem, will make these indices a matter of ministerial discretion. Since no provision exists in that regard to check the discretion, it may be abused and consequently become a source for admitting unqualified assignees into the Nigerian oil industry. When this happens, environmental degradation becomes inevitable.

Another license condition relevant to pollution prevention is licensee or lease's enjoyment of way-leave rights for the laying, operation and maintenance of pipelines and other appurtenances relevant to the license and lease operations.[912] Although way-leave rights are critical to the maintenance of hydrocarbon infrastructures, they only enjoy an incidental relevance to pollution prevention and control. Much depends on internal response strategies on the part of the licensee or lessees and could extend to such considerations as the supervisory capacity of the regulator.

Another useful condition is the one relevant to the revocation of licenses. Revocation is simply the annulment or cancellation of a license for failure to comply with the

[909] While this reference is commendable, it has not addressed the continuous admission of notorious polluters like Shell in the Nigeria's oil industry; See Friends of the Earth, *' Shell Dodging Responsibilities: A briefing note on Shell's recent affairs regarding unpaid compensation for oil Spills, involvement with corruption and shelling of onshore oilfields'*(2015), https://africanarguments.org/2016/11/shell-tries-to-dodge-responsibility-for-nigeria-oil-spills-again/ last accessed on the 8/01/2019.
[910] Guidelines and Procedures for Obtaining Minister's Consent to the Assignment of Interest in Oil and Gas Assets 2014, available on https://dpr.gov.ng/wp-content/uploads/2018/03/Giudeline-on-Asset-divestment-16-10-14.pdf last accessed 21/7/2018
[911] See Paras 4.2.
[912] Paras. 21 (a) and (b).

terms upon which it is granted. There are several grounds for revoking an oil prospecting license or an oil mining lease under Nigerian law.[913] One of such grounds is that the licensee is not conducting operations in accordance with good oil field practice.[914] Another condition is if the licensee fails to comply with any provision of the PA or any regulation or direction given thereunder or is not fulfilling his obligations under the special conditions of his license.[915] While the phrase 'good oil field practice' is nebulous and remains undefined in the PA, Regulation 7 of the Mineral Oil (Safety) Regulation defines it to mean 'current institute of Petroleum Safety Codes, the American Petroleum institute Codes or the American society of mechanical engineers code'. The phrase is also generally taken to relate 'largely to technical matters within the discipline of geology and reservoir, petroleum and facilities engineering and the impact of development on the environment'.[916] Flowing from the definition, the phrase enjoys sufficient proximity with the obligation on the part of operator to enhance environmental protection and can extend to effectual corporate strategies aimed at maintaining environmental safety in course of operations.

The powers of the minister to revoke oil prospecting licenses and oil mining leases is a regulatory strategy to ensure that the licensee procures compliance with all regulations and ensure that he deploys enough capital to ensure that his operations under the license are safe. Through this power, licenses are reminded that their obligations in relation to environment are a condition upon which their continued business interest can be sustained. While the power to revoke a license is a worthy tool intended to put the activities of licensees under check by reinforcing and justifying expenditures targeted at capacity building, equipment purchase and maintenance, the expression of the power is subject to ministerial discretion. Paragraph 25 of the 1st schedule to the PA employs the word 'may' in the qualification of the power of

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[913] See Paras. 25-30 of the Schedule 1 to the PA.
[914] Paras 25 (a) (iii).
[915] Paras 25 (b)
[916] G. Gordon (note 390) 127; Cf A. O Ekpu *'Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the united states and Nigeria'* (1995) Denver Journal of International Law and policy, 78, where it was suggested that the term 'good oilfield practice' should incorporate an obligation to ensure minimal environmental harm. See also K. Edu, 'A Review of the Existing Legal Regime on Exploitation of Oil and the Protection of the environment in Nigeria' (2011) 37 (2), Commonwealth Law Bulletin, 307.

revocation. The word 'may' means 'loosely required to do'.[917] What this definition presupposes is that even when the licensee is in breach of the conditions necessary for the revocation of a license the minister may decide not to exercise the power of revocation, as it is not mandatory for him to do so. Where this is so, environmental harm is inevitable.

However, the point must be stated that the exercise of the minister's power to revoke a license or oil mining lease is a public law function and whatever decision he makes in that regards is subject to judicial review.[918] In *Federal Government of Nigeria v Zebra Energy,*[919] the supreme court of Nigeria held that once the revocation of the license was not done as provided by statute, the appellant's action would be a breach of the agreement entered with the respondent.[920] The Court further held that the proper order to make in situations where a license have been improperly terminated is to direct the parties to complete their obligations under the contract.

The implications of the above decision are twofold. First, ministerial discretion to revoke a license must be exercised in the light of the conditions provided in the Act. Second, whatever decision the minister makes in the exercise of that jurisdiction is subject to judicial inspection and can be overturned in Court. By the same token, where a licensee behaves in an environmentally irresponsible manner, the minister can be compelled by those likely to be affected through a writ of mandamus to perform his function of revocation under the enabling provisions of the Act to protect the environment. This is a sure way to ensure that the discretion he enjoys with respect to revocation is not abused.

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[917] Bryan A (note 650) 1127

[918] *South Atlantic Petroleum Ltd. V. The Minister of Petroleum Resources* [Unreported Suit No. FHC/L/CS/361/2006].

[919] [2002] 18 NWLR (Pt. 798) 162

[920] In *Obikoya & Sons Limited v. Governor of Lagos State* [1987] 1 NWLR (pt. 50) 385, the court suggested that any law that governs mandatory acquisition is construed firmly against the acquiring party.; see generally O.J. Olujobi, *'Annulment of Oil Licenses in Nigeria's Upstream Petroleum Sector: A Legal Critique of the Costs benefits*' (2017) 7 (3), International Journal of Energy Economics and Policy

3.3.4.1.2 Pollution Prevention through Ministerial supervision

The PA gives the minister of petroleum resources the power to exercise general supervision over all operations carried on under the license.[921] Pursuant to this supervisory power, the minister may summon a holder of a license to give information about the conduct of operation in relation to the license and the licensee is bound to comply with the summons.[922] He may also direct in writing that operations under the license or lease granted under the PA be suspended in any area until arrangements have been made which in his opinion are necessary to prevent danger.[923] The minister may also suspend operations which are not been conducted in accordance with good oilfield practice.[924] He may also direct that operations be suspended for failure to comply with the PA or any regulation made pursuant to it.[925]

As can be seen from the above, the supervisory powers of the minister are broad and can be used to provide the vigilance necessary to check environmentally irresponsible behaviour and expenditure on the part of operators. This ministerial power is a useful tool to ensure that equipment complying with regulatory standards are procured together with expertise sufficient to deploy them in field operations. General ministerial supervision is critical to ensure that the operator (polluter) does not in pursuit of his drive for profit, fail in his obligation to procure the means through which safe operations can be guaranteed.

However, the point must be made that the extent to which the supervisory power of the minister is deployed effectively would depend on the access he has to up-to-date-knowledge. Ministerial supervision, without more, does little to put operators in check if the minister lacks knowledge of the complex economics of the industry or updated industry standards for tackling environmental concerns. The absence of ministerial knowledge is sometimes a recipe for regulatory capture[926], a notorious vice imperils

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[921] S. 8 (1) PA
[922] S. 8 (1) (e).
[923] S. 8 (1) (f).
[924] S. 8 (g).
[925] S. 8 (h).
[926] Regulatory capture is simply regulator's pursuit of the interest of the regulated enterprise rather than the interest of the public; see C. Hood, 'Explaining Economic Public Policy Reversals (Bukingham, 1994) 21; for a captivating discussion on capture see D. Moss and J. Cisternino, 'New Perspectives on Regulation' (2009) 13-26; see also W.J Novak, 'A revisionist History of Capture' in D. Carpenter and

regulatory efficiency and undermines environmental safety. The reality however, is that the effectiveness of ministerial supervision is reduced by the fact that the government of Nigeria owns interest in almost all hydrocarbon licenses existing today. It will therefore, be illogical to suggest that the minister in his capacity as watch man over Nigeria's interest in the exploitation of hydrocarbon resources would supervise himself. This apparent conflict of interest has been at the heart of many environmental violations that has fueled degradation in the Niger delta. A possible solution to this conflict of interest could be to separate regulatory functions from commercial functions. Another solution could be to diversify Nigeria's energy portfolio from fossil fuel to renewable energy in other to reduce reliance on oil. While these are attractive solutions, they are bound to exact a cost on Nigeria's economic outlook and energy security given the fact that Nigeria earns about 90 percent of its foreign exchange from fossil fuel (oil and gas).

3.3.4.1.3 Pollution prevention through regulation making powers

The minister of petroleum resources enjoys a wide range of regulation making powers in the PA which are relevant to strengthening a policy of pollution prevention and control in Nigeria's hydrocarbon industry. From the language of the PA, 'the minister may make regulations prescribing anything required to be prescribed for purposes of the PA'.[927] The minister's regulation making powers in relation to licenses extends to such matters as safe working conditions, conservation of petroleum resources, the prevention of pollution of watercourses and atmosphere and the construction, maintenance and operation of installations.[928] Pursuant to the minister's regulation making powers, several regulations have been enacted but only a few considered below bear relevance to the preventive facets of the PPP.

D. Moss (eds) 'Preventing Regulatory Capture: Special Interest Influence and how to Limit it' (publisher? 2014) 23-56.

[927] PA, S. 9 (1) (a).

[928] Petroleum Act, S. 9 (1) (b) (i) (ii) (iii) and (c).

3.3.4.1.4 *The Petroleum (Drilling and Production) Regulation (PDPR)*

Several provisions in the PDPR are relevant to pollution prevention in the hydrocarbon industry. Regulations 25, 37 and 46 (3) are all relevant in this regard.
Regulation 25 provides as follows:
"The licensee or leasee shall adopt all practical precautions including the provision of up to date equipment approved by the Director of Petroleum Resources to prevent the pollution of inland waters, rivers, water courses, the territorial water of Nigeria or the high seas by oil, mud or other fluids or substances which might contaminate the water banks, or shorelines or which might cause harm or destruction to fresh water or marine life, and where such pollution occurs or has occurred, shall take prompt steps to control and, if possible, end it".

In a similar tenor Regulation 37 provides thus:
"The licensee or leasee shall maintain all apparatus and appliances in use in his operations, and all boreholes and wells capable of producing petroleum, in good repair and condition, and shall carry out all his operations in the proper workmanlike manner in accordance with these and other relevant regulations and methods and practices accepted by the Director of Petroleum Resources as good oilfield practice; and without prejudice to the generality of the forgoing he shall, in accordance with all those practices take all steps practicable:

(a) to control the flow and to prevent the escape or avoidable waste of petroleum discovered in or obtained from the relevant area;

(d) to prevent the escape of petroleum into any water, well, spring, stream, river, lake, reservoir, estuary or harbour; and
(e) to cause as little damage as possible to the surface of the relevant area and to the trees, crops, buildings, structures and other property thereon".

As can be seen above, Regulations 25 and 37 strengthens the preventive and control function of the PPP under Nigeria's hydrocarbon law. Although the allusion to practical precautions initially lends Regulations 25 away as reinforcing the precautionary principle, when read vis-à-vis with the responsibility of the Director of

petroleum Resources to approve up-to-date- equipment, it reinforces the preventive posture of the PPP. Regulation 37 dealing with the obligation of licensee or leasee to maintain all apparatus and appliances in use in the license operation performs a more extensive task that encompasses prevention and control. The obligation to adopt practical precautions and to maintain apparatus and appliances is a function of technology use and technical sophistication. Obligations of that nature always give rise to capital expenditure and operational service contracts necessary to meet the expectations of regulations. Sometimes meeting the obligations demand the technical know-how of subsea and safety and reliability engineers to monitor wellheads from remote locations. Most often than not, they involve the installation of blow-out preventer (BOP)[929] to ensure that sufficient barriers exist to prevent the escape of oil, mud and other fluids into rivers, watercourses and land. Testing the integrity of these equipment also requires trainings or drills that are held to sustain crew familiarity and ensure that the equipment are in good order. Investments in technical capacity, equipment leases and regular maintenance are borne by the polluter in his capacity as operator. While these provisions create a standard of expectation from the operator, they fail to create provisions explicitly for sanctions and the extent of their enforceability will depend on the meaning ascribed to expressions like 'practical precautions', and other terms used in these regulations.[930]

Another provision of the PDPR relevant to pollution prevention is Regulation 46. The Regulation imposes a general obligation on IOCs to upon the termination of their licenses, 'remove all building, installations, works, chattel or effects erected or brought by the leasee upon the relevant area for or in connection with petroleum operations subject to the minister's right to take over the installation.[931] The type of obligation imposed under this Regulation is technically referred to as 'decommissioning obligations' and they require ministerial consent because of how important they are to environmental safety.[932] Decommissioning obligations are

[929] A blow-out preventer is a large valve at the top of the well that may be closed if the drilling crew loses control of formation fluid. Schlumberger, 'Oilfield Glossary', available on http://www.glossary.oilfield.slb.com/Terms/b/blowout_preventer.aspx , accessed 22/ 8/2018.
[930] MTF Okorodudu, *'Law of Environmental Protection': Materials and Texts*' (Caltop Publications, Ibadan 1994) ; U. J Orji, *'An Appraisal of the Legal Frameworks for the Control of environmental Pollution in Nigeria'* (2012) 38 (2) 331
[931] Reg. 46 (3).
[932] Reg. 46 (1)

necessary to ensure that the dangers which dumping installations pose to the environment are obviated.[933] While this provision holds the implications of preventing pollution from abandoned oil installations, they have been criticized as inapplicable to offshore decommissioning given the complexity associated with the latter. [934] The requirement for decommissioning offshore installations is now specifically provided under Part VIII-G of the EGASPIN 2002. The EGASPIN demands the complete removal of any offshore installation sited in water depth of less than 100 metres and weighing less than 4, 000 tons.[935] It also provides that any installation placed on the Nigerian Continental Shelf or the Exclusive Economic Zone (EEZ) from January 2003 must be designed in such a way that it can be completely removed.[936] The Guidelines also require decommissioning programmes for offshore installations to be planned at the initial or design stages of the project and for the consultation of communities likely to be affected.[937] While the provisions of the EGASPIN relating to offshore decommissioning have been lauded as compliant with international standard, they have also been criticized for lacking clearly outlined procedures in the form of guidance notes to guide operators.[938] Another criticism is that there is no financial guarantee for meeting decommissioning cost.[939] Given the fact that abandonment takes effect after the effluxion or termination of the lease term, the absence of such guarantees can become a source of an abysmal internalization of environmental cost as the licensee may fail to meet regulatory obligations or declare bankruptcy. This is bound to affect EJ.

3.3.4.1.5 *Other Regulations Relevant to Pollution Prevention*

Two other Regulations that enhance the preventive functions of the PPP are the Petroleum Refining Regulation (PORR) and the Mineral Oil (Safety) Regulation (MOSR).

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[933] E. Azaino, *'International Decommissioning Obligations: Are there Lessons Nigeria can Acquire from the UK's Legal and Regulatory Framework'* (2012) 16 CEPMLP Annual Review-CAR, 14

[934] Worika, I. L., *'Towards a Sustainable Offshore Abandonment/Rehabilitation Policy in Africa: Part II'*, (2000) 11/12 I.E.L.T.R., pp 266-275

[935] EGASPIN 2002- Part VIII-G, Clause 1.0

[936] Ibid.

[937] Ibid.

[938] M. A Fagbeja, I. Clark and I.O. Ibaba, *'In Support of a Sustainable Framework for Decommissioning of Redundant Oil and Gas Installations in Nigeria'* (2015) Safe Earth Development Foundation Publications, 25-28.

[939] M.A Fagbeja, 25-28.

A host of provisions in the PORR sustains the preventive dimensions of the PPP. Apart from general provisions mandating licensees to secure boundary fencing around tank farms, offtake facilities and jetties,[940] employ competent persons to observe fire safety precautions in restricted areas, make provisions for adequate fire control measures,[941] there are also more specific obligations for the manager similar to those contained in PDPR. Regulation 27 provides for the disposal of residues, sludges, rust and similar matter from tanks which contain lead petroleum products according to good refining practice and only to such places as have been approved by the Director'. There is also a provision that the design, construction and testing of the liquefied petroleum gas unit and storage shall be in accordance with the current requirement of standard practice of design and construction.[942] In a reaffirmation of the spirit behind the PDPR, Regulation 43 (3) provides that the manager shall adopt all practicable precautions including the provisions of up-to-date equipment as may be specified by the Director from time to time to prevent the pollution of the environment by petroleum or petroleum products. It is also provided that if actual pollution occurs, the manager shall take all reasonable steps to control it and if possible, end it.[943] The failure to conform to approve effluent specification is an offence punishable by a fine of N100 or six months imprisonment.[944] While the above provisions at a good means of reinforcing environmental integrity and preventing pollution, the fines stipulated are ridiculously low and incapable of discouraging the sort of environmental irresponsibility, which the regulation seeks to deter. The provisions are also void of clarity especially in relation to what meanings should be ascribed to expressions like 'good refining practice' and 'standard practice of design and construction'. Speculative nature of these expressions can become a means of accommodating a less than acceptable standard of operations capable of damaging environmental safety, up scaling the heights of environmental externalities.

The MOSR is another regulation that performs the functions of pollution prevention and control. The Regulation enacted under the repealed Mineral Oils Act 1962 but

[940] Reg. 9
[941] Reg. 10
[942] Reg. 29 (1)
[943] Ibid.
[944] Reg. 43 (4).

saved under section 9 of the PA, was updated in 1997. MOSR is the primary regulation dealing with safety concerns in Nigeria's petroleum industry.[945] The Regulation generally provide for the duties of licensees and lessees,[946] managers[947] and employees,[948] and other miscellaneous matters.[949] A few of these provisions are relevant to pollution prevention. In Part I dealing with the duties of lessees and licensees, the regulation creates the obligations to appoint a manager to take charge of all operations and provide clear, comprehensive, safe and practical operational procedures and guidelines for the workforce. There is also an obligation on the part of licensees to ensure that there is specified in every contract in unambiguous words, the responsibilities of the contractors with regards to safety of operations.[950] The essence of this provisions is to enable an easy transfer of regulatory obligations to contractors working on an oilfield (given the absence of legal proximity between them and the regulator) in order to ensure that environmental violations are properly accounted for. In relation to offshore operations, the regulation imposed duties on managers of installations regarding safe operations offshore.[951] The failure of a manager to comply with Part III renders a manager guilty of an offence which upon conviction carries a punishment of =N=250, 000 or imprisonment for a term not exceeding 5 years or to both such fine and imprisonment.[952] For a billion dollars industry, the fine imposed under the regulation is most likely to have little or no deterrent effect.[953] More particularly in relation to drilling and production operations, the regulation provides as follow:

'Except as otherwise provided in these Regulations, every drilling, production and other operation which is necessary for the production and subsequent handling of the

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[945] For a robust consideration of this regulation see E. Wifa and M.K Amakoromo, *'A Comparative Analysis of the Health and Safety Regulatory Regime for Offshore Oil and Gas Workers in Nigeria and the United Kingdom'* (2017) 1 African Journal of International Energy and Environmental Law, 77-94.
[946] Part I
[947] Part II
[948] Part III
[949] Part IV
[950] Mineral Oils (Safety) Regulations 1997, part 1 dealing with Duties of Licensees and lessees.
[951] Section 17-21, Part III.
[952] Mineral Oil Safety Regulation 1997, Reg. 47
[953] M.K Amakoromo and GA Agbaitoro *'Reforming the Regulatory Framework for Offshore Health and Safety in Nigerian Oil and Gas Industry: Lessons from the United Kingdom'*, OGEL 4 (2016) www.ogel.org/article.asp?key=3655 accessed 15 January 2017.

crude oil and natural gas shall conform with good oil field practice which for the purpose of these Regulations, shall be considered to be adequate if it conforms with

(a) The appropriate current Institute of Petroleum safety Codes; or
(b) The American Petroleum Institute Code; or
(c) The American society of Mechanical Engineers Codes; or
(d) Any other internationally recognised and acceptable systems.'[954]

Two points are worthy of note from the above provisions. The MOSR makes reference to good oilfield practice, which is expounded in relation to the codes mentioned above. The regulation also makes reference to international standards and by so doing, leaves a wide regulatory passage way for drilling and production operations to comply with international standards and practices determined to ensure the integrity of such operations. A part of American practice is the provision to use best available technology (BAT).[955] The MOSR provides that the blow-out preventer installation shall be substantially constructed, securely fastened in place and be of adequate rating; it also requires that well control drills shall be conducted once a week.[956]

A worthy criticism of the MOSR however, is that the regulation assumes that offshore standards and codes mentioned above are worthy of integrity.[957] Given the fact that those codes are the products of human endeavour, they will be far from being perfect and whatever defect that resides in them are more likely to be inherited by the Nigerian regulatory system. An adaptation of the codes to the peculiar realities of Nigeria would be a worthy option. This is because transplantation of legal provisions works well when adapted to the cultural realities of each individual nation. Regular regulatory audits will also be of help in spotting practices which have become ineffectual or hold little promise of success. Another criticism is that the regulations are themselves also highly prescriptive suggesting that the processes leading to environmental safety is a worthy vocation for law.[958] The offshore petroleum industry is characterized by

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[954] Mineral Oil safety Regulation, 1997, reg. 6.
[955] R. Steiner, 'Double Standards? International Standards to prevent and Control Pipeline Oil Spills, Compared with Shell Practices in Nigeria', published by Friends of the Earth, the Netherland, November, 2008; O.F Oluduro and O Oluduro, 'Oil Exploitation and Compliance with International Standards in the Niger Delta of Nigeria' (2015) 37 Journal of Law Policy and Globalization, 68.
[956] Mineral Oil safety Regulation, reg. 13.
[957] E. Wifa and M.K Amakoromo (note 593) 4-5.
[958] E. Wifa and M.K Amakoromo (note 593) 4-5.

technological changes and reliance on prescriptive regulation will place a charge on the regulator to constantly rewrite regulations to keep pace with such changes.[959] Prescriptive Regulation is also accused of promoting a compliance mentality that weakens corporate management of safety concerns after complying with what law demands. This is another way of saying that the regulation is more likely to trigger a rudimentary attention to matters of environmental safety. Rather than managing environmental safety as an operational necessity, MNOCs will be desirous of complying with the provisions of regulation no matter how ineffectual. When this happens, environmental externalities are bound to be poorly internalized. One way of ensuring that MNOC live up to their regulatory responsibilities could be to regularize corporate social responsibilities in regulatory instruments. While this hold the promise of superimposing these obligations on license, it will also ensure that MNOC do not abandon their regulatory obligations to prevent and make good their pollution.

3.3.4.2 Prevention and Control under the NOSDRA Act 2006 (As Amended).

The National Oil Spill and Response Agency was established in 2006 for preparedness, detection and response to all oil spillages in Nigeria and for related matters.[960] The NOSDRA Act was enacted to give effect to Nigeria's obligation as a signatory to the International Convention on Pollution Preparedness, Response and Cooperation (OPRC) 1990.[961]Amongst a litany of other objectives, the Agency is expected to co-ordinate and implement the National Oil Spill Contingency Plan and ensure a safe, timely, effective and appropriate response to major or disastrous oil pollution.[962] The Agency is also charged with the mandates of identifying and protecting high risk areas, establishing mechanisms to protect threatened environment, funding appropriate pre-positioned pollution combating equipment and provide support for research and development in local development of oil detection

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[959] J. Penny, A Easton, P Bishop, R. Bloomfield, 'The Practicalities of Goal-Based Safety Regulation', Proc Ninth Safety-Critical Systems Symposium (SSS 01), Bristol, UK, 6-8 feb, PP 35-48, New York: Springer, ISBN: 1-85233-411-8, 2001, 1.

[960] S. 1 (1).

[961] International Convention for Pollution Preparedness, Response and Cooperation, Article 6; For an excellent reading on the role of NOSDRA see E. O Ekhator, *'Environmental Protection in the Oil and Gas Industry in Nigeria: the Roles of Government Agencies'* (2013) International Energy Law Review, 1-11; See also R. O Ugbe and A Ekpoudo, 'Legal Approach to Causes and Consequence of Oil Spillage in Nigeria (2017) 20 Nigerian L.J, 158-159.

[962] S. 5 (a).

equipment.[963] The functions of the Agency are clearly set out in section 6 of the Act. The section provides that the Agency is responsible for surveillance and compliance with all existing environmental legislation and the detection of oil spills in the petroleum sector including those relating to prevention, detection and general management of oil spills, oily wastes and gas flare.[964] The Agency is also responsible for the coordination and implementation of National Oil Spill Contingency Plan for Nigeria and for the removal of hazardous substances as may be issued by the Federal Government and other incidental responsibilities relevant to its function.[965] Failure to report an oil spill to the Agency within 24 hours after the occurrence of the spill constitutes an offence and carries a fine of two million naira (=N=2,000, 000) for each day of failure to report the Spill.[966] The failure to clean up the impacted site, to all practical extent including remediation attracts a fine of five million naira (=N=5,000,000) or to imprisonment for a term not exceeding 2 years or to both such fine and imprisonment.[967] The Act provides that the Agency shall establish and maintain a fund into which shall be paid and credited take-off and subvention grants of the FG, 5 per cent of the ecological fund to serve as superfund for the management of major oil spill disaster annually.[968] The Act also makes part of the Agency's fund, the sum of 0.5 per cent operations funds of oil companies for the enforcement of environmental legislation in the petroleum sector.[969]

The Agency can, with the power of the governing board, make regulations that it considers expedient to give full effect to the provisions of the Act.[970] Specifically, Section 26-(2) provides that the Agency may in pursuance of its regulation making powers, make regulations setting specifications and standards relating to use of dispersants and the engagement of oil spill responders by oil companies.[971] Its regulation making powers in relation to standards, extends to the establishment of a benchmark for oil spill contingency planning; development of framework to guide operators in Oil Spill Contingency planning; and most appropriate means of

[963] S. 5 (b) - (n)
[964] S. 6 (1) (a)
[965] S. 6 (1) (c) – (e)
[966] S. 6 (2) (a)
[967] S. 6 (3).
[968] S. 11 (a) (b) and (c).
[969] S. 11 (d).
[970] S. 26
[971] S. 26 (2) (a) and (b).

preventing and combating various oil spills and its attendant oil and gas pollution.[972] Violation of regulations made by the Agency prescribing standards carries a fine of five hundred thousand naira (=N=500, 000) or to both imprisonment and fine.[973] Where the offence is committed by a body corporate, it shall on conviction, be liable to a fine not exceeding two million (=N=2, 000, 000) or to both such imprisonment and fine.[974] Pursuant to its statutory remit, NOSDRA issued and administers the National Contingency plan for Nigeria (NOSCP)[975] in accordance with the International Convention for Pollution Preparedness, Response and Cooperation.[976] Pursuant to its regulation making powers, the Agency has enacted two regulations that are worthy of note. These regulations are Oil Spill and Oily Waste Management Regulations (OSOWMR) 2011 and the Oil Spill Recovery, Clean up, Remediation and Damage Assessment (OSRCRDA) Regulations 2011.

The OSOWMR applies to onshore and offshore facilities in Nigeria especially to facilities which due to their location can be reasonably deemed to be capable of discharging oily waste in harmful quantities into navigable water or land in Nigeria.[977] The Regulation imposes an obligation on operators of oil facilities who desire to discharge oily waste into navigable water or land to prepare a Spill Prevention Control and Counter Measures Plan (SPCCP) and an Oil Spill Contingency Plan (OSCP) especially when a facility is in a fixed operating mode.[978] Failure to comply attracts the penalties stipulated in the principal Act.[979]

The OSRCRDA regulations on the other hand, sort to 'establish procedures, methods and other requirements for the detection, response, clean-up and remediation of oil spill from onshore petroleum facilities into upland and navigable waters of Nigeria or adjoining shorelines.'[980] The Regulation imposes an obligation on the owner or operator of oil facility wherein oil is discharged into navigable waters or land to

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[972] S.26 (2) (c) (d) and (e).
[973] S.26 (3)
[974] S. 26 (4).
[975] The National Oil Spill Contingency Plan (NOSCP) for Nigeria Revised in 2013, available on http://nosdra.gov.ng/PDF/NOSCP2013.pdf, last accessed on the 25/ 07/ 2018.
[976] International Convention for Pollution Preparedness, Response and Cooperation, Art. 6
[977] OSOWMR 2011, Reg. 2 (1).
[978] OSOWMR 2011, Reg. 4 (1) and (2).
[979] OSOWMR 2011, Reg. 19; See also S. 6 (2) and (3) of the NODRA Act 2006.
[980] OSRCRDAR 2011, Reg. 1

provide equipment to monitor spill detection and evaluate the extent of the spill through the use of aerial and visual surveillance.[981] The Regulation further provides for the constitution of a joint investigation team to be comprised of community State Government representatives and NOSDRA in the event of a spill, immediately after an oil spill notification.[982] The joint investigation team is intended to investigate and determine the cause and extent of a spill and report its findings prepared by NOSDRA.[983] The Regulation also provides for elaborate spill containment procedures that the operator is expected to comply with.[984] There is also a provisions that the operator or polluter shall pay compensation to the victims of oil spills for damage caused to his person, business or property.[985] Compensation is however, not payable for acts of sabotage.[986] In an apparent reference to the PPP, the Regulation mandates the owner or operator to internalize the cost of compensation as part of the PPP.[987] The compensation paid shall cover such liability heads as buildings, economic trees or crops by any person who surveys, dig, lays pipes or undertakes any other incidental activity for the supply and distribution of energy and fuel.[988] These compensation provisions sustain the curative character of the PPP.

The NOSDRA Act and its accompanying Regulations from a linguistic perspective are clearly designed to control the adverse effects of oil pollution when they occur.[989] They are post-pollution response instruments designed to ensure that oil spillages are detected timely and do not wrought havoc on the environment in whatever proportion. Being an Agency established for preparedness, detection and response of all oil spillages in Nigeria, the functions of NOSDRA and the obligations created in regulations made pursuant to the Act take effect prior to but mainly after spillage. Those functions and obligations are wide enough to accommodate a constituency of concerns relevant to the PPP. The Federal Government of Nigeria (FGN) and oil companies, as polluters, bear the cost of oil spill management.[990] This is a clear attempt

[981] OSRCRDAR 2011, Reg. 2 (1).
[982] OSRCRDAR 2011, Reg. 5
[983] Ibid.
[984] OSRCRDAR 2011, Reg. 6.
[985] OSRCRDAR 2011, Reg. 26 (1).
[986] OSRCRDAR 2011, Reg. 26 (2)
[987] OSRCRDAR 2011, Reg. 26 (3).
[988] OSRCRDAR 2011, Reg. 27.
[989] NOSDRA Act 2006, Section 1 (1).
[990] S. 11 (c) and (d).

by the Act to make polluters internalize the cost of spill management and keep them safe within their corridors. The Act and regulations made pursuant to it also vitalizes the control and curative dimensions of the PPP since the focal point of the Agency's statutory remit is surveillance and remediation of oil spillages. By imposing an obligation on the operator or polluter to prepare a Spill Contingency Plan and provide equipment to monitor spill detection, the Regulations can pass as frameworks of Pollution prevention and control imposing cost. Similar attributes can be seen in Section 6 (2) and (3) of the Act which delimits financial charges for refusing to report an accident or remediate a spill as provided under the Act. In *Pipelines and Product Marketing Company (PPMC) v NOSDRA,*[991] NOSDRA imposed a fine of one million (the equivalent of E2, 000) on the PPMC for neglecting the clean-up of oil spills on some communities occasioned by its operations. The PPMC refused to pay but took the rather mundane option of suing NOSDRA. The Court held that PPMC was in breach of section S. 6 (3) of the NOSDRA Act when it declined to clean-up and remediate the oil spill. Holding that NOSDRA was well within its powers to impose the fine, the Court further held that the PPMC was also liable for damages accruing from the impacts of the oil spill on the communities and mandated it to clean-up the affected areas.[992]

As lofty as the objectives and functions of the Agency are, there are several concerns in the NOSDRA Act and its accompanying regulations capable of affecting the extent to which environmental cost can be internalized. First, the penalties imposed under the act for failing to report an accident or spill are basically non-deterrent and minute when matched against the financial realities of the oil industry.[993] The sort of charge contemplated by the PPP is one that is proportionate to the pollution generated. The penalties therefore, do not match the PPP's expectation.

Secondly, the Act is unclear as to whether NOSDRA have the power to impose punitive financial penalties beyond the financial limits provided under Section 6 (2)

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[991] Suit No. FHC/ASB/18/105/10, cited in J. Onuanyim, *'Court Upheld fine on PPMC over Failure to Clean-up Oil Spill'*, Compass Newspaper, July 17, 2012. http://www.compassnewspaper.org/index.php/index.php?option=com_content&view=article&id=1964:court-upheld-fine-onppmc-over-failure last accessed 25/06/2018.

[992] Ibid.

[993] A. Olaniyan, *'Imposing Liability for Oil spills Clean-ups in Nigeria: An Examination of the Polluter-pays Principle' (*2015) 40, Journal of Law, Policy and Globalization, 82-3.

and (3). In July 2012 for instance, Shell Nigeria Exploration and Production Company was fined $5 billion dollars by NOSDRA in relation to the extensive oil spill that occurred in its Bonga oilfield.[994] The Agency acknowledging that Shell put in place adequate containment measures to combat the spill, noted however in an apparent justification of the fine, that the spill posed serious environmental threat to the offshore environment.[995] Shell rejected the fine and nothing has been heard of the fine till date. Although, it has been argued that NOSDRA has the power to enforce the order,[996] an alternative argument is that the jurisdiction of NOSDRA to enforce a fine of that nature would depend on whether the fine was in response to a refusal to report an accident, remediate a spill or imposed as a consequence of a breach of standard imposed by regulation[997]. Where the penalty falls short of these considerations then liability will be not be established. Even where a link exists between the fines imposed and the qualifications provided in Section 6 (2) and (3) and Section 26-(3) and (4) of the Act (as amended), there is need to determine the point at which the operator or the polluter would be deemed to know that an accident has occurred. Does knowledge become apparent after the spill or upon coming to knowledge that a spill has occurred? While knowledge can easily be attributable in cases of equipment failure, they may not be quite handy in cases of sabotage where if proven exculpates the operator from liability. These considerations are bound to have effect on how the environmental cost occasioned by oil spills is internalized.

A recent decision of the Nigerian Court of Appeal has now laid the issue of whether NOSDRA has powers to impose fines to rest. In *NOSDRA v. Mobil Producing Nigeria unlimited* ,[998] NOSDRA levied a fine of =N=10, 000, 000 (£23, 000) on the Exxon Mobil in respect of a spillage which the respondent cleaned up immediately. The CA was called upon to decide the question of whether an administrative/regulatory agency like NOSDRA has the inherent power to impose fines without proper adjudication by a court of law. The CA held that 'awarding a fine is a judicial act and it is the sole prerogative of the court of law under section 6 of the 1999 constitution of the Federal

[994] Joe Brocks and Camillus Eboh (Reuters), 'Shell Faces $5 billion Dollars Fine over Nigeria's Bonga Oil Spill', 6th March 2012, available on https://uk.reuters.com/article/uk-shell-nigeria-fine-idUKBRE86G0WX20120717 , last accessed on the 9/01/2019.
[995] C. Nwachukwu, *'Bonga Oilfield Spill: FG Fines Shell $5bn'*, Vanguard Newspaper, July 17, 2012
[996] Ekhator (note 961) 8.
[997] Ibid.
[998] [2018] LPELR-44210 (CA).

Republic of Nigeria 1999 (as amended). The Court further held that no other organizations or bodies can usurp that power and that 'any law that would consign to anybody other than the courts the power to award fine is unconstitutional'.[999] Justice Chioma JCA summed up the position of the Court in an apparent revelation of the gaps in the NOSDRA Act as follows:

> *On the facts and circumstance of this case, I am of the firm but humble view that the imposition of penalties by the Appellant was ultra vires its powers, especially where no platform was established to observe the principles of natural justice. Penalties or fines are imposed as punishment for an offence or violation of the law. The Power as well as competence to come to that finding belongs to the courts and the Appellant is not clothed with the power to properly exercise that function in view of the law creating the Appellant (NOSDRA). There is therefore a lacuna in the law creating the Appellant…*

The conclusion from the above decision is that NOSDRA does not have the legal capacity to issue an administrative fine. The absence of a definitive adjudicatory power in the NOSDRA Act makes any imposition of penalty or fines ultra vires the constitutional provisions relating to fair hearing.[1000] While this decision is in tandem with constitutional logic, it is bound to leave a robust catalogue of environmental cost uninternalized.

Another criticism of NOSDRA is that it does not have the tools to function as a proper independent enforcement Agency.[1001] NOSDRA relies on polluters for necessary tools and expertise to discharge their statutory functions. As one report notes:

'Oil Spill investigations are organized and led by oil company personnel. Despite its title, the National Oil Spill Detection and Response Agency (NOSDRA) does not initiate oil spill investigations. It is usually dependent on the company both to take NOSDRA staff to oil spill sites and to supply technical data about spills'[1002]

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[999] Ibid: p. 1

[1000] Constitution of the Federal Republic of Nigeria 1999 (as amended), S. 36 (1).

[1001] J. Ezeanokwasa, *'Polluter-Pays Principle and the regulation of Environmental Pollution in Nigeria: Major Challenges'* (2018) 70, Journal of Policy Law and globalization, 51

[1002] Amnesty International, 'Bad Information: Oil Spill Investigations in the Niger Delta (2013) 15, < https://www.amnesty.nl/content/uploads/2016/11/1311_rap_shell_.pdf?x32866> last accessed 27/07/2018; see also UNEP, Environmental Assessment of Ogoniland, August 2011, ISBN: 978-92-807-3130-9, p 140

This inability to initiate oil spill investigations prevents NOSDRA from living up to the ideals of its objectives of 'ensuring a safe, timely, effective and appropriate response to major or disastrous oil pollution' or complying with other regulations.[1003] NOSDRA's technical dependence oil companies can become a recipe for regulatory capture and lead to an underestimation of spill extent or compromise the integrity of the Joint Investigative Report (JIR). Where this is so, environmental costs are bound to be poorly internalized.

Yet another challenge with the enforcement of the NOSDRA Act is that the jurisdiction of NOSDRA seems to conflict with that of DPR and both regulatory agencies are yet to find a common ground.[1004] A lack of regulatory co-ordination between both Agencies can lead to implementation inconsistencies that can affect the internalization of environmental cost.

Another challenge affecting the organization's efficiency and which are likely to affect its functionality is the issue of poor funding for its activities.[1005] It is difficult to see how the Agency can efficiently discharge its statutory obligations without adequate funding. Where such funding is lacking, necessary logistics could prevent the surveillance, detection and remedial capacities of the organization in a manner that environmental cost may become poorly internalized and polluters discharged from remedial obligations. Despite these criticisms, it must be acknowledged that the Agency is work in progress and the Act, regulations and plans that define its obligations are works in progress and may be devoid of immediate solutions.

Finally, it is important to point out that the provisions of the NOSDRA Act are essentially prescriptive. The reference to 'the most appropriate means of preventing and combating various oil spills and its attendant oil and gas pollution' as one of the forms in which regulation prescribing standards can take put this fact beyond dispute.

[1003] NOSDRA, S. 5 (a); see Department of Petroleum Resources, Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN), revised edition 2002, p148, para 2.6.3., which provides that clean-up of an oil spill shall commence within 24 hours of the occurrence of the spill.

[1004] O. Fagbohun, '*The imperatives of Environmental restoration Due to Oil Pollution in Nigeria'* (2007) 18 Stellenbosch L. Rev., 359

[1005] K. K. Ezeibe, *'The Legislative and Institutional Framework of Environmental Protection in the Oil and Gas Sector in Nigeria'* (2011) Nnamdi Azikiwe U. J. Int'L & Juris. 39, 44-53

Similarly, throughout the provisions of the Act and its regulations, there is a heavy reliance on financial sanctions. While this is a worthwhile means of internalizing environmental cost, they actually do little to help oil companies improve their spill response protocol and rather expand the frontiers of the vice of merely complying with regulation without more.

3.3.4.3 Prevention and Control through the Associated Gas Re-injection Act 1979

Another law that strengthens the prevention and control functions of the PPP under Nigerian law is the Associated Gas Re-injection Act (AGRA) 1979. The Act was enacted to 'compel every company producing oil and gas in Nigeria to submit preliminary programmes for gas re-injection and detailed plans for the implementation of gas re-injection.[1006] The Act stipulated the 1st of January 1984 as the deadline for the termination of gas flaring and imposed a responsibility on all oil-producing companies to submit preliminary programmes and detailed plans for the implementation of gas re-injection and utilisation.[1007] Section 3(1) of the Act prohibits the flaring of associated gas without ministerial permission. However, section 3 (2) creates a ministerial discretion to grant gas-flaring permits where the minister is satisfied that either the utilisation or reinjection of gas is unsuitable or infeasible in any particular field subject to certain conditions or the payment of certain levies. Where an oil company offends the provisions of Section 3 (1), it shall forfeit the concessions granted in the particular field where the offence was committed.[1008] The Act also allows the minister to withhold any entitlements of an offending company towards the completion or implementation of a desirable gas re-injection scheme.[1009] The minister may also make regulations prescribing anything requiring to be prescribed for the purposes of this Act.[1010] Pursuant to this regulation making powers, the Associated Gas Re-injection Regulations was enacted in 1984.[1011] The regulation prescribed conditions to be met by oil-producing companies for the continued flaring of associated gas. The Regulation provides that the continued flaring of associated gas shall be based on the following conditions:

[1006] See Long title.
[1007] AGRA 1979, s. 1 and 2.
[1008] AGRA 1979, S. 4 (1)
[1009] AGRA 1979, S. 4 (2).
[1010] AGRA 1979, s. 5
[1011] SI 43 of 1984, CAP A25 LFN 2004.

(a) Where more than 75 percent of the produced gas is effectively utilized or conserved;
(b) Where the produced gas contains more than fifteen percent impurities which renders the gas unsuitable for industrial purposes
(c) Where an ongoing utilization programme is interrupted by equipment failure
(d) Where the ratio of the volume of gas produced per day to the distance of the field from the nearest gas line or possible utilization point is less than 50,000 SCF/KM: and it is technically impossible to reinject the gas in the field; or
(e) Where the minister orders the production of oil from a field that does not satisfy any of the conditions specified in the Regulations. [1012]

As can be seen above, the AGRA and its associated regulation are legal instruments aimed at preventing and controlling the flaring of associated gas and they are critical to internalizing the environmental cost arising from such an industrial vocation. The establishment of a timeline to stop gas flaring and the delimitation of conditions upon which gas can be flared are worthy examples that the Act and regulation applies and strengthens the pollution prevention and control abilities of the PPP. The overall philosophy of the legislation and regulation is to entrench a 'no flare' culture on the path of industry by encouraging a policy of gas re-injection not only as a means of preventing the adverse impact of flaring on the environment but also forestalling the waste of a non-renewable resource. By linking the right to flare gas to ministerial approval and payment of such sum as the minister may from time to time prescribe, the Act creates a statutory avenue for the environmental cost arising from the flaring of associated gas to be internalized. This link is explainable upon the hypothesis that the polluter has a choice between investing in reinjection facilities and paying a sum commensurate with the gas flared. This regulatory posture is in tune with the PPP.

However, several provisions in the Act and its associated regulation deepens concerns that the Act and regulation may not be the perfect instruments for internalizing the environmental cost arising from gas flaring. The first of these concerns is that the Act contains a contradiction that is shy of an appreciation of the cost of re-injection. While the Act is bold enough to prohibit gas flaring, it does not state the role which an ambiguous regulatory posture poses to the realization of such an objective. Despite

[1012] AGR Regulation, Reg. 1 (a) – (e).

the prohibition on gas flaring, compliance with the provisions of the Act have been far from realizable.[1013] One of the reasons why oil producing companies do not comply with the deadline for provisional gas re-injection programmes and its implementation is the absence of infrastructure for gas utilization.[1014] Gas utilization projects require the securing of substantial ex ante investments.[1015] The government as a joint venture partner in most cases fail to honour cash calls for the establishment of re-injections facilities. Rather than address this situation, the Act bars the activity in one breadth and in yet another breadth, make the activity valid upon securing ministerial consent. This sort of policy contradiction leaves room for regulatory capture and defiles regulatory attempts at ending gas flaring. It also suggests that environmental cost arising from gas flaring will be poorly internalized as the complicity of government in not meeting obligation can provide impetus for oil producing companies to flout the Act and regulation at will.

Another concern is that the Act creates little or no incentive for gas utilisation.[1016] The enormity of investment in pipeline transportation needed to utilize gas is a cost to which law ought to be sensitive. The portfolio of risk created from such investment demand, ought to be bridged through regulation. Law as a means of socio-engineering and ought to find solution to a community of investment exposures.[1017] The first of such exposure is the risk posed by domestic gas supply obligation under the Domestic Gas Supply regulations 2008.[1018] Domestic gas supply obligation is an obligation concerned with the dedication of a stipulated reserve and production for the purposes of supplying the domestic market.[1019] The obligation mandates upstream gas producing companies to make available to the domestic market, a specific volume of

[1013] U. J Orji, *'Moving From Gas Flaring to Gas Conservation and Utilization in Nigeria: a Review of the legal and Policy Regime'* (2014) OPEC Energy Law Review, 153-154
[1014] Ibid.
[1015] Columbia Institute on Sustainable Investment, 'Flaring Gas: How Not to Waste a Valuable Resource' September 16th 2016.
[1016] U.J Orji (note 1013).
[1017] See L.J Mcmannaman, 'Social Engineering: The Legal Philosophy of Roscoe Pound' (1958) 33 St. John's Law Review, 1-47; See also D.R Pound, 'The Cause of Popular Dissatisfaction with the Administration of Justice, address before A.B.A Annual Meeting (1906) Reprinted in 20 J.AM; see also N.D Dias (note 395).
[1018] Domestic Gas Supply and Pricing Regulation 2008, published in the Federal Republic of Nigeria Gazette No. 10, Vol. 95 of 19th February 2008, S. 10.
[1019] C. M Okorie, *'Can Domestic Gas Obligation (DGO) Principles be compromised by Detailed Regulation? A Review of Nigeria's Downstream Gas Policies'* (LLM thesis, CEPMLP University of Dundee, 2010) at 29 [Unpublished].

their total gas production as allocated by the Department of Gas.[1020] This obligation when matched against the fact that the Petroleum Products Pricing Regulatory Agency (PPPRA) determines pricing policies of petroleum products and particularly moderate volatility of petroleum products prices,[1021] raises a cause for alarm. This is because the PPPRA is more likely to lean in favour of price structures which do not reflect the production value of the gas in the international market. When this happens, gas flaring will continue as the market realities of Nigeria may provide little incentive for utilizing associated gas. This will invariably lead to the poor internalization of environmental cost.[1022]

The most important issue militating against the proper internalization of cost arising from gas-flaring from polluters is the imperceptible nature of fines for gas flaring. For companies that produce 10,000 bpd in any oil mining lease or field designated as marginal field, the regulations prescribe a fine of 28.37 standard cubic metres (one thousand standard cubic feet) of gas flared. .[1023] A penalty of $0.5 cent is imposed for flaring in any oil mining lease or field designated as marginal field where less than 10,000 bpd of oil is produced.[1024] While this penalty represents an increase in the penalty for gas flaring, it is insignificant relative to the size of externalities which gas faring generates. This insignificant penalty makes it far more economical for companies to flare than to utilize or re-inject gas at the commercial expense of the Nigerian nation.[1025] In recent years, oil companies in Nigeria have been charged a total of between 20 million and 50 million naira ($120, 750) annually for flaring associated gas but each year the country loses between US$500 million and US$.5 billion to gas flaring.[1026] On an economic scale, this reveals that the environmental cost arising from

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[1020] Domestic Gas Supply and Pricing Regulation 2008, s. 2 (d).

[1021] See Petroleum Products Pricing Regulatory Agency (Establishment) Act No. 8 2003, s. 7 (a) and (d).

[1022] Other legislations however, provide incentives for the use of Associated gas; See S. 10 of the Petroleum Profit Tax Act.

[1023] Flare Gas (Prevention of Waste and Pollution) Regulations 2018, Reg 13 (1) : cf G. Adenji, 'Approaches to Gas Flare Reduction in Nigeria, Global gas Flaring reduction Forum: London (October, 24th and 25th 2012) p. 4.

[1024] Flare Gas (Prevention of Waste and Pollution) Regulations 2018, Reg 13 (2).

[1025] Y. Omoregbe, 'Oil and Gas Law in Nigeria' (Malthouse Press, Lagos 2001) 59

[1026] World Bank, 'Regulation of Associated Gas Flaring and Venting: A Global Overview and Lessons from international Experience' (2004) 70, available on https://www.esmap.org/sites/default/files/esmap-files/Rpt_GBL_RegOfGasFlaringandVenting.pdf last accessed on the 29/07/2018.

the flaring of associated gas are poorly internalized by the AGRA and its associated regulation.

