



**OIL-PIGMENTED NIGER DELTA:
TOWARDS EFFECTIVE ENFORCEMENT
OF THE OIL POLLUTION LAWS AS A
WAY OF ACHIEVING ENVIRONMENTAL
JUSTICE**

ELOAMAKA CAROL OKONKWO

(LL.B, B.L, LL.M)

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School of Law, University of Strathclyde, Glasgow, United Kingdom

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Journal Articles

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DEDICATION

In loving memory of my most cherished mother Mrs Grace Okonkwo for her resoluteness against all widowhood challenges and deprivations to send the children to school. Your hard work is paying off, unfortunately after your death. I hide my tears when I think of the ordeal you went through, yet there is so much pain in my heart.

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ACRONYMS

API	American Petroleum Institute
Art.	Article
ASME	American Society of Mechanical Engineers
BAT	Best Available Technology
BBC	British Broadcasting Corporation
BCF	Billion Cubic Feet
BOEM	Bureau of Ocean Energy Management
BP	British Petroleum
BSEE	Bureau of Safety and Environmental Enforcement
CAA	Clean Air Act
CCFA	Connecticut Coastal Fishermen's Association
CEHRD	Centre for Environment, Human Rights and Development
CERCLA	Comprehensive Environmental Response, Compensation and Liability Act 1980
CFRN	Constitution of the Federal Republic of Nigeria
CGA	US Common Ground Alliance
CI	Conservative International
CJN	Chief Justice of Nigeria
CLEAR Act	Consolidated Land, Energy, and Aquatic Resources Act of 2010
CLO	Civil Liberties Organisations
CPM	Computational Pipeline Monitoring
CSO	Civil Society Organisations
CWA	Clean Waters Act 1972
DCIA	Debt Collection Improvement Act of 1996
DECC	Department for Energy and Climate Change
DEFRA	Department for Environment, Food and Rural Affairs
DHS	Department of Homeland Security
DOCD	Development Operations Coordination Document
DOJ	Department of Justice
DPP	Development and Production Plan
DPR	Department of Petroleum Resources
ECCJ	ECOWAS Court of Justice
ECHR	ECOWAS Court of Human Rights
ECOWAS	Economic Community of West African States
EEC	European Economic Commission
EFCC	Economic and Financial Crimes Commission
EGASPIN	Environmental Guidelines and Standards for the Petroleum Industry in Nigeria
EI	Environmental Injustice
EIA	Environmental Impact Assessment
EJ	Environmental Justice
ELF	Environmental Law Foundation
ELI	Environmental Law Institute
EO	Executive Order

EPA	Environmental Protection Agency
EPIL	Environmental Public Interest Litigation
ERA	Environmental Right Action
FEPA	Federal Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
FG	Federal Government
FGN	Federal Government of Nigeria
FHR	Fundamental Human Rights
FME	Federal Ministry of Environment
FOE	Friends of the Earth
FOIA	Freedom of Information Act
GCCF	Gulf Coast Claims Facility
GGFRI	Global Gas Flaring Reduction Initiative
GHG	Green House Gas
HCA	High Consequence Areas
HSE	Health and Safety Executive
HYPREP	Hydrocarbon Pollution Restoration Project
IACC	Impressed Alternating Cycle Current
IAS	International Acceptable Standard
ICC	International Chamber of Commerce
ICPC	Independent Corrupt Practices and Other Related Offences Commission
IIJD	International Institute for Justice and Development
IM	Integrity Management
INDC	Intended Nationally Determined Contribution
INECE	International Network for Environmental Compliance and Enforcement
ISO	International Standards Organisation
IUCN	International Union for the Conservation of Nature
JIV	Joint Investigation Visits
LNG	Liquefied Natural Gas
LPFO	Loading Low Pour Fuel Oil
LUA	Land Use Act
MNOCs	Multinational Oil Companies
MOSOP	Movement for the Survival of Ogoni People
MOU	Memorandum of Understanding
MSCF	One Thousand Standard Cubic Feet
NAOC	Nigerian Agip Oil Company
NCP	National Contact Point
ND	Niger Delta
NDDC	Niger Delta Development Commission
NEITI	Nigerian Extractive Industries Transparency Initiative
NEJAC	National Environmental Justice Advisory Council
NESREA	National Environmental Standards and Regulation Enforcement Agency

NGOs	Non-Governmental Organisations
NIMASA	Nigerian Maritime Administration and Safety Agency
NNPC	Nigeria National Petroleum Corporation
NOC	National Oil Company
NOPMA	National Oil Pollution Management Agency
NOSCP	National Oil Spill Contingency Plan
NOSDRA	National Oil Spill Detection and Response Agency
NPA	Nigerian Ports Authority
NPAM	Nigeria Petroleum Assets Management Co
NRC	National Response Centre
NRDC	Natural Resources Defense Council
OECA	Office of Enforcement and Compliance Assurance
OECD	Organisation for Economic Co-operation and Development
OGP	Oil and Gas Producers Standards
OMPADEC	Oil Mineral Producing Areas Development Commission
ONWA	Oil in Navigable Waters Act 1968
OPA	Oil Pollution Act
OPRC	Oil Pollution Preparedness, Response and Cooperation 1990
OSC	On-Scene Coordinator
OSHA	Occupational Safety and Health Administration
OSTLF	Oil Spill Trust Liability Fund
OUP	Oxford University Press
PCC	Public Complaints Commission
PHMSA	Pipeline and Hazardous Materials Safety Administration
PIB	Petroleum Industry Bill
PIGB	Petroleum Industry Governance Bill
PIL	Public Interest Litigation
PIPP	Pipeline Inspection Priority Program
PPMC	Pipelines and Product Marketing Company
PRP	Potentially Responsible Parties
PTF	Petroleum Trust Fund
RDS	Royal Dutch Shell
RTF	Restoration Trust Fund
RBCA	Risk-Based Corrective Action
RCRA	Resource Conservation and Recovery Act
RENA	Remediation by Enhanced Natural Attenuation
RESTORE ACT	Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act
RP	Responsible Party
SARA	Superfund Amendments and Reauthorization Act 1986
SCADA	Supervisory Control and Data Acquisition
SDWA	Safe Drinking Waters Act
SEPCO	Sterling Energy and Exploration Production Limited
SERAC	Social and Economic Rights Action Centre
SERAP	Socio-Economic Rights and Accountability Project

SFIP	Sector Facility Indexing Project
SNEPCo	Shell Nigeria Exploration and Production Company
SNG	Shell Nigeria Gas
SNOP	Shell Nigeria Oil Products
SPDC	Shell Petroleum Development Company of Nigeria
SUPERFUND	Comprehensive Environmental Response, Compensation and Liability Act, 1980
UAC	United African Company
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNPO	Unrepresented Nations and Peoples Organization
US	United States
US DOT	United States Department of Transport
USEPA	United States Environmental Protection Agency
USIM	United States Integrity Management
WBCSD	World Business Council for Sustainable Development

ABSTRACT

Environmental justice means different things to different people; however, it links ethnicity, race, income and equitable distribution of environmental goods and burdens, access to information, participation and access to justice. For some, the focus is on equal distribution, for others, it is a context for dialogue, whilst for others it connotes legal principles and procedures. Application of these interpretations involves diverse approaches and rules. In this study, the researcher examines how the oil-related activities and its externalities cause environmental injustice (EI) in the Niger Delta. Using comparative analysis, the research also examines the relevant laws and their enforcement in the US and Nigeria with a view of achieving environmental justice (EJ) for the Niger Deltans. It also considers the use of international acceptable standards (IAS) as the standard of enforcement by both the regulators and private enforcers by examining some court decisions that furthers the advancement of achieving EJ. It examined the NGOs role, the extraterritorial litigations and the use of African courts in pursuing EJ matters.

The thesis was inspired because of the ongoing EI in the Niger Delta because of inequitable policies and ineffective regulation and its aim was to examine Nigerian laws and enforcement processes relating to oil pollution as a necessary contribution to prompting and sustaining EJ in the Niger Delta. The researcher achieved this by means of a literature review and comparative analysis of oil pollution laws, enforcement mechanisms and strategies in the US and Nigeria as well as evaluation of how the practices measure with the industry IASs. Findings revealed that there is a connection between oil-related activities and EI in the Niger Delta, attributed to the laws, disparity between law and reality and enforcement failures. It specifically examined the effectiveness of the laws by analysing their design; analysing penalties for non-compliance and how long it takes to address the problems the law intends to address. It found that the designation of the Nigerian laws reduce EJ, encourage EI and does not provide the benchmark for effective enforcement. It also found that economic interest caused by oil dependency, ineffective federal structure, conflict of interest; legislative gaps, limited regulatory powers and reactive enforcement affect regulatory enforcement showing a pattern of EI. The examination of the effectiveness of regulatory and private enforcement in line with EJ principles and the insights drawn from the literature review and experiences in the US help in identifying some theoretical and normative weaknesses in the Nigerian laws relating to oil-pollution abatement and their enforcements. These apply where relevant and apply in finding proposals for improvement.

To position Nigeria for optimal enforcement, the study recommends review of the laws in line with some US laws and IAS considering contextual issues in Nigeria. It concludes that pollution laws modelled on economic theory of law and economics and citizen suits offer the most appropriate approach to deter and in effect help in achieving EJ in Nigeria. Considering the difficulty faced in Nigeria in amending or enacting new laws, the researcher also recommends the adoption of EGASPIN by the legislature and the courts as a quick solution pending the enactment of new laws. The courts should also consider IAS because some Nigerian laws referred to them. The recommendations are for Nigeria, but can apply in any jurisdiction seeking to improve on EI caused by oil pollution.

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CHAPTER ONE

1.1 RESEARCH STATEMENT

This thesis is a reform-oriented¹ and comparative analysis seeking to answer the question of whether, or how to use Nigerian pollution laws and their enforcements as a tool to reduce environmental injustice (EI) that has arisen² because of oil pollution in the Niger Delta. Where there is ineffective enforcement, how best to improve it to achieve a greater degree for environmental justice (EJ). It will analyse and recommend reforms to the Nigerian laws relating to oil pollution and their enforcement as a necessary contribution to promoting and sustaining EJ in the Niger Delta.³

The aim of this thesis is to find a connection between oil pollution and EI, facilitate identification of situations that may be instances of EI in the Niger Delta area of Nigeria and seek solution to identified EI using enforcement. It compares oil-pollution abatement laws and their enforcements with that of the USA and evaluates how Nigerian practices measure with the internationally acceptable standards (IAS) in the industry.

Focusing on the enforcement sections of relevant laws, the research examines the extent to which each of those provisions promotes effective enforcement. It compares the relevant enforcement provisions with that of the US, noting several significant issues, assesses the relative merits of the provisions and offers some practical recommendations for reform. The researcher makes proposals for the improvement to Nigerian pollution laws are a necessary step into effective enforcement in view of practices in the US as well as the provisions of IAS. The researcher will also make proposals on how improved enforcement can reduce pollution and invariably reduce EI, drawing lessons from US and adapting them to local circumstances bearing in mind the socio-economic, socio-cultural, socio-legal and socio-political situations in Nigeria. The underpinning principle herein relates to adherence to five basic principles in discussing EJ. The first is that no disproportionate environmental burden should be borne by any particular group, especially the minority. The second is that the benefits of environmental protection should be equally available to all concerned. In addition, there should be opportunities for meaningful and transparent public participation in decision-making.⁴ The fourth is that everyone should have access to effective remedies

¹ Research which intensively evaluates the adequacy of existing rules and which recommends changes to any rules found wanting: D Pearce, E Campbell and D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing, 1987)

² There are well-documented evidences of pollution in the Niger Delta. Researchers such as Ako, Ebeku, Ladan, Ekhatior had also established the link between oil exploration and EI in the Niger Delta.

³ For the purpose of this thesis, Niger Delta is as defined by section 30 of the NDDC Act 2000

⁴ This is one of the tenets of EJ, however, Etemire had discussed its importance in the Nigerian environmental law setting extensively therefore not the focus of this research. See U Etemire, *Law and Practice on Public Access to Environmental Information and Participation in Environmental Decision Making: A Comparative Analysis of Nigerian Legal Regime with International Best Practice* (Routledge 2015) 245

or access to justice where there is violation and laws enforced without regard to the political or economic power of any wrongdoer and finally the level of environmental protection should be adequate to sustain human health and wellbeing.

The research also examines the factors that hinder EJ in the Niger Delta according to Rasmussen⁵ which are; commoditization of land, energy and air for the benefit of those in power;⁶ and the second is lack of resources and power by the affected communities to protect their interests against those in authority and affluence. The third factor is unresponsive and unaccountable governmental policies and regulations because of the oppressive power structure and governmental availability to powerful corporations making it almost impossible for the victims to use governmental resources and power to advance their cause.⁷ The final one is piecemeal approach to regulation, which allows loopholes and the consequent ongoing unfair treatment of low-income populations.⁸

Following the above premises, the study explores the protection given to the Niger Deltans before the Harmful Waste Act, 1988⁹ and the Federal Environmental Protection Agency (FEPA Act) 1988¹⁰ to understand the level of protection.¹¹ It also shows how the Department of Petroleum Resources (DPR) using various regulatory powers given by the laws and even Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) introduced by it has been ineffectual in protecting the Niger Delta environment. Furthermore, it shows how the evolution of the National Oil Spill Detection and Response (Establishment) Act 2006 (NOSDRA Act) has been ineffectual thereby exposing the inhabitants to greater levels of pollution which in effect causes EI. It also considers how to review these oil pollution laws in line with related US laws and IAS. It goes further to explore how the regulatory authorities, the judiciary and even the NGOs can play roles in achieving EJ even in absence of well-couched oil pollution laws.

The research shows that the laws and enforcement approaches used by the regulatory agencies in Nigeria have not produced palpable justice for the Niger Deltans.¹² Drawing on both regulatory and judicial decisions from the US, the research makes recommendations towards achieving EJ for the Niger Deltans suggesting that not only the laws need to be improved, but also other factors outside the laws should be

⁵ See Larry Rasmussen, "Environmental Racism and Environmental Justice: Moral Theory in the Making?" (2004) 24 (1) Journal of the Society of Christian Ethics 11

⁶ The researcher will be discussing this in chapter three under the Land Use Act, 1978.

⁷ See chapter four for more discussion under the Petroleum Industry Bill and foreseeable changes

⁸ This is evident in Nigeria, for instance, PIB/PIGB is divided into many parts: see chapter four for discussion

⁹ Laws of the Federation of Nigeria, 2004

¹⁰ Ibid

¹¹ FEPA Act generally regulated the environment including the petroleum industry

¹² See chapter three for discussion

considered to achieve greater levels of EJ.¹³ Based on that, the hypothesis of this study is that despite efforts made in recent times in enacting several pollution abatement laws, Nigeria still needs to do more to achieve EJ.

This study adds to the growing literature¹⁴ on oil-related activities, oil-pollution and other related issues and injustices caused by them in Nigeria¹⁵ by providing one of the first detailed comparisons of the oil pollution abatement and redress laws in the US and Nigeria with reference to IAS.¹⁶ In this research, oil-related activities incorporates the six stages in oil and gas activities, which are exploration, production, terminal operations, hydrocarbon processing, oil transportation and marketing operations. The researcher will use it interchangeably with exploration activities. The study also provides one of the first instructive views on the development of oil-pollution abatement laws in Nigeria in a manner that it will enhance enforcement. It also provides comparison on redress laws where someone suffers because of an oil pollution incident. It shows that many of the laws are neither proactive nor reactive. Still examining the problems, the researcher identified the importance of the African regional courts, which are the ECOWAS court and the African Court of Human Rights. The research provides the narratives of using the two courts as alternate ways to justice for the Niger Deltans. One thing that distinguishes this research is the comparison of these two regional courts with a view of finding an easier and better alternative to seeking justice. It also offers the first optimal enforcement model in the face of oil pollution laws enforcement in Nigeria. In addition, the study adds to the literature on the role of the non-governmental organisations (NGOs) in justice delivery¹⁷ and provides detailed discussion of citizen suits and its usefulness in achieving EJ for the Niger Deltans (ND). It shows the involvement of the NGOs from the early days of EJ movement in the US and their role securing the 1994 Executive Order 12898 that requires federal agencies to address EJ as part of their overall mission.¹⁸ From then, not only that NGOs involvement had influenced legislation and policies, it has also increased NGOs participation in EJ conflicts. It had also helped in its development through legal actions, conferences, protests and academic research.¹⁹ The discussion proceeds in a progressive manner showing the linkage between effective laws and effective enforcement and between ineffective enforcement and EJ.²⁰

¹³ This research is not about those other factors, but the researcher is aware of their importance.

¹⁴ The researcher will be discussing many of this literature below

¹⁵ Some of the literatures are the works of R Ako, E Ekhator, JG Frynas, E Emeseh, MT Ladan and many more all discussed in this research.

¹⁶ This extensive research disclosed no other.

¹⁷ Some of the works discussed herein are the works of E Ekhator, DF Murphy and J Bendell, OC Okafor, UNEP and many more.

¹⁸ Discussed further in chapter three

¹⁹ Very many of them are discussed all through this research

²⁰ Discussed further in chapter three

Because measuring effectiveness provides the critical link between strategy and execution and influences how decision makers evaluate the impact of deliberate actions and critical issues, the researcher also evaluates effectiveness to identify the point of efficiency. To measure effectiveness, the researcher highlighted some fundamentals of effective regulatory regimes. The first is that a regulatory regime must play a significant role in solving or at least managing the problem that led to its creation, therefore in environmental law, measuring effectiveness is based on the extent to which regimes contributes to solving or mitigating the problems motivating its creation. It can also be measured by outputs/regulations and infrastructure created to make the regulation work in practice or by outcomes or changes in the behaviour of actors relevant to the problem.²¹ There are several scholarly works on measurement of effectiveness; however, the researcher aligns with Young's research²² and Fulton and Gilberg²³ characteristics of effective enforcement programme. Young's research generally found that some regimes make a difference in outcomes and solving the problems motivating its creation.²⁴ It also found that designation of a regime is often a more important determinant of effectiveness. Young's finding in essence explains that a better designation of regime makes it easier to solve the problems leading to the creation of the environmental regime. He found however that environmental regimes change continually after their initial formation therefore contextual factors also determine effectiveness because an arrangement that works perfectly well in one setting may fail in another setting because of the context.²⁵ Here, Young reminds the reader that environmental regimes are dynamic; therefore, to design a better regime requires consideration of the context for a particular setting. Furthermore, it found that maintenance of feelings of fairness and legitimacy is important to effectiveness, especially where active participation of members of a group determines success. In addition, arrangements featuring hybrid systems or multiple pathways encompassing both public and private elements can solve some types of environmental problems.

For Fulton and Gilberg, an effective environmental enforcement programme ensures achievement of the goals of environmental protection and to do so, an enforcement programme should be strong, efficient, creative, and fair.²⁶ He explained further that an effective enforcement programmes:

²¹ T Bernauer 'Protecting the Rhine River against Chloride Pollution' in RO Keohane and ML Levy (eds), *Institutions for Environmental Aid* (MIT 1996) 201

²² Oran Young, 'Effectiveness of International Environmental Regimes: Existing Knowledge, Cutting-Edge Themes, and Research Strategies' [2011] PNAS 108 19853 <<http://www.pnas.org/content/108/50/19853.full>> accessed 27 March 2017

²³ SF Fulton and EJ Gilberg, 'Developing Enforceable Environmental Regulations and Permits' (International Conference on Environmental Enforcement Proceedings, Budapest, September 22-25 1992) <<https://nepis.epa.gov/Exe/ZyPDF.cgi/9101RKN7.PDF?Dockey=9101RKN7.PDF>> accessed 27 March 2017

²⁴ Oran Young (n 22)

²⁵ This is particularly important in this research because comparison involves developing and developed country

²⁶ (n 23) 253

- a. Should be strong enough to impact on the regulated, change behaviour and deliver environmental compliance. To accomplish this objective, the program must reach enough violators to pose a credible threat of enforcement against all violators, it must provide sufficient penalties to deter future violations, and it must effectively communicate its results to the regulated community;
- b. must be efficient to establish a presence within the regulated community despite limited resources using all available tools; administrative, civil judicial, and criminal remedies, as well as adopting targeted approaches such as risk-based regulation of target resources;
- c. should be creative, seeking to achieve results beyond compliance; and
- d. Should be fair and provide confidence in the system, which includes transparency for efficiency, effectiveness of their activities and accountability by the environmental enforcement authority.²⁷

Applying Young's and Fulton and Gilberg findings in the Nigerian context, the researcher looked at the penalty provided by the Nigerian laws, the regulators and even the judiciary as discussed in chapters four and five and found that such penalties cannot provide effective enforcement for not being strong, efficient, creative and fair. The regulatory agencies do not pose credible threat of enforcement as civil judicial remedies are limited and criminal remedies are almost non-existent. It also looked at the time spent in resolving issues both through regulatory and judicial process and found it ineffective because there is no feeling of fairness and therefore do not provide confidence in the system.²⁸ The research found not so much difference in outcomes and solving oil pollution problems in the Niger Delta despite creation of NOSDRA and enactment of NOSDRA Act. This is because the designations of the laws are not to solve these problems; environmental regimes are not particularly dynamic: the contextual factors are there, however, there is still ineffectiveness and the current hybrid system is not strong enough to achieve effectiveness.²⁹

The study follows Devon Garvie and Andrew Keeler's model of environmental enforcement as a process involving three groups: the regulator, the judiciary and the firms.³⁰ By doing this, Garvie and Keeler specified the enforcement goal of regulatory agencies and characterised the regulator as a violation-minimizing police officer.³¹ Here the regulator commits to an enforcement policy and firms respond by choosing levels of compliance, and the judiciary makes decisions on the nature and extent of firms' deviation from the law.³² The study also emphasizes the importance of

²⁷ Ibid

²⁸ See some of the cases discussed in chapter six

²⁹ Ibid

³⁰ Devon Garvie and Andrew Keeler, 'Incomplete Enforcement with Endogenous Regulatory Choice' (1994) 55 *Journal of Public Economics* 141 <http://ac.els-cdn.com/004727279490085X/1-s2.0-004727279490085X-main.pdf?_tid=4daafe5e-38f0-11e4-bf8a-00000aab0f01&acdnat=1410356727_3e3dab9e8a6979d42c6f77a86de5caa8> accessed 27 March 2017

³¹ Ibid

³² Ibid

application of economic theory of enforcement³³ as one way of overcoming various enforcement impediments causing EI for the Niger Deltans. In addition to aligning with Young's proposition, the researcher measures effectiveness in terms of an enforcement system with enforcement deterrents that will be more than the financial incentives motivating violation or causing pollution. The study shows that as long as oil and gas activities continues in Nigeria with the Nigerian economy being dependent on the proceeds³⁴ and the government holding more than 50% in the joint venture partnership³⁵ with the laws, political, social and economic situation in Nigeria not changing positively and drastically, regulatory enforcement will be elusive or at least tainted. Because of that, Nigeria needs to use targeting approach to achieve EJ. First, there should be amendment of the laws that includes higher penalties for non-compliance and strengthening of regulatory powers. Furthermore, in addition to using NGOs to overcome possible regulatory capture, enforcement should target the profit of the regulated as disincentive to non-compliance. In addition, where there is non-compliance leading to pollution, polluting companies should pay high level of compensation that is deterrent enough to compel compliance even where regulators are not effective in regulating them.

The detailed discussion of the enforcement theories is one of the first if not the first detailed discussions of applicable theory that may help to improve the enforcement of oil pollution laws in Nigeria putting into consideration the factors that are currently affecting regulatory enforcement. The researcher will also examine the acceptable international standards on pollution abatement in the extractive industries on implementation and assessment of pollution abatement laws. This will assess and link this to EJ regime to examine its adaptation to Nigeria with a view of achieving EJ in Nigeria. Looking generally at the academic scholarship, the discussion of the enforcement theories, IAS brings a thought-provoking insight into the understanding of the powers of the industry standards in regulating the multi-national oil companies (MNOCs).

Finally, the researcher found that most of the few enforcement actions in Nigeria are reactive in nature because most actions taken currently enforce fundamental human rights already breached, taken to reduce spills and pollution, and taken to compensate

³³ Law and Economics theory began in the Chicago School with the influential writings of Gary Becker. For further discussion see RA Posner, 'The Economic Approach to Law' (1975) 53 Texas Law Review 757. The researcher will be discussing this more in chapter three under economic theory

³⁴ The other aspects of Nigerian economy do not seem to be growing too quickly; therefore, the oil dependent economy is not likely to end soon.

³⁵ Here, two or more oil companies enter into an agreement for joint development of jointly held oil prospecting licences or leases with each contributing to the costs and shares the benefits or losses according to its proportionate equity interest. Each joint venture operates under Operating Agreement with the NNPC and a Memorandum of Understanding (MOU) with the Federal Government. It currently involves six foreign owned companies and Nigerian government that are Shell, Mobil, Chevron, Agip, Elf and Texaco. See NNPC website: <<http://www.nnpcgroup.com/nnpcbusiness/upstreamventures.aspx>> accessed 27 March 2017.

and clean-up after spills. Yet, they are ineffectual. The researcher finds that because of established causes of enforcement failures and EI, proactive regulatory actions will deal with the actions or inactions likely to cause EI in the Niger Delta area of Nigeria.³⁶

Thematically, this thesis focuses on environmental justice in terms of three main areas, which are pollution abatement laws, international acceptable standards and enforcement because of their relevance in achieving the aim of this research.³⁷ It follows the widely understood concept that even though there are various definitions of EJ due to different factors in the definers' environment, the central agreement of two major elements in the literature are '*fair treatment*' and '*meaningful involvement*.'³⁸ These two concepts represent the interrelated and inseparable substantive and procedural aspects of EJ. This is because substantive EJ cannot produce actual justice without procedural EJ as in many cases substantive EJ is only valuable if procedure to achieving substantive EJ is fair.

By way of meaningful comparison, this research will examine the causes of EI in the US and Nigeria focusing on oil-related activities. It also examines how the United States Environmental Protection Agency's (USEPA) and Nigerian agencies treats oil pollution issues,³⁹ with a view of reducing EI. The research found that EI in the US generally comes in many forms including siting infrastructure and the built environment problems, fossil fuels and climate change, biomass and land conflicts, industrial and utilities conflicts, waste management issues, biodiversity conflicts, mineral extraction conflicts and tourism and recreation conflicts. There are some examples of EJ issues in the US that are relevant. First, in Louisiana, offshore drilling repeatedly caused spills along the shoreline with the latest being the Gulf of Mexico BP oil spill,⁴⁰ however many coastal communities depends on natural resources for their livelihoods. In addition, oil drilling in the Arctic National Wildlife Refuge from 1977 in the Alaskan coast permitted by Congress under the Alaska National Interest Lands Conservation Act of 1980 caused serious negative effects on the calving grounds of the Porcupine Caribou herd that certain minorities partially rely on for food. Furthermore, fossil fuels conflicts focusing on the extraction and processing of oil and gas resources led to many EI issues in the US.⁴¹ Another example is a gold mining at Fort Belknap Indian Reservation in Montana that experienced problems with

³⁶ Worthy of note is that many regulatory actions are reactive; however, these regulatory actions results to what the research will call reactive-proactive regulatory actions. This is because though the response actions could be reacting to environmental problem; it proactively focuses on corrective and adaptive solutions by improving regulatory standards after disasters.

³⁷ As noted earlier, the researcher is aware of access to information and public participation as two aspects of EJ, however, they are not within the scope of this research.

³⁸ See USEPAs' definition, the Commonwealth of Massachusetts and the Scottish definition discussed in chapter 3.

³⁹ This is discussed in chapter four of this thesis

⁴⁰ Ibid

⁴¹ This is particularly important as one of the main problems in the Niger Delta.

spills and contamination of surface and groundwater in the 1980s leading to health problems and its eventual shut down in 1996.⁴² In a recent case of Standing Rock Sioux Tribe in North Dakota, a federal judge ruled that because there was no adequate environmental vetting which includes impacts of spills on fishing and hunting, EI was imminent.⁴³ It is interesting to note that the decision was because of inadequate environmental study and EJ concerns as the tribe members' rely on fish or hunted game for a steady source of food.⁴⁴

Comparison with Nigeria found that many US issues relate to ND issues especially as they relate to the oil mineral extraction leading to fossil fuels and climate change problems, biodiversity conflicts, industrial and utilities conflicts, waste management issues and biomass and land conflicts. Fossil fuels are from spills and effluent and climate change problems are from flaring close to residents of many ND communities.⁴⁵ Habitat destruction, and air and water pollution, land degradation causes biodiversity problems in the mangrove including sudden and drastic changes to the local environment all of which has economic, social, health and environment impacts constituting severe threats to human and animal existence as well as environmental and economic sustainability in the ND. ⁴⁶It also results in a loss of profits, diminishes subsistence and their purchasing power. By extension, the destruction of biodiversity renders the agricultural sector, which is the largest employer of labour in the Niger Delta unprofitable leading to unemployment. Climate change and lack of biodiversity have forcefully displaced the people who can no

⁴² Heather Abel, 'The Rise and Fall of a Gold Mining Company' *High Country News* (Dec. 22, 1997) <<http://www.hcn.org/issues/121/3860>> accessed 27 March 2017. Also a suit was won under Title VI of the 1964 Civil Rights Act for the disposal of low-level nuclear waste in a 2/3 Hispanic Minority in Sierra Blanca, Texas in 1994. Also Fisk and Crawford Coal Plants in the predominantly Hispanic neighbourhoods Chicago had the worst environmental compliance records and with a 2001 study by the Harvard School of Public Health estimating pollution from the plants leading to 41 premature deaths, 550 emergency room visits, and 2,800 asthma attacks, through local groups effort it was shut down. See Dennis Moon and Others 'Using CALPUFF to Evaluate the Impacts of Power Plant Emissions in Illinois: Model Sensitivity and Implications' 36 (2002) 36 *Atmospheric Environment* 1063 and Kari Lydersen, 'Closing the Cloud Factories: Lessons from the Fight to Shut Down' *Midwest Energy News and REAMP* (Minnesota) <<https://midwestenergynews.atavist.com/closingthecloudfactories>> accessed 27 March 2017.

⁴³ R Meyer, 'The Standing Rock Sioux Claim 'Victory and Vindication' in Court' *The Atlantic Daily* (14 June 2017) <<https://www.theatlantic.com/science/archive/2017/06/dakota-access-standing-rock-sioux-victory-court/530427/>> accessed 3 April 2018

⁴⁴ Standing Rock Sioux are assured certain hunting and fishing rights in their recent Treaty with the US government and the Corps did not study whether a spill would kill most fishes and whether the chemicals used to clean up could poison local game, rendering them unfit for human consumption

⁴⁵ See Figure 1 below

⁴⁶ Amnesty International Report shows that the quality of crops in the Niger Delta is deteriorating because of production of soil toxicity; Amnesty International, '*The True Tragedy: Delays and Failures in Tackling Oil Spills in the Niger Delta*' (Amnesty International Report, Index AFR 44/018/2011) <<http://www.amnesty.cz/zakazdoucenu/doc/Niger-Delta-True-Tragedy-Report.pdf>> accessed 3 September 2017

longer cope with the problem from their ancestral land.⁴⁷ In Nigeria, the decisions taken by the government seem not to be effectual in cushioning the effect of the activities because laws are difficult to enact or revise worsening enforcement problems. More so, inhabitants find little help as there are no provision of services to help reduce the effect of the pollution. Linking exploration activities to EJ in both countries are Principles 3, 4, 7, 9, 10 and 14 of EJ Principles.⁴⁸ Principle 14 specifically noted that EJ opposes the destructive operations of multi-national corporations.⁴⁹ Worthy of note is that there are issues of reliance of the poisoned land or water for sustenance in many of the examples in both the US and ND.⁵⁰ There are also health issues caused by either actions or inactions of the government. In addition, environmental issues are at the forefront and social issues are touched in both jurisdictions. It is also clear that most of the EJ issues in the US discussed here showed siting industry or government inactions in Hispanics or minorities areas similar to the ND where most oil and gas activities take place.

There is meaningful progress towards enhancing justice made by NOSDRA and the courts in recent times with respect to the level of penalties imposed; however, its result is far from what is acceptable in the researcher's view. Looking at the extra-territorial decisions of the *Nigerian farmers' v Shell*,⁵¹ *Bodo community v Shell*⁵² and *SERAC v Nigeria*,⁵³ one concludes that Nigeria need to do more to get to what is close to justice. In addition, there is no better way of proving regulatory failures than how oil-related pollution has continued to engulf the Niger Delta environment. The impact of this devastation has caused protests⁵⁴ and demand for justice from the oil producing communities whose life and well-being are affected. All this raises serious questions about the adequacy of Nigerian pollutions laws and the enforcement practices of the regulators. Also concerning is that MNOCs works in joint ventures of various forms with Nigeria through the Nigerian nationalised state corporation called Nigerian National Petroleum Corporation (NNPC).⁵⁵ In addition, there are concerns regarding

⁴⁷ See Eloamaka Carol Okonkwo, 'Environmentally Displaced Persons in the Niger Delta: Challenges and Prospects' in Jordi Jaria i Manzano, Nathalie Chalifour and Louis J Kotzé (eds) *Energy, Governance and Sustainability* (The IUCN Academy of Environmental Law, 2016)

⁴⁸ See the United Church of Christ Commission for Racial Justice, 'Principles of Environmental Justice' (Proceedings of the First National People of Color Environmental Leadership Summit, Washington DC, October 1991) < <https://www.nrdc.org/sites/default/files/ej-principles.pdf> > accessed 27 September 2017

⁴⁹ Ibid

⁵⁰ This was a major issue raised in the recent Standing Rock issue discussed above

⁵¹ *Akpan v RDS and SPDC* Case/docket number: C/09/337050/HA ZA 09-1580

⁵² [2014] EWHC 1973 (TCC)

⁵³ [2001] AHRLR 60

⁵⁴ There are many ongoing protest starting from Adaka Boro protest of 1967 till date

⁵⁵ Joint ventures account for approximately 95% of all crude oil output, while local independent companies operating in marginal fields account for the remaining 5%. Shell operates largely onshore with more than one-hundred producing oil fields, and a network of more than 6,000 kilometres of pipelines, flowing through eighty-seven flow stations. SPDC also operates two coastal oil export terminals. Mobil Producing Nigeria Unlimited operates largely offshore in Akwa Ibom state in the Niger

the role of soft laws in the extractive industries and to what extent the MNOCs follow the soft laws. It is against this background that in-depth research relating to Nigerians oil-pollution laws, enforcement practices and their potentials to deliver and sustain EJ is considered.

Employing reform-oriented comparative research in the analysis of the oil pollution laws and enforcement to answer the research questions, this study follows a new path that represents a valuable contribution to knowledge to the field of substantive and procedural EJ in Nigeria. The discussion herein clarifies and deepens the understanding of inter-relationship between oil-related activities and EI in Nigeria. This research will further decipher the main cause EI in the Niger Delta whether it is the laws, other factors such as economic, political, and social or the enforcement/implementation of these laws. It will help the Nigerian legislature to make the legal regime robust enough to nurture its enforcement by the regulatory agencies, the judiciary and the private parties as a necessary path to achieving EJ for the Niger Deltans. Furthermore, the analysis will increase the understanding of what the regulators are doing to improve enforcement in the US and what roles the regulatory agencies, NGOs and the private parties have played in developing enforcement and in effect reducing EI. In general, the analysis will help the responsible public institutions to know what to do to ensure the achievement of EJ even as the country is dependent on the proceeds of oil.

1.2 RESEARCH QUESTION

The central question is; to what extent could improvement of enforcement of oil pollution laws assist in reducing environmental injustice that has arisen because of oil exploration and related activities in the Niger Delta?

To answer the central question, the researcher developed the following sub-research questions:

- 1.1 What is the nature of environmental justice and to what extent is it related to issues in the ND area of Nigeria?
- 1.2 To what extent are Nigerian oil-pollution abatement laws adequate to aid enforcement and how can they contribute to achieving environmental justice in Nigeria. Are there lessons from the US?

Delta and holds a 50% interest in a Production Sharing Contract for a deep-water block further offshore. Furthermore, Nigerian Agip Oil Company Limited (NAOC) joint venture mostly from small onshore fields. TotalElf joint venture is both on and offshore and finally, Chevron produces both onshore and offshore in shallow water. It merged with Texaco and currently has five offshore fields. The current joint venture are NNPC/Shell/Elf/Egip (55/30/10/5), NNPC/Mobil (60/40), NNPC/Agip/ Phillips (60/20/20), NNPC/Elf, NNPC/ChevronTexaco (60/40), and NNPC/PanOcean (60/40) <<http://dev.nnpcgroup.com/napims/Partners/JointVentureCompanies.aspx>>

- 1.3 What is the nature of regulatory enforcement and to what extent can regulatory enforcement contribute to achieving EJ in Nigeria? Are there lessons from the US?
- 1.4 What is the nature of NGOs involvement in the enforcement process and how can they be empowered to participate effectively in the enforcement of environmental protection laws in Nigeria with a view of achieving EJ? Are there lessons from the US?

It is important to note that the unifying string is for the researcher to make proposals, aiming at enhancing enforcement of pollution laws in Nigeria with a view of reducing EI in the oil producing areas of Nigeria even as Nigeria is dependent on the proceeds of oil. To add meaning to this thesis, there is need to address the problems within the laws themselves to help in achieving enforcement.

1.3 RESEARCH PROBLEM

Nigeria today was a formation of the colonialists from many independent nation-states of many ethnic groups existing before the 1914 amalgamation.⁵⁶ The nation-states were originally centralised politically,⁵⁷ however, colonialism and the 1914 amalgamation reduced the centralised political structure.⁵⁸ This reduced centralised political structure continued in the post-colonial Nigeria leading to some discriminatory policies, judges' limited role in governance and lukewarm legislative attitude.⁵⁹ Although the discovery of oil in commercial quantities was before the Nigerian independence, the quest for economic development increased oil activities after independence and that increased oil-related pollution leading to demand to mitigate the environmental effects, resource control, justice and true federalism.⁶⁰ Furthermore, the military took over political power after independence and their governance was associated with non-accountability and corruption, leading to worsened social and economic issues. These problems: colonialism, political structure, economy and militarisation of Nigeria all contributed to inequities and EI existing in the Niger Delta today.⁶¹ In addition, the federal structure⁶² left by the colonial masters

⁵⁶ T Falola and MM Heaton, *A History of Nigeria* (New York: Cambridge University Press 2008) 17

⁵⁷ M Fortes and E Pritchard, 'Introduction' in M Fortes and E Pritchard (eds), *African Political Systems* (London: KPI Ltd, 1987)

⁵⁸ W Rodney, *How Europe Underdeveloped Africa* (Washington: Howard University Press 1982) 69

⁵⁹ HO Yusuf, 'The Judiciary and Political Change in Africa: Developing Transnational Jurisprudence in Nigeria' (2009) 7 (654) *International Journal of Constitutional Law* 654. See also C Obiagwu and CA Odinkalu, 'Nigeria: 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

⁶⁰ K Okoko and J Nna, 'Federalism and Resource Allocation: The Nigerian Experience' (1997) 1 (1) *Nigerian Journal of Oil and Politics*, 16: See also C Ikporukpo, 'Federalism, Political Power and the Economic Power Game: Conflict over Access to Petroleum Resources in Nigeria' (1996) 14 (2) *Environment and Planning C: Government and Policy*, 159

⁶¹ The research explains this in chapter two under society, history and political governance in Nigeria.

at independence gives the Federal Government (FG) a wide range of powers to make laws on sixty-eight matters on the exclusive legislative list of which mines and minerals, including oil fields, oil mining, geological surveys and natural gas are included.⁶³ Section 4(2) of the 1999 Constitution specifically states that such laws should be for the peace, order and good government of Nigeria or any part of it. This gives the FG flexible power, therefore FG can balance consideration of oil fields and terrain, economic, social and environmental factors and make subjective judgment on whether to grant exploration or mining license. However, oil and gas exploration activities only take place in a few states of the country including the Niger Delta states. The structure like in many other countries allows the legislature to make the laws, the executive to implement and enforce the laws and the judiciary to interpret the laws.

Apart from legislating on oil and mines, oil has been owned by the FG from 1916 to date save for section 140 of the 1963 Constitution that provided for 50% of royalty or revenues accruing from the resources of each region of the Federation to go to that region. The military took over government from 1st January 1966 and the Constitution was suspended. The 1979 Constitution removed the 50% royalty; and retained FG ownership by virtue of section 40 (3) of that Constitution. The 1999 Constitution then introduced at least 13% derivation for states with resources.⁶⁴ This simply means that Niger Deltans can only benefit from oil activities if the Nigerian legislature legislates to that effect and only if the state governments decide to use it in their favour.⁶⁵ In addition to vesting the ownership of oil in the FG, the State government owns land needed for exploration and construction of oil facilities.⁶⁶ The Land Use Act 1978 (LUA) supersedes all other laws in Nigeria including the Constitution itself which is supposedly the grundnorm.⁶⁷ In addition, The Minerals and Mining Act, 2007 provided for acquisition of land for mineral exploration purposes in accordance with LUA. All

⁶² The 1954 Lyttleton Constitution created this and the 1960 Constitution created a parliamentary system.

⁶³ Section 4, item 39, part I of the Second Schedule to the 1999 Constitution

⁶⁴ See section 162 (2) of the 1999 Constitution of Nigeria in its original state

⁶⁵ It is not within the scope of this research to investigate the usage of the derivation fund, but suffice to say that the government is not compelled or obliged to use it in a specific way

⁶⁶ Section 1 of LUA, 1978 and sections 28, 29 and 47 (1) for incidental discussion

⁶⁷ This is by virtue of the provisions of the LUA, 1979 and the 1999 Constitution. Section 47 (1) of the LUA provides that the Act shall have effect notwithstanding any contrary provision in the Constitution or any other law. Section 274 (5) (d) of the 1979 Constitution and section 315 (5) (d) of the 1999 Constitution provides that nothing shall invalidate the LUA and that LUA shall continue to apply in the same manner as any other constitutional provision. It also provided that the LUA can only be altered or repealed with two-third majority as provided in section 9 (2) of the Constitution. Ebeku noted that LUA is the main cause of Niger Deltan violence and Ako argues that the LUA obstructs the Niger Deltans rights to EJ: See KSA Ebeku 'Niger Delta Oil, Development of the Niger Delta and the New Development Initiative: Some Reflections from a Socio-Legal Perspective' (2008) 43 *Journal of Asian and African Studies* 399 and R Ako, 'Nigeria's Land Use Act: An Antithesis to Environmental Justice' (2009) 52 (2) *JAL* 289

these have led to various calls for resource control⁶⁸ and abolition or amendment of the LUA⁶⁹ that will give way for the Niger Deltans to control their resources. This is not the focus of this research; however, this call for resource control and consequence militancy is because of perceived EI suffered by the Niger Deltans.⁷⁰

Because EJ discussion revolves around minority and low income, the researcher examines the population of Niger Delta against Nigerian population. The Niger Delta has population of about 22 million people according to the last population census conducted by the National Population Commission in 2006⁷¹ and approximately 30 million people occupying about 70,000km² (7.5% of the total land area of Nigeria) according to SDN.⁷² Bearing in mind the complexity of the definition of minority, the researcher determines the minority status of the Niger Deltans by adopting the definition of Capotorti. Capotorti defined minority as:

a group which is numerically inferior to the rest of the population in a State, and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity towards preserving their culture, traditions, religion or language⁷³

This definition shows the importance of size, distinctiveness and non-dominant position.⁷⁴ Article 27 of the International Covenant on Civil and Political Rights provide for minorities' rights.⁷⁵ According to World Bank 2015 figure, Nigerian

⁶⁸ The issue of resource control had been on the front burner in Niger Delta for few decades and there are many scholarly works such as Y Omorogbe and P Oniemola, 'Property Rights in Oil and Gas under Domanial Regimes' in A McHarg, (eds), *Property and the Law in Energy and Natural Resources* (OUP 2010)

⁶⁹ KSA Ebeku, 'Oil and the Niger Delta People: The Injustice of the Land Use Act' (2002) 35(2) *Verfassung Und Recht in Übersee* 201: MA Ajomo, 'Ownership of Oil and the Land Use Act' [1982] *Nigerian Current Law Review* 330: Eloamaka Carol Okonkwo 'A Closer Look at the Management, Revocation and Compensation Principles under the Nigerian Land Use Act' (2013) 1 (1) *Journal of Sustainable Development Law and Policy* 21

⁷⁰ This is the researcher's view and the view of Churchill Okonkwo. See C Okonkwo 'The Preconditions for Environmental Justice and Peace in Niger Delta, Nigeria' <<http://www.nigeriavillagesquare.com/articles/churchill-okonkwo/the-preconditions-for-environmental-justice-and-peace-in-niger-delta-nigeria.html>> accessed 6 September 2017.

⁷¹ National Population Commission, *State Population* (Nigerian National Population Commission Publication) <<http://www.population.gov.ng/index.php/state-population>> accessed 27 March 2017

⁷² SDN, *About the Niger Delta* (SDN Publication) <<http://www.stakeholderdemocracy.org/about-the-niger-delta/>> accessed 27 March 2017

⁷³ UN Office of the High Commissioner, *Minority Rights: International Standards and Guidance for Implementation* (UN Publication, 2010) <http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf> accessed 3 September 2017

⁷⁴ For a broader perspective of Niger Delta as minority ethnic group see KSA Ebeku, 'Legals Aspects of Environmental Issues and Equity Considerations in the Exploitation of Oil in the Nigeria's Niger Delta' (PhD Thesis, University of Kent, 2002)

⁷⁵ Nigeria is signatory

population was about 182.2million.⁷⁶ From this figure, ND population is only about 12% showing numeric inferiority, they are distinct as they are mainly farmers and fishers which they always see as their culture worth preserving and are in non-dominant position going by the Nigerian political structure, therefore can be regarded as a minority.⁷⁷ Politically, the government is unresponsive and unaccountable in their policies and regulations because of the oppressive power structure⁷⁸ as enshrined in the Constitution, corruption, weak democratic institutions and ineffectiveness after colonialism, decades of military rule and many more.⁷⁹ Changing or influencing laws in the legislature is almost impossible for the Niger Deltans even where the law requires simple majority because there is always division towards ethnic groups.⁸⁰ The corporations appear more powerful because of government interest in oil and there is currently piecemeal approach to regulation allowing loopholes.

Apart from the political dominance, Nigerian economy is dependent on the proceeds of oil. The make-up of the Nigerian petroleum industry is the upstream,⁸¹ downstream,⁸² midstream⁸³ and even oil servicing companies.⁸⁴ Many MNOCs and the indigenous companies are involved.⁸⁵ There are currently over eighteen MNOCs involved in exploration and production and the major players are Dutch Shell,⁸⁶ ExxonMobil, ENI/Agip, TotalFinaElf and Chevron/Texaco. According to Graf,⁸⁷ income from crude oil sales escalated from 2.5% to 8.1% in 1970, to 93.6% in 1975 greater than 98% through the first half of the 1980s. Income thereon account for over 85% of the Nigeria's gross domestic product (GDP), represents over 95% of nation's export earnings and contributes over 80 % of the government revenues.⁸⁸ The revenue has been falling and fell to the lowest level in March 2016 for more than five years as oil

⁷⁶ The World Bank, 'Population Total' <<http://data.worldbank.org/indicator/SP.POP.TOTL?locations=NG>> accessed 27 March 2017

⁷⁷ Ibid

⁷⁸ This is what Adeola calls internal colonialism. See Francis O Adeola, 'Cross-National Environmental Injustice and Human Rights Issues: A Review of Evidence from the Developing World' (2000) 43 American Behavioural Scientist 686, 693

⁷⁹ Discussed infra

⁸⁰ The researcher will be discussing this in chapter four under challenges of legislative reforms

⁸¹ Exploration and Production companies

⁸² Marketing and distribution of fuel products, supply and trading and terminals

⁸³ This is in-between upstream and downstream dealing with processing the crude oil or gas such as refining and gas processing as well the infrastructure such as building pipelines.

⁸⁴ Specialist contractors helping upstream and downstream companies in carrying out their projects that specialise in drilling, seismic, logistics, survey, logging, data processing, well and reservoir services.

⁸⁵ As at 2017, there were about 140 companies involved in all the segment, however, the research concentrates on mainly the upstream and the midstream, which cause most pollution in the industry.

⁸⁶ This comprises of four companies, which are SPDC, SNEPCo, Shell Nigeria Gas (SNG), Shell Nigeria Oil Products (SNOP), but conducts most operations through SPDC. Shell also holds a major stake in Nigeria Liquidified Natural Gas (NLNG).

⁸⁷ WD Graf, *The Nigerian State: Political Economy, State Class, and Political System in the Post-Colonial Era* (London; Heinemann, 1988)

⁸⁸ KK Aaron, 'Perspective: Big Oil, Rural Poverty, and Environmental Degradation in the Niger Delta Region of Nigeria' (2005) 11 (2) Journal of Agricultural Safety and Health 127

earnings dropped.⁸⁹ According to the National Bureau of Statistics, Nigeria derives 95% of export earnings and 70% of government revenue from the oil sector, which saw its contribution to the real GDP dropping below 11% in the third quarter of 2015 because of falling oil prices.⁹⁰

The DPR is the agency of the FG in charge of granting licences, raises money for the Nigerian Government through the granting of licences, and regulates the oil industries' activities.⁹¹ It is worthy of note that combining this role and regulating the industry amounts to conflict of interest and potential regulatory capture. This approach was ineffectual in many developed countries leading to its change in the USA, UK and Australia.⁹² In Nigeria, the approach does not provide any benchmark to tackling very many environmental problems associated with oil-related activities. Therefore, not only that EI is widespread, there appears to be no tailored solution to reducing it.

The discussion so far shows that Niger Delta indigenes do not have control over oil exploration activities and sharing of its proceeds, however, pollution caused by oil-related activities mostly impact them showing a pattern of EI. This is particularly important as the government has a role to protect the environment, also government regulatory agencies grant oil licence/permits. Oil-related activities engender series of ecological problems ranging from spills, flaring, habitat destruction, and air and water pollution, land degradation, all of which has economic,⁹³ social,⁹⁴ health⁹⁵ and

⁸⁹ See P Wallace and DM Doya, 'Nigeria Revenue Drops to 5-Year Low as Tax, Oil Income Fall' *The Bloomberg* (Europe, 22 April 2016) <<http://www.bloomberg.com/news/articles/2016-04-22/nigeria-s-revenue-drops-to-five-year-low-as-tax-oil-income-fall>> accessed 27 March 2017. See also Ivana Kottasova, Nigeria is Running out of Cash: Falling Oil Prices Hit Nigerian Economy' *CNN Money* (Washington DC, 1 February 2016) <<http://money.cnn.com/2016/02/01/investing/nigeria-opec-oil/>> accessed 27 March 2017

⁹⁰ The Federal Ministry of Budget and National Planning, Nigeria's Oil Sector Contribution to GDP Lowest in OPEC – Blueprint (The Federal Ministry of Budget and National Planning News Report) <<http://www.nationalplanning.gov.ng/index.php/news-media/news/news-summary/333-nigeria-s-oil-sector-contribution-to-gdp-lowest-in-opec-blueprint>> accessed 27 March 2017

⁹¹ DPR role is discussed in the chapter on statutory framework

⁹² See removal of regulation of safety from the Department of Energy after Piper Alpha 167 deaths in the UK; splitting the Minerals Management Service into three under the US Department of the Interior after the 2010 Deepwater Horizon disaster in the US and creation of new independent regulator by central government in Australia after Montara spill. The researcher will be discussing this more in chapter five.

⁹³ Including loss of sources of livelihood especially for women

⁹⁴ They include oil pollution-induced conflicts, destruction of many cultural, tourism facilities disruption and forceful displacement.

⁹⁵ For instance, researchers from a Swiss university recently found that neonatal mortality rises if a child's mother lives close to an oil spill before conception. See Anna Bruederle and Roland Hodler, *The Effect of Oil Spills on Infant Mortality: Evidence from Nigeria: CESifo Working Papers* 6653 (CESifo September 2017) <https://www.cesifo-group.de/DocDL/cesifo1_wp6653.pdf> accessed November 10, 2017 See also the research of Best Ordinioha and Seiyefa Brisibe, 'The Human Health Implications of Crude Oil Spills in the Niger Delta, Nigeria: An Interpretation of Published Studies' (2013) 54 (1) *Niger Med J* 10 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3644738/>> accessed 27 March 2017. See also research after Deepwater horizons spills by JP Incardona and Others, 'Deepwater Horizon Crude

environment impacts⁹⁶ that constitute severe threats to human and animal existence as well as environmental and economic sustainability.⁹⁷

The laws appear to be ineffective and have proven to be environmentally inimical to the Niger Deltans. For instance, the gas flaring laws have not really helped to reduce flaring.⁹⁸ Between 1999 and 2004, of 4.6 bcfd produced, nearly 55% was flared yearly.⁹⁹ Shell Petroleum Development Corporation (SPDC) in 2011 disclosed flaring of not less than 50% of its gas production in Nigeria.¹⁰⁰ Nigeria was consistently ranking second in world flaring¹⁰¹ after Russia, contributing about 25% to the total amount of gas flared in the world,¹⁰² until 2014 when it reduced flaring to 289,600,014 mscf being about 12% ranking the fifth-largest natural gas flaring country and in 2015 ranking seventh.¹⁰³ The UNDP/World bank research noted that the gross monetary value of flared gas in Nigeria amounted to US\$50 billion over 20 years.¹⁰⁴ Nigeria set a January 1, 1984 deadline for stopping gas flaring and has postponed it at least seven times from then.¹⁰⁵ All this lead to losses in terms of resource and revenue, but it also causes EI and a breach of fundamental human rights as held in *Gbemre v Shell*.¹⁰⁶

Oil Impacts the Developing Hearts of Large Predatory Pelagic Fish' (2014) 111 (15) PNAS <<http://www.pnas.org/content/111/15/E1510.full.pdf>> accessed 27 March 2017

⁹⁶ Mostly evident in the loss of biodiversity and destruction of habitats

⁹⁷ For further discussion, see PR Epstein and J Selber, *Oil: A Life Cycle Analysis of its Health and Environmental Impacts* (The Center for Health and the Global Environment 2002)

⁹⁸ Other strategies appears to be yielding better result as can be seen from discussion infra

⁹⁹ Joint UNDP/World Bank *Strategic Gas Plan for Nigeria* (ESMAP Report 279/04, 2004), 13 <https://www.esmap.org/sites/esmap.org/files/Rpt_27904_Nigeria_GasPlan.pdf> accessed 27 March 2017; See also John Vidal, 'World Bank Urges Nations to End "Wasteful" Gas Flaring' *The Guardian* (London, 24 October 2012) <<http://www.theguardian.com/environment/2012/oct/24/world-bank-gas-flaring>> accessed 27 March 2017.

¹⁰⁰ See Sunday Vanguard Newspaper, 13th February 2011, vol. 6 no 411, p 6; One could imagine the quantity of gas flared in Nigeria, considering that SPDC owns most oil wells in Nigeria.

¹⁰¹ At least for five years

¹⁰² World Bank Project: *Global Gas Flaring Reduction* (World Bank Report) <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTOGMC/EXTGGFR/0,,contentMDK:22137498~pagePK:64168445~piPK:64168309~theSitePK:578069,00.html>> accessed 27 March 2017

¹⁰³ See OPEC, *Annual Statistical Bulletin 2015* (OPEC 50th ed Report, October 2015) 97 <http://www.opec.org/opec_web/static_files_project/media/downloads/publications/ASB2015.pdf> accessed 1 June, 2016; See also US Energy Information Administration, *Country Analysis Brief: Nigeria* (US Energy Information Administration Report, May, 2016) <http://www.ieee.es/Galerias/fichero/OtrasPublicaciones/Internacional/2016/EIA_Nigeria_6may2016.pdf> accessed 27 March 2017. Though Nigeria is now seventh, there are no new laws in place that caused this change, so it appears that MNOCs changed their practices voluntarily or some facts are uncovered.

¹⁰⁴ Joint UNDP/ESMAP Strategic Gas Plans, 13-para 1.13 <http://www.esmap.org/sites/esmap.org/files/FR58200861713_Nigeria_strategicgasplanforigeria.pdf> accessed 27 March 2017

¹⁰⁵ Nigeria set another deadline for January 1, 1985, and nothing happened until the court ordered SPDC and NNPC to end flaring by April 2007 in the case of *Gbemre v Shell*. It was extended to December 2007 and then to January 1, 2008. From that moved to January 6, 2008. However when the 2008

Despite these available facts,¹⁰⁷ it is pertinent to note that there is no right to a healthy environment provided for in the Nigerian Constitution.¹⁰⁸ The extent of environmental degradation prompted UNEP to note that complete restoration could entail the world's 'most wide-ranging and long-term oil clean-up' that could take up to 30 years after stoppage of pollution and with estimated preliminary five years cost of over \$1 billion US dollars.¹⁰⁹ In addition, a Guardian report,¹¹⁰ noted that the Bodo spills of 2008 and 2009 may take at least 20 years to clean-up and may cost more than \$100m for proper clean up.¹¹¹ This in the researcher's opinion leads to further or continued EI unless something is done to reduce the environmental burden.¹¹² The UNEP Report, Environmental Rights Action (ERA) and Friends of the Earth (FOE) Nigeria have all called for the creation of Environmental Restoration Fund for the Niger Delta.¹¹³

In an effort to tackle this problem, the Federal Government in 2006, enacted NOSDRA Act as the first real legislation focusing spills associated with exploration activities and created a regulatory agency called NOSDRA. The regulatory agencies in recent times tried to enforce the provisions of the Act, however, not only are the powers of NOSDRA limited, many factors inhibit its successful operation that this research can refer to NOSDRA as toothless bulldog. The DPR also made guidelines and prescribes standards, which include EGASPIN to manage the oil industries' activities, which include reducing pollution, but has not achieved much based on available evidence and research. Generally, in the oil and gas industry, reducing oil-related pollution entails prevention, preparation, response and restoration of the environment in an efficient and

deadline was not met, the regulator enforced fines for non-compliance and the legislature hurried a legislation few months later, proposing to end gas flaring by December 2012 and that still failed.

¹⁰⁶ *Gbemre v SPDC and Ors* (2005) Suit No. FHC/B/CS/53/05

¹⁰⁷ UNEP, UNEP Environmental Assessment of Ogoniland (UNEP Report, 2011)

<http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf> accessed 27 March 2017, FOE Reports, Amnesty International Reports all discussed in this research

¹⁰⁸ However, see Art. 24 of African Charter and decision of *SERAC v Nigeria* based on the Charter and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1983

¹⁰⁹ UNEP Report 2011 (n 107) 211 and 226

¹¹⁰ John Vidal, 'Shell Accepts Liability for Two Oil Spills in Nigeria' *The Guardian* (London, 3 August 2011) <<http://www.theguardian.com/environment/2011/aug/03/shell-liability-oil-spills-nigeria>> accessed 27 March 2017

¹¹¹ The researcher will be discussing Bodo spills and its relevance in chapters two and six of this research

¹¹² The consequences of tolerating gross inequality, profligate energy use and environmental abuse was dealt with by Peel in his book Michael Peel, *A Swamp Full of Dollars: Pipelines and Paramilitaries at Nigeria's Oil Frontier* (Chicago: Hill Books Publishers 2010)

¹¹³ UNEP Report 2011 (n 107) and John Vidal, 'Nigeria: Oil-polluted Ogoniland could become Environmental Model' *The Guardian* (London, 9 August 2011), Ernest Chinwo, 'Nigeria: Environmental Rights Groups Demand U.S. \$100 Billion Clean-up Fund for Niger Delta' *All Africa News* (Monrovia, 10 November 2015) <<http://allafrica.com/stories/20151111009.html>> accessed 27 March 2017. Adamu Abu, 'ERA Faults Proposed Bill, Canvasses \$100b Restoration Fund for Niger Delta' *The Guardian* (Lagos, 8 June, 2016)

speedy manner. Many existing laws including EGASPIN¹¹⁴ require operators to report, respond, investigate and clean-up spills, however, there are always problems in practice. Evidence shows that the oil companies do not respond to spills adequately, investigations are also problematic as the oil companies rather than the regulators lead the joint investigation visits (JIV) because NOSDRA does not have independent means of initiating spill investigations and relies on the data supplied by MNOCs about spills.¹¹⁵ In addition, the basis of compensation is JIV therefore, the composition of JIV team, their expertise and fairness to the parties concerned call for questioning. This is especially so when one looks at the level of spills recurrence, the incalculable destructions and the EIs often meted to the affected communities. The JIV team representatives are normally NOSDRA, DPR, Nigerian Police, oil companies' involved, State Ministries of Environments and the host communities.