Several other challenges have been identified as standing on the way of flare reduction and gas utilization likely to affect the manner in which the polluter internalizes these externalities. The first is government dependence on oil as a major source of revenue which denies it the necessary political will to tackle gas flaring.[1027] Another challenge is poor regulatory oversight occasioned by the double image of regulator both as an arbiter of state participation in hydrocarbon commerce and as regulator of the industry.[1028] The absence of requisite technological capacities on the part of regulator to monitor the volume of gas flared by oil companies in order to impose commensurate fines further weakens the performance of oversight functions by regulator.[1029] Yet another challenge is the fact that the geographical terrain of the Niger Delta has hindered the development of gas gathering and transportation infrastructure.[1030] Overall, the regulation is prescriptive and holds little succour for victims of gas flaring.

3.3.5 The Curative Dimensions of the PPP under Nigerian Law

In its curative character, the PPP helps victims of pollution to obtain compensation for environmental damage. Under this heading the PPP is used as a critical filter to consider the current health of positive law to survey how well it internalizes the cost arising from environmental externalities. There are several ways in which Nigerian law reflects the curative aspects of the PPP. It is reflected sometimes in the form of nuisance, negligence or an action for strict liability. Sometimes, it is reflected in the form of statutory guarantees like the PDPR. It could take the form of constitutional guarantees[1031] in the form of fundamental human rights. Whatever form liability takes, the expectation of the PPP is that it must offer recompense to the full value of what is

[1027] International Monetary Fund, Case studies on Energy Subsidy Reform: Lessons and Implications (International Monetary Fund, Washington DC, 28 January 2013), p. 48;

[1028] Orji (note 1013) 165.

[1029] Citizens Budget, DPR and Gas Flaring: Communities Suffer as Government fails to Regulate Oil Companies (26 March 2012), available at http://www.citizensbudget.org/index.php?option=com_content&gas-flaring-communities-suffer-as-government-fails-communities-suffer-as-pgovernment-fails-to-regulate-oil-companies&catid=38:press-release&itemid=63 , last accessed 28/ 07/ 2018

[1030] ibid

[1031] Already considered in Part 3.1 of this thesis.

lost or closer to the full of what is lost. The extent to which Nigerian law does this is open to argument. This section shall consider liability strands under the common law and some select legislations applicable to the oil industry to examine how they help victims of ecological damage find succour and the extent to which Nigerian curative laws internalizes the costs suffered by victims.

3.3.5.1 Compensation under Common Law

The law of torts in common law system basically performs the function accomplished by the law of obligations under Roman law, which is to organize the rights and duties arising between individuals.[1032] Common law forms part of Nigeria's legal system and an action can be brought thereunder to redress environmental wrongs arising from hydrocarbon activities insofar as rights emanating therefrom have not been extinguished by a Federal legislation.[1033] Standing on a philosophical plane, the law of tort is explained by a theory of corrective justice, which simply put, principally serves the aim of reversing injustice.[1034] An example of the corrective justice potentials of tort law is clearly visible in how tort law is being deployed to address the problem of climate change. As of January 2020, the total number of climate change cases filed stood at 1444.[1035] Innovative litigation has seen lawyers deploying basic tort principles in conjunction with scientific evidence to provide a basis for liability claims against major corporate emitters for some of climate change effects.[1036] The main common

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[1032] O. Fagbohun, 'The Law of Oil Pollution and Environmental Restoration' (Odade Publishers, 2010) 234

[1033] Interpretation Act 1964 now CAP 123 LFN 2004, S. 32 (1) provides as follows: 'Subject to the provisions of this section and except as in so far as other provisions is made by any federal law, the common law of England and the doctrines of equity, together with the statute of general application that were in force in England on the first day of January, 1900, shall, in so far as they relate to any matter within the legislative competence of the Federal legislature, be in force in Nigeria.'

[1034] E. J Weinrib. 'The Idea of Private Law' (Cambridge MA, Harvard university Press, 1995) 169 n 53.

[1035] UN Human Rights, Office of the High Commissioner, News, "Bachelet welcomes top court's landmark decision to protect human rights from climate change", 20 December 2019, available on <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25450&LangID=E> last accessed on the 20/03/2021.

[1036] Robert F. Blomquist, "Comparative Climate Change Torts" (2012) 46 (4) Valparaiso University Law Review, 1053-1075, 1055; see also Luciano Butti, "The Tortious Road to Liability: A Critical Survey on Climate Change Litigation in Europe and North America (2011) 11 (2) Journal of Sustainable Development Law and policy, 32-84; see also Randall S. Abate, " Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as part of a Global Warming Solution in California" (2008) CONN. L. REV, 1-71; Joana setzer and Rebecca Byrnes "Global Trends in Climate Change Litigation: 2020 Snapshot, policy Report, July 2020, available on <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf> last accessed on the 20/03/2021 and Janqueline Peel and Hari M.

law tort theories used in pollution are those of negligence, trespass, nuisance and strict liability.[1037] But this thesis shall only consider the common law of strict liability and negligence since they are the main basis upon which litigation relating to environmental damage are activated.

Negligence

The common law of tort of negligence generally prohibits any person from unreasonably injuring another person or another person's property. Under English law, it is an independent tort within the framework of the law of tort, and is defined as the breach of a legal duty of care, which results in damage undesired by the defendant to the plaintiff.[1038] For negligence to crystallize, there must be a legal duty owed and breached by the defendant and which caused the plaintiff some damage.[1039] The legal duty of care is hinged on some sort of proximity or neighbourhood construed as imposing liability on anyone who is bound to exercise some degree of care on any sphere of life in relation to others, but fail in that regard.[1040] In relation to oil operations, this legal duty of care also exists between companies and their host or anyone to whom the proximity theory might be applicable. In *SPDC v. Tiebo VII*,[1041] the plaintiff-respondents claimed that the defendant-appellant company in the course of its operations in their area caused oil spillage that covered the whole of River Nun, a tributary of the River Niger, which flowed to their community. The plaintiffs-

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Osofsky, "Climate Change Litigation" (2020) 16 Annual Review of Law and Social Science, 21-38, available on < https://www.annualreviews.org/doi/full/10.1146/annurev-lawsocsci-022420-122936> last accessed on the 20/03/2021.

[1037] For more on this see Pontin B., *'Nuisance Law Regulation and the Intervention of Prototypical Pollution Abatement technology: 'Voluntarism' in Common Law and Regulation'* in Brownsword R., Scotford E. and Yeung K. (eds) 'The Oxford Handbook of Law, Regulation and Technology (Oxford University Press 2017) pp 1253-1272; Pontin B., *'A room with a view in English Nuisance Law: Explains Modernisation Hidden Within the 'Textbook Tradition'* (2018) 38 (4) Legal studies, pp 627-644; Adam D.K Abelkop, 'The Role of Tort Law in Environmental and Public Health Governance' in: Michael Faure (ed) 'The Encyclopaedia of Environmental Law' (Edward Edgar Publishing 2020) 233-250; Douglas A Kystar, 'The Public Life of Law: Tort Law as Risk Regulation Mechanism' (2018) 9 (special Issue 1) European Journal of Risk Regulation, 48-65 and Donald N. Dewees, 'The Role of Tort Law in Controlling Environmental Pollution' (1992) 18 (4) Canadian Journal of Public Policy, pp 425-442.

[1038] Rogers, W.V.H., *'Winfield and Jolowicz on Tort* (14th edn Sweet & Maxwell 2013) 78

[1039] Ibid; See also the locus classicus case of *Donoghue v. Stevenson* [1932] A.C. 562 at 580 were the neighbourhood principle was established; Vivienne Harpwood, 'Modern Tort Law' (7th edn, Routledge Cavendish Plishers, 2009) 19-35; Jenny Steele, "Tort Law: Text, Cases, and Materials" (3rd edn, Oxford University Press 2014) 1-62

[1040] *Abusomwan v. Mercantile Bank of Nigeria* [187] 3 NWLR (pt. 60) 196 at p. 208-209; Aku Nmecha *Transport Service v. Atoloye* [1993] 6 NWLR (pt. 298) 233; *Benson v. Otubor* [1975] 3 SC 9 and Nigerian *Airways Limited v. Abe* [1991] 1 NWLR (Pt. 170) 733.

[1041] [1996] 4 N.W.L.R (Pt. 445) 657

respondents maintained that the rampaging crude oil destroyed their source of drinking water, fishing nets, sacred areas and shrines and fishponds. The Court of Appeal held that because of the dangerous nature of crude oil, allowing its escape by the defendant company amounted to an act of negligence for which the plaintiffs were entitled to damages proved.[1042] However, in *Seismograph Ltd. V. Onokpasa,*[1043] the plaintiff's case for negligence was dismissed because he could not establish facts to prove sufficient proximity in an action against the defendant for an alleged damage to his building.

As can be seen from the above cases surveyed, while the tort of negligence offers a shield to MNOCs against heads of harm outside the stream of causation and is more compatible with the moral appeals of justice, [1044] its enlarged catalogue of defences is capable of leaving a community of environmental cost uninternalized. Where this is so, its credential as justice-based tort is questioned.[1045]

The Rule in Ryland v Fletcher[1046]

The principle established in this case is that 'a person who for his own purpose brings on his land and collects and keep there anything likely to do mischief if it escapes, must keep it at his own peril and if he does so, is prima facie answerable for all the damage which is the natural consequence of its escape.'[1047] The rule of strict liability applies to ensure that the polluter is held liable for damages that occur from his activities irrespective of whether he was at fault or negligent. Liability under this heading of tort is intended purely as a means of loss redistribution.[1048]The rule is one

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[1042] See also Shell Petroleum Development co. (Nig.) Ltd v. Anaro [2001] FWLR (pt. 50) 1815; see also Shell BP Limited v. Cole [1978] 3 SC. 183
[1043] [1972] 4 S.C. 123
[1044] R. A. Epstein, 'A Theory of Strict liability: Towards the Reformulation of Tort Law' (Cato Institute 1980) 5-14
[1045] For a broader reading on the limitations of negligence see J. Spier (ed), 'The Limits of Liability: Keeping the floodgates shut (Kluwer Law International 1996) 5-7; K. Stanton, P Skidmore, M. Harris and J. wright, 'Statutory Torts' (Sweet & Maxwell 2003) 57- 147
[1046] [1866] L.R. 3 HL; 37 L.J. Ex 161; 19 L.T. 220 HL, affirming Ryland v Fletcher [1866] L.R. 1 Ex. 265
[1047] Ibid: Lord Blackburn; See L. E Nwosu, SAN, 'Oil and Gas Practice: The Role of Nigerian Lawyers, a paper presented at the Annual General Conference of the Nigerian Bar Association held between 24th -30th August, 2003 in Enugu Nigeria published in the Business Law Session (document) on Oil and gas sponsored by OCJ Okocha, SAN, pp 20 and 22.
[1048] P. Cane, ' Atiyah's Accidents and Compensations' (7th Edition Cambridge University Press 2006)

predicated on displacing the burden of proof which will ordinarily lie with the victim of environmental pollution. As one commentator noted, 'the highly technical nature of oil operations makes it too intricate for a rural fisher man or farmer to comprehend or explain reasons behind the escape of a dangerous substance in the nature of crude oil into the sea or unto land'.[1049] The rule in *Ryland v Fletcher* has been applied in several Nigerian cases. In *Umudje v. Shell-BP Petroleum Development Company (Nig.) Limited,*[1050] The Supreme Court held that liability on the part of an owner or a person in control of an oil-waste pit such as located in the case in hand, exist under the rule in Ryland v Fletcher, although the escape has not occurred as a result of negligence. Similarly, in the consolidated case of *Alfred Diete-Spiff & Ors v. Mobil Nigeria Unlimited,*[1051] Mustapha J. had no difficulty in holding that the escape of 100, 000 barrels of crude oil from the defendant's 24 inch pipeline from its offshore crude oil production platform into the plaintiff's homestead situate at the south east Niger Delta causing damage to the Plaintiff's communities, activated the rule in *Ryland v Fletcher.*

Reliance on the rule of strict liability however, is predicated on several conditions. The first is that the object causing harm and its escape must relate to a non-natural use of land.[1052] The second is that it must be unconnected with an act of God,[1053] must not have been caused by the plaintiff[1054] or a third party[1055] and no statutory provision exist exculpating the polluter from liability.[1056] There is also doubt as to whether the rule will apply where a spillage occurs from a ship or from an offshore facility.[1057]

The canalization of liability along the lines of strict liability holds a lot of advantages. First, it has the advantage of shifting the burden of proof from the claimant to the

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[1049] I.T Amachree, 'Compensation Claims relating to Oil Spillage and Land Acquisitions for oil and Gas Fields in Nigeria: A suggested Practical guide' (Pearle Publishers 2011) 29-30
[1050] [1975] 5 U.I.|L.R (pt. 1) 115
[1051] [2003] 2 F.H.C.L.R 311 at 386
[1052] A thing is natural if it is ordinary and usual; see G. Kodilinye, 'The Nigerian Law of Tort' (Sweet & Maxwell Publishers 1982) p. 114
[1053] The phrase 'Act of God' is used to refer to a harm caused by the 'operation of natural forces, free from human intervention; See Kodilinye, p.119.
[1054] See *Ponting v. Noakes* [1894] 2 QB 281; *Dunn v Birmingham Canal* [1872] 7 Q.B. 224
[1055] *Box v. Jubb* [1879] 4 Ex. D 76; the Rule is inapplicable is cases of deliberate malicious act of a third party; See also Shell Petroleum Development Company of Nigeria v Amachree [2002] F.W.L.R (pt. 130) 1654.
[1056] Amachree (note 1049) 39.
[1057] G. Etikerentse (note 519) p. 158.

defendant who would be required to justify the damage, upscaling the probability that environmental cost would be internalized. In this light, it is capable of achieving a more efficient internalization of environmental cost of accidents giving rise to pollution. Secondly, it creates an incentive for persons to adopt accident prevention measures or to withdraw from an activity which would, given a correct allocation of incentives have been economically beneficial.[1058] Thirdly, strict liability offers a more accurate allocation of incentives which helps eliminate operational inefficiencies in the allocation of social marginal cost. Under this thought line, environmental law can be used as tool for declaring MNOCs best placed to tackle ecological harms arising from oil industry activities even when they are not negligent in claims where they are called to do so.[1059]

However, the variety of defences available under the tort leaves one in wonder as to whether strictness of liability has not been compromised.[1060] The fact that damage is still subject to the losses proved, makes compensation arising from claims predicated on strict liability infinitesimal. This has the potentials of leaving some categories of environmental cost uninternalized or unaccounted for.

3.3.5.2 Compensation under the Petroleum (Drilling and Production) Regulation.

Regulation 23 of the PDPR mandates a licensee who exercises the right conferred by the license or a lease in such a manner that it interferes with fishing rights to pay adequate compensation to any person injured by the exercise of his licensing rights. This provision seeks to assist the victims of pollution to recover compensation for loss of fishing rights.[1061] In *Phyne v. SPDC,*[1062] the Federal High Court awarded 700, 000 for damage to fish pond and land.

[1058] K. M Stanton, *'The Modern law of Tort'* (Sweet & Maxwell 1994) 39
[1059] ibid: 40
[1060] A few examples of these defences are contributory negligence, causation and remoteness of damage, non-natural use of land, act of God, third party wrongs and statutory excuses. See Eric Descheemaeker, "Tort Law Defences: A Defence of Conventionalism" (2014) 77 (3) , Modern Law Review, 493 and James Goudkamp, 'Tort Law Defences' (Hart Publishing 2013) 153.
[1061] O. Oloduru*, 'Oil Exploration and Ecological Damage: The Compensation Policy in Nigeria'* (2012) 33 (2), Canadian Journal of Development Studies, 169.
[1062] [Unreported suit No FHC/PH/376/97 of 2nd August 2006] 26

However, the provision is riddled with weaknesses. Alongside the fact that the provision contains unclear terms like 'adequate compensation', the scope of the provision is limited to fishing rights and no mention is made in the regulation of remediation of impacted areas by the unreasonable exercise of the licensees right.[1063] Another problem with the provision is that the victim is only entitled to compensation if he or she is able to prove that the licensee or lessee exercises his right 'unreasonably'.[1064] While this standard of proof is herculean and is capable of shooting up the correlative cost of litigation for poor fishermen whose fishing rights have been abridged, it is also bound to limit the category of the environmental cost which the polluter internalizes especially in respect of harm arising from reasonable or justifiable exercises of license rights. This exposes the victims to dual jeopardy. In *Chief Omu & Ors v. SPDC*, [1065] the Federal High Court held dismissing a claim for special damages that because there is no evidence that individual fishermen, the plaintiffs, are entitled for damages for inconveniences resulting from spillage, they were only entitled to general damages.

3.3.5.3 Compensation under the Oil Pipelines Act 1956

The OPA[1066] was passed to make 'provision for licenses to be granted for the establishment and maintenance of pipelines incidental and supplementary to oil fields and oil mining and for purposes ancillary to such pipelines.[1067] The legislation is another statutory instrument through which the curative aspects of the PPP are ventilated under Nigeria law. The Act makes provisions in relation to the power of the minister to grant permit to survey pipeline routes,[1068] permit to survey,[1069] oil pipeline license,[1070] compensation,[1071] and other miscellaneous matters.[1072]

[1063] I.S Ibiba and J.C. Olumati, *'Sabotage Induced Oil spillages and Human Right Violations in Nigeria's Niger Delta'* (2009) 4 Journal of Sustainable Development in Africa, 58.
[1064] See Petroleum Drilling and Production Regulation 1969, Reg. 23.
[1065] [Unreported Suit FHC/PH/21 of 21st November 2007] 15
[1066] 1956 No. 31, 1965 No.24
[1067] See the recital to the Act.
[1068] Part 1 (sections 1-3).
[1069] Part II (sections 4-6).
[1070] Part III (Sections 7-18).
[1071] Part IV (sections 19-23)
[1072] Part V (Sections 24- 34).

In relation to the payment of compensation and damages, it provides in Section 11-(5) as follows:

"The holder of a license shall pay compensation-

(a) To any person whose land or interest in land (whether or not it is land in respect of which the license has been granted) is injuriously affected by the exercise of the rights conferred by the licence, from any such injurious affection not otherwise made good; and

(b) To any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work, structure or thing executed under the license, for any such damage not otherwise made good; and

(c) To any person suffering damage (other than on his own default or on the account of the malicious act of a third party) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation, for such damage not otherwise made good".

This section is intended to provide a simple system of compensation to reduce the risk associated with a poor internalization of *ex post* environmental cost from the operation of an oil pipeline.

Several issues arise in relation to the application of the compensation provisions of the OPA. The first issue is whether the provision is mutually exclusive of the remedy under common law. This thesis takes the view that section 11(5) admits of the principle of supersession by which a statute can qualify and even remove common law.[1073] In *Bodo v SPDC*[1074] the Technology and Construction Court of the High Court of Justice, Queens Bench Division, took the view that the section 'provided a statutory platform for the controlled reception of the English Common Law in Nigeria.' That this view represents the intentions of the drafts man is easily visible from the tenor of Section 11 (5) of the OPA. While the reference to 'any person whose land is injuriously affected' bear visible marks of the torts of nuisance and trespass, the references to 'any person suffering damage by reason of neglect' and any person suffering damage as a

[1073] Interpretation Act 1964, S.32 (1).
[1074] [2014] EWHC 1973 (TCC) 37

consequence of breakage or leakage' points towards the direction of negligence and strict liability. Since the OPA has covered the field which common law use to cover, there is absolutely no need to resort to common law remedies. The implication of this observation is not academic but bears relevance to the category of cost or compensation recoverable. We shall return to this issue later.[1075]

The second issue relates to whether the legal provisions allow any exception. A careful examination of s. 11-(5)-(c) reveals that the draftsman while drafting the legislation in 1956 foresaw that 'sabotage' might be a problem in the future and therefore took steps to protect oil companies from the burden that such acts would imposed on them.[1076] Section 11-(5) (c) excludes harm from bunkering from its liability pool since the harm therefrom will not be emanating from the license activities of licensee.[1077] The rationale behind this provision is that no one should benefit from his/her own wrongdoing or suffer for actions taken by someone over which he/she had no control.[1078] While section 11-(5)-(c) is a posterior statutory reaction to a social problem, the provision however, does not provide succour for innocent victims of oil spills resulting from malicious acts of third parties. This gap to the extent that it legally exempts oil companies from paying compensation in most oil-spill incidents, leaves a greater constituency of environmental cost uninternalized.[1079] Not only will this affect the livelihood of the Niger Delta people, it will also effectively lunch them into the poverty category.

In response to the problem posed by sabotage, the Nigerian government enacted the Petroleum Production and Distribution (Anti sabotage) Act 1975.[1080] Although the Act makes provisions criminalizing and punishing the offence of sabotage with death and imprisonment terms not exceeding 21 years[1081], no record exists of anyone who has

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[1075] See the discussion concerning section 20 (2) of the OPA below.
[1076] D. E. Omukoro, 'Environmental Regulation in Nigeria and Liability for Oil Pollution Damage: musings from Norway and the US (Alaska)' (2017) 8 I.E.L.R.,
[1077] See Firibeb v. SPDC FHC/PH/990/98, 28 September 2006
[1078] Oliver W. Holmes Jnr., 'The Common Law' (Belknap Press of Harvard University Press, 2009), pp76-77
[1079] B. Oloworaran, 'The Liability for Oil Spillages Resulting from the Act of Strangers/ third parties' (2007) 4 Environmental & Planning Law Review, 37, 38.; See John Holt Krebale & Ors v. S.P.D.C [Suit No: FHC/ASB/CS/41/09].
[1080] CAP P12 LFN 2004.
[1081] Petroleum Production and Distribution (Anti-Sabotage) Act, s. 1.

been convicted under the Act.[1082] The conclusion to be drawn from the above situation is that the war on sabotage is far from been won and this fact remains a threat to the internalization of environmental cost.

The third and final issue is the quantum of compensation available under the OPA. Two sections are relevant to the quantum of compensation. Section 6-(3) of the OPA provides for the duty of licensee acting under the authority of Section 5 of this Act to take all reasonable steps to avoid unnecessary damage to any land entered upon to any building, crops or profitable tree thereon, and to make compensation to the owners or occupiers for any damage done under such authority. The quantum of compensation envisaged in respect of this section is what the judge considers just in respect to any damage done.[1083]

Section 20-(2) however provides with respects of other heads of damages as follows: 'If a claim is made under subsection (5) of section 11 the court shall award such compensation as it considers just having regards to-

(a) Any damage done to any building, crops or profitable trees by the holder of the license in the exercise of the rights conferred by the licence; and
(b) Any disturbance caused by the holder in the exercise of such rights; and
(c) Any damage suffered by any person by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work, structure or other thing executed under the licence; and
(d) Any damage suffered by any person (other than as stated in such subsection (5) of this Section) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation; and
(e) Loss (if any) in value of the land or interests in land by reason of the exercise of the rights as aforesaid.'

As can be seen from above, the recoverable compensation will cover capital diminution attributable to oil pollution and loss of amenity in relation to the land in question and damage arising from nuisance and trespass, negligence and strict

[1082] Omukoro (note 1076) 4.
[1083] OPA, s. 20-(1).

liability.[1084] It has been held also that the word compensation is exclusive of punitive and exemplary damages.[1085] While the above section is wide enough for would be victims to explore, it has been argued that the introduction of negligence to a liability to pay compensation, is an 'unnecessary paralysis of the victim' as the burden of proof cast on him is unattainable.[1086] When this is considered against the fact that torts such as negligence require proof of causation, then the possibility exist that an expanded constituency of environmental cost would remain uninternalized under the OPA. Another weakness of section 20 is that it does not contain an obligation to pay compensation for the restoration of contaminated land. The licensee is however, under obligation to take prompt steps and where possible end any pollution that emanates from its facility.[1087] This omission is fundamental and can escalate environmental externalities in oil producing communities.

3.4 CONCLUSION

This chapter has traced environmental regulation in Nigeria from the colonial period to the current era. The colonial era while consolidating British hold on Nigeria had the weakness of a dearth of specific enforcement remedies that imperils environmental regulation. The era of petroleum-focused legislations was borne out of the emergency of oil discovery but has a sectoral outlook that concentrated institutional attention on the petroleum sector. The era of rudimentary legislation inspired a poor awareness in environmental matters that made environmental concerns absent from the list of government necessities. The contemporary period of environmental regulation came with improved awareness that necessitated the enactment of several environmental legislations with fine promises of sustainability.

This chapter also considered the principal instruments through which the PPP is applied in the hydrocarbon industry. This chapter notes the important role which the Constitution of the Federal Republic of Nigeria plays in the internalization of environmental cost in Nigeria. The chapter maintains that the provisions of the Constitution relating to environmental agenda, delimitation of Court jurisdiction,

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[1084] Bodo Community v SPDC (supra).
[1085] Ibid.
[1086] J.F Fekumo, 'Disturbance and injurious Affection in the Nigerian Petroleum industry (Springfield Publishers 1998) 12
[1087] Petroleum Drilling and Production Regulation 1969, Reg. 25.

fundamental human rights, domestication of international treaties, classification of ownership rights and duties and the redistribution of revenue are all relevant to the application of the polluter pays principle and the internalization of environmental cost. The Constitution lays the foundation for sustainability and cost internalization in chapter two dealing with Fundamental Objectives and Directive Principles of State Policy but with bricks of impaired justiciability. While encouraging compliance with the Fundamental Objectives and Directive Principles of State Policy , the Constitution offers little space for questioning whether the activities of the three arms of government conforms with the objectives. Not only does this have implication for the overall health of environmental regulation, but it also ensures that the discretion of internalizing environmental cost remains with the state even as a notorious polluter. The decision of the draftsman to make chapter two of the Constitution non-justiciable may be justified on grounds of public policy, but it hangs the fate of environmental cost internalization on the balance. However, fundamental objectives can transit from being unenforceable to being enforceable where the National Assembly makes a law making an item in the chapter enforceable. Similarly, the power of the National Assembly under Section 4 (2) of the CFRN 1999 can also be utilized to enforce the provisions of the directive principles and make improvements to the standards of environmental cost internalization. But the fact that statutory provisions ranks lower in the hierarchy of the laws of Nigeria holds the prospects that adjustments in environmental obligations can be declared inconsistent with the provisions of the Constitution. This may defeat the aspiration of internalizing environmental cost by consolidating the defects in existing guarantees. Through these variables, the Constitution offers mixed possibilities the strength of which will be determined by how courts choose to interpret these provisions of the Constitution. Perhaps, a purposive interpretation of environmental provisions of the Constitution will best preserve the channels through which the Constitution can internalize environmental costs.

Aside the Constitution, other instruments support the application of the PPP under Nigerian law. Relevant in this category are Petroleum Act and its associated regulations. Through the power to grant licenses on terms provided under the Act, make regulations and supervise oil operations, the minister can ensure that only companies with enough resources and credentials to meet environmental obligations

are admitted into the Nigerian oil industry. Through the regulation making powers, maintenance and decommissioning obligations in relation to oil installations have been created. Some terms have also mandated that operators comply with international codes that represent best practice in relations to different aspects of hydrocarbon operations. While these legislations and regulations enjoy the advantage of helping the quest for cost internalization, they are either too prescriptive, lacking effectual fines, or lacking institutional arrangements to help regulatory agencies function as independent agencies. Other challenges associated with these instruments are the heavy reliance on financial sanctions, a poor balance between environmental safety concerns and commercial realities, regulatory capture and the poor regulatory oversight that comes with it. While these components are not completely devoid of merits, they are capable of curtailing the ability of law to arrest environmental externalities or internalize environment in the Nigerian hydrocarbon industry.

On a final note, this chapter also considered the manner in which the curative dimensions of the PPP under Nigerian law are sustained. In relation to this strand of the PPP, Nigerian law relies on common law remedies like the torts of negligence, nuisance and strict liability together with other constitutional and statutory guarantees to obtain worthy compensation. Remedies also exist under the Oil Pollution Act and the Petroleum Drilling and Production Regulation. A note however, is that the OPA through the principle of supersession have extinguished common law remedies giving the fact that it contains provisions with similar intendments as those remedies. Worthwhile is also the fact that the provisions of the OPA create an exception, which excludes sabotage from the category of compensable wrong. While this is a legislative response to a social problem, it is bound to leave an enormous category of environmental cost uninternalized giving the fact that victims of sabotage may not necessarily be perpetrators.

The conclusion to be drawn from the story of Nigeria's application of the PPP is that the manner in which regulation is structured determines the extent to which environmental cost will be internalized. Beyond punishing operators, the law ought to seek ways to encourage the improvement of environmental safety on the part of MNOCs. The law must accommodate provisions, which strengthen oversight, and makes the task of environmental protection a matter of mutual interest. While this is a

daunting challenge, it is clear beyond dispute that if these instruments are left in their current state, they are bound to have implications for environmental justice. The next chapter considers this strand of justice.

CHAPTER 4

ENVIRONMENTAL JUSTICE FRAMEWORK FOR THE APPLICATION OF THE POLLUTER PAYS PRINCIPLE UNDER NATIONAL LAW

4.1 INTRODUCTION

Environmental justice has become a subject of global concern and a rallying cry for communities imperiled and negatively impacted by environmental degradation. With the revelation that global environmental catastrophe lurks around as a result of environmental transgressions from industrial activities, the chorus of environmental justice from impacted communities are presently at its highest pitch.[1088] From Asia, Latin America and Africa, environmental justice movements are emerging and demanding a better deal for those impacted.[1089]

The idea of environmental justice presupposes the existence of an injustice related to authorized and unauthorized use of the environment. As one author notes, ‘the idea of environmental justice reflected the lived experience of the reality of injustice on the ground, in the air, in one’s food, at the workplace or school and on the playground.[1090] Environmental justice movements (EJM) are challenging the transboundary waste trade, ‘blood for oil deals’, environmental racism, unsustainable development, denial of human rights and economic opportunities to communities impacted by these

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[1088] See Will Steffen et al., ‘Planetary Boundaries: Guiding Human Development on the Changing Planet (2015) 347 SCI, available on <http://science.sciencemag.org/content/sci/347/6223/1259855.full.pdf> (the study concludes that local and regional environmental quality and stability are threatening to undermine the progress made through industrialization by damaging human health and degrading ecosystem since industrial societies use local water ways and air sheds as dumping grounds for their waste and effluents from industrial processes); See also Carmen G. Gonzalez, ‘Bridging the North South Divide: International Environmental Law in the Anthropogenic (2015) 32 Pace Envt. L Rev., 407.

[1089] See for example the Flint Water Crisis in North America where cost-cutting measures lead to tainted drinking water that contain lead and other toxins. For an explanation of this crisis, see CNN, ‘Flint Water Crisis: Fast Facts’ (6th December 2018), available on < https://edition.cnn.com/2016/03/04/us/flint-water-crisis-fast-facts/index.html> last accessed on the 22/02/ 2019; see also Friends of the Earth, ‘Access to Environmental Justice in Nigeria: The Case for Global Environmental Court of Justice (October 2016), available on < https://www.foei.org/wp-content/uploads/2016/10/Environmental-Justice-Nigeria-Shell-English.pdf> last accessed on the 23/02/219.

[1090] D. Schlosberg, *‘Theorizing Environmental Justice: The Expanding Sphere of the Discourse,* Journal of Environmental Politics (2013) 51

injustices.[1091] Other injustices associated with EJM take the form of land grabbing, renewable energy conflicts (methane emissions and cost overruns concealed in twisted sustainability discourse), sand mining, ocean and fish grabbing and the hazards of living in close proximity to nuclear plants.[1092] EJMs are also challenging inequities in disaster preparedness and emergency response and the development, management and use of natural resources in ways that cause poor and vulnerable people disadvantages.[1093] From movements to secure access to clean water and sanitation to popular mobilization against dams, mining, and petroleum extraction, grassroot EJMs are dedicated to specific issues including water justice, food justice, energy justice and climate justice.[1094] In the hydrocarbon industry, EJMs confront oil exploration impacts like oil spillage and gas flaring or poor health and safety guarantees for workers working in oil installations where the prospect of harm resulting in extensive social, economic and environmental costs is high.[1095] The principal focus of EJMs is the

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[1091] Robert Bullard, 'The Quest for Environmental justice: Human Rights and the Politics of Pollution (Sierra Book Club 2005) 1; Mary Menton, Carlos Larrea and Joan Martinez-Alier et al, 'Environmental Justice and the SDGs: From Synergies to Gaps and Contradictions' (2020) 15 Journal of sustainability Science, 1621-1636; Schlosberg D '*Theorising environmental justice: the expanding sphere of a discourse'* (2013) 22(1) Journal of Environ Politics 37–55; Schlosberg D and Caruthers D, *'Indigenous Struggles, Environmental Justice and Community Struggles'* (2010) 10 (4) Journal of Global Environmental Politics, 12-35 and Adrian Martins, M Teresa Armijos and B Coolsaet et al., *" Environmental Justice and Transformations to Sustainability"* (2020) Journal of Environmental Science for Sustainable Development, 19-30

[1092] Julie Snorek, 'The World's Top 10 Battles for Environmental Justice' (2018) Environmental Justice Atlas, available on https://cosmosmagazine.com/geoscience/the-world-s-top-10-battles-for-environmental-justice , last accessed on the 26th of February 2019.

[1093] C.G. Gonzalez, *An environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms* (2011) U. Pa. J. Int'l. L. 728; see also D. H. Geteches & D. N. Pellow, Beyond 'Traditional Environmental Justice, in Kathryn M. Mutz et. Al. (ed), *Justice and natural Resources: Concepts, Strategies and Applications* [3-5 2002] 34-40.

[1094] J. Martinez-Alier et al., 'Between Activism and Science: Grassroots Concepts for Sustainability Coined by Environmental Justice Organizations (2014) 21 Journal of Political Ecology, 19 at 27-42; In a recent book it was observed that although EJ initially focused on environmental hazards and pollution, the scope of EJ activism and research has now expanded to encompass almost everything that is unsustainable about the world, including rampant industrialization, resource depletion, energy use, consumption patterns , food systems, access to environmental amenities, and public policies that adversely affect minority, indigenous, and low in-come communities, other vulnerable groups such as disabled, immigrant and linguistically isolated populations as well as future generations. See Ryan Holified, J. Chakraborty and Gordon Walker, 'The Routledge Handbook of Environmental Justice' (Routledge Publishers 2018) 2.

[1095] See for example the Green Peace Movement that stopped the dumping of an oil installation at sea (Brent Spar) which weighed about 14, 500 in the North sea, See Greg Gordon, J. Paterson and E Usenmez, 'UK Oil and Gas Law: Current Practices and Emerging Trends, vol. 1 (3rd ed, Edinburgh University Press 2018) 401-407; In relation to gas flaring and its impacts on air quality, the Institute for Health Metrics and Evaluation (IHME) estimates that diseases related to airborne pollutants contributed to two-third of all life years lost to environmentally related deaths and disability; See IHME, 2018 Environmental Performance Index, available on < https://epi.envirocenter.yale.edu/downloads/epi2018policymakerssummaryv01.pdf> ; See also the

health and wellbeing of impacted communities as most of the struggles confront indifference to public health and welfare of distressed communities.[1096]

The dialogue of environmental justice unfolded in the United States in the 1980 in reaction to the disproportionate concentration of environmental hazards in low-income communities and communities of colour.[1097] From a poorly framed concept as "environmental racism''[1098] the concept of EJ has become a multi-dimensional principle with versatile importations. The dimensions of environmental justice extend to questions of sustainability,[1099] equal distribution of environmental harm, procedural issues and social conditions of minority populations.[1100] It also extends to substantive rights to be safeguarded from environmental destruction, 'ecocentric justice' (as opposed to anthropocentric justice) and questions of communal utility and common

United Nations Environmental Programme, *Environmental Justice, Comparative Experiences in Legal Empowerment* (2014) 19, available on < http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Environmental-Justice-Comparative-Experiences.pdf> 22/2/2019.

[1096] The World Health Organization defines health as 'a state of complete physical and social wellbeing not just the absence of disease or infirmity'. See Encyclopedia Britannica, 'World Health Organization, UN public Health Agency, available on < https://www.britannica.com/topic/World-Health-Organization> last accessed on 4/03/2019; see also R.R Kuehn, *'A Taxonomy of Environmental justice'* (2000) 30 Environmental Law Reporter 1068; Deborah McGregor, Mashisha Sritharan et al, *'Indigenous Environmental Justice and Sustainability'* (2020) 43 Journal of Environmental sustainability, 35-40; *Rights Based Law for systemic Change: Indigenous Environmental Network'* in S. Biggs, O.O Lake and T.B.K Goldtooth (Eds.) 'Women's Earth & Climate action Network, Indigenous Environmental Network (2017) 12-15; K. Whyte, *'Settler Colonialism, Ecology, and Environmental Injustice'* (2018) 9 (1) 125-144; James D. Ford, sherilee L. Harper et. al, *"The Resilience of Indigenous Peoples to Environmental Change'* (2020) 2 (6) Journal of Earth, 532-543 and K. Whyte *"Too Late for Indigenous Climate Justice: Ecological; Relational Tipping Points'* (2020) 11 (1) Willey Interdisciplinary Reviews on Climate Change, 603 and Saskia Vermeylen, *"Environmental Justice and Epistemic Violence"* (2019) 24 (2)International Journal of Justice and sustainability', 89-93

[1097] Early instances of environmental injustices in the United States include the siting in 1979 of a waste facility in a predominantly African-American neighbourhood in Northwood manor, Houston eight years after the same neighbourhood (when the area was predominantly white) had been rejected by local authorities; See R.D Bullard, 'Environmental Racism and Invincible Communities' (1994) 96 W. Va. L. Rev. 1037 at 1038; see also C. G Gonzalez, *Environmental Racism, American Exceptionalism, and Cold War Human Rights* (2017) 26 (2), Journal of Transnational Law and contemporary problems, 281-316

[1098] See R.R Kuehn, *'A Taxonomy of Environmental justice'* (note 1096) 10683

[1099] Ako R.T., *'Environmental Justice in Developing Countries: Perspectives in Developing Countries'* (Routledge Publishers 2016) 12 (it was argued here that environmental justice fit snuggly within the development paradigm and that sustainable development may be described as economic development that take cognizance of and strive to achieve environmental justice in the process); See also Klaus Bosselmann, *'The Principle of Sustainability: Transforming Law and Governance'* (Ashgate Publishing Limited 2008) 9 (Klaus noted that the term sustainability triggers a similar response as the term of justice).

[1100] Ole. W Pedersen, *Environmental Principles and Environmental Justice* (2010) 26 EnV. L.Rev, 1

good.[1101] Sometimes definitions of EJ are reflective of the factors that shape its emergence in different jurisdictions especially in developing countries.[1102]

In relation to Nigeria, EJ is couched more in the language of recognition and social justice predicated on adverse distributional burden. The demands of EJ activists had led to the enactment of the NDDC Act and the creation of the ministry of the Niger Delta to help give institutional impetus to the environmental challenges of the people of the Niger Delta and enforce changes in the economic fortunes of the people. More recently, there have been attempts to promulgate the Petroleum Industry Governance and Institutional Framework Bill 2016 with a statutory promise of a new fund for host communities.[1103] While the creation of these institutions and fund attunes more with the idea of distributive justice of environmental resources, the extent to which these institutions are addressing environmental impacts of oil exploration is still open to debate. Concerns over Nigeria's economic system, inadequacy of existing legal infrastructures, poor environmental governance systems, and corruption with attendant poor-project quality amongst others are factors which limit the actualization of EJ obligations in Nigeria.

This chapter develops an environmental justice framework for the application of the PPP under national law and captures the evolution of EJ from its early existence as a principle of environmental racism to its development as a principle with a plurality of meanings grounded on sustainability. It asserts that although EJ is a stand-alone principle, its links to equitable distribution of harm, sustainability, corrective justice and substantive rights to a healthy environment make the principle relevant to the application of the PPP. Not only does the PPP share similar aspirations with EJ, but it is also an ideological pathway for realizing EJ. The chapter notes that while EJ has become a concept of wide ideological pluralism, the only aspects of EJ relevant to the application of the PPP are distributive, social, procedural, corrective justice and substantive rights to a healthy environment . This chapter argues that for the application of the PPP to stand any chance of being effective under national law it

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[1101] ibid.

[1102] Ako R.T., Environmental Justice in Developing Countries (note 1099) 1.

[1103] sections 234-257 of the Petroleum Industry Act 2020, available on <, http://www.petroleumindustrybill.com/wp-content/uploads/2020/09/Petroleum-Industry-Bill-2020.pdf> last accessed on the 24/05/2021.

should be modeled after the image of these strands of justice and possess qualities, which reflect these images. EJ and the principles underlying it should provide guidance on how laws and regulations applying the PPP should be designed. This chapter argues that to reflect these qualities, a national framework for the application of the PPP must possess pollution prevention capacity, an effective rights component and impose and redistribute environmental taxes proportionately. It must also possess a potential for the reparation of harm and a statutory pathway to make the state compliant of its international and local obligations in an environmental law context.

This chapter is divided into four parts. The first part explores the history of EJ from its beginning as a response to 'environmental racism' to the plural concept it has become. The second part considers the expanding scope of environmental justice and how scholars in practice have deployed it as a tool to analyse issues relating to sustainability. The third examines EJ in Nigeria and the legal frameworks through which EJ issues are addressed in Nigeria. The fourth part attempts to create an environmental justice framework for the polluter pays principle under national law. This chapter notes that the concept of distributive justice, social justice, procedural justice, substantive right to healthy environment and corrective justice bear firm relevance with the PPP. The chapter concludes that while a plural approach to EJ which appeals to a multiplicity of stakeholders is within the reach of law, political and cultural exigencies will have to play second fiddle in order to consolidate this plurality in a legal system.

4.2 THE HISTORY AND DEVELOPMENT OF THE ENVIRONMENTAL JUSTICE MOVEMENT

A worthy exploration of the subject of EJ would demand more than the convenience of explaining its various meanings. That task would also demand the painstaking journey into history to unwrap the developments that gave rise the EJM. The idea of EJ started as an American concept to drive resistance against government policies which are environmentally unfriendly. EJM in the US emerged partly out of what have been characterized as 'preservationists and conservationist battles of the late 19th century.[1104] The aim of these conservationists was initially to prevent environmental

[1104] Daniel Faber, 'Capitalizing on Environmental Injustice: The Polluter-Industrial Complex in the Age of Globalization (Rowman & Littlefield Publishers 2008) 1

abuses stemming from irrational over-exploitation of natural resources (NR) and to obviate the commodification of wilderness by rapacious corporations.[1105] Nineteenth and twentieth century preservationists fought to prevent mountains, marshes and wetlands, valleys, and other valued landscapes from becoming capitalist property.[1106]

Modern EJM emerged in the United States in the 1980s with a focus different from that of the nineteenth and early twentieth century organizations. The focus of these movements was mainly on environmental health in response to the growth in the use of chemicals by American businesses.[1107] It was during this period that EJMs began to organize around issues like industrial pollution, dangerous chemicals and later to toxic waste dumping in low-income neighborhoods and communities of colour.[1108] More specifically, the question of EJM was brought to national attention by the 1982 opposition of an African-American community in North Carolina to have a hazardous landfill.[1109] In response to these distributional concerns, a growing number of groups made up of people of colour organized themselves into potent networks and coalition to confront large corporations and government responsible escalating environmental externalities and the poor regulation of the environment. EJM during this period represented a convergence of seven formerly independent social movements.[1110] The solidarity of purpose between these groups gave rise to the First People of Colour

[1105] Jim O' Brien, 'Environmentalism as a Mass Movement: Historical notes' (1983) 17 (2), Radical America, 77
[1106] Daniel Faber (note 1104) 2
[1107] Ibid.
[1108] L. Cole and S. Foster, 'From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement (New York University press, 2001) pp 19-33; See also Carmen G. Gonzalez, 'Food Justice: Environmental Justice Critique of the Global Food System' in Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, and Jona Razzaque (eds) 'International Environmental Law and the Global South (Cambridge University Press, 2015)
[1109] David E. Newton, 'Environmental Justice: A Reference Handbook (1996)1-3; Collins Crawford, 'Strategies for Environmental Justice: Rethinking CERCLA Medical Monitoring Lawsuits (1994) 74 B.U.L Rev. 267
[1110] They include (1) *the Civil rights movement* focused on issues of environmental racism and the disproportionate impacts of pollution in communities of colour, the racial biases in government regulatory practices and the absence of affirmative action and sensitivity to racial issues in established environmental advocacy movements; (2) *the Occupational Health and Safety Movement* which was more concerned about labour rights of non-union immigrants and undocumented workers; (3) *the indigenous lands movement* which emerged out of the struggles of Native Americans and other indigenous groups to retain traditional lands; (4) *the Environmental Health Movement* which emerged out of the anti-toxic movement; (5) *Community-based movement for social and economic justice* concerned more about abandoned waste dump, the lack of parks and green spaces, poor air quality and other issues of justice; (6) *The Human Rights Peace and Solidarity Movements,* with campaigns focused on apartheid in South Africa and the US intervention in Nicaragua and Central America: and (7) *The Immigrants' Rights Movement* which enlarged the basic rights of citizenship, including the right to clean air and water.

Environmental Leadership summit held on the 24th of October 1991 in Washington, where their concerns were articulated in a formal document.[1111] The preamble to the document gave away the purpose of the leadership summit, which was to trigger coalition building amongst people of colour 'to fight the destruction and taking of … lands and communities' and amongst other objectives, 'insure environmental justice'.[1112]

Acknowledging that the environmental protection apparatus was broken in many communities in which people of colour and low-income groups live, and after enormous pressure from EJMs, the US Environmental Protection Agency (EPA) acknowledged its mandate to protect all Americans.[1113] In 1992 the EPA established the Office of Environmental Equity (rechristened under the Clinton administration as the office of Environmental Justice) and produced a document that it styled *'Environmental Equity: Reducing Risk for all Communities'*.[1114] The document while acknowledging the environmental benefits which the growth in EJM has brought to most communities noted that more still needs to be done. According to the document, "in many locations the air remains too polluted, the water is still too dirty and the land still bears too much uncontrolled waste…all communities have direct interest in identifying, prioritizing and addressing environmental problems".[1115]

On February 11, 1994, President Clinton signed Executive Order (EO) 12898, *Federal Actions to Address Environmental Justice in Minority Populations and low-income Populations.*[1116] The purpose of the EO was to focus federal attention on the environmental and human health effects of federal actions on minority and low-income populations with the goal of achieving environmental protection for all

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[1111] Principles of Environmental Justice (EJ) (October 24th 1991) available on https://www.nrdc.org/sites/default/files/ej-principles.pdf last accessed on the 4/3/2019 (the document contains itemized 17 principles of EJ), the document is annexed in Appendix 1 for ease of reference.
[1112] Ibid.
[1113] Robert Bullard, 'The Quest for Environmental justice (note 1091) 3.
[1114] EPA, 'Environmental Equity: Reducing Risk for all Communities' (1992) vol. Supporting Document available on https://www.epa.gov/sites/production/files/2015-02/documents/reducing_risk_com_vol2.pdf
[1115] Ibid.
[1116] EPA, Executive Order 12898-FederalActions to Address Environmental Justice in Minority Populations and low-income Populations, 59 FR 7629; Feb. 16, 1994, available on < https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf> last accessed on the 15th of March 2019.

communities.[1117] The EO instructs Federal Agencies to identify and address the disproportionately elevated and adverse human health or environmental effects of their actions on minority and low-income populations to the greatest extent practicable within the confines of existing laws.[1118] It also mandates agencies to develop strategies for implementing EJ.[1119] More particularly, the presidential Memorandum accompanying the EO offers a lucid insight for deploying existing laws to address EJ objectives. It provides as follows:

> *Environmental and civil rights statutes provide many opportunities to address environmental hazards in minority and low-income communities. Application of these existing provisions is an important part of the Administration's effort to prevent those minority communities and low-income communities from being subject to disproportionately high and adverse environmental effects*.[1120]

The EO's deployment of the term 'environmental justice' is remarkable in many respects. First, it focuses not only on the disproportionate burden addressed by the term environmental equity, but also the issue of enforcement of environmental laws and a window for public participation.[1121] Second, the EO identifies not just minorities but also low-income populations as the group which is most amenable to unfair and equal treatment and is subject to relief from these ills. Finally, the memorandum accompanying the EO qualifies EJ as an aspiration to be achieved rather than as a problem to be solved. Although the EO reinforced civil rights as a tool for fighting for environmental justice, most of the rights that existed at that time were not couched in a manner sensitive to ecological issues and are well below the mark of driving an administrative renaissance directed at promoting EJ. What is not lost in consideration is that the EO captured with sufficient clarity the link between EJ, race and personal status.

In 1998, the EPA offered a definition of EJ that encompasses a wide constituency of concerns with mixed implications. It defines EJ as:

[1117] Ibid.
[1118] Ibid.
[1119] Ibid.
[1120] Ibid; See also Robert Bullard (note 1091) 3.
[1121] R.R Kuehn, *'A Taxonomy of Environmental justice'* (note 1096) 10682.

Fair treatment and meaningful involvement of all people regardless of race, colour, national origin, or income with respect to the development, implementation, and enforcement of environmental law, regulations and policies. Fair treatment means that no group of people, including racial, ethnic, or socio-economic groups, should bear a disproportionate share of the negative consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local and tribal programs and policies.[1122]

While the reference to 'fair treatment' in the above definition suggests that the definition goes beyond the realms of disproportionate burden and public participation, the definition offered for the phrase 'fair treatment' limits any interpretation suggesting otherwise. However, transcending the notions of disproportionate exposure in the development of environmental law and policy the EPA supplied an extended elaboration of the term EJ in a subsequent document.[1123] The document suggests that EJ may be more of a distributional and public health issue as much as it may be a goal-oriented, fundamental fairness and an issue of economic and racial prejudice.[1124] It is clear that the cradle of EJ scholarship started with activities from the first People of Colour Environmental Leadership Submit, extended to administrative directions calling for the integration of EJ in the activities of agencies in the US before the subject gained visibility in other jurisdictions including developing countries.