Clean-ups should start within twenty-four hours of any spill which are not always complied with and where there are clean-ups; it is always below standards that even UNEP opined that regulatory certifications being given to MNOC's by the Nigerian regulators are meaningless.¹¹⁶ In the Bodo case, SPDC did not only fail to clean-up, but also ignored continual demands by NOSDRA to act. Nonetheless, it later accepted that equipment failure caused the spill because of natural corrosion.¹¹⁷ Also Pipelines and Product Marketing Company (PPMC) refused to undertake clean-up and remediation of discharge of Low Pour Fuel Oil (LPFO) from its jetty at Ijala, Delta state over fifteen months after the spill leading to warnings and an eventual lawsuit between NOSDRA and PPMC.¹¹⁸ Therefore, the researcher identifies neither a significant degree of focused oil pollution law nor improved enforcement of the available laws to prevent, prepare, respond and restore the environment in an efficient and speedy manner.

An important area of EJ concerns in this research is violation and enforcement of environmental laws especially as regards penalties. It is noteworthy that EI prevails on application of lower penalties in minority or low income areas than violations

¹¹⁴ The DPR made EGASPIN, therefore not an Act of National Assembly; the researcher will be discussing the legal status in chapter two.

¹¹⁵ Discussed in chapter two

¹¹⁶ UNEP Report 2011 (n 107): The UNEP Report was the most comprehensive assessment ever undertaken in the Niger Delta. It is a 14-month independent scientific assessment with examination of over 200 places and survey of 122 kilometres of pipeline Rights of Way. It also reviewed over 5,000 medical records and engaged more than 23,000 people at local community meetings. See also Richard Steiner, *Double Standard: Shell Practices in Nigeria Compared with International Standards to Prevent and Control Pipeline Oil Spills and the Deepwater Horizon Oil Spill* (FOE Netherlands Report, November 2010) <www.milieudefensie.nl/publicaties/rapporten/double-standard> accessed 3 September 2015

¹¹⁷ See *Shell v Bodo* London case

¹¹⁸ The cleanup was in contention as PPMC spokesperson Nasir Nmodaghe insisted that cleanup was done by the Clean Nigeria Associates and was surprised about the litigation. See Nnenna Ezeah, 'Oil Spill: Court imposes N62.5M on PPMC' *The Vanguard Newspaper* (Lagos 10 April, 2012) <<http://www.vanguardngr.com/2012/04/oil-spill-court-imposes-n62-5m-fine-on-ppmc/>> accessed 27 March 2017. There are many other examples

elsewhere. This may explain why the recommended penalties in National Environmental Standards and Regulation Enforcement Agency 2007 (NESREA Act) is far more than the ones in NOSDRA Act 2006 despite the fact that visible environmental devastation in Nigeria is more in the oil industry than other industries.¹¹⁹ One could see that despite environmental problems in the Niger Delta, enforcement of the available inadequate laws has not been at its best, causing more EJ problems. It is obvious that the presence of pollutants presents formidable EJ challenges in the ND. It then follows that there is a breach of the notion of EJ of rights of protection of all individuals from environmental protection. Worthy of note is that an oil pollution incident can give rise to four types of pollution damage claims, which are clean-up cost, property damage, economic losses and costs for reinstatement of the environment. Property damage and economic losses many times leads to compensation, however, compensation is a problem in the Niger Delta because of weakness of the laws and enforcement¹²⁰ causing more EJ problems.¹²¹

The manner of acquiring the land for the exploration activities and compensation for it shows further injustice. The compensation principles are for surface rights to land occupiers,¹²² loss of value of the land¹²³ affected by a pipeline¹²⁴ and negligence/neglect including vicarious liability¹²⁵ or disturbance, which cannot be queried under the LUA.¹²⁶ The Niger Deltans have sought for justice through

¹¹⁹ This is not within the scope of this research, but suffices to look at section 24 of NESREA Act that provides higher penalty and prison terms.

¹²⁰ See the provisions of the Petroleum Act 1968, the Nigerian Minerals and Mining Act of 2007, the Oil Pipelines Act 1965 that all focused on economic value. See CO Ikporukpo, 'Petroleum, Fiscal Federalism and Environmental Justice in Nigeria' (2004) 8 (3) Space and Policy 321 for further discussion

¹²¹ This is not the focus of this research but worth mentioning as compensation is not compensatory and takes longer time to be paid. For discussion on this see Wilson Akpan, 'Oil, People and the Environment: Understanding Land-Related Controversies in Nigeria's Oil Region' (XI CODESRIA General Assembly Conference Rethinking African Development Maputo Mozambique, December 2005) <<http://www.codesria.org/IMG/pdf/akpan.pdf>> accessed 27 March 2017; SDN, *Towards a New Oil Spill Compensation System in Nigeria* (SDN Report July 2014) 2 <<http://www.stakeholderdemocracy.org/stockholm/wp-content/uploads/2015/04/Towards-a-Nigerian-Compensation-Scheme-.pdf>> accessed 27 March 2017; SDN, 'New Compensation Systems and Mechanisms in the Oil and Gas Industry in Nigeria' (SDN Research Report Summary, July, 2014) <<http://www.stakeholderdemocracy.org/stockholm/wp-content/uploads/2015/04/RESEARCH-REPORT-SUMMARY.pdf>> accessed 27 March 2017; Ejama-Ebubu Community got compensated after 40 years: UNPO, 'Ogoni: The people of Ejama Ebubu Compensated for Oil Spill after a 40 Year Wait' UNPO (The Hague, 27 July 2010) <<http://unpo.org/article/11398>> accessed 27 March 2017; Bodo Community got compensated years after securing judgment against SPDC because negotiation for compensation failed many times

¹²² See section 29 LUA; see also Section 37 of the Petroleum Act, 1968

¹²³ Buildings, crops and economic trees; See Oil Pipelines Act section 6.3 and Petroleum (Drilling and Production) Regulations 1969

¹²⁴ Section 11(5) (a), see also section 20 (3) on courts' power

¹²⁵ Section 11(5) (b)

¹²⁶ Section 47(2): For discussion surrounding how compensation are paid see Akpan (n 121)

legislative, executive and judicial actions in Nigeria,¹²⁷ but injustice is continuing even as Nigeria hardly executes favourable judgments. On this, the International Commission of Jurists (ICJ) observed that despite previous court decisions,¹²⁸ on similar issue, the conditions of living and the respect of the rights for the Niger Delta people have not substantially improved.¹²⁹ The ICJ called on the then President Jonathan to enforce the ruling by the of ECOWAS Court of Justice on oil pollution-related cases in the Niger Delta in a suit brought by Socio-Economic Rights and Accountability Project (SERAP) on December 14, 2012.¹³⁰ The suit was about violation of Nigeria obligations under the Article 24 of the African Charter on Human Rights and Peoples' Rights (African Charter).¹³¹ The inaction of the stakeholders further led UNEP representatives through Special Envoy Erik Solheim, to propose meeting with top Government of Nigeria officials and other key partners regarding the implementation of the environmental remediation proposed by the UNEP Report.¹³² In the *Bodo Community v SPDC*,¹³³ SPDC eventually accepted responsibility but it took further lawsuits to agree on compensation in 2015.¹³⁴ Despite the compensation payment in 2015, clean-up only started in September 2017.¹³⁵

Before the NOSDRA Act in 2006, the judiciary using the common law provisions had attempted to give justice to this Niger Deltans.¹³⁶ However, there still delays that some

¹²⁷ There have been many actions including class action many times with the help of civil organisations that secured judgment against polluters, yet not implemented. See cases of SERAP, FOE, ERA and many more.

¹²⁸ See the African Commission in *SERAC v FGN* (155/96)

¹²⁹ Bertram Nwannekanma, 'ICJ Seeks Enforcement of Verdict on Oil Pollution in Niger Delta' *Vanguard Newspaper* (Lagos, 20 December 2013) <http://www.nguardiannews.com/index.php?option=com_content&view=article&id=114087:icj-seeks-enforcement-of-verdict-on-oil-pollution-in-niger-delta&catid=1:national&Itemid=559> accessed 27 March 2017

¹³⁰ *SERAP v FGN* (No ECW/CCJ/JUD/18/12)

¹³¹ Ibid

¹³² UNEP, UNEP Team in Nigeria to Discuss Steps Needed to Implement Ogoniland *UNEP News Centre* (5 Feb 2013) <<http://www.unep.org/newscentre/Default.aspx?DocumentID=2704&ArticleID=9386&l=en>> accessed 27 March 2017

¹³³ [2014] EWHC 1973 (TCC)

¹³⁴ The spill was in 2008 and 2009. See News24Nigeria, 'Bodo Residents Rejects Oil Spill Compensation Offer' *News24Nigeria* (Nigeria, 14 September 2013)

¹³⁵ M Udoma, Shell's Bodo Clean-Up Excites Community Leader *Sweet Crude Reports* (Port-Harcourt, 11 October 2017) <<http://sweetcrudereports.com/2017/10/11/shells-bodo-clean-excites-community-leader/>> accessed 15 January 2018. See also Liberty George, 'Anger Seethes on Margins of Historic Clean-up in Nigeria's Delta' *Reuters* (Port-Harcourt, November 8, 2017) <<https://uk.reuters.com/article/us-nigeria-delta-environment/anger-seethes-on-margins-of-historic-clean-up-in-nigerias-delta-idUKKBN1D81WF>> accessed 15 January 2018

¹³⁶ See *Gbemre v SPDC and Ors* (2005) Suit No. FHC/B/CS/53/05, *SPDC v Chief Otoko and Ors* (1990) 6 WLR (Pt. 159) 693, *SPDC v Tiebo VII and others* (2005) 4 N.W.L.R (Pt. 445) 657, *Umudje v Shell* (1975) 9-11 S.C. 155 *Siesmograph v Ogbeni* (1976) 4 SC 85, *Gulf oil ltd v Oluba* (2003) F.W.L.R

case lasted up to twenty-five years in court.¹³⁷ Apart from the common laws interpretations, efforts by the judiciary to interpret oil pollution laws to come close to justice bring justice seem not to have brought real justice, therefore the judiciary need to do more in the researcher's opinion. This is because, pollution appears not abating, penalties and compensation paid are still very poor in comparison to what is obtainable in many countries such as US and there are still delays even where favourable decisions are taken. There was sponsorship of two bills by members of the legislature in 2012:¹³⁸ the NOSDRA Amendment Bill 2012 and the Petroleum Industry Bill 2012.¹³⁹ These two Bills are still with the legislature; however, they attempt to improve the laws and provide wider enforcement powers.¹⁴⁰

Niger Deltans have also explored, alternative dispute resolution including arbitration, mediation and negotiation but seemed to have been ineffectual.¹⁴¹ A good example is the recent Bodo SDPC London case that arose when negotiation with SPDC failed.¹⁴² In reality, private individuals have decided not to rely on the agencies of the government that largely are adjudged failures and this could explain why some youths in the Niger Delta took to arms.¹⁴³ In some cases, those affected by spills and pollution challenge oil companies in court mostly to seek compensation, in other cases, they resort to out of court settlement having considered all it takes to get a favourable judgment. This is because their actions are often constrained by factors limiting justice, which includes cost,¹⁴⁴ delay,¹⁴⁵ provisions of the law and lack of modalities to enforce the judgments,¹⁴⁶ court jurisdiction over oil pollution matters,¹⁴⁷ locus standi and other technicalities,¹⁴⁸ technical expertise¹⁴⁹ and conflict of laws.¹⁵⁰

(pt.145) 712, *SPDC v Farah* [1995] 3 N.W.L.R (Part 382) 148, *SPDC v Joel Anare and Ors* (2015) LPELR-24750(SC) and many more

¹³⁷ See the recent case *SPDC v Joel Anare and ors* (2015) LPELR-24750(SC) where the Supreme Court of Nigeria relied of the Rule in Ryland and Fletcher in taking decision in the case

¹³⁸ The Nigerian federal legislature

¹³⁹ These Bills are discussed infra

¹⁴⁰ The PIB has been modified numerous times with numerous name change and is currently called the Petroleum Industry Governance Bill, 2016

¹⁴¹ Alternative dispute resolution are mainly arbitration and mediation according to legal Match, however there are Med-arb, Mini-trial, Summary Jury trial, Early Neutral evaluation and negotiation. See Legal Match, 'What is ADR' <<http://www.legalmatch.com/law-library/article/types-of-alternative-dispute-resolution-adr.html>> accessed 27 August 2017

¹⁴² See other cases such as *Joel Odum and Ors v Shell B.P. and Weco Nigeria Ltd* 1974 2 R.S.L.R. 93, *Godspower Nweke and Anor v N.A.O.C*

¹⁴³ This is not within the scope of this research

¹⁴⁴ Absence of effective legal aid for civil actions to pursue matter against MNOC's is not helping even with recent amendments to the legal aid scheme. See section 8 of Legal Aid Act 2011

¹⁴⁵ *SPDC v Joel Anare and ors* (2015) LPELR-24750(SC) lasted at least 30 years in court. The suits were consolidated by Order of the then Bendel State High Court on 21/3/85, the trial court delivered judgment on 27th May, 1997 in favour of the Plaintiffs, the defendant appealed to the Court of Appeal, Benin City in CA/8/255/97. The Court of Appeal dismissed the appeal on 22nd May 2000, the defendant/appellant then appealed to the Supreme Court and the judgement was in June 2015.

¹⁴⁶ See SERAP case won at the ECOWAS court of justice and still not enforced.

Furthermore, there is an obligation of the host country to protect the investment of the MNOs under the international law. This is a major challenge for the Nigerian government, as the government needs to balance environmental protection and protection of the MNOs investment especially as vandalism, oil installation attacks, hostage taking of oil workers and similar vices has been at the centre stage in Nigeria.¹⁵¹ Also, international law treaties and remedies do not help much in this regard because not only that the adopted international instruments are not directly binding, they mainly do not establish judicial or enforcement mechanisms to hold private actors directly responsible under international law. Ong observed that through multilateral and bilateral treaties, states use international law to intervene within global markets and create opportunities for private transnational actors, such as MNOs to operate within foreign jurisdictions, however, when domestic courts and enforcement agencies within these foreign jurisdictions do not remedy their environmental harms, there is no international mechanisms directly enforceable against these private actors.¹⁵² In addition, the growing sense of common obligations, accountability, and acceptance of responsibility is not because of effective enforcement of international norms within the domestic jurisdictions, but usually voluntary leading to enforcement problems especially where there is significant interest by the state.¹⁵³

This absence of international and sometimes domestic legally binding responsibilities for pollution had made several internationally recognised intergovernmental and non-governmental organisations to focus on the use of soft laws such as the UN Global Compact that cover issues of human rights, environmental and anticorruption values to create a framework for corporate accountability.¹⁵⁴ Ong also highlighted at least two ways developed by intergovernmental organisations to regulate the environmental actors.¹⁵⁵ They are the adoption of multi-layered global and regional normative instruments targeting transnational business activities such as ‘2011 UN Guiding Principles on Business and Human Rights (Ruggie Guiding Principles)¹⁵⁶ and

¹⁴⁷ Now settled to be within the jurisdiction of Federal High Court by virtue of the Supreme Court’s decision in *SPDC v Abel Isaiah and others* (2001) FWLR (Pt. 56) 608

¹⁴⁸ See *Amos and Anor v Shell BP Ltd* [1974] 4 ECSLR 486

¹⁴⁹ See the 2013 recent Dutch case where three farmers lost because, they do not have the information required to prove their case and could not compel SPDC to provide it by virtue of the Dutch law, but see the 2015 Appeal court decision on the same matter.

¹⁵⁰ Discussed in subsequent chapters

¹⁵¹ This is not the focus of this research, but suffices to say that this contributes to regulatory problems in Nigeria.

¹⁵² DM Ong, ‘Regulating Environmental Responsibility for the Multinational Oil Industry: Continuing Challenges for International Law’, (2015) 11 (2) International Journal of Law in Context 153

¹⁵³ Ibid

¹⁵⁴ LC Backer, *Transparency and Business in International Law—Governance between Norm and Technique* (Consortium for Peace and Ethics Working Papers Series 2012-2013)

¹⁵⁵ Ibid

¹⁵⁶ The UN Human Rights Council endorsed the ‘Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework’ on 16 June 2011

institutional networks established both across and within national jurisdictions such as OECD National Contact Points (NCPs).¹⁵⁷ Unfortunately, those ways do not still bind the transnational private actors because they do not provide any international means for enforcing the principles and standards.¹⁵⁸ It is pertinent to note that some MNOs now localise some of these principles in their respective codes of conduct, yet they are not binding.¹⁵⁹ All these difficulties could explain why there is continued EI and human right abuses by MNOs in Nigeria. Ong however suggested three possible ways of dealing with these problems, which are State intervention establishing compulsory international compensation schemes that extends to cover the activities of non-state private transnational economic actors; International Tribunal for the Law of the Sea reluctance to expand international responsibility; and Litigation before domestic courts of the transnational private actors.¹⁶⁰ It is in the light of the last that the Niger Deltans had made extra-territorial litigations by taking MNOs to their home courts in Hague, London and United States. Ong however pointed that '*forum non conveniens rule*'¹⁶¹ and the doctrine of 'corporate veil' are two main challenges to

<<https://business-humanrights.org/en/principles/un-guiding-principles-on-business-human-rights>>
accessed 3 September 2017

¹⁵⁷ The OECD Guidelines is a government-backed international instrument on responsible business conduct with a built-in grievance mechanism – specific instances. It requires each member state to set up NCPs to hear grievances from any party against a company headquartered in a member state or one of ten non-members adhering to the Guidelines, find a resolution for issues arising from the alleged non-observance of the Guidelines. NCPs must be impartial, predictable, equitable, and decisions will be compatible with the principles and standards of the Guidelines. NCPs offer mediation services to reach settlement and issue statements summarizing their findings and recommendations.

¹⁵⁸ Discussions are ongoing at the UN level to fashion a binding treaty for the MNOs in whatever form. See UN Open-Ended Intergovernmental Working Group, Elements for the Draft Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights: HRC Res. A/HRC/RES/26/9 (UN Publications September 29 2017) <<https://business-humanrights.org/en/un-intergovt-working-group-on-proposed-treaty-releases-elements-for-draft-instrument-for-negotiations>> accessed 3 October 2017; see also United Nations, Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (UN Publications September 29 2017) <<http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>> accessed 3 October 2017. They could offer effective remedies; however, this is not the focus of this research.

¹⁵⁹ Shell for instance avers in its code of conduct to respect human rights as localised in the Universal Declaration of Human Rights and ILO Conventions. See Shell, *Code of Conduct* (Shell Publication 2014) 11 <http://www.shell.com/promos/code-of-conduct-english/jcr_content.stream/1448871047472/d63089ffcbc22d0aeb173dd3417997f9df9411004148469aba013d05926c8446/codeofconduct-english-2015.pdf> accessed 3 September 2017. See also Total 2011 Code of Conduct: Total, *Code of conduct* (Total Publication 2011) 4 <http://www.total.com/sites/default/files/atoms/files/total_code_of_conduct_va.pdf> accessed 3 September 2017. For detailed discussion see EO Ekhator, 'Regulating the Activities of Oil Multinationals in Nigeria: A Case for Self-Regulation?' (2016) 60 (1) *Journal of African Law* 1

¹⁶⁰ DM Ong 2015 (n 152)

¹⁶¹ The doctrine allows a court to decline to exercise jurisdiction if it determines that it is an unnecessarily inconvenient forum for the trial, where there is a more appropriate forum is available to

these extra-territorial litigations. These two rules were impediment in many of the cases instituted by the Niger Deltans against Shell abroad.¹⁶²

The reality is that the Niger Delta region is presently experiencing recurring pollution incidents because of oil exploration activities with little or no benefit to the communities, thus sentencing them to a life of bearing a disproportionate burden for the rest of the country. It is indeed worrisome that despite the obvious degradation and other problems visible in the Niger Delta, there are so many gaps between even the porous pollution laws and the practical reality showing regulatory and enforcement flaws. There has been ongoing research on how to deal with these problems; however, one under researched area is issue surrounding enforcement of the laws governing both the exploration and resultant pollution.¹⁶³ In addition, few literatures discussed these laws in the discourse of substantive and procedural EJ. For example, Ako focussed on substantive EJ using the lens of land use as a fundamental issue to address EJ,¹⁶⁴ and this is not the focus of this thesis. Both Ladan and Etemire focused on procedural environmental rights. Ladan focused on access to EJ in oil pollution and gas flaring in Nigeria¹⁶⁵ while Etemire focused on environmental participatory rights, which is not the path of this research.¹⁶⁶ Omorogbe¹⁶⁷ discussed enforcement and civil regulation in Nigeria in general terms and Oshionebo focused on social irresponsibility of MNOs in Africa's extractive industries without being specific to Nigeria.¹⁶⁸ This research also

the plaintiff. It provides that liability of a subsidiary company should not be upon the parent company, especially when the parent company is resident in a different national jurisdiction.

¹⁶² *Bodo v Shell, Ogale v Shell* (now on appeal), *Nigerian Farmers v Shell, Kiobel v Shell* and many more

¹⁶³ Many academic literature written immediately after the Nigerian independence was from the economic perspective, therefore did not address environmental problems caused by exploration activities. LH Schatzl, *Petroleum in Nigeria* (OUP 1969); SR Pearson, *Petroleum and the Nigerian Economy* (Stanford University Press 1970) 84; T Turner, (Government and Oil in Nigeria: A Study of the Making and Implementation of Petroleum Policy – PhD Thesis, London School of Economics and Political Science 2007); and SA Khan, *Nigeria: The Political Economy of Oil* (OUP 1994). The publication of 1980's and 1990's also omitted the aspect of impacts of exploration activities. See the works of Etikerentse, Omotola, Olisa, Ajomo, Kassim-Momodu, Atsegbua, Kachikwu, Okorodudu and Akpan. The later works of Atsegbua, Ebeku, Omorogbe and others however include environmental protection but not concentrating on the laws and enforcement. Other works are on environmental pollution by Ekpu, ownership by Omorogbe and Oniemola, environmental crimes and terrorism by Aigbokhaevbo and Ogbodo and corporate social responsibility by Idemudia

¹⁶⁴ R Ako, (n 67)

¹⁶⁵ MT Ladan, 'Access to Environmental Justice in Oil Pollution and Gas Flaring Cases as a Human Right Issue in Nigeria' (Institute for Oil and Gas Law Training Workshop For Federal Ministry of Justice Lawyers, Abuja, November 28-30, 2011) <https://www.academia.edu/5150147/access_to_environmental_justice_in_oil_pollution_and_gas_flaring_cases_as_a_human_right_issue_in_nigeria> accessed 27 March 2017

¹⁶⁶ U Etemire, 'Public Access to Environmental Information: A Comparative Analysis of Nigerian Legislation with International Best Practice' (2014) 3 *Transnational Environmental Law* 149

¹⁶⁷ YO Omorogbe, 'Alternative Regulation and Governance Reform in Resource-Rich Developing Countries of Africa in B Barton and others (eds.) *Regulating Energy and natural Resources* (OUP 2006)

¹⁶⁸ E Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (University of Toronto Press 2009)

takes a different path from social responsibility. Ekhatior discussed general civil society's regulation in the context of the use of African Charter and recommended regulation of MNOCs by the African Union. To distinguish this research from Ekhatior, this research makes a clear departure from civil societies' regulation and focus on the role of NGOs¹⁶⁹ in enforcement of pollution laws, which can help in reducing EI. It also makes a clear distinction between seeking for EJ using the ECOWAS court and the ACHR. Ako also generally compared enforcement of right to the environment using developing countries with specific reference to Nigeria and India,¹⁷⁰ however this research is not focusing on environmental rights, but EJ and the comparison is with a developing country while this work is comparing a developed country. Furthermore, the academic work done by Amechi focused on public interest litigation in Nigeria and citizen suit in South Africa focusing on standing especially as it pertain human right issues and not on regulatory enforcement.¹⁷¹ Amechi based his recommendation of citizen suits for Nigeria on just standing after comparing South Africa and Nigeria. This research differ as it will compare with US which is a developed country and recommends citizens' suit using the lens of achievement of EJ and not just standing in PIL cases. This researcher's approach adds to this growing literature from different perspective and is better from other approaches for many reasons. First, it is broader than Amechi's recommendation that is on just standing. In addition, this research is looking at NGOs role using the lens of EJ caused by oil exploration, which is not the path of other researches highlighted here. Emeseh focused on jurisdiction and argued for constitutional amendment because the Constitution is the basis of overall framework for regulation and enforcement. Even as this researcher agrees with her position, this research adds that there is also need for amendment of other environmental laws adding citizens' suit provisions to boost private enforcement powers that will help in achieving EJ. Worthy of note is that most of the academic works discussed here, identified the overall problems, with few discussing regulatory enforcement. Thus far, none of these identified scholars had done any in-depth research on the enforcement mechanisms and strategies used to enforce these laws and there have been no attempts to compare these mechanisms and strategies with the US. In addition, a classical distinction of the current research is the use of economic power of enforcement combined with citizens' suit as a lens to fortify private enforcers to pressure the Nigeria regulatory agencies into actions, with a view of achieving EJ for the ND. This work also differs by comparing both the relevant oil-pollution laws and their enforcements with that of the US. The researcher carefully chose this path because EJ issues in Nigeria is similar to the US because both countries

¹⁶⁹ NGOs are part of organised civil societies

¹⁷⁰ RT Ako, 'The Judicial Recognition and Enforcement of the Right To Environment: Differing Perspectives from Nigeria and India' (2010) 3 National University of Juridical Sciences Law Review 423

¹⁷¹ EP Amechi, 'Strengthening Environmental Public Interest Litigation through Citizen Suits in Nigeria: Learning from the South African Environmental Jurisprudential Development' (2015) 23 (3) African Journal of International and Comparative Law <<http://www.eupublishing.com/doi/abs/10.3366/ajicl.2015.0128>> accessed 27 March 2017

EJ are caused by oil exploration as against South Africa, which concerns mainly coal mining and other issues. Moreover, considering the fact that the researcher is seeking for solution and that US has an advanced system, it seems most appropriate to choose the US.¹⁷²

Against that backgrounds therefore, this thesis adds to these growing literature¹⁷³ on improving EJ focusing on enforcement as way of addressing the problems in the Niger Delta. This thesis brings to fore the connection between oil production and EI in the Niger Delta, attributed to the poor, outdated and ineffective pollution abatement laws, enforcement failures, neglect and marginalization of the minorities that bear the burden of oil exploration and exploitation best explains the struggle between the exploiters and the exploited Niger Deltans.

1.4 METHODOLOGICAL APPROACH

Given that the main aim of this research is to analyse and recommend reforms to the Nigerian laws and their enforcement relating to oil pollution as a necessary contribution to promoting and sustaining EJ in the Niger Delta, the research is rooted in a critical analysis of the relevant laws and enforcement practices in Nigeria and the US. Within the socio-legal context, the research employs a reform-oriented and comparative approach to establish a balance between exploration of oil and improving the laws and their enforcement practices with a view of helping in achieving environmental justice in Nigeria. The approach also establishes the relationship between EJ and enforcement, the reason for discussing both of them in this research work and the usefulness of enforcement as a way of achieving EJ. This approach is because robust enforcement is important in firms' compliance decisions and effective enforcement in an important way of achieving EJ.¹⁷⁴ Furthermore, disproportionate enforcement is one of the reasons for the emergence of EJ movement.¹⁷⁵ Taking Konisky's¹⁷⁶ approach, the researcher will be evaluating enforcement from the lens of class/poor and minority disparities.¹⁷⁷ This is because agencies may pursue different strategies¹⁷⁸ and might dedicate fewer efforts in some facilities or areas.¹⁷⁹ This

¹⁷² This choice is explained further infra under methodological approach

¹⁷³ EJOLT Report No. 9, 73 2013 of GL Ojo and others, the works of AA Utuama, several works of MT Ladan and works of RA Mmadu and many others all cited in this work.

¹⁷⁴ In chapter five, the researcher will be discussing enforcement in the US and Nigeria with a view of identifying the strategies and mechanisms that could be transferred to Nigeria

¹⁷⁵ RD Bullard, Overview and Legacy of Early Struggles in Robert D Bullard (ed.) *Unequal Protection: Environmental Justice and Communities of Color* (Sierra Club Books 1994) 11

¹⁷⁶ He found that disparate enforcement could lead to partial patterns of inequitable pollution levels and firms may locate polluting facilities in jurisdictions governed by agencies with reputations for lax enforcement leading to unequal protection.

¹⁷⁷ DM Konisky and C Reenock 'Regulatory Enforcement, Risksapes, and Environmental Justice' (2017) Policy Stud J. 12203; DM Konisky and C Reenock, 'Evaluating Fairness in Environmental Regulatory Enforcement in DM Konisky Failed Promises (MIT Press 2015)

¹⁷⁸ This may include political enforcement strategy that incorporates EJ goals or a risk-based or instrumental enforcement

methodology will also explore what comparative law does and what comparatists do starting with Alan Watson's view. Watson noted that comparative law is more than the study of a foreign legal system or a comparison of individual rules of two or more legal systems but a broader study of the relationship and influences between rules of separate legal systems.¹⁸⁰ To Eberle, the work of the comparatist involves studying a legal culture to see rules, how they function, how effective they are, and how they influence and form the culture.¹⁸¹ Walker also noted that comparative research stimulates awareness of the cultural and social characters of the law and provides a unique understanding of the way law develops and works in different cultures.¹⁸² To Palmer, comparative legal research facilitates better understanding of the functions of the rules and principles of laws and involves the exploration of detailed knowledge of law of other countries to understand them, preserve them, or trace their evolution.¹⁸³ In addition, Prof Chianu noted, comparative law simply means that in searching for legal principles to solve a problem, it behoves a researcher to look beyond one legal or judicial system in order to proffer a well rounded out solution.¹⁸⁴ Lundmark defines comparative law as entailing a purposeful analysis of different laws or legal systems by the use of one or more approaches.¹⁸⁵ Identifying the purpose, the approach and the subject as three interconnected elements of comparative study,¹⁸⁶ Lundmark posited three general purposes for comparative legal research.¹⁸⁷ They are to improve one's law, to harmonize the laws and to search for universal commonalities and differences.¹⁸⁸ He also suggested and examined five main uses of comparative law, which are making of law; the interpretation and application of the law; the confluence of the law; the development of general common principles; and finally the unification of the law.¹⁸⁹ Lundmark also noted division of comparative law approaches into micro-comparisons that emphasize rules and practices and macro-comparisons that emphasize people, particularly the legal actors.¹⁹⁰ Hoecke on his part noted the importance of including practices in comparative research.¹⁹¹ In addition, Razak

¹⁷⁹ This could be because some communities may exert fewer political resources therefor secure less attention from regulatory officials or may be less effective in pressuring officials to pursue strong enforcement: see DM Konisky and C Reenock 'Compliance Bias and Environmental (In) Justice' (2013) 75 (2) *Journal of Politics* 506

¹⁸⁰ A Watson, 'Legal Transplants and Law Reform' (1976) 92 *Law Quarterly Review* 79

¹⁸¹ EJ Eberle, 'The Method and Role of Comparative Law' (2009) 8 *Wash. U. Global Stud. L. Rev.* 451

¹⁸² DM Walker, *The Scottish Legal System: An Introduction to the Study of Scots Law* (5th edn, Revised, W. Green and Son Ltd: Edinburgh 1981)

¹⁸³ VV Palmer, 'From Leretholi to Lando: Some Examples of Comparative Law Methodology' (2005) 53 *American Journal Comparative Law* 261

¹⁸⁴ Emeka Chianu, 'The Horse and Ass Yoked: Legal Principles to Aid the Weak in a World of Unequals' (University of Benin 91st Inaugural Lecture Series, Nigeria, 20 September 2007)

¹⁸⁵ T Lundmark, *Charting the Divide between Common and Civil Law* (OUP 2012) 2

¹⁸⁶ *Ibid*, 3

¹⁸⁷ *Ibid*

¹⁸⁸ *Ibid*

¹⁸⁹ *Ibid*, 5

¹⁹⁰ For detailed discussion, see Lundmark *ibid*.

¹⁹¹ MV Hoecke, 'Methodology of Comparative Legal Research' (2015) 12 *Law and Method* 1

identified the benefits of comparative legal research in a legal development process where modification, amendment, and changes to the law are required and concluded that typically, researchers examine the law as it is while at the same time providing ideas and views for future legal development.¹⁹² In this thesis, the researcher attempted to follow the footsteps of these legal thinkers in seeking solutions to EI by adopting a broad comparative approach in examining the practices in the US in addition to IAS to find good practices that can be of relevant application to Nigeria.¹⁹³

The methodology involved the use of both primary and secondary sources of data. The researcher sought official information from the enforcement unit of the DPR in April 2013 with the aim of understanding the strategies and mechanisms used by the DPR in regulating the oil and gas industry as well as the extent of using its regulatory powers. The researcher conducted a semi-formal interview with the director of legal department of NOSDRA to find out how the industry operators obey the NOSDRA Act, 2006.¹⁹⁴ The research also examines sources of information, which includes legislation, regulations, USEPA guidelines, manuals and commentaries, official publications of USEPA, American Petroleum Institute (API), NOSDRA, DPR, Shell and many more, which includes annual reports, compliance and enforcement statistics and judicial decisions. The secondary literatures used are both legal and non-legal literature, which includes books, journal articles, newspaper articles and publications, official websites, and speeches. There are however, limitations of information as some information are not available because of the sensitive nature of oil and gas industry, corruption and even the ethnic problems in Nigeria.

Considering that there are many environmental laws and enforcement agencies in Nigeria and USA the study will be limited to the major federal laws relating to management of oil industry and major oil and environmental protection agencies with reference to state agencies where necessary. The thesis explores the very many mechanisms, relevant to achieving EJ such as improving legislation, improving regulatory enforcement, improving judicial roles and improving private enforcement. However, because of the multiplicity of problems surrounding law making and enforcement in Nigeria, this thesis moves towards approach that is multi-dimensional as a way of achieving EJ. In addition, because there is no primary data collected on enforcement and compliance, it is difficult to present an effective account of enforcement and compliance rate in Nigeria therefore; the thesis assesses the effectiveness of the laws as the benchmark for achieving effective enforcement. It also attempts to assess the effectiveness of regulatory and private enforcement and provides a proposal to improve the laws in line with very many US laws in extractive industry

¹⁹² AA Razak, 'Understanding Legal Research' (2009) 4 Integration & Dissemination 19 <http://web.a.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=2&sid=57964751-5d24-4e00-bb95-8c43e2673a27%40sessionmgr4008>> accessed 1st October 2017

¹⁹³ The reason for choosing US is explained in the next sub-section

¹⁹⁴ The interview was on 21st of March 2013

and IAS bearing in mind Nigerian local circumstances in order to provide basis for effective enforcement.

In view of the importance of ensuring that there is both substantive and procedural EJ, one could see several environmental regimes in the US trying to address EJ problems. In the oil and gas industry specifically, there are several laws, regulations, and even industry standards aimed at regulating the oil industry activities with the aim of reducing the negative impacts. Many of these industry standards are broadly seen as IAS particularly the standards by API and International Association of Oil and Gas Producers (IOGP).¹⁹⁵ This is because API standards encompass standards at all the stages of activities in the oil industry and accepted by the US Government where it is compatible with laws in the US. According to Walker and Jong, OGP in 2009/10 surveyed variation among regulators on the use of standards in regulating and found API standards dominant¹⁹⁶ amongst the International standards.¹⁹⁷ Furthermore, their websites offer useful information on historical developments, mission, standards and incorporation by states and federations and profiles of members. More so, as can be seen in the subsequent chapters, the Nigerian laws recognise API and some other standards therefore shows governance gaps. For these reasons, the researcher assumes the position that the provisions of the standards especially the API standards should be binding on the MNOCs and therefore relevant in enforcement in Nigeria.

1.4i The Concept Legal Transplant and Diffusion of Laws

Before explaining why the researcher chose the US as a comparator, it is germane to explain the meaning of a legal system, legal transplant and diffusion of law and the relationship between the US and the Nigeria legal system. This will help in assessing whether there should be transplant of any aspect of the US laws or practices to Nigeria in whole or as diffused. Legal system is simply a procedure or process for interpreting and enforcing the law. According to Gul,¹⁹⁸ legal system is comprised of three

¹⁹⁵ IOGP is the voice of the global upstream industry since 1974 with membership base of about 80 that produce more than a third of the world's oil and gas and operates in all producing regions. See IOGP, 'About IOGP' <<http://www.iogp.org/PapersPDF/About%20IOGP%20brochure-c.pdf> or <http://www.iogp.org/About-IOGP>> accessed 27 March 2017; See also IOGP, *Catalogue of International Standards Used in the Petroleum and Natural Gas Industries* (Report No. 362 February 2012) <<http://www.ogp.org.uk/pubs/362.pdf>> accessed 27 March 2017

¹⁹⁶ It was referenced 225 times

¹⁹⁷ Steve Walker and Jan De Jong, 'The Involvement of IRF in Setting Standards and Best Practices' (IRF Summit Conference, Stavanger, Norway 4/6 October 2011) <<http://www.irfshoresafety.com/conferences/2011Summit/presentations/Paper%20-%20Standards%20and%20best%20practices%20-%20IRF%20Summit%202011.pdf>> accessed 27 March 2017; also AR Johansen, 'Regulators' Use of Standards' (Report number 426, 2014 BSEE Domestic and International Standards Workshop New Orleans, Louisiana 28-29 January 2014) <<file:///C:/Users/gbb11207/Desktop/8-international-discussion-johansen-alf-reidar.pdf>> accessed 27 March 2017

¹⁹⁸ Gülsirin Gök, 'Is the European Union Competition Law Regime Suitable for the Republic of Turkey: Does One-Size Fit All?' (PhD Thesis, University of Strathclyde, 2017)

fundamental components: the substantive,¹⁹⁹ institutional²⁰⁰ and cultural components.²⁰¹ The cultural component is region and jurisdiction-specific; there may however be diffusion and they may differ significantly from one jurisdiction to another even where there are similar or identical substantive rules.²⁰² What then is diffusion and legal transplant, and what is their relationship? Diffusion of law generally takes place when one legal order, legal system or tradition influences another in some significant ways.²⁰³ According to Friedman,²⁰⁴ diffusion started long ago through colonialism²⁰⁵ and Glenn noted that legal systems and legal traditions have interacted throughout history.²⁰⁶ Watson coined legal transplant and it indicates the moving of a rule or a system of law from one country to another.²⁰⁷ To Watson, transplantation is the most fertile source of legal development.²⁰⁸ Legal transplant is diffusion-based and changes in most legal systems occur because of borrowing.²⁰⁹

In spite of being part of legal history, recent developments show that early legal works on transplant were mainly academic, therefore, there is need to focus on practice.²¹⁰ Some of the questions raised relates to why there is perception of failure of transplants, the conditions for success, how to measure success, what factors to consider in choosing between alternative models and appropriate time to treat foreign precedents and other sources as persuasive.²¹¹ Some others also want to learn about the most effective strategies and techniques for lessening the impact of transplant or ways of adapting unwelcome imports to local conditions.²¹² These questions particularly raise issues of complexities relating to diffusion and transplant especially as it relates to a research that is bipolar²¹³ in nature. Here, the researcher examines the points raised by Twining while considering a bipolar transplant involving a one-way transfer. Twining

¹⁹⁹ This refers to the body of legal rules, which incorporates legal doctrines, statutes, secondary legislation, and soft-laws

²⁰⁰ These are primarily legislative and administrative institutions and the judiciary that adopt, apply and enforce substantive rules

²⁰¹ These are the standards, beliefs, values and consciousness of society, and perhaps the political aspect of law representing the way in which substantive rules are applied

²⁰² Gülsirin Gök (n 198)

²⁰³ William Twining, 'Diffusion of Law: A Global Perspective' (2004) 36 The Journal of Legal Pluralism and Unofficial Law 1

²⁰⁴ L Friedman, 'Legal Culture and Social Development' 1969 4(1) Law and Society Review 29

²⁰⁵ For instance, colonial masters injected foreign laws into the Nigerian customary legal system prevalent in Nigeria for centuries before colonialism.

²⁰⁶ HP Glenn, 'Persuasive Authority' (1987) 32 McGill Law Journal 261

²⁰⁷ A Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia, 1974)

²⁰⁸ Ibid

²⁰⁹ Friedman also identified that law can be borrowed through law reform or 'modernisation especially where development is needed

²¹⁰ Twining noted that there is shift from legislation to enforcement representing significant moves away from surface law to law in action.

²¹¹ HP Glenn (n 206)

²¹² Ibid

²¹³ This commonly involves transfer from an advanced legal system to a less developed one with erroneous believe that there are gaps

noted that in a bipolar transplant, erroneous believe exist that there are gaps in existing laws or that local laws need replacement, however, he thinks that it may not be the case because legal change is not that straightforward.²¹⁴ He rather says that where exporters are ignorant of, indifferent, or hostile to indigenous or other pre-existing law they often treat it as invisible or insignificant.²¹⁵ Here, Twining is telling the reader that transplant is more than mere copying or replacement of the existing laws; therefore, there is need to consider other factors to ensure that the transplanted laws should be practicable. The researcher thinks that Twining's view aligns with Watson's view that the study of legal system should be broad to include relationship and influences.²¹⁶ In addition, reviewing Latour's dictum on '*no transportation without transformation*',²¹⁷ Twining noted that any serious student of diffusion could not assume that borrowed, imposed or imported laws remains the same.²¹⁸ By saying this, Twining believes that there is always diffusion however; he reveals three prevalent views. They are the instrumentalism, ideological and expressive/contextual views. He identifies the instrumentalist as one that sees diffusion as a process in which solutions developed elsewhere are imported to solve local problems in the process of modernisation.²¹⁹ The ideological view portrays the underlying values, principles and political interests as the main reason for receiving the rules while the expressive/contextual views see law as an outgrowth of local society, values and traditions and in large part expresses or reflects local society.²²⁰ The expressive view means that law mirrors the society, embedded holistically in local culture therefore; reception and assimilation of foreign ideas are slow and complex and receiving the transplanted law may not mean acceptance.²²¹ Twining noted that all the views are useful reference points because of the vastness of the laws and they represent three different, but related perspectives for viewing particular phenomena. He concluded that one could not proceed far in law without considering underlying beliefs, values and purposes.²²² Twining cautioned against making simplistic assumptions regarding diffusion, but noted that diffusion may take place between many kinds of legal orders and across different geographical levels. Supporting the issue of diffusion, Roscoe Pound noted that infusing new values into the law is acceptable provided it does not hamper its efficacy, expresses peoples' general will and will enhance the achievement of new aspirations.²²³

²¹⁴ Twining (n 203)

²¹⁵ Ibid

²¹⁶ Watson 1976 (n 180)

²¹⁷ B Latour, 1996 *Aramis or the Love of Technology* (Catherine Porter tr, Harvard University Press 1996)

²¹⁸ Twining (n 203)

²¹⁹ Ibid

²²⁰ Ibid

²²¹ The researcher will be discussing this below.

²²² Twining (n 203)

²²³ Roscoe Pound, '*An Introduction to the Philosophy of Law*' (Yale University Press 1922)

Watson on his part examined the development of legal systems and legal transplants from a comparative approach.²²⁴ Watson posits that comparative legal work is concerned with two fundamental questions: the nature of the relationship between society and legal rules that operate within it and the factors that cause legal change. Watson's central argument relies on his observation and investigation that showed that transplant/ borrowing has been the main source of legal change both in the 'ancient world' and recent legal history.²²⁵ To Watson, examining legal transplants is to conduct a comparative legal study focused on the patterns and divergences between two jurisdictions.²²⁶ To Watson, legal borrowing is concerned with the examination of how, when, why, and from which legal system(s) the '*transplant*' has been made, the examination of circumstances under which the '*model law*' has succeeded and failed, and the impact on the transplanted rules of their new environment.²²⁷ Watson noted that there is need to examine how law changes in response to 'non-law' elements, such as economics and politics to understand the relationship between law and society.²²⁸ He concluded that a rule that is transplanted is different in its new home and the same legal rules operate differently in two jurisdictions primarily because it is rules, institutions, legal concepts and structures that are borrowed but not the 'spirit' of the legal system.²²⁹ Watson added that the significance of partial 'acceptance' and partial 'non-acceptance' of the transplanted law is the main theme of 'legal transplant' as a comparative legal study.

It is in the light of Watson's and Twining's explanation above that the researcher brings in the comparison of the Nigerian system and the US. The researcher seeks to apply the relevant strategies and mechanisms of US EJ laws following Watson's understanding of legal transplant as a comparative legal study and following Twining's analysis that diffusion may take place between many kinds of legal orders and across different geographical levels. Bringing in Watson and Twining views into this research and considering the complexities, the researcher will examine the legal systems, socio-political, socio-economic, socio-cultural issues and other factors in both jurisdictions and propose diffusion and/or transplant of the aspects of the laws and enforcement practices that will be useful to achieve the aim of this research. Scholars such as Gul had also noted that importing a more sophisticated and modern legal systems of developed countries to developing countries will enhance modernisation and

²²⁴See A Watson, 1974 (n 207); A Watson 1976 (n 180); A Watson, 'Comparative Law and Legal Change' (1978) 37 Cambridge Law Journal 313; A Watson, 'Two-Tier Law: A New Approach to Law Making' (1978) 27 International and Comparative Law Quarterly 552 and A Watson, 'Society's Choice and Legal Change' (1981) 9 Hofstra Law Review 1473. He introduced this as a comparative legal study when he conducted a comparative legal study on the diffusion of certain parts of Roman law into the Scottish legal system.

²²⁵ A Watson, *Legal Origin and Legal Change* (Hambledon Press London 1991)

²²⁶ A Watson 1976 (n 180)

²²⁷ A Watson 1974 (n 202) and A Watson 1976 (n 180)

²²⁸ Ibid

²²⁹ This is similar to contextual view of Twining that the society shapes the law. This also means that laws are diffused to suit the new society

development in the latter because the jurisdictions borrowing foreign law assume that legal clarity, legal order, and system brought by borrowed law will lead to important social and economic changes.²³⁰ However, following Twining and other scholars' view, the success of bipolar transplant is still under scrutiny especially regarding the conditions for success, their practicability and measurement of successful transplant. One of the reasons for this scrutiny is capacity issues faced by developing countries. For instance, Rodrik in his economic theory posits that developing countries mainly adopt reform framework without highly educated, skilled and competent labour force.²³¹ Another challenge is whether diffusion of the transplanted laws suits the socio-cultural element of the recipient jurisdiction. On this, Rodrik also noted that missing element in jurisdictions that failed is the lack of necessary social and cultural pre-conditions of societies that binds law and economics together.²³² Rodrik draws attention to the three aspects of law discussed above, and reinstated the importance of the cultural dimension of law and its binding effect. Corroborating Rodrik view, Montesquieu noted each nation should tailor their laws to the people for whom they are made because law is a part of societal values and socio-economic dynamics and institutions and change in law is a natural response to these dynamics.²³³ Montesquieu showed scepticism to change when he noted that characteristics of governance and the nature of law implementation interwove, therefore culture and law are not readily transferable between nations with different institutional, governmental and economic structures.²³⁴ In the researcher's view, Montesquieu means that the characteristics of governance shape the law and where institutional, governmental and economic structures differ, there will be practical challenges. This Montesquieu's view will particularly be important in analysing the proposed reform bearing in mind the socio-economic dynamics, politics and characteristics of governance and socio-legal culture in Nigeria. The researcher concludes that due consideration should be given to the relevant economic framework within which the transplanted laws shall operate and law reform should consider other factors within a broader context because laws, rules and approaches taken in one jurisdiction may not work well in another especially in developing countries. There may also be retention of identity of the transplanted laws, but sometimes there may be significant change.

1.4ii Why Compare Nigeria with the USA?

With the background discussion above in mind, the next question is why the researcher thinks that the US is the best comparator. The main reason for researcher's comparative approach is to find out whether to transplant or diffuse any aspect of the US laws and regulations to Nigerian to make enforcement better with a view of

²³⁰ And this is the opinion of the researcher and the researcher will be explaining more below

²³¹ Dani Rodrik, '*Getting Interventions Right: How South Korea and Taiwan Grew Rich*' Working Paper No. 4964 (National Bureau of Economic Research Working Paper Series, 1994)

²³² Ibid

²³³ Charles de Secondat Montesquieu, *De L'esprit Des Lois (The Spirit of Laws)* 1750

²³⁴ Ibid

enhancing EJ. In doing this, the researcher considered the differences and similarities between the two legal systems.²³⁵ Bearing in mind that US is a developed country; an important question is whether transplant from a developed jurisdiction will help the developing jurisdiction in any way. The researcher is aware of the numerous challenges comparing with a developed country, which includes capacity, poverty, formalistic issues²³⁶ however, if the research is to fulfil one of its aim, which is to propose reforms based on lessons learnt, it follows that comparing with a developed country is necessary. The reasons for comparing the US and Nigeria are summarised below.

First, EJ as a concept started and developed in the USA first.²³⁷ Though it has now moved far beyond the US and its original definition given by USEPA, it is a very good reference and starting point with any discussion concerning environmental justice. Secondly, EJ development was because of several movements in the USA²³⁸ that were rooted in fair and equitable principles of law.²³⁹ Because EJ derives from these principles, it is potentially applicable in Nigeria and other jurisdictions. To show the importance of equitable principles, even with customary law practice in Nigeria, where a custom is repugnant to natural justice, equity and good conscience, the Nigerian courts will not apply such customary law.

Thirdly, the structure of governance in both the USA and Nigeria is federalism.²⁴⁰ It is not part of the scope of this research to critically examine the federal structures of both countries; but suffice to highlight few important points. One of the features of a federal system of governance is that there must be more than one level of government to act simultaneously or autonomously on the same territory and on the same citizens and this is similar in both US and Nigeria. The American federal system is composed of a national government and the fifty states recognised by the Constitution while the Nigerian system comprises of a national government and the thirty-six states with regulatory and legislative powers derived from the Constitution. Another feature is that each government must have its own authority and sphere of power with some areas

²³⁵ A process for interpreting and enforcing the law

²³⁶ Formalist theory gives an unsentimental and honest account of what judges really do. Here, a judge identifies the relevant legal principles from various sources of legal authority including constitutions, statutes, regulations, and case law, applies them to the facts, and logically deduces a rule that will govern the outcome of a dispute: See Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue? Working Papers No. 320* (University of Chicago Public Law & Legal Theory, 2010)

²³⁷ The development is discussed in chapter three of this research

²³⁸ Discussed in theoretical framework chapter

²³⁹ It emerged in the thirteenth centuries where the Court of Equity/the Chancellor's Court provided extraordinary justice where there were no remedies or jurisdiction at common law. It originally, followed the broad notion of natural justice, different from the common law courts because the application was discretionary, though it developed equitable doctrines and maxims, guiding the court in granting equitable relief.

²⁴⁰ Federalism is a system of government in which sovereignty is shared between two or more levels of government

exclusively regulated by the national government. They may overlap, but where they conflict, federal law supersedes and this is the case in both jurisdictions. The third prominent feature is that neither level of government can abolish the other²⁴¹ in the US and Nigeria. Before becoming a federation with the ratification of the Constitution in 1788, the US was a confederation. The US federation had undergone several periods including the era of dual federalism, cooperative federalism, creative federalism, and now contemporary federalism. Nigeria, do not have similar history, but there were several trials by the colonial masters before giving Nigeria independence under what the researcher would call a quasi-federal structure.²⁴² The two countries also currently have presidential system of government. Because they both have different history and because it involves developed and developing jurisdiction with different social, economic and political differences, federalism might differ in some ways, however, the basic similarities justifies this choice to compare them.

In addition, Nigeria and the US are both common law countries. There are three primary categories of law in both countries, which are the constitutions, statutes and common law. In the case of US, both the federal and state levels largely derived their laws from the English common law system, in force at the time of the revolutionary war while Nigeria received her common law with colonialism. There are also few differences in the way the work. In the US, there is federal constitution and state constitutions that set out the structure and powers of government and other areas, but in Nigeria, it is just the federal constitution. The US derived her law from five sources: constitutional law, statutory law, treaties, administrative regulations, and the common law. In contrast, Nigeria is a classic example of a country with legal pluralism²⁴³ despite the common/English law influence, and this makes the system more complex. Therefore, in addition to constitutions, statutes and common law, the doctrine of equity, statutes of general application in force in England on January 1, 1900 and treaties, there is customary law that emanated from the usage and practices of the people.²⁴⁴ According to Tamanaha, what makes the pluralism noteworthy is not merely that there are multiple coexisting or overlapping bodies of law, but there is diversity

²⁴¹ For further discussion see BO Nwabueze, 'Federalism in Nigeria Under the Presidential Constitution (London, Sweet & Maxwell 1983)

²⁴² The colonial or pre-independence constitutional development in Nigeria had six constitutional instruments, which are the 1914, 1922, 1946, 1951, 1954 and 1960.

²⁴³ This is the existence of multiple legal systems within a country or one geographic area or where to an extent some recognition is given to the legal systems of the indigenous population. Griffiths in 1986 defined pluralism as, 'that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs': See John Griffiths, 'What Is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism* 1, 2; Pluralism is prevalent in former colonies, where the law of a former colonial authority may exist alongside traditional legal systems: see SE Merry, 'Legal Pluralism' (1988) 22 *Law & Society Review* 869. It is embedded on the fact that the law is moving away from territorial limitations; See PS Berman, 'Global Legal Pluralism: A Jurisprudence of Law Beyond Borders', (2013) 26 (2) *L.J.I.L.* 483

²⁴⁴ For further discussion, see AO Obilade, *The Nigerian Legal System* (London: Sweet and Maxwell 1979)

amongst them.²⁴⁵ The anchor of EJ is on natural justice and equity therefore, legal pluralism /customary law application will not likely affect the application or transplantation of relevant rules from the US because Nigeria mainly employs customary laws when the facts in issue relates to custom and where the custom is repugnant courts will not apply such customary law. All the points herein show many similarities in both jurisdictions, but some differences may make some US laws and regulatory policies inapplicable in Nigeria.²⁴⁶

Another reason for choosing the US is that oil exploration activities in the USA are both onshore and offshore as the case in Nigeria; therefore, the researcher argues that many applicable laws and rules could be adapted to the local circumstance²⁴⁷ or diffused into the Nigerian law.

Furthermore, the US has a very advanced oil pollution regime despite the shortcomings discussed in this thesis.²⁴⁸ If Nigeria is looking for reform or positive change, it follows that Nigeria should be forward thinking especially because not only that it is MNOCs that are mainly involved in oil-related activities; but they are mainly from the developed countries.

Additionally, as explained above, the nature of EJ in the US and Nigeria are related in so many ways.

Finally, many MNOCs operating in Nigeria also operate in the US and should operate under the same IAS, which they mainly designed for their use in the industry. Good examples of the relevant IAS are the ones developed by the API, American Society of Mechanical Engineers (ASME) standards for all petroleum production and transport operations, US Integrity Management for High Consequence Areas (HCAs), the Alaska Best Available Technology (BAT) industry standards for petroleum industry.

All reasons above informed the researcher's choice of the USA to meaningfully compare and assess the adequacy of the laws and enforcement practices with a view to determining the extent to which they meaningfully contribute to reducing EI caused by oil and gas activities in Nigeria. The study explores the laws, mechanisms and strategies of enforcement in the US and considers whether they will be useful in improving the enforcement of oil pollution laws in Nigeria with a view of reducing EI. The researcher's aim is not to discuss all these aspects of the laws or the enforcement strategies and mechanisms used in the US, but to identify the aspects that are important to answering the research questions. The researcher identified USEPA's combination of innovative accommodative/managerial and sanctioning enforcement strategies with a penalty policy that emphasise the '*economic law enforcement*' discussed in chapter five as important. USEPA's administrative mechanisms, which include supplemental

²⁴⁵ BZ Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 Sydney L. Rev. 375 < <http://www.austlii.edu.au/au/journals/SydLRev/2008/20.pdf> > accessed 18 April 2018.

²⁴⁶ This is analysed where the researcher discussed the diffusion and transferability of laws

²⁴⁷ This includes the culture, economy and political circumstance

²⁴⁸ The researcher will explain in the enforcement chapters of four and five

environmental projects, are also important.²⁴⁹ Aside the mechanisms and strategies, other features identified include the extent to which oil-related laws can affect their enforcement and the extent enforcement of relevant laws can help to achieve EJ. There is also consideration of the extent the extensiveness of ranges of punishment; consideration of aggravating and mitigating factors in the US; the extent strategies and mechanisms reduce or aggravate capture, rules and standards for departures from the rules; the role of previous violations and the role of the citizens in reducing capture and enhancing enforcement. The analytical comparison of the strategies and mechanisms are to find differences and similarities and to find out how US has been dealing with violations and potential violations and provide suggestions on how Nigeria can improve their own bearing in mind the local circumstance in Nigeria. This method will evaluate enforcement successes using the measurement of effectiveness discussed herein. Where necessary, the findings will lead to recommendations for the improvement of the laws and enforcement practices taking into cognizance the unique structure and the socio-legal context in Nigeria.

It is a common experience in most developing nations when carrying out a study like this to have limitation of data sources. A major problem encountered in this study is the inability of the researcher to have readily available data of enforcement actions taken by either the DPR or NOSDRA. Because of unavailability of primary data, the researcher relied on secondary data mainly from the NGOs. Availability of these primary data could have strengthened the result of this study. In addition, because of non-availability of the comprehensive number of DPR and NOSDRA staffs and information on allocated budgets over the years, there was difficulty in comparing the staffing level and funding with USEPA. In addition, USEPA deals with general environmental problems in the US. All these limits the level of comparison the researcher would have achieved. Even with these limitations, the researcher avows that they are not strong enough to invalidate the result of this study.

1.5 STRUCTURE

This work is set out in seven chapters. Chapter one is the introduction covering the following issues: research statement, research question, research problems that analysed current situation and prompts the lacuna further necessitating this study, explains the methodological approach and justifying the reasons for the choice as well as this structure.

Chapter two generally deals with the fundamentals of the thesis. It explores the society and history, political governance and inequities that contribute to EI in Nigeria. It also explores the history, ownership and politics around the exploration and management of oil and spills in the affected areas of Nigeria as well as discussing environmental pollution and injustices often meted to the host communities and how the laws, regulations and their implementations appear not to be reducing oil-related pollution. It

²⁴⁹ These mechanisms are discussed in detail in chapter five

also discusses the causes and impacts of pollution, land acquisition for exploration and background statutory frameworks and applicable common law principles and precedents. It generally establishes the Niger Deltans do not have the capacity to decide who owns the oil and the land or even how Nigeria shares proceeds; yet suffers from pollution resulting from oil-related activities. It finally looks at the general procedure for dealing with oil pollution, which seems porous thereby adding to EI already existing in the Niger Delta.

Chapter three provides a theoretical foundation for the research. It deals with the evolution of EJ and attempts to clarify the concept and meaning of justice and EJ in many jurisdictions as a foundation for recommendation for Nigeria. It also discusses the history of EJ, the initial problems encountered in practice and the working definition as foundation for substantive discussion in this research. The chapter also discusses the relationship between human rights, environmental rights and EJ considering the importance of human rights laws in the context of enforcement as a way of addressing EI. Furthermore, it points out the importance of an understanding of enforcement process, its challenges, and a system's weaknesses before designing, implementing enforcement programmes accommodative/managerial and sanctioning enforcement strategies and makes a link between better enforcement and enhanced EJ. It concludes that improved enforcement enhances EJ.