In the United Kingdom, EJ is defined on the basis of income disparities that create and/or exacerbate' environmental inequities'.[1125] The UK's approach to EJ, like that of the US, focuses on distributional issues that sustain the experience of poor environmental quality. A report of the Department of Environment, Food and Rural Affairs concludes that:

- Environmental injustice is a real and substantive problem within the UK

[1122] EPA, 'Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis, April, 1998, available on <https://www.epa.gov/sites/production/files/2014-08/documents/ej_guidance_nepa_epa0498.pdf> last accessed on the 15th of March 2019.

[1123] Memorandum from Barry E. Hill, Director, Office of Environmental Justice, EPA to Deputy Director Regional Administrators, EPA et al. (Dec. 16, 1998) (On File with the Author) (Quoting Office of Solid Waste and Emergency Response, US. EPA, Guide to Environmental Issues, earth day 25 Edition (EPA/OSWER Directive No. 520/B-94-001 (April 1995)

[1124] Ibid.

[1125] 'Air Quality and Social Deprivation in the UK: An Environmental Inequities Analysis, Final Report of the Department of Environment, Food and Rural affairs AEAT/ENV/R/20170, June 2006, iv.

- Problems of environmental injustice afflict many of our most deprived communities and socially excluded groups
- Both poor local environmental quality and differential access to environmental goods and services have detrimental effect on the quality of life experienced by members of those communities and groups
- In some cases, not only are deprived and excluded communities disproportionately exposed to an environmental risk they are also disproportionately vulnerable to its effects.[1126]

It has been observed that procedural issues re-emphasize the overreaching attention to income disparity in the UK and are considered part of the core problem to solve the problem of socio-economic inequities.[1127] More specifically, the Scottish Government adopts a definition of EJ that emphasizes both socio-economic disparity as well as procedural issues.[1128]

In developing countries, EJ is defined rather differently particularly for countries rich in resources.[1129] The idea of EJ includes the ownership by indigenous people of a composite and identifiable equity in natural resources protected by law. In such resource-affluent countries, oil or biodiversity with benefits arising therefrom are considered central aspects of EJ.[1130] Exploring the differences in the conception of EJ between developed and developing countries, Beinart and McGregor observed that while some environmentalists use EJ platform to emphasize the responsibility for future generations for the well-being of the planet, 'Africanists' consider issues such

[1126] Ibid (i) and (ii).
[1127] Ako R.T., Environmental Justice in Developing Countries: Perspectives in Developing Countries' (note 12) 3; Environmental Agency Position statement, cited in R. Ako, 'Resource Exploitation and Environmental Justice
[1128] Scottish Executive online, cited in R. Ako 'Resolving the Conflicts in the Nigerian Oil Industry: The Critical Role of Public Participation', a PhD thesis submitted to the University of Kent at Canterbury, 2009; see also Scottish Government, 'Developments in Environmental Justice in Scotland: A Consultation' (March, 2016) available on <https://consult.gov.scot/courts-judicial-appointments-policy-unit/environmental-justice/user_uploads/00497279.pdf> last accessed on the 19th of March 2019.
[1129] Ako (note 1099) 3.
[1130] R.T. Ako, 'Resource Exploitation and environmental Justice in Developing Countries: the Nigerian Experience' in F. Botchway (ed), Natural Resource Investment and Africa's Development (Cheltenham: Edward Elgar, 2011) 72-104

as access to resources as critical issues for communities.[1131] The challenges for EJ in this African context, include the equitable distribution of environmental amenities, the rectification and retribution of environmental abuses, the restoration of nature and the fair exchange of nature.[1132] According to Obiora, EJ is not simply an attack against environmental discrimination, but a movement to reign in and subject corporate and bureaucratic decision-making, as well as relevant market processes, to democratic scrutiny and accountability.[1133] EJ is also being theorized in a similar fashion in South Africa and most Asian countries.[1134]

Aside the early attempts by authorities in the US, UK and developing countries, other authors have offered definitions of EJ that contribute to the mapping of the subject. For Brant, EJ refers 'to those cultural norms and values, rules, regulations, behaviour, policies and decisions to support sustainable communities, where people can interact with confidence that their environment is safe, nurturing and protective'.[1135] Most critics of EJ criticize the definitions offered in government instruments and by some scholars as too wide and aspirational to make any meaningful impact for reason of the vagueness associated with the breath of these definitions.[1136]

The conclusion to be drawn from the history and development of environmental justice is that the concept does not have a universal posture that applies uniformly to set environmental situations or concerns. Although similarities exist on how nations have theorized EJ, the concept is complex and exists in a diversity of forms determined by national responses to environmental challenges especially the ones that imperil poor and vulnerable people, causing them physical and economic harm of epic proportions. The theories of EJ and its ever-stretching suite of meanings sit at the centre of concerns which international environmental law seeks to solve and keep changing in response to emerging threats with links to industrial irresponsibility enabled by poor regulation of environmental challenges. The next part shall consider the many postures of EJ

[1131] L. Obiora, 'Symbolic Episodes in the Quest for environmental justice' (1991) 21 Human Rights Quarterly, 2, 477

[1132] Ibid.

[1133] Ibid.

[1134] Environmental Justice Network forum (EJNF) 'Environmental Justice Networker', Autumn 1997; see also Asian Pacific Environmental Justice Network

[1135] Bunyan Bryant, Introduction in Environmental justice: Issues, Policies and Solutions, (Bunyan Bryant ed 1995) 16

[1136] See Christopher H. Foreman, The Promise and Peril of environmental Justice (1998) 11-13

(especially those relevant to the application of the PPP), theoretical underpinnings and emerging trends.

4.3 THE THEORETICAL UNDERPININGS OF ENVIRONMENTAL JUSTICE AND EMERGING TRENDS OF ANALYSIS

Although there are many theories of EJ, the principal forms of EJ are distributive and procedural justice. While the former is used in reference to the equal distribution of environmental burdens and benefits, the latter is used in reference to people's involvement in the process leading to the enactment and formulation of environmental legislations and policies. Other paradigms of EJ include social justice, which combines a policy of 'people recognition' together with distributive and procedural approaches and substantive justice dealing with the rights of all individuals to be protected from environmental harm.[1137] Another form of EJ questions the prior reasons and decisions controlling the production of environmental burdens by calling for a more ecological focus in the management of environmental risk.[1138] This type of EJ is called productive justice.[1139] More recently, EJ have been analyzed from the perspectives of rational choice,[1140] political economy,[1141] food security[1142] and science and technology.[1143] However for the purpose of this thesis, only the distributive, social, procedural, substantive rights and corrective justice paradigms of EJ shall be examined given the fact that they bear the most proximity to the PPP. Similarly, attempts shall be made to examine emerging trends of EJ predicated on public choice theory, political economy and food justice being that they are relevant in the search for the proximity between EJ and PPP. These emerging trends of EJ analysis are useful in explaining and determining whether current attempts by states at meeting environmental justice goals

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[1137] Ole. W Pedersen (note 1100) 2.
[1138] ibid.
[1139] See D. Schlosberg, 'Environmental Justice and the New Pluralism: The Change of Diversity for Environmentalism (Oxford University Press 1999); D. Schlosberg, 'Defining Environmental Justice: Theories, Movements and Nature (Oxford University Press 2007).
[1140] Williams M. Bowen, 'Environmental Justice and Rational Choice Theory, in Ryan Holified, J. Chakraborty and Gordon Walker (eds) 'The Routledge Handbook of Environmental Justice' (Routledge Publishers 2018)
[1141] Daniel Faber, 'The Political Economy of Environmental Justice' in Ryan Holified, J. Chakraborty and Gordon Walker (eds) 'The Routledge Handbook of Environmental Justice' (Routledge Publishers 2018)
[1142] Carmen G. Gonzalez, 'Food Justice: Environmental Justice Critique of the Global Food System (note 1108).
[1143] Gwen Ottinger, 'Opening the Black Boxes: environmental Injustice through the lens of Science and Technology Studies in Ryan Holified, J. Chakraborty and Gordon Walker (eds) 'The Routledge Handbook of Environmental Justice' (Routledge Publishers 2018).

have been effectual and up to date. The emerging paradigms will also help states appreciate the urgency of addressing environmental justice concerns.

4.3.1 Distributive Justice as Environmental Justice

The idea behind distributive justice (DJ) is the equitable allocation of benefits and burdens. The concept of DJ has been defined as "the right to equal treatment, that is, to the same distribution of goods and opportunities as anyone else has or is given."[1144] The foundational idea behind DJ is credited to Aristotle who explained the concept as "the distribution of honour, wealth, and the other divisible assets of the community, which may be allotted amongst its members".[1145] Relying on the definition offered by Aristotle, Ernest J., Weinrib argues that 'a political authority must define and particularize the scope or criterion of any scheme of distribution'.[1146] The problem of DJ lies in the performance of this duty. Although the definition offered by Aristotle appears broad and has a positive reference to honour and wealth, the reference to 'divisible assets' is not particularly welcoming to DJ as used in an environmental context. This is because environmental burdens and impacts cannot possibly be classified as assets. The focus of DJ is on equitably distributed outcomes rather than on the process or politics of arriving at such outcomes.[1147]

In the context of environmental law, distributive justice demands the fair allocation of the burdens resulting from environmental harm or of the environmental gains of government and private-sector programmes.[1148] In an EJ perspective, DJ involves providing solutions to the disproportionate public health and environmental risks borne by vulnerable people or people of low income.[1149] This brand of EJ has been the subject of several scholarly labels. Bullard refers to this type of EJ as 'geographical equity" referring to the positioning and geometrical configuration of communities and

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[1144] Ronald Dworkin, 'Taking Rights Seriously' in Jacob Levy, 'The Oxford Handbook of Classics in Contemporary Political Theory' (Oxford University Press 2017) 273
[1145] Aristotle, 'The Nichomachean Ethics, Book V 267 (H. Rackham trans., Cambridge University Press 1982); see also Aristotle 'The Politics', a Translation by T.A Sinclair, revised and re-presented by Trevor J. Saunders (Penguin Publishing 1962) (writing on equality and justice Aristotle remarked "in the state, the good aimed at is justice; and that means what is for the benefit of the whole community").
[1146] Ernest J. Weinrib, 'Legal Formalism: On the Imminent Rationality of Law' (1988) 97 Yale L.J 949-989
[1147] R.R Kuehn, *'A Taxonomy of Environmental justice'* (note 1096) 10684.
[1148] ibid.
[1149] ibid.

their nearness to unwanted land uses.[1150] Claims regarding questions of DJ involve the proximity of populations to threatening land uses and non-geographic allegations that certain ethnic, income or racial groups are disproportionately exposed to environmental hazards.[1151] These claims focus on whether communities bear more than their fair share of environmental burden.[1152] According to Hart, claims for justice are predicated on fairness and where the issue is the distribution of burdens and benefits to classes of individuals, "what is typically fair or unfair is a share".[1153] What this means in essence is that the idea of DJ is not prima facie against the allocation of environmental burdens and benefits against a class of people. What DJ is against is the excessive allocation of the burdens and benefits especially where it holds the promises of environmental hazards that threaten the quality of life of those affected.

DJ is concerned with outcomes as opposed to the causes of those outcomes.[1154] Accordingly, a claim for distributive injustice can arise if the distribution of waste disposal facilities is highly skewed regardless of whether the disproportionality was caused by intentional discrimination or by objective citing criteria unconnected with the community's demographics. However, it has been argued that in the context of EJ, DJ does not mean the distribution of pollution or risk but equal protection for all and the elimination of environmental hazards.[1155] An integral part of DJ is that it also involves the distribution of environmental programs and policies, such as parks and beaches, safe drinking water, sewage, drainage and public transportation.[1156] Although this latter aspect of DJ is often overlooked.

4.3.1.1 Conceptions of Distributive Justice

There are different conceptions of DJ. These theories range from liberalism, utilitarianism, 'just dessert', theories predicated on the common good,

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[1150] Robert Bullard, 'Overcoming Racism in Environmental Decision-making' (1994) 36 ENT'T 11, 12-15

[1151] ibid; See also Alice Kaswan, 'Distributive Justice and the Environment' (2003) 81 N.C.L. Rev. 1031, at 1043

[1152] H.L.A Hart, 'The Concept of Law' (Oxford university Press 1961) 154

[1153] Ibid.

[1154] Alice (note 1151).

[1155] Robert Bullard, 'Overcoming Racism in Environmental Decision-making' (note 1150) 43.

[1156] Michael Gelobter, 'The Meaning of urban Environmental Justice, (1994) 21 FORDHAM Urb L.J, 841

cosmopolitanism, nationalism and realism.[1157] While these theories are not mutually exclusive, they help us understand the aspirations and gaps of DJ. These theories also point to the fact that the subject of DJ is not one for which scholars agree. However, in identifying the different theories scholars adopt of what characterizes DJ, it is useful to note that there are four main and interrelated dimensions along which they disagree. These dimensions concern respectively, (i) the preconditions; (ii) the subject; (iii) the object; and (iv) the normative significance of distributive justice.[1158]

In relation to the preconditions of DJ, many scholars are in agreement that the issues of DJ arise only when there is material scarcity.[1159] According to Hume, the existence of scarcity creates both an identity and conflict of interest that makes the quest for principles needed to resolve conflict claims both necessary and possible.[1160] Despite the wide reception of Hume's notions, some scholars argue that the existence of social cooperation is necessary for the demands of justice to emerge since it was only in the context of relations of reciprocity that individuals can assert claims to sharing the goods that social cooperation makes available.[1161] Others assert that DJ issues only arise where there are shared institutions through which we exercise caution over each other.[1162]

4.3.1.1.1 Liberalism

Rawls represents the focal point of liberal DJ theory. He argues that everyone has the same political rights as everyone else and that the distribution of economic and social

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[1157] Hilde Bojer, *'Distributive Justice: Theories and Measurements'* (Routledge Publishers 2003) Samuel Fleischacker, *"A short History of Distributive Justice'* (Havard University Press 2004) 109-125; Izhak Englard, *"Corrective Justice to Distributive Justice'* (Oxford University Press 2009) 123-177; Fred Eldman *'Distributive Justice: Getting What we Deserve from our Country"* (Oxford university press 2016) 1-212; Oisin suttle, *'Distributive Justice and World trade Law': A Poliical theory of International Trade Regulation'* (Cambridge University Press 2018) 1-63 and Lynelle Watts and David Hodgson, *"Social Justice Theory and Practice for Social Work: Critical and Philosophical Perspectives'* (Springer Publishers 2019) 117-132;

[1158] Serena Olsaretti, *"The Oxford Handbook of Distributive Justice"* (Oxford University Press 2018) 3

[1159] Ibid; see also T.H Green and T. H Grose, 'The philosophical Works of David Hume (London, Longmans, Green and Co. 1875) 3-122

[1160] Ibid. (Hume argues "understanding distributive justice as involving a balancing of competing claims over what is distributable reflects acceptance of the view that claims of DJ only arise if the circumstance of justice obtain").

[1161] John Rawls, 'A Theory of Justice' (Oxford University Press 1972) 15

[1162] Thomas Nagel, 'The Problem of Justice' (2005) 33 (2) Journal of Philosophy & Public Affairs, 113-147 (Nagel asserts that in the context of shared institutions only disadvantages that are intentionally caused by those institutions, rather than the result of natural causes is unjust).

inequality in a society should benefit all including the least well off.[1163] Rawls also argued that justice is institutionalists and regulates primarily the basic structure of society.[1164]According to Rawls, "justice provides a way of assigning rights and duties in the basic institutions of society and define the appropriate distribution of benefits and burdens of social cooperation".[1165] The reference to institutions in Rawls conception of justice has led to arguments by scholars that 'what characterizes the demands of DJ is specifically the facts that they are demands which social institutions must satisfy.[1166] While Rawlsian theory of DJ is attractive for its universality, especially its tendency to ensure that the least well off are treated right and are not drowned in the misery associated with environmental impacts, it is difficult to envision how the division of economic and social inequality in practice can benefit everyone. This difficulty arises from the fact that there is no universal measure of what is beneficial for all. The plurality of individual and national expectations makes it challenging to allocate economic and social inequality in a manner that favours everyone. It has been observed that Rawls' idea of justice reflects a specific socialization- one dominant in western democracies and is useful to the extent that it systematizes a particular sense of justice.[1167] Rawls' theory may thus, be difficult to apply in practice.

4.3.1.1.2 Utilitarianism

Another theory of DJ is utilitarianism, which has been referred to as a 'quintessential consequentialist theory' given its focus on outcomes like many paradigms of DJ.[1168] According to this conception, 'the best distribution is that which will lead to "the

[1163] Ibid; (According to Rawls "Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if untrue; likewise, laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability found of justice that even the welfare of society, as a whole cannot override. For this reason, justice denies that loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sun in advantages enjoyed by many. Therefore, in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to bargaining or the calculus of social interest) ; See also David Schlosberg, 'Reconceiving Environmental Justice: Global Movements And Political Theories' (2004) 13 (3) Journal of Environmental Politics,
[1164] John Rawls 'A Theory of Justice (note 1161).
[1165] Chandran Kukathas and Philip Petite, 'Rawls: A Theory of Justice' (1990) 86 (1) American Political Science Review, 311
[1166] Scanlon, T., 'What we owe Each Other' (Cambridge MA: Harvard university Press 1998).
[1167] Chandran Kukathas and Philip Petite (note 1165) 311.
[1168] Alice Kaswan (note 1151) 1061.

greatest good for the greatest number".[1169] While this conception appears fanciful, it has been criticized for not providing a gratifying answer for how goods are distributed among people especially since 'greatest good' is not a complete insulation against poverty and impacts.[1170] Given the potential for serious inequality, the potential for a section of the population to suffer for the greatest good, Rawls argues that "the principle of utility is inconsistent with the idea of reciprocity implicit in a well-ordered society".[1171] On the basis that equality needs no justification, it is therefore doubtful whether the utilitarian conception of distribution can be interpreted as fair or be associated with justice.[1172] Not only does the principle's reference to 'greatest good for the greatest number' harbours the potentials for discrimination, it also holds the implications that the wellbeing of a classified number of citizens can be justifiably put in harm's way. This in essence means that where pollution can sustain activities which promote positive externalities for a greater number of the population, harm which polluting activities cause can be tolerated and dealt with through compensating benefits. It is based on these criticisms that utilitarianism is considered a theory demonstrative of injustice as applied in an environmental context.

4.3.1.1.3 'Just Dessert'

Another conception of DJ is the principle of "just dessert". The theory was conceived in response to the question of what difference could be tolerated in the DJ paradigm since equality demands that we treat different people alike. This theory of DJ provides that distribution should be done on the basis of what people really deserve.[1173] The theory provides that factors like innate ability; actual achievement attained, the level of efforts expended, and moral excellence should form the basis for distribution. While this theory offers a pathway for citizens within a political system to develop competencies essential for building a great nation, the factors upon which this brand of distribution is based stands against reason when considered in an environmental law context.[1174] It is grossly inconceivable that a community, states or political zone

[1169] Nicholas Rescher, Distributive Justice: A Constructive Critique of the Utilitarian Theory of Distribution (Macmillan Publishing 1966)
[1170] John Arthur and Williams Shaw, ''Justice and Economic Distribution' (1978) 2
[1171] John Rawls, 'A Theory of Justice (Harvard University Press 1971) 14.
[1172] Aristotle, The Varieties of Justice, in James P. Straba, Justice: Alternative Political Perspectives (1980) 18 (excerpt from a translation of Aristotle's NICHOMACHEAN ETHICS stating that "what is unjust is unequal, what is just is equal").
[1173] Arthur Shaw (note 1170) 133-138
[1174] Alice Kwasan, (note 1151) 1063.

can on the basis of an administrative judgment based on such factors decide that the zone in question should bear an environmental burden with damaging impacts. For example, it has been argued that no community deserves a distribution of environmental burden based on some defect in ability, effort, achievement, or moral excellence.[1175] Doing so will have an implication not only for communal cohesion but also for life expectancy, productive capacity and national development generally.

4.3.1.1.4 'Common Good Theory'

Another theory of distribution is that which provides that distribution should serve the common good.[1176] This theory has been described as a version of utilitarianism, which defines the common good as the 'greatest good for the greatest number'.[1177] The "difference principle" of John Rawls fits partly into the common good formulation. According to him, inequalities can be legitimized under limited circumstances if 'they will result "in compensating benefits for everyone, and in particular for the least advantaged members of the society".[1178] Rawls' 'difference principle' differs from traditional utilitarianism because he does not justify inequality on the basis of general welfare. He differs from traditional utilitarian theorists because he does not accept a brand of distribution that permits some to endure a greater disadvantage for the benefits of others.[1179] To rely on the difference principle, regulatory authorities must be able to show not only that there is a general benefit to society from siting facilities in a particular location but also that no one is made worse off in the process, particularly, poor and vulnerable people.[1180] The 'difference principle' enjoys the posture of fairness through the window which it leaves open for compensation of the 'least disadvantage' where the siting of a waste facility makes them worse off. The principle strikes a balance between a State's interest in having a facility located at a particular point and the need to equalize the social marginal cost arising from such a decision. However, it has been argued that Rawls' difference principle does not justify deviations from equality as a distributional goal.[1181]

[1175] Alice Kwasan (note 1151) 1063.
[1176] N. Rescher (note 1169) 80.
[1177] Alice Kwasan (note 1151) 1064.
[1178] J. Rawls (note 1161).
[1179] Ibid.
[1180] Ibid.
[1181] Alice Kwasan (note 1151) 1065.

Another concern for the difference principle is that it does not stipulate the manner in which compensation is to be determined given the fact that it is most likely from an efficiency perspective, that people living in a neighborhood zoned for waste facilities would be affected by such a decision. It is however, suggested that to make the most of the difference principle, there is a need for compensation allocated to those affected or the least advantage to index the cost of the externalities generated from siting the facility in their neighborhood. The possibility of cost indexing externalities would however, depend on how the principles of DJ are expressed in a legal system.

4.3.1.1.5 Cosmopolitanism

Cosmopolitanism is another theory of distribution that is gaining traction amongst scholars. Brian Barry, Charles Beitz and Thomas Pogge, popularized this theory.[1182] These theorists argue that the principle of DJ should be applied to the world as a whole. They maintain that duties of distribution apply to all human beings regardless of nationality and called for the abolition of fragmentary applications moderated by states on their own terms.[1183] According to Beitz, 'state boundaries can have derivative but they cannot have fundamental moral importance'.[1184] Like liberalists and utilitarians, cosmopolitan theorists suggest that practical measures should be taken to maximize the condition of the least well off.[1185] Cosmopolitanism has both institutional and interactive dimensions. Institutional cosmopolitanism, concerns the distribution of resources within institutions and its main concern is on the fairness of institutions.[1186] Interactive cosmopolitanism on the other hand, maintains that the principles of justice concern the obligations of individuals and one has obligations to other human beings independently of whether they are members of an institution.[1187] In defence of the institutional approach, Pogge argues that given the degree of international economic interdependence, there is a global basic structure and a global principle of DJ.[1188] In

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[1182] Simon Caney, 'international Distributive justice' (2001) 49 Journal of Political studies, 974-997

[1183] Barry B. 'Humanity and Justice in a Global Perspective', in Liberty and Justice, Essays in Political Theories' (Vol. 2 Oxford Clarendon Press 1991)182-210; See also T. Pogge, 'A Global Resource Dividend', in Crocker and T. Liden (eds), Ethics of Consumption of the Good Life, Justice and the Global Stewardship (Lanham MD Rowman and Littlefield 1998) 501-536

[1184] Beitz C., 'International Liberalism and state systems: a Survey of Recent Thoughts (1999) 51 (2) Journal of World politics, 269-296, 182.

[1185] Beitz C., '*Political Theory in International Relations with a new afterword by the author'* (Princeton University Press 1999) 150-153.

[1186] Simon Caney (note 1182) 975-976.

[1187] Simon Caney, (note 1182) 975-976.

[1188] Pogge T., 'Cosmopolitanism and sovereignty' in C. Brown (ed), *Political Restructuring in Europe: Ethical Perspectives* (London Routledge 1994) 89-122, 91-97

relation to whom is entitled to receive resources, the cosmopolitan brand of DJ argues that the duties are owed to individuals and not States.[1189] There is also contraction, right-based and goal-based versions of cosmopolitanism.[1190]

The global brand of cosmopolitanism is in concert with the reality of the environment as a shared concern. Globalizing distribution can have an effect in developing concerted remedies to environmental issues relating to the allocation of burden and rather than subjecting them to national interest. With an institutional structure favoured to ensure enforcement, cosmopolitanism holds the prospects of moderating a brand of DJ that is sensitive to national fragilities but at the same time has the propensity of permeating vested interests given the fact that nations have unequal bargaining strengths. This can make redistributive justice at international level grossly disproportionate.

4.3.1.1.6 Nationalism and Realism

Another international principle of DJ is nationalism. This theory of distributive justice is based on three principal assumptions. First, that individuals bear special obligations of distributive justice to other members of their nation.[1191] Secondly, that systems of DJ to be feasible must map onto national communities and hence the global systems of DJ are unworkable.[1192] Finally, that nations have special duties to ensure that their members receive their just entitlements a defined by a cosmopolitan theory of DJ.[1193] While nationalism enjoys the advantage of concentrating DJ obligations on citizens and clearly promotes allocative efficiency by its reference to 'just entitlement', it has been criticized as possessing an ambitious demand of reciprocity.[1194] It has been argued that the central problem with nationalist theories is the implausibility that arises from thinking of nations as systems of reciprocity since it is difficult to assume that members of a state will always participate in a common enterprise.[1195] Another

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[1189] Ibid; see also Beitz C., International Liberalism (note 1184) 152.

[1190] Simon Caney (note 1182) 977-979.

[1191] Miller D. 'O Nationality' (Oxford Clarendon Press 1995) 83-85; See also Tamir Y., 'Liberal nationalism' (Princeton University Press 1993) 104-111; McMahan J., 'The Limits of National Partiality' in R. Mckin and J. McMahan (eds), The Morality of Nationalism (New York University Press 1997) 101-138

[1192] Ibid.

[1193] Ibid.

[1194] Richard Dagger, 'Civil Virtues: Rights, Citizenship and Republican Liberalism (New York: Oxford University press 1997) 46-60

[1195] ibid

criticism of the nationalism theory is that its viability thesis relies on a static account of human nature that overlooks the facts that people's willingness to adhere to principles depends considerably on political institutions, the behaviour of others and existing social norms.[1196]

Realism, on the other hand, is the theory that asserts that states should advance its national interest rather than pursuing the aspirations of global justice. Realism is similar to nationalism only to the extent that national interest forms the focal point of both theories. From a global justice perspective, realism overlooks the fact that environmental concerns are transboundary in nature and requires a global approach to finding a generally appealing resolution.[1197] Realism is likely to promote disproportionate distribution of environmental benefits and burden where it will be in the national interest to do so. The theory may therefore, justify dumping, fracking, gas flaring and other distributional concerns where it may be in the national interest to do so especially given the fluidity in the meaning of the phrase 'national interest'.[1198] This sectional focus of realism is bound to consolidate international environmental crisis.

4.3.1.2 Distributive justice issues in the oil and Gas Industry

Distributive injustices can arise in a plethora of forms. It could take the form of dumping.[1199] It could also take the form of harm done to the natural resources of indigenous people and exportation of waste to least developed countries.[1200] It could also exist in the form of environmental racism.[1201] Deploying industrial practices that puts workers at risk of contamination[1202] or disproportionately siting hazardous

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[1196] Goodin R., 'Protecting the Vulnerable: A Reanalysis of our Social Responsibilities' (Chicago IL: University of Chicago Press 1985) 167.

[1197] The United Nations Conference on Environment and Development 1992 (Agenda 21), Paras 39.1 (c); 39. 3 (a) and 39.9; See also Brian J. Preston and Charlotte Handson, 'The Globalisation and Harmonisation of Environmental Law: An Australian Perspective' (2013) 16 Asian Pacific Journal of Environmental Law, 8; Tseming Yang and Robert V. Percival, 'The Emergence of Global Environmental Law' (2009) 36 (3) Ecology L.Q., 615-664.

[1198] Miroslave Nincic, *'The National Interest and its Interpretation'* (1999) 61 (1) Review of Politics, 29-55

[1199] See for example distributive concerns have been raised where a Taiwanese based company which specializes in mercury waste decided to dump them in an open pit in Cambodia. See R.R Kuehn, *'A Taxonomy of Environmental justice'* (note 9) 10684

[1200] Questions of Distributive justice has been raised by the action of US companies in harming natural resources in South America. See R.R Kuehn, *'A Taxonomy of Environmental justice'* (note 9) 10684.

[1201] ibid.

[1202] George Friedman-Jimenez, "Achieving Environmental Justice: The Role of Occupational Health

facilities like nuclear reactors in a particular zone with the potential future risk of harm are other forms in which it may take.[1203]

The hydrocarbon industry is one industry where issues of DJ are rife. Oil Pollution, gas flaring and unconventional gas development (UNGD) are some of the environmental problems that escalate disproportionate burdens on communities. Two areas where these environmental challenges impact communities the most are in the area of public health and social and economic impacts like food security[1204] and unemployment. For every production doubled, there is an impact on the health of those who live in close proximity with these oil facilities. There are an estimated 70, 000 oilfields across 100 countries with over 1600 billion barrels of known crude oil reservoirs.[1205] Many studies document the impacts of existing oil fields on the health and environment of over 600 million people world-wide.[1206] As far back as 1983, a World Health Organization (WHO) Report identified the health impacts of different energy sources as a challenge for the end of the 19th century.[1207] Some of the health effects that oil extraction can have on communities are cancer, rheumatic disease, lupus, neurological and respiratory symptoms and cardiovascular problems and the alteration of immunological functions in communities that host oil installations.[1208]

[1203] Nuclear power plant reactors produce low-level ionizing radiation, high-level nuclear waste and are subject to catastrophic contamination events. See D. Kyne and B. Bolin, ‘Emerging Environmental Justice Issues in Nuclear Power and Radioactive Contamination (2016) International Journal of Environmental Research and Public Health, 1-19, 1; see also P. Katsch, C. Spix, R. Schulze-Rath et al, ‘Leukaemia in Young Children Living in the Vicinity of German Nuclear Power Plants’ (2008) 1120 Int. J. Cancer, 721-726 (this report reveals that ionising radiation during routine operations of nuclear power plants may increase the risk of Leukaemia in children).

[1204] Food Security is defined as the ‘global availability of food supply resources to sustain the increasing demand for food and to recompense market prices. See United Nations, Report of the World Food Conference held in Rome from the 5-16 of November 1975, available on < https://digitallibrary.un.org/record/701143/files/E_CONF.65_20-EN.pdf> last accessed on the 27th of April, 2019; See also

[1205] Central Intelligence Agency (CIA) ‘World Fact Book 2017’ available on < https://www.nilc.org/wp-content/uploads/2017/03/IRAP-v-Trump-Exhibit-Hausman-Dec-part2.pdf> last accessed on the 25th of April 2019.

[1206] See C.O Callaghen-Gordo, M. Orta-Martinez, M. Kogevinas, ‘Health Effects of non-occupational exposure to oil Extraction’ (2016)15 Environs Health, 56; See also Jill E. Johnston, Esther Lim, Hannah Roh, ‘Impact of Upstream Oil Extraction and Environmental Public Health: A Review of Evidence (2019) 657 Science of Total Environment, 187-199

[1207] WHO, ‘Health Impacts of Different energy Sources: a Challenge for the end of the Century (1983), available on < file:///Volumes/AHOLU/Environmental%20Justice%20Heinonline%20Lexisonline/Environmental%20Impacts%20of%20Oil%20Exploration%20/Health%20impact%20of%20Different%20energy%20Sources%20.pdf> last accessed on the 28th of April, 2019.

[1208] S. San Sebastian, B Armstrung, J.A Cordoba and C. Stephens, ‘Exposures and Cancer Incidence near Oil Fields in the Amazon Basin of Ecuador’ (2001) 58 Occup. Env. Med, 517-522

Other health effects are hematopoietic, hepatic, renal and pulmonary abnormalities, changes in the mood and cognitive functions, psychological problems, damage to reproductive health and respiratory tract involvement.[1209] Further health complications can result from eating food contaminated by oil in communities that rely on the environment as their source of livelihood. Studies also show that UNGD has been associated with decreased community air quality.[1210]

Some reports classify the impacts of hydrocarbon extraction on food security as part of the social impacts associated with hydrocarbon extraction.[1211] These reports document the impacts of extractive activities more generally to include extensive social underdevelopment, which engrosses lack of social amenities like physical infrastructure, pipe-borne water, schools, hospitals and employment opportunities irrespective of the huge benefits of crude oil.[1212] There are also specific reports which link environmentally hazardous activities to food insecurity.[1213] For example, research reveals that the expanded usage of 'hydraulic fracturing'[1214] has the effect of reducing agricultural productivity through competition for water, land, labour and other factors of production.[1215] The report also notes that hydraulic fracturing has effect on surface and groundwater contamination which in turn affects product yield.[1216] Another report

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[1209] M. Isabel Ramirez, A Paulina Arevalo, S. Sotomayor and N. Bailon-Moskoso, 'Contamination of Oil Crude Extraction-Refinement and their effects' (2017) 231 Environmental Pollution Journal, 415-425, 416. (this study also associates crude oil extraction to psychological symptoms like stress, anxiety and depression

[1210] M.D. Wills, Todd A. Jusko et al., 'Unconventional Natural gas development and Paediatric Asthma Hospitalization in Pennsylvania (2018) 166 Environ Res., 402-408; see also L.M. Mc Kenzie, R.Z, Witter, L.S Newman, J.L Aldgate, 'Human Health Risk Assessment of Air Emissions from Development of Unconventional Gas Resources (2012) 24, Sci. Total Environ., 79-87 (this study show that through UNGD processes, numerous toxic air pollutants capable of causing respiratory health outcomes are emitted. The study also demonstrates air pollution above background levels in communities with UNGD sites).

[1211] O.N Albert, D Amaratunga and R. Haigh 'Evaluation of the Impacts of Oil Spill Disaster on Communities and its Influence on Restiveness in the Niger Delta, Nigeria (2017), 7th International Conference on Building Resilience, Using scientific Knowledge to inform Policy and Practice in Disaster Risk Reduction, ICBR 2017, Bangkok Thailand, 1-4

[1212] ibid.

[1213] The World Food Summit in 1996 declared that "Food Security exist when all people at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life". See the Report of the World Food Summit held from the 13th-17th of November, 1996, available on http://www.fao.org/3/w3548e/w3548e00.htm , last accessed on the 27th of April 2019.

[1214] Hydraulic fracturing involves injection of a pressurized mixture of water, sand and other chemicals (often called Proppants) into deep wells. The pressurized mixtures creates fractures into low permeable rock layers releasing oil and natural gas which flow back up the well. See Naima Farah, 'The Effects of Hydraulic Fracturing on Agricultural Productivity' (2016) Job Market Paper, 1

[1215] Ibid.

[1216] Ibid.

documents how extractive industries undermine agriculture by promoting the myth of job creation, economic growth and wellbeing whilst undermining sustainable resilient and localized food production.[1217] The report documents how land grabbing, water pollution (through acid mine drainages, leakages, spills from tailing, fracking chemicals and heavy metal leaching) and desertification of grazing land from extractive activities are threatening global efforts at entrenching food security and sovereignty.[1218] The report concludes that when communities lose their ability to grow food and forage, they not only lose their livelihoods but also the 'certainty of having enough to eat'.[1219] This has the greatest effect in the global south where rural communities are largely subsistent farmers growing much of the food that they and their families rely on. Yet another report documents the impact of exploratory drilling on marine species, an essential source of protein for indigenous people.[1220] Extractive activities also rank high amongst drivers of food prices globally.[1221]

The conclusion to be drawn from the above is that those who live in close proximity to hydrocarbon facilities suffer distributional consequences (such as health challenges and economic impacts like food shortages and unemployment), most of which breeds in turn, social consequences which law ought to be sensitive to and deal with accordingly. These impacts are contemplatable costs, which the law must allocate to those who generate them as polluters.

4.3.2 Social justice as Environmental Justice

According to Roberts Rhodes, social justice is "that branch of virtue of justice that moves us to use our best efforts to bring about a more just ordering of society-one in

[1217] Gaia Foundation, 'Under-mining Agriculture: How Extractive Industries Threaten our Food systems (2014) 3, 27-33, available on < https://www.gaiafoundation.org/wp-content/uploads/2015/11/UnderMiningAgriculture_Summary.pdf> last accessed on the 28th of April, 2019.
[1218] Ibid.
[1219] Ibid.
[1220] Fisheries Research Service (FRS) 'Environmental Impacts of Oil and Gas Industries (2005) 1 (the report concludes that commercial fish species are sensitive to sound and that at close range, larval fish might even be killed by seismic sources. Seismic survey might therefore, disturb spurning fish away from territory where they have chosen to aggregate and this could in extreme circumstances be harmful to stock productivity).
[1221] World Bank, Long-Term Drivers of Food Prices' (2013) Policy paper 6455, 1-37, available on < http://documents.worldbank.org/curated/en/832971468150565490/pdf/WPS6455.pdf> last accessed on the 28th of April, 2019.

which people's needs are more fully met".[1222] Social justice demands first, that members of every class have enough resources and enough power to live a life befitting of human beings and secondly, that those who find themselves in a position of privilege be accountable to the wider society for the manner in which they deploy their advantages.[1223]

Social environmental justice scholars style environmental justice considerations in different forms and are traditionally quick to criticize the narrow focus of issues of distribution. Alston described environmental justice as "a marriage of the movement of social movement for social justice and environmentalism.[1224] Bullard labels this aspect of justice as "social equity', an expression use to capture an evaluation of the role of sociological factors (race, ethnicity, class, culture, lifestyle, political power etc.) in environmental decision-making.[1225] Foster contends that the straightened pivot of DJ neglects the search for social structures and agents that are escalating environmental problems.[1226]

Young, is a social justice scholar, whose theory is as radical as it would have great ramifications for EJ scholarship. She argues that while theories of DJ offer models by which distribution may be improved, none of them thoroughly examines the social, cultural, symbolic and institutional conditions underlying poor distribution occurs in the first place.[1227] Young asserts that distributional issues are crucial to the satisfaction of justice and that a part of the problem of distribution is a lack of recognition of group difference.[1228] Young further argues that 'if social differences exist, and are attached

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[1222] Roberts E. Rhodes Jr., 'Social Justice and Liberation (1996) L. Rev. 619, 620
[1223] Ibid: 626 (Rhodes argued that efforts to reform unjust institutions and achieve social justice give rise to a class struggle: "the victims have a stake in reform while the beneficiaries have an equal stake in the status quo.
[1224] Dana A. Alston, 'Introduction, in 'We Speak for Ourselves: Social Justice, Race and the Environment (Dana Alston 1990).
[1225] Robert Bullard, 'Unequal Environmental Protection: Incorporating Environmental Justice in Decision Making, in Adam Finkel and Dominic Golden (eds) 'Worse things first' (1994).
[1226] Sheila Foster, 'justice from the Ground Up: Distributive Inequities, Grassroot resistance and the Transformative Politics of the Environmental Justice movement (1998) 86 (4) California Law Review, 86 (4).
[1227] Young, Iris Marion, 'Justice and the politics of Difference' (Princeton University Press 1990); See also Young Iris Marion (Oxford University Press 2000); David Schlosberg, 'Reconceiving Environmental justice: Global Movements and Political theories' (2007) 13 (3) Journal of Environmental Politics, 517-540, 517-518
[1228] David Schlosberg, 518

to both privilege and oppression, social justice requires an examination of those differences to undermine their effects on DJ.[1229]

EJ advocacy predicated on the concept of social justice call for economic alternatives that contribute to the development of environmentally amiable livelihoods; political, economic and cultural liberation and policies free from discrimination.[1230] They also advocate for swift clean-up of polluted sites, the rebuilding of cities and rural areas, respect for the cultural integrity of communities and fair access for all to the full range of society's resources.[1231]

Legal tools for dealing with social justice issues take a lot of forms. At the level of international law they take the form of PSNR[1232] and rules relevant to sustainable development as conceptualized in the various Earth summits,[1233] and international and regional instruments recognizing the rights of those concerned to fair share of distribution.[1234] For example, socio-economic rights like the rights to education and

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[1229] Ibid: (According to young, recognition is key and a lack of it is demonstrated by various forms of insults, degradation and devaluation at both the individual and cultural level, inflicts damage to both oppressed communities and the image of those communities in the larger cultural and social realm. The lack of recognition is an injustice not only because it constrains people and does them harm but also because it is the foundation for Distributive justice).

[1230] See R.R Kuehn, *'A Taxonomy of Environmental justice'* (note 1096) 10699.

[1231] Principles of Environmental justice (note 1111), 2, 12.

[1232] The notion of PSNR connotes that states have the right to use and exploit their natural resources for the purpose of national development and for the welfare of their citizens; See J.H Bhuiyan, "Evolution of the Permanent Sovereignty over Natural Resources in the Context of the Investment regime, in Shawkat Alam, Jahid Bhuiyan and Jona Razzaque (eds), "International Natural Resources Law, Investment and Sustainability (Routledge Research in International Environmental Law) 62; (UN General Assembly Resolution 1802 (xvii) of 14th December 1962;

[1233] For example, the World Commission on Environment and Development 1987 Report weaved social, environmental and economic issues and provided direction for a comprehensive global solution. See generally, R.T. Ako, Environmental Justice in Developing Countries (note 1099) 12-22.

[1234] For instance, the Stockholm Declaration in Principle 1 provides that 'man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and wellbeing, and he bears a solemn responsibility to protect and improve the environment for the present and future generations. In this light, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.' See also Art. 14 of the African Charter on Human and peoples' Right 1981 dealing with the right of property. (This right has been construed as providing members of vulnerable and disadvantaged groups including indigenous populations/ communities who are victims of historic land injustices, independent access to and use of land and the right to be adequately compensated for both historic and current destruction of wealth and resources. The article also mandates state parties to ensure that 'public need in the context of land acquisition serve legitimate public interest objectives such as economic reforms or measures designed to achieve greater social justice). See generally, African Commission on Human and People's Right (ACHPR), Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Right, available on < http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf> last accessed on the 29th of April, 2019.

the right to work can serve as powerful tools for the acquisition of literacy skills relevant to income generation which addresses the inequalities associated with the social impacts of oil exploration.[1235] At the national level, they can take a variety of forms, from constitutional provisions recognizing the rights of those who live in close proximity to hydrocarbon installations to access additional revenues to deal with their peculiar disadvantages; [1236] taxes directed at equalizing social marginal cost;[1237] and statutes stipulating corporate social responsibilities and local content obligations.[1238] The only question that arises from these multiplicity of methods is how effective they have been in practice.

Calls for social justice in the hydrocarbon industry take the form of protest directed at ending fossil fuel subsidies, which perpetuate dependence on dirty energy sources, and rob states of capacity to fund energy solutions of the future and smart climate policies.[1239]At other times the call for social justice reflects concerns for effects of horizontal drilling associated with the extraction of unconventional gas.[1240] The effects that such drilling has on the proximate population who experience a reduction in property values and suffer acute hazards and nuisances are veritable sources of protests.[1241] Other times, social justice protests in the hydrocarbon industry are directed at the levels of unemployment in areas around refineries where proximate pollution lives with the inconveniences and health risks of benzene and toluene emissions.[1242] While social justice in the hydrocarbon industry concerns is neatly identified, meeting the demands of social protests is clearly a matter of rational regulatory choices made either at the point of deliberation between stakeholders in

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[1235] See Articles 6, 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (ICSR) dealing with the rights to work and education; Article 17 of the African Charter on Human and Peoples Right 1981; see also O.K. Osuji and U.L. Obiabuaku, 'rights and Corporate Social Responsibility: Competing and Complementary Approaches to Poverty Reduction and Social Rights (2016) 136, J Bus Ethics, 329-347, 331

[1236] See for example section 162 (2) of the Constitution of the Federal Republic of Nigeria

[1237] See for example Section 14 (1) and (2) of the Nigerian NDDC Act 2000 (as amended).

[1238] See for instance the Nigerian Content and Development Act 2010.

[1239] Friends of the Earth, "Fossil Fuel Subsidies: A Social Justice Perspective", available on < https://foe.org/blog/2012-05-fossil-fuel-subsidies-a-social-justice-perspective/> last accessed on the 6th of January 2021.

[1240] Addrianne C. Kroepsche, Peter T. Manloff, John L. Adgate et. Al., *"Environmental Justice in Unconventional Oil and Natural Gas Drilling and Production: A Critical Review and Research agenda"* (2019) 53 Journal Environmental Science and Technology, 6603.

[1241] Addrianne (note 1240) 8.

[1242] Carpenter A. and Wargner M. "Environmental Justice in Oil Refinery Industry: A Panel Analysis Across United states Counties" (2019) 159 Journal of Ecological Economics, 101-109.

matters relating to future state planning aimed at reducing the social impacts of hydrocarbon activities. Other times it could be a matter of existing constitutional rights and the extent they go to protect correct and protect those made vulnerable by the realities of pollution and the enormity of social cost that accompanies it.

4.3.3 Procedural Environmental Justice (PEJ) as Environmental Justice

Part of the concerns of EJ is the participation of impacted communities in the law making processes that underlie environmental legislation and policies. Most times, the perception of a community as to the fairness of distribution is determined by how fair the procedure leading to that outcome has been.[1243] PEJ has been defined as the right to equal treatment, concern and respect in the political decisions about how goods and opportunities are to be distributed.[1244] PEJ interrogates the process through which a decision (administrative or judicial) is taken and generally includes public consultations, provisions relating to access to information and access to justice.[1245] As a legal commentator noted, 'the core issues involved are procedural fairness, allowing people to be part of the process, and community empowerment, enabling people to take an active role in decisions affecting their lives.'[1246]

The right to public participation as a part of PEJ allows people to contribute to environmental decision-making process through consultation and comments and to have their concerns heard and addressed. Public hearings, notice and consultation, citizen's ombudsmen and judicial review procedure are typical participation

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[1243] Robert R. Kuehn, 'The Taxonomy of Environmental Justice (2000) 30 Environmental Law Reporter, 10681-2000, 10688.

[1244] Ronald Dworkin, 'taking Rights Seriously' (1977) 45

[1245] Jona Razzaque *'Human Rights to a Clean Environment: Procedural Rights"* in M Fitzmaurice, David M. Ong and Panos Merkouris (eds) in *'Research Handbook on International Environmental Law'* (Edward Elgar Publishing 2010) 284; See also J. Razzaque *'Information Public Participation and Access to Justice in Environmental Matters'* (Draft book chapter Taylor and Francis 2020) 58-72; J. Ebbesson, *'The Notion of Public Participation in International Environmental Law'* (1997) 8 Year Book of International Environmental Law, 70-75.

[1246] Jona Razzaque, 'Human Rights to a Clean Environment: Procedural Rights' (note 1245) 284

mechanisms.[1247] To be effectual, participation rights need to be reinforced with a right to accurate, accessible, timely and comprehensive information.[1248]

The usual justifications for PEJ are that they raise the credibility, value and accountability of governmental decision-making processes.[1249] PEJ is critical to the adaptation and furtherance of human rights and amplifies the legitimacy of environmental decision-making.[1250] PEJ also helps streamlines the scope of environmental law by making explicit the interests protected by environmental regulations.[1251] They are also said to generate considerable confidence in the decision-making process and reduce the possibility of future conflicts.[1252] Another justification is that the absence of PEJ upscales the possibility of unsustainable resource management.[1253] For example, both the millennium Ecosystem Assessment[1254]and the Global Assessment on Biodiversity and Ecosystem services[1255] note that community participation in the implementation of market-based instruments targeted at conserving nature and ecosystem services is necessary for the success of these instruments. Some scholars justify PEJ especially, participation on socio-political grounds as a means of sharing political power between various interest groups and democratising environmental decision making.[1256]

[1247] Dannemaier E., *'Democracy in Development: Towards a Legal Framework for the Americas'* (1997) 11 (1) Tulane Environmental Law Journal, 13

[1248] Pektova E. C. Maurer, N Henniger and F. Irwin, *'Closing the Gap: Information, Participation and justice in Decision making for the Environment*' (World Resource Institute 2002), 121-132

[1249] Pektova E. C. Maurer, N Henniger and F. Irwin, *'Closing the Gap, 66-67*

[1250] Jona Ebbesson, 'Public Participation' in Jorge E. Vinuales (ed), 'The Rio Declaration on Environment and development: A Commentary' (Oxford university press 2015) 287-310, 289.

[1251] Jona Ebbesson, 290.

[1252] Jona Razzaque (note 1245), 284.; See also L Temper, F. Demaria et al. *The Global Environmental Justice Atlas* (2018) 13 Springer Journal of Sustainability Science, 573-584, Available at < https://link.springer.com/article/10.1007/s11625-018-0563-4> Accessed on the 15th of November 2020.