Applying a comparative approach, chapter four focuses on the importance of the laws in enforcement. It examines the relevant sections of the US Comprehensive Environmental Response, Compensation and Liability Act, 1980 (CERCLA),²⁵⁰ the Clean Waters Act 1972/Oil Pollution Act (OPA) 1990 and the Oil Spill Liability Trust Fund 1986 in line with the provisions of NOSDRA Act, 2006, Petroleum Act, 1968, EGASPIN and other relevant Nigerian laws. The emphasis is on spill reasons and response, flaring, penalties and fines for breach and compensation for pollution. It also discusses the effectiveness of the US oil-pollution governance in line with the Gulf of Mexico spill, being a recent catastrophic spill in the US.²⁵¹ Showing that Nigeria is moving towards a better governance regime, the chapter discusses the relevant sections of two relevant bills with the Nigerian legislature, the Petroleum Industry Bill (PIB) (now PIGB) and NOSDRA Amendment Bill 2012²⁵² without overlooking the reasons why legislative reforms has been difficult. The chapter then examines the IAS in the extractive industries and discusses the extent to which they can be applicable in the context of enforcement in Nigeria.

²⁵⁰ Also known as SUPERFUND is an Act to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites including clean-up uncontrolled or abandoned hazardous-waste sites as well as accidents, spills, and other emergency releases into the environment. <<http://www.epw.senate.gov/cercla.pdf>> accessed 27 March 2017

²⁵¹ Other catastrophic spills before Gulf of Mexico spill include the 1978 Alaskan Transatlantic spill, the 1979 Texas Burma Agate spill, the 1985, 1989 and 2004, Grand Eagle major spills in Delaware, the 1980 Exxon Valdez and many more

²⁵² Though still Bills, they could be passed

Chapter five discusses in detail the specialized agencies and their enforcement powers and practices with the aim of bring into the fore the enforcement strengths and weaknesses of both the US and Nigerian regulatory agencies. It highlights compliance monitoring and compares the enforcement strategies and mechanisms used in the USA and Nigeria. It also discussed the impacts of the enforcement actions, bringing to fore the Gulf of Mexico and Bonga spills. It also examines the overall challenges of enforcement in both US and Nigeria. The chapter identified the cause of the enforcement gap that is in part because of legislative inadequacies, however, other challenges such as corruption, economic and social factors, inadequate sanctions; fusion of roles, institutional incapacity, delay and other aggravating and mitigating factors contribute to EI in addition to already weak pollution abatement laws in Nigeria. The chapter concludes with the progress made in the US enforcement with the aim of recommending some of it in chapter seven as not all may be directly applicable in Nigeria because of social, political and legal culture differences in both jurisdictions.

Chapter six discusses the role of private enforcers in oil pollution law enforcement in both the US and Nigeria. This is done in comparison with the role of private enforcers in the US with the aim of showing how citizen's suit have been playing a vital role in shaping enforcement of pollution laws in the US. It brought to the fore the NGOs role in helping the Niger Deltans in making extra-territorial litigations in US, United Kingdom and the Netherlands and in Nigeria and governments reactions to the extra-territorial litigations. This chapter also highlights the relevance of approaching the regional courts by private enforcers with a view of better access to EJ and concludes that if empowered, the NGOs can drive more enforcement actions in Nigeria.

Chapter seven is the general conclusion of this work. Because of lessons learnt from the US and Nigeria overtime, it focuses on using improved punishments and the NGO's and private enforcers to achieve EJ. It shows the researcher's findings, contribution to knowledge and suggestion for reform as well as areas for further research.

CHAPTER TWO

THE CONSEQUENCES OF OIL AND GAS EXPLORATION IN NIGERIA

2.1 INTRODUCTION

The purpose of this chapter is to create an understanding of socio-cultural, political and legal history of contemporary Nigeria and to assess how it has contributed to shaping the current character of regulation in Nigeria, especially as they relate to the environment. To realise these aims, this chapter will broadly examine issues relating to political governance before and after the 1960 independence to know whether they contribute to inequities and other problems surrounding the management oil business and consequent pollution in Nigeria. The chapter will also highlight other elements that influence the contemporary environment-related pollution laws and their enforcement in Nigeria. Furthermore, it presents the origin of exploration activities in the Niger Delta, defining the ownership of oil and the politics around the exploration and management of oil consequent pollution. Besides, the chapter highlights the land ownership structure that does not permit the Niger Deltans either to determine the use of their lands or to receive compensation for the land. Hinged to this historical discussion, the chapter further traces the development of the relevant environment-related laws concentrating on assessing their adequacy to help their implementation with a view of reducing pollution. Finally, it generally establishes that Niger Deltans do not have ownership rights to oil; are not entitled to royalties, are not land owners and therefore do not have rights over the lands and what it is used for; notwithstanding the suffer from pollution resulting from exploration and exploitation activities.

2.2 SOCIETY, HISTORY AND POLITICAL GOVERNANCE/INEQUITIES IN NIGERIA

Historically, Nigeria is a formation of many independent nation-states with more than 250 ethnic groups who interact socially and economically before the 1914 amalgamation.²⁵³ The three major ethnic groups are the Hausa-Fulani in the north, the Yoruba in the southwest, and the Igbo in the east.²⁵⁴ In addition, Niger Delta as known today was a collection of regions and communities controlled by different tribes and kings trading with each other before colonialism.²⁵⁵ These ethnic groups though originally decentralised, developed a more centralised political structures, even before the British colonialists arrived.²⁵⁶ Benefits from the ruled were also in differing extents.²⁵⁷ The basis for utilisation of resources was the accruing benefits from the community.²⁵⁸ With colonialism and granting of a royal charter, the United African

²⁵³ T Falola and MM Heaton (n 56)

²⁵⁴ T Falola and A Genova, *Historical Dictionary of Nigeria*, No. 111 (Maryland: Scarecrow Press, 2009)

²⁵⁵ With slave trade, which was more lucrative, and colonisation, there was reduction in inter-community trade relationships.

²⁵⁶ See W Rodney, (n 58) and M Fortes and E Pritchard, (n 58) for more discussion

²⁵⁷ Ibid and L Mair, *African Kingdoms* (New York: OUP 1977) 95

²⁵⁸ This is very important in discussing the EJ issues in the ND

Company (UAC)²⁵⁹ had the authority to administer the Niger Delta and the banks of the Benue and Niger Rivers with little regard for the natives and it led to agitations because Niger Deltans felt that there was imposition of UAC as the administrator. In 1899, the UAC now renamed Royal Niger Company sold its interest to the British colonialist, which the colonialist later used to form the Southern Nigerian Protectorate when they created the colonies.²⁶⁰ The colonies were the Lagos, Southern Nigeria, and Northern Nigeria. By 1959, there were formally self-governing Western, Eastern and Northern regions divided along majority ethnic lines: the Hausa, Igbos and Yorubas. This implied leaving out vast ethnic minorities including the Niger Deltans from mainstream majority agendas leading to reduced economic, political and social opportunities and that gave feeling of inequality and resentment. The discovery of oil and the Nigerian independence worsened the resentment with Niger Deltans seeing themselves as second-class citizens as Sir Abubakar Tafawa Balewa from the north emerged the first Prime Minister of the independent Nigeria.

The post-independence governance also followed the colonial government governance structure, leading to continued resentment.²⁶¹ Various governments of the independent Nigeria retained colonial government laws or enacted related laws to prevent government transparency and to boost the economy.²⁶² With price increase of oil in the late 1960s and 1970s and with little or no benefit to the Niger Deltans,²⁶³ contrary to what was obtainable in pre-colonial traditional societies, feeling of inequity continued. The tension over the unfair distribution of the wealth and the government failure to address this led to the mobilization of the radical armed militia by Isaac Adaka Boro in 1967.²⁶⁴ This struggle for power and share of the oil wealth continued until the Biafran war erupted and the involvement of the British, Dutch, French and Italian oil companies allegedly sustained the war.²⁶⁵ The military continued to govern Nigeria for a long time after the civil war and there was suspension of the Constitution and promulgation and enforcement of exclusive Decrees that not only trampled fundamental rights and aided degradation, but also somewhat made the judiciary to

²⁵⁹ It was formed during the colonial era and later renamed the Royal Niger Company

²⁶⁰ The colonialist used either force or threats in creating the colonies. See EE Osaghae, *Crippled Giant: Nigeria since Independence* (London: Hurst and Co, 1998) 3

²⁶¹ T Falola and MM Heaton (n 57); See also T Forrest, 'The Political Economy of Civil Rule and the Economic Crisis in Nigeria (1979- 1984)' (1986) 13 (35) *Review of African Political Economy* 4

²⁶² C Obiagwu and CA Odinkalu, (n 59)

²⁶³ K Edu, 'A Review of the Existing Legal Regime on the Exploration of Oil and the Protection of the Environment in Nigeria' (2011) 37 (2) *Commonwealth Law Bulletin* 307, 308

²⁶⁴ The Niger Delta Volunteer Force (NDVF) lead by Isaac Boro that fought the Nigerian military for 12 days to get the Niger Delta Republic, however, Boro and his accomplices were captured and sentenced to jail for treason. This attempt to fight injustice paved the way for other like-minded activists such as Ken Saro Wiwa, who advocated a non-violent approach to reconciliation of the injustices felt by the Ogoni people.

²⁶⁵ SDN, A History of the Niger Delta <<http://www.stakeholderdemocracy.org/about-the-niger-delta/niger-delta-history/>> accessed 27 March 2017

legitimise the militarisation of governance.²⁶⁶ Even before the military intervention, there were general lukewarm attitude to legislative peculiarities connected with colonial heritage.²⁶⁷ There was disobedience to court orders because the executive military government was responsible for enforcement even where the judiciary manage to show activism.²⁶⁸ There were also discriminatory and frustrating policies especially with the military government that deny Niger Deltans access to positions of authority and this slowed down the economic development.²⁶⁹ On this, Prof Stephen Azaiki²⁷⁰ of the National think-tank noted, ‘*When oil was discovered in Oloibiri, in Bayelsa State in 1956, the country was still a colony. Neither Nigeria nor the communities where oil was found had a say in the laws governing the industry. Unfortunately, fifty years after, this is largely the situation today.*’ The massive price increase of crude oil in the late 1960s and 1970s made Nigeria oil dependent, as Nigeria abandoned agriculture²⁷¹ and this gave rise to corruption especially because the military government is associated with less checks and balances, and accountability was almost non-existent.²⁷² In consonance with the research findings of Sachs and Warner that resource-poor economies often outperform resource-abundance economies in economic growth, this resulted in poverty and low standard of living.²⁷³ This massive corruption under the military regime also is in consonance with Bhattacharyya and Hodler findings that natural resources lead to an increase in corruption where there is poor quality of the democratic institutions using data over 1980 to 2004 in 99 countries.²⁷⁴

Given that oil and gas industry is prone to pollution, increased production gave rise to more pollution,²⁷⁵ which affects the livelihood of the Niger Deltans,²⁷⁶ especially with many new laws focusing on the economy and not environmental protection.²⁷⁷ The

²⁶⁶ U Etemire, (n 4)

²⁶⁷ HO Yusuf, (n 59), 664

²⁶⁸ JN Aduba, ‘The Protection of Human Rights in Nigeria’, in AO Obilade and C Nwankwo (eds), *Text for Human Rights Teaching in Schools* (Lagos: Constitutional Rights Project, 1999) 109, 129

²⁶⁹ World Bank, *Nigeria Economic Report* (World Bank, No 1, May 2013)

²⁷⁰ Stephen Azaiki, ‘*Community Relations: A Panacea for Peaceful Niger Delta*’ (Nigeria Institute for International Affairs Lecture, Victoria Island, Lagos, 26 June, 2008)

²⁷¹ Agriculture was the mainstay of Nigerian economy, however, by 1974, about 82% of Nigerian government’s revenue came from crude alone: See Falola and Heaton (n 57)

²⁷² Corruption is still a major problem in Nigeria today ; See chapter five for more discussion

²⁷³ Sachs JD and Warner AM, *Natural Resources Abundance and Economic Growth* (NBER Discussion Paper No. 517a 1995)

²⁷⁴ Sambit Bhattacharyya and Roland Hodler, ‘Natural Resources, Democracy and Corruption’ (2010) 54 (4) *European Economic Review* 608

²⁷⁵ KK Aaron, ‘Human Rights Violation and Environmental Degradation in the Niger Delta’, in E Porter and B Offord (eds), *Activating Human Rights* (Oxford: Peter Lang, 2006) 193.

²⁷⁶ The researcher will be discussing impact of pollution on the Niger Deltans below especially as Niger Deltans are distinctively farmers and fishers.

²⁷⁷ These laws include the Land Use Act of 1978, Petroleum Act of 1969, and The Mining Act of 1977.

degradation gave rise to some known conflicts.²⁷⁸ Causes of conflicts include demand for better management, accountability and transparency;²⁷⁹ demand for justice, compensation for land appropriation and environmental damages, negligence, true federalism and sharing formula,²⁸⁰ corporate social responsibility by the MNOC's,²⁸¹ corruption,²⁸² and more importantly the failure of the Nigerian government to mitigate the environmental effects of oil operations through their actions or inactions. All these gave rise to both non-violent and violent anti-government and anti-oil-company protests.²⁸³ Hamilton and others report estimated that Niger Delta violence alone killed about 1000 persons a year equal to conflicts in Chechnya and Columbia.²⁸⁴ The government did not address the raised concerns, instead militarised their protest²⁸⁵ similar to the relations between the colonialist and the indigenous people.²⁸⁶ These conflicts threatened both the Nigerian and international economic stability,²⁸⁷ leading

²⁷⁸ K Aaron, (n 2006); "See also I Okonta and D Oronto, *Where Vultures Feast: Forty Years of Oil in the Niger Delta* (Ibadan; Kraft Books Limited, 2001)108. See also the hanging of Ken Saro-Wiwa and Ogoni 8.

²⁷⁹ M Peel, *Crisis in the Niger Delta: How Failures of Transparency and Accountability are Destroying the Region* (Armed Non-state Actors Project Briefing Paper, Chatham House African Programme AFP BP 05/02 July 2005)

<<https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/bpnigerdelta.pdf>> See also D Enweremadu, 'The Vicious Circle Oil, Corruption and Armed Conflicts in the Niger Delta' (International Conference on the Nigerian State, Oil and the Niger Delta, Department of Political Science, Niger Delta University, March 2008); P Inokoba and D Imbua, 'Vexation and Militancy in the Niger Delta' (International Conference on the Nigerian State, Oil and the Niger Delta, Department of Political Science, Niger Delta University, March 2008)

²⁸⁰ K Okoko and J Nna (n 60) and C Ikporukpo, (n 60)

²⁸¹ A Ikelegbe, 'Interrogating a Crisis of Corporate Governance and the Interface with Conflict: The Case of Multinational Oil Companies and the Conflicts in the Niger Delta' (International Conference on the Nigerian State, Oil and the Niger Delta, Department of Political Science, Niger Delta University, March 2008). See also K Aaron, 'The Failure of Corporate Social Responsibility in the Niger Delta: Towards a Re-interpretation' (International Conference on the Nigerian State, Oil and the Niger Delta, Department of Political Science, Niger Delta University, March 2008) and H Clark and others (n 342)

²⁸² David Bracknell said that Nigeria is subject to a lot of corruption, and evidentially there's doubt over there are any honest people left in government. See BBC News 'Viewpoint: Is Kidnapping Easy Money?' BBC News Africa (London, 20 July 2010) <<http://www.bbc.co.uk/news/world-africa-10684541>> accessed 3 September 2014

²⁸³ This involves vandalism and sometimes blow-up of oil installations, kidnapping of oil company workers for ransom (hostage taking), bomb attacks and gun battles with Nigerian security operatives in the Niger Delta.

²⁸⁴ Jo Hamilton and Others, 'Beyond Oil: The Oil Curse and Solutions for An Oil-Free Future' Rising Tide Report by Platform and Friends of the Earth, (2004) <http://www.griequity.com/resources/industryandissues/Energy/beyond_oil.pdf>

²⁸⁵ A good example is Odi Massacre

²⁸⁶ There has been on-going violence and uprising taking different dimensions in the Niger Delta from the time of Adaka Boro until date.

²⁸⁷ BBC, 'Nigeria Attacks Raise Oil Prices' BBC News (London 20 February 2006) <<http://news.bbc.co.uk/1/hi/business/4731366.stm>> accessed 27 March 2017

to loss of revenue to Nigeria.²⁸⁸ All these were in line with some findings of a senior researcher with Worldwatch Institute that natural resources fundamentally increased risk of civil conflict.²⁸⁹ According to Collier and Hoeffler, of all natural resources oil is of the highest risk.²⁹⁰ They noted that 22% oil dependent export states are likely to experience war compared to 1% for countries that are not oil dependent.²⁹¹ It is interesting to note that instead of dealing with the alleged injustice, Nigeria in 2009 granted amnesty²⁹² to some members of the armed groups, which in the researcher's opinion do not address the acclaimed EI.²⁹³ These entire scenarios show the impact of colonialism and military rule in the socio-political and legal institutions of Nigeria and shows how corruption, politics, economic interest, diversity all contributed to EI especially as it relates to making laws that marginalise the minorities for the economic gains of Nigeria.²⁹⁴ Apart from the political and societal history, there are issues of ownership of oil and acquisition of land for oil and gas activities that had contributed to EI and the researcher will be discussing that next.

2.3 HISTORY, OWNERSHIP OF OIL AND ACQUISITION OF LAND FOR OIL EXPLORATION ACTIVITIES IN NIGERIA

According to Etikerentse,²⁹⁵ the history of the Nigerian oil industry started with the exploration in Ijebu Ode and Okitipupa in 1908 by a German company – the Nigerian Bitumen Corporation, but stopped because of the First World War as Germany and Britain were enemies during the war and Nigeria was a colony of Britain. Germany was stopped from going back to explore by the Mineral Oil Ordinance No. 17 of 1914²⁹⁶ passed by Britain which barred non-British companies from acquiring mineral

²⁸⁸ S Daniel 'Why Bunkering, Kidnappings are Back in the Niger Delta – Security Agencies', *The Vanguard Newspaper* (Lagos, 30 March 2013) <<http://www.vanguardngr.com/2013/03/why-bunkeringkidnappings-are-back-in-niger-delta-security-agencies/>> accessed 27 March 2018

²⁸⁹ According to Renner, resource-driven conflicts killed more than 5 million people, forced 5 to 6 million people to flee to neighbouring countries and internally displaced about 15 million people in 1980s and 1990s alone: See M Renner, Oil and War: Fueling Conflict' Worldwatch Monographs <https://www.laohamutuk.org/OilWeb/Bground/War/PetroPol%20oil-war.pdf> accessed 27 March 2018

²⁹⁰ P Collier and A Hoeffler, 'Greed and Grievance in Civil War' (2004) 56 (1) *Oxford Economic Papers* 563 <<https://doi.org/10.1093/oep/gpf064>> accessed 27 March 2017

²⁹¹ Ibid, 580

²⁹² and training opportunities with financial assistance

²⁹³ See also the opinion of Adeyemo and Olu-Adeyemi: D Adeyemo and L Olu-Adeyemi, 'Amnesty in a Vacuum: The Unending Insurgency in the Niger Delta of Nigeria', in Ojakorotu and Gilbert (eds) in V Ojakorotu and LD Gilbert (eds) *Checkmating the Resurgence of Oil Violence in the Niger Delta of Nigeria*, http://www.iags.org/Niger_Delta_book.pdf and KSA Ebeku, (n 68), 402

²⁹⁴ The resultant pollution had affected their occupation and fishing/farming culture distinguishing them from other ethnic groups in Nigeria.

²⁹⁵ G Etikerentse, *Nigerian Petroleum Law* (Macmillan Publishers 1985); MM Olisa, *Nigerian Petroleum Law and Practice* (Fountain Books 1987); RO Akintola, *Oil in Nigeria- A Study in Political Economy of Development* (Macmillan Publishers Ltd)

²⁹⁶ This is the first notable legislation on the ownership and control of oil but there were earlier legislations.

oil rights in Nigeria.²⁹⁷ The Ordinance also regulated the right to search and conferred powers of granting prospecting licences on the colonial administration. This law helped the British company known today as Shell Petroleum Development Company (SPDC)²⁹⁸ to gain dominance in the Nigeria oil industry to date.²⁹⁹ It also principally vested oil ownership right in the Crown.³⁰⁰ Subsequent laws retained this ownership structure to date; hence, the ownership now vests in the FG.³⁰¹ However, section 140 of the 1963 Constitution provided for 50% royalty from minerals for the mineral producing states and deemed the continental shelf as part of the state/region. With the Offshore Oil Revenue Decree of 1971 royalties, rents and other revenues derived from or relating to offshore petroleum operations were vested absolutely with the FG abolished these mineral rights.³⁰² Section 2 (1) of the Exclusive Economic Zone Act 1978³⁰³ also maintained absolute and exclusive FG ownership and control of the natural resources in the continental shelf as already provided in earlier laws.³⁰⁴

In addition, the FG discontinued 50% royalty in the 1979 Constitutions. Section 44 (3) of the 1999 Constitution strengthened the FG powers by adding Exclusive Economic Zone and territorial waters and empowering the legislature to prescribe the formula for sharing the proceeds. The President shall propose revenue allocation before the legislature and the legislature shall consider the allocation principles including *population, equality of States, internal revenue generation, land mass, terrain and population density*³⁰⁵ before allocating, but must not be less than 13%.³⁰⁶ The 1999 Constitution left a lacuna regarding ownership of mineral resources in the continental shelf leading to the case of *AG Abia and others v AG Federation*.³⁰⁷ In that case,³⁰⁸ the Supreme Court interpreted the Constitution and held that the revenue accruable to the mineral bearing states does not include revenue derived from the offshore areas of these states and that it is the low-water mark of the land surface or the seaward limits of inland waters within the States. In addition to the ownership of mineral resources by the FG, the State Government owns the land needed for exploration and construction of oil facilities.³⁰⁹ By section 28 of LUA, the minister can revoke the right to occupy

²⁹⁷ Section 6 (1) (a)

²⁹⁸ Shell was originally a Dutch company

²⁹⁹ The company originally got exploration license covering the whole Nigeria

³⁰⁰ Before the 1916 ordinance, minerals belonged to the surface owner, as governed by common law.

³⁰¹ See Section 158 (1) of the 1963 post-independence Constitution, section 1 (1) of the Petroleum Act, 1969, see also Sections 40(3), 42(3) and 44(3) of the 1979, 1989 and 1999 Constitutions of the Federal Republic of Nigeria respectively

³⁰² Also by sec. 1 (2) of the 2004 revised Petroleum Act, sec. 1(1) applies to all land including land covered by the Nigerian waters, territorial waters, part of continental shelf and part of exclusive economic zones.

³⁰³ Cap 116 LFN 2004

³⁰⁴ Section 1 of the 1999 the Constitution and the Minerals Act 2007

³⁰⁵ Emphasis mine

³⁰⁶ Section 162 (2) of the Constitution

³⁰⁷ (2002)FWLR (pt 102)

³⁰⁸ Ibid

³⁰⁹ Section 1 of LUA

for overriding public interest and this includes amongst other things the acquisition of the land for mining purposes or oil pipelines or for any purpose connected therewith.³¹⁰ The LUA supersedes all other laws in Nigeria including the Constitution even as section 274 (5) of the 1979, also provides that nothing shall invalidate LUA.³¹¹ Before the colonial era, land ownership was mostly by settlement and conquest after war and customary land tenure was the only recognised land tenure system. When Nigeria became a colony of Britain, the colonial officials used the 'tools' found locally in the North to introduce the Public Lands Proclamation 1902 vesting Crown lands in the Governor in trust for her majesty and the public/native lands were vested in the Governor in trust for the people.³¹² This control was somewhat transplanted to the southern part of Nigeria with the introduction of several laws by the Colonial Government with the 1914 amalgamation of the northern and southern protectorate paving way for what was eventually enacted as LUA.³¹³ This land use policy introduced by colonialism is one of the major problems faced by the Niger Deltans today.³¹⁴

The Minerals and Mining Act, 2007 on its part provided for acquisition of land for mineral exploration purposes accordance with LUA. The Minerals Act categorised mining operations as constituting an overriding public interest under the LUA³¹⁵ therefore, a State Governor is obliged to revoke a valid right of occupancy within sixty days of granting of a mining lease in accordance with the provisions of section 28 of LUA.³¹⁶ The licensee do not require the permission of the Minister to enter most lands by Regulation 17(3) of Petroleum Regulations 1969,³¹⁷ and contrary to that, the Minerals and Mining Act 2007 requires notice to occupiers before granting the license by the minister. What is then the relationship between these issues, exploration activities, oil pollution and inequities?

2.4 OIL POLLUTION AS A NEGATIVE OUTCOME OF OIL AND GAS EXPLORATION

The word 'pollution' is derived from the Latin word '*polluere*' that means to make dirty.³¹⁸ There are many definitions of pollution. The Nigerian National Environmental

³¹⁰ Section 29

³¹¹ See also section 315(5) (d) of the 1999 Constitution

³¹² For further discussion on this see EC Okonkwo, 2013 (n 69)

³¹³ Ibid

³¹⁴ For further discussion on the impact of LUA on the Niger Deltans see Ako 2009 (n 129) and K Ebeku 2002 (n 49)

³¹⁵ Section 22 (1)

³¹⁶ Section 22 (2) Nigerian Mineral and Mining Act, 1977

³¹⁷ Where the land is sacred or used/appropriated to public purposes; occupied by government, situate within a township, town, village, market, burial ground or cemetery; within fifty yards of any building, installation, reservoir, dam, public road or tramway or appropriated for or situate within fifty yards of any railway, the Minister will authorise in writing.

³¹⁸ See Encarta Dictionaries (Microsoft Corporation 2007)

Standards and Regulations Enforcement Agency (Establishment) Act, defines ‘pollution’ as ‘*the man-made or man-aided alteration of the chemical, physical or biological quality of the environment beyond acceptable limits*’.³¹⁹ A polluted environment is alteration of composition or condition directly or indirectly because of human activities such that it becomes less suitable for all or some of the uses for which it was naturally suitable.³²⁰ Section 1 of the UK Environmental Protection Act 1990 defines pollution of the environment as pollution ‘due to the release, into any environmental medium from any process of substances which are capable of causing harm to man or any other living organisms supported by the environment.’ The most important types of pollution are air, water and soil pollution. Pollution sources are many and are generally classified into ‘point sources’³²¹ and ‘non-point sources’,³²² while pollutants are categorized into ‘biodegradable pollutants’³²³ and ‘non-biodegradable pollutants’.³²⁴ In the oil and gas industry, its sources are mainly from drill cuttings, mud and effluents drilling, spills and flaring which occur mainly during seismic activity; exploration drilling operation; exploitation and transportation; exploitation and exploration and refining of crude oil. There is well-documented oil-related pollution in Nigeria.³²⁵

2.4i Causes of Oil-Related Pollution in Nigeria

There are many causes of oil-related pollution in Nigeria. They include spills, flaring, effluent discharges, equipment breakdowns, natural disasters; however, this study will concentrate on the most prevalent ones that are spills and gas flares.

2.4ia Oil Spills

This is one of the most serious causes of oil-related pollution in the Niger Delta. The gravity of spills is one of the reasons for the enactment of National Oil Spill Detection and Response (Establishment) Agency (NOSDRA) Act in 2006 to deal specifically with spills while still leaving the general regulatory powers with the DPR. Incessant spills occur all year round in Nigeria.³²⁶ Amnesty International identified more than 2,000 sites contaminated by spills, which affect fishing, forests products, drinking water and agriculture.³²⁷ Sabotage, equipment failure and operational failure/human

³¹⁹ See section 37 of the NESREA Act 2007. See also section 38 of the FEPA Act, 1988

³²⁰ AO Adenuga, K Ogujiuba and FK Ohuche, ‘Sustainability of the Environment and Water Pollution in Nigeria: Problems, Management and Policy Options’ (2006) 5 (1) Global Journal of Environmental Sciences 3 <<http://www.econwpa.wustl.edu>> accessed 30 November 2015

³²¹ This means pollution from a single and identifiable source such as a discharge pipe from a factory, well, container or vessel. See s 37 of the NESERA Act

³²² This means pollution from non-single source or point.

³²³ Biodegradable are pollutants that are recyclable within the ecosystem.

³²⁴ Non-biodegradable pollutants are pollutants that are not recyclable.

³²⁵ Amongst them are the UNEP Report 2011, IUCN Report 2013, very many Amnesty International Reports, ERA, FOE and many others referred to in this thesis.

³²⁶ There are very many figures depending on the source, but all the figures show that they are many.

³²⁷ Amnesty International, *Petroleum, Pollution and Poverty in the Niger Delta* (Amnesty International Report: Index number AFR 44/017/2009, 30 June 2009) <<https://www.amnesty.org/en/documents/AFR44/017/2009/en/>> accessed 27 March 2017

error are mainly three causes of spills in Nigeria.³²⁸ The researcher will be discussing sabotage and equipment failure in detail below to show how they contribute to EI in the Niger Delta.

2.4ia1 Sabotage/Intentional Damage and Theft

According to Ibaba and Olumati, sabotage is deliberate damage to crude oil installations, such as pipelines and manifolds that causes spills.³²⁹ In recent years, oil industry operators have blamed a substantial part of spills on sabotage. SPDC for instance blamed 40% of its spill in year 2000 on sabotage.³³⁰ It also recorded oil thieves as the cause of majority in 2009 spills.³³¹ It cited the examples of a wellhead at its Odidi field and another where militants bombed the Trans Escravos pipeline.³³² To explain this further, Shell's director for sub-Sahara Africa alleged that sabotage by Nigerian militants is responsible for 70% of spills in the troubled Niger Delta region in 2009.³³³ Shell's Head of Spill Response corroborated this,³³⁴ when he noted that over the past five years, operational spills from SPDC facilities cause less than 30% of spills, as sabotage or theft most spills. He further stated that *'The Shell Petroleum Development Company of Nigeria Limited is committed to minimizing oil spills in the environment and to prompt cleaning up of oil spills in the Niger Delta when they occur, no matter their cause'*³³⁵ Mutiu Sunmonu the former chairman of Shell Nigeria also claimed that theft and sabotage were the cause of 75% of spills from the SPDC JV pipelines in 2014 with 139 spills compared with 157 in 2013.³³⁶ In addition, SPDC's official spill report for 2013 shows not only a reduction in spills, but also an increase in sabotage as a cause of the spills.³³⁷ Nigerian Agip Oil Company (NAOC) on its part reported that between 2007 and 2014, the number of oil theft points registered on

³²⁸ Human error occurs most time because of physical stress, tiredness or negligence.

³²⁹ IS Ibaba and JC Olumati, 'Sabotage Induced Oil Spillages and Human Rights Violation in Nigeria's Niger Delta' (2009) 11 (4) Journal of Sustainable Development in Africa Clarion 51

³³⁰ SPDC, 'People and the Environment' (SPDC Annual Report, 2000); the economic contribution of Shell will be discussed in chapter five under challenges of enforcement

³³¹ See JIV documents in appendix

³³² The Guardian, 'Shell Reports Record Oil Spillages in Nigeria: Oil Giant Blames Thieves and Militants for the Spilling of Nearly 14,000 Tons of Crude Oil into the Niger Delta Last Year' *The Guardian Newspaper* (London, 05 May 2010) <<http://www.theguardian.com/environment/2010/may/05/shell-oil-spill-niger-delta>> accessed 27 March 2017; Shell: 'Sabotage caused Nigeria oil spills: <http://www.bbc.co.uk/news/world-middle-east-19916473> accessed 27 March 2017

³³³ Rowena Mason, 'Shell Accepts Liability for Nigeria Oil Spills' *The Telegraph* (London, 04 August 2011) <<http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/8680030/Shell-accepts-liability-for-Nigeria-oil-spills.html>> accessed 27 March 2017. See generally Shell's 2009 spill data

³³⁴ SPDC, Oil Spill Data (SPDC Spill Report 2009) <<http://www.shell.com.ng/environment-society/environment-tpkg/oil-spills.html>> accessed 27 March 2017

³³⁵ Ibid

³³⁶ Shell, *Nigeria: Letter from Mutiu Sunmonu* (Shell Sustainability Report 2014) <http://reports.shell.com/sustainability-report/2014/servicepages/downloads/files/nigeria_shell_sr14.pdf> accessed 27 March 2017

³³⁷ Ibid

NAOC facilities has increased 40-fold.³³⁸ However, Andy Rowell,³³⁹ claimed that a set of data from Oil Spill Intelligence Report from 1982-1992 covering the whole of Niger Delta dealing only with major³⁴⁰ spills show that 27 out of Shell's 67 spills worldwide were in Nigeria and of the 27, only 4 were due to sabotage.

The researcher could not get recent comparable data to establish the causes of most spills; however, a pertinent question is why recent spills caused by sabotage while older ones were not? What has changed? The concern here is that though there are always claims of sabotage, evidence do not always substantiate it. Emeseh observed that the figures for sabotage are unsubstantiated, sometimes inconsistent, misleading and questionable.³⁴¹ Even where there is evidence of sabotage, research so far shows that, the oil companies use a standard of operation that encourages sabotage. This is particularly so when one see old decrepit pipes over-ground when it would have been underground. On this, Henry Clark and others report³⁴² showed that communities complain that though allegation of sabotage by oil companies is a common occurrence, they rarely provide evidence to support that and had not proved any claim in court.³⁴³ Recent Amnesty International Report³⁴⁴ also supported this view. The Report showed that Amnesty with the help of supporters and activists took part in online project, decoded spills from JIV reports; a consultant data analyst verified the decoded spills and an independent US firm Accufacts with expertise in pipeline security reviewed the information relating to thirty specific spills.³⁴⁵ However, both NAOC/Eni and SPDC

³³⁸ ENI, *NAOC Sustainability: Incident Statistics* (NAOC Report, 2016) <https://www.eni.com/en_NG/sustainability/environment/response-to-oil-spills/spill-incident-data/spill-incident-data.shtml> accessed 27 March 2017

³³⁹ Rowell is an investigative journalist with Spin Watch. He carried on undertaking on oil and biotech industry corporate public relations and the strategies against activists with special emphasis on Shell: See Andy Rowell, *Nigeria: Independent Figures Dispute UN's Findings* (Oil Change International 2010) <<http://priceofoil.org/2010/08/24/nigeria-independent-figures-dispute-un%E2%80%99s-findings/>> accessed 27 March 2017. See also JF Fekumoh, *Disturbance and Injurious Affection in the Nigerian Petroleum Industry* (Owerri: Springfield Publishers, 1998) Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Human Rights Watch Report Index No. 1-January 1999) <<https://www.hrw.org/reports/1999/nigeria/>> accessed 27 March 2017

³⁴⁰ Major oil spill in the report are spills of over 10,000 gallons

³⁴¹ E Emeseh, 'Limitations of Law in Promoting Synergy between Environment and Development Policies in Developing Countries: A Case Study of the Petroleum Industry in Nigeria' (2006) 24(4) *Journal of Energy and Natural Resources Law* 574, 593

³⁴² Henry Clark and others, *Oil for Nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta* (Essential Actions and Global Exchange Trip Delegation Report, 1999) < http://www.essentialaction.org/shell/Final_Report.pdf > accessed 8 January 2015

³⁴³ This is a research dating from 2000, so the position may have changed today.

³⁴⁴ Amnesty International, *Negligence in the Niger Delta: Decoding Shell and Eni's Poor Record on Oil Spills* (Amnesty International Report Index: AFR 44/7970/2018) <<https://www.amnesty.org/download/Documents/AFR4479702018ENGLISH.PDF>> accessed 27 March 2018

³⁴⁵ It involved 3,545 people, from 142 countries that answered 163,063 individual questions and analysing 3,592 JIV documents and photographs covering spills from January 2011 to December 2017.

rejected most findings.³⁴⁶ Amnesty International also analysed JIV forms completed by NOSDRA and found that between 2014 and 2017, NOSDRA agents had warned NAOC/Eni on 162 different occasions to improve surveillance along the pipeline to prevent further spills.³⁴⁷ In some cases, they alleged sabotage even before carrying out investigation or may not even visit the site at all,³⁴⁸ and in some cases, this allegation affects its clean-up process and compensation.³⁴⁹ In 2015 alone, both SPDC and NAOC/Eni admitted to 319 spills³⁵⁰ and this figure is far too much.³⁵¹ For instance, it is interesting to know that according to industry analyst Concaawe,³⁵² there were only 485 spills in the whole of Europe between 1971 and 2011. This means that for about 42 years, a continent experienced 485 spills and in one year, just few states of Nigeria experienced 319 spills showing almost daily occurrence of spills.

One may also wonder why the MNOCs allege sabotage when they have agreed on many occasions that their equipment is outdated.³⁵³ In addition, seeing how pipelines criss-cross Niger Delta, even on the surface of the land; one sees the risk of spills occurring. Amnesty International and FOE under the Specific Instance Procedure of the OECD's guidelines also challenged this questionable claim for Multinational

It helped to create the first independent, structured databases of spills in the Niger Delta. See Amnesty International, *Decode Oil Spills: Make Oil Companies Accountable for Devastating Oil Pollution in Nigeria* (Amnesty International Report, 2018)

<://decoders.amnesty.org/projects/decode-oil-spills > accessed 27 March 2018

³⁴⁶ See Amnesty International 2018 (n 344) 43 and 53.

³⁴⁷ Amnesty International, *Decode Oil Spills* Ibid

³⁴⁸ See August spill in Bodo

³⁴⁹ U Kalu, 'We Won't Pay Compensation for Oil Spill Caused by Sabotage- Shell' *The Vanguard Newspaper* (Lagos, 27 January 2011) <<http://www.vanguardngr.com/2011/01/we-wont-pay-compensation-for-oil-spill-caused-by-sabotage-shell/>> accessed 27 May 2017; N Bassey, 'UN Report on Nigeria Oil Spills Relies too Heavily on Data from Shell' *The Guardian* (London UK, 25 August 2010) <<http://www.theguardian.com/environment/cif-green/2010/aug/25/un-nigeria-oil-spill-shell>> accessed 27 May 2017; Robyn Dixon, 'Nigeria Oil Spills Have Created Ecological Disaster, Report Says' *Los Angeles Times* (Los Angeles, 05 August 2011) <<http://articles.latimes.com/2011/aug/05/world/la-fg-nigeria-oil-20110805>> accessed 27 May 2017; the Guardian, 'Oil Giant Blames Thieves and Militants for the Spilling of Nearly 14,000 Tons of Crude Oil into the Niger Delta Last Year' *The Guardian* (London, 05 May 2010) <<http://www.theguardian.com/environment/2010/may/05/shell-oil-spill-niger-delta>> accessed 27 May 2017 and BBC News, 'Shell: Sabotage Caused Nigeria Oil Spills' *BBC News Africa* (11 October 2012) <<http://www.bbc.co.uk/news/world-middle-east-19916473>> accessed 27 May 2017. See Shell spill data 2007-12

³⁵⁰ Only about 13% was for operational failure.

³⁵¹ They were even accused of under-reporting which Shell denied instead accuses the local population of stealing oil from pipelines. See Yvonne Ndege, 'Shell Denies Lying about Nigeria Oil Spills' *Al Jazeera News Report* (Nigeria, 7 Nov 2013) <<http://www.youtube.com/watch?v=R-Yu-BA3BGQ>> accessed 27 March 2017

³⁵² Conservation of Clean Air and Water in Europe, *Performance of European Cross-Country Oil Pipelines: Statistical Summary of Reported Spillages in 2011 and since 1971* (CONCAWE Report no. 3/13 Brussels, April 2013) 13 <https://www.concaawe.eu/uploads/Modules/Publications/report-no.-3_13.pdf> accessed 27 May 2017

³⁵³ See Richard Steiner (n 116) and Shell website

Enterprises in both the UK and Dutch National Contact Points.³⁵⁴ In addition, NAOC/Eni's incident data for 2014-2015 showed that sabotage and theft cause most spills.³⁵⁵ The researcher had observed in chapter one that the expertise of the other members of the JIV team is in doubt even though NAOC/Eni disclosed that the company confirmed the causes of spills through visual observation and Ultrasonic Thickness Measurements (UTM) result.³⁵⁶ In 2013, Ambrose Osuolo, who represented the Ikalaba community on a joint investigation visit (JIV) on 3rd May 2013, noted that because of disagreement on the cause of the spill whether equipment failure or theft; the JIV report was not signed.³⁵⁷ Moreover, according to Ikalaba community residents, oil companies deny responsibility even when they sometimes have JIV report indicting them citing example of the 2009 spills.³⁵⁸

The fact remains that there is doubtfully any independent investigation into the causes of spills; therefore, substantiation of sabotage claim is a challenge.³⁵⁹ Even if all the claims for sabotage are true, it is the duty of the companies to protect their equipment in line with international industry standards and practices. The recent case against Shell in the Netherlands³⁶⁰ is instructive. Because of allegation of sabotage, sometimes spills are not cleaned-up contrary to the provision of the laws.³⁶¹ Apart from this, one wonders why MNOCs should be using sabotage as a reason for evading responsibility and inflicting environmental injustice on the innocent Niger Deltans. Expectedly, oil companies are duty bound to prevent likely harm to their operational environment by

³⁵⁴ Amnesty International/FOE, Royal Dutch Shell in the Niger Delta: Complaint to the UK and Dutch National Contact Points under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises, 25 January 2011. Misleading disclosure by Shell on oil spills in Nigeria. See OECD Watch, *Amnesty International and FOE v Shell: Case overview (OECD Watch)* (25 January 2011) <http://oecdwatch.org/cases/Case_197> accessed 27 March 2017. Unfortunately, the court found SPDC innocent. See Tom Bowden, 'Shell Uses Sabotage Claims to Avoid Blame for Nigeria Oil Spills' *Independent Newspaper* (London, 18 June 2013) <<http://www.independent.co.uk/news/business/news/shell-uses-sabotage-claims-to-avoid-blame-for-nigeria-oil-spills-8664202.html>> accessed 27 March 2017

³⁵⁵ ENI, NAOC Sustainability: Incident Statistics (NAOC Report, 2016) <https://www.eni.com/en_NG/sustainability/environment/response-to-oil-spills/spill-incident-data/spill-incident-data.shtml> accessed 27 March 2017

³⁵⁶ ENI, NAOC Sustainability: Response to Oil Spills (NAOC Sustainability Report) <http://www.eni.com/en_NG/sustainability/environment/response-to-oil-spills/response-to-oil-spills.shtml> accessed 27 March 2017

³⁵⁷ The Nigerian Voice 'Confusion as Shell, Bayelsa Community Disagrees over Cause of Oil Spill' *The Nigerian Voice* (South Africa, 20 May 2013) <<http://www.thenigerianvoice.com/lifestyle/114135/1/confusion-as-shell-bayelsa-community-disagree-over.html>> accessed 27 March 2017

³⁵⁸ Environews, 'For the Umpteenth Time, Oil Spill in Kalaba' *Environews* (Nigeria, 28 February 2013) <<http://www.environewsigeria.com/for-the-umpteenth-time-oil-spill-in-kalaba/>> accessed 27 March 2017

³⁵⁹ Amnesty International 2018 Report (n 344) is independent

³⁶⁰ *Nigerian Farmers v Shell* C/09/337050/HA ZA 09-1580

³⁶¹ Art.14 EGASPIN

their operations or equipment. This was the reasoning of Lord Hoffmann in the case of *Empress Car Company Ltd v National Rivers Authority*.³⁶² In that case, the House of Lords held that the appellant would have foreseen that interference with their equipment was an ever-present possibility but they had failed to take the simple precaution of putting on a proper lock and a bund and this was a significant cause of the escape even if the major cause was third party interference. This is indeed the researcher's view.

It is opined that sabotage and vandalism should be dealt with by protecting the pipelines using cable patrols, alert reporting persons, acoustic systems, satellite and CCTV installation, fibre optics systems, an automated shutoff valve and impressed alternating cycle current (IACC). This is the international best practice and even Shell's international standard and has been the case in most developed countries, so why is the case different in Nigeria?³⁶³

2.4ia2 Equipment Failure

The Nigerian Oil Pipelines Act, 1965 and EGASPIN require companies to check and maintain oil infrastructure. EGASPIN requires monthly inspection of pipelines, including corrosion-monitoring indications and measurements.³⁶⁴ Equipment failure may result from corrosion of pipes and underground equipment, burst pipes, leakages, and blowouts. Practically, the state of pipelines in Nigeria has not proven to be within what the laws and regulations prescribed.³⁶⁵ According to research by Steiner,³⁶⁶ the state of the pipelines of SPDC in particular remains poor. Also considering the state of these pipelines in the Niger Delta, Henry Clark and others³⁶⁷ had this to say

In addition to the grave problems associated with gas flares, on-site oil leaks and ruptured pipelines are serious problems in the Niger Delta. Decrepit pipelines, some reportedly over 40 years old, criss-cross villages and land, some of them above the ground. These pipes are rusty and in obvious need of repair.³⁶⁸

Henry Clark and others also noted *'from our own observations of existing surface pipelines, it appeared plausible that the rust and corrosion affecting some of these pipes could result in leaks and spills.'*³⁶⁹ In another development, Wikileaks stated that

³⁶² 1995] 1 A.C. 444, 3

³⁶³ See Richard Steiner (n 116) 81

³⁶⁴ Amnesty International wrote in July 2011 to DPR and requested copies of SPDC monthly inspection reports of Trans-Niger pipeline between January 2008 and May 2011. They received no reply after two reminders.

³⁶⁵ Henry Clark and others (n 342)

³⁶⁶ Richard Steiner (n 116)

³⁶⁷ A group of nine US activists, academics, experts and journalists from around the US spent ten days in the Niger Delta hosted by ERA and FOE Nigeria to conduct field trip research.

³⁶⁸ Henry Clark and others (n 342) 6

³⁶⁹ Ibid

a contractor with many years' experience of laying pipelines in the Niger delta informed the US consulate that 73% of all pipelines are more than a decade overdue for replacement.³⁷⁰ They observed that corroded equipment close to the surface contributes to daily occurrence of spills. The contractor reportedly suggested that pipelines be replaced with 'new, concrete-encased pipes and should be buried three to four meters underground' which would reduce spills caused by both bunkering and equipment failure.³⁷¹ The cable concludes that this '*assessment of the current state of pipelines has been confirmed by other of our interlocutors*'.³⁷² Still, there is no verifiable evidence from DPR to show how DPR enforce the laws. It is also not clear whether and how they carry out the monthly inspection of pipelines as required by EGASPIN. Findings from DPR reveal that the agency possibly does not have financial and human resources required for inspecting these pipelines.³⁷³ More worrisome is that they did not show any independent process that the DPR employs to evaluate and verify the condition of the oil infrastructure. Accordingly, Amnesty International³⁷⁴ observed that there is a general lack of transparency about the process of maintaining oil infrastructure in Nigeria.³⁷⁵

Also on equipment issues, Shell in the mid-1990s, established a programme to replace and upgrade its facilities as a response to oil spills.³⁷⁶ However, between 2003 and 2005 SPDC switched to a pipeline integrity management involving checking the condition of pipes and replacing them based on their condition, rather than age. Shell did not make the outcome of the check public however, in 2007; Basil Omiyi, Shell's then Country chair noted that Shell had a substantial backlog of asset integrity work caused by under-funding by partners over many years, operational problems and lack of safe access to the facilities.³⁷⁷ On one occasion, Shell's former Head of Environmental Studies in Nigeria, Bopp Van Dessel, in 1996 claimed on the TV programme '*World in Action*' that Shell ignored repeated warnings that its oil production operations in Nigeria were causing widespread environmental damage. Amnesty International quoted him³⁷⁸ as saying that

³⁷⁰ Amnesty International, *Another Bodo Oil Spill: Another Flawed Oil Spill Investigation in the Niger Delta* (Amnesty International Publications, 2012) <<https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/afr440372012en?CMD=VEROBJ&MLKOB=31819313232>> accessed 27 March 2017

³⁷¹ Ibid

³⁷² Ibid

³⁷³ The researcher will be discussing this in chapter five

³⁷⁴ Amnesty International, *Nigeria: Joint Memorandum on Petroleum Industry Bill March 2012* (Amnesty International Report 2012) 3 <<file:///H:/Conferences/Oxford%20pictures/afr440312012en.pdf>> accessed 27 March 2017. See also Amnesty International 2011 (n 46).

³⁷⁵ Without independent assessment, it is difficult to confirm the extent of poor pipeline maintenance and integrity in the Niger Delta. However, by SPDC's own admission, the situation prior to the 1990s was poor; Shell initiated a pipeline replacement programme before replacing many pipes.

³⁷⁶ SPDC, *Nigeria Brief, The Environment*, 1995

³⁷⁷ Roger Hammond interview with Basil Omiyi

³⁷⁸ Amnesty International 2011 (n 46), 35

They were not meeting their own standards; they were not meeting international standards. Any Shell site that I saw was polluted. Any terminal that I saw was polluted. It was clear to me that Shell was devastating the area.’ In trying to defend itself and bring the company in a good light, Shell said ‘over the years, we have reduced the amount of spills from our operations because we can control corrosion or operational failures.’³⁷⁹

Evaluation of all this made the researcher to conclude that there is no compliance of these provisions by Shell and this is very significant as Shell is a major MNOC in Nigeria.

2.4ib Gas Flaring

Gas flaring is the process of burning associated and non-associated gas that comes with the crude oil during extraction process. Gas flaring pollutes the environment and causes many health related problems. Reviewing the danger constituted by gas flaring, Frynas³⁸⁰ noted that the daily flaring in the Niger Delta produces thermal, air, water and soil pollution, it destroys vegetation, damages infrastructures, soil, crops and vegetation because of severe heat and the decomposition of contaminants. Pollution engenders discomfoting noise and harmful fumes, which constitute serious health risks. Environmental Rights Action summarized the health implication of pollution when it estimated that in one Niger Delta region alone, flaring is statistically likely to cause 49 premature deaths, 4960 respiratory illnesses among children, 120,000 asthma attacks and 8 additional causes of cancer each year.³⁸¹

The oil companies prefer to flare gas, as it appears the easiest and cheapest way to take care of associated gas. Nigeria flared about 14,270.0 of her produced gas in 2011 constituting about 14.6% of total amount of gas flared in the world in that year and being the second top in the world after Russia.³⁸² In 2014, not only that Nigeria reduced the amount to 10,736.8, being 12%, Nigeria moved from the second position to the fifth-largest natural gas flaring country and in 2015, Nigeria ranked seventh

³⁷⁹ Ibid

³⁸⁰ JG Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (Hamburg: LIT VERLAG Munster, 2000) 164, see also E Okoko, Women and Environmental Change in the Niger Delta, Nigeria: Evidence from Ibeno’ (1999) 6(4) *Genders, Place and Culture* 375; AO Isichei and WW Sanford, ‘The Effects of Waste Gas Flares on The Surrounding Vegetation in South-Eastern Nigeria’ (1976) 13 *Journal of Applied Ecology* 177; the World Bank, *Defining an Environmental Development Strategy for the Niger Delta II* (World Bank Report 14266, 2005) 40 <http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2000/11/10/000094946_00082605382642/Rendered/PDF/multi_page.pdf> accessed 3 September 2015

³⁸¹ ERA/FOE Nigeria, *Gas Flaring in Nigeria: a Human Rights Environmental and Economic Monstrosity* (ERA, June 2005) 25 <http://www.foe.co.uk/sites/default/files/downloads/gas_flaring_nigeria.pdf> accessed 27 March 2017

³⁸² For figures see World Bank Project below

based on the figure produced by OPEC Bulletin³⁸³ which even lowered it to 9,687.3 as can be seen from the figure below.

Table 8.2
Natural gas data

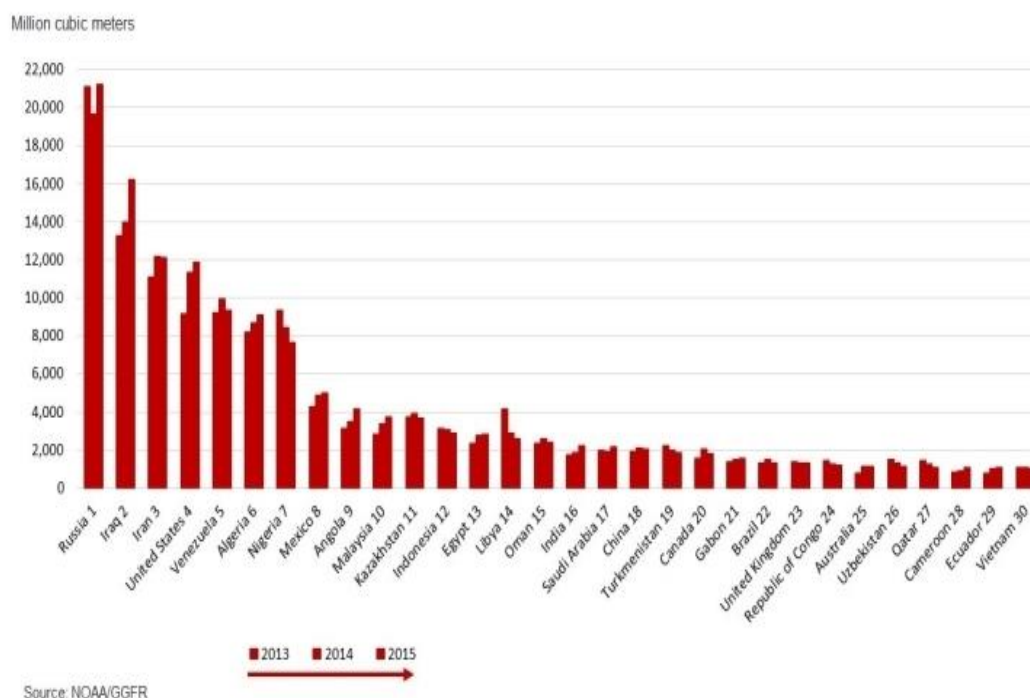
Natural gas production in OPEC Members (in standard cu m)

	2011	2012	2013	2014	2015	% change 15/14
Libya						
Gross production	9,861.0	23,436.0	22,873.7	21,016.2	19,941.0	-5.1
Marketed production	7,855.0	18,118.0	18,462.6	16,523.3	15,493.0	-6.2
Flaring	1,302.0	3,922.0	3,248.0	4,485.6	4,440.7	-1.0
Reinjection	704.0	1,396.0	1,148.0	7.3	7.3	-
Shrinkage	-	-	15.1	-	-	-
Nigeria						
Gross production	84,004.0	84,846.0	79,626.0	86,325.2	85,223.2	-1.3
Marketed production	41,323.0	42,571.0	38,411.0	43,841.6	45,148.1	3.0
Flaring	14,270.0	13,182.0	12,112.0	10,736.8	9,687.3	-9.8
Reinjection	22,519.0	20,520.0	21,466.0	22,894.3	21,040.2	-8.1
Shrinkage	5,892.0	8,573.0	7,637.0	8,852.6	9,347.6	5.6

OPEC, *Annual Statistical Bulletin 2016* (OPEC Report, 2016) 103
<http://www.opec.org/opec_web/static_files_project/media/downloads/publications/ASB2016.pdf> accessed 27 March 2018

³⁸³ OPEC, *Annual Statistical Bulletin 2015* (n 65); See also US Energy Information Administration, *Country Analysis Brief: Nigeria* (US Energy Information Administration Report, May, 2016)<http://www.ieee.es/Galerias/fichero/OtrasPublicaciones/Internacional/2016/EIA_Nigeria_6may2016.pdf> accessed 27 March 2017

The *new* ranking – top 30 flaring countries (2013-15)



World Bank, 'New Data Reveals Uptick in Global Gas Flaring' (World Bank Press Release 12 December 2016) <http://www.worldbank.org/content/dam/photos/780x439/2016/dec/Slide2.JPG> accessed 27 March 2017

Confirming the news is the Managing Director, of the Nigeria Liquefied Natural Gas when he noted that Nigeria has exited the top five league of gas flaring countries in the world through the construction of six NLNG Trains.³⁸⁴ The 2004 to 2014 history of gas production and gas flared in Nigeria below from the Nigerian National Petroleum Corporation (NNPC) also shows almost a steady decline on the percentage of gas flared from 2004 to 2014 despite increase in production and this might explain Nigerian movement from the second to the seventh position.³⁸⁵

³⁸⁴ Today News, 'Nigeria No Longer among Dangerous Gas Flaring Nations – NLNG Boss' *Today News* (July 10, 2016) <https://www.today.ng/news/nigeria/150584/nigeria-longer-dangerous-gas-flaring-nations-nlng-boss> accessed 27 March 2017

³⁸⁵ It is also possible that the 2001 decision of *SERAC v Nigeria* and even the 2005 high court decision of *Gbemre v SPDC* played a role. However, there is no proving yet.

10 – Year Gas Production and Utilization (mscf)

YEAR	GAS PRODUCED	GAS USED AS FUEL	GAS SOLD TO THIRD PARTIES	GAS TO NGC	GAS RE-INJECTED	FUEL GAS TO EPCL	GAS FOR LPG/NGL (FEEDSTOCK TO EPCL)	GAS FOR LNG	GAS LIFT	TOTAL GAS UTILIZED	GAS FLARED	% Flared
2004	2,082,283,189	71,534,048	239,513,290	72,758,426	332,806,436	9,979,511	47,100,859	410,167,378	11,883,045	1,195,742,993	886,540,196	42.58
2005	2,093,628,859	84,137,982	526,288,967	-	397,744,644	10,339,547	46,337,150	187,287,551	30,177,141	1,282,313,082	811,315,777	38.75
2006	2,182,432,084	76,797,392	629,596,866	-	333,687,178	7,926,235	44,410,804	240,915,583	45,436,202	1,378,770,261	803,661,823	36.82
2007	2,415,649,041	76,524,011	760,747,361	-	354,610,374	9,417,626	34,980,978	368,626,236	51,053,728	1,655,960,315	759,688,726	31.45
2008	2,287,547,344	83,730,016	708,159,550	63,831,255	391,075,575	7,640,304	23,582,179	331,369,374	58,560,235	1,668,148,489	619,398,854	27.08
2009	1,837,278,307	80,573,880	440,941,863	21,021,894	409,848,718	8,086,525	42,401,451	269,095,956	55,956,116	1,327,926,402	509,351,905	27.72
2010	2,392,838,898	72,233,897	857,225,685	167,190,149	21,182,685	493,309,826	5,204,476	25,866,822	169,057,005	1,811,270,545	581,568,354	24.30
2011	2,400,402,880	104,541,241	786,837,515	101,560,670	348,331,140	9,434,734	38,607,385	313,087,278	78,970,059	1,781,370,022	619,032,858	25.79
2012	2,580,165,626	115,677,106	875,458,449	72,166,259	462,875,916	15,367,328	47,186,521	329,863,143	72,904,179	1,991,498,902	588,666,724	22.82
2013	2,325,137,449	128,523,560	606,542,389	129,885,775	638,506,664	9,220,378	56,076,709	300,877,404	46,898,121	1,916,531,001	409,311,430	17.60
2014	2,524,268,444	154,370,682	712,296,160	178,446,671	643,806,744	11,006,087	38,795,138	391,369,174	104,577,824	2,234,668,430	289,600,014	11.47

Source: 2014 Annual Statistical Bulletin, NNPC ASB 2014 – 1st Edition
[http://www.nnpcgroup.com/Portals/0/Monthly%20Performance/2014%20ASB%201st%20Edition%20\(2\).pdf](http://www.nnpcgroup.com/Portals/0/Monthly%20Performance/2014%20ASB%201st%20Edition%20(2).pdf) accessed 27 March 2018

However, the Nigerian Government accuses the oil companies of fraud, as the amount of gas they believe flared is more than the ones declared because the oil companies' wants to reduce the penalties paid to government for flaring.³⁸⁶ According to the DPR 2016 report, flaring cost Nigeria an average of N289.6 billion annually³⁸⁷ and the 2004 World Bank/UNDP report of twelve years ago, showed loses of about US\$2.5 billion annually.³⁸⁸ It is interesting to note that the comment from the Nigerian

³⁸⁶ Henry Umoru and others, 'Gas Flaring; FG Accuses Oil Firms of Fraud' *Vanguard Newspaper* (Lagos, 14 December 2016) <<http://www.vanguardngr.com/2016/12/gas-flaring-fg-accuses-oil-firms-of-fraud/>> accessed 27 March 2017

³⁸⁷ Ezekiel Enejeta, 'Nigeria Loses N2trn to Gas Flaring in Seven Years' *Financial Watch* (Lagos, 18 March 2016) <<http://www.financialwatchngr.com/2016/03/18/nigeria-loses-n2trn-gas-flaring-seven-years/>> accessed 27 March 2017

³⁸⁸ Joint UNDP/World Bank 'Strategic Gas Plan for Nigeria' (n 69)

Government is not about the impact of flaring, but revenues lost by government in penalties for flaring. This corroborates the researcher's view and it is against some of the principles of EJ including bearing disproportionate environmental burden, benefits of environmental protection not being equally available to all and the level of environmental protection not being adequate to sustain human health and wellbeing.³⁸⁹ Government has shifted the deadlines to end gas flaring between 1983 and 2016 at least seven times.³⁹⁰ Also according to data gathered from Vanguard Newspaper, Nigeria lost about \$128 million to flaring between January and February 2016.³⁹¹ With the latest accusation by the government, one cannot actually say that flaring is actually reducing. The researcher's opinion is that the government and the industry operators need to make more effort to reduce flaring.