[1253] U. Pascual, *'Valuing Nature's Contribution to people: the IPES Approach'* (2017) 25-27

[1254] Millennium Ecosystem Assessment, Ecosystems and Human Wellbeing: General Synthesis (Island Press 2005) v.

[1255] J. Settele, S. Diaz et al. (eds), '*Global Assessment Report of the Intergovernmental science-Policy platform on Biodiversity and Ecosystem Services'* (IPES 2019). Available at https://ipbes.net/global-assessment, accessed 15th November 2020.

[1256] Jenny Steele, *'Participation and Deliberation in Environmental law: exploring the Problem-Solving Approach'* (2001) 21 OJLES, 415

Despite the scholarly justifications for PEJ, it is subject to several criticisms. First, some scholars question the empowerment potentials of PEJ especially public participation.[1257] These set of scholars argue that rather than empower local communities PEJ is a tool in the hands of certain development institutions intended to secure external donor funding.[1258] Second, there is the argument that PEJ is blind to specific and cultural context that undermines its transformative potentials.[1259] Third, there is also the criticism that the non-reflexive calls for participation fail to properly engage with the process and shy away from addressing the issues of power distribution, providing an avenue for elite groups rather than the public to have dominant control of the process and arrest the viability of PEJ.[1260] Further criticisms exist in scholarly works.[1261]

PEJ has a long history and is now a part of many international and regional environmental Treaties and conventions. This is considered below.

International Law on Procedural Environmental Justice

PEJ has become a subject of interest for international law. Several non-binding and binding international Conventions and Treaties make provisions which laid the foundation for PEJ. Early sets of instruments providing for PEJ existed in the form of human rights Treaties and instruments. For example, the 1948 Universal Declaration on Human Rights[1262] the 1950 European Convention on Human Rights,[1263] and the

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[1257] David Mosse, *'People Knowledge", Participation and patronage: Operations and representation in Rural development'* in Cooke and USA Kotari (eds) *'Participation: the New Tyranny?'* (Zee Books 2001).

[1258] David mosse, 15

[1259] Frances Cleaver *'Institutions, Agency and the limitations of participatory approaches to development'* in Cooke and Kotani above,

[1260] Jenny Steele (note 1256).

[1261] Maria lee and Carolyn Abbot, *'The Usual suspects? Public Participation Under the Aarhus Convention'* (2003) 66 MLR, 80; Julia Black, 'Proceduralizing Regulation Part 1' (2000) 21 OJLS, 33; Gunther Teubner, '*De Collissione Discussuum; Communicative Rationalite in Law, Morality and politics in Michael Rosenfield and Andrew Aragon'* (eds) *Habermas on Law and Democracy: Critical exchanges'* (University of California press 1998).

[1262] Arts 8, 10, 19 and 20 of the Universal Declaration on Human Rights.

[1263] Arts 3, 7, 9 (1), 13 and 24 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

1966 International Covenant on Civil and Political Rights[1264] all contained provisions dealing with collective rights to access to information and justice, political participation, and the right to assembly.[1265]

Further down the line, other international instruments emerged addressing the specifics of PEJ. Some of these Treaties are the Stockholm Declaration 1972,[1266] UNEP Montreal Protocol on Substances that Deplete the Ozone Layer 1987,[1267] the Brundtland Report,[1268] and the World Charter on Nature.[1269] The Rio Declaration,[1270] the UN Declaration on the Rights of Indigenous Peoples[1271] and Agenda 21,[1272] also have provisions concerning PEJ. In Article 10 of the Rio Declaration, it is provided that *"each individual shall have access to information concerning the environment held by public authorities…states shall facilitate and encourage public awareness and participation in decision-making processes'*. The same article also provides that, '*effective access to judicial and administrative proceedings, including redress and remedy, shall be provided"*.[1273]

[1264] Arts 19 and 25 of the 1966 International Covenant on Civil and Political Rights.

[1265] J. Razzaque *'Information Public Participation and Access to Justice in Environmental Matters'* (note 1245) 61.

[1266] Principle 19 of the Declaration of the United Nations Conference on Environment, June 16 1972 II LLM., 1416 (although the Stockholm declaration is not considered as having made a significant contribution to PEJ, principle 19 recommended the creation of environmental information provision in domestic law); see also Z. Khan *'a case of Emperors new Cloths: A Critical Examination of Public Participation in Environmental decision-making'* (2014) PhD Dissertation of the University of the West of England, 19-21

[1267] Art. 9 (2) of the Protocol on Substances that Deplete the Ozone Layer (Adopted 16th September 1987 but entered into force on the 1st of January 1989) 1522 UNTS 3 called on parties to co-operate in 'promoting public awareness of the environmental effects of the emissions of controlled substances and other substances that Deplete the ozone layer".

[1268] World Commission on Environment and Development (WCED) 'Our Common future' (1987) 43

[1269] 'United Nations, World Charter for Nature', GA Res. 37/7, UN Doc A/37/51 (1982)

[1270] Art. 10 of the Rio Declaration on Environment and Development, UN. Conference on Environment and Development, UN. Doc. A/CONF.151/5/Rev.1 (1992).

[1271] Arts 10, 11, 15, 17, 19, 28, -30, 32, 36, 38 and 40 of the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly Resolution 61/295 on the 13 September 2007. Available at www.un.org/development/desa/indigenouspeoples/wp-conten/uploads/sites/19/2018/11/UNIDRIP_E_web.pdf accessed 27th November 2020.

[1272] Chapters 12, 19, 27, 36, 37 and 40 of Agenda 21, Report of the UNCED, 1 (1992) UN Doc. A/CONF. 151/26/Rev.1, (1992) 31 I.L.M. 874

[1273] Art. 10 of the Rio Declaration 1992.

These set of Declarations and Treaties while encouraging and making a case for PEJ, have one weakness; they lack the fang in the form of enforceable rights to bite.[1274] Their aspirational nature makes enforceability unlikely. However, the role they played in the consolidation of PEJ at international and municipal levels of governance cannot be denied. Particularly, Principle 10 of the Rio Declaration has been praised for its role in *'crystallizing and lending significant weight to the theme of public access to environmental information and for inspiring similar provisions in many international environmental regimes'*.[1275] Despite the role which principle 10 of the Rio Declaration plays as a catalyst instrument for public participation in environmental decision-making, it is criticized for its narrow 'linguistic focus.'[1276] For example, it limits the duty of providing information to public authorities rather than individual enterprises and its reference to 'all concerned citizens' rather than all concerned persons restricts the category of persons that are entitled to public access to information.[1277]

In Europe, one of the instruments that consolidated the thinking behind Principle 10 was the UN Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental matters (Aarhus Convention).[1278]Aside from containing a substantive right to a healthy environment, the convention creates a channel for the enforcement of PEJ in courts. It makes provisions for the right to access environmental information[1279] held by public authorities,[1280] the right to a functional involvement and

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[1274] Z. Kahn (note 1266) 21; see also J. Razzaque *'Information Public Participation and Access to Justice in Environmental Matters'* (note 3) 61.

[1275] Uzuazo Etemire, *"Public Access to Environmental Information: A Comparative Analysis of Nigerian Legislation with International Best Practice'* (2014) 3 (1) Journal of Transnational Environmental Law, 149-172, 152.

[1276] See Jona Ebbesson, *'Public Participation'* in Jorge E. Vinuales (ed), '*The Rio Declaration on Environment and development: A Commentary'* (note 1250) 292.

[1277] Jona Ebbesson, (note 1250) 292.

[1278] Aarhus (Denmark), 25th June 1998, in force on the 30th of October, 2001, available on < https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> last accessed on the 27th of November, 2020.

[1279] Art. 2 (3) defines environmental information to include any information on the state of the elements of the environment, factors affecting the environment or likely to do so, cost-benefit analyses used in environmental decision-making, information on human health and safety and cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment.

[1280] Aarhus Convention, Arts 2 (3), 4 and 5.

participation in environmental decision-making[1281] and access to justice in environmental matters.[1282]

While the Aarhus Convention has been praised for its consolidation of principle 10 of the Rio Declaration and for providing standards that might supply inspiration at international level to protect the environment,[1283] it has been criticized for several reasons. First, the convention contains limitations that allow restrictive interpretation of access to justice rights on the ground of public interest.[1284] For example in Article 9 of the Convention mention is made of the right of any person 'with sufficient interest to administrative or judicial review to seek redress where the relevant authority refuses to disclose environmental information or insure public participation. As crucial as this access right is, the convention defers determination of *locus standi* to national law but underlines the importance of allowing the public to gain 'wide access to justice'.[1285] The reference to sufficient interest undermines the convention's aim of achieving 'wide access to justice' and creates a normative gap, which sustains an interpretation that consolidates the poor standing of NGOs.[1286] The language of Article 9 has been described as 'porous',[1287] yielding to the sovereignty of states to determine which litigants come within the definition of sufficient interest'.[1288] The implication of this is that through its own limiting expression the convention obscures the pathways to public interest litigations and the benefits that come from it.[1289] Another criticism is that the convention will appeal less to developing countries given the fact that it

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[1281] Aarhus Convention, Arts 6-8 and 2 (2) Annex I.
[1282] Aarhus Convention, Art 9.
[1283] Aarhus Convention, Art. 19 (3).
[1284] Aarhus Convention, Arts 3 and 4.
[1285] See the definition of public concern in art. 2 (5) of the Aarhus Convention.
[1286] K. Radkova, '*Has the Adoption of the Aarhus Convention Advanced the Legal Standing of NGOs When Exercising the Right of Access to Justice Granted to Them by Article 9 (3)?'* (2020) LLB Thesis of Hague University of Applied Sciences, 2.
[1287] Maria Lee and Carolyn Abbot, 'Legislation: The Usual Suspects? Public Participation Under the Aarhus Convention (2003) 80 Modern Law Review, 106
[1288] Aarhus Convention, Art. 9 (2) (b).
[1289] For the benefits of public interest litigation see Brain J Preston, *'Environmental Public Interest Litigation: Conditions for Success'* (2013) International symposium titled: '*Towards an Effective Guarantee of Green Access: Japan's Achievements and Critical Points from a Global Perspective'*, 1-32 and Monia Segeeta Ahuja, 'Public Interest Litigation in India: A Socio-Legal Study (1995) Thesis submitted for the Award of Doctor of Philosophy at the London School of Economics, 81-102, available at < http://etheses.lse.ac.uk/1417/1/U084680.pdf> accessed 8th December 2020,

contains a comprehensive environmental impact assessment procedure for development projects (pipeline, infrastructure projects, and power plants) which might be construed as exorbitant and time wasting.[1290]

In the same vein as the Aarhus Convention, the Escazu Agreement reinforces the ties between environmental protection and human in Latin America. [1291] The Agreement contains provisions granting access rights to persons or groups in vulnerable situations,[1292] the right of every person to live in a healthy environment[1293] and a provision that offers solace to persons and groups who shield human rights.[1294] While the Agreement is praised for its innovative provisions and as *'a valuable tool to seek people-centred solutions grounded in nature'*[1295] it has also been criticized for its imprecision particularly in relation to its definition of public.[1296]

While PEJ at international and regional levels remains a work in progress, its effect at national level will depend on substantive guarantees accommodated in environmental legislations and regulations.

[1290] J. Razzaque *'Information Public Participation and Access to Justice in Environmental Matters'*, (note 3) 63; however, Guinea Bissau (a West African developing Country) expressed interest to join the Aarhus Convention in 2017.

[1291] ECLAC, Regional Agreement on Access to Information, Public Participation and Justice in Environmental matters in Latin America and the Caribbean adopted in Escazu', Costa Rica on the 4th of March 2018.

[1292] Escazu Agreement, Art. 2 (c).

[1293] Escazu Agreement, Art. 4 (1).

[1294] Escazu Agreement, Art. 9.

[1295] Kimberley Graham, *'Protecting Environmental Defenders in Latin America: The Escazu Agreement'*, IUCN Publication of October 16th 2020, available on < https://www.iucn.org/news/world-commission-environmental-law/202010/protecting-environmental-defenders-latin-america-escazu-agreement> last accessed on the 6th of January 2021;

[1296] S. Stec and J. Jendroska, "The Escazu Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings' (2019) 31 Journal of Environmental Law, 533; See also J. Razzaque *'Information Public Participation and Access to Justice in Environmental Matter'* (note 3) 63 and Domenico Giannino, 'The Escazu' Agreement, Environmental Democracy and Human Rights (2019) Researchgates, 1-4, available on < https://www.researchgate.net/publication/334785658_The_Escazu_Agreement_Enviromental_Democracy_and_Human_Rights> last accessed on the 6th of January 2021.

4.3.4 Substantive Right to be Protected from Environmental Degradation

As human activities continue to overreach natural systems, the link between the environment and human rights continues to be felt across the globe. The urgency of a reorientation and the realization that environmental despoliation encumbers the enjoyment of internationally guaranteed human rights, has given birth to international instruments that consolidate this link.[1297] Particularly, the UN General Assembly Resolution 45/94 affirmed that all individuals qualify to live in an environment adequate to their health and wellbeing. Similar reinforcements are contained in the Stockholm Declaration,[1298] and other UN documents.[1299] A substantive right to a healthy environment is therefore not only a means of protecting the human race from environmental degradation, but also a means of redressing the damage done to the earth system and the human race that draws sustenance from these systems. As one scholar puts it, it is *'one of the responses to counter environment degradation and safeguard human interests that encapsulate our vulnerability and our power in complex social-ecological systems'*.[1300] The right emerged from the realization that the reinforcement of human rights as the basis of rudimentary human traits like equality, dignity and liberty would depend on an environment tolerant of these traits.[1301]

Substantive right to a healthy environment is the subject of two competing philosophical perspectives. On the one hand, it is used in a wider sense to depict rights enjoyed by, or on behalf of the environment itself.[1302] On this strand, it is deemed

[1297] For a list of selected Treaty and other provisions linking Human Rights, Health and Environment see D. Shelton, "Human Rights, Health and Environmental Protection: Linkages in Law and Practice" (2002) Health and Human Rights Working Paper Series No. 1, being a Background Paper for the World Health Organization, 6-10; See also Louise J. Kotze, '*Human Rights, the Environment, and the Global South' in S. Alam, S. Atapattu et al (eds) 'International Environmental Law and the Global South'* (Cambridge university Press 2015) 171-191, 171

[1298] Stockholm Declaration 1972, Principle 1; See the discussion on fundamental human Rights and the Polluter pays Principle in chapter 3 of this thesis, page 130

[1299] See Paragraph 3.3.2.4 of this thesis (notes 660-661), 130-138, 130

[1300] ibid.

[1301] UN General Assembly, Report of the Independent Expert on the issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox, 24 December 2012, A/HRC/22/43, paras. 10.

[1302] Chris Wilson, '*Substantive Environmental Rights in the EU: Doomed to Disappoint?* In Bogojevic, S. and Rayfuse, R. (eds) *Environmental Rights in Europe and Beyond* (Hart Publishing 2018) 87-103, 87;

ecocentric and recognizes the right of humans and other beings to the conservation, protection, and restoration of the health and integrity of ecosystems.[1303] On the other hand, it is used to refer to a right to a clean or healthy environment.[1304] Under this plank, the right is deemed anthropocentric with human beings as its primary beneficiaries as against other natural entities. While the environment may benefit indirectly from the enforcement of such rights, the environment will lack standing under this philosophical shade.[1305] The arguments for and against these two philosophical strands of substantive right to a healthy environment are well laid own in scholarly works.[1306] Core international and regional instruments pertaining to this right are also laid out in this thesis.[1307] The important point to note is that where a firm version of the right exists, it triggers an obligation on the part of a state to prevent environmental harm and the protection of natural resources.[1308] For the PPP, a substantive right to a healthy environment addresses the preventive and curative components of the principle by providing a channel of access to address accountability issues arising from poor governance decisions.[1309] It also helps secure remediation rights for victims of environmental harm providing a foothold for corrective justice, which is considered below.

4.3.5 Corrective Justice as Environmental justice

The idea of corrective justice (CJ) as a branch of EJ was first muted 2000 years ago in Aristotle's treatise, the *Nicomachean Ethic.*[1310] Aristotle articulates CJ as a 'rectificatory' system distinct from distributive justice. According to him, CJ is predicated on the social equality of the parties and would only arise where a person

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[1303] IUCN, *World Declaration on Environmental Rule of Law*, Rio De Janerio (Brazil) April 2016,
[1304] Chris Hilson, '*Substantive Environmental Rights in the EU, 87*
[1305] Chris Hilson, 87.
[1306] See Anna Grear, 'The Vulnerable Living Order: Human Rights and the Environment in a Critical and Philosophical Perspective' (2011) 2 (1) Journal of Human Rights and Environment, 23-44;
[1307] See Paragraph 3.3.2.4 of this thesis (notes 660-661), 130-138, 130
[1308] Principle 1, IUCN, *World Declaration on Environmental Rule of Law*, Rio De Janerio (Brazil) April 2016.
[1309] Louise J. Kotze, 'Human Rights, the Environment, and the Global South' (note 1297) 171.
[1310] Aristotle, *Nicomachean Ethic*s, Book V, 2-5, 1130a14-113b28; for a critique of Aristotle's theory of corrective justice see Jason W. Neyers, "*The Inconsistencies of Aristotle's Theory of Corrective Justice"* (1998) 11 CAN J. L and Jurisprudence, 311

has done a wrong, which causes another harm in a manner that disrupts the equality of distribution.[1311] The aim of CJ is to restore the parties as nearly as possible to the position they were before the injury was inflicted.[1312] Its essence is to reverse harm, preserve established distribution to members of society and forestall untoward changes capable of inducing social instability.[1313] Corrective justice treats the defendant's unjust gain as correlative to the plaintiff's unjust loss in situations where there is a connection between the wrong and loss.[1314] Thus, it imposes a duty to an agent who has acted wrongfully and thereby cause loss to some individuals, to repair the loss.[1315] CJ requires fairness in the way punishment for environmental law breaking is assigned and damages inflicted on individuals and communities are addressed and compensated.[1316] There are two elements in the corrective justice paradigm. These elements are the victim's loss (which should be a setback to protected interest and not merely a reduction in wellbeing) and wrongful action on the part of the defendant connected to the loss.[1317]

[1311] Aristotle, *Nicomachean Ethics*, 1132b6 ("This equality consist in persons having what lawfully belongs to them. Injustices occurs when relative to this baseline, one party realizes a gain and the other party a corresponding loss".); See also Ernest J. Weinrib, *"Corrective Justice in a Nutshell"* (2002) 52 (4) University of Toronto Law Journal, 349-356; See also Ernest Weinrib, *'The Idea of Private Law"* (Cambridge, M.A: Harvard University Press, 1995); for a critique of corrective justice see Andrew Fell, *"Corrective Justice, Coherence, and Kantian right"* (2020) 70 (1) University of Toronto Law Journal, 40-63; Richard Wright, *'Right, Justice and Tort Law'* in David Owed, (ed), *'Philosophical Foundations of Tort Law'* (New York: Oxford University Press, 1995).

[1312] E. Weinrib, *"Corrective Justice in a Nutshell",* 349-350

[1313] E. Weinrib, *'Legal Formalism: On the Immanent Rationality of the Law'* (1998) 97 Yale L.J, 945-977, 85; See also Kathryn R. Heidt, *"Corrective Justice from Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot Pay?"* (1990) 42 (2) Washington and Lee Law Review,

[1314] E. Weinrib *"Corrective Justice in a Nutshell", 349;* See also Fanny Thornton, *"Of Harm, Culprits and Rectification: Obtaining Corrective Justice for Climate Change Displacement"* (2020) Journal of Transnational Law, 1-21, 7

[1315] Mathew D Adler, *"Corrective Justice and Liability for Global Warming"* (2007) 155, University of Pennsylvania Law Review, 1859; See also Benjamin C. Zipursky, *"Civil Recourse, Not Corrective Justice'* (2003) 91 GEO. L.J. 699-700, 695 ("corrective justice theory explains tort law as the embodiment of a deontological…set of values. One who causes a wrongful injury to another is obligated to compensate for the injury causes").

[1316] Robert R. Kuehn, '*The Taxonomy of Environmental Justice*', 10693; Jules L. Coleman, 'The Practice of Corrective Justice, (1995) 27 ARIZ. L REV. 15, 30

[1317] Mathew D Adler, *"Corrective Justice and Liability for Global Warming", 1859-1860;* Fanny Thornton, *"Of Harm, Culprits and Rectification: Obtaining Corrective Justice for Climate Change Displacement", 9-10*

International environmental law expresses a strong corrective justice component especially in the form of state responsibility and state liability.[1318] While the idea of corrective justice propels the idea of moral equality and offers a route to the curative aspirations of the PPP in theory, in practice its standard of 'rectification' is difficult to attain in a manner that leads to the effectual realization of the ideas behind the PPP.[1319]

4.3.6 Emerging Trends of Environmental Justice

The plurality of the environmental justice discourse has expanded the notion to accommodate theories based on rational choice, food justice, political economy and science and technology. But for the purposes of this thesis, only analysis of EJ predicated on rational choice and food justice are examined below. This preference is predicated on the fact that the two theories bear the most relevance to the PPP given the link they have to regulatory decisions and DJ.

4.1.1.1. Environmental justice and the Rational Choice theory (RCT)

RCT explains social phenomena as outcomes of individual choices that can in some way be construed as rational.[1320] It is a framework for understanding social and economic behaviour based upon a glamorized model of human decision-making

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[1318] See the discussion on Curative Justice in Paras. 2.7.4 of Chapter 2 of this thesis, 64-68; For more on this see Malgosia Fitzmaurice, *"Liability and Compensation in Jorge E. Vinuales (ed) 'The Rio Declaration on Environment and Development: A Commentary'* (Oxford University Press 2015) 359-372; Phoebe Okowa, 'Responsibility for Environmental Damage' in Malgosia Fitzmaurice, David M. Ong and Panos Merkouris (eds) Research Handbook on International Environmental Law' (2010) 303-319; Louise Angelique de La Fayette, *"International Liability for Damage to the Environment"* in Malgosia Fitzmaurice, David M. Ong and Panos Merkouris (eds) Research Handbook on International Environmental Law' (2010) 320-360; Malgosia Fitzmaurice, *'International Responsibility and Liability'* in Daniel Bodansky, Jutta Brunnee and E. Hey (eds) *'Oxford Handbook of International Environmental Law"* (2007) 1010-1035; Xuyu Hu, *"The Doctrine of Liability Fixation of State Responsibility in the Convention on Transboundary Pollution Damage"* (2020) 20 International Environmental Agreements: Politics, Law and Economics Journal, 179-195 and Isabel Feichtner, *"Contractor Liability for Environmental Damage Resulting from Deep Seabed Mining"* (2020) 114 Marine Policy Journal, 103502.

[1319] For a Critique of Corrective justice see Zoe Sinel, 'Concerns Abou Corrective Justice' (2013) XXVI (1) Canadian Journal of Law and jurisprudence, 137-155

[1320] Rafael Wittek, 'Rational Choice Theory' (2013) Oxford Bibliographies online: Sociology, 688, available on <http://www.oxfordbibliographies.com/abstract/document/obo-9780199756384/obo-9780199756384-0070.xml?rskey=zpLLcv&result=3&q=Public+Choice+theory+#firstMatch> last accessed on the 30th of April 2019; see also William Bowen (note 55) .

predicated on the assumption that choice-making behaviour may be understood on the basis of a set of assumptions.[1321] Choices are rational if *'they meet some consistency criterion as defined by decision theory and are suitable to achieve specific goals, given the constraints of the situation'*.[1322] At the core of RCT, are three notions of neoclassical economics: (1) that individuals have selfish preferences (2) they maximize their own utility and (3) they act independently based on full information.[1323]

A rational choice theory of environmental justice holds that because individuals or group-level choices contribute to the creation of conditions of environmental justice every day, conditions of improved EJ cannot be created until decisions of individuals and groups lead to aggregate outcomes consistent with EJ principles.[1324] RCT therefore dictates that the notion of fairness must exist as part of the core of RCT for the concept of EJ to emanate from a RCT basis.

Although the RCT provides a system for institutions to make and balance environmental decisions, the theory is also criticized for possessing lean practicality considered from the perspective of utility maximization. Although individuals and decision makers may have a comprehensive range of knowledge of alternatives and outcomes likely to flow from committing themselves to such alternative, certain considerations can inspire them to make irrational choices.[1325] RCT can be used to justify poor environmental quality, poor economic instruments and environmental institutions as rational choices for utility maximization. One clear example of this problem is that regulators can in the guise of promoting foreign investment and trade,

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[1321] These axioms stipulate that decision-makers can make fully rational choices if they have complete knowledge of all the alternatives in choice sets, they know the entire range of consequences that will follow from selection of each of the alternatives, they possess a perfectly known and consistent preference ordering across the alternatives, and they use a consistent decision rule for combining their knowledge and preferences. See William Bowen (note 55) 52 (Bowen notes that the process begins by 'identifying the problem, specifying the goals; specifying all of the alternative courses of action available to attain these goals along with the range of outcome that would be likely to follow from marketing a commitment to each, evaluating the alternatives in light of these outcomes and selecting the optimal alternative which maximizes the decision maker's utility').

[1322] Raphael Wittek (note 1320) 688.

[1323] Raphael Wittek (note 1320) 688.

[1324] Bowen, 51.

[1325] For example, political appointments to environmental institutions made on the basis of considerations outside competence cannot be termed rational and it is bound to produce decisions and outcomes not premised on a complete set of knowledge of consequences or distributional impacts.

rationalize poor environmental obligations or lengthy incentives even though they create disproportionate environmental burden and social crisis. Not only does this defeat the essence of EJ, but it can also allow for sub-optimal environmental decisions that can escalate environmental pollution.[1326]

The relevance of RCT to the oil and gas industry is its ability to help rationalize the action of stakeholders in the industry. A RCT of EJ will question the utility of government policies and decisions, which creates externalities, and judge them against a set of consistency criterion (standards) that helps test the rational foundations for the decisions. Through this analysis, the stakeholders can have a proper understanding of the impacts of their activities within the oil and gas value chain and be responsive to their duties.

4.3.6.1 Food Justice as Environmental Justice

Food justice (FJ) is a response to the inequities of the global food system with emphasis on food sovereignty.[1327] It has been defined as 'the right of communities to grow, sell, and consume healthy, nutritious, affordable and culturally appropriate food produced through ecologically sustainable methods and their rights to democratically determine their own food and agricultural policy.[1328] Food justice movements decry the social and economic factors that prevent local communities from purchasing or producing healthy, nutritious, environmentally sustainable and culturally appropriate food for consumption.[1329] At the international level, food sovereignty movement seeks

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[1326] Other difficulties associated with RCT is the difficulty in predicting behaviours and the fact that RCT does not accommodate standards of fairness or equity amongst its core elements. For a critique of RCT as applied in an environmental law context see Kiser. L.L and Ostrom E., *'The Three words of Action: A Metatheoretical synthesis of Institutional Approaches*, in Haynes K., E. A. Kulunski and Kutalati (eds), pathologies of Urban Process (Finn Publishers 1982) ; Kuehn R.R, *'Remedying the Unequal Enforcement of Environmental Laws'* (1994) 9 (2) Journal of Civil Rights and Economic Development, 625-668; Ostrom E. '*Beyond Markets and states: Polycentric Governance of Complex Economic Systems'* (2010) 100 American Economic Review, 1-33; Ostrom E. A. '*Behavioural Approach to Rational Choice theory of Collective Action: Presidential Address* (1998) 92 American Political Science Review, 1-22 and Zey M. 'Making Alternatives to Rational Choice Models' (Sage Publishers 1992).

[1327] Carmen G. Gonzalez, 'Food Justice: Environmental Justice Critique of the Global Food System (note 1108) 404.

[1328] This definition of food justice is compatible with the idea of food sovereignty which emphasizes 'the right of people to healthy and culturally appropriate food produced through ecologically sound and sustainable methods and their right to define their own food and agricultural systems'. See R. Patel, 'What does Food Sovereignty look like? (2009) 36 (2) Journal of Peasant studies 663 at 666; Gonzalez Carmen (note 1093) 404

[1329] Ibid.

to disassemble corporate-dominated free trade policies that have devastated rural livelihoods and environments in both north and south,[1330] promote redistribution of land and water rights to small scale farmers and advocate the rights of peoples and nations to define their own food policies and control their food-producing resources.[1331] FJ is grounded in the language of human rights.[1332]

Food justice has important ramifications for the attempt at promoting sustainability. FJ addresses the distributional impacts of hydrocarbon activities,[1333] and is critical to the eradication of poverty and malnourishment and by extension, helps to meet sustainable development goals (SDG).[1334]

Fanciful as the idea of FJ is, it is criticized for several reasons. First, the concept of FJ drives the possibility of conflicts between the Northern and southern Countries since it emphasizes an end to land –grabbing to free up land for rural farmers, a fact that can escalate food crisis in northern countries. Secondly, grounding FJ on human rights raises governance costs that third world countries may not be able to meet in view of their diminished governance capabilities.[1335] Another identifiable obstacle to FJ is the continuous attempts by third world countries to subsidize regulatory costs to attract foreign investments[1336]

[1330] For example, United States and European subsidies and import barriers were allowed under the 1947 General Agreement on Tariffs and Trade which exempted agriculture from GATT's trade liberalization requirements. See C.G Gonzalez, 'Institutionalizing inequity: The WTO, Agriculture and Developing Countries' (2002) 27 Columbia Journal of Environmental Law, 431 at 468-470

[1331] World Food Summit, 'Rome Declaration on World Food Security and World Food Summit plan of Action', available on www.fao.org , last accessed on the 2nd of May 2019.

[1332] The human Rights to food is recognised in both the Universal Declaration of Human Rights (UDHR), Art. 25; and the International Covenant on Civil and political Rights, Arts. 6 (1). (Art. 6 (1) of ICCPR which guarantees the right to life has been interpreted to require the implementation of affirmative measures to eliminate chronic undernourishment.

[1333] These have already been addressed in paragraphs 3.1.8 of this chapter.

[1334] According to the United Nations, about 842 million people do not consume enough calories to satisfy their dietary energy requirement; two billion people suffer from deficiencies of essential nutrients (Vitamin A and iron) and about 26 percent of the world's children fail to achieve normal height and weight due to malnourishment. See FAO, the State of Food and Agriculture Organization (FAO*), The State of Food Insecurity in the World 2013: The Multiple Dimensions of Food Insecurity* (Rome: FAO, 2013); see also Rafael Perez-Escamilla, '*Food Security and the 2015-2030 Sustainable Development Goals: From Human to Planetary Health: Perspectives and Opinion'* (2017) 1 (7) Journal of Current Development in Nutrition, 1-8

[1335] For example, third world countries have not been able to deal with the perennial problem of how lending practices enabled by IMF, the World Bank and Trade and Investment agreements have created an international framework that benefits investors and transnational food Corporations. See P. Simon, "International Law's Invincible Hands and the Future of Corporate Accountability for Violations of Human Rights" (2012) 3 Journal of Human Rights and the Environment, 5, 40

[1336] Gonzalez, (note 1108) 426.

The specter of the emerging conceptions of EJ and their challenges are visible in Nigeria's hydrocarbon industry. The next section shall examine EJ in Nigeria.

4.4 ENVIRONMENTAL JUSTICE AND NIGERIA'S HYDROCARBON INDUSTRY

The traditional legal framework for applying environmental justice in Nigeria includes frameworks, relevant to land management, petroleum licensing, fundamental human rights, resource allocation and access to justice generally and in environmental matters. [1337] Some of these frameworks are the Constitution of the Federal Republic of Nigeria 1999 (as amended)[1338], Land Use Act 1978[1339], the Petroleum Act 1969 and its associated regulations[1340] and the African Charter of Human and Peoples Right (Ratification and Enforcement) Act 1983.[1341] Others include the NDDC Act 2000 (as amended),[1342] National Oil Spill Detection and Response Agency Act 2006[1343], Oil Pipelines Act 1956,[1344] National Human Rights (Amendment) Act 2010[1345] and some lower-level instruments like Fundamental Rights Enforcement Procedure Rules (FREPR) 2009.[1346] These have been considered in great details in chapter three of this thesis.

While these laws contain provisions addressing specific grievances related to EJ, they have been criticized as instruments consolidating land grabbing, denying indigenous

[1337] See generally, Ako R.T., Environmental Justice in Developing Countries (note 1099) 23-40.
[1338] See section 20 and chapter 4.
[1339] See section 1 (1); see also the following cases, Amodu Tijani v Secretary, Southern Nigeria (1921) 2 AC 404; Makanjoula v. Balogun (1989) 5 SC, 82; Abioye v Yakubu ((1991) 5 NWLR (part 190), 130 (the conclusion from these cases and statutory section is that all land vest on state governors in trust for the use and common enjoyment of all Nigerians in accordance with the provisions of the Land Use Act).
[1340] 1(1)
[1341] Sections 7 and 14; see also section 162 (2)
[1342] Sections 7 and 14
[1343] 5 and 6
[1344] Section11 (5)
[1345] Section 6 (1) expands the mandate of the National Human Rights Commission (NHRC) to deal with all matters relating to the protection of human rights guaranteed under the Constitution of the Federal Republic of Nigeria, the united Nations Charter, the universal Declaration of Human Rights and all International and Regional Human Rights instrument to which Nigeria is party.
[1346] Preamble 3 provides that 'the Court shall encourage and welcome public interest litigations in human rights field and no human rights case may be dismissed for want of locus standi'.

people access to natural resources and containing minimal punishments and compensation barely enough to address EJ concerns.[1347] What cannot be denied however is that the application of EJ both under international law and Nigerian law addresses distributive and social justice issues escalated by the oil industry externalities.

4.4.1 Distributive and Social Justice Issues in Nigeria's Oil Industry

The Niger Delta region (NDR) of Nigeria and its experiences in hydrocarbon exploitation typifies the plural realities upon which conceptions of EJ are based. As the cash cow of the Nigerian nation, the region plays host to a multiplicity of multinational oil companies with enormous portfolio of oil assets.[1348] Oil, which accounts for almost 80% of government revenue plays a critical role in the survival of the Nigerian nation. Approximately, one trillion dollars have been earned from oil. [1349]

While revenue from oil has enabled Nigeria's rise as a major economic power in Africa, that rise has come at the expense of the environmental despoliation of the NDR with escalating distributional injustices. Several reports lay credence to the devastating impacts, which hydrocarbon activities have had on the NDR.[1350] These impacts cut across all aspects of the lives of the people of the Niger Delta. They relate to health,[1351]

[1347] Ako R.T., Environmental Justice in Developing Countries (note 1099) 23-40.

[1348] There are approximately 606 oil fields in the Niger Delta of which 360 are onshore and 246 are offshore. See E.O. Nwaichi and S.A Ntorgbo, 'Assessment of Polycyclic Aromatic Hydrocarbons (PAHs) Levels in some Fish and Seafood from Different Coastal Waters in the Niger Delta' (2016) 3 Toxicology Report, 167-172, 167

[1349] N. H Barma, *The Political Economy of Natural Resource-Led Development* (World Bank Publication 2012) 1 available on https://openknowledge.worldbank.org/bitstream/handle/10986/2381/659570PUB0EPI10737B0Rents0to0Riches.pdf?sequence, last accessed on the 23rd of March 2017.

[1350] See the Niger Delta Natural Resource Damage Assessment and Restoration Project, Federal Ministry of Environment Abuja, 31st May 2006; A. Maitland and M. Chapman, Oil Spills in the Niger Delta: Proposal for an Effective Non-Judicial Grievance Mechanism, a Report produced for Stakeholder Democracy Network (2014) 3, available on < http://www.stakeholderdemocracy.org/wp-content/uploads/2016/06/JULY-2014-OIL-SPILLS-IN-THE-NIGER-DELTA.pdf> last accessed 31/05/2018.

[1350] Stakeholders Democratic Network, Addressing the South South Environmental Emergency, The Vital Importance of Environmental Issues in Securing Stability and Prosperity in the Niger Delta (2015) 3, available on <http://www.stakeholderdemocracy.org/wp-content/uploads/2016/06/Addressing-the-South-Souths-Environmental-Emergency.pdf> (1/6/2018); see also the UNEP Report on Ogoniland 2011; these effects have been considered in the first part (introduction) of the third chapter of this thesis.

[1351] For example, 93 persons died from illnesses associated with shell's injection of one million litres of waste into an abandoned oil well that was later certified by two Nigerian Universities to be toxic.

food production,[1352] ground water contamination,[1353] resource depletion and migration and other socio-economic impact impacts like job losses just to mention but a few.[1354]

Planked principally on the inequitable distribution of environmental benefits and burdens and social justice, EJ scholarship in Nigeria has little or nothing to do with race but seats on a tripod of distributive justice, social justice and human rights targeted at achieving a broad range of objectives.[1355] EJ in Nigeria is more a subject predicated on the concept of 'recognition' where scholars make a case for a fair allocation of resources or ownership of a composite or identifiable interest in natural resources (environmental benefits) in view of the distributional injustices that hydrocarbon activities subject the people of the Niger Delta to.[1356]

See Sam Olukoya, Environmental Justice From the Niger Delta to the World Conference Against Racism' (2001); See also K.N Aroh and I.U Ubong et al, 'Oil Spill Incidents and Pipeline vandalization in Nigeria: Impact on Public Health and Negation to attainment of Millennium development Goal: the Ishiagu example (2010) 19 (1) Journal of Disaster prevention and Management, 70-87; Maximillian Feldner, "Representing the Neocolonial Destruction of the Niger Delta: Helon Habila's Oil on water (2011) 54 (4) Journal of Postcolonial Writing, 515-527; George J. Frynas, "Royal Dutch shell' (2003) 8 (2) Journal of new political economy, 275-285; Kenneth Omeje, "The Rentier state: Oil-related legislation and Conflict in the Niger Delta, Nigeria (2006) 6 (2) Conflict , Security and Development journal, 211-230.

[1352] For example, it has been observed that the Niger Delta has both the reputation of possessing more species of freshwater fish than any ecosystem in West Africa and the notoriety of abnormal levels of pollutants generated by a multiplicity of oil and gas related installations, including flow stations, oil well heads, loading terminals and tank farms. See O.O. Emoyan, A. I. Akpoborie and E.E. Akporhonor, 'Oil and Gas Industry and the Niger Delta: Implications for the Environment' (2008) 12 (3) Journal of Applied Science and Environmental management, 29-37 (This study observed that "oil exploration has in the last forty years impacted negatively on the socio-physical environment of the Niger Delta oil bearing communities, massively threatening the subsistent peasant economy, the environment and hence the entire livelihood and basic survival of the people"); See also Friends of the Earth International, 'Access to Environmental Justice in Nigeria: The Case for a Global Environmental Court of Justice' (2016) 3-4 (this report concludes that "environmental pollution has resulted in lowering farm yields and depleting fish catch which are the mainstay occupation of the people").

[1353] The UNEP Report on Ogoniland concludes that 'there are in a significant number of locations, serious threats to health from contaminated drinking water to concerns over the viability and productivity of ecosystems". See page 3 of Chapter two of this thesis.

[1354] See generally Kenneth Omeje, "Oil Conflict in Nigeria: Contending Issues and perspectives of the Local Niger Delta people (2005) 10 (3) Journal of New Political economy, 321-334;

[1355] Some of these objectives are 'the equitable distribution of environmental amenities, rectification and retribution of environmental abuses, the restoration of nature and the fair exchange of resources. See L. Obiora, 'Symbolic Episode in the Quest for Environmental Justice (1991) 21 (2) Human Rights Quarterly, 477

[1356] L. Obiora, 'Symbolic Episode in the Quest for Environmental Justice (1991) 21 (2) Human Rights Quarterly, 477 (According to Obiora, the structural focus of EJ in Nigeria could be seen, not simply as an attack against environmental discrimination but a movement to rein in the subject corporate and bureaucratic decision making, as well as relevant market processes to democratic scrutiny and accountability')

The EJ struggles of the Niger Delta people of Nigeria have been categorized into four phases with conflicting claims of origin.[1357] Although Major Isaac Adaka Boro alongside the renowned novelist Ken Saro Wiwa were the forerunners of the struggle for better environmental quality for the people of the Niger Delta, some reports trace environmental justice to the issuance of the Ogoni Bill of Rights in 1990.[1358] The subject of EJ in Nigeria has been at the forefront of social struggles and most often than not, violent conflicts.[1359]

A string of causes is implicated in the escalation of EJ crisis in Nigeria. Most scholars attribute environmental injustice to a trinity of stakeholders (government, oil companies and host communities).[1360] Amongst other causes are sporadic approach to repercussions and fragmentary approach emblematic in the lack of sustained commitment to engage with the root causes of conflicts fully and continually in the Niger Delta. [1361] Other causes include the lack of independent institutions, the lack of institutional coordination, Nigeria's overdependence on oil revenue, poor clean up and the deprivation of social essentials to the people of the Niger Delta.[1362] It has been observed that with this multiplicity of triggers escalating EJ crisis in Nigeria, laws and

[1357] These stages include the stage of legal actions by communities in the Niger Delta for adequate compensation, demonstration and shutting down of flow stations, invitation of security agencies to secure oil infrastructures, the confrontation by security agencies and militant attacks and kidnappings. See Lemmy Owugah, *"Local Resistance and the State"* (1999) Paper presented at Oil Watch African General Assembly, Port Harcourt (9–14 February 1999); see also Cyril I. Obi, 'globalization and the politics of Local Resistance: The Case of Ogoni versus Shell' (1997) 2 (1) Journal of New Political Economy, 137-148, 137 (Cyril noted that the politics of local resistance is a form of collective action directed at blocking further alienation, expropriation and environmental degradation).

[1358] S. Sobomate, *'Environmental Justice in Nigeria: Reflections on Shell-Ogoni Uprising: Twenty Years afterwards'* (June 2014) 14th EADI General Conference, 1;

[1359] On March 16 2003, Royal Dutch Shell, Nigeria's biggest oil producer, evacuated non-essential staff from its facilities in Warri District of Southern Nigeria owing to mouthing unrest by ethnic Ijaw militants that culminated in an attack on the Nigerian Navy. See Esther Cesart et.al, 'Alienation and militancy in Nigeria's Niger Delta' (May 2003) CSIS, African Notes, 1, available on < https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/media/csis/pubs/anotes_0305.pdf>; see also Daniel E. Abiboa, 'Have we Heard the Last? : Oil Environmental Insecurity and the impact of the Amnesty Programme on the Niger delta Resistance movement' (2013) 40 (137) Review of African Political Economy, 447-465; Cyril Obi, 'Oil Conflict in Nigeria's Niger Delta Region: Between the Barrel and the Trigger' (2014) 1 Extractive Industries and Society, 147-153

[1360] C. Ukeje, 'Oil Communities and Political Violence: The Case of Ethnic Ijaws in the Niger Delta Region' (2001) 13 Journal of Terrorism and political Violence, 15-36; see also Osahae E, 'The Ogoni Uprising: Oil Politics, Minority agitation and the Future of the Nigerian State' (1995) 94 Journal of African Affairs, pp 325-344

[1361] ; R.T. Ako and D.S. Olawuyi, 'Environmental Justice in Nigeria: Divergent Tales, Paradoxes and Future Prospects in (eds) 'The Routledge Handbook of Environmental Justice (Routledge Publishing 2018) 569.

[1362] Ibid.

institutions need to address social impacts[1363] of resource utilization on host communities especially poor and vulnerable groups.[1364]

4.5 AN ENVIRONMENTAL JUSTICE FRAMEWORK FOR THE APPLICATION OF THE PPP

A perfect point to examine an environmental justice framework for the PPP is to start with the observation of Ole W. Pedersen.[1365] The legal theorist opined that a comparison of the PPP like other environmental principles with EJ 'gives rise to conflicts as well as conformity.' Pedersen's observation is hinged both on the complexities and ambiguities that have come to be associated with EJ. As a concept with a plurality of meanings, EJ is accused of being nebulous, vague, and ambiguous, traits, which as he observed deprives the principle of value and conclusive meaning.[1366] Ole's qualification was an attempt at problematizing EJ, which in its conceptual plurality run the risk of conflict with other environmental principles. Whereas this possibility remains part of the modern weakness of EJ, it is noted that EJ remains the definitive objective and philosophy of every environmental principle and should offer a guide for their application. The application of the PPP under international, regional, and national laws should strive to attain EJ, not as a perfect principle but as one with a conceptual base that is still evolving.

Bearing the above in mind, this thesis makes the case that an effectual application of the PPP under national law must reflect some EJ qualities. First, it must possess a strong pollution prevention capacity. Second, it should have a strong rights component. Third, it should impose and redistribute environmental taxes proportionately. Fourth, it should have a potential for reparation of harm suffered

[1363] Social impacts of resource utilization on host communities manifest mainly in the form of food insecurity, contamination of community water sources, high levels of unemployment communal conflicts and economic losses. See Osamuyimen Egbon, Uwafiokun Idemudia and Kenneth Amaeshi, "Shell Nigeria's Global Memorandum of Understanding and Coroporate-Community Accountability Relations: a critical Appraisal" (2018) 31 Accounting, Auditing and Accountability Journal, 51-74.

[1364] Olawuyi D. "The Emergence of Right-based Approaches to Resource Governance in Africa: False Start or New Dawn?" (2015) Journal of sustainable Development Law and Policy, vol. 16, pp 15-28; See also Oluduro O. "Oil Exploitation and Human Rights Violations in Nigeria's Oil and Gas Industry

[1365] Ole W. Pedersen, 'Environmental Principles and Environmental Justice' (2010) Environment Law Review, 1

[1366] Ibid.

(corrective justice) and a pathway to hold the state responsible for its environmental obligations to its citizens. While these qualities are by no means exhaustive, they represent the minimum standard by which the application of the PPP can live up to its billings under national law because they offer a possibility for incremental progress in the application of the PPP. These qualities are explained below.

4.5.1 Pollution Prevention Capacity (PPC)

The first aspirational pursuit of a PPP regime that intends to promote EJ is to strive to improve overall environmental safety, an idea predicated on a regime having a robust PCC. The pursuit of this aspiration brings the PPP to a realization of the EJ objective of maintaining and preserving established distribution. For EJ, the pursuit of its plurality of objectives has one aim to ensure that the environment is safe from harm so as to continue to perform its vital services to the present and future generations.[1367] A justice system predicated on the environment strives to promote laws which as Mark Sagoff observed should 'insist on ample margins of safety.[1368] Ample margins of safety would refer to laws and regulation which have a formidable prospect of safety and less possibility to trigger environmental misbehaviour on the part of stakeholders. This idea of environmental safety is captured in the first people of colour summit where EJ was expressed as a principle targeted at arresting ecological destruction.[1369] For the PPP, this margin of safety is reached when all the social cost arising from pollution has been internalized. While this remains a tough call, the idea of internalizing environmental cost addresses the free rider problem, which leaves the environment in a vulnerable state. Clear instances of the triumph of law in this regard are demonstrated by the quality of obligations which law imposes on corporations and individuals not only as it concerns the maintenance of vital installations but also the adjustments of industrial processes to reduce pollution. Evidence of environmental standards, the pace of energy transition, the existence of incentives to aid pollution reduction and retribution in the case of compulsive polluters all reinforce a state's ability to attain a robust enough PPC.

[1367] Richard l. Revesz, 'Foundations of Environmental Law and Principles' (foundation Press 1997) 1-18

[1368] Ibid, 20-24

[1369] Principle 1 of that summit affirms environmental justice as the sacredness of mother earth, ecological unity and the independence of all species and the right to be free from ecological destruction.

4.5.2 An Effective Rights Component

Another quality, which a PPP regime should strive for in other to promote EJ at national level, is a strong rights component. A strong rights component will draw the PPP closer to the realization of EJ. The idea behind a substantive right to a healthy environment in addition to solving distributional challenges enabled by the free rider problem has been addressed as a veritable means of internalizing environmental cost.[1370] There are three justifications for this proposition. First, a strong rights component will ease the way for international human rights treaties to be superimposed on the application of the PPP especially in cases where they have been ratified under national law. Second, a strong rights component will help address distributional environmental impacts with very legible linkages to human rights violations.[1371] Distributional impacts directly constitute threats to lives, livelihoods, health and wellbeing. The third justification is that standing on a human right approach allows a framework to appeal to traditional human right norms and deploy the institutions and mechanisms developed to promote and enhance the application of the PPP in a way that is effectual. This allows for a broader possibility of attaining the aspirations of the PPP as a means to the ends of EJ. Evidence of a strong rights component includes but is not limited to the existence of an enforceable substantive right to a healthy environment with ecocentric[1372] focus, strong procedural rights to environmental information, public participation and access to justice. Strong rights component will also involve the lowering of standing barriers to allow NGOs and other constituency of litigants to ventilate environmental grievances.

[1370] See section 3.3.2.4. pages 121-128.

[1371] ibid.

[1372] A substantive right to a healthy environment with an ecocentric focus is more likely to promote the conservation of natural resources, an idea central to the PPP; See H. Kponina, H. Washington, P. Cryer et al., *'Why Ecocentrism is the Key Pathway to Sustainability'* (2017) 1 (1) The Ecological Citizen, 35-41; Rob White, 'Ecocentrism and Criminal Justice' (2018) 22 (3) 342-262 and H. Kponina, H. Washington, Joe Gray and Bron Taylor, 'The 'Future of Conservation' Debate: Defending Ecocentrism and the Nature Needs Movement' (2017) 217 Journal of Biological Conservation, 140-148.