2.4ic Other Sources: Effluent and Waste discharges

Effluent discharge into the environment is another source of oil-related pollution. This happens mostly during seismic surveys, drill cuttings, drilling mud and fluids used for stimulating production. The materials many times dispersed and sank into the soil and may kill local living plants and animals by burying them in the water. There are also untreated wastes and other refinery effluents that cause land, water and air pollution. Eaton observed that the Nigerian refineries have grossly inadequate waste treatment facilities characterized by inefficient and ineffective anti-pollution devices.³⁹² In addition, research by Otti and Okafor in 2012 proved that consistent daily production of 60,000 bpd by Port Harcourt Refining Company poses an environmental adverse effect to the host community from the nitrous oxide present in the refinery flare.³⁹³ All these pollution problems was summed up by Hon Justice Inko-Tariah when he said

Their streams get polluted with the disposal of waste products from oil operations thus, rendering the river void of fishes ... their farm crops planted on the remaining areas of farmland get damaged by oil pollution; their economic trees are hewed down; their economic situation bites hard and there is no help for them. These deprivations without any compensatory benefits cause frustration ... The compensations paid for these deprivations are just

³⁸⁹ See the discussion on EJ in chapter three of this research

³⁹⁰ Ezekiel Enejeta (n 387)

³⁹¹ The Vanguard Newspaper, 'N25bn, 3000MW Power Lost to Gas Flaring' *The Vanguard Newspaper* (Lagos, 4 May 2016) <<http://www.vanguardngr.com/2016/05/n25bn-3000mw-power-lost-gas-flaring/>> accessed 27 March 2017. Discussed further in chapter four

³⁹² J Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment' (1997) 15 Boston Univ. Intl. L J 261

³⁹³ G Otti and PN Okafor, 'Impact of Petroleum Refining Activities On Nitrate and Nitrite Content of Edible Vegetables and on their in Vivo Kinetics in Albino Rats' (2012) 3 (4) *Journal of Biophysical Chemistry* <http://file.scirp.org/pdf/JPBC20120400001_79594878.pdf> accessed 27 September 2017

pittance, meagre pittance, on which people cannot subsist for even six months and they become frustrated with life....³⁹⁴

As highlighted above, these polluting activities come with considerable negative impacts on health, environment, economy and the overall sustainable development and the researcher will be discuss this below.

2.5 IMPACT OF OIL AND GAS POLLUTION

As noted before, oil and gas exploration activities engender a series of ecological problems ranging from oil spills, gas flaring, habitat destruction, air and water pollution, land degradation, all of which constitute severe threats to human and animal existence as well as environmental and economic sustainability. These impacts are mainly economic, social, health and environmental impacts.

Exploration activities comes with severe health complications such as serious respiratory problems, different forms of cancer, kidney and liver problems among others commonly reported in many oil prospecting communities affected by spills and flaring.³⁹⁵ In the Niger Delta, there were cases of asthma attacks, headaches and dizziness, cardiovascular problems, water borne diseases, typhoid, hepatitis, neurobehavioral disorders and premature death in extreme cases.³⁹⁶ According to Energydesk report, Alagoa Morris of ERA noted that ERA has environmental testimonies of deaths occasioned by spill/gas leaks, sickness, and destruction of farms and farmlands; including fishing grounds.³⁹⁷ The health impacts have led to many suits including *Gbemre v Shell*.³⁹⁸ In that case, the applicants claimed that gas flaring in their community was responsible for severe air pollution, water pollution, low crop yields, acid rain, global warming and several health impairment such as asthma and other life-threatening respiratory disorders, and that these amounted to a violation of their rights to life, dignity and a healthy environment. The court declared that the provisions of sections 3(2) (a) and (b) of the Associated Gas Re-Injection Act and section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations permitting gas flaring were inconsistent with the applicants' fundamental rights to life and dignity as provided in the sections 33(1) and 34(1) the 1999 Constitution. However, flaring is still on going in Nigeria and the end date is not clear.³⁹⁹

³⁹⁴ Rivers State Government, *Report of Commission of Inquiry to the Causes and Circumstances of the Disturbances that Occurred at Umuechem in the Etche Local Government Area* (Rivers State Report 1990)

³⁹⁵ See research of JP Incardona and others (n 65)

³⁹⁶ Joe Sandler Clarke, *Oil: Artic explorer Eni Averages Four Spills a Week in the Niger Delta* (Greenpeace Report, 22 February 2016) <<http://energydesk.greenpeace.org/2016/02/22/arctic-oil-eni-nigeria-spills/>> accessed 27 March 2017

³⁹⁷ Ibid

³⁹⁸ (Unreported) Suit no FHC/3/C5/53/05 November 2005

³⁹⁹ See the discussion on the Petroleum Industry Bill infra.

Apart from the health impacts, the environmental impact is mostly evident in the loss of biodiversity and destruction of habitats in the mangrove including sudden and drastic changes to the local environment sometimes leading to loss of human life. The economic impacts result from severe degradation of farmlands, destruction of fishing industry and damage to flora and fauna that are sources of food and livelihood for the Niger Deltans.⁴⁰⁰ It also results in loss of profits, diminishes subsistence level and their purchasing power. By extension, the destruction of biodiversity renders the agricultural sector, which is the largest employer of labour in the Niger Delta, region unprofitable leading to unemployment. In 1999, Chief Obom, the Paramount ruler of Ebubu, in an interview with Oil and Nigeria said

The flora and fauna and the entire ecosystem of the place is destroyed.... We are contributing to the growth.... We know that the operators ... are there to maximize [their] profit. But you don't maximize your profit to the detriment of the people. The government of the state is also aware of that. You can see the level of injustice being meted to the community.... We have written [a] series of letters guaranteeing the security of their personnel. Yet Nigerian Agip Oil Company has refused and the ecosystem of the place is destroyed.⁴⁰¹

It has also caused considerable social impacts including oil pollution–induced conflicts between two communities, individuals and among communities and the oil companies.⁴⁰² Pollution also had caused destruction of many cultural sites killing medicinal plants and herbs rooted in the tradition that are symbols of their traditional medicine and spirituality, disrupts tourism facilities and forcefully displaced the people in the community giving rise to migration and environmental refugees⁴⁰³ as well as destroyed the communities.⁴⁰⁴ Arguably, degradation is one of the main causes of kidnapping, militancy and associated vices as the destruction of the traditional occupational base of the communities has created a large army of jobless, hungry and angry youths most of who have now taken to kidnapping, militancy, pipeline vandalism, prostitution and drug trafficking as the feasible alternative means of

⁴⁰⁰ Available evidence shows that the quality of crops in the Niger Delta is deteriorating because of production of soil toxicity; Amnesty Report 2011 (n 46)

⁴⁰¹ Excerpts from Henry Clark and others interview with HRH, Chief Nikuman Ebe Obom, the Paramount ruler of Ebubu, (Port-Harcourt 9 Sept. 1999. See Henry Clark and others (n 342) 7

⁴⁰² There are so many dimensions to these conflicts. See Obi CI, 'Oil Extraction, Dispossession, Resistance, and Conflict in Nigeria's Oil-Rich Niger Delta' (2010) 30 Canadian Journal of Development Studies 1; E Emeseh, 'The Niger Delta Crisis and the Question of Access to Justice', in CI Obi and SA Rustad (eds), *Oil and Insurgency in Niger Delta: Managing the Complex Politics of Petro-violence* (Zed Books 2011) 55

⁴⁰³ See EC Okonkwo, 2016 (n 47); see also Legborsi Saro Pyagbara, *Minority Rights, Development and Migration-The Case of the Ogoni People* [2004];

⁴⁰⁴ For further discussion, see CO Opukri and IS Ibaba, 'Oil Induced Environmental Degradation and Internal Population Displacement in the Nigeria's Niger Delta' (2008) 10 (1) Journal of Sustainable Development in Africa 173 <http://www.jsd-africa.com/Jsda/V10N1_Spring2008/PDF/OilInducedEnvDegr.pdf> accessed 27 March 2017

survival.⁴⁰⁵ This social impact increases frustration, aggravates violence and causes avoidable deaths.⁴⁰⁶

Analysing the entire problem, Okonkwo concluded

After few years of struggle for ‘environmental justice’ as defined by the global North and faced with the political realities on the ground that led to the death of Ken Saro-Wiwa, the Odi massacre and other acts of brutality, the game plan moved back to economic survival.⁴⁰⁷

It is now imperative to examine the industry statutory frameworks relevant to this thesis to know if they advance the solution or worsen the problems.

2.6 THE RELEVANT STATUTORY FRAMEWORKS

Increased oil production and economic interest after the Nigerian independence, also increased pollution giving rise to some considerable public interest leading to protest,⁴⁰⁸ and enactment of some scattered pollution laws by the Nigerian Government. Amongst the laws were the Mineral Oil (Safety) Regulations 1963 dealing with safe discharge of harmful or inflammable gases including penalties for contravention and non-compliance.⁴⁰⁹ The Oil Pipeline Act 1965⁴¹⁰ prevents pollution of land or any waters amongst other things and the Petroleum Regulations 1967 prohibited the discharge or escape of petroleum into waters within a harbour area and made provisions for precautions in the conveyance of petroleum and rules for safe operation of pipelines. In 1968, the Oil in Navigable Waters Act (ONWA), which implemented the International Convention for the Prevention of Pollution of Sea, made detailed, provision for the prevention of pollution of watercourses, the sea, territorial or navigable inland waters.⁴¹¹ There is also the Petroleum Act, 1969 for the aim of

⁴⁰⁵ Several lives have been lost because of the incessant violent activities. Apart from many oil workers who were killed because of violent attack, oftentimes, vandalism and oil scooping had resulted in fire outbreak that has claimed thousands of lives. See 1998 Jesse pipeline fire killing about 1200 villagers and 2000 another pipeline explosion near the town of Jesse killed about 250 villagers: see CNN ‘Pipeline Explosion Kills at Least 200’ CNN World News (26 December 2006) <http://web.archive.org/web/20071227231055/http://www.cnn.com/2006/WORLD/africa/12/26/nigeria_blast/index.html> accessed 27 December 2015. See also PM News, ‘30 Nigerians Killed in Fresh Oil Pipeline Fire’ PM News (Lagos, 12 January 2013) <<http://pmnewsnigeria.com/2013/01/12/30-nigerians-killed-in-fresh-oil-pipeline-fire/>> accessed 27 March 2017

⁴⁰⁶ The death and hanging of Ken Saro-Wiwa with eight others is an indirect problem caused by pollution

⁴⁰⁷ C Okonkwo (n 70)

⁴⁰⁸ For the Ogonis: see Adaka Boro protest of 1967. For more discussion see BA Chokor, ‘Government Policy and Environmental Protection in Developing World’ (1993) 17 (1) Environmental Management 15

⁴⁰⁹ Regulation 4 creates N100 or six months imprisonment or both

⁴¹⁰ Amended the Oil Pipelines Act 1956

⁴¹¹ See sections 1, 3 and 5

prospecting and exploring oil.⁴¹² The Oil Terminal Dues Act 1969 on its part prohibits oil discharge to an area of the continental shelf within any oil terminal.⁴¹³ The Petroleum (Drilling and Production) Regulations 1969 mandates every licence or leaseholder under the regulations to adopt all practicable precautions including the provision of up-to-date equipment to prevent oil pollution, to take prompt steps to end the effects where it occurs,⁴¹⁴ provide for *good refining practices*⁴¹⁵ and *good oil field practices*.⁴¹⁶ Mineral Oil Safety Regulations, 1968 explicitly provides for good oilfield practice as covered by the appropriate current Institute of Petroleum Safety Codes, the American Petroleum Institute Codes or the American Society of Mechanical Engineers Codes.⁴¹⁷

The Petroleum Drilling and Production Regulations 1969 require submission of a feasibility study, programme or proposal for utilisation of any natural gas⁴¹⁸ and the Associated Gas Re-injection Act 1979 sets a flare-out date of 1st January 1984⁴¹⁹ and provides for the utilisation and re-injection of unutilised gas. The Minister can give consent to flare after 1 January 1984 with payment to the FG on satisfaction that utilisation or re-injection is inappropriate or not feasible in any particular field.⁴²⁰ The question is whether the payment is deterrent to help reduce flaring. Interestingly, it appears that this money paid by the companies is now a source of huge revenue to the government and there is no compensation for flaring to the affected communities and that is not for remediation. The Federal Capital Territory that is the centre of government is about 646 kilometres away from the Niger Delta, therefore not affected directly and the money paid is not commensurate with the hazard caused. The fact that Niger Deltans face the burdens of flaring and Nigeria collect monies or penalties for the benefits of all Nigerians shows unequal distribution of goods and burdens therefore qualifies to be environmental injustice.⁴²¹ The Associated Gas Re-Injection

⁴¹² Worthy of note is that in 1998, section 5 of the Petroleum (Amendment) Decree 22 of 1998 amended its section 24 (1) to oblige oil companies to ensure '*good oil field practice*'.

⁴¹³ S 6(2) (a) (b) and (c); See also Regulation 25, 27, 38 and 43 (3) of the Petroleum Refining Regulations 1974

⁴¹⁴ Reg 25, 40

⁴¹⁵ Reg 27

⁴¹⁶ Reg 37; Okorodudu observed that the enforceability depends on the interpretations of '*good oilfield practices*' and '*good refining practice*'; See MTF Okorodudu, *Law of Environmental Protection: Materials and Texts* (Caltop Publications, Ibadan 1994); I Ehighelua, *Environmental Protection Law* (New Pages Pub 2007) 43; I Ehighelua, *Environmental Protection Law* (New Pages Pub 2007) 56. However, Zhiguo defined good oilfield practice as an objective standard according to which all operations should be conducted; G Zhiguo, 'Environmental Regulation of Oil and Gas' (Recommended Practice for Pipeline SCADA Displays, 2007) and many others.

⁴¹⁷ Other laws are the Nigerian Ports Authority (NPA) Act, 1999; the Nigerian Maritime Administration and Safety Agency (NIMASA) Act 2007; the Mineral Act of 1977 and Hydrocarbon Oil Refineries Act, 1965.

⁴¹⁸ Regulation 43

⁴¹⁹ Section 3(1)

⁴²⁰ Section 3 (2)

⁴²¹ See EJ discussion in chapter three of this research

Amendment Decree 7 of 1985 introduced an insignificant charge of N.2k/1000cf of gas flared without authority.⁴²² However, Nigeria still flare gas thirty-three years after the deadline, and one cannot say when gas flaring will stop as even the Petroleum Industry Bill, 2012/PIGB 2017 currently being debated in the legislature did not set a revised flare-out date.⁴²³ In general, there are so many laws with little attention given to environmental pollution problems especially before 1988, but because they are not at the core of this research, there is no in-depth analysis of these laws. Suffice to say that their design was not to tackle oil-related pollution and they have many enforcement problems including low penalties and lack of clarity about enforcement agencies.

From 1988, there was a stronger focus to environmental protection in Nigeria. Koko incident of May 1988 under a supposed private arrangement with the local inhabitants of Koko Delta State, Nigeria led to the enactment of the Harmful Waste (Special Criminal Provisions) Act in 1988 as a better-articulated policy towards environmental protection.⁴²⁴ The Act makes a fundamental departure from pollution abatement laws before 1988 especially as it relates to sanctions. It introduced life imprisonment without the option of a fine, the forfeiture, lifting the veil of incorporation,⁴²⁵ exclusion of diplomatic immunity and civil penalties.⁴²⁶ It also provides enforcement powers including empowering the Minister to seal premise;⁴²⁷ provides for N50, 000 minimum fines or five years minimum imprisonment for breaking off the seal or obstructing any measure taken by the Minister.⁴²⁸ The Federal Environmental Protection Agency (FEPA) Act, 1988 that created FEPA, followed the Harmful Waste Act. FEPA among other things inspects,⁴²⁹ search, seize and arrest.⁴³⁰ FEPA strove very hard⁴³¹ to develop capacity for pollution monitoring, abatement and enforcement.

⁴²² This amount is so insignificant as it may be about three pence. This was increased in 1990 to N.50k/1000k and N10/1000cf (US\$0.0315) (£0.02567) using Oanda currency converter rate of 24th December, 2016 in 1998 making it more profitable to flare than to harness gas and this encourages flaring instead of deterring it; See PPPRA, *Report of the Special Committee on the Review of Petroleum Products Supply and Distributions* (PPPR Publication) 77, where it said inter alia, 'it is cheaper for the companies to pay penalty for flaring' <<http://pppra.gov.ng/history-the-evolution-of-petroleum-products-pricing-regulatory-agency/>> accessed 27 March 2017

⁴²³ The researcher will be discussing this in detail in chapter four

⁴²⁴ The Koko Incident in the researcher's view reawakens the government consciousness on the negative impacts of pollution and how the West use Nigeria as a dumping ground for toxics.

⁴²⁵ It simply means removing a clause the shield directors of a company so that they can be liable for offences committed.

⁴²⁶ Section 6, 7, 9 and 12

⁴²⁷ Section 11

⁴²⁸ Section 11 (6)

⁴²⁹ Section 26

⁴³⁰ Section 27

⁴³¹ It created the Inspectorate and Enforcement Department on 1st April 1991, to make enforcement sections reality, adopted 'carrot and stick' policy and procedure and monitors compliance through self-monitoring, inspections, environmental auditing and source testing. FEPA's existence brought eight guidelines and Regulations dealing with different aspects of the Nigerian environmental issues including guidelines and Standards for Environmental Pollution Control in Nigeria 1991. It sensitized the public

The law also charged FEPA with the leadership role for the combined spill response team by Regulations 3 and 19 of the Pollution Abatement Regulations. Under FEPA, there was enactment of the Environmental Impact Assessment Act (EIA) 1992. EIA is a preventive management tool used globally to minimize the harmful consequences of development.⁴³² It was first given legal status through the US National Environmental Policy Act (NEPA) in 1969 and is now in many countries starting with the developed countries: Canada,⁴³³ Australia,⁴³⁴ West Germany⁴³⁵ and France with the EU adopting a Europe-wide scheme in 1985, which came into force in 1988.⁴³⁶ The EIA later moved to the developing countries like Nigeria in the nineties.⁴³⁷

The DPR also has developed various environmental guidelines covering all aspects of oil and gas operations since 1981, with the current one being EGASPIN 2002.⁴³⁸ One of the reasons for EGASPIN is the lack of detail and enforcement mechanisms within the petroleum laws, as well as the growing concern for adverse environmental impact and damages arising from oil-related pollution.⁴³⁹ It requires oil companies to take practical precautions to prevent pollution⁴⁴⁰ including monthly inspection of pipelines to prevent equipment failure,⁴⁴¹ prepare spill contingency plan, place all measures for containing and cleaning-up spills, and make accurate information available to the public and the authorities.⁴⁴² It is to standardise the environmental pollution abatement and monitoring procedures,⁴⁴³ establish an effective control programme for the oil discharges and ensure compliance by all operators.⁴⁴⁴ EGASPIN obliges oil companies to ensure ‘good oilfield practice’⁴⁴⁵ conforming to internationally recognized standards⁴⁴⁶ as well as complying with other relevant legislation/regulations.⁴⁴⁷

through public enlightenment exercises about the hazards of pollution. FEPA also organized/sponsored workshops/Seminars and Conferences on Pollution management and related themes.

⁴³² J Glasson, ‘Environmental Impact Assessment: The Next Steps?’ (1995a) 20 (4) Built Environ 277

⁴³³ 1973

⁴³⁴ 1974

⁴³⁵ 1975 (Now Germany)

⁴³⁶ The EIA Directive (85/337/EEC) codified by Directive 2011/92/EU and amended in 2014 by [Directive 2014/52/EU](#)

⁴³⁷ J Glasson, R Therivel and A Chadwick, *Introduction to Environmental Impact Assessment* (2nd ed. 7 UCL Press 1999)

⁴³⁸ Department of Petroleum Resources, *About DPR: Historical Background* (DPR Publication) <<https://dpr.gov.ng/index/about-dpr/history-of-dpr/>> accessed 27 March 2017

⁴³⁹ Part I.3

⁴⁴⁰ Part VIII B, 1.1.1

⁴⁴¹ Part VI, 3.2

⁴⁴² Part VIII B, 2.2

⁴⁴³ Part I.4

⁴⁴⁴ Part II A.3: See also GU Agha, DO Irechukwu and MM Ziga, ‘The Development of Environmental Guideline and Standard for the Petroleum Industry in Nigeria: A Systematic Approach and Future Challenges’ (7th Society for Petroleum Engineers International Conference on Health, Safety and Environment in Oil and Gas Exploration and Production: SPE Conf. Paper 88640-MS)

⁴⁴⁵ EGASPIN, Appendix C 1.1

⁴⁴⁶ Discussed in chapter four

With EGASPIN, Nigeria will remove a royalty of at least N500, 000 from the operators' costs for avoidable spillages in addition to daily penalty of N100, 000 for as long as the violation persists.⁴⁴⁸ Again, the focus here is royalty to the government, which shows a pattern of EI because the researcher thinks that there is no fairness in the distribution of revenue in Nigeria.⁴⁴⁹ Where the effluent quality of discharges exceeded by 20% of the allowed average concentration, there will be penalty of N5, 000.00 for every 50m³ discharged with a maximum of two years imprisonment for the first offender upon conviction.⁴⁵⁰ There is also revocation of permit for persistent violators.⁴⁵¹ The spiller will also remediate the environment to DPR acceptable level.⁴⁵²

Part IX 4 of EGASPIN provides for enforcement powers and sanctions, which include examination of permits and other documents; equipment, searches; tests, and cause arrest of any person(s) whom the inspector has reasons to believe has committed offence without warrant.⁴⁵³ There is also penalty for obstructing authorised inspector or failure to comply with any lawful enquiries or requirements made by any authorised inspector.⁴⁵⁴ Part IX 4.4 provides for corporate officers liability of fine not less than N150, 000 or minimum of two (2) years imprisonment or to both and/or revocation of licence/permit where false compliance statement.⁴⁵⁵

What is then the legal status of EGASPIN? EGASPIN is not Act of the National Assembly, and the Petroleum Act of 1969 did not expressly provide for it, but it partly governs the enforcement of the laws in the Petroleum industry. The absurdity is that challenging the oil companies following EGASPIN provision may fail; however, no one has tested its legal status in the Nigerian courts. This is because guidelines is similar to procedures and according to ISO, a *'Standard is a document provides requirements, specifications, guidelines or characteristics used consistently to ensure*

⁴⁴⁷ Art. 7 Part 1

⁴⁴⁸ See Art. 4.6.2.a

⁴⁴⁹ Section 162 (2) of the 1999 Constitution of Nigeria provides for 13% derivation for states, however, there are two problems. First, there is no provision for usage of part or whole of the 13% for remediation or for their benefit. Secondly, section 5 (4) of the Allocation of Revenue (Federation Account) Act (LFN 1990) provides that 2% of the money in the Federation Account shall be paid into a fund to be set up for the amelioration of general ecological problems anywhere in Nigeria, as may be directed from time to time by the National Assembly. The challenge with the later provision is the point earlier explained by the research that because Niger Deltans are minorities in the National Assemblies, the money might not be fairly distributed.

⁴⁵⁰ Art. 4.6.2.3

⁴⁵¹ Art. 4.7

⁴⁵² Art. 4.6.2.B and C

⁴⁵³ Part ix 4.2

⁴⁵⁴ Part ix 4.3: N500,000 or to imprisonment for a term not exceeding 2 years or to both such fine, imprisonment and/or revocation of licence/permit.

⁴⁵⁵ See also Part ix 4.5

*that materials, products, processes and services are fit for their purpose.*⁴⁵⁶ Standards are not generally binding unless incorporated into legislation by government.⁴⁵⁷

As part of the move to reduce impacts of pollution, in 2006, the Nigerian government created a new agency called NOSDRA through the NOSDRA Act 2006 to address spill detection, implementation and enforcement and strengthening spill response.⁴⁵⁸ Before the establishment of NOSDRA, the National Oil Spill Contingency Plan (NOSCP), which ranged from National Policy on the Environment to Oil Pollution Contingency Plan, was in place.⁴⁵⁹ It requires adoption of all practicable precautions, including the provision of up-to-date equipment to prevent pollution, take prompt steps to control and end pollution if it occurs; maintain installations to prevent the escape or avoidable waste of petroleum, and cause *'as little damage as possible to the surface of the relevant areas, trees, crops, buildings, structures and other properties thereon.'* However, despite that plan, there were serious issues concerning environmental oil-related pollution leading to the review of this contingency plan and the establishment of NOSDRA in compliance with the International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC) to which Nigeria is a signatory.

By section 5 of the NOSDRA Act, the powers of NOSDRA include: co-ordination of the contingency plan by establishing a viable national operational organisation that ensures a safe, timely, effective and appropriate response to major or disastrous oil pollution; identifying high-risk and priority; establishing monitoring and assistance mechanism or where expedient direct, advises and guides the response.⁴⁶⁰ By section 6 NOSDRA is also to ensure compliance with all existing environmental legislation in the petroleum sector and impose penalties. NOSDRA is to also ensure timely, effective and appropriate response to spills, impose clean-up/remediation obligation and fine, embark on joint investigation visits and facilities inspection and liaise with Nigerian stakeholders to develop realistic methods of managing the environment to meet with the changes in the sector.⁴⁶¹

⁴⁵⁶ International Standards Organisation, 'Standards: What is a Standard' <<http://www.iso.org/iso/home/standards.htm>> accessed 3rd October 2016

⁴⁵⁷ The researcher will be discussing this chapter four where the researcher argues that it could be binding.

⁴⁵⁸ NOSDRA Act 7(b)

⁴⁵⁹ This was a policy and presumably not legally enforceable. The National Policy on the Environment, required oil companies to adopt all practicable precautions to prevent pollution, and take prompt steps to control and, wherever possible, end pollution if it did occur; maintain all installations in good repair and condition in order to prevent the escape or avoidable waste of petroleum, and cause as little damage as possible.

⁴⁶⁰ The first attempt to implement it was in 2013. See NOSDRA unveils its plan to implement its ever contingency plan: Adeola Yusuf, 'NOSDRA Activates National Oil Spill Contingency Plan' *Daily Independent* (Lagos, 2 December 2013) <<http://dailyindependentnig.com/2013/12/nosdra-activates-national-oil-spill-contingency-plan/>> accessed 27 March 2017.

⁴⁶¹ Section 19 (1); NOSDRA is also to advise on possible health impacts and help to mediate between the affected community and the company

Nigeria also has some international obligations such as the UN Framework Convention on Climate Change (UNFCCC), which Nigeria signed in 1992 and ratified in 1994.⁴⁶² Although UNFCCC does not impose any specific obligations to reduce flaring, Article 3 places an obligation to protect the climate system. More than twenty-two years after the ratification, Nigeria still flares gas extensively. Other International engagements, agreements and initiatives include Kyoto Protocol; World Bank Carbon Credit Finance; Convention on Biological Diversity; Global Gas Flaring Reduction Initiative (GGFRI) and recently, Paris Agreement.⁴⁶³ Nigeria signed Paris Agreement on 22nd September 2016, ratified it on 16th May 2017, but it is yet to be domesticated.⁴⁶⁴ The argument is that domestication of Paris Agreement might lead to flaring reduction that in effect will reduce pollution, but it is only after domestication that it can fully bind Nigeria. Unlike the UNFCCC, the Paris Agreement did not relieve or exonerate the developing countries of obligation.⁴⁶⁵ It however maintained assistance to these developing countries to achieve these obligations.⁴⁶⁶

It is also welcoming that Nigeria had taken some steps to reduce climate change using some strategic policies. The first is the Nigeria Biofuel and Incentive policy 2007 aimed at helping in the development of the biofuel industry to gradually reduce the dependence on imported gasoline as well as reduce GHG emissions while promoting economic development.⁴⁶⁷ The second is the 2010 vision 2020, which aimed at reducing the impact of climate change on development processes and the environment.⁴⁶⁸ The third policy is the National Policy on Climate Change Response and Strategy 2013 adopted by Federal Executive Council in 2012. The Climate Change Response and Strategy 2013 is to strengthen national initiatives to adapt to and

⁴⁶² UN Framework Convention on Climate Change, *Status of Ratification of the Convention* <http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php> accessed 27 March 2017

⁴⁶³ UN Framework Convention on Climate Change, 2015 (Paris Agreement) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=en> accessed 27 March 2017; It opened for signature from 22nd April, 2016 till 21 April, 2017 by states and regional economic integration organisations that are Parties to the UNFCCC in accordance with its Art. 20. As at 5 October 2016, it had 194 signatures with at least 55 Parties of mostly carbon emission countries depositing their instrument of ratification, acceptance, approval and accession leading to entering into force 4 November 2016.