4.5.3 Proportionate Imposition and Redistribution of Environmental Taxes

The proportionate imposition and redistribution of environmental taxes is another way through which a PPP regime at national level can be recalibrated to effectively promote EJ. To perform this responsibility, an environmental tax or a charge should be equal to the marginal damage which an individual or firm inflicts on others or the environment.[1373] It is only when it has this complexion that it can achieve the objectives of addressing externalities and reducing pollution. A disproportionate ET or charge promotes ineffectual distribution of environmental resources and widens externalities.[1374] It also provides little or no incentives for polluters to internalize environmental cost in a manner that preserves social justice and its accompanying order of distribution.[1375] However, the imposition of proportionate ETs generates welfare gains,[1376] promotes ecological sustainable development,[1377] energy stewardship, efficient resource use,[1378] eco-justice,[1379] concerns which are at the heart of EJ. At the level redistribution legislations and regulations creating ETs must reference the quantum of tax revenue to be committed to the task of redistributing environmental harm and funding environmental polices in local communities. Doing so would ensure that ETs revenues serve their purpose of addressing distributive impacts and ameliorating environmental externalities and reducing social conflicts.

[1373] See the discussion on charges and environmental taxes in Paras 2.9.2.1. of chapter 2 of this thesis, 85

[1374] Andrew Leicester, *"Environmental Taxes: Economic Principles and the UK Experience"* (2012) paper was presented at the workshop on energy and environmental taxation held at Deusto University, Bilbao, on 25th September 2012, 3

[1375] Andrew Leicester, *"Environmental Taxes: Economic Principles and the UK Experience,* 3 ("Environmental taxes can therefore be used to help people recognize the full social costs of their behaviour – to 'internalize the externality' – and thus reduce harmful activities to socially optimal levels, creating an overall welfare gain from taxation").

[1376] European Environment Agency, *Market-based Instruments for Environmental Policy in Europe* (2005) 84.

[1377] . A Lockhart, *'Environmental Taxation: A tool to Advance Eco-Justice'* in K. Deketelaere, J. Milne, L. Kreiser and H. Ashiabor (eds), *' Critical issues in Environmental Taxation: International and Comparative Perspectives',* Vol. IV, (Oxford University Press 2007) 491-508.

[1378] M. D'Ascenzo, *'Taxation and Environment: The Challenges for Tax Administration'* (the Australian Perspective), in H. Ashiabor, K. Deketelaere, L Kresiser and J. Milne (eds) *'Critical Issues in Environmental Taxation: International and Comparative Perspective',* Vol II (Oxford university Press 2005) 364.

[1379] . A Lockhart, 'Environmental Taxation: A tool to Advance Eco-Justice' in K. Deketelaere, J. Milne, L. Kreiser and H. Ashiabor (eds), ' Critical issues in Environmental Taxation: International and Comparative Perspectives', Vol. IV, (Oxford University Press 2007) 491-508.

4.5.4 Recognition of Corrective Justice

Another way that the application of the PPP at the level of national law can promote EJ is to recognize expressly or impliedly the thinking behind corrective justice. CJ plays a vital role in addressing distributional impacts as well as making the polluter pay. The very idea of DJ creates room for corrective justice. Although there is a clear distinction between CJ and DJ, where there is a private reset of the order of distribution through pollution, CJ is the means of re-establishing equilibrium between private persons. It ensures that the impacts, which emerge from a reset of the order of distribution, are addressed as between private individuals where there is a connection between the activity and the harm. The aim of CJ is to restore the parties as nearly as possible to the position they were before the injury was inflicted.[1380] A reset of the order of distribution creates inequalities, which as Rawls asserted must give rise to 'compensating benefits' for everyone affected and in particular the 'least advantaged members of the society'.[1381] The above reference to 'compensating benefits' for everyone is explainable upon no other hypothesis than the concept of corrective justice. In relation to the PPP, the idea of CJ is expressed in full measure in its curative function.[1382] It is demonstrated in the idea behind remediation and compensation obligations that reflects to the greatest extent possible a full or near full measure of the size of the externalities. Accordingly, people who suffer harm from the effects of gas flaring, oil spillage, oil infrastructure development, sabotage from third parties who overreach pipelines in their care, are entitled to be compensated. It also means that the cost of cleaning their contaminated land, air and sea must be borne by polluters. This approach well serves the ideals of justice for vulnerable local dwellers by preserving their means of sustenance in those cases where the likelihood of oil pollution is high.

[1380] E. Weinrib, *"Corrective Justice in a Nutshell",* 349-350

[1381] J. Rawls (note 1161).

[1382] See page 30 of chapter two of this thesis.

4.5.5 State Responsibility

Another quality, which a PPP regime should have at national level to be able to promote EJ, is a clear delineation of the responsibility of state in an environmental law context. Almost all international instruments recognizing the PPP delineate the responsibilities of states to bring the principle into municipal fulfilment. Achieving EJ requires the inputs of states to translate aspirations into concrete realities. In relation to EJ, the obligation of states is not only to design legally binding strategies for a fair allocation of environmental burdens and benefits but also to achieve greater depth in the just ordering of society.[1383] A just ordering of society not only reinforces the idea behind social justice; it clearly sets out a pathway for addressing distributive concerns by making clear what rights are available under the state's regulatory system.

The state discharges this obligation by creating Agencies that make decisions using statutory indices which address human health effects and promote EJ in the plurality of its forms. For example, in the US, the Executive Order 12989 provides as part of agency responsibilities that 'to the greatest extent practicable and permitted by law, each Federal Agency shall make achieving EJ part of its mission.'[1384] They are to do this 'by identifying and addressing as appropriate, disproportionate high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States'.[1385] The state also discharges this responsibility of just ordering by facilitating interagency working groups that provide guidance for identifying disproportionately high and adverse human health or environmental effects on low-income or vulnerable communities. These agencies collect and analyse data relevant to human health and environmental impacts, they measure subsistence in the consumption of fish and wildlife, facilitate public participation and access to information in environmental matters amongst a litany of objectives.[1386]

[1383] This responsibility under International law exist in the form of responsibility to protect the marine environment and take measures necessary to ensure that activities within a state's jurisdiction are conducted in a manner that does not cause harm to the environment of another state. See the discussion in paras. 2.4 of chapter 2 dealing with state responsibility.
[1384] EPA, Executive Order 12898 (note 1095) 59.
[1385] EPA, Executive Order 12898 (note 1095).
[1386] Ibid.

The most important responsibility of state in relation to the PPP at international level is to attenuate barriers to harmonisation so as to bring economic instruments close to full or near cost internalization. Other responsibilities of state include creating transitional trade-offs in the form of incentive that allows for a fair transition from polluting technologies to pollution abatement technologies and a fair allocation of redistributed revenue to communities that bear disproportionate environmental impacts.[1387] The state also maintains environmental institutions to check the activities of companies operating in the hydrocarbon sector in order to ensure that they are held to account when the breaches of obligations involving the PPP occurs. The state also brightens the routes to accountability through enforceable substantive rights and also creates clear pathways to decarbonisation so as to reduce externalities. A full breadth of these responsibilities will not only promote EJ in all its forms but ensure that where the state goes against its own rules, it can be challenged to ensure that it lives up to its expectation of promoting a brand of the PPP that does not jeopardize EJ.

4.6 CONCLUSION

This chapter traced the history of EJ from its emergence as preservationist and conservationist battles of the late 19th century to a modern conception with focus predicated on public health in response to the growth in the use of chemicals by American businesses. The chapter also notes that although EJ has acquired theorizations that has defined its plurality, there is no one-size-fits-all approach that applies to all environmental concerns. A distinction in approach exists between how EJ issues are conceptualized in developed and developing countries.

This chapter also captures in great detail, the theoretical underpinnings of EJ and emerging trends of analysis. With a principal focus on DJ, social justice, procedural justice, corrective justice and other emerging ideas of EJ like public choice analysis of EJ and food justice, the chapter while noting the many paradigms of DJ, also notes that a recurrent problem associated with DJ is the inability of existing scholarship to define and particularize the scope and criterion of schemes of distribution. While

[1387] For a comprehensive consideration of these responsibilities see page 23-25 of chapter 2 of this thesis.

scholars are quick to offer prescriptions premised on liberalism, utilitarianism, just dessert, common good, cosmopolitanism, nationalism and realism, such prescriptions are inundated with defects which set them at odds with the central idea of EJ. The revelation that the oil industry generates distributional impacts touching on health and food security, suggests that more than ever, EJ justice demands further interrogation and attention. Although social justice offers a route to balancing distributional impacts arising from oil exploration and consolidating a sense of recognition for local communities, its effectiveness is downplayed by such factors as corruption and conflicts arising from national development plans and economic prosperity. Emerging conceptions of justice expand the plurality of the concept of EJ. While the notion of food justice helps local communities to determine their agricultural policies, protect their land and promote sustainable development, the rational choice theory helps rationalize public decision making in an environmental law context. However, both have their drawbacks. Just as food justice has the implications of escalating the gulf between the North and the South, RCT can provide a plank for rationalizing poor environmental decisions given the fact that it has lean practicality.

The chapter also considers the concept of EJ as applied in Nigeria. While the Nigerian brand of EJ has little or nothing to do with race, it leans more in favour of the social recognition paradigm. EJ in Nigeria sits on a tripod of DJ, social justice and human rights targeted at a broad range of objectives. Whether these objectives have been achieved is another question which may not be affirmatively answered with optimism. The Niger Delta Region of Nigeria remains one of the most polluted sites in the world and poverty amongst its people is presently at its peak. What cannot be denied is that there are links between the poverty in the Niger Delta and activities incidental to hydrocarbon exploitation. This chapter also noted that while existing legal framework for dealing with distributional issues in Nigeria are legion, the instruments consolidate environmental injustice through poor regulatory posturing, minimal access to justice amongst a host of other defects.

The chapter also explores an environmental justice framework for the application of the PPP. While noting the traits which are capable of winning EJ the unenviable reputation of been an ambiguous and inconclusive concept, the chapter notes with clarity that EJ should provide philosophical guidance on how the PPP should be

applied effectively under national law. To be effective, a PPP regime under national law should have a strong PPC, a strong rights component, distribute environmental taxes effectively and accommodate responsibilities that makes a state responsive to its responsibility under international law. While these frameworks sustain a broad approach to dealing with pollution and its consequences, the plurality of EJ makes it a worthy philosophical principle to guide the application of the PPP under national law. However, while an EJ framework for the PPP holds the promise for an effectual application of the PPP under national law, it is a different issue all together whether the application of the PPP especially in developing countries like Nigeria, mirrors the reality. To reflect the ideals of EJ the legal atmosphere must be receptive of the thinking behind EJ. The extent to which Nigerian law reflects this concern is considered in the next chapter.

CHAPTER FIVE

DOES THE APPLICATION OF THE POLLUTER PAYS PRINCIPLE IN NIGERIA'S OIL AND GAS INDUSTRY PROMOTE ENVIRONMENTAL JUSTICE?

5.1 INTRODUCTION

With the aid of the EJ framework for the application of the PPP developed in chapter four of this thesis, this chapter considers the extent to which the application of the PPP in Nigeria's oil and gas industry promotes environmental justice. The chapter notes that although Nigeria petroleum laws have enormous potential to internalize environmental cost in a manner that promotes EJ, such potential does not translate in reality to promoting EJ effectively. This chapter argues that Nigerian petroleum laws do not enjoy a sufficient margin of safety that strengthen the potentials for pollution reduction. This situation escalates existing problems of poor natural resource conservation, poor water quality, food insecurity, inequality and public health which forestalls the realization of EJ in Nigeria's hydrocarbon industry. This chapter also argues that although Nigerian law possess many channels for redressing of environmental grievances, the rights component under Nigerian law are sub-optimal and falls short of the standard required to effectively promote EJ. The chapter notes that the design of environmental taxes applicable in Nigeria's oil industry inspires little hope for EJ. This chapter argues further that the restorative ability of Nigerian law needs to be strengthened to be able to serve the purpose of re-establishing the order of distribution of the right to use the environment as a communal amenity especially between private persons effectively bringing the PPP close to the parameters of EJ. Finally, the chapter makes the case that to achieve proximity between the application of the PPP under Nigerian law and EJ, there is need for the state to be responsive to its governance responsibilities in an environmental law context. The ramifications of these responsibilities would entail the transposition of parameters of international responsibility and best practices from other jurisdictions into domestic law, the planning and execution of environmental policies and the proper funding of proactive regulatory agencies that can stand the wave of regulatory capture.

The final part of this chapter concludes that although the history of environmental regulation reveals an incremental bulge in environmental regulation relative to the conceptual periods of oil exploration, the reality on the ground demonstrates that Nigeria's brand of the PPP does not effectively promote environmental justice even when it has great potentials to do so.

The first part of this chapter considers the pollution prevention capacity of Nigerian law. The second and the third part of this chapter considers the effectiveness of the rights component of Nigerian law and whether the redistribution of environmental taxes promotes EJ respectively. The last part of this chapter considers the effectiveness of the Nigeria's CJ framework and how well the state has lived up to its responsibility in the context of international environmental law and how they aid the realization of EJ.

5.2 THE POLLUTION PREVENTION CAPACITY OF NIGERIAN PETROLEUM LAWS

As we noted in chapter 4 of this thesis, one of the conditions that a legal system need to possess to ensure that the application of the PPP within that legal system is pollution prevention capacity (PPC).[1388] To possess PPC, the legal system must have a formidable margin of safety. A legal system is said to have a sufficient margins of safety if its implementation can achieve a wide range of substantive environmental objectives principally related to sustainability.[1389] According to OECD Key Environmental Indicators[1390] some of these objectives are ambient air quality, water quality, reduced emission levels across all productive sectors of the oil industry and safe climate, improved biological diversity and conservation of natural resources.

[1388] Richard Revesz, 'Foundations of Environmental Law and Principles' (note 1342) 1-18

[1389] Bartosz Baririzak and Andrzej Raszkkowski "Sustainable Development in African Countries: An Indicator-Based Approach and Recommendations for the Future" (2019) 11 (22), Journal of Sustainability, 2-23

[1390] OECD, Environmental Indicators 2008 updated in a later document OECD, Environment at a Glance 2020, available on < https://www.oecd-ilibrary.org/docserver/4ea7d35f-en.pdf?expires=1626742444&id=id&accname=guest&checksum=7F46666AAB3E7F8C6B388830AFAAFD41> last accessed 20/07/2021.

Other African based indicators[1391] maintain that to achieve PPC, a legal system should strive to reduce inequality in all its dimensions, make cities sustainable and ensure sustainable consumption.[1392] In modern time, this margin of safety has come to be associated with the design of environmental taxes to drive innovation in pollution abatement technology and sustainability.[1393] These objectives are critical to the achievement of the principal aim of the PPP which is to prevent pollution and conserve natural resources. Accordingly, where the application of the PPP within a system cannot help drive these objectives, the legal system would be said to have a poor margin of safety and cannot be said to have PPC which in turn can drive the application of the PPP to the fulfilment of EJ. The idea behind the margin of safety cuts across the entire spectrum of environmental scholarship touching such subjects as resource governance, governance of environmental institutions, legislative processes and other considerations all of which play a role in the internalization of environmental externalities in local communities.[1394] Some international documents contain indicators of what should form a formidable margin of safety should possess in an environmental law context. Some notable examples are:

- The Revised list of UN sustainable Development Indicators[1395] and the 2020 Sustainable Development Report.[1396]
- Environmental Performance Indicator (EPI).[1397]

[1391] African Union (AU) Agenda 2063, the Africa we want: First Ten Year Implementation Plan (2013-2023), Core Indicator Profile Handbook for Member States (March 2017), 78.; See also Africa Sustainable Development Report 2017.

[1392] Bartosz, (note 1389) 2.

[1393] Armando Di Nardo, Enrico Creaco, Vasiliki Manakuo et.al, 'Innovative Approach and Design for Environmental Protection Arising from Threats' (2021) 28 Environmental Science Research and Pollution, 33806-33808.

[1394] Richard Revesz (note 1342) 20.

[1395] UN, Revised list of UN sustainable Development Indicators 2017 developed by the Interagency and Expert Group on Sustainable Development at the 48th session of the United Nation's Statistical Commission held in March 2017, available on < https://unstats.un.org/sdgs/indicators/official%20revised%20list%20of%20global%20sdg%20indicators.pdf> last accessed 20/07/2021.

[1396] UN, Sustainable Development Goals Report 2020, available on < https://unstats.un.org/sdgs/report/2020/The-Sustainable-Development-Goals-Report-2020.pdf> last accessed 20/07/2021.

[1397] Environmental Performance Indicator 2020, available on https://epi.yale.edu/about-epi , last accessed on the 24th of July, 2021. ("The 2020 Environmental Performance Index (EPI) provides a data-driven summary of the state of sustainability around the world. Using 32 performance indicators across 11 issue categories, the EPI ranks 180 countries on environmental health and ecosystem vitality. These indicators provide a gauge at a national scale of how close countries are to established environmental policy targets. The EPI offers a scorecard that highlights leaders and laggards in environmental performance and provides practical guidance for countries that aspire to move toward a sustainable future.").

- OECD Environmental Indicators 2020.[1398]
- The International Atomic Energy Agency Indicators for Sustainable Energy Development.[1399]
- The UN Biodiversity Indicators for Extractive Companies.[1400]
- IUCN Guidelines for Planning and Monitoring Corporate Biodiversity.[1401]
- IUCN Environmental Guidance Note for Disaster Risk Reduction.[1402]
- World Economic Forum Global Risk Report.[1403]
- International Renewable Energy Agency's World Energy Transition Outlook.[1404]
- UNEP- WCMC's Protected Planet indicators[1405] and
- UNEP Good Practice Guide on the Rights to a Healthy Environment.[1406]

However, despite the extensive indicators relevant to the margin of safety, under this heading, the thesis explores only those qualities under Nigerian law which portray petroleum legislation as falling below this safety margin, affecting their ability to promote EJ effectively. While discussions on environmental human rights, corrective justice, redistributive justice and state responsibilities might be relevant to this margin of safety, they are considered in separate headings giving that they are independent

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1398 OECD, Environment at a Glance-Environmental Indicators (note 3)

1399 IAEA, Indicators for Sustainable Energy Development

1400 UN-WCMC, Biodiversity Indicators for Extractive Companies: An Assessment of Needs, Current Practice and Potential Indicator Models 2017, available on < https://www.unep-wcmc.org/system/dataset_file_fields/files/000/000/487/original/Biodiversity_Indicators_for_Extractive_Companies_FINAL.pdf?1516357616> last accessed 20/07/2021.

1401 IUCN, Guidelines for Planning and Monitoring Biodiversity, September 2021, available on < https://portals.iucn.org/library/sites/library/files/documents/2021-009-En.pdf> last accessed 20/07/2021.

1402 IUCN, Environmental Guidance Note for Disaster Risk Reduction 2013, available on < https://www.iucn.org/sites/dev/files/content/documents/2013_iucn_bookv2.pdf> last accessed on the 20/07/2021.

1403 World Economic Forum, Global Risk Report 2021, available on < http://www3.weforum.org/docs/WEF_The_Global_Risks_Report_2021.pdf> last accessed on the 20/07/2021.

1404 World Economic Forum, Energy Transition Outlook: 1.5. C Pathway 2021, available on < file:///C:/Users/Charles/Downloads/IRENA_World_Energy_Transitions_Outlook_2021.pdf> last accessed on the 20/07/2021.

1405 UNEP- WCMC Protected Planet Indicators, available on < https://livereport.protectedplanet.net/> last accessed on the 20/07/2021

1406 UNEP, ' The Right to a Healthy Environment: Good Practices: Report of the Special Rapporteur on the issue of Human Rights Obligations Relating to the enjoyment of a safe, Clean, healthy and Sustainable Development 2020, available on < https://www.unep.org/resources/toolkits-manuals-and-guides/right-healthy-environment-good-practices> last accessed on the 20/07/2021.

strands of the EJ framework for the application of the PPP. Discussions under this part shall focus on how petroleum law help achieve ambient air quality, water quality and a safe climate in Nigeria. The next part of this section now considers how Nigerian petroleum law meets these objectives.

5.2.1 Ambient Air Quality, Safe Climate & Reduced Emission Across All Productive Sectors of the Oil Industry

Globally, air pollution accounts for about seven million premature deaths annually, including 600,000 children under the age of five.[1407] Nine out of ten persons live in areas that do not meet the standards and Guidelines of World Health Organization for air quality.[1408] Data from world Bank indicates that 94% of the population of Nigeria are exposed to air pollution levels (measured in PM 2.5) that exceeds WHO Guidelines (compared to 72% on average in sub-Saharan Africa).[1409] The sources, impacts and cost of air pollution in the hydrocarbon industry are well articulated in scholarly works.[1410] Many stationary sources of air pollution emission discharge contaminants into the atmosphere as particulate matter aerosols, vapors or gases.[1411] Known specific sources of these emissions are particulate matter from combustion sources such as motor vehicles, power plants in hydrocarbon platforms offshore, gases such as ammonium from fertilizers in Petro-chemical plants and refineries, and concentration

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[1407] UNEP, 'The Right to a Healthy Environment: Good Practices (note 16); See also World Health Organization "Air Pollution", available on < https://www.who.int/health-topics/air-pollution#tab=tab_1> last accessed on the 20/07/2021.

[1408] Ibid.

[1409] World Bank, "A Plea for Action Against Air Pollution in Nigeria" (2015), available on < https://www.worldbank.org/en/news/feature/2015/06/16/in-lagos-nigeria-a-plea-for-action-against-pollution> last accessed on the 20/007/2021; See also World Bank, "The Little Green Data Book" (2015) 159, available on < https://openknowledge.worldbank.org/bitstream/handle/10986/22025/9781464805608.pdf?sequence=5&isAllowed=y> last accessed on the 21/07/21.

[1410] Bamidele Sunday Fakinle, Abiodun Paul Olalekan, Ebenezer Leke Odekunle et al., "Assessment of the Contribution of Hazardous Air Pollutants from Nigeria's Petroleum Refineries to Ambient Air Quality, Part 1" (2021) 8 (1) Journal of Cogent Engineering, 1-15, 1.; World Bank, "The Cost of Air Pollution: Strengthening the Economic Case for Action" (2016) 1-47, available on https://documents.worldbank.org/en/publication/documents-reports/documentdetail/781521473177013155/the-cost-of-air-pollution-strengthening-the-economic-case-for-action , last accessed on the 21/07/2021; C.B Obida, George A. Blackburn, James D. Wyatt and K.T. Semple, "Counting the Cost of the Niger Delta's Largest Oil Spills: Satellite Remote Sensing Reveals Extensive Environmental Damage with> 1 Million people in the Impact Zone" (2021) 775, Journal of Science of Total Environment, 1-11;

[1411] Nicholas P. Chemermisnoff, "Pollution Control Handbook for Oil and Gas Engineering (Scivener Publishing 2016) 109

of natural wind-blown dust.[1412] Other sources are flared associated gas[1413] and gas and chemical released from artisanal refining. These sources of emission discharges affect ambient air quality and escalates climate change in Nigeria.

Poor air quality and exposure of the climate to greenhouse gases impacts public health where the pollution concentration is high.[1414]The health effects of poor air quality include but are not limited to cardiac arrests, respiratory diseases, bronchitis and pneumonia.[1415] Also toxic chemicals from pollutants can interfere with normal body functions, resulting in headaches, nausea, organ damage, birth defects, breath disorders and death.[1416] Historically, climate change has been known to affect human health. For example, extreme hot weather causes hyperthemia, draught causes famine and injuries, displacement and death result from flood, hurricanes, tornadoes and fire.[1417] These are distributive consequences and externalities that should be accounted for the application of the PPP.

It is accepted as good practice that to protect clean air and enable a safe climate, states must take a medley of actions. States are expected to monitor air quality and its impacts on human health, assess sources of air pollution, make information publicly available including public health advisories and establish quality

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[1412] Zhongchao Tan "Air Pollution and Greenhouse Gases: From Basic Concepts to Engineering Applications for Air Emission Control" (Springer 2014) 1-6; See also Daniel Vallero "Fundamentals of Air Pollution" (4th Ed., Elsevier 2008) 1-51.

[1413] Solomon O. Giwa, Collins Nwaokocha, Sidikat, Kinye and Kayode O. Adama, "Gas Flaring, Attendant Impacts of Criterial and Particulate Pollutants: A Case of Niger Delta Region of Nigeria (2019) 31 Journal of King Saud University, 209-217; Segun G. Fawole, X. M. Cai, A.R. Mackenzie "Gas Flaring and Resultant Air Pollution: A Review Focusing on Black Carbon" (2016) 216 Journal of Environmental Pollution, 182-197; M. Davoudi, M.R. Rahimpor, S.M Jokar, F. Nikbaht and H. Abbasford, "The Major Sources of Gas Flaring and Contamination in Natural Gas Processing Plants: A Case study" (2013) 13 Journal of Natural Sciences and Engineering, 1-19; See also Damilola S. Olawuyi and Zibima Tubodenyefa, " Reviews of the Environmental Guidance and Standards for the Petroleum Industry in Nigeria (EGASPIN), November 2018, 3, available on < https://www.iucn.org/sites/dev/files/content/documents/2019/review_of_the_environmental_guidelines_and_standards_for_the_petroleum_industry_in_nigeria.pdf> last accessed on the

[1414] Zhongchao Tan "Air Pollution and Greenhouse Gases, 109

[1415] Zhongchao Tan, 109.

[1416] Zhongchao Tan, 109.

[1417] Howard Frunkin, Jeremy Hess, George Luber et al, "Climate Change: The Public Health Response" (2008) 98 (3) American Journal of Public Health, 435-445; See also Jason Gomez, Anna Goshua, Nicholas Pokrajac et.al, "Teaching Medical Students the impact of climate Change on Human Health (2021) 3 Journal of Climate Change and Health, 1-5 and B.S Levy and J.A. Patz, "The Impact of Climate Change on Public Health", in Dominick A. Dellasala and Michael I. Goldstein 'Encyclopedia of the Anthropocene' (Elsevier 2018) 435-439.

legislations, regulations and policies.[1418] States are also expected to develop air quality action plans at national, regional and local levels, implement air quality action plans, evaluate progress and strengthen plans to ensure that standards are met.[1419] In relation to climate change, the enactment of framework climate legislations and policies with bold targets, timelines and accountability mechanism and long term plans for achieving emission reduction are considered as good practice examples.[1420]

While Nigeria has taken some steps towards enacting laws, regulations and policies necessary to control air quality and climate change especially from the oil industry,[1421] it is doubtful whether such laws have improved ambient air quality and climate safety especially those emanating from the hydrocarbon industry. The main regulations relevant to air quality in the hydrocarbon industry are the National Guidelines and Standards for Environmental Pollution Control in Nigeria 2013,[1422] and the National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Waste) Regulation 1991. Others are the National Environmental (Ozone Layer Protection) Regulation 2009, National Environmental (Noise Standards and Control) Regulations 2009 and the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria 2002.[1423] While most of these laws are also relevant to climate safety, the main laws and policy relevant to climate change in Nigeria's hydrocarbon industry are the Flare Gas (Prevention of waste and Pollution) Regulations 2018, the National Gas Policy 2017, National Renewable

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[1418] UNEP, 'The Right to a Healthy Environment: Good Practices (note 16).

[1419] ibid.

[1420] Ibid, 25

[1421] UNEP, "Nigerian Air Quality Policies" (2015) 1-4 available on https://wedocs.unep.org/bitstream/handle/20.500.11822/17073/Nigeria.pdf?sequence=1&isAllowed=y last accessed on the 21/07/2021; See also Ejide Sodipo, Onome Omofuma and Vivian C. Nwachi "Environmental Law and Practice in Nigeria: Overview (2017) Thomson Reuters Practical Law, available on < https://uk.practicallaw.thomsonreuters.com/w-006-3572?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a384775> last accessed on 22/07/2021.

[1422] 1 DPR, Environmental Guidelines and Standards for the Petroleum Industry in Nigeria 1991 (Revised Edition, 2002), available on < https://www.dpr.gov.ng/egaspin/> accessed 21/07/2021

[1423] See Paras 4.4.5.; The EGASPIN as provides extensively for operators to limit gas flaring (Sections 3.8.8.1), estimate and register potential emission points (Sections 4.4), control hydrocarbon emissions from vessels and cargoes with vapour recovering systems (Part VI), patrol pipelines once a month or as approved by the director of petroleum resources (section 3.2.1) and apply best available technology for new sources of emission for which permit has not been issued from point sources (Part IX).

Energy and Energy Efficiency Policy (NREEP), the National Policy on Climate Change, Nigerian Vision 2020 and Nigeria Biofuel Policy and Incentives.[1424]

Despite the existence of these legislations and regulations and their extensive provisions, air quality and climate safety in Nigeria remains poor on account of several reasons. First, most of the laws and policies are prescriptive, providing methods for limiting air quality and adapting to climate change. The prescriptive nature of Nigeria's policy on air quality and climate safety leaves little room for innovation in the management and regulation of ambient air quality and climate regulation and strengthens the challenges of deploying existing pollution abatement technologies.[1425] This consolidates 'compliance mentality' leaving little or no room for industrial initiative targeted at driving down emissions at all levels in the hydrocarbon industry.

Second, Nigeria grapples with the age long problem of gas flaring which accounts for a substantial release of greenhouse gases into the atmosphere affecting ambient air quality and escalating climate change. Several reports [1426]have attested to the impact of gas flaring on air quality and human health. One report concludes that gas flaring is the major contributor to air pollution across the Niger Delta with atmospheric concentrations exceeding WHO limits and exposing about 20 million inhabitants to potential harm.[1427] However, Nigeria has made remarkable progress in the reduction of gas flaring. According to the Global Gas Flaring Report 2021,[1428] Nigeria in the last 15 years has reduced its gas flaring by 70 percent. While this demonstrates progress and improvement in safety margins, Nigeria still ranks as the

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[1424] LSE Grantham Research Institute on Climate Change, 'Laws of the World: Nigeria, available on < https://climate-laws.org/legislation_and_policies?from_geography_page=Nigeria&geography%5B%5D=130&type%5B%5D=executive> last accessed on the

[1425] R. Baldwin (note 333) 107-108.

[1426] UNEP Report on Ogoniland 2011; SDN, Nigeria Oil Industry Environmental Performance Index (2008), available on < Report: 2018 Nigerian oil industry environmental performance index | SDN (stakeholderdemocracy.org)> accessed on the 9th of October 2021.

[1427] Obinna C.D. Anejionu, J. Duncan Whyatt, G. Alan Blackburn and Catheryn S. Price, "Contributions of Gas Flaring to Global Air Pollution Hotspot: Spatial and Temporal Variations, Impacts and Alleviation" (2015) 118, Journal of Atmospheric Environment,

[1428] World Bank, 'Global Gas Flaring Tracker Report April 28th, 2021, available on https://www.worldbank.org/en/topic/extractiveindustries/publication/global-gas-flaring-tracker-report last accessed on the 20/07/2021, (The Report records with respect to Nigeria that "flaring declined from over 25 bcm in 2000 to close to 7 bcm in 2020").

seventh flare jurisdiction in the world and together with Russia, Iran, the United States, Algeria and Venezuela account for roughly 65% of global gas flaring.[1429]

Third, although Nigeria has created air quality and climate standards and targets for the hydrocarbon industry, enforcing those standards have been an uphill task given the fluidity of the EGASPIN and its legal status and interpretation.[1430] While the EGASPIN provides guidelines that are consistent with international standards, its implementation and interpretation has remained problematic. For example, Part III (production) of the EGASPIN, prohibits gas flaring but provides that if a permission is given for flaring, operators must secure a permit to flare gas and pay the necessary fine for every standard cubic meter flared.[1431] There is also a requirement that operators must pre-treat gas; create a setback of 60 m radius for the flare; ensure complete combustion; close system valves when flare is in use (to prevent venting); and ensure that leakages are minimized.[1432] However, the EGASPIN creates a enormous level of discretion to the DPR to intervene and permit discharges even when limitation standards are exceeded. The phrase “unless otherwise permitted by the director of petroleum resources” appears in a number of key sections of the EGASPIN.[1433] The same expression is found in the Associated Gas Re-injection Act and the regulation made pursuant to it.[1434] While this in itself is not a conclusive threat to environmental margin of safety, it raises significant questions on how such approvals are granted by the DPR and provides a leeway for gas flaring and emission discharge thresholds to be justifiable defied. This outcome does not ensure that gas flaring and other discharges that affect air quality and climate safety in the hydrocarbon industry are arrested.

Fourth, many global indexes on air quality and Climate change rank Nigeria high in toxic air concentration and climate change adaptability. In relation to air quality some indexes rank the concentration of particulate matters and other pollutants in Nigeria’s

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[1429] World Bank, ‘Global Gas Flaring Tracker Report 2021, 5.

[1430] Damilola S. Olawuyi and Zibima Tubodenyefa, “Reviews of the Environmental Guidance and Standards for the Petroleum Industry in Nigeria (EGASPIN) (note 1413) 2.

[1431] Section 3.8.8.1.

[1432] Ibid.

[1433] Damilola S. Olawuyi and Zibima Tubodenyefa (note 23) 3

[1434] Flare Gas (Prevention of Waste and Pollution) Regulation 2018, Reg. 8.

air as falling below the WHO air quality standards. Both the World Bank[1435] and the Environmental Performance Index (EPI)[1436] rank Nigeria high in both particulate matter exposure and ozone exposure. In terms of climate change, the EPI scores Nigeria 50.8 with a carbon growth rate of +36.1% and a greenhouse gas emission of +5.3% leaving the country trailing at 151 on the log of countries using the indicators of the index.[1437] This demonstrates that while Nigeria has made some progress in trying to regulate ambient air quality and climate safety, such progress has not significantly improved ambient air quality and climate safety. Nigeria's poor air quality standards accounts for these rankings especially as it does not enhance the internalization of the cost associated with this externality.

Fifth, another challenge is that proving the effects of poor air quality and climate change on human health requires the evidence of experts and other relevant professionals to tie a potential damage to the poor quality of air. This makes it difficult for the cost of this externality to be recovered or dissuade industrial activities which promote poor air quality. Those who suffer the most from poor air quality and exposure to climate change do not have the means to afford expert witnesses needed to discharge the burden of proving such environmental harm on the preponderance of evidence in an adversarial system like Nigeria where the exchange of pleadings is fundamental to the success of litigation.[1438] These community of factors robs the air quality standard of Nigeria's hydrocarbon industry the PPC needed to enhance EJ.

5.2.2 Water Quality and Biodiversity.

Oil and gas activities in the Niger Delta region of Nigeria exert a significant cost on water quality and biodiversity.[1439] Hydrocarbons can cause both physical and

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[1435] World Bank, "The Little Green Data Book

[1436] Environmental Performance Index (EPI): Country Profile, Nigeria 2020, available on < https://epi.yale.edu/sites/default/files/files/NGA_EPI2020_CP.pdf> last accessed on the 22/07/2021.

[1437] ibid.

[1438] *Charles Owologbo Ugbor* v. *Florence Mamunomu Ugbotor* [2006] 3 PLR, 31 and *Chief D.B. Ajibulu* v. *Major General D.O. Ajayi* [2013] 3 PLR, 33.

[1439] Biodiversity is defined in Article 2 of the Biodiversity Convention as "the variability among living organisms from all sources including *inter alia* terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part', and this 'includes diversity within the species, between species and of ecosystems". See also Kaniye S.A. Ebeku, *"Biodiversity Conservation in Nigeria: An*

chemical effects on water rendering water unfit for human consumption and affecting aquatic life support systems.[1440] The UNEP Report on Ogoniland and a plethora of other reports capture with sufficient clarity the impact of oil and gas activities on both water quality and biodiversity in the Niger Delta.[1441] It is accepted as a good practice guide for states to articulate the right to water through laws, regulations, and policies regulating availability, physical accessibility, affordability, quality and safety, acceptability and eliminating discrimination.[1442] In relation to biodiversity, it is good practice for nations to set targets with respect to protected areas, incorporate duties related to wildlife and nature protection and regulate activities that could harm or lead to the over-exploitation or destruction of other species such as fishing, hunting, mining agriculture and forestry.[1443] At a general level, Nigerian law meets these expectations because there is evidence of waters quality and biodiversity standards, targets and laws.[1444]

While there are laws in Nigeria which address specifics of this good practice with respect to water quality and biodiversity it is doubtful whether they meet the standard necessary to guarantee water quality and biodiversity at the level needed to promote environmental justice. The quality control and required standards of surface waters and groundwater are governed by the National Environmental (Surface and

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Appraisal of the Legal Regime in Relation to the Niger Delta Area of the Country" (2004) 16 (3) Oxford Journal of Environmental Law, 361-375, 361.

1440 UNEP Report on Ogoniland 2011, 38

1441 UNEP Report on Ogoniland 2011, 38; See also SDN, Nigeria Oil Industry Environmental Performance Index (2018), available at < EPI-Report-01.07.20-DT-DIGITAL.pdf (stakeholderdemocracy.org)> accessed on the 14/10/2021; Julia Pitkin, 'Oil, Oil, Everywhere: Environmental and Human Impacts of Oil Extraction in the Niger Delta' (2013) Thesis paper 88, 38-39 and Collins N.C. Ugochukwu and Jurgen Ertel, 'Negative Impacts of Oil Exploration on Biodiversity Management in the Niger Delta Area of Nigeria' (2012) 26 (2) Journal of Impact Assessment and Project Appraisal, 139-147.

1442 UNEP, 'The Right to a Healthy Environment: Good Practices (note 16) 34-38

1443 UNEP, 'The Right to a Healthy Environment: Good Practices (note 16) 41-45

1444 Ejide Sodipo, Onome I. Omofuma and Vivian C Nwachi, "Environmental Law and Practice in Nigeria: overview (Thompson Reuters, 2017) 5-7, available on < https://uk.practicallaw.thomsonreuters.com/w-006-3572?transitionType=Default&contextData=(sc.Default)&firstPage=true> last accessed on 20/07/2021; For an detailed exposition on biodiversity laws in Nigeria see Olubisi F. Oludoro and Gideon N. Gasu, *"A Critical Appraisal of the Legal Regime for Biodiversity Conservation in Nigeria"* (2012) 8 (4) Journal of Canadian Social Science, 249-257; Kaniye S.A. Ebeku, *"Biodiversity Conservation in Nigeria* (note 44) 365-374; For a historical analysis of biodiversity regulation in Nigeria see M.T. Okorodudu-Fubara, *'Law of Environmental Protection: Materials and Text'* (Ibadan, 1998) 331; See also S.R. Harrop, '*Conservation Regulation: A Backward Step for Biodiversity?'*(1999) 8 Journal of Biodiversity and Conservation 1999) 679-707 for a more penetrating analysis of biodiversity during the colonial era.

Groundwater Quality Control) Regulations, 2011.[1445] The Regulation has as its purpose the restoration, enhancement and preservation of the physical, chemical and biological integrity of the nation's surface waters and to maintain existing water uses.[1446] The regulation also provides for standards aimed at the protection of surface water from pollutants so that the waters shall be protected, use, developed , conserved, managed and controlled in ways which recognizes the rights of citizens to clean water and sanitation.[1447] It also protects the water environment for sustainability of resources and the protection of aquatic ecosystem and reduce and prevent pollution of surface water resource.[1448] The Regulation also expressly recognizes the PPP.[1449] There are other regulations which make provisions against water pollution and biodiversity destruction in Nigeria.[1450] The DPR issues mandatory permits to operators for storage, treatment and transportation of harmful toxic waste, effluents with constituents beyond permissible limits discharged into public drains, rivers, lakes, sea, or an underground injection.[1451] A permit is also required for facility with a new point source of pollution or new process line with a new point source and for all aspects of oil-related effluent discharges from point sources (gaseous, liquid and solid) and oil-related project development.[1452]

Despite the existence of laws designating water quality standards and conservation of biodiversity, water quality and biodiversity in Nigeria are poor and fall below pollution prevention and conservation margins.[1453] The main reason for the poor

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[1445] This Regulation is made pursuant to Section 34 of the National Standards and Regulations Enforcement Agency (Establishment) Act 2007.

[1446] Reg. 1

[1447] Reg. 1 (a)

[1448] Reg. 1 (b) and (c).

[1449] Reg. 1 (c).

[1450] Some of the regulations are The National Guidelines and Standards for Water Quality in Nigeria; Nigerian Industrial Standards for Portable Water and Mineral Water; National Water Resources Institute Act 1985 and the River Basin Development Authorities Act;

[1451] Ejide Sodipo, Onome I. Omofuma and Vivian C Nwachi, "Environmental Law and Practice in Nigeria: overview (Thompson Reuters, 2017) 5-7, available on < https://uk.practicallaw.thomsonreuters.com/w-006-3572?transitionType=Default&contextData=(sc.Default)&firstPage=true> last accessed on 20/07/2021.

[1452] Section 8 (1) (a) and 9 (1) (a) and (h) of the petroleum (Drilling and Production) Amendment Regulations 1988.

[1453] UNEP Report on Ogoniland 2011, 9-10.

regulation of oil spill, a known threat to improved water quality and biodiversity.[1454] One study estimates that in the last 50 years of oil exploitation in the Niger Delta, a total of 1.5 million tons of crude oil has been spilled in the Niger Delta ecosystem.[1455] A recent report asserts that *'oil exploration has resulted in the estimated spillage of 13 million barrels of crude oil in the Niger Delta since 1958'.*[1456] These spills contaminate water sources and destroys the rich biodiversity of the Niger Delta.[1457] The UNEP Report paints an apocalyptic picture of the effects of oil spill on water quality and biodiversity. The Report concludes that the groundwater in Ogoniland is exposed to surface spills where hydrocarbons were discovered in depths of 5 meters with extensive implications for human health.[1458] The Report also captures the gory impacts of hydrocarbon activities on vegetation, aquatic life and public health.[1459] Oil industry contamination of water systems and biodiversity breaches the central idea behind distributive, food and social justice.[1460]

Improper regulation of oil spills escalates externalities in proportions which makes it economically infeasible for these costs to be internalized in Nigeria. One area where the cost of externalities is not internalized is with respect to the deleterious effects of water contamination and biodiversity destruction on public health. The UNEP Report on Ogoniland concludes that "… the Ogoni community is exposed to petroleum hydrocarbons in outdoor air and drinking water, sometimes at elevated concentrations."[1461] The Report also notes that there are also dermal contacts exposure from contaminated soil, sediments and surface water warranting

[1454] Any oil operation is an inherent risk to water resources and biodiversity, see Nenibarini Zabbey and Gustaf Olsson, 'Conflicts-Oil Exploration and Water' (2017) 1 Global Challenges Review, 1-10

[1455] Federal Ministry of Environment et al., 'Niger Delta Natural Resources Damage Assessment and Restoration Project (Phase 1 Scoping Report, May 2006).

[1456] Stakeholders Democratic Network, Addressing the South South Environmental Emergency, The Vital Importance of Environmental Issues in Securing Stability and Prosperity in the Niger Delta (2015) 3, available on <http://www.stakeholderdemocracy.org/wp-content/uploads/2016/06/Addressing-the-South-Souths-Environmental-Emergency.pdf> (1/6/2018).

[1457] Kaniye S.A. Ebeku, *"Biodiversity Conservation in Nigeria* (note 44)

[1458] UNEP Report on Ogoniland 2011, 9-10 (The Report concludes that "Community members at Nisisioken Ogale are drinking water from wells that is contaminated with benzene, a known carcinogen, at levels over 900 times above the World Health Organization (WHO) Guideline").

[1459] UNEP Report on Ogoniland 2011, 10-11 (With respect to the impacts of pollution on vegetation the report concludes that "oil pollution in many intertidal creeks has left mangroves denuded of leaves and stems leaving roots coated in a bitumen-like substance sometimes 1 cm or more thick

[1460] Nigeria, Fifth Biodiversity Report 2015, available on < CBD Fifth National Report - Nigeria (English version), last accessed on the 28/07/2021.

[1461] UNEP Report on Ogoniland 2011, 10.

emergency action.[1462] The Report paints a horrific image that members of Nisisioken Ogale were drinking water contaminated with benzene, a known carcinogen.[1463] Irrespective of this level of exposure, there is no evidence to suggest that the cost of this risk was factored into the operational expenses of hydrocarbon companies to enable government cater for public health pressure emanating from the exposure of Ogoni people to this levels of contamination. The fact that the Nigerian government didn't know of this scale of contamination and its public health effects before the publication of the UNEP Report demonstrates a clear regulatory failure on the part of government. This monumental failure of government with regards to oil spills has been largely attributed to ineffectual sanctions and conflicting regulatory provisions and the political pressure from MNOCs which makes it difficult for industry to be held accountable their actions and omission in a manner that protects the environment.[1464]

Another externality that flows from the poor regulation of oil spills is the social impact of hydrocarbon contamination of water sources and biodiversity on livelihood of the Niger Delta people. Several Reports lay bare the social impacts of water contamination and biodiversity degradation on the people of the Niger Delta.[1465] Since water quality and biodiversity conservation forms a solid base for rural livelihoods and economy, their contamination or degradation levies a cost on society.[1466] Fishes, periwinkles, snails, shrimps and prawns, timber, river herbs are harvested from rivers and creeks in the ND.[1467] The sale of these items constitutes a major aspect of trade for the people of the ND.[1468] The Contamination or degradation

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[1462] UNEP Report on Ogoniland 2011, 10.

[1463] UNEP Report on Ogoniland 2011, 10.

[1464] I.L. Worika, U. Etemire and P.S. Tamuno, "Oil Politics and the Application of Environmental Laws to the Pollution of the Niger Delta: Current Challenges and Prospects" (2019) 17 (1) OGEL,

[1465] Amnesty International, Nigeria: Petroleum, Pollution and Poverty in the Niger Delta (Amnesty International, 2009), 21, available at < Landscape (amnesty.org)> last accessed on the 4th of August, 2021; UNEP Report on Ogoniland 2011, 37-38 (report concludes that "even very small quantities of hydrocarbon can prevent oxygen transfer in water column, thus affecting aquatic life-support systems") and Eze Simpson Osuagwu and Eseoghene Olaifa, 'Effects of Oil Spill on Fish Production in the Niger Delta' (2018) 13 (10) PLOS ONE, 1-14.

[1466] Nigeria, Fifth Biodiversity Report 2015, 5

[1467] Nigeria, Fifth Biodiversity Report 2015, 5

[1468] Scott Pegg and Nenibarini Zabbey, *"Oil and Water: The Bodo Spills and the Destruction of Traditional Livelihood in the Niger Delta"* (2013) 48 (3) Oxford Journal of Community Development, 391-405 at 397

of rivers and biodiversity threatens these sources of livelihood and escalates poverty at an unprecedented scale in the ND.[1469] For example, concerning Bodo community in Ogoniland, the UNEP Report noted that "while fishing was indeed once a prime activity…it has essentially ceased in areas polluted by oil.[1470] This cessation in fishing is a testament to loss of employment in the Niger Delta and deprivation of indigenes to essential proteins which forms part of their traditional diet, leaving them exposed to distributive, food and social injustices.[1471] Perhaps this tripartite injustices account for why unemployment in the Niger Delta has remained endemic.[1472] The next session considers the extent to which human rights law achieves EJ in Nigeria's hydrocarbon industry.

5.3 DOES THE RIGHTS COMPONENT OF NIGERIAN LAW MEET THE EXPECTATIONS OF ENVIRONMENTAL JUSTICE?

The importance of human rights law as a means of internalizing EC has been highlighted in different parts of this thesis. In the last chapter, this thesis identified environmental rights as a critical component for a framework which applies the PPP to attain EJ. According to the UN Good Practice Guide on the Right to a Healthy Environment, 'good practices in relation to environmental rights address both the procedural and substantive elements.[1473] The procedural elements are access to information, public participation and access to justice and effective remedies.[1474] Other requirements include legal recognition either by means of constitutional protection, inclusion in environmental legislation or ratification of a regional treaty

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[1469] Joseph C. Ebegbulem, Dickson Ekpe and Theophilus Oyime Adejumo *"Oil Exploration and Poverty in the Niger Delta Region of Nigeria: A Critical Analysis"* (2013) 4 (3) International Journal of Business and social Sciences, 279-287, 279 ("The ecological devastation occasioned by oil exploration has rendered farming and fishing, which are the main occupations of the rural people of this region, useless").

[1470] UNEP Report on Ogoniland 2011, 178.

[1471] Scott Pegg and Nenibarini Zabbey*, "Oil and Water, 397.*

[1472] For example, in the third quarter of 2018 two states in the Niger Delta (Akwa-Ibom and Rivers State) topped the chart of unemployment in Nigeria recording 37% and 32% rates of unemployment respectively. See Nsekang Nseyeng, Bureau of National Statistics Releases States with Highest Unemployment Rate', (Daily Post Newspaper of April 26th 2019), available on < Bureau of Statistics releases states with highest unemployment rate - Daily Post Nigeria> last accessed on the 25th of July 2021.

[1473] UNEP, 'The Right to a Healthy Environment: Good Practices (note 1406).

[1474] ibid.

that includes the right.[1475] The substantive elements include clean air, a safe climate, access to safe water and adequate sanitation, health and sustainably produced food, non-toxic environments in which to live, work, study and play and healthy biodiversity and ecosystems.[1476] Since we have already considered clean air and biodiversity and a non-toxic environment in the discussion on margin of safety, and have dealt with the recognition element in chapter 3 of this thesis, we shall limit discussion to the effectiveness of procedural provisions and the challenges bedeviling the rights components of EJ in Nigeria.

5.3.1 Procedural Environmental Law in Nigeria

Although there is clear evidence that Nigerian Petroleum law addresses key components of procedural environmental justice, there are challenges which makes these components ineffectual.

5.3.1.1 Right to Public Participation

As it relates to public participation, Section 2 of the Environmental Impact Assessment Act 1992 places a restriction on public or private sector projects without prior consideration at an early stage of their environmental impacts with an opportunity for members of the public to make presentations on the EIA of the activity.[1477] While this provision has potentials to engender high quality decisions that help achieve sustainable development, human wellbeing and protect the environment, several scholars pass a damning verdict on the provision.[1478] The provision is principally criticized because it is observed more in breach than in compliance.[1479] This is because

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[1475] ibid.

[1476] Ibid.

[1477] EIA Act, Section 7

[1478] Uzuazo Etemire, *"A Fresh Perspective on the Human Right to Political Participation and the Environmental Decision-Making in Nigeria"* (2018) 26 African Journal of International and Comparative Law, 565-584; For a discussion on the EIA regime in Nigeria, see M.N. Isah, "The Role of Environmental Impact Assessment in Nigeria's Oil and Gas Industry" (2012, PhD Thesis Submitted to the university of Cardiff); See also N.E. Ojukwu-Ogba, "Legislating Development in Nigeria's Oil Producing Region: The NDDC Act Seven Years on" (2009) 17 AJ.I.C.L. 1; Wifa Eddy Lenusira, "The Role of Environmental Impact Assessment (EIA) in the Nigerian Oil and Gas industry Using the United Nation's Environmental Programme EIA on Ogoni as a Case Study-Lesson From some International Good Practices (2014) 3 I.E.L.R., 111-117

[1479] P.C. Williams, *"The Environmental Impact Assessment Act and Process as an Environmental and Livelihood Advocacy Tool"*, in B. Obayanju and M. Obaseki (eds) Defending the Environment: The Role of Environmental Impact Assessment (Environmental Rights Action, 2009), pp7-12.

participatory rights under the EIA are made subject to the opulent discretion of government Agency to exclude the application of the Act.[1480] This discretion acts as a barrier to actualizing the principal purpose of the Act which is to mainstream environmental concerns into development projects.[1481] With respect to this limitation, it has been argued that the right to public participation as provided under Nigerian law merely provides loopholes that have permitted government to dodge compliance with the Act whenever they choose to do so.[1482] Given this enormous limitation, it is doubtful if the EIA creates any meaningful participatory right for the public capable of enforcement.[1483] In *Oronto Douglas v. Shell Petroleum Development Company Nigeria Limited and Ors,*[1484] the plaintiff sought to stop the commissioning of a multi-billion naira NLNG project executed in non-compliance with the EIA Act, until the EIA done with the active participation of the people affected by the project. The Court struck out the case on the ground that "the plaintiff shows no prima facie evidence that his private right was affected in any direct injury caused to him by non-compliance with the EIA.[1485] While this decision can help hasten the execution of projects with energy security potentials, it has the potential of discouraging members of the pubic to stake a comprehensive claim to the right to participation in environmental decision-making. This discouragement can prevent local communities from bringing the impacts which they suffer as a result of developments to the attention of authorities. This prevents the government from exploring regulatory solutions to the environmental challenges of local communities and sustains the possibility that ecological resources damaged as a result of the construction of these projects are not effectively internalized or accounted for, leaving the public with enormous distributive and social burdens.

[1480] For example, section 14 (1) (a) and (c) of the EIA Act allows the president or the Council of the relevant government agency to exclude the application of the Act where it is "of the opinion that the environmental effects of the project are likely to be minimal' or the project is in the interest of public health and safety' respectively.

[1481] Phillipe Sands, Jacquiline Peel, Adriana Fabra and Ruth Mackenzie, "Principles of International Environmental Law" (3rd Ed, Cambridge University Press 2012) 601.

[1482] Y. Omorogbe, *"The Legal Framework for Public Participation in decision-making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless*", in Zillman, Lucas and Pring (eds), *Human Rights in National Resource Development* (Oxford University Press 2002), 549, 569.

[1483] Uzuazo Etemire*, "A Fresh Perspective on the Human Right to Political Participation* (note 1478) 570.

[1484] Unreported Sit No. FHC/L/CS/573/96, 17 February 1997. The decision of the Court of Appeal in this case was reported in (1999) 2 Nigerian Weekly Law Report, p. 466.

[1485] *Ibid.* (Unreported judgement), 2.

5.3.1.2 Access to Public Information

Meaningful access to public information is the bedrock to effectual public participation and access to justice.[1486] Premised on the logic that the environment remains a public good for which information related thereto should not be restricted, access to justice offer a pathway to the protection of human rights.[1487] The existence of laws, policies and programmes that create enhanced access to environmental information including constitutionalizing the right have been suggested as good practice examples.[1488] Further good practice examples involve the creation of websites that offer comprehensive environmental information[1489]. Others are a comprehensive information on the state of the environment and the publication of data about toxic substances.[1490]

Nigerian law meets some of these good practice expectations. Nigeria's freedom of Information (FOI) Act 2011 provides a legislative shift away from a culture of environmental secrecy rooted in colonial Nigeria.[1491] The FOI Act has a lot of innovative provisions with potential to preserve access to information. Section 1 (1) of the FOI Act established '…the right of any person to access or request information… which is in the custody of any public official, agency or institution

[1486] G. Pring & S.Y. Noe, 'The Emerging International law of Public participation Affecting Global mining, Energy, and Resources Development', in D.N Zillman, A.R. Lucas & Pring (eds), Human Rights in National Resource Development: Public Participation in Sustainable Development of Mining and Energy Resource (Oxford University Press 2002), 11-76, at 11.

[1487] L. Kramer, 'Transnational Access to Environmental Information' (2012) 1 (1) Journal of Transnational Environmental Law, 95-104, at 97-103; see also UNEP, 'The Right to a Healthy Environment: Good Practices (note 16), 14.

[1488] For example, Norway's Environmental Information Act No. 31, of 2003 recognizes the right of every person to obtain a broad range of environmental information from public and private entities, subject to exceptions which cannot be broadly interpreted; see also UNEP, 'The Right to a Healthy Environment: Good Practices Guide (note 1406), 15.

[1489] For example, Uruguay established a National Environmental Observatory to organize and disseminate all available environmental information in a single portal. See Law 19.147. The observatory is available on < Environmental Observatory l MA (dinama.gub.uy) last accessed on the 30th of July, 2021.

[1490] South Sudan, 'State of the Environment Outlook Report 2020, available on < SSoEESEN.pdf (unep.org)., last accessed on the 1st of August 2021.

[1491] The information system under the Official Secrets Act CAP O3 LFN 2004 was predominantly the law which regulated public information dissemination. Section 1 of the Act made it a crime for civil servants to give out classified official information, and for anyone to receive or reproduce such information without government authorization.

howsoever described.' This provision has been described as typifying best practice[1492] as reflected in Principle 10 of the Rio Declaration and Article 4 (1) of the Arhus Convention, the Bali Guidelines and other Environmental Instruments.[1493] The Act also accommodates electronic application,[1494] removing barriers to access such as difficulties accessing the offices of public institutions as a result of distance and financial cost associate with making the trip to public offices.[1495]

However, the FOI Act is criticized for many reasons. First, the Act in Section 8 provides for fees to be charged for 'document duplication and transcription where necessary.' This provision is an unnecessary inhibition of the right to environmental information and places enormous burden on the people of the Niger Delta who are suffering the worse form of poverty as a result of the ecological degradation of their land. This provision can create barriers to environmental information that can lead to the under quantification of environmental externalities and recoverable compensation. Secondly, the Act lacks a provision mandating public authorities to assist and guide those seeking access to environmental information.[1496] This gap can supply justification for public authorities to legitimately refuse environmental information in those instances where they could easily have assisted and guided the applicant in making an appropriate application.[1497] This possibility is more likely to deprive members of the public from making informed decisions and in those cases where the documents are critical to securing environmental redress and taking vital decision necessary to arrest ecological concerns. Finally, the Act is criticized for the reason that public institutions have no provision to ensure the transfer of applications from public institution that does not hold the requested information to those which it believes does

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[1492] The Act recognizes the right of an applicant to make oral applications through a third party. See FOI Act, Section 3 (4) and Section 3 (3).

[1493] UNEP/GCSS.X1/11, Decision SSX1/5, Part A, 26 February, 2010, available at < file://nstu-nas01.uwe.ac.uk/users3$/oc2-aholu/Windows/Downloads/Guidelines%20for%20the%20Development%20of%20National%20Legislation%20on%20Access%20to%20information,%20Public%20Participation%20and%20Access%20to%20Justice%20in%20Environmental%20Matters.pdf> last accessed on the 27th of July 2021; See also Uzuazo Etemire, *'Public Access to Environmental Information: A Comparative Analysis of Nigerian Legislation with International Best Practice'* (2014) 3 TEL, 149, 160

[1494] See Paragraph 1.9 of the Guidelines for the Implementation of the Freedom of Information Act 2011

[1495] Uzuazo Etemire, (note 1493) 160.

[1496] Arhus Convention, Art. 3 (2).

[1497] Uzuazo Etemire, (note 1493) 162.

hold the information. This gap in the FOI places an avoidable burden on applicants to find the actual public institution that hold the required information.[1498] This situation may discourage potential applicants from accessing vital environmental information. Such a lacuna suppresses the provision of relevant environmental information in Nigeria where there is still a protracted culture of secrecy in most public institutions.[1499] The possibility of not obtaining vital information may make it impossible for members of the public or communities to seek redress in those instances where public documents are essential for prevent environmental harm, thus escalating environmental injustice.

5.3.1.3 Access to Justice

Access to justice is the bedrock of EJ. It is essential to the realization of both the preventive and curative facets of the PPP.[1500] The order of distribution when altered cannot be restored if there are road blocks on the paths of justice. Good practice related to access to justice strive to overcome three essential hurdles, standing to sue, economic barriers and lack of judicial expertise in environmental matters.[1501] As we identified in chapters three and four of this thesis, Nigerian law recognizes a constitutional right to access for any violation of human rights.[1502] It also makes provisions relating to standing to sue,[1503] economic barriers and judicial expertise in environmental matters but is fundamental rights is inhibited by certain challenges.[1504]

[1498] Uzuazo Etemire, (note 1493) 164.
[1499] Uzuazo Etemire, (note 1493) 164.
[1500] See the discussion on the preventive and curative functions of the PPP in sections 2.6.3 and 2.6.4. of this thesis (pages 57-60) and the discussion of procedural justice in section 4.3.3. of this thesis (213-219).
[1501] UNEP, 'The Right to a Healthy Environment: Good Practices (note 1406) 20.
[1502] Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended), Section 46 (1).
[1503] Section 46 (1) CFRN; see also
[1504] Sections 13, 16, 17 and 20 of the CFRN 1999 (as amended); see also Section 6 (1) of the National Human Rights Commission (Amendment) Act 2010 which expanded the mandate of the National Human Rights Commission to deal with all matters relating to the protection to human rights guaranteed under the constitution, the United Nations Charter, the Universal Declaration of Human Rights and all International and regional human rights instruments to which Nigeria is a party. See also Rhuks T. Ako, "Environmental Justice in Developing Countries: Perspectives from Africa and Asia-Pacific" (Routledge Publishers 2016) 23-40, 33.

5.3.2 Standing to Sue

Before the 2009 Fundamental Rights Enforcement Procedure Rules (FREP) was made by the Chief Justice of Nigeria under power conferred by section 46 (3), the procedure for seeking redress for the violation of fundamental human rights were very restrictive and cumbersome.[1505] One challenge that affected enforcement of fundamental human rights and by extension environmental human rights was the problem of *locus standi.* Locus standi deals with the right or competence of a person to institute proceedings in Court or for assertion of a right enforceable in law.[1506] The Constitutional basis for the locus standi rule in Nigeria is Section 6 (6) (b) which provides that a person can only approach the court "for determination of any question as to civil rights and obligations of that person". The reference to the 'civil rights of that person' provided a justification for courts to apply a strict interpretation of standing even in environmental matters constituting a barrier to public interest litigation.[1507] The consequence of this strict interpretation have been to stifle the enforcement by public spirited people of environmental rights, especially fundamental rights linked to the environment.[1508] This makes it difficult for those who suffer from disproportionate effects of these degradation to access remedies and prevent pollution. It is therefore, a threat to securing the curative and preventive objectives of the PPP.

However, the coming into force of the FREP rules has now altered the rule relating to *locus standi* in Nigeria. Preamble 3 (e) of the FREP Rules provides that 'the court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*.[1509] The

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[1505] For a full account of this procedure see Eva Brems and Charles Olufemi Adekoya, *"Human Rights Enforcement by People Living in Poverty: Access to Justice in Nigeria"* (2010) 54 (2) Journal of African Law, 258-273, 259; See also Eyinna Nwauche, *"The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A Fitting Response to Problems in the enforcement of Human Rights in Nigeria?"* (2010) 10 African Human Rights Law Journal, 502-514.

[1506] Eva Brems, (note 1505) 266.

[1507] *Adesanya v President of Nigeria* [1981] 2 NCLR, 358; See also *Fawehinmi v Akilu* [1987] 4 NWLR (Pt. 67) 797.; See generally C. Obiagwu and C.A. Odinkalu, "Combating Legacies of Colonialism and Militarism" in AA An-Na'im (ed) Human Rights Under African Constitutions: Realizing the Promise for Ourselves'(University of Pennsylvania Press 2003) 211 at 233.

[1508] Ibid.

[1509] The same preamble provides that "human rights activists, advocates, or groups as well as any non-governmental organizations, may institute human rights application on behalf of any potential applicant. In human Rights litigation, the applicant may include any of the following: (i) Anyone acting on his own (ii) Anyone acting on behalf of another person; (iii) anyone acting as a member of , or in the interest

implication of Preamble 3 (e) is that all human rights cases (including the right to a healthy environment) must be heard as the provision makes it clear that standing to sue is not a ground for striking out suits. The provision is therefore receptive of public interest litigation and its accompanying benefits. The extensive scope of potential applicants allowed under FREP opens a window of opportunity for redressing and rectifying environmental grievances. It also ensures that NGOs can offer assistance to those who lack the wherewithal to pursue environmental claims to their ultimate conclusion, raising the possibility for environmental externalities to be internalized and remedied.[1510] Another benefit of FREP Rules is that it simplifies the process of activating human rights claims by removing barriers to speedy disposal of human rights complaints.[1511] The Rule removed the requirement for leave and the allow parties to commence human rights action through any procedure acceptable to the courts.[1512] While this offers those who suffer environmental degradation the convenience of procedure, subjecting commencement procedures to the acceptability of courts without delimiting the circumstances under which such acceptability can be justified can put EJ in the firm grips of judicial indulgence. The non-liberal posture of the Nigerian court system consolidated by decades of precedents makes that a dangerous enterprise. Another positive highlight of the FREP Rules is that it encourages respect for regional and international bills of rights, expanding the scope for the application of (access) rights.[1513] While this encouragement is commendable, it is difficult to see how this provision can allow the application and enforcement of human rights instruments which has not been domesticated under Nigerian law.[1514] Even when these instruments have been signed and domesticated the extent of their

of a group or class of persons; (iv) anyone acting in the public interest, and (v)Association acting in the interest of its members or other individuals or groups.

[1510] Eghosa Eghator*, "Improving Access to Environmental Justice Under the African Charter on Human and Peoples Right: The Role of NGOs in Nigeria"* (2014) 22 (1), 63-79.

[1511] See Order II Rule 2 of FREP Rules 2009 for example, abolished the requirement for leave to from the court to institute an action for fundamental human rights; Order XII Rule requires that the hearing must be conducted on party's written address with each party having 20 minutes each to adumbrate on matters in their written address.

[1512] Order II Rule 2.

[1513] Preamble 3 (b) of the FREP Rules provides that Courts shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the court is aware, including human rights instruments

[1514] Section 12 of the CFRN 1999 (as amended) only allows international Treaties which has been ratified by the Nigerian parliament to apply in Nigeria. See discussion in Paras 3.7.2.3. of chapter 3; see generally, See also Eyinna Nwauche, *"The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009* (note 1511) 509-514.

applicability would depend on whether or not they are in consonance with the constitution. The possibility of inconsistencies bears the consequence that these instruments where they are relevant to pollution prevention, control and remediation, may remain unenforceable against the state.

The FREP Rules also address economic barriers access and judicial expertise and philosophy. Appendix A of the FREP Rules 2009 fixes the filling fees for instituting actions for fundamental rights at less than £2, ensuring that nothing hinders access. The low filling fees ensures that even the poorest of the poor who suffer from the adverse effects of environmental externalities can seek redress in Court. However, with the revelation that 39 percent of Nigerians live below the international poverty threshold of $1.90 per person per day,[1515] this filling fee may still be out of reach for an enormous category of residents in the Niger Delta.

In terms of judicial philosophy, preamble 3 (a) of the FREP Rules enjoins Nigerian Courts to expansively and purposively interpret and apply the Nigerian constitution, especially chapter IV, as well as the African Charter with a view to advancing and realizing the rights and freedoms contained in them and affording the protections intended by them. While this provision favours a liberal interpretation that could sustain innovative constitutional arguments that strengthens fundamental rights (environmental rights inclusive), this liberality would be limited by the principle of *stare decisis* which has become a formidable path of Nigerian law.[1516] It is unthinkable that a decision of the Supreme Court of Nigeria could be set aside by a lower court on the basis of this liberality. This in itself could limit the fine provisions of the rules and set back actions intended to redress the infraction of environmental human rights, especially as they relate to the prevention, control and remediation of pollution.

[1515] World Bank, Poverty and Equity Brief Africa: Nigeria, April 2021, available on < https://databank.worldbank.org/data/download/poverty/987B9C90-CB9F-4D93-AE8C-750588BF00QA/AM2020/Global_POVEQ_NGA.pdf> last accessed on the 27th of July, 2021.

[1516] Section 187 CFRN 1999.

5.3.3 Challenges of a Human Rights Approach to Environmental Justice

Irrespective of the improvement to access to justice enabled by the FREP Rules 2009, a human rights approach to EJ in Nigeria is still limited by a plethora of challenges towit;

5.3.3.1 A Lack of Assertiveness

The first factor that has been identified in scholarly works is a lack of assertiveness.[1517] This factor manifest in the form of unwillingness of those who suffer infractions to their human rights to pursue claims related to such infractions in courts.[1518] With the reality of government suppression of environmental rights and activists in Nigeria, appetites to pursue environmental claims are low. This factor leaves a large catalogue of environmental harms and externalities unredressed.

5.3.3.2 Corruption

The second challenge is that of corruption. The World Bank defines corruption as "the abuse of public or corporate office for private gain". [1519] With respect to enforcement of fundamental or environmental rights corruption manifests itself in the form of unofficial payments to judges, lawyers, court staff and the police for the sole purpose of obtaining favourable judgement.[1520] This affects the general enforcement of environmental laws and the remedies available to litigants.[1521] It also has a negative

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[1517] In Nigeria's 2006 Report to the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) Committee/C/NGA/6 of October 2006, available on < http://www.bayefsky.com/reports/nigeria_cedaw_c_nga_6_2006.pdf> last accessed on the 17th of August 2021, lack of capacity for asserting rights was noted as one of the factors responsible for the limited access to justice amongst rural women.

[1518] Guidelines 8 (right of equal access to justice) in UN office of the High Commissioner for Human Rights "Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies" HR/PUB/06/12 (June 2012), Paras 204, available at < PovertyStrategiesen.pdf (ohchr.org)> last accessed on the 17th of August 2021 ("the most important tool for people living in poverty to defend themselves against human rights abuses is court protection.

[1519] World Bank, The Cancer of Corruption (2005) World Bank Global Issues Series, 1.

[1520] UN Office of Drugs and Crime, *"Assessment of the Integrity and Capacity of the Justice System in Three Nigerian States"* (Technical Assessment Report, January 2006) 33

[1521] See M. Aklin, Patrick Bayer and S.P Harish and Johannes Urepelainen, '*Who Blames Corruption for the Poor Enforcement of Environmental Laws? Survey Evidence from Brazil'* (2014); Oguzham C. Dincer and Per. G Fredrilasson, *"Corruption and Environmental Regulatory Policy in the United States: Does Trust Matter?* (2018) 54 Journal of Resources and Energy Economics, 212-225; Maurizio Lasiandra and Carlo Migliardo, *"An Empirical Study of the Impact of corruption on Environmental Performance: Evidence from Panel Data"* (2017) 16 (8) Journal of Environmental Resource Eco, 297-318

effect on social welfare as little impetus would exist to drive corporate accountability for environmental externalities.[1522] Rather, it enables firms to influence policy and rulemaking or to break and bend rules.[1523] The multiplier effect of judicial corruption on the enforcement of human rights is that it reduces the stringency of environmental policy, raises deforestation, air pollution and reduces access to public good like clean water and sanitation.[1524] Corruption is also a breeding ground for regulatory capture, which affects the effectiveness with which legislations are enforced and the independence of the judiciary to dispense justice.[1525]

5.3.3.3 Poor Administration of Justice

Another challenge is the that of inefficient administration of justice and high cost of service fees, legal fees and transport cost. Inefficiency is explained by delays in trials and rules requiring litigants to be present in court from the filling of the case to its actual conclusion.[1526] One report found that civil matters like environmental rights and toxic torts take an average of 3 to 4 years to dispose of making it difficult to sustain associated cost of hiring lawyers and expert witnesses.[1527] Although the FREP Rules has reduced the cost of filling human rights related claims, other costs associated with pursuing claims in court like the cost of legal fees, service fees and transportation are still astronomically high.[1528] These inefficiency and costs hampers justice delivery in human rights claims.

[1522] Oguzham (note 1521), 212.

[1523] Oguzham, 212.

[1524] Oguzham, 212.

[1525] Maurizio Lasiandra (note 1521) 297.

[1526] Eva Brems and Charles Olufemi Adekoya, *"Human Rights Enforcement by People Living in Poverty* (note 107) 270-271

[1527] I.A. Ayua and D.A Guobadia (eds) *"Technical Report on the Nigerian Court Procedure project, including proposal for Reform of the Court of Lagos State Civil Service Procedure Rules"* (2001, Nigerian Institute of Advanced Legal Studies) 23; Hon. Dr. T.A Aguda, "The Jurisprudence of unequal Justice" (Foundational Lecture Delivered at the Lagos State University, 12 January 1987) 4-6 (" The whole system of administration of justice is heavily weighted against the vast majority of the people, who are unable to afford the expense of any search after justice. If however the poor is foolhardy enough to enter the temple of justice, he and his family may regret it for the rest of their lives…such a case may traverse eight courts in between 5 to 20 years"); See also *Wilson Bolaji Olaleye v NNPC* [1982] 3 NCLR, at 928 where it took 13 years before judgement was awarded to a dead victim and *Ariori v Elemo* [1981] 1 SCNL 1, where the Supreme Court of Nigeria ordered a retrial after 20 years on the grounds that the inordinate delays of the High Court has occasioned a miscarriage of justice.

[1528] Eva Brems and Charles Olufemi Adekoya, *"Human Rights Enforcement by People Living in Poverty* (note 107) 270-271

5.3.3.4 Non Justiciability of Environmental Rights

A final challenge is the non-justiciability of environmental rights provided under the Constitution. All the environmental obligations captured in chapter 2 of the CFRN dealing with fundamental objectives and Directive Principles of state policy are non-justiciable. [1529]What this means is that questions as to the Nigerian state complying with them cannot be entertained in any Nigerian Courts except a law is made by the National Assembly to bring them into execution.[1530] The arguments underlying Justiciability and non-Justiciability have already being dealt with somewhere in this thesis and is well captured in scholarly works.[1531]

In relation to EJ, non-justiciability offers conflicting possibilities. First, non-justiciability does not provide an avenue for those who suffer exposure as a result of poor government regulation of the oil industry to maintain an action against the state to remediate their losses or halt such injurious state actions. Such exposures defeat the central idea behind environmental justice with its emphasis on the equal distribution of environmental harm or where unequal distribution of environmental harm and burden is inevitable, a fair compensation for that burden. Non-justiciability also runs against the substantive elements of environmental justice with emphasis on substantive rights to a healthy environment. Although the African Charter to Human and Peoples Rights which Nigeria has ratified guarantees a self-executing substantive right to a healthy environment,[1532] it is difficult to see how that right can stand against the provisions of the Constitution. Given the fact that the task of building appropriate legal architecture for environmental regulation is a state obligation under international environmental law, self-executing environmental rights provide a means for such obligations to be enforced.[1533] Unfortunately, a self-executing right to a healthy environment is missing under Nigerian law. The implication of this lacuna is that there

[1529] Seen Section 3.3.2.1. of this thesis (dealing with the Constitution and the Clarification of Environmental agenda) , 104-115.

[1530] Please see Section 6 (6) (c) CFRN 1999.

[1531] See Paras 3.2.1 of chapter 2 of this thesis; see Tim Hayward, ' Constitutional Environmental Rights' (Oxford university Press 2005) 65-92; Louise J. Kotze' 'Human Rights, the Environment and the Global South' in Shawkat Alam, Sumudu Atapattu, Carmen Gonzalez and Jona Razzaque (eds) 'International Environmental Law and the Global South" (Cambridge University Press 2016) 171-191

[1532] African Charter on Human and Peoples Rights (Ratification and Enforcement) Act 1983 Cap A9 LFN 2004, Art. 24.

[1533] John G. Merrills, 'Environmental Rights' in D Bodansky, J. Brunnee and Ellen Hey, 'The Oxford Handbook of International Environmental Law' (Oxford University Press) 663- 680

is little motivation under Nigerian law for the Nigerian government to take these guarantees seriously. Self-executing environmental right serve some very useful benefits. Proclaiming respect for the environment in the form of a self-executing environmental right amounts to elevating a new value to the apex legal order.[1534] This value stands against a mere policy choice that can be discarded at will by the executive. Second, such a right is not deprived of legal effects; a constitutional right will be given precedence over inferior legal and executive norms.[1535] In addition it will justify the constitutionality of environmental rules that can no longer be trumped by other fundamental rights.[1536] Where a substantive right to a healthy environment is not self-executory as in the case of Nigeria, the government of Nigeria cannot be held to account to fulfill its international and national environmental obligations including the very important task of internalizing environmental costs or preventing or controlling pollution. Accountability[1537] is the cornerstone of quality environmental regulation at national level. It ensures the conservation of the environment and the internalization of environmental costs as necessary implications of environmental justice. Where the Constitution of a nation does not guarantee it, then the environment would be left at mercy of government and multi-national oil companies. Not only is this capable of suppressing indigenous people's rights under international law, but it is also bound to escalate distributive concerns and endanger future generations.

Denial of self-executing environmental rights can have devastating external cost and distributive effects. Some of these effects are forced displacement, which can result to homelessness, loss of livelihood and the destruction of social networks.[1538] Others include the propensity of public health emergencies like diarrheal, dehydration caused

[1534] Nicolas De Sadeleer, "EU Environmental Law and the Internal Market (Oxford University Press 2014) 96

[1535] Ibid.

[1536] ibid.

[1537] Accountability here means being liable to be called to account or answerable. For an in-depth consideration of this subject in an environmental law context see please see Jerry Mashaw, 'Structuring a "Dense Complexity": Accountability and the Project of Administrative Law' (2005) 5 Issues in Legal Scholarship1, 16-17; Jerry L Mashaw 'Administrative Law and Agency Accountability' in David S. Clark (ed), Encyclopedia of Law and Society: American and Global Perspectives (Sage Publications 2007) 31-32 and E. Fisher. B. Lange and E. Scotford, 'Environmental Law Text Cases and Materials' (Oxford University Press 2013) 519-525.

[1538] OHCHR, 'Frequently Asked Questions on Economic, Social and Cultural Rights, Fact sheet No. 33 2008, available on < https://www.ohchr.org/EN/Issues/ESCR/Pages/ESCRIndex.aspx> last accessed on the 31/01/2020, 4

by the lack of safe drinking water.[1539] The gross violation of environmental rights have been amongst the leading drivers of conflicts and failure to address systemic inequities prompted by a sub-optimal constitutional guarantee can undermine the recovery from conflict.[1540] These afflictions are currently living with the people of ND Evidence from scholarly works and public documents demonstrates that the people of the ND suffer from these distributional impacts. For example, the Inter-governmental Panel on Climate Change (IPCC) estimates that a 2m sea level rise (potentially within 50 years) will displace 10 million people in the Southern coastlines of Nigeria as a consequence of climate change catalyzed by the oil industry.[1541]

On the flip side, the presence of such an executory substantive right to a healthy environment may be justified on the basis of public interest.[1542] Leaving the tap of potential litigation open in a country like Nigeria grappling with a population explosion and dwindling revenues (from?) would put enormous strain on public resources. Restriction on environmental rights may be one way that Nigeria ensures that there are no distruption of international trade and investment.[1543] This is in view of the impacts, which such distortion can have on trade and investments. This public interest posture does not necessarily negate the PPP. The Rio Declaration admonished that the principle was to be applied 'with due regards to public interest and without distorting international trade and investment'.[1544] The business of hydrocarbon is an international business critical to the energy and national security of most countries. Disrupting the business by providing a right that exposes the government of a hydrocarbon jurisdiction to a situation that may suspend environmentally unsustainable but financially beneficial regulatory practices while guaranteeing successful environmental outcomes can put the energy security of non- oil producing

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[1539] ibid.
[1540] ibid.
[1541] Inter-governmental Panel on Climate Change, Fourth Assessment Report 2007, 450; see generally the introduction to chapter three of this thesis.
[1542] Georges A. Tanguay, Paul Lonoie and Jerome Moreau, 'Environmental Policy, Public Interest and Political Market' (2004) 1-25 and Aileen Mc Harge, 'Reconcilling Human Rights and Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 MOD. L. Rev., 671-696.
[1543] Alan O. Sykes, 'International Trade and Human Rights: An Economic Perspective' (2003) John M. Olin Law & Economic Working Paper No.188 (2nd Series) 1-32, available at file:///C:/Users/Charles/Downloads/SSRN-id415802.pdf last accessed on the 15/10/2021.
[1544] See Principle 16 of the Rio Declaration on Environment and Development 1992.

countries in jeopardy.[1545] This thesis takes the view that given the fact that both environment protection and international trade and investments are all in public interest, a need therefore arises to balance these concerns. One way of doing so could be to substantively guarantee environmental rights and create delimiting circumstances under which the right can be exercised without exposing the government to a floodgate of litigation.[1546] The argument of public interest however, will be limited by the fact that where the government does not perform its obligation of internalizing environment costs, this could promote the poor conservation of natural resources.[1547] This poor conservation of natural resources is capable of threatening energy security and the survival of businesses.[1548] Any threat against the conservation of natural resources is a threat to EJ. The problem in the hands of Nigeria regulators can therefore conveniently be described as a surmountable problem of enormous complexity But one thing that cannot be denied is that challenges identified limits the full realization of the rights component of EJ under Nigerian law in a manner that affects both distributive and corrective justice.

5.4 DOES THE IMPOSITION AND REDISTRIBUTION OF ENVIRONMENTAL TAXES IN NIGERIA'S HYDROCARBON SECTOR PROMOTE EJ?

As we noted in chapter four of this thesis, the proportionate imposition and redistribution of environmental taxes (ETs) is another way through which a PPP

[1545] Martin J. Pasqualetti & Benjamin K. Sovacool, 'The Importance of Scale to Energy Security' (2012) 9 (3) Journal of Integrative Environmental Sciences, 167-180 and Vladimir Litvinenko, 'The Role of Hydrocarbons in the Global Energy Agenda: the Focus of Liquified Natural Gas' (2020) 9 (59) Resources Review, 1-22.

[1546] Varun Gauri, 'Public Interest Litigation in India: Overreaching or Underachieving? (2009) World Bank Policy Research Paper No. 5109, 1-11 and Gao Qi, *'Public Interest Litigation in China: Panacea or Placebo for Environmental Protection?'* (2018) 16 (4) China: an International Journal, 47-75.

[1547] Jennifer Bansard and Mika Schroder, *'The Sustainable Use of Natural Resources: The Governance Challenge'* (2021) Earth Negotiation Bulletin Brief No.16, available at https://www.iisd.org/system/files/2021-04/still-one-earth-natural-resources.pdf , last accessed 15/10/2021.

[1548] Yven Chouinard, Jib Ellison and Rick Ridgeway, *'The Sustainable Economy'* (2011) Havard Business Review, available at <The Sustainable Economy (hbr.org)> accessed 15/10/2021; Richard G. Pearson, 'Reasons to Conserve Nature' (2016) 31 (5) Trends in Ecology & Evolution, 1-6; Marianna Strzelecka, Marcin Rechcinski, Joanna Tusznio et. al., *'Environmental Justice in Natura 2000 Conservation Conflict: the Case for Resident Empowerment'* (2021) 107, Journal of Land Use Policy, 105494.

regime at national level can be recalibrated to effectively promote EJ. The imposition and redistribution of ETs addresses both distributive and corrective justice concerns. The potentials of Nigerian petroleum laws to internalize environmental cost through the imposition and redistribution of ETs have already been considered in chapter three of this thesis.[1549] However, despite the imposition and redistribution of ETs in Nigeria's hydrocarbon industry, there are challenges which limits the imposition and redistribution of environmental taxes in a manner that promotes EJ. Some of the challenges are ineffectual fines, poorly designed incentives, and unsustainable decommissioning regulation. They are considered below.

5.4.1 Ineffectual Nature of Fines Imposed for Environmental Externalities.

One of the factors that affects DJ in Nigeria's hydrocarbon industry is the imperceptible nature of the charges imposed on polluters for the externalities they generate. The original idea behind the PPP is to internalize the full cost of externalities through economic instruments like charges, taxes and legal liabilities. The objective of this idea is to promote a pricing system that accounts for externalities in full or to keep the price close to full cost internalization. A pricing system that does not promote pollution abatement cannot be said to reflect this objective. Where the charges and fines are relatively small, little incentive exists for polluters to prevent pollution. This in itself can be a catalyst for distributive environmental concerns that damages the aspirations of environmental justice. Charges and taxes are imposed as a consequence of externalities and as cost arising from the implementation of a policy of prevention.[1550] They should in principle cover the cost of prevention, control, mitigation measures and environmental cost.[1551]

The OECD Guidance for Environmental Enforcement Authorities suggests that to be an effective enforcement instruments, administrative fines should be designed in the

[1549] See the discussion in Section 3.7.4. of chapter 3 of thesis.
[1550] Please see the discussion on the preventive functions of the Polluter Pays Principle in Paras. 3.3 of Chapter 3 of this thesis.
[1551] Please see the discussion on how much the Polluter should pay in Paras. 4.3. of Chapter 2 of this thesis.

likeness of certain key principles.[1552] The instrument should aim to deter future non-compliance and eliminate financial gains for non-compliance.[1553] It should also be proportionate to the nature of the offence or the harm caused and must demonstrate a consideration of what is appropriate for the particular offender and the regulatory issue.[1554] Nigerian law falls short of this standard for reasons of imperceptible fines.

There are two classical instances of imperceptible fines under Nigeria's hydrocarbon laws. The first relates to the pricing of associated gas flared during oil production. The second are fines imposed by NOSDRA as a consequence of the performance of their statutory functions under the NOSDRA Act.

In relations to gas flaring, the regulations prescribe a fine of $2 (£1.46) per 1,000 standard cubic metres (SCM) of gas flared in a 10, 000 oil production marginal field and $0.5 (£0.3) dollars per SCM of gas flared from a less than 10,000 capacity production marginal field. for every one thousand standard cubic feet of gas flared.[1555] In recent years hydrocarbon companies have been charged between 20 and fifty million naira (£35-88,000) annually for flaring associated gas but each year Nigeria loses between $500 million to $5 billion to gas flaring. This insignificant penalty makes it far more economical for companies to flare than to utilize or re-inject gas at the commercial expense of the Nigerian nation. By its very nature, the fines confer the benefit of evading the cost of utilization facilities and makes it possible for hydrocarbon companies to profit from their non-compliance. The nature of the fine also makes it difficult to conserve an important natural resource like gas, which is a great product that underlies international trade. This failure to conserve this resource escalates distributive concerns and robs Nigeria of vital capital to address environmental impacts and perform its international obligations in an environmental context. The effects of gas flaring are quite extensive. These effects range from effects on human health, economic loss and loss of trade opportunities.[1556] Nigeria's new draft

[1552] OECD, "Determination and Application of Administrative Fines for Environmental Offences: Guidance for Environmental Enforcement Authorities in EECCA Countries" (2009) 9.
[1553] Ibid.
[1554] Ibid.
[1555] G. Adenji, 'Approaches to Gas Flare Reduction in Nigeria, Global Gas Flaring Reduction Forum: London (October, 24th and 25th 2012) P. 4.
[1556] Draft National Gas Policy, Nigerian Government Policy and Actions 2016, 55.

policy on gas captures these effects clearly. It states, *"Gas flaring affects the environment and human health, produces economic loss, deprives the government of tax revenues and trade opportunities and deprives consumers of a clean and cheap energy resource"*.[1557] Gas flaring has also been described as "Africa's single biggest contribution to greenhouse gas emission symbolic of the brutally exploitative nature of the oil industry with propensity to cause incalculable environmental damage".[1558]

The fact that fines for gas flaring will consolidate these environmental, social and economic impacts affects environmental justice. For example, the emission of greenhouse gases from gas flaring affect air quality contaminates water systems; streams, lakes and turns up the possibility of food insecurity[1559] through soil contamination.[1560] In relation to air quality a study conducted in Bayelsa (a state in the Niger Delta) links toxic air from gas flaring to 49 premature deaths, respiratory illness in 4, 960 children, 120, 000 asthma attacks and 8 additional cases of cancer each year.[1561] The imperceptible fines for gas flaring under Nigerian law is insensitive to these distributional burdens borne by the people of the Niger Delta. Not only is a consolidation of these impacts through unsustainable charges unfair to the people of the Niger Delta who bear these burdens every day, it limits their rights as indigenous people considerably. It also affects their right to the food that underpins their culture and existence. If EJ is understood as the fair distribution of environmental burdens and benefits, the charges for the gas flaring would reflect a full range of the externalities associated with the social and environmental impacts associated with flaring gas as a means of incentivizing a transition from flaring to gas utilization. On the economic side, the fact that the continued flaring of associated gas robs Nigeria of a considerable amount of resources deprives her of its ability to address matters of social justice in the Niger Delta. The economic losses from flaring associated gas can make a

[1557] Ibid.

[1558] H. Ahmed Sharif, and D.D. Hammawa (et al) 'Gas Flaring: When Will Nigeria Decarbonize its Oil and Gas Industry (2016) 1 (3) International journal of Economy, Energy and Environment, 40-45, 43.

[1559] The World Health Organization (WHO) estimates that air pollution causes almost 12% of global deaths in 2012 with 88% of the deaths occurring in middle-income countries. See WHO, 'Burden of Disease for Household Air Pollution for 2012 <https://www.who.int/phe/health_topics/outdoorair/databases/FINAL_HAP_AAP_BoD_24March2014.pdf>

[1560] Ibid.

[1561] See Section 6 (2) (a) of the NOSDRA Act.

difference in addressing the distributive impacts of oil exploitation in the Niger Delta and help green the Nigeria budget.

The NOSDRA Act also epitomizes the problem of imperceptible fines in Nigeria's oil industry. For failure to report a spill an operator can on conviction be fined Two Million Naira (less than £4, 000) for each day of failure to report the spill. The failure to clean up impacted sites attracts a fine of Five Million Naira (less than £10, 000) or a maximum imprisonment term of 2 years.[1562] Regulatory violations for individuals carry a fine of Five Hundred Thousand Naira (less than £1, 000). For corporate entities the fine for regulatory violations is pegged at Two Million Naira only (less than £4, 000). There are three problems with the penalties imposed under the NOSDRA Act. The first problem is that the penalties are not commensurate with the possible impact of neglecting to report a spill, refusing to clean up impacted sites or for regulatory violations. These violations are the principal reasons why the Niger Delta remains one of the most polluted places on earth. The fines defy the sort of charge contemplated by the PPP, which is a charge proportionate to the pollution generated. Secondly, the penalties imposed under the NOSDRA Act are basically non-deterrent especially when matched against the size of the expected externalities from those penalized activities and the profit which is an integral feature of the oil industry. Thirdly, the fines are statutory fixed, a fact which makes it impossible to adapt them to the size of individual externality generated by hydrocarbon companies. The static nature of the fine is not sensitive to the fact that volumes of emissions vary according to the sizes of different companies and the efficiency of their production processes. This can lead to the underestimation of externalities that can encourage a subsidy of environmental costs and escalate environmental crisis in a manner that affects environmental justice.

5.4.2 Poor Design of Environmental Incentives

A handful of incentives exists under Nigerian law to help companies desirous of investing in pollution abatement make the most of their decision.[1563] Some of these

[1562] Section 6 (3) NOSDRA Act.

[1563] Nigeria Investment and Promotion Commission (NIPC) and Federal Inland Revenue Service (FIRS) "Compendium of Investment Incentives in Nigeria" (1st Edition, October 31st 2017), available

incentives are the upstream and downstream gas utilization incentives,[1564] research and development incentives (10% of total profit), [1565] reconstruction investment allowance, [1566] and zero import duty on equipment on equipment and machinery in the power and mining sectors.[1567] While these incentives have extensive subject matter coverage that can accommodate investments in pollution prevention technology, certain factors make their utilization problematic. For example, the assurances on gas utilization contained in the NLNG (Fiscal Incentives Guarantees and Assurances) Act[1568] are prescriptive and immobilizes the FG from subjecting the NLNG to a change of future regulatory obligations and assurances.[1569] This type of long term assurances can limit environmental cost obligation to which the company ordinary would be subject to escalating both distributive and social injustices. Another challenge to the utilization of environmental incentive is that the environmental costs imposed for pollution is cheaper that the financial incentives offered under assurance legislations, making companies to lean in favour of the latter. Environmental injustice is the end result of this regulatory choice.

5.4.3 Unsustainable Decommissioning Regime

Decommissioning obligations are necessary to ensure that the dangers which dumping installations pose to the environment are obviated.[1570] A general obligation exists under the Petroleum Drilling and Production Regulation (PDPR) to decommission oil installation at the effluxion of the life of the license.[1571] The requirement of decommissioning oil installation is also now provided under Part VIII-G of the EGASPIN 2002, which demands the complete removal of any offshore installation

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at < Compendium-of-Investment-Incentives-in-Nigeria-final1.pdf (nipc.gov.ng)> last accessed on the 18/08/2021.

[1564] See for instance Section 1 (1) of the Nigerian Liquefied Natural Gas (Fiscal Incentives Guarantees and Assurances) Act Cap N87 LFN 2004 and Section 11 of the Petroleum Profit Tax Act Cap P13 LFN 2004 which creates incentives for businesses wishing to invest in the economic utilization of flared associated gas; See also Section 39 (c) accelerated capital allowance after tax-free period for companies desirous of investing in gas utilization downstream.

[1565] Section 25 of the Companies Income Tax Act (CITA) Cap C21, LFN 2004.

[1566] Section 32 of CITA, LFN 2004

[1567] Headings 84, 85 and 90 of the CITA Cap. C21 LFN 2004.

[1568] CAP N87 LFN 2004.

[1569] See Section 2 of the First Schedule to the NLNG Act.

[1570] Worika I.L., "Towards a Sustainable Offshore Abandonment /Rehabilitation Policy in Africa Part II" (2000) 11 (12) I.E.L.R, 226-275

[1571] Petroleum (Drilling and Production) Regulation, Regulation 46.

sited in water depth of less than 100 meters and weighing less than 4, 000 tons.[1572] The provisions in the EGASPIN covers the lacuna in PDPR, which does not address decommissioning offshore.

While it is worthwhile that there is a legal regime for decommissioning oil and gas installations exist under Nigerian law there are indications that the regime is far from being sustainable and adequate to guarantee the internalization of the environmental costs associated with decommissioning. A World Bank Report on Decommissioning itemizes the indicators of sustainable decommissioning.[1573] These indicators are effective policy and regulatory framework; environmental and social best practice and management systems and financial assurance mechanisms.[1574] Others are effectual oversight and stakeholder engagement and continuous improvement.[1575]

It is not difficult to see the defects in the Nigerian decommissioning regime. In chapter three of this thesis attention was drawn to the shortcomings of the decommissioning regime in Nigeria.[1576] First, the guarantee under Regulation 46 of the PDPR is sub-optimal. Even if this gap was covered by the EGASPIN, the latter is an industry initiative that falls flat of the requirements of law. It therefore cannot be posted as an effective regulatory policy or framework for decommissioning for its want of legal force. This poor legal posture is further compounded by the absence of a clear guidance procedure for decommissioning in Nigeria's oil industry.

Second, the nature of the regulation of the terms of the Nigerian hydrocarbon license is highly prescriptive. Provisions in the first schedule of the Act are superimposed on licenses.[1577] Nothing in the implied terms addresses the need for environmental, social best practice and management systems. There is only a cursory mention of the necessity of ministerial consent for the assignment of interest in oil prospecting

[1572] Please see the discussion in 3.4.1.3 of chapter 3 of this thesis.

[1573] World Bank, Towards Sustainable Decommissioning and Closure of Oil Fields and Mines: A Toolkit to Assist Government Agencies (2010) 3/ES1-ES 3, available on < http://siteresources.worldbank.org/EXTOGMC/Resources/336929-1258667423902/decommission_toolkit3_full.pdf> last accessed on the 13th of March 2020

[1574] World Bank, Towards Sustainable Decommissioning, E2

[1575] World Bank, E2

[1576] Please see the discussion in 3.4.1.3 of chapter 3 of this thesis.

[1577] Petroleum Act, section 2 (3).

licenses or oil mining lease.[1578] There is also a reference to the minister's power to refuse assignment on grounds of good reputation.[1579] While the judgment of the minister is more likely to be influenced by a company's demonstration of an effective Environmental Management System (EMS), that does not translate to a positive obligation that demands a demonstration of the existence of such a system.

Third, Nigerian decommissioning regime lacks legally binding financial assurances for decommissioning. Decommissioning demand considerable and extensive future technical and operational resources.[1580] Given the huge cost associated with decommissioning, it is imperative that a legal regime for decommissioning demand an early estimate of this decommissioning cost and insists that the cost be factored into the economics of the project life cycle.[1581] Financial assurance provides security to governments that funding will be available to conduct decommissioning and closure activities.[1582] It is considered the 'most effective insurance mechanism to ensure the funding needed for proper decommissioning and closure activities for hydrocarbon companies.[1583] These assurances can take the form of trust fund, insurance policy, third party guarantee, irrevocable letter of credit and cash deposit.[1584] However, a new Petroleum Industry Act 2021 which just received the assent of the president,[1585] creates a decommissioning fund that provides insurance that licensee will meet the cost of decommissioning hydrocarbon installations.[1586] While this provision is commendable, its implementation and enforcement would labour under the inefficiency of ministerial directions. This is because the Act permits the minister of petroleum resources to give lawful directives to the Upstream Regulatory Authority being the agency with powers

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[1578] Paras. 14, Schedule 1 of the PA.

[1579] Paras. 16 (a), Schedule 1

[1580] John Wills and Evans C. Nelson, '' The Technical and legal Guide to the UK Oil and Gas Industry" (2007) 481-527

[1581] World Bank (note 159) T3-1-14

[1582] World bank, T3-2

[1583] Ibid.

[1584] World Bank, T3-10.

[1585] This Day, *'Buhari Signs Petroleum Industry Bill'* (This Day Newspaper of 16th August 2021), available on < Breaking: Buhari Signs Petroleum Industry Bill | THISDAYLIVE> last accessed on the 23/08/2021.

[1586] See section 233 (1) of the Petroleum Industry Act 2021.

to supervise decommissioning.[1587] This ministerial checkmate can limit the oversight functions of the regulator in relation to the application of the fund.

Fourth, there is no evidence under Nigerian law that oversight and monitoring is effectual. Although Nigeria has regulatory agencies that monitor the operation of hydrocarbon companies, the potentials for conflict of interest and the fact that most of these agencies are underfunded make these agencies pander to the will of industry.[1588] With respect to stakeholder engagement, there is little evidence to suggest that stakeholders are engaged before oil-prospecting licenses are granted to licensee. Although Nigerian law makes Environmental Impact Assessment (EIA) and stakeholder consultation necessary[1589], the usual rush for oil royalties does not ensure that this requirement of law is complied with.[1590] More so, special interest requirements under access provisions make it difficult for stakeholders to challenge the non-compliance with these mandatory provisions of the EIA in court.[1591]

The unsustainable nature of Nigeria's decommissioning regime has environmental implications. The environmental impact of decommission would depend on the decommissioning regime favoured under Nigerian regulation. Reg. 46 of the PDPR favours complete removal of all installations subject to the minister's right to authorize a takeover of the installation. Complete removal is also favoured by the EGASPIN and also provides that installations should be designed in a manner that guarantees it complete removal.[1592] This decommissioning posture has environmental implications. Where offshore installations act as artificial reef for certain habitats complete removal of installations may come at great ecological costs through the loss of flora and fauna

[1587] Section 3 (4) and (5) of the Petroleum Industry Act 2021.

[1588] Please see the discussion on conflict of interest.

[1589] EIA Act, 1992, Section 1(a)-(c).

[1590] Under Nigerian certain mandatory activities require a full EIA. These are activities include agriculture, infrastructure, industry, petroleum, airport, drainage/irrigation, land reclamation, fisheries, forestry, housing, industry, mining, ports, power-generation/transmission, queries, railways, transportation, and waste treatment/ disposal; See Schedule to the EIA Act 1992.

[1591] For a discussion on the EIA regime in Nigeria, see M.N. Isah, "The Role of Environmental Impact Assessment in Nigeria's Oil and Gas Industry" (2012, PhD Thesis Submitted to the university of Cardiff); See also N.E. Ojukwu-Ogba, "Legislating Development in Nigeria's Oil Producing Region: The NDDC Act Seven Years on" (2009) 17 AJ.I.C.L. 1; Wifa Eddy Lenusira, "The Role of Environmental Impact Assessment (EIA) in the Nigerian Oil and Gas industry Using the United Nation's Environmental Programme EIA on Ogoni as a Case Study-Lesson From some International Good Practices (2014) 3 I.E.L.R., 111-117

[1592] EGASPIN, Part VIII-G

and their associated ecosystem services.[1593] Other effects include the complete loss of associated reef bio data and the loss of benefits associated with the facts that oil and gas structures enhance taxonomic and functional diversity of the marine environment and encourage the assemblage of fishes.[1594] These advantages have implications for food security and help cushion the social and impacts of hydrocarbon exploitation in the ND.

5.5 HOW EFFECTUAL IS THE CORRECTIVE JUSTICE FRAMEWORK IN THE PETROLEUM INDUSTRY?

In the application of the PPP, corrective justice (CJ) serves the principal purpose of equalizing the order of distribution distorted by the polluter. The method of cleanup and the framework and measure of compensation determine the extent to which this principal objective is served. The channels of compensation in the hydrocarbon industry have already been discussed in this thesis.[1595] Two options are available to the victims. They can seek redress through arbitration or mediation or through the court system.[1596] The option of arbitration is favourable to most victims because of the inefficiencies associated with the process of seeking compensation in Court. However, while there are legal provisions under Nigerian law that enable compensation when victims of pollution suffer environmental harm, the system of compensation is inhibited by certain challenges. First, given the appetite of victims to avoid the inefficiencies associated with the slow court system in Nigeria, the compensation recovered through arbitration is negligible. Even when victims submit to the court, the compensation recoverable is contingent upon prove of damage.[1597] This requirement places the burden of prove on the weaker party, the victim of the pollution in question. Given the level of scientific information required to discharge this burden, the possibility of capitulating to whims of state and MNOCs remains high.

[1593] Brigitte Sommer, Ashley M. Fowler et.al, "Decommissioning of Offshore Oil and Gas Structures: Environmental Opportunities and Challenges" (2019) 973-981

[1594] Brigitte Sommers, 974

[1595] See Paras. 3.7.5 of Chapter three of this thesis.

[1596] Rachael Eben, "A Systemic Appraisal of Nigeria's Vessel-Source Compensation Regimes for Spill Victims" (2016) 24 (3) African Journal of International and Comparative Law, 40-419, 9

[1597] Omobolaji Adewale, *"Oil Spill Compensation Claims in Nigeria: Principles, Guidelines and Criteria"* (1989) 33 (1), Journal of African Law, 93.

Second, there is a tendency for courts in matters of compensation to lean in favour of the industry given the contribution of the industry to national GDP. In *Allar Irou v Shell-BP Development Company (Nigeria) Ltd*,[1598] the plaintiff's request for an injunction on the grounds that the defendant's production activities adversely injured his interests was refused. As the Court noted, "to grant the injunction would amount to asking the defendant to stop operating in the area and cause the stoppage of a trade…mineral which is the main source of the country's revenue."[1599] While this decision protects international trade and investment as a component of the PPP, it advances environmental injustice to the victim concerned as the decision suggests that the order of distribution which he seeks to re-establish is beyond his legal reach. This type of decision escalates the vulnerability of victims to environmental impacts and social crisis.

Third, compensation under Nigerian law is imposed on the speculation of prices and estimate of damages that do not take account of the country's inflationary realities.[1600] Even victims who prefer out-of-court settlement for compensation through arbitration /mediation from the Oil producer Trading section of the Lagos chamber of Commerce are frustrated by the body's use of data sets established since 1977.[1601] This compensation regime is prescriptive and is not adjusted on a regular basis for inflation.[1602] The regime only focuses attention on the value of cash crops and economic trees, they do not take into account a farmer's labour or any loss of future earnings.[1603] The compensation regime only relates to the economic value of damaged land rather than specific environmental damage done to the ecosystem.[1604] The compensation system therefore does not account for ecosystem functions. Thus, it does not serve the purpose of re-establishing the order of distribution which is a principal pursuit of CJ.

[1598] Unreported Suit No. W/89/71, Warri High Court, November 26, 1973.

[1599] Page 67.

[1600] Rachael Eben, "A Systemic Appraisal of Nigeria's Vessel-Source Compensation Regimes (note 187) 11.

[1601] Stakeholders Democracy Network (SDN) " International Compensation Systems for Oil Spill in Relation to Reform in Nigeria" (July 2014), available at < Towards-a-Nigerian-Compensation-Scheme-.pdf (stakeholderdemocracy.org)> last accessed on the 22/08/2021.

[1602] SDN, International Compensation Systems, 5

[1603] Ibid.

[1604] Ibid.

Another factor which affects corrective justice under Nigerian law is the method of remediation deployed.[1605] To achieve the aim of corrective justice such method should help restore the environment to the state it was before the spill occurs. Concerning the remediation method in the Niger Delta, the UNEP Report noted that "remediation by enhanced natural attenuation (RENA)-… has not proven to be effective…as observations…show that contamination can often penetrate deeper than 5 meters and has reached the groundwater in many locations."[1606] Not only does this revelation support a colossal regulatory failure on the part of Nigerian authorities it reveals that MNOC strive for methods which are cost effective, making real time remediation a postponed promise. This irresponsible corporate attitude remains a major trigger of environmental pollution and restiveness in the Niger Delta region of Nigeria.

5.6 STATE RESPONSBILITY: HOW EFFECTUAL?

Achieving EJ require the inputs of states to translate aspirations into concrete realities. In relation to EJ, the obligation of states is not only to design legally binding strategies for a fair allocation of environmental burdens and benefits but also to achieve greater depth in the just ordering of society through innovative use of the mechanics of political power.[1607] One responsibility of state stand out in the application of the PPP. That responsibility is the responsibility of governance which broadly extends to the making, executing and interpreting legislation and regulations relevant to the application of the PPP.

While Nigeria has worked towards achieving the objective of good governance by creating administrative and judicial institutions for the enforcement of environmental laws two challenges demonstrate a failure of environmental governance in Nigeria. These challenges are Nigeria's 'gray' judicial posture and a compromised model of national participation in the hydrocarbon trade. They are considered below.

[1605] For details of these methods see Ashutosh Agarwal, *"Remediation Technologies for Oil-Contamination Sediments"* (2015) 101 (2), 483-490

[1606] UNEP Report 2011, 12.

[1607] This responsibility under international law exist in the form of responsibility to protect the marine environment and take measures necessary to ensure that activities within a state's jurisdiction are conducted in a manner that does not cause harm to the environment of another state. See the discussion in paras. 2.4 of chapter 2 dealing with state responsibility.

5.6.1 A 'Gray' Judicial Posture

Giving the essential role of environmental law in the protection of natural resources and ecosystems the judiciary is relied upon to advance EJ and implement the framework of principles and law.[1608] The role of the judiciary in this regard is essential to enforcing compliance.[1609] The judiciary fills a vital role of providing coercion while supplying motivation for compliance. The judiciary is also a critical arbiter of fairness, and it helps assure reasonable consistency among similarly situated environmental cases and provide the mechanism through which intransigent law violators can be made to comply.[1610] The Courts provide the ultimate recourse where there is resistance to investigation and unwillingness on the part of the community to comply with the demands of the enforcement authorities.[1611]

In the context of the PPP, the judiciary is expected broaden the avenues through which polluters can be held to account and made to shoulder the externalities they generate. This task requires the adjustment of rules relating to the computation and assessment of damages to ensure that those who have suffered losses or distributional consequences as a result of the polluter's mischief get a full measure of compensation when the need arises. One way that the courts can do this is for the court to promote environmental values by putting a price on them through court-developed matrix of liability evaluation .[1612]

[1608] UNEP, advancing Justice, Governance and Law for Environmental Sustainability: Rio+20 and the World Congress of Chief Justices, Attorneys General and Auditor General' (2012) IV.

[1609] World Bank, "Guidance Notes on Tools for Pollution Management: The Role of the Judiciary in Pollution Management" (2010), available on http://siteresources.worldbank.org/INTRANETENVIRONMENT/Resources/244351-1279901011064/GuidanceNoteonRoleofJudiciary.pdf> last accessed 09/02/2020.

[1610] Marcia E. Mulkey, "Judges and the Other Lawmakers: Critical Contributions to Environmental Law Enforcement" (2004) 4 Sustainable Development Law Policy journal, 2-10; See also Kenneth J. Markowitz and Jo. J.A. Gerardu, 'The Importance of the Judiciary in Compliance and Enforcement' (2012) 29 Pace Environmental Law Review, 540 (the authors notes in this paper that "the judiciary is positioned in the vanguard of change-pioneering 'green courts, helping to empower a broader group of stakeholders to participate in the process of achieving environmental justice and using informal networks to collaborate and exchange information with counterparts around the world").

[1611] ibid.

[1612] See Brian J. Preston, "The Contribution of the Courts in Tackling Climate Change" (2016) 28 Journal of Environmental Law, 14-15.

While these environmental functions are commendable, many factors limit the ability of the judiciary to function effectively under Nigerian law. First, environmental adjudication is as good as the law it seeks to enforce. Where the law is limited in scope, adjudication can only guarantee limited rights especially in adversarial systems were contested pleadings are deployed. Second, staying abreast of the complex and rapidly changing environmental issues can be difficult for individual judges.[1613] Not only does this rob them of the ability to adapt current judicial innovation to their country's local circumstances, it deprives potential environmental litigants of the possibility of innovative remedies that may have been accommodated in their jurisdiction to promote EJ. Third, environmental harm (especially those emanating from climate change) involves complex science and do not conform to jurisdictional boundaries, a factor which may make judges uncomfortable.[1614]

The extent to which Nigerian judiciary has lived up to its functions in EJ context is a matter of scholarly contestation. But reality checks demonstrates that the judgement of Nigerian Apex Courts do not stimulate the hope that environmental law (especially those relating to the allocation of environmental cost) is finding its footing on the sands of Nigerian law. In the application of the PPP, many factors demonstrate the complicity of the judiciary in the poor quality of environmental regulation in Nigeria.

First, is the inability of the judiciary to take a more activist posture in relation to environmental concerns. The fact is demonstrated by the attitude of superior Courts in Nigeria in relation to environmental obligations of the Federal Government as provided in chapter two of the Constitution[1615]. Given the sufficient link that exists between guaranteed fundamental human rights and environmental obligation, the judiciary in Nigeria at the apex level lost many opportunities to expand the frontiers of interpretation in relation to a substantive right to a healthy environment. In *Attorney General of Ondo State v Attorney of the Federation,*[1616] the Supreme Court of Nigeria held that Courts cannot enforce any of the provisions of chapter II of the CFRN 1999

[1613] Kenneth J. Markowitz and Jo. J.A. Gerardu (note 1610) 544.
[1614] Ibid.
[1615] Archbishop Anthony Okogie v. Attorney-General of Lagos State [1981] 2 NCLR 337 CA and Attorney-General of the Federation and ors [2002] FWLR (part III) 1972.
[1616] [2002] Federation Weekly Law Report (FWLR) Part III p. 172.

until the National Assembly has enacted specific laws intended to enforce the objectives. This case demonstrates the unwillingness to assume ambitious interpretative postures that will entrench government accountability at all levels. This kind of interpretation while demonstrative of the Court's willingness to remain within the precincts of its constitutional responsibilities, defy the kind of bold function that a modern judiciary sensitive to environmental concern should be performing. Perhaps, a contributory cause of this gray judicial posture is the nature of Nigeria's judicial policy.

The handling of *Jonah Gbemre's Case,*[1617] at the appeal levels and the silence of the judiciary when the case file was forcefully removed at the Court of first instance by state authorities is explainable upon no other hypothesis than an unwillingness to enrich environmental jurisprudence. Despite the promises of the case at the Court of first instance, nothing has been heard of the case on Appeal more than 15 years after the case file was whisked away from the High Court in commando fashion.

Another proof of the Judiciary's inability to green the interpretation of environmental law in Nigeria is the rise in the number of litigants who seek solace in foreign courts for environmental harms committed in Nigeria.[1618] In *Oguru Effanga and others v. Royal Dutch Shell*[1619]*,* A group of Nigerian fishermen filed an action in Netherland against Shell to recover damages for leaking pipelines, which destroyed their land and fishing settlements. Shell challenged the jurisdiction of the Dutch Court to hear the matter. The Court dismissed Shell's argument and held that it had extra-territorial jurisdiction over both SPDC and Royal Dutch Shell in environmental matters. In *Bodo v SPDC*[1620]*,* in an action regarding a historic oil spill, both parties reached a settlement of £55 million pounds sterling as compensation to the victims of the spill. However, in *Okpabi v. Royal Dutch Shell,*[1621] the Technology and Construction Court, held that it does not have jurisdiction to hear the claim of the plaintiff concerning wrongs complained of the defendant's subsidiary in Nigeria.

[1617] [2005] A.H.R.L.R. 151, NGHC

[1618] See Bodo v SPDC [2017] EWHC 89 (TCC) and Okpabi V Royal Dutch Shell [2018] EWCA Civ., 191

[1619] ibid.

[1620] [2014] EWHC 1973 (TCC) 37

[1621] ibid.

However, recent decisions demonstrate that the attitude of foreign courts in relation to subject of jurisdiction in foreign countries is changing.[1622] While this changes in judicial attitude offers Nigerian litigants extended opportunities to pursue claims in foreign jurisdictions, this foreign scout for justice reveals that Nigerian Courts need to do more to ensure that those who suffer environmental harm receive due recompense. It points to the fact that the volume of EC recovered outside Nigeria is far greater than what is recoverable in Nigeria. The under-recovery of environmental cost cannot promote EJ.

5.6.2 Conflict of Interest and a Compromised Model of National Participation in the Hydrocarbon Trade

Another factor that contributes to a failure of environmental governance is the potential for Nigerian law to enable the fusion of conflicting objectives on regulator. This conflict can exist in the form of unifying inconsistent objectives in a single regulator or imposing objectives which regulator in practice cannot fulfill.

One source of this conflict is the merging of two conflicting responsibilities on the DPR. [1623] The DPR is the regulatory agency responsible for both economic development and ensuring compliance with safety and environmental regulations.[1624] The fusion of these conflicting responsibilities in a single authority can potentially

[1622] Okpabi v Shell [2021] UKSC, 3 where the United Kingdom held on appeal that parent companies like Shell can have a duty of care towards those affected by a subsidiary's action and accordingly declared that on that basis it has jurisdiction to hear the case from the Nigerian farmers; see also Oguru, Effanga and Others v Royal Dutch Shell Plc and SPDC Limited case no36549/HA ZA 10-1677.

[1623] DPR, Functions of the Department of Petroleum Resources, available on < https://www.dpr.gov.ng/functions-of-dpr/> last accessed on the 12th of March 2020 [the functions of DPR are listed as (a) Supervising all Petroleum Industry operations being carried out under licences and leases in the country (b) Monitoring the Petroleum Industry operations to ensure that are in line with national goals and aspirations including those relating to Flare down and Domestic Gas Supply Obligations. (c) Ensuring that Health Safety& Environment regulations conform with national and international best oil field practice (d) Maintaining records on petroleum industry operations, particularly on matters relating to petroleum reserves, production/exports, licences and leases. (d) Advising Government and relevant Government agencies on technical matters and public policies that may have impact on the administration and petroleum activities (e) Processing industry applications for leases, licences and permits (f) Ensure timely and accurate payments of Rents, Royalties and other revenues due to the government and (g) Maintain and administer the National Data Repository (NDR).

[1624] G. Agbaitoro, M. Amakoromo and E. Wifa, "Enforcement Challenges in the Protection of Environment from Upstream Petroleum Operations in Nigeria: The Need for Judicial Independence" (2017) 85 I.E.L.R, 85-93.

lead to a conflict of interest where a choice would have to be made to advance one objective above the other. This conflict has the propensity to undermine the independence and impartiality of regulator and could make the enforcement of environmental legislations more difficult than would otherwise be the case.[1625]

The NNPC Act and other legislations demonstrate the potential for this conflict. Under the Act, the NNPC is charged with powers of exploring, prospecting for and working or otherwise acquiring, possessing and disposing petroleum.[1626] The Act also establishes a Petroleum Inspectorate (the organization which transformed into DPR and performs the regulatory functions for the oil industry).[1627] It would appear that there is an administrative link between the Nigerian Government through the NNPC and international Oil Companies and the DPR. The NNPC has historically being in production partnerships with major oil companies through JVA agreements, production sharing contracts (PSCs) and technical service contracts.[1628] All these contracts may be subject to association or JVAs.[1629] The NNPC holds an average of 55 percent stake in upstream JVAs.[1630] The existence of these arrangements makes the NNPC complicit in the pollution of the Niger Delta and turns up the potential for conflict of interest. It means that NNPC is responsible for a share of the financial obligations arising from oil industry operations including environmental costs. When operator makes a cash call under the JVA, NNPC is expected to honour that call to the extent of the size of its interest under the JVA. It is therefore unimaginable that the polluter (the Federal Government through the DPR) can be trusted with regulatory responsibilities. This would amount to the polluter regulating itself. The potential for this conflict is the reason why ND is one of the most polluted sites in the world.

[1625] G. Agbaitoro, 87

[1626] NNPC Act, section 5

[1627] NNPC Act, section 10

[1628] Baker Institute for Public Policy Rice University, "The Nigerian National Petroleum Corporation and the Development of Nigerian Oil and Gas Industry: Histories, Strategies and Current Directions (2007) 8, available on < https://www.bakerinstitute.org/media/files/page/9b067dc6/noc_nnpc_ugo.pdf

[1629] Kyla Tienhaara, "Foreign Investment Contracts in the Oil and Gas Sector: A survey of Environmentally Relevant Clauses" (2011) 11 (3) Sustainable Development Law and Policy Journal, 15-20

[1630] Baker Institute (note 1628).

However, due to the NNPC's inability to honour cash calls, it is changing the structure of its partnership to Production sharing Contracts.[1631] Under Nigerian law, the PSC regime is regulated by the Deep Inland Basin (Production Sharing Contract) Act.[1632] The Act was enacted as the long title suggests, to give effect to certain fiscal incentives given to the Oil and gas companies operating in the Deep Offshore and Inland Basin areas under production sharing contracts with NNPC. It does not contain an express term intended to make the polluter pay except the grossly sub-optimal provisions contained in existing laws. Contracts of this nature contain statutory assurances and guarantees that limit the subsequent environmentally desirable legislations in future that tend to alter terms created under legislations in force when the contract was made.[1633] The implication of such guarantees and statutory assurances in PSCs and JVAs is to encourage a reduction of policy space on social and environmental law.[1634] Their legal effect is to freeze a state's sovereign power or tie the hand of the state party during the life of the contract to make legislations, which affects the guarantees and assurances.[1635] It therefore follows that future legislations intended to make polluters pay would remain inoperative to contracts concluded using the model of a PSA. Not only does this affect the recovery of pollution, prevention and control cost given the sub-optimality of environmental charges and fines in Nigeria, it is bound to sharpen the edges of distributive concerns in a manner continuously endanger the people of the Niger Delta.

5.7 CONCLUSION

This chapter with the aid of the framework developed in chapter four of this thesis has analyzed the extent to which Nigerian petroleum laws relevant to the application of

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[1631] Baker Institute, 8

[1632] Deep Offshore and Inland Basins Production Sharing Contract Act, CAP D3 2004.

[1633] NLNG (Fiscal and Assurances) Act, Section 2 to the first schedule of the Act; See also the discussion in Paras. 3.3.2. of chapter three of this thesis on the Redistribution Under the NDDC Act 2000.

[1634] Sotonye Frank, 'Stabilization Clauses and Sustainable Development in Developing Countries" (2014), PhD Thesis, University of Nottingham, 203-2011, available on <https://core.ac.uk/download/pdf/33567613.pdf> last accessed on the 13th of March 2020.

[1635] In the Texaco Award, the sole arbitrator held that "the state cannot invoke its sovereignty to disregard commitments freely undertaken through the exercise of the same sovereignty".

the PPP promote EJ. The chapter also notes the potential of Nigeria's legal system to internalize environmental cost in a manner that reflects the ideals of EJ. This potential is revealed in the existence of legislations which strive to elevate the margins of safety of Nigeria's petroleum laws. This chapter notes that these laws are those relevant to ambient air quality, safe climate and reduced emission across all productive sectors of the hydrocarbon industry. The existence of laws intended to protect water quality and biodiversity is also a testament to the potentials of Nigerian law to achieve ample margins of safety, thereby consolidating the pollution prevention expectations of the legal system. While this potential cannot be denied, the Nigerian system of petroleum regulation falls below the mark of a sufficient margin of safety when matched against best practice indicators. The prescriptive nature of the regulatory system, its tolerance for gas flaring and enforcement challenges enabled by ineffectual legal instruments possible reasons which account for this poor margin of safety. Nigeria's environmental performance ranking by both the World Bank and the Environmental Performance Index, put its poor margin of safety beyond dispute. The implication of this legal system poverty is the poor regulation of oil spills which accounts for public health and social impacts in dimensions which elevates distributive, social and food justice concerns.

The chapter also analyzed the extent to which the rights component of Nigerian law meets the expectations of EJ. While Nigerian law meets and surpasses some expectations of good practice examples, it falls short in other instances. The existence of legislation which promotes the right to public participation, access to public information and access to justice demonstrate the progress of Nigerian law in achieving a formidable rights component. More specifically, the passing of the FOI Act in 2011 and the introduction of the FREP Rules puts the rights component of the Nigerian legal system at an elevated stance with potential to achieve EJ. However, in the midst of this potential there are challenges which limits the scope for a free EJ reign leveraging on the rights components of Nigerian law. The fact that participatory rights are subject to extensive discretion is one of such challenges which acts as a barrier for achieving the EJ concern of mainstreaming environmental concerns into development projects. This discretion limits the level of public scrutiny needed to achieve accountability in environmental decision making. Fees charged for transcription services also creates barriers which can lead to the under quantification

of environmental externalities in a manner that encourages unsustainable industrial practices. In relation to access to justice, this chapter notes that while Nigeria's legal system guarantees access, challenges like lack of assertiveness, corruption, poor administration of justice and the non-justiciability of environmental rights affect the extent to which access rights under Nigerian law promotes EJ.

This chapter has also demonstrated the fact that there have been efforts to allocate and redistribute environmental taxes in Nigeria's hydrocarbon industry.[1636] However, the performance of this function is however limited by imperceptible nature of environmental fines, charges and taxes, poorly designed incentives and an unsustainable decommissioning regime that dampens the hopes of achieving a just allocation of environmental burdens and benefits.

This chapter (in section 5.4 of this thesis) also made clear the CJ channels for victims who suffer environmental injuries to redress these injuries. The chapter also makes clear that while these options are an integral part of the legal system they are limited in scope and emasculated by a lack of assertiveness, the unwillingness of courts to support claims and speculated measures of damages which seldom accounts for ecological damages.

Finally, this chapter considered (in section 5.5.) how the Nigerian state has fared in the performance of its governance responsibilities in an environmental law context. While Nigerian petroleum laws have taken a leap forward to enhance its governance objectives, a non-liberal judicial posture and a compromised model of state participation in the hydrocarbon trade hinders the attainment of its governance responsibilities. These limitations prevent the wheels of statecraft from moving to achieve EJ, consolidating inefficiency and the capture of regulatory institutions by industry.

On the basis of the above, it will therefore be safe to conclude that while the application of the PPP in Nigeria's legal system has the potential to promote EJ, such potential is inhibited by challenges which the legal system is yet to surmount.

[1636] See Section 5.3 of this chapter.

The next chapter details what lessons Nigeria can learn from other jurisdictions in other to address the challenges which prevents the Nigerian legal system from achieving environmental justice.

CHAPTER SIX

RECOMMENDATIONS AND LESSONS FROM OTHER JURISDICTIONS ON HOW TO APPLY THE PPP TO PROMOTE EJ

6.1 INTRODUCTION

This chapter details a list of recommendations adumbrated with lessons from other jurisdictions that will help elevate Nigerian law to a level where the application of the PPP promotes EJ. The chapter argues that to achieve a just and progressive improvement in the application of the PPP, Nigerian law needs to overcome the limitations that make EJ difficult and unrealistic to attain. Overcoming these limitations will involve the recalibration of legislations to address sub-optimality, the mode of government participation in petroleum trade, the introduction of an environmental business case and a roadmap for energy transition. It will also entail a project specific tax system (PSTS)[1637], a green budget, the creation of special environmental courts, future financial guarantees, comprehensive constitutional guarantees of environmental rights and an uncapped and inflation-sensitive liability system. Lessons shall be drawn from the United Kingdom, Norway, United States of America, Australia, United Arab Emirate (UAE) and India. While attention shall be principally focused on these countries, this chapter shall make passing references to other countries that stand out as good practice examples. No claim of perfection is made in relation to the countries considered as good practice examples. This chapter only expresses a confidence that the introduction of innovative solutions from these countries would offer incremental improvement on how the PPP is applied in Nigeria's petroleum industry that would eventually lead to the attainment of EJ.

6.2 JUSTIFICATION FOR CHOICE OF BEST PRACTICE JURISDICTIONS

The countries chosen as learning points for Nigeria have been carefully selected. A mixture of developed and developing countries were chosen for many reasons. These reasons are general and country-specific. For developed countries like Australia, Norway, United Kingdom and the United States of America, their ranking on the

[1637] See the discussion in Section 6.1.5 of this chapter.

Environmental Performance Index (EPI), effective governance and bold PPP targets mostly account for why they were selected. For example, the UK, Norway, Australia and the US occupy fourth, ninth, thirteenth and twenty fourth positions in the ranking of 180 countries in PPP-relevant reviews and indicators like health ecosystem vitality, ecosystem services and climate change.[1638] These countries were found to possess impressive regulatory qualities,[1639] accountability and political stability, aspirations which Nigeria has expressed an intention to achieve in its development and environmental plans.[1640]

A second general reason is that almost all the countries chosen with the exception of India are net exporters of hydrocarbon where oil exploration has reached maturity.[1641] This situation is also compatible with the realities in Nigeria where oil exploration (especially onshore) is nearing decommissioning with implications for the application of the PPP. A third general reason is that in almost all the countries selected as good practice examples, there is evidence of the existence of PPP-related policies with potentials to achieve EJ. For example, while the UK and Norway offer bold energy transition targets for the hydrocarbon sector backed by legislations, Australia, India and UAE offer lessons on effectual judicial policy and uncapped liability regimes essential for the accommodation and effective internalisation of extensive environmental cost. Finally, all the countries chosen as best practice examples are signatories to relevant international treaties relevant to the application of the PPP. For

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[1638] Environmental Performance Index (EPI), 2020 EPI Results, available at <Environmental Performance Index | Environmental Performance Index (yale.edu), last accessed on the 30/08/2021; see also OECD, OCED Environmental Performance Reviews: Australia (OECD Publishing 2019), available at <OECD iLibrary | OECD Environmental Performance Reviews: Australia 2019 (oecd-ilibrary.org)> last accessed on the 01/08/2021

[1639] See A. Hale, "Advancing Robust Regulation: Reflections and Lessons to be Learned" in Preben Hempel Lindoe, Michael Baram, and Ortun Renn (eds) "Risk Governance of Offshore Oil and Gas Operations (Cambridge University Press 2014) 403-423 and Robert Baldwin and Julia Black, "Really Responsible Regulation" (2008) 71 (1) Modern Law Review, 62-63.

[1640] Federal Republic of Nigeria, Vision: 20:2020 (Abridged Version), available on < https://www.nigerianstat.gov.ng/pdfuploads/Abridged_Version_of_Nigeria%20Vision%202020.pdf> last accessed on the 15th of March 2020. (Nigeria aspires to join the league of top 20 economies of the world in 2020. One of the objectives of Nigeria's vision is "to make efficient use of human and natural resources to achieve rapid economic growth and translate the economic growth into equitable social development of all citizens").

[1641] Maturity presupposes that oil and gas fortunes are on a steady decline. See Oil and Gas UK, 'Economic Report 2015, 23, available at < Oil & Gas UK Economic Report 2015 (cld.bz)> accessed 8th September, 2021.

example, Australia, Norway, India, UAE, UK and US feature prominently on the list of parties that have signed up to the Paris Agreement on Climate Change.[1642] This fact, creates some form of assurances that the lessons which Nigeria can draw from these countries would be in tandem with the expectations of international environmental justice.

More specific reasons for the choice of these countries relates to legal system compatibility. The United Kingdom and Nigeria share colonial ties. The received English law is a part of the Laws of the Federal Republic of Nigeria. Nigeria is an active member of the Commonwealth of nations[1643] and is stepped in the legal traditions of the common law.[1644] Australia, India and USA also share this common law traditions.[1645] These similarity in legal tradition could offer Nigeria realistic, transposable legislative, regulatory and judicial learning points that could encourage the just application of the PPP.

The USA shares some political and legal system compatibility with Nigeria. First, it operates a presidential and federal system of government like Nigeria.[1646] In fact, Nigeria's Federalism is modelled after that of the US and is greatly influenced by

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[1642] UN, List of Parties that Signed the Paris Agreement on the 22nd of April 2016, available at <List of Parties that signed the Paris Agreement on 22 April – United Nations Sustainable Development> last accessed on the 01/09/2021.

[1643] There are 54 members of the Commonwealth in Africa, Asia, the Caribbean and Americas, Europe and the Pacific. See Commonwealth, 'Pan-Commonwealth', available on <https://thecommonwealth.org/regions/pan-commonwealth> last accessed on the 15th of March 2020.

[1644] Common law is used in the context of a legal system which relies heavily on court precedent in formal adjudications as opposed to civil law systems which relies more on codes and provide rules of decisions for many specific disputes. See Toni M. Fine *"American Legal Systems: A Resource and Reference Guide"* (Anderson Publishing 1997); See also G. Edward White *"American Legal History: A very Short Introduction"* (Oxford University Press 2014) and John M. Scheb II and Hermant Sharmat *"An Introduction to American Legal System"* (4th Ed, Wolter Kluwer 2015).

[1645] A.J Brown, Jacob Deem and John Kincaid, *"Federal Constitutional Values and Citizen's Attitude to Government: Explaining Federal System Viability and Reform Preferences in Eight Countries"* (2021) Journal of Federalism, 1-25, 1-4.

[1646] For more reading on this see William C. Murrey *"Sources of American Federalism"* (Sage Publications 1895) 1-30; F. Palermo and C. Kossler, *"Comparative Federalism"* (Hart Publishing 2017) 3; Claire Dunn, *"Subnational Politics and Redistribution in a Federal System: Determinants of Progressive Social Spending in Brazilian States"* (2021) Oxford Journal of Federalism, 1-27; J. Kincaid, "Introduction' in J. Kincaid (ed), *"A Research Agenda for Federalism Studies"* (Edward Elgar 2019), PP 1-14, 1. Cf: Dele Olowu, *"The Literature of Nigerian Federalism: A Critical Appraisal"* (1991) 21 (4) Oxford Journal of Federalism, 55-171 and Ufot B. Inamete, *"Federalism in Nigeria"* (1991) 318, Commonwealth Journal of International Affairs, 191-207.

judicial precedents.[1647] The US is also reputed as the birthplace of the EJM.[1648] This political system compatibility and the country's long history of dealing with EJ concerns could offer lessons in regulatory effectiveness and an effective distributive justice model for Nigeria. As a country that dealt with the worse offshore safety incident in history (Gulf of Mexico Spill),[1649] the US also offers lessons on effective liability systems, enforcement and regulatory orientation. good

Australia is also a commonwealth country and a federal system with a high environmental rating.[1650] It is also reputed as having the first specialist superior court in the world (the Land and Environment Court.[1651] Its environmental courts have implemented the Judicial Excellence Framework.[1652] Nigeria's judiciary can learn one or two things from Australia on how to structure its environmental courts if it decides to create one in future to be responsive to EJ. The UAE has been selected given the fact that the country and Nigeria are members of the Organization of Petroleum Exporting Countries (OPEC), an organization that plays a vital role in the making of global petroleum policy.[1653] Thus, regulatory solutions from the UAE relevant to the application of the PPP is more likely to meet the expectations of Nigeria's obligations

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[1647] Andrej Stefanovic, *"The Role of the Judiciary in Shaping Federations: Cases of the Supreme Court in the United States of America and the Court of Justice in European Union"* (2017) 1 Journal of Liberty and International Affairs, 1875-9760; John Mc Ginnis and Ilya Somin, *"Federalism v State' Rights: A Defence of Judicial Review in Federal System"* (2004) Public Law and Legal Theory paper 9 of Northwestern University School of Law, 1-49, 1-3

[1648] See the discussion in Paras 4.2 of Chapter 4 of this thesis.

[1649] National Commission on the Deepwater Horizon Accident, "The Gulf Oil Disaster and the Future of Offshore Drilling Report to the President, available at <GPO-OILCOMMISSION.pdf (govinfo.gov)> last accessed on the 31st of August 2021.

[1650] OECD, OCED Environmental Performance Reviews: Australia (note 2).

[1651] See also Brain J. Preston, "International Quality Framework in Operation at the Land and Environmental Court of New South Wales, being a Paper Delivered at Australia's Court Administrators' Conference on the 6th of October, 2011 in Sydney, 1 available at < International Quality Framework in operation, AIJA Confere… (nsw.gov.au)> last accessed on 02/08/2021.

[1652] International Consortium For Court Excellence (ICCE), "International Framework for Court Excellence" (3rd Edition, May 2020), available at <The-International-Framework-3E-2020-V2.pdf (courtexcellence.com)> last accessed on the 2nd of September 2021; See also Brain J. Preston, "International Quality Framework in Operation at the Land and Environmental Court of New South Wales (note 1651).

[1653] OPEC Member Countries, available at <OPEC : Member Countries> last accessed on the 01/08/2021.

as a member of OPEC.[1654] The diversity of these solutions hunt is intended to offer Nigeria incremental improvement in the just application of the PPP.

The next part of this chapter considers these recommendations.

6.3 RECOMMENDATIONS AND IMPLICATIONS

Given the fact that the implementation of the PPP in Nigeria's hydrocarbon does not effectively promote EJ, this section makes a list of some recommendations or possible solutions to the challenges identified in this research. These recommendations are as follows:

6.3.1 Remodeling Legislative Provisions to Address Legal Sub-optimality

Given the fact that statutory provisions, which apply the PPP under Nigerian law, are sub-optimal, this thesis suggests that there is need to remodel Nigerian law to address this sub-optimality.[1655] The indicators of suboptimality in Nigeria's petroleum sector which affects the application of the PPP are those factors which decreases the margin of safety of petroleum laws and escalates externalities. This would involve the development of new rules which obligates polluters to assume responsibilities for any industrial action on their part which escalate poor air quality, climate safety, protect sources of clean water and preserve biological diversity. It will also involve a recalibration of Nigeria's pricing policy for emissions to address poor charges and penalties for breach of environmental regulations and the introduction of a decommission regime with adequate financial guarantees. Nigerian law needs to be remodeled to remove barriers to gas utilization by introducing realistic incentives for gas utilization to put an end to gas flaring in the country given its environmental, economic and social costs. The US, UK and Norway offer formidable examples of how these can be done.

In terms of emission pricing policy, Nigeria can borrow a leaf from Norway and UK to introduce a carbon tax. Norway introduced a carbon tax in 1991 applied to petrol, auto diesel oil, mineral oil and the offshore petroleum sector in accordance with the

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[1654] OPEC, "Energy Climate Change and Sustainable Development", (OPEC Bulletin Special Edition of April 2019) available at <OB042019.pdf (opec.org), last accessed on the 1st of September, 2021.

[1655] See the discussion in section 3.2 of chapter 3 of this thesis.

CO_2 Tax Act No. 72 of 1990.[1656] The carbon tax has been described as "Norway's most important cross-sectoral climate policy instruments for cost-effective cuts in greenhouse gas emissions."[1657] This carbon tax provides an incentive for cleaner production and consumption patterns.[1658] In 2013, the government raised the carbon tax on offshore petroleum production by NOK200 (USD 29.47) per tonne, raising the stringency level of policy to incentivize corporate investment in pollution abatement.[1659] The government also recently announced plans to triple its national tax on carbon dioxide (CO_2) emissions by 2030 to help it reach its climate goals.[1660] It plans to raise the cost of emissions to 2,000 Norwegian crowns ($237) per tonne by 2030 from 590 crowns for most industries including the hydrocarbon industry.[1661] While evidence from scholarly works demonstrate that this stringent regulatory posture is yielding emission reduction results,[1662] there are concerns that the new proposed increase could increase transaction cost in the Norwegian Continental Shelf (NCS) and weaken Norwegian competitiveness.[1663]

[1656] Act 21 of December 1990 no. 72 relating to Tax on Discharge of CO_2 in the petroleum Activities of the Continental Shelf; Michael Nachmany, Sam Fankhuser, Jana Davidova et.al, "Climate Change Legislation in Norway: an Excerpt from the Global Climate Legislation Study, A Review of Climate Change Legislation in 1999 Countries (2015) LSE, available at < 4 (lse.ac.uk)> last accessed on 02/08/2021, 5.

[1657] Norwegian Petroleum, ' Emissions to Air' (Environment and Technology, 13th August 2021) < Emissions to air - Norwegianpetroleum.no (norskpetroleum.no)> accessed 7th September 2021.

[1658] Michael Nachmany, Sam Fankhuser, Jana Davidova et.al, "Climate Change Legislation in Norway, 5

[1659] Michael Nachmany, 5

[1660] Nora Buli and Nerijus Ademaitis, 'Norway's Plans to Raise Carbon Tax Draw Oil Industry Ire' Reuters (8th January 2021), available at < Norway's plans to raise carbon tax draw oil industry ire | Reuters> last accessed on the 3rd of September, 2021; see also Ministry of Climate and Environment, 'Norway's Comprehensive Action Plan 2021-2030, available at <Norway's comprehensive climate action plan - regjeringen.no> last accessed on the 3rd of September, 2021.

[1661] Ministry of Climate and Environment, "Norway's Comprehensive Climate Action Plan" (Government.no, 1st of August, 2021) < Norway's comprehensive climate action plan - regjeringen.no> accessed 7th September, 2021.

[1662] Annegrete Bruvoll and Bodil Merethe Larsen, *"Greenhouse Emission in Norway: Do Carbon Taxes Work?"* (2004) 32 Journal of Energy Policy, 493-505; M. Andersen 'Europe's Experience with Carbon Energy Taxation (2010) 3 (2) SAPIENS, World Bank, *'Carbon Tax Guide: A Handbook for Policy Makers'* (Synthesis, Carbon Taxes in Brief, 2017), available at < Carbon Tax Guide - Synthesis web FINAL.pdf (worldbank.org)> last accessed on the 3rd of September 202 ("Where there is a lack of technical mitigation options, carbon taxes can encourage investment in research but may need to be complemented by other policies to help spur technology development"); Mikael Suo Andersen, *'Introductory note on Carbon Taxation in Europe'* (a Vermont Briefing 2016) 1-6, 2 ("when carbon taxes are levied strictly according to the properties of fuels, renewables will gain a proportional competitive advantage").

[1663] Nora Buli, 'Norway's Plans to Raise Carbon Tax Draw Oil Industry Ire' (note 1660).

To improve the stringency level of regulation, Nigerian government needs to alter the charges imposed both under the NOSDRA Act and under the Associated Gas Re-injection Act and regulations made pursuant to these laws. An amendment in this regard would stop oil companies from benefiting from pollution and acting responsibly. One way of doing this is by making environmental offences subject to strict liability and jerking up the financial penalty for these offences. Nigeria can learn a lesson from the US where liability under the Oil Pollution Act (OPA) 1990 is strict, joint and several (in cases where the incident involves more than one person).

Although there are limited defences permitted under US law like, act of God, act of war or spill resulting from a third party's gross negligence or willingful misconduct (even events solely caused by third parties), these defences do not weaken the stringency nature of regulation in the US.[1664] For example, the CWA prohibits both negligent and intentional discharge of oil in US navigable waters.[1665] It is a misdemeanor for an operator of an offshore facility to discharge oil negligently into navigable waters and a felony to do so knowingly.[1666] A person who violates the relevant provisions of the CWA may be fined up to $2,500[1667] per day of violation or an imprisonment term of one year or both.[1668] An intentional violation of the relevant CWA provisions may be liable to pay a fine of $5,000 per day of violation or

[1664] Robert Force, Martin Davies and Joshua Force, 'Deepwater Horizon: Removal Costs, Civil Damages, Crime, Civil Penalties and State Remedies in Oil Spill Cases' (2011) 85 Tulane Law Review, 891.
[1665] CWA 1977, s 309 (c); See also Brigid Harrington, "A Proposed Narrowing of the Clean Water Act's Criminal Negligence Provisions: It's Only Human? (2005) 32 Boston College of Environmental Affairs Review, 645; Eric Odion Otojahni, "United States Oil Pollution Liability Regime: The Implications of the Deepwater Horizon Incident' (2013) Masters Dissertation Submitted to the University of Aberdeen, 12-13.
[1666] Williams H. Rogers, Jason DeRosa and Serah Reyneyeld, "Stranger than Fiction: 'Inside' Look at Environmental Liability and Defence Strategy in the Deepwater Horizon Aftermath' (2011) 1 Washington Journal of Environmental Law and Policy, 230.
[1667] The Court may Rely on Criminal Fines Improvement Act 1984 (as amended) in imposing the fines. This Act was enacted by the US Congress to reflect changes in Criminal Fines except for statutes specifically exempted under the Act; See also Robert Meltz, "Federal Civil Criminal Penalties Possibly Applicable to Parties Responsible for the Gulf of Mexico Spill' , Congressional Research Service, CSR Report for Congress (16th December 2010) 1-11.
[1668] CWA 1977, s 309 (c) (1) (a). However, a second conviction for the same offence warrants a fine of $50,000 per day of violation, or an imprisonment term of more than two years or both.

imprisonment of up to three years and above or both.[1669] Where the guilty party knows at the time of the violation that he places another person in imminent danger of death or serious bodily injury he may upon conviction be liable to a fine of up to $250, 000 dollars or an imprisonment term of up to 15 years or both.[1670] Where such person is an organization, it may upon conviction be liable to fine of $1,000,000.00 dollars.[1671] Responsible corporate officers could also be charged for the felony of criminal endangerment.[1672] The CWA defines ‘persons’ for the purpose of criminal liability under the CWA to include, among other entities, ‘any responsible corporate officers’.[1673] This provision elevates the possibility that high-level corporate officers may face criminal prosecution for violations of the CWA, regardless of whether they know of the violation or not.[1674] It has been argued that the responsible corporate officer doctrine permits juries to infer knowledge element of environmental crimes through an individual’s corporate position, knowledge of other violations, and the authority to control activity, even if the authority is passively exercise or not exercised at all.[1675] This possibility incentivizes preventive corporate actions aimed at improving environmental outcomes. It is also compatible with the indicators of regulatory stringency that reduces the opportunity cost of pollution and helps to entrench a formidable margin of safety.[1676] The fact that the CWA also makes provisions for civil administrative and judicial penalties[1677] puts the margin of safety of American hydrocarbon laws beyond dispute. A person who operates an offshore facility from which oil is discharged may be liable for an administrative penalty of up to $25,000

[1669] CWA 1977, Section 309 (c) (2) (a). However, a second conviction for the same offence might warrant a fine of up to $100,000 per day of violation
[1670] CWA, 1977, Section 309 (c) (3) (a).
[1671] CWA, 1977 Section 309 (c) (3) (a);
[1672] Kirk F. Marty, ‘Criminal Prosecution of Responsible Corporate Officers and negligent Conduct Under Environmental Law’ (2009) 23 Journal of Natural Resource and the Environment, 1
[1673] CWA, 1977, section 309 (c) (6).
[1674] Kirk F. Marty, (note 1672) 1; Faisal Shujah, ‘Federal Criminal Issues Presented by British Petroleum Oil Spill’ (2011) Loyola Maritime Law Journal, 132.
[1675] Kirk F. Marty (note (1672) 5.
[1676] Enrico Botta and Tomasz Kozluck, “Measuring Environmental Policy Stringency in OECD Countries: A Composite Index Approach” (2014) OECD Economic Department Working Papers 1177, 9, available at < 5jxrjnc45gvg-en.pdf (oecd-ilibrary.org)> last accessed on the 7th of September 202.
[1677] CWA 1977, Section 311 (b) (6) and (7).

(adjusted to $37, 500)[1678] per day[1679] or civil judicial penalty of up to $25,000 (adjusted $37,500) per day of violation[1680] or $1,000 (adjusted to $1,100) per barrel of oil discharged.[1681] A violation linked to gross negligence or willful misconduct may be subject to a liability of up to $100,000 (adjusted to $140,000) for the violation or $3,000 (adjusted to $4,300) per barrel of oil discharged.[1682] The availability of civil administrative and judicial penalty accords with that the idea polluter should bear the administrative cost associated with his pollution. The stringency level of this penalty can help promote tact in industrial operations in a manner that achieves EJ.

For gas flaring, a multi-pronged approach is recommended. This approach will involve the creation through legislations, of statutory pathways to the utilization and commercialization of gas. This will require the restructuring of gas markets to allow operators to trade associated gas downstream within the convenience of a legal framework which provides a fair and non-discriminatory access to network and customers.[1683] It will involve setting improvement targets for flaring and venting, putting a ceiling on emissions and the introduction of fiscal policies related to the hydrocarbon sector including royalty payments and taxes.[1684] This can be done through the statutory availability of carbon-specific incentives and regulations which set out prices payable for carbon on a graduation basis (a basis which prevents

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[1678] See US Environmental Protection Agency (EPA) Adjustment of Civil Monetary Penalties for Inflation 2020, 5 , available at < 2020 Penalty Inflation Rule Adjustments (epa.gov)> last accessed on the 7th of September 2021. The adjustments were made by the EPA pursuant to the Federal Penalties Adjustment Act 1990.

[1679] CWA 1977, Section 311 (b) (6).

[1680] CWA 1977, Section 311 (b) (7) (a).

[1681] CWA 1977, Section 311 (b) (7) (a); In a similar vein, an operator or person in charge of an offshore facility who fails to carry out a removal order by the president without sufficient cause may be liable to an amount up to 425, 000 per day (adjusted to 37, 500) or up three times the costs incurred by the Oil Spill Trust Fund established by the OPA; or an amount of $25,000 (adjusted to $35, 500) per day of violation for failure to comply with the National Contingency Plan.

[1682] CWA 1977, Section 311 (b) (7) (a).

[1683] World Bank Global Gas Flaring Reduction, 'Regulation of Associated Gas Flaring and venting: A Global Overview and Lessons from International Experience' (World Bank Report No. 3 of 2004), 25 accessed < https://documents1.worldbank.org/curated/ar/590561468765565919/pdf/295540Regulati1aring0no10301public1.pdf> accessed 7th of September, 2021.

[1684] ibid: World Bank Global Gas Flaring Reduction, 'Regulation of Associated Gas Flaring and venting, 25

companies from paying the same price for carbon emissions after the effluxion of statutorily-fixed timelines).[1685]

Norway, the UK and US are textbook examples of what a regulatory response to gas flaring should look like. In Norway, the government addresses gas flaring through a medley of responses. First, it favours a cooperative approach with industry through the Environmental Forum[1686] 'to achieve the established environmental goals including reducing flaring and venting without imposing excessive economic cost burdens on the society.'[1687] This cooperative approach secures the buy-in of stakeholders and avoids the frictions associated with implementing regulations in the NCS. Secondly, unlike Nigeria's Associated Gas Reinjection Act 1984 which provides a blanket justification for gas flaring if ministerial consent is secured, the Petroleum Activities Act of Norway 1996 bans "flaring in excess of the quantities needed for operational safety except they are approved as part of a field development plan".[1688] The Act makes clear that "upon application from the licensee, the ministry shall stipulate, for fixed periods of time, the quantity which may be produced, injected or cold vented at all times."[1689] Thus, the Act clearly limits the extent to which the licensee is allowed to flare gas and also charges a substantial tax for the emission from the gas flared.[1690] This double-barrel regulatory posture is a form of standard setting and reinforces the stringent nature of Norwegian environmental regulation. In terms of market structure and design, operators in the Norwegian Continental Shelf (NCS)

[1685] Ibid: World Bank Global Gas Flaring Reduction, 'Regulation of Associated Gas Flaring and venting, 25.

[1686] The Norwegian Forum for Development and Environment is a network of 50 Norwegian Organizations within development, environment, peace and human rights with a vision to entrench a "democratic and peaceful world based on fair distribution, solidarity, human rights and sustainability". See <About ForUM - ForUM for Utvikling og Miljø>accessed 7th of September 2021.

[1687] World Bank Global Gas Flaring Reduction, 'Regulation of Associated Gas Flaring and venting, 40.

[1688] Petroleum Activities Act no 72 1996, section 4 (4); In other to achieve an agenda of prudent production (Section 4 (1)), the Act mandates operators to develop a plan for development and operation of petroleum deposits (section 4 (2) and a plan to operate and install facilities (section 4 (3), subject to EIA and public consultation before developing a discovery.

[1689] Petroleum Activities Act No. 72 1996, Section 4-4; Pollution Control Act No.6 of 1981 also provides in section 9 (1) that the pollution control authority may issue regulations laying down "emission limit values for types of pollution that shall be permitted or laying down that pollution shall be prohibited completely or at certain times".

[1690] Act 21 of December 1990 no. 72 relating to Tax on Discharge of CO2 in the petroleum Activities of the Continental Shelf, section 2 ("CO2 tax is to be charged on petroleum which is burnt and natural gas which is discharged to air and also CO2 separated from petroleum and discharged to air, on installation used in connection with production of petroleum in Norwegian internal waters, Norwegian Sea Territory and on the Continental Shelf").

can market associated gas downstream.[1691] This supplies an incentive for the development of gas utilization facilities making regulation dynamically efficient enough to reduce gas flaring and promote gas utilization at the same time. Finally, there are provisions under Norwegian law for supervised internal control systems, application of equipment that measures quantity of gas flared and venting and emission reporting.[1692] These cocktail of regulatory responses to gas flaring accounts for the extensive decarbonization of the Norwegian petroleum sector with potentials to enhance EJ in the application of the PPP.

The regulation of gas flaring in the UK is not less robust and can also offer vital lessons to Nigeria. The UK's regulation of gas flaring is principally situated within the government's objectives of maximizing economic recovery standard (MERS)[1693] of the UK's oil and gas reserves and reducing greenhouse emissions. To preserve ambient air quality and climate safety, UK law prohibits gas flaring,[1694] sets limits to emission of nitrogen and certain ozone-depleting substances,[1695] and impose a ceiling on the emission of nitrogen oxides, sulphur oxide, ammonia and other volatile compounds.[1696] Through a robust and fair system of 'third party access to existing oil and gas infrastructures',[1697] the UK ensures that smaller oil companies gain access to existing gas infrastructures to reduce the possibility of flaring on the part of much

[1691] Until 2002, gas marketing was subject to the coordination of sales by Gas Negotiating Committee. But it is now a matter of individual sales contract by each company; World Bank Global Gas Flaring Reduction, 'Regulation of Associated Gas Flaring and venting, 41.

[1692] Perrine Toledano, Belinda Archibong, Julia Korosteleva, "Norway: Associated Gas utilization Study" (Columbia Centre on Sustainable Investment) available at < Norway3.pptx (columbia.edu)> accessed 7th September 2021.

[1693] Oil and Gas Authority (OGA) 'OGA strategy 2021', <the-oga-strategy.pdf (ogauthority.co.uk)> accessed on the 7th of September, 2021 ("To assist the Secretary with meeting the net zero target and support investment in relevant activities, the OGA encourages and support industry to be proactive in identifying and taking steps necessary to reduce their greenhouse gas emissions… consider their social licence to operate, and develop and maintain good environmental, social and governance practices in their plans and daily operations"), Paras b and c.

[1694] Petroleum Licensing Production (Seaward Area) Regulation, Reg. 23.

[1695] Merchant Shipping Act 1995, section 10 (1) (2)

[1696] National Emissions ceilings Regulation, Reg 2 and 3.

[1697] Third party access to oil and gas infrastructure is an initiative aimed at persuading infrastructure owners to make capacity in the infrastructure available to third party users in consideration for a fee or tariff. For more on this see Richard Nelson and Kristian Whitaker, 'Gas Reform: The Advent of Third-party Access in Asia' (2017) 1 IELR, 28-33; Aleksander Kotlowski 'Third Party Access Rights in the Energy Sector: A Competition Law Perspective' (2007) 16 (3) Utilities Law Review, 101-104; David H. Sweeney, 'Introduction to Access to third Party Infrastructure in Offshore Projects: A Comparative Approach' (2016) LSU Journal of Energy Law and Resources, 1-5 and Uisdean Vass, ' Access to Infrastructure' in Greg Gordons, John Paterson and Emre Usenmez (eds) 'Oil and Gas Law: Current Practice and Emerging Trends' (2018) 173-174.

established oil companies. This system solution to gas flaring promotes competition for gas utilization in fields for which infrastructure owners would have considered uneconomic, thus, reducing gas flaring and promoting EJ.

Recently, the Government of Nigeria introduced a regulation to address the social impacts of gas flaring.[1698] The purpose of the regulation is to reduce the environmental and social impact caused by gas flaring, promote environmental protection and create social and economic benefit from gas flare capture.[1699] The Regulation applies to all petroleum leases and licence, including marginal fields.[1700] It also sets out circumstance under which permits granted under it can be revoked.[1701] The attempt at commercializing gas is a step in the right direction. However, it is doubtful whether the regulation can apply retrospectively given the fact that most international oil and gas contracts contain terms limiting the introduction of new environmental obligations. The point however, needs to be made that since hydrocarbon companies have shown little willingness in gas utilization, they sure can welcome an obligation which takes away that financial burden from them.

6.3.2 Advance Financial Guarantees to Bear Future Environmental Cost & an Inflation-sensitive Liability Regime

Given the nature of devastation that can take place in the event of an accident and consequent environment harm, it is very important for regulators to secure *ex ante* financial guarantees enough to meet future cost of pollution when they occur in oil and gas installations. The importance of this guarantee is to ensure that where the company goes into administration or is liquidated, the state does not bear the environmental cost associated with the operations of the company. Through this guarantee, the state can also ensure that operator meets the environmental cost associated with decommissioning oil and gas installations and remediate environmental infractions.

[1698] Flare Gas (Prevention of Waste and Pollution) Regulations 2018, available on <https://ngfcp.dpr.gov.ng/resources/regulations/ngfcp-regulations/> last accessed on the 30th of March 2020.
[1699] Flare Gas Regulations, Reg. 1 (a)- (d).
[1700] Flare gas Regulations, Reg. 2 (2).
[1701] Flare Gas Regulations, Reg. 9.

Perhaps, Nigeria can draw lessons from the UK on what a regime that meets this expectation looks like. The Offshore Safety Directive (implemented by the Offshore Safety Directive) (Safety Case) Regulation 2015 stipulates that licensees are financially liable for the prevention and remediation of any environmental damage caused by offshore oil and gas activities carried on by the licensee or persons acting in his behalf.[1702] Prospective licensees must therefore supply proof that they have (or can access) sufficient financial resources for the launch and uninterrupted continuation of measures necessary for effective emergency response and remediation of damage.[1703] The evidence of financial resources can take the form of appropriate insurance or indemnity provisions.[1704] This assurance of financial resources on the part of operators is in line with the expectations of the Oil and Gas Authority (OGA) as regulator, that all offshore operators sign up to the Oil Pollution Liability Association Limited, a voluntary scheme where insurance is mandatory.[1705] While this ensures that liability costs arising from hydrocarbon externalities are immediately remedied, there is a cap of £250 million on recoverable liability which in itself, can lead to the under-compensation of victims.[1706] However, the essence of the cap is to reduce the transaction cost of the liability regime on operators.

Lessons can also be learnt from the US where there is a similar ex ante but capped financial liability obligation with potentials for unlimited liability.[1707] Under the US OPA 1990, a responsible party is liable for the total clean-up costs[1708] of a spill in addition to $75 million liability limit to cover economic damage[1709] resulting from

[1702] Offshore Safety Case Regulations 2015, section 7 (1)-(10) dealing with corporate major accident prevention policy.
[1703] James Day, 'Oil and Gas Regulation in the UK: an Overview' (Practical Law Country Q & A 5) 46.
[1704] James Day, 46.
[1705] OPOL, available on www.opol.org.uk, (last accessed 28th March 2020).
[1706] Ibid.
[1707] Vincent J. Foley, *'Post-Deepwater horizon: Challenging Landscape of Liability for Oil Pollution in the United States'* (2010/2011) 74 Albany Law Review, 516.
[1708] Clean up costs/removal costs include the cost associated with prevention, minimization or mitigation of pollution. See OPA 1990, section 1001 (32) (c).
[1709] Economic damage include injury to natural resources, injury to real or personal property, loss of profit or impairment for earning resulting from spill and the costs of providing additional public services during or after removal activities. See OPA 1990, section 1002 (b) (2). For a consideration on economic damage see David W. Robertson, *'The Oil Pollution Act's Provision on Damages for Economic Loss'* (2011) 30 Mississippi College Law Review, 157; Andrew B. Davis, 'Pure Economic Loss Claims Under the Oil Pollution Act: Combining Policy and Congressional Intent' (2011) 45 Columbia Journal of Law and Social Problems, 1; David W. Robertson, 'Criteria for Recovery of

spills from offshore oil and gas facilities.[1710] However, the responsible party may incur unlimited liability where it is established that the oil spill was as a result of the responsible party's gross negligence, willful misconduct or violation of applicable federal safety or operating regulations.[1711]Oil exploration and production companies are required to establish financial responsibility for liability under the Act.[1712] Financial responsibility of $35,000, 000 is required for an offshore facility located seaward of the seaward boundary of the state,[1713] or $10,000, 000 for an offshore facility located landward of a seaward boundary of a state.[1714] Depending on relative operational, environmental, human health and other risk posed by the quantity of oil explored for, financial liability of up to $150 million can be required from an offshore facility located seaward of the boundary of a state.[1715] Evidence of insurance, surety bond, guarantee, letter of credit or qualification as a self-insurer satisfy financial liability requirements in the US.[1716] Where financial responsibility is established by way of guarantee, the guarantor is required to execute a statement indicating agreement to be subject to direct action claims from the government or injured claimants who has been denied payment by the responsible party.[1717] The OPA permits compensation for injured parties, for removal costs and damages resulting from an oil spill through Oil Spill Liability Trust Fund (OSLTF).[1718] Liability exceeding the OPA limits are made to claimants from the OSLTF, subrogating the claimant's right to recover from the responsible party or third party who may be responsible for an oil spill.[1719] The OSLTF has a maximum payout for a single incident of $1 billion or the

Economic Loss Under the Oil Pollution Act 1990' (2012) 7 Texas Journal of Oil, Gas and Energy Law Review, 241.

[1710] OPA 1990, section 1004 (a) (3).

[1711] Ibid, section 1004 (c) (1). Liability is unlimited whether the gross negligence or willful misconduct or violation of regulation is occasioned by the responsible party's agents, employees or a person acting pursuant to a contractual relationship with the responsible party. OPA 1990, section 1018 (c).

[1712] OPA 1990, section 1016 (c) (1) (a).

[1713] ibid.

[1714] ibid, Section 1016 (c) (1) (b).

[1715] ibid, section 1016 (e).

[1716] OPA 1990, section 1016 (e).

[1717] Ibid, section 1016 (f).

[1718] The OSLTF was created by the internal Revenue Code , 26 USC, section 9509.

[1719] Lawrence I. Kiern, 'The Oil Pollution Act of 1990 and the National Pollution Funds Center' (1994) 25 journal of Maritime Law and Commerce, 489-491.

balance of the fund whichever is less[1720] and is funded partly by tax on imported oil[1721] and partly by penalties imposed on oil polluters.[1722] To account for inflation, US law allows fines to be adjusted for inflation.[1723] This ensures that curative obligations are not subsidized in any form as a result of currency depreciation.

The US approach represents an effectual curative policy and the potential for unlimited liability ensures that all harm associated with the operations of the licensees are remediated by polluters. While this approach is more in tune with the idea behind the PPP, introducing unlimited liability into Nigeria can turn up regulatory cost that can make Nigeria unattractive for oil and gas investments.

6.3.3 Constitutionalizing Environmental Rights (ERs) to Promote Accountability

The importance of constitutionalizing environmental rights has been emphasized in this thesis.[1724] This thesis recommends a comprehensive inclusion of all environmental rights in the constitution. especially as the rights provided in chapter 2 of the Constitution have limited enforceability. Thus, this thesis recommends that a substantive right to a healthy environment should be constitutionalized and the limitations to environmental duties under the 1999 Constitution of Nigeria should be amended.[1725] The form and language in which this new constitutional right would take should be such as to guarantee the highest legal protection and offer enforceable channels of accountability.[1726]

[1720] Internal Revenue Code, 26 USC, Section 9509 (c) (2) (a) (i); The maximum amount of claim for a single incident in respect of natural resource damage assessment and claims is $500 million. See Internal Revenue Code, 26 USC, Section 9509 (c) (2) (a) (ii).
[1721] Oil companies pay 8 percent per barrel to part finance the OSLTF. Internal Revenue Code, 26 USC, Section 4611 (c) (2) (b) (i).
[1722] Lawrence I. Kiern, 'Liability, Compensation and Financial Responsibility Under the Oil Pollution Act 1990: A Review of the Second Decade' (2011) 36 Tulane Maritime Journal, 11.
[1723] See US Environmental Protection Agency (EPA) Adjustment of Civil Monetary Penalties for Inflation 2019', 213-214 <Transmittal of the 2019 Annual Civil Monetary Penalty Inflation Adjustment Rule (epa.gov) > accessed 20/09/2021.
[1724] See Paras. 3.7.2.4 of this thesis.
[1725] See the discussion in sections 3.3.2.1. of this thesis (Constitution and the clarification of environmental Agenda) 104-115 of this thesis.
[1726] James R. May, 'The Case for Environmental Human Rights: Recognition, Implementation, and Outcomes' (2021) 3 (7) Cardozo Law Review, 984-1005, 989-995.

Nigeria can join countries like Norway[1727] and Indonesia to include a substantive right to a healthy environment in its Constitution.[1728] While both countries present interesting learning points, Indonesia presents a more comprehensive inclusion of environmental rights in its Constitution. The 1945 Constitution of Indonesia accommodates both substantive[1729] and procedural[1730] environmental rights.[1731] This comprehensive outlook can be a useful tool to achieving better environmental outcomes and access to environmental remedies for people who suffer the effects of pollution if deployed effectively. However, while the provisions of the Indonesian Constitution represent a progressive approach to constitutionalizing ERs, the provisions suffer from some limitations. First, under Article 28J (2) of the 1954 Indonesian Constitution, it is provided that human rights be subject to restrictions on grounds of moral values, security interests and public order in a democratic society.[1732] This restriction reduces the legal effects of environmental rights to the extent that they supply constitutional justification to excuse its application. Secondly, the Indonesian Constitutional Court (ICC) established in 2003 to undertake constitutional reviews and ensure that national statutes do not breach the Constitution; however, the ICC does not have power to review lower-level regulations.[1733] This limitation is significant and particularly problematic for the development of ERs since most of the specific and operational rules under Indonesian law take the form of regulations.[1734]

[1727] Article 110 (b) of Norway's Constitution 1992 provides that "every person shall have the right to an environment that is conducive to a health and to natural surroundings whose productivity and diversity are preserved. Natural resources should be made use of on the basis of comprehensive long-term considerations whereby the right will be safeguarded for future generations".

[1728] David R. Boyd, *'The Status of Constitutional Protection for the Environment in other Nations'* (2013, David Suzuki Foundation) paper 4, available at < status-constitutional-protection-environment-other-nations.pdf (davidsuzuki.org)>last accessed on the 13/09/2021.

[1729] Article 28H (1) of the Constitution of Indonesia 1945 (as amended in 2000) provides that "each person has a right to a life of well-being in body and mind, to a place to dwell, to enjoy a healthy environment, and to receive health care'. See generally, Simon Butt and Prayekti Murharjanti, The Constitutional Environmental Right in Indonesia' (2021) 33 (1), Journal of Environmental Law, 3-4

[1730] Article 28E (3); In Coastal Areas and Small Island Case [2010] 32/PUU-VIII/2010, the court acknowledged

[1731] See generally, Simon Butt and Prayekti Murharjanti, *'The Constitutional Environmental Right in Indonesia'* (2021) 33 (1), Journal of Environmental Law, 3-4; Simon Butts and Tim Lindsley, *'The Indonesian Constitution: A Contextual Analysis'* (Hart Publishing 2012) 130-138

[1732] This provision has been construed by the Constitutional Court of Indonesia as allowing the legislature to enact laws that violate human rights when those rights conflict with the human rights of others, provided that the legislature is in those laws also pursuing other purposes or values such as public order, democracy or religious values. See Simon Butt, *'The Constitutional Court and Democracy in Indonesia'* (Brill 2015) 84-87.

[1733] Examples of these regulations are government or ministerial regulations and actions. See Simon Butt and Prayekti Murharjanti, *'The Constitutional Environmental Right in Indonesia'*, 6.

[1734] Tim Lindsey, *'Filling the Hole in Indonesia's Constitutional System: Constitutional Courts and the Review of Regulations in a Split Jurisdiction'* (2018) 4 Constitutional Review, 27.

Thirdly, two limitations imposed by the ICC on its own decisions affects the quality of remedies available through the court. First, the ICC has declared that its decision operates prospectively.[1735] This limitation robs environmental disputes of valid effects where the government has already acted on the statutory provision that is the subject of the dispute in the first place. This is significant in environment and natural resource disputes because it holds the implication that any licence or concession that government may have issued under an unconstitutional law before the law was declared invalid would remain valid.[1736] This approach robs the court's decision of utility since the court would be unable to prevent continuing environmental damage caused by activities performed under a licence or concession granted before the law was invalidated.[1737] The court would not be able to live up to the expectations of vitalizing the preventive aspects of the PPP. The second limitation is that the court only reviews substantive norms of law (example the constitutionality of government actions), not its effect or implementation.[1738] This means that the court offers no relief to applicants who suffer even the most egregious loss. A country like Indonesia where law is honoured more in breach than in observance, this limitation is material[1739] especially as it could lead to an escalation of distributive, social and curative justice as vital components of EJ. Having a declaration of court on a substantive issue without a channel of implementation would not guarantee that the effects of infractions are remedied.

While these are significant limitations to constitutional ERs under Indonesian law, it is argued that Nigerian constitutional law is built to withstand these limitations as an inclusion of procedural and substantive ERs would strengthen existing constitutional guarantees like access to remedies,[1740] and state duties accommodated in chapter 2 of the Constitution. This is because the limitations imposed by the ICC do not exist in Nigeria. Constitutionalizing both substantive and procedural ERs in Nigeria would

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[1735] This means that the decisions of the Court take effect next after the judgement is delivered in open court. See Simon Butt and Tim Lindsey, 'Indonesian Law' (Oxford University Press 2018) 110.
[1736] Simon Butt and Prayekti Murharjanti, 6
[1737] Simon Butt and Prayekti Murharjanti, 6.
[1738] Simon Butt and Prayekti Murharjanti, 6
[1739] Simon Butt and Prayekti Murharjanti, 6.
[1740] CFRN 1999, section 46 (1).

offer incremental improvement in environmental remedies and strengthen accountability in the context of environmental rule making and implementation. Evidence exists at a global level that constitutionalizing ERs guarantees stronger environmental laws and court decisions defending ERs from violation, closes gaps in environmental law, prevents policy rollbacks, promote improved implementation and enforcement and address EJ concerns.[1741] However, the extent to which the constitutional ERs would help realize these outcomes in Nigeria might be limited by factors such as rule of law (effective legal institutions including independent judiciary), widespread poverty, civil war or authoritarian governments.[1742] Thus, to reap the benefits of constitutional inclusion of ERs, Nigeria must address these factors too.

6.3.4 Creation of Special Environmental Courts (SEC) and New Judicial Posturing

Given the 'gray' posturing of the judiciary in relation to environmental matters especially those relating to the oil industry this thesis recommends the creation of SEC in Nigeria. The basis of this recommendation is that scholarly evidence demonstrate that courts of this nature are more suited to dealing with environmental claims and appreciating the urgency of a broad application of environmental law.[1743] The reasons for and characteristics of successful SECs are well accommodated in scholarly works.[1744] The growth of environmental issues, the public's lack of environmental awareness, unenforced laws, public interest litigation, traditional court failure and the

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[1741] D.R. Boyd, *'The Effectiveness of Constitutional Environmental Rights'*, (Yale UNITAR Workshop of April 26/27, 2013) 6-19, available at <Boyd-Effectiveness-of-Constitutional-Environmental-Rights.docx (live.com)> last accessed 14/09/2021; Susan Borras, *'New Transitions from Human Rights to the Environment to the Rights of Nature'* (2016) 5 (1), Journal of Transnational Environmental Law, 113-143; Danwood M. Chirwa and Christopher Mbazira, *'Constitutional Rights, Horizontality and the Ugandan Constitution: an example of Emerging Norms and Practices in Africa'* (2020) 18 (4), International Journal of Constitutional Law, 1231-1235; Tinashe Madebwe, Emma Chitsove and Jimcall Pfumorodze, *'Giving Effect to Human Right to a Clean Environment in Botswana'* (2021) 23 (1), Environmental Law Review, 1-14 and Louise J. Kotze, *'Arguing Global Environmental Constitutionalism'* (2012) 1 (1), Journal of Transnational Environmental Law, 199-233.

[1742] D.R. Boyd, *'The Effectiveness of Constitutional Environmental Rights'*, 20.

[1743] See Brian Preston, *"Benefits of Judicial specialization in Environmental Law: The Land and Environmental Court of New South Wales as a Case Study"* (2011) 29 Pace Environmental Law Review, 396-398. Good, any more recent materials supporting this view?

[1744] Brian J. Preston, *'Characteristics of Successful Environmental Courts and Tribunal'* (2014) 26 Journal of Environmental Law, 365-393; Zhang Minchun and Zhang Boa, *'Specialized Environmental Courts in China: Status Quo, Challenges and Responses'* (2012) Journal of Environment and Natural Resources, 31-363;; George Ping and Catherine Pring, 'Increase in Environmental Courts and Tribunals Prompts New Global Institute' (2010) 3 Journal of Court Innovation, 11.

emergence of reform minded leaders are amongst the top reasons for SEC.[1745] In terms of characteristics Justice Preston analyzed a set of 12 criteria that should underlie successful SECs.[1746] Where these criteria are met, the new SEC would be able to appreciate the clear link between human rights and the environment and develop a liberal approach to constitutional interpretation that sustains the Justiciability of environmental rights, thus, promoting EJ. A SEC is also expected to broaden the avenue through which polluters can be held accountable and made to bear the cost of the externalities they generate through a robust articulation and formulation of environmental jurisprudence.

In terms of posture, Nigeria can model its SEC in the form of Australia's Land and Environment Court of New South Wales (NSWLEC)[1747], Green Tribunal of India[1748] or the Land and Environment Court of Kenyan[1749]. While the modelling of Nigeria's SEC after the examples captured above all hold the promise of improving the enforcement and application of environmental law and principles, the Australian model hold a greater promise for two reasons. First, Australia's NSWLEC is established as a superior Court of record with comprehensive jurisdiction.[1750] This represents a public acknowledgement of the importance of the Court and its decisions.[1751] Nigeria's SEC should be established in like fashion to ensure that it does

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[1745] Akinseye Akinteye, 'Adjudicating the Impact of Oil Spills in Nigeria: The Need for Black Benches in Oil Producing States' (2018) 16 (1) OGEL, 1.

[1746] Brian J. Preston, *'Characteristics of Successful Environmental Courts and Tribunal'* (note 82) 365 to 393 (These characteristics include its status and authority as a superior court of records, independence and impartiality, comprehensive and centralized jurisdiction, knowledgeable and competent judges, multi-door court house, access to scientific and technical expertise and ability to facilitate access to justice. Others are just, quick and cheap resolution of disputes, ability to be responsive to environmental problems, effective development of environmental justice jurisprudence and should have clear underling ethos and missions).

[1747] Brian Preston, *'Operating an Environment Court: the Experience of the Land and Environment Court of New South Wales'* (2008) 25 EPLJ, 385, 387

[1748] Gitanjali Nain Gill, 'The National Green Tribunal of India: Decision-making, Scientific Expertise and Uncertainty' (2017) 29 (2-3), Journal of Environmental Law and Management, 82-88; Tracy D Hester, 'Green Statutory Interpretations by Environmental Courts and Tribunals' (2017) 29 (2-3) Journal of Environmental Law and Management, 88-92; Gitanjali Nain Gill, 'The National Green Tribunal of India: A sustainable Future through the Principles of International Environmental law' (2014) 16 Environmental Law Review, 183-202.

[1749] Samson Okongo, 'Environmental Adjudication in Kenya: a Reflection on the Early Years of the Environment and Land Court of Kenya' (2017) 16 Environmental Law Review, 103-110 and Caiphas B. Soyapi, 'Environmental Protection in kenya's Environment and land Court (2019) 31 Journal of Environmental Law, 151-161.

[1750] Brian Preston, *'Benefits of Environmental Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study'* (2012) 29 Pace Envtl Law Rev., 396

[1751] Preston, *'Benefits of Environmental Specialization,* 427

not become subject to the supervisory jurisdiction of the High Courts in Nigeria. This would require an amendment of the list of Superior Courts in Section 6 of the CFRN 1999 (as amended) and the allocation of a constitutional jurisdiction that is comprehensive enough to cover entire spectrum of environmental adjudication[1752]. Secondly, Australia's NSWLEC is the first Court to implement the International Framework for Court Excellence in 2009.[1753] The framework requires a court to evaluate its performance through a self-assessment questionnaire provided in the framework.[1754] It allows a process where all judicial stakeholders (judges, administrators of court and court employees) all have an opportunity to participate in the evaluation of court performance and implementing improvements.[1755] This participatory approach improves communication with court users, allow court to plan and act strategically, advance court purpose and create an environment for professional partners and court users to work together.[1756] More particularly, the framework has been instrumental in providing the NSWLEC with a resource for measuring their performance and providing a tool for developing initiatives for continuous improvement.[1757] Evidence from scholarly works demonstrate that in countries where the framework have been applied, it improves the wellbeing of individuals and communities and promotes a culture of judicial innovation that leads to greater EJ.[1758]

[1752] Preston, *'Characteristics of Successful Environmental Courts and Tribunal'* (note 84) 367.
[1753] Brain J. Preston, *"International Quality Framework in Operation at the Land and Environmental Court of New South Wales*, being a Paper Delivered at Australia's Court Administrators' Conference on the 6th of October, 2011 in Sydney, available at < International Quality Framework in operation, AIJA Confere… (nsw.gov.au)> last accessed on 02/08/2021.
[1754] International Consortium for Court Excellence (ICCE), *"International Framework for Court Excellence"* (3rd Edition, May 2020) (note 14), Appendix A.
[1755] International Consortium for Court Excellence, Appendix A.
[1756] Preston, *"International Quality Framework in Operation at the Land and Environmental Court of New South Wales,* 8-9.
[1757] Brain Preston, 'Achieving Court Excellence: The Need for a Collaborative Approach' (Being a Paper Presented to 'Judiciary of the Future' International Conference on Court Excellence held on the 28th of January, 2016, 1, available at < PrestonCJ Achieving Court Excellence 280116.pdf (nsw.gov.au)> last accessed on the 14/09/2021.
[1758] Elizabeth Richardson, Pauline Spencer and David B. Wexler, *'The International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Courts and Enhancing Wellbeing'* (2016) 25 Journal of Judicial Administration, 148; Rassel Kassem, Matloub Hussain, Main M. Ajmal and Petri Helo, 'Critical Factors for a Culture of Judicial Excellence: Benchmarking Study of Emirati Courts' (2017) 24 Benchmarking: an International Journal, 341-358.

6.3.5 A New Legislation or Regulation to Introduce (the requirement of an)Environmental Business Case (EBC) in Nigeria

To ensure that the environmental costs arising from oil industry externalities are internalized, a new legislation or regulation should be introduced to ensure that oil companies submit an EBC as a condition precedent for commencing oil operations. A business case relates to arguments and rationales that support investments in environmental impact reduction activities.[1759] An EBC would demonstrate how oil companies propose to optimize the economic recovery of hydrocarbons and environment performance simultaneously.[1760]An EBC will demonstrate how hydrocarbon companies intend to increase competitive advantage while supporting pollution mitigation.[1761] The essence of an EBC is to lower resource consumption and promote its conservation through company-specific strategies and financial plans.[1762] Legislation or regulation could require potential licensees to demonstrate through their field development plans (FDP) how they intend to improve risk management, foster innovation[1763], integrate energy[1764] and ensure that local communities are insulated from harm.[1765] An EBC approach to pollution reduction is compatible with the efficiency objectives of the PPP and can be deployed to unlock creative solutions to

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[1759] Ken Doodey,*"The Business Case for Environmental Sustainability: Embedding Long-Term Strategies that Enhance Environmental and Economic Performance"* (2014), Sustainable Future in Climate Change Finland, 1- 12, 1, available on <file:///Users/mac/Downloads/Thebusinesscaseforenvironmentalsustainability2014Dooley-Revised.pdf> last accessed on the 30th of March 2020.

[1760] Ken Doodey, 1-12

[1761] Ken Doodey, 1-12

[1762] Louise L. Hunter and Cohen Boyd, "Climate Capitalism" (Hill and Way Publishers 2011) 56-57

[1763] Minnesota Mining and Manufacturing Company (3M) in America through its pollution prevention pays program, aims to proactively minimize waste and avoid pollution through product reformulation, equipment redesign, process modification and waste recycling and the company's NOVEC fire suppression fluids are the first viable sustainable alternative to hydrofluorocarbons. See Tensie Whelan and Carly Fink, 'The Comprehensive Business Case for Sustainability (2016) Harvard Business Review, 5-6 available at < The Comprehensive Business Case for Sustainability (everestenergy.nl)>; Russell H. Susag, 'Pollution Prevention Pays: The 3M Corporate Experience (1982) Ecology with Economy as Policy, 17-22; Gary Miller, J. Burke, C. Mccomas and K. Dick, 'Advancing Pollution Prevention and Cleaner Production-USA's Contribution' (2008) 16 Journal of Cleaner Production, 665-672.

[1764] Magnus C. Abraham, M.O. Dioha and Okechukwu C. Aholu et.al, 'A Marriage of Convenience or Necessity? Research and Policy Implications for Electrifying Upstream Petroleum Production systems with Renewables' (2021) 80 Journal of Energy Research and Social Sciences, 1-8

[1765] Paolo Galizzi and Emily Smith Ewing, 'Regulatory Strategies, CSR and Resource Protection' in Shawkat Alam, J.H. Bhuiyan and J. Razzaque, 'International Natural Resources Law, Investment and Sustainability (Routledge 2018) 187.

traditional operational efficiency problems.[1766] There is also evidence that companies who pursue sustainability as a component of their business profit from their investment in the long run.[1767] This is in line with international instruments designed to make firms especially MNOCs, more environmentally responsible.[1768]

While EBC can lead to improved internalization of environmental costs the extent to which it can deliver results is contingent upon the existence of effective pre and post licence scrutiny and regulatory governance systems which optimize the creative control of licences. Nigeria can learn useful lessons from the UK as to what this system entails. For example, in the UK, the Hydrocarbon Licensing Directive Regulation 1995[1769] provides for the terms which underlie the award of a UK oil and Gas licence. The regulation provides that only terms which ensures the proper performance of activities under the licence and those relevant to national security, public health, security of transportation and the protection of biological resources and the environment should underlie the award of seaward licences.[1770] From the tenor of the provision, one can argue that a sustainability case relevant to cost internalization is a condition precedent for winning a licence. This system check act as both a regulatory and contractual commitment on the part of the operator to enhance environmental protection and by extension EJ.

6.3.6 Limiting Government Participation in Oil Commerce

One way that the application of the PPP can be improved in Nigeria's hydrocarbon industry is to limit government participation in hydrocarbon commerce. While

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[1766] See generally Dooley Ken, "Organization: Business Models for a Profitable and Sustainable Future (2014) 3 (1) Journal of Social Sciences, 247-257.

[1767] Chin-Chen Chien and Chih-Wei Peng, 'Does Going Green Pay off in the Long run?' (2012) 65 Journal of Business Research, 1636-1642; Ye Li, C. Kool and Peter-Jan Engelen, 'Analyzing the Business Case for Hydrogen-Fuel Infrastructure Investment in Netherlands: A Real Option Approach' (2020) Journal of sustainability, 2-22 cf: Carrie Bradshaw, 'the Environmental Business Case and Unenlightened Shareholder Value' (2013) Journal of Legal studies, 141-161.

[1768] Some examples of these international instruments are OECD Guidelines for Multinational Enterprises (OECD Publishing 2011); United Nations Global Compact <www.unglobalcompact.org> accessed 18/09/2021; Equator Principles adopted in 2016 (Eps), www.equator-principles.com/resources/equator_principles_iii.pdf > accessed 18/09/2021; International Chamber of Commerce Business Charter for Sustainable Development 2015; United Nations Guiding Principles on Business and Human Rights

[1769] Hydrocarbon Licensing Directive Regulations 1995 (SI 1995/1434) (Hereinafter HLDR).

[1770] HLDR, Reg. 4 (2).

justifications for participation in the complex business of oil and gas are rife,[1771] this participation puts government in an invidious position that sometimes leaves it at the doorpost of environmental compromise. Where participation is necessary, government should do so by way of a technical service contracts (TSC)[1772] not through joint venture agreements or production sharing contracts which puts it in a position of compromise. This will help remove government from the invidious position of becoming trapped in environmental violations when the operation of the joint venture agreements triggers environmental infractions and from committing to stabilization clauses which arrests future environmental obligations.

6.3.7 Greening Nigeria's Fiscal Expenditure Framework (Budget).

Since fiscal tools are key elements of government integrated strategy to achieving pollution reduction, this chapter recommends a greening of the Nigeria's expenditure frameworks .[1773] Green budgeting (GB) means using the tools of budgetary policy-making to achieve environmental and climate goals.[1774] GB accords with the idea that pollution reduction ambitions should be reflected in countries development priorities and be incorporated into medium-term planning and annual budget allocation decisions.[1775] GB is expected to be modelled in accordance with international GB frameworks.[1776] The idea of GB accords with the PPP since most of what is deployed

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[1771] Some of these justifications are national value creation, wealth distribution, economic development, foreign policy, energy security and local content. See Robert Pirog, 'The Role of National Oil Companies in the International Oil Market' (Congressional Research Service CSR Reports, 2007) 5-9 ;Silvana Tordo, Brandon S. Tracy and Noora Arfaa, 'National Oil Companies and Value Creation' (World Bank Working Paper no. 218 of 2011) 4-9, available at < World Bank Document> last accessed 18/09/2021.

[1772] For a robust discussion on this type of contract see Eduardo G. Pereira, Catalin Gabriel Stanescu, Wan M Zulhafiz et.al, *'Host Granting Instrument Models: Why do they matter and for whom?'* (2020) 6 (1) Oil and Gas, Natural Resources and Energy Journal, 23-97; Fatima Dirani and Tatiana Ponomarenko, *'Contractual Systems in the Oil and Gas Sector: Current Status and Development'* (2021) 14 Energy Reviews, 549 and Fee D. *'Host Government Relations'* in Fee D (eds) '*Oil and Gas Databook for Developing Countries'* (Springer 1985) 3-5.

[1773] Fabrien Gouguet, Claude Wendling, O. Aydin and Bryn Battersby, *'Climate-sensitive Management of Public Finances- "Green PFM"* (IMF Staff Climate Notes 2021/002), 1, available at < file:///C:/Users/Charles/Downloads/CLNEA2021002.pdf> last accessed on the 20/09/2021.

[1774] OECD, *'The Paris Collaborative on Green Budgeting'* (OECD Green Budget Framework 2017), 1, available at < OECD-Green-Budgeting-Framework-Highlights.pdf>last accessed on the 20/09/2021.

[1775] Fabrien Gouguet, Claude Wendling, O. Aydin and Bryn Battersby, *'Climate-sensitive Management of Public Finances- "Green PFM"* (IMF Staff Climate Notes 2021/002) available at < file:///C:/Users/Charles/Downloads/CLNEA2021002.pdf> last accessed on the 20/09/2021.

[1776] See for example, World Bank, 'Moving Towards Climate Budgeting (World Bank Policy Note 2017), available at < World Bank Document>last accessed on the 20/09/2021 and OECD, Green Budget Framework 2017.

in a GB are funds which have been realized from polluters as a consequence of their pollution. Greening Nigeria's budget is therefore central to promoting EJ.

The strength of a green budget depends on the legal framework that underpin the budget circle.[1777] A clear and enabling legal framework can support green public financial management (PFM) at each entry point of the budget process and provide flexible mechanisms to sure-up appropriation for pollution-reduction initiatives.[1778] For example, Nigeria's expenditure framework can reserve specific percentage of funds generated from government permitting systems, administrative fines issued pursuant to infractions to environmental obligations, environmental taxes and charges to address distributive consequences of oil industry externalities. Nigeria's Expenditure Framework can also make provisions for direct R & D funding, government funding of low-emission infrastructures and nature-based solutions to environmental externalities.[1779]

A classic example of a GB which Nigeria can easily adapt is UAE's Sustainable Finance Framework.[1780] This framework serves not only as a deal enabler for sustainable projects but also as a solution to mitigate current and future risks associated with the wide range of environmental, social and climate risk.[1781] The Framework also incentivize sustainable finance products and initiatives including capacity building for future sustainable finance professionals, raising the possibility of future green jobs and the human resource potentials of regulatory agencies. Another GB initiative in the UAE is the Dubai Green Fund (DGF) of AED 100 billion which contributes easy loans for investors in the clean energy sector in the emirate at reduced interest rates, incentivizing innovation relevant to pollution reduction and abatements.[1782] These GB initiatives will contribute to the effective implementation of the PPP in a manner that

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[1777] Fabrien Gouguet, 3
[1778] Fabrien Gouguet, 3
[1779] UNEP, 'International Good Practice Principles for Sustainable Infrastructure: Integrated, System-Level Approaches for Policymakers' (1st ed, UNEP 2021), available at < https://wedocs.unep.org/bitstream/handle/20.500.11822/34853/GPSI.pdf> last accessed on the 20/09/2021.
[1780] UAE Ministry of Climate and Environment, 'UAE Sustainable Finance Framework 2021-2031, available at < UAE_Sustainable_ Finance framework_21.pdf> last accessed on the 20/09/2021.
[1781] UAE Sustainable Finance Framework, 9.
[1782] UAE, 'Dubai Clean Energy Strategy, available at <Dubai Clean Energy Strategy - The Official Portal of the UAE Government> last accessed on the 20/09/2021.

promotes EJ. However, the finance is an example of subsidy that traditionally defies the idea of the PPP.

6.3.8 Project Specific Tax System (PSTS) and Permanent Fund Dividend

To solve the problem associated with corruption in Agencies like the NDDC, the thesis recommends a PSTS system. Under this system, oil-producing companies eligible to make 3 percent contribution to the funds of the NDDC[1783] will be allowed to present a list of projects, which they intend to execute in a fiscal year using their contribution under existing laws.[1784] Completion of the project life circle every year will be a condition precedent for continuing operation under the licence. Non completion of project without justifiable excuse would be a ground to revoke an oil prospecting licence. To address the problem of project quality, suboptimal execution of any of the project listed for execution would be designated an environmental crime if such suboptimality results in environmental harm. On conviction, a penalty equivalent to the capital cost of the project would be imposed as a means of raising the stringency level of regulation giving Nigeria's peculiar circumstance as a maturing hydrocarbon province. Legislation introducing the PSTS model should have a non-prescriptive schedule dedicated to project quality to ensure that project design and completion do not fall short of international standards. This PSTS model of addressing environmental externalities may eliminate the possibility of corruption at bureaucratic levels and allow government concentrate on the other important task like monitoring and regulations. Funds from other sources can be allocated at the Commission's discretion and committed to addressing other issues relevant to EJ.

Several reasons justify this approach. First, remittances to the NDDC have not resulted in the much needed development and ecological improvements in the ND but has escalated corruption in the NDDC. A recent NDDC Forensic Audit Report discovered that despite receiving ₦6 trillion (£10.5 billion) from 2001 to 2019, a record number of 13,777 contracts were awarded but remained uncompleted.[1785] This demonstrates

[1783] See section 3.3.2.7 (Redistribution under the NDDC Act) 141-151.
[1784] Ibid.
[1785] Ikechukwu Nnochiri and Davies Iheamnachor, 'NDDC Report: 13,777 Project Awarded Uncompleted' (Vanguard Newspaper of 3rd September, 2021) available at < NDDC report: 13,777 projects awarded, uncompleted (vanguardngr.com)> last accessed 16/09/2021.

that NDDC is not living up to the expectations of the reasons which underlie its existence in the first place of addressing social and distributional issues emanating from oil exploration. Secondly, the award process in the NDDC which places emphasis on local empowerments through contracts does not result in the execution of quality projects.[1786] MNOC have greater capacity in view of the complexity of their work and the diversity of its workforce to deliver quality projects at international competitive rates. PSTS has the ability to promote brand quality as it will intensify competition for innovation deployment to address environmental and social problems in the ND.

Despite the promise of this PSTS system, it is bound to have an economic cost on the inhabitants of the Niger Delta who rely on contracts from the NDDC as a means of empowering the inhabitants and creating employment. To solve this problem, lessons can be drawn from the US state of Alaska yearly income distribution model, Canadian Alberta Permanent Fund or the Government pension fund of Norway.[1787] While all three funds address distributive and social justice concerns, this thesis makes a case for the Alaska's version of income distribution to be adapted to the Niger Delta. Since its inception in 1982, Alaskans receive an average of $1,100 per year from the Permanent Fund Dividend (PFD).[1788] This fund has been instrumental in addressing the social impacts of hydrocarbon activities in Alaska.[1789] The adaptation of Alaska fund model in the Niger Delta will ensure that everyone is empowered financially or has a taste of the 'distributive pie'. A combination of these systems would help address infrastructure gaps in the Niger, Delta, generate employment and reduce social justice

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[1786] See section 3.3.2.7 of this thesis.

[1787] Temitope T. Onifade, *'Regulating Natural Resource Funds: Alaska Heritage Trust Fund, Alberta Permanent Fund and Government Pension Fund of Norway'* (2017) 6 Global Journal of Comparative Law, 138-173.

[1788] See generally Christopher L. Griffin, *'The Alaska Permanent Fund Dividend and Membership in the State's Political Community'* (2012) 29 (1) Alaska L. Rev., 79.; Scott Goldsmith, *'The Economic and Social Impacts of the Permanent Fund Dividend of Alaska'* in Karl Widerquist and Michael W. Howard, *'Alaska's Permanent Fund Dividend: Examining its Suitability as a Model'* (Palgrave Macmillan 2012) 49-64; Kate Kozminski J. Baek, *'Can an Oil-rich Economy Reduce its Income Inequality? Empirical Evidence from Alaska's Permanent Fund Dividend'* (2017) 65 Journal of Energy Economics, 98-104; Eli Kozminsky, *'Children and Alaska's Permanent Fund Dividend: Reasons for Rethinking Parental Duty'* (2017) 34 Alaska L. Rev., 85-110;

[1789] Mathias Lerner, 'the Impacts of the Alaska Permanent Fund Dividend on High School Status Completion Rates: A Synthetic Control Study (2019), 1-30, available at < The Impacts of the Alaska Permanent Fund Dividend on High School Status Completion Rates (arxiv.org)> last accessed on the 18/09/2021.

concerns arising from oil industry externalities and by extension serve environmental justice.

6.3.9 A Change in Regulatory Orientation

In view of the fact that regulation in Nigeria's oil and gas industry has been largely prescriptive and ineffectual, this thesis recommends a change in regulatory orientation from prescriptive regulation to performance-based regulation. An example of prescription under Nigerian law is the requirement that operators should substantially construct and securely fasten in the place of adequate rating blowout preventers.[1790] The danger of this kind of approach to pollution prevention is that it assumes that the installation of this equipment is a definitive guarantee of environmental safety. It therefore creates an avenue for regulators to be complacent operators having fulfilled regulatory obligations. Where liability is fault-based, it may be difficult to prove that the operator is at fault having acquitted itself of regulatory requirements by installing the BOP.[1791] However, a transition to performance-based regulation as complemented with EBC legislation would promote internal proactive risk assessment and control that address the pollution prevention and control aspirations of the PPP. Performance-based regulations also provides regulator the opportunity of developing guidance on risk assessment thereby taking the task of regulatory vigilance more seriously.[1792]

6.4 FINAL CONCLUSION

This chapter had explored a list of recommendations adumbrated with lessons from other jurisdictions that will help elevate Nigerian law to a level where the application of the PPP promotes EJ. First, the chapter recommends a remodeling of legislative provisions to address legal sub-optimality (factors which decreases the margin of safety of environmental laws and regulation in Nigeria). This would require polluters to address industrial practices which elevates poor air quality and the loss of biodiversity and a recalibration of Nigeria's emission pricing policies.

[1790] Mineral Oil Safety Regulations, Reg. 13. See the discussion in section 3.3.4.1.4 of this thesis, especially at page 160.

[1791] See page 76 of Chapter 3.

[1792] Other advantages of performance-based regulation are captured in Section 5 of Chapter 2 of this thesis.

Second, the chapter recommends that polluters bear advance financial guarantees for future environmental cost and an inflation-sensitive liability regime. This would provide assurance that future environmental cost engineered by companies who may no longer be operational will be met. The UK offers useful lessons of how this can be done.

Third, the chapter recommends the introduction of a substantive right to a healthy environment with potentials to accommodate all known environmental rights. Indonesia and Norway offer examples of how this can be done. While the Indonesian model of constitutional rights is comprehensive enough, there are weaknesses which undermine its effectiveness. It is the hope of this thesis that the introduction of a substantive right to a healthy environment in the constitution would not have the limitations observed in Indonesia especially the helplessness of the Indonesian Constitutional Courts in terms of enforcement if the provisions related to state duties become enforceable. Where such right is located in chapter 4 of the constitution of Nigeria, it will become enforceable by the operation of section 46 (1) CFRN 1999 (as amended). This will promote greater accountability and environmental governance that will help vitalize both the preventive, control and liability aspects of the PPP.

Fourth, the chapter recommends the creation of SECs and a new judicial posturing especially as they are well suited to deal with environmental matters including the internalisation of environmental costs. While the options available to Nigeria are extensive, the Australian model (the Land and Environment Court) is preferable for the reasons that it is established as a superior court of record and has implemented the judicial excellence framework.

Fifth, the chapter recommends a new legislation to introduce EBC as a condition precedent for the operation of an oil and gas licence in Nigeria. This is in view of the potentials of the EBC to demonstrate how MNOCs would remain competitive while preventing, controlling and restituting pollution. This will put to rest the usual complains of the impacts of regulatory costs on MNOCs.

Sixth, this chapter also recommends limited government participation in oil business the essence of which is to address factors which make government yield to regulatory

compromise and capture. This thesis expresses a confidence that this will enhance the effectiveness of regulators and ensure that polluters pay.

Seventh, a greening of Nigeria's fiscal expenditure framework is also recommended. This green framework can provide funding for low-emission research and innovation, infrastructures, thus, helping to enhance pollution abatement and control. It is recommended that lessons be learnt from the UAE on how it utilizes its Sustainable Finance Framework to further the objectives of pollution mitigation and control.

Eight, this chapter also recommends a PSTS and the payment of permanent fund dividend for the people of the ND to address the problem of corruption in the NDDC. Finally, the chapter recommends a change in regulatory orientation from prescriptive to performance-based regulation. It is expected that this change will promote internal proactive risk assessment and management in a manner that enhances pollution abatement and control.

While these recommendations offer pathways to incremental improvements in the application of the PPP (especially the internalisation of environmental costs) this study on current analysis of Nigerian law can only reach one conclusion. While Nigerian law has the potential to apply the PPP in a manner that promotes EJ, in reality the application of the PPP in Nigeria's hydrocarbon sector does not effectively promote EJ.

6.5 SUGGESTED AREAS FOR FUTURE RESEARCH

This study metered the extent to which the application of the PPP promotes EJ. It aims to consolidate positive environmental obligations that promotes environmental protection in a manner that addresses the wellbeing of local communities where hydrocarbon exploitation take place. Future research can examine further the relationship between the PPP and sustainable development in full, or the extent to which the application of the principle promotes biological diversity in full. There may also be the need to examine the important role which the PPP plays in the global energy transition. As countries develop national strategies to address climate change, it is important to examine if these strategies accommodate proper prizing mechanisms for

externalities. Not only will these studies consolidate knowledge about the unitary nature of the planet, but it will also help generate innovative ideas on how the PPP can help conserve natural resources in its diversity. Further research can also concentrate in greater detail on the relevance of the so-called Sustainable Development Mechanism under the Paris Agreement on Climate Change 2015[1793] on the internalization of environmental cost arising from oil industry externalities. Particular emphasis could be paid on the role that incentives would play to drive this process. Future research can also consider the application of the PPP in the context of climate change and the importance of corporate governance practices to the application of the PPP.

[1793] Art. 6.4 of the Paris Agreement on Climate change 2015.

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