⁴⁶⁴ To become law in Nigeria, there should be ratification and domestication of Treaty in Nigeria. The Nigerian President on 26 November 2015 approved the Nigeria Intended Nationally Determined Contribution and submitted to the Paris Agreement.

⁴⁶⁵ See Articles 3, 4, 7, 9, 10, 11 and 13

⁴⁶⁶ Art. 7 (13) and 9

⁴⁶⁷ Federal Republic of Nigeria, *Official Gazette of the Nigerian Bio-fuel Policy and Incentives* (24th July, 2007) <<https://community.irena.org/rbsvc25562/attachments/rbsvc25562/News/97/2/National%20Biofuels%20Policy.pdf>> accessed 27 March 2017

⁴⁶⁸ National Planning Commission, *Nigeria Vision 20: 2020 Economic Transformation Blueprint* (National Planning Commission Report December, 2009) <<http://www.nationalplanning.gov.ng/images/docs/NationalPlans/nigeria-vision-20-20-20.pdf>> accessed 27 March 2017

mitigates climate change within all and increase participation and public awareness with the private sector; strengthen national institutions and mechanisms to establish a suitable and functional framework for climate change governance.⁴⁶⁹ Nigeria's Intended Nationally Determined Contribution (INDC) also shows her determination to contribute to the success of the Paris Climate Summit and to grow her economy sustainably while reducing carbon pollution.⁴⁷⁰ The key measures in the INDC are to work towards ending flaring by 2030; work towards off-grid solar PV of 13GW; efficiently generate gas and energy to 30% in 2030 among others. The INDC divided the objectives into 20% unconditional and 45% conditional objectives. With INDC, Nigeria will have a LEAP model using a bottom-up approach that is rooted in sector-based analysis of which energy, oil and gas are topmost. The mitigation actions will implement or enforce existing policies/strategies, with requirement for additional regulatory changes. In the oil and gas, the key requirements of mitigation actions are; improved enforcement of flaring restrictions, development of Gas-to-Power Plants at gas flare sites, blending 10% by volume of fuel-ethanol with gasoline and 20% by volume of biodiesel with petroleum diesel for transportation fuels.⁴⁷¹

Nigeria is also a partner with GGFR led by World Bank,⁴⁷² but then again Nigeria is faced with some challenges including high cost of gathering and utilising the associated gas, undeveloped domestic gas markets and limited access to international markets, lack of financing of gas infrastructure, poor regulatory frameworks and inefficient gas pricing systems.⁴⁷³ According to Aniche,⁴⁷⁴ the GGFR provides three main regulatory approaches for achieving flaring and venting reductions such as

⁴⁶⁹ Michal Nachmany and others, *Climate Change Legislation in Nigeria: An Excerpt from the 2015 Global Climate Legislation Study: A Review of Climate Change Legislation in 99 Countries* (Grantham Research Institute on Climate Change Report) <<http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2015/05/NIGERIA.pdf>> accessed 27 March 2017.

⁴⁷⁰ Federal Ministry of Environment, 'The Nigeria's Intended Nationally Determined Contribution' (In Preparation for the Adoption of Climate Change Agreement at the Paris Conference on Climate Change coming up in December 2015, Abuja, 27 October 2015) <<http://www4.unfccc.int/submissions/INDC/Published%20Documents/Nigeria/1/Executive%20Summary%20Nigerian%20INDC%20271115.pdf>> accessed 27 March 2017; See also Nigeria's Intended Nationally Determined Contribution <<http://www4.unfccc.int/ndcregistry/PublishedDocuments/Nigeria%20First/Approved%20Nigeria's%20INDC%20271115.pdf>> accessed 27 March 2017

⁴⁷¹ Ibid

⁴⁷² World Bank (2004a), *GGFR Initiative Report on Consultations with Stakeholders* (The World Bank Paper 27275, Washington D.C)

⁴⁷³ See N Ogbara, 'Why the Extant Legal Framework Prohibiting Gas Flare in Nigeria did not Work?' (Social Action Organized Forum on Gas Flaring Prohibition and Sustainable Energy Future for Nigeria, Abuja, September 30 2009); ET Aniche, 'Nigeria and World Bank Global Gas Flaring Reduction (GGFR) Partnership: The Tragedy of the Commons' (74th Annual Midwest Political Science Association, Chicago USA, April 2016)

⁴⁷⁴ ET Aniche, 'International Oil Corporations (IOCs), Associated Gas Utilization Technologies and Gas Flare Elimination Strategies: Implication for Zero-Gas Flaring Regime in Nigeria' (2015b) 1 (1) Journal of Asian and African Social Sciences and Humanities 48

prescription, performance-based and hybrid approaches. Recently,⁴⁷⁵ Nigeria endorsed the global initiative to end routine gas flaring by 2030, disallow routine flaring in new oil field developments and even set a Nigerian target date of 2020 in a letter to the World Bank by Dr Kachikwu, Minister of State for Petroleum Resources.⁴⁷⁶ With the help of the GGFRI and other engagements, the Nigerian government introduced some economic incentives, agreements and regulation to encourage oil companies to utilise associated gas which may have helped in reducing flaring in Nigeria; however the volume of gas flared is still high especially where crude oil production increases.

Corroborating positive impacts of the FG initiatives, the SPDC 2015 sustainable report stated that flaring from its facilities decreased by 85% between 2002 and 2015⁴⁷⁷ because of divestments and improved operations at SPDC assets, progress made on several gas-gathering projects, which are at advanced stages of completion. The report also noted that since 2000, Shell design all new SPDC JV facilities to eliminate continuous flaring.⁴⁷⁸

With the foregoing discussion, the researcher believes that there are positive impacts of the FG actions despite not getting to zero flaring, but there are still problems. Aniche⁴⁷⁹ captured some contradictions in what FG says and some of the implementation challenges in Nigeria. They include contradiction between developments of productive forces of the society and the environment; contradiction between profits and environment; conflict between economic growth/sustainable development and environmental protection; tension between national security and environmental security and contradiction between economic diplomacy and environmental diplomacy.⁴⁸⁰ With all the listed contradictions, it is not very clear the extent of flaring reduction and one is inclined to believe that Nigeria may not be doing enough to reduce flaring despite the commitments. Because there is still persistent pollution despite all the presumed progress, the next discussion will be on the manner the stakeholders and government are dealing with the issues in reality.

⁴⁷⁵ August 18, 2016

⁴⁷⁶ Nigeria Endorses 2030 Flaring Initiative; Raises Own Goal to 2020, (World Bank Brief, 18 August 2016) <<http://www.worldbank.org/en/programs/zero-routine-flaring-by-2030/brief/nigeria-endorses-zero-flaring-initiative>> accessed 27 March 2017

⁴⁷⁷ Shell Sustainability Report 2015, *Our Activities in Nigeria: Flaring* (Shell Petroleum Development Company Report, 2015) <<http://reports.shell.com/sustainability-report/2015/managing-operations/flaring.html>> accessed 27 March 2017

⁴⁷⁸ SPDC is also a partner in GGFRI

⁴⁷⁹ ET Aniche, 'The Effects of Oil Joint Venture Partnerships on Enforcement of Zero-Gas Flaring Policy in Nigeria, 2003-2011' (A PhD Thesis, University of Nigeria, Nsukka January 2014)
World Bank, *GFR Initiative Report on Consultations with Stakeholders* (The World Bank Paper 27275, 2004a)

⁴⁸⁰ This is not mainly the focus of this research, however, for further reading see, Aniche Ibid

2.7 DEALING WITH OIL-RELATED POLLUTION IN NIGERIA

The focus of discussion here will be on spills, which is the main cause of pollution in the Niger Delta. In order to reduce oil-related pollution in Nigeria, there should be prevention of spills, preparation for spills, response to spills and restoration of the environment in an efficient and speedy manner. Although the laws require operators to reports spills, respond to them, investigate and clean-up spills, there are always problems in practice, and that leads the researcher to examine the effectiveness of these actions.

2.7i Report and Response to Spills

According to EGASPIN and NOSDRA Act,⁴⁸¹ report of spills should be within twenty-four hours; or the responsible party would be penalised. Evidence shows that the oil companies do not respond to spills adequately and do not report within the twenty-four hours. The Bodo 2008 and 2009 spills are classical examples.⁴⁸² Another example is the Ewelesuo community incident.⁴⁸³ The Ewelesuo community reported the spill to SPDC, but Timi Steadfast⁴⁸⁴ confirmed that SPDC did nothing even after twenty-four hours that Vanguard Nigerian newspaper reported the incident. The same newspaper,⁴⁸⁵ confirmed it when it reported its contact with the Chairman of the Oil and Gas Committee of Nembe, Chief Nengi James who confirmed the spills and the poor attitude of the SPDC towards such spills. According to the Vanguard newspaper, the Chairman claimed to have witnessed more than ten massive spills since he became Chairman that had not been cleaned-up, instead, companies allegedly delayed until heavy tide washed away some signs of the spillage.⁴⁸⁶ The poor response of the oil companies according to Chief James has drastically reduced the life span of the people of the area and therefore, he called on the relevant agencies and government to intervene and prevail on the companies to be prompt in their responsibilities.⁴⁸⁷

2.7ii Joint Investigation Visits (JIV)

The regulators are to lead JIVs after spills to investigate and ascertain the cause of the spill. The representatives from the investigation team are NOSDRA, DPR, Nigerian Police, relevant MNOC, State Ministries of Environments and the host communities. In reality JIV team is always being led by the oil companies, rather than the regulators

⁴⁸¹ The researcher will be discussing this in subsequent chapters

⁴⁸² Discussed infra

⁴⁸³ Samuel Oyadongha, 'Fresh Oil Spill Hits Bayelsa Community' *Vanguard Newspapers* (Lagos Nigeria, 13 April 2013) <<http://www.vanguardngr.com/2013/04/fresh-oil-spill-hits-bayelsa-community-3/>> accessed 27 March 2017: See also February 16, 2013 spill, the fifth reported case of oil spill within seven years in Kalaba, community: one in 2006, a notable one in 2009 lasting about two months. In 2011, the community experienced over 10 spills on both sides of the Taylor Creek and in June 2012; other spills along the pipelines that lasted several days. Residents alleged that spills of 2006 and 2011 are still pending.

⁴⁸⁴ A fisherman and indigene of the community

⁴⁸⁵ Samuel Oyadongha (n 335)

⁴⁸⁶ Ibid

⁴⁸⁷ Ibid

because NOSDRA has no independent means of initiating spill investigations; rather only relies on the data supplied by the relevant MNOC about spills. This is worrisome as the MNOC determines spill causes, the volume, the area affected and the scale and extent of the impact. It is pertinent to mention that there are allegations that oil companies usually influence JIV. One report from Amnesty International accused SPDC and the Nigerian government of changing JIV report of spill caused by equipment failure to sabotage without explanation.⁴⁸⁸ SPDC continued to use that condemned data which caused Amnesty International and FOE to officially complaint under the OECD Development Guidelines on Multinational Enterprises.⁴⁸⁹ Another problem is that because of lack of capability, JIV might not be presenting the true picture. A good example is the 2008 Bodo spill where JIV reports on the first spill incident showed that a total of 1,640 barrels of oil covering an area of 61,350m²: but the independent estimate suggested more than 4,000 barrels daily leak during the first spill based on available video footage and other evidence.⁴⁹⁰ According to the Amnesty Report, it requested an independent assessment of the Bodo spill from NOSDRA in September 2011 and it replied that it was awaiting SPDC's damage assessment report.⁴⁹¹ The 'wait' simply shows that NOSDRA lacks capacity to do it on its own.⁴⁹² This is another inherent flaw as verification is dependent. One can reasonably deduce from this circumstance that SPDC has become a judge in its own cause. The UNEP Report described the regulators to be '*at the mercy of the oil companies when it comes to conducting site visits.*'⁴⁹³

Although communities are supposed to be involved in the investigation according to the Oil Spill Recovery, Clean-Up Remediation and Damage Regulations, 2011,⁴⁹⁴ SPDC information in the website shows that oftentimes, communities are not involved.⁴⁹⁵ One significant thing is that the oil companies pay compensation based on this JIV and only paid where the company is at fault. This is particularly worrisome in view of favourable strict liability⁴⁹⁶ decisions under the common law in Nigeria such as *Umudje v Shell*⁴⁹⁷ and *SPDC v Chief Otoko and Others*.⁴⁹⁸ One will obviously

⁴⁸⁸ Amnesty International 2009 (n 327)

⁴⁸⁹ Amnesty International, FOE (n 354)

⁴⁹⁰ Expert advice to the Bodo community's lawyers estimates that more than 4,000 barrels spillage a day.

⁴⁹¹ Amnesty International wrote to NOSDRA on 14 July 2011, requesting a reaction by 30 July 2011 sent reminders on 10 August and 12 September 2011 and only got NOSDRA reply on 16 September 2011.

⁴⁹² And this wait was after about two years of the spill

⁴⁹³ UNEP Report 2011 (n 107) 140

⁴⁹⁴ Regulation 5

⁴⁹⁵ See for instance, Bodo JIV did not involve Bodo community members as claimed. See also several SPDC JIV reports of 2011 attached to this research proving this point.

⁴⁹⁶ Also known as the rule *Rylands v Fletcher* (1866) L.R. Ex 265 where it was firstly enunciated. It means absolute liability where there is escape of something dangerous from the defendant company's land or premises to somewhere outside his occupation or control, which is non-natural use of the land or premises.

⁴⁹⁷ (1975) 9-11 S.C. 155

assume that dependent JIV is likely to be manipulated using financial gratification, which, as business entity, may be comparatively cheaper than compensating the communities. Against the above backdrop, the composition of JIV team, their expertise and fairness to the parties concerned call for questioning especially when one looks at the level of spills recurrence, the incalculable destructions and the environmental injustices often meted to the affected communities. From the discussion so far, and based on the outcome of most of their reports that are usually tilted on the side of the oil corporations, one may reasonably infer that, perhaps, persons or groups that attend JIV do not have the expertise to know when spills are caused by corrosion or other operational errors or are compromised. This explains why EI in the Niger Delta has remained an issue for long.

2.7iii Clean-Up of Spills

According to Nigerian laws, regulations and guidelines, a clean-up should start within twenty-four hours of oil spill occurrence.⁴⁹⁹ It is however disheartening to note that there has always been time lag between the spillage occurrence and clean-up process. An example is the second Bodo spill, which took SPDC ten weeks after identifying the spill before it visited the site⁵⁰⁰ not to talk of cleaning the spill. Additionally, looking at the whole scenario and the devastation of oil spill in Ogoni, UNEP's report, proves that delays in addressing spills in Ogoniland are the rule rather than the exception.⁵⁰¹ Even where there are clean-ups, it is always below standards set by EGASPIN. The primary remediation method as provided by EGASPIN is Risk-Based corrective Action (RBCA) provided by American Society for Testing and Materials.⁵⁰² According to UNEP's report, the clean-up standard used by SPDC is below the standard set out in the Nigerian laws and indeed SPDC's own standards.⁵⁰³ Shell used non-effective remediation by enhanced natural attenuation (RENA) as a primary method of oil remediation. RENA does not comply with the legislation and Shell Global Solutions do not endorse it. UNEP's investigation found that: *'Ten out of fifteen investigated sites which SPDC records reveal as having completed remediation, still have pollution exceeding the SPDC (and government) remediation closure values.'*⁵⁰⁴ In eight of them, the contamination had migrated to ground water.⁵⁰⁵ At nine out of ten, pollution had migrated to areas not targeted for clean-up and of two out of fifteen sites; there was contamination in a nearby community well.⁵⁰⁶ To this end, UNEP

⁴⁹⁸ (1990) 6 WLR (Pt. 159) 693

⁴⁹⁹ EGASPIN Part VIII B2.6.3 and NOSDRA Regulation 36 of Oil Spill Recovery, Clean-Up Remediation and Damage Regulations, 2011

⁵⁰⁰ Between 19 and 21 February 2009

⁵⁰¹ UNEP Report 2011 (n 107)

⁵⁰² See Appendix VIII F 2 of EGASPIN

⁵⁰³ UNEP Report 2011 (n 107) 135; See also Richard Steiner (n 116)

⁵⁰⁴ Ibid

⁵⁰⁵ Ibid

⁵⁰⁶ Ibid

opined that regulatory certifications to MNOC's by the Nigerian regulators are meaningless.⁵⁰⁷

Another fact found in UNEP's report after surveying dozens of oil spill sites in Ogoniland is that some documented assessed and cleaned up sites by SPDC did not show any obvious difference from the site awaiting clean-up.⁵⁰⁸ Also, according to Henry Clark and others research,⁵⁰⁹ they saw the site of a pipe blowout and massive spill that took place in 1970 where SPDC claimed to have '*cleaned up*' in Eleme, Ogoniland.⁵¹⁰ The place was with a 6-foot thick crust of carbonized oil material covering the soil, turning the area into a wasteland where only a few plants had been able to survive.⁵¹¹ Henry Clark and others reports revealed that even when the community took SPDC to court in 1984, there was no settlement even at the date of their visit⁵¹² and there was no clean-up done. Speaking to Henry Clark and others, a MOSOP member Patrick Naagbanton said '*this is just a tip of the iceberg of the environmental calamities they [Shell] have brought to Ogoni.*'⁵¹³

SPDC claimed it that it became aware of the Bodo spill on October 5, 2008;⁵¹⁴ however, it is not clear when Shell informed NOSDRA. Amnesty International asked Shell and NOSDRA to confirm when Shell reported, which they are required to do within twenty-four hours, Shell did not respond and NOSDRA replied that Shell reported within twenty-four hours after it occurred on 28 August 2008.⁵¹⁵ NOSDRA response cannot be reconciled with the fact that Shell did not accept that the company knew of the spill on 5th October 2008. Question arises as to whom to believe, Shell, NOSDRA or members of Bodo community who claimed that it started on 28th August 2008. Incidentally, from 5th October 2008 when Shell claimed knowledge of the leaks, the leakages were not stopped until 7th November 2008⁵¹⁶ following CEHRD notification to the Rivers State Ministry of Environment about the disaster on 12 October 2008 and the clean-up did not still commence. Even by 3rd August 2011, when Shell accepted the responsibility for the spill, much was not cleaned-up.⁵¹⁷ This is obviously contrary to the provisions of the pollution abatement laws and it is concerning. On many occasions, fisherpersons (rather than regulators or oil

⁵⁰⁷ UNEP Report 2011 (n 107)

⁵⁰⁸ Ibid, 150

⁵⁰⁹ Henry Clark (n 342)

⁵¹⁰ Ibid

⁵¹¹ Ibid

⁵¹² Henry Clark and others interview with residents of Eleme (Eleme Nigeria 10 September 1999)

⁵¹³ Henry Clark (n 342)

⁵¹⁴ <<http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/8680030/Shell-accepts-liability-for-Nigeria-oil-spills.html>> accessed 27 March 2017. See also Email communication with Sue Lloyd Roberts of the BBC who covered the case in a report on the Niger Delta in 2008. Rivers State Ministry of Environment was informed of the leak and its devastating consequences on 12 October by Centre for Environment, Human Rights and Development (CEHRD)

⁵¹⁵ Amnesty Report 2011 (n 46) 49

⁵¹⁶ 33 days after the official Shell acceptance as against 24 hours stated by the laws

⁵¹⁷ See R Mason (n 333)

companies) detect spills.⁵¹⁸ The company should be monitoring its facilities and not relying on communities to report oil spills to them. All these claims and counter claims make EI issues even worse.

Despite the indictments as well as evidence of negligence levelled against SPDC, it has consistently claimed that it addresses spills in the Niger Delta promptly and very well.⁵¹⁹ On one occasion SPDC stated *‘No matter what the cause, whether operational or sabotage/ theft, SPDC is committed to stopping and containing all spills, recovering and cleaning up as much oil as possible and restoring sites in compliance with regulations as quickly as possible.’*⁵²⁰ In the Bodo case, SPDC did not only fail to clean-up, it ignored continual demands by NOSDRA to act even as it later accepted equipment failure because of natural corrosion as cause of the spill. Another example of non-clean-up is PPMC’s refusal to undertake clean-up and remediation of discharge of LPFO from its jetty at Ijala, Delta over 15 months after the spill leading to warning and eventual lawsuit between NOSDRA and PPMC.⁵²¹

Oil companies sometimes allege lack of access⁵²² or sabotage.⁵²³ In the Bodo case, Amnesty International found Shell’s claims to be false as its letter to the Bodo community’s lawyers on 7 May 2009 stated that clean-up was on-going,⁵²⁴ but it later alleged lack of access. UNEP report also proved that the *‘time-lag between the spill event and the site being comprehensively cleaned up shows that issues of access are not the sole cause of delays.’*⁵²⁵ In some cases, clean-ups are abandoned. According to Niyi, ExxonMobil abandoned clean-up of an oil-polluted site in Akwa Ibom State.⁵²⁶ Another indicting case in point is in the UNEP 2011 report on Ogoni,⁵²⁷ where it

⁵¹⁸ See reports of Exxon-Mobil’s spill at Qua Iboe facility on May 1 2010, which was detected by fishers and Exxon-Mobil later confirmed oil deposits on the shoreline of Ibeno community

⁵¹⁹ RDS, *Shell in Nigeria: Environmental Performance-Oil Spills* (Royal Dutch Shell Report, 2011)

⁵²⁰ RDS, *Shell in Nigeria: Environmental Performance-Oil Spills* (Royal Dutch Shell Report, 2007) <<http://s07.static-shell.com/content/dam/shell-new/local/country/nga/downloads/pdf/2013bnotes/environmental-performance2012.pdf>> accessed 27 March 2017

⁵²¹ Nnenna Ezeah, (n 118)

⁵²² Email communication with Sue Lloyd Roberts of the BBC, who covered the case in a report on the Niger Delta in 2008.

⁵²³ Discussion infra

⁵²⁴ Letter from Shell Head of Pipeline East to BM Wifa and Co. Re: Demand for Twenty Billion Naira Compensation Claim and Immediate Remediation of Impacted Site; Letter from NOSDRA to SPDC, dated 9 June 2009, Re: Modalities for the Conduct of Damage Assessment of Areas Impacted by the Bodo Spill Incidences of August and December 2008; Letter from NOSDRA to Amnesty International, dated 16 September 2011, Re: Statutory Request for Information in Terms of the Freedom of Information Act

⁵²⁵ UNEP report 2011 (n 107) 151

⁵²⁶ Information Nigeria, ‘ExxonMobil Abandons Clean Up Of Oil-polluted Site in Akwa Ibom’ *Information Nigeria* (Nigeria, 29 September 2012) <http://www.informationng.com/2012/09/exxonmobil-abandons-clean-up-of-oil-polluted-site-in-akwa-ibom.html?utm_source=dlvr.it&utm_medium=twitter> accessed 27 March 2017

⁵²⁷ See UNEP Report 2011 (n 107)

observed that though a National Oil Spill Contingency Plan exists in Ogoniland and a clear legislative role of NOSDRA, the situation on the ground indicates that Nigeria do not deal with incidences of spill promptly.⁵²⁸ The foregoing analysis in this chapter including colonial influence, political structure, ownership and land use, the laws and socio-legal factors, reporting, JIV and clean-up problems gives insight of the magnitude of the problems and with that in mind, the researcher will conclude this chapter.

2.8 CONCLUSION

The Niger Delta region is presently experiencing recurring incidences of pollution because of oil-related activities with little or no benefit to the communities, thus sentencing them to a life of bearing a disproportionate burden for the rest of the country showing a pattern of EI. It is indeed worrisome that despite this pattern of EI, obvious degradation and other problems visible in the Niger Delta, Nigeria is not doing enough to reduce these impacts therefore not addressing the EI challenges. All these problems: political structure, ownership problems, pollution, participatory, access to justice issues as well as the laws and regulation in the researcher's opinion causes EI and they form the background of this research. Against that backgrounds therefore, the next chapter proceeds to consider the theoretical framework of environmental justice and enforcement both which this research is centred.

⁵²⁸ Ibid 206

CHAPTER THREE

THEORETICAL FOUNDATIONS/CONCEPTUAL FRAMEWORKS

3.1 INTRODUCTION

The aim/purpose of this chapter is to provide a theoretical framework for more a legal and practical discussions in subsequent chapters of this research. To do this, there will be a definition of the most important concepts in this research: ‘justice, environmental justice and enforcement’ to clarify their nature, how they are related to Niger Delta issues and to highlight the viewpoints of these concepts in environmental law generally, as this will help in advancing the arguments in this research. This chapter will also discuss theories and categories of justice, the origin of environmental justice and the relationship between environmental justice and human rights. Furthermore, the chapter will discuss regulation, which includes strategies, mechanisms and models of enforcement with a view of highlighting how effective regulation can enhance EJ. Discussing this is also very important, as it will help the researcher to weigh the possibility of diffusing US laws and enforcement practices into Nigeria bearing in mind the socio-legal, cultural, socio-economic and political differences with the aim of achieving EJ in Nigeria.⁵²⁹

3.2 CONCEPTUAL FRAMEWORK: JUSTICE

3.2i Concept/Theories of Justice

The definition of ‘justice’ has not been easy, but it generally brings about the understanding of what is fair, right, deserved and appropriate. Discussing four concept of justice, Plato in his Republic noted that he did not know what justice was but he knew what justice was not.⁵³⁰ His four concepts are the Athenian that sees justice as honesty in what you say and do. The second is conventional which means justice as helping friends and harming enemies. The third cynical concept where justice is the interest of the stronger as said by Thrasymachus and the fourth is Plato’s concept that believes that justice is all about reward and punishment.⁵³¹ To Plato, justice is harmony of the soul and state. He says that the just man will live well, and if you live well, you are blessed and happy and the just man is simply happy. Pieper gave a classical definition of justice when he said that ‘*Justice is a habit whereby a man renders to each one his due with constant and perpetual will*’.⁵³²

For a clearer understanding of justice, it is prudent to review the theories of justice espoused by some legal philosophers. The first is by John Rawls,⁵³³ which arguably

⁵²⁹ US enforcement and EJ is discussed in chapter five

⁵³⁰ T Plato, *The Republic* (Benjamin Jowett tr, Gutenberg EBook, August 27, 2008 [EBook 1497] <<http://www.gutenberg.org/files/1497/1497-h/1497-h.htm>> accessed 27 March 2017

⁵³¹ Ibid

⁵³² Josef Pieper, *The Four Cardinal Virtues Prudence Justice Fortitude Temperance* (Harcourt, Brace and World, Inc, 1955) <<http://archive.org/details/fourcardinalvirt012953mbp>> 44 accessed 27 March 2017

⁵³³ J Rawls, *A Theory of Justice* (Belknap Press of Harvard University Press 1971)

the most influential theory of justice in modern times. He sets out the fundamental principles of justice for the basic structure of society.⁵³⁴ In Rawls' theory, mutually disinterested people meet in the hypothetical '*original position*' behind a veil of ignorance⁵³⁵ where they decide upon the basic principles that are to govern society. Rawls claims that '*Justice is the first virtue of social institutions, as truth is of systems of thought.*'⁵³⁶ Rawls argues that people are most likely to choose two principles of justice: the *liberty principle* and the *difference principle*.⁵³⁷

The *liberty principle* establishes a right to equal basic liberties for all citizens: freedoms of conscience, association, and expression as well as democratic rights. The *difference principle* regulates inequalities and only allows inequalities that work to the advantage of the worst-off. By guaranteeing the worst-off in society a fair deal, Rawls compensates for naturally occurring inequalities. The major understanding of Rawls theory is to give the least advantaged more help to enhance their chance of success. Treating everyone as equally deserving certainly leads to liberal democracy, regulates the free market and leads to a protective welfare state.⁵³⁸

The next theory is that of Bentham and Mill that promoted the '*utilitarian theory of justice.*' *Utilitarian* theories look forward to the future consequences of punishment that is justified by the ability to achieve future social benefit resulting in crime reduction. To Bentham⁵³⁹ justice theory is the pursuit of the greatest happiness and if a law or an action does not do any good, then it is not just. To Mill,⁵⁴⁰ justice is mutual agreement of everyone concerned: whatever he or she agree that is just is just. This thesis does not examine these theories, but just to highlight their existence because they are not majorly within the scope of this research. There is also social contract theory of Plato and Locke. To Plato, a just man is a man in just the right place, doing his best and giving the precise equivalent of what he has received both at the individual and universal level, therefore he viewed justice as harmony.⁵⁴¹ For Locke,⁵⁴² justice is a natural law where people were free, equal and independent with rights to defend life, health, liberty and possessions and free people need to agree on some

⁵³⁴ J Rawls, *A Theory of Justice* (Revised ed, OUP 1999) 3

⁵³⁵ Behind this veil, you know nothing of yourself and your natural abilities, or your position in society, your sex, race, nationality, or individual tastes

⁵³⁶ J Rawls 1999 (n 534)

⁵³⁷ Ibid

⁵³⁸ Ibid

⁵³⁹ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1907)

⁵⁴⁰ JS Mill, *Utilitarianism* in *on Liberty and Other Essays* (ed), John Gray (OUP 1991) Chapter 5; See also JS Mill, *Collected Works of John Stuart Mill*, JM Robson (ed.) (University of Toronto Press 1963)

⁵⁴¹ Plato, *Republic* (Robin Waterfield tr, OUP 1984)

⁵⁴² John Locke is one of the founders of liberal political philosophy: the philosophy of individual rights and limited government.

ground rules in order to live together in harmony.⁵⁴³ In chapter 11 of his second treatise of government he said

Every one as he is bound to preserve himself, and not to quit his station wilfully, so by the like reason, when his own preservation comes not in competition, ought he as much as he can to preserve the rest of mankind, and not unless it be to do justice on an offender, take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another.⁵⁴⁴

Locke uses natural law in his philosophy by championing the social contract and government by consent, arguing that government must respect the rights of individuals. However, some argue that the basis of Locke's political philosophy is not natural law,⁵⁴⁵ but on natural rights as he asserts that men in the state of nature are free and equal, and at liberty to do as they wish within the bounds of the law of nature.⁵⁴⁶ This argument follows because even though Locke claims that individuals are duty bound to respect the rights of others even in the state of nature, he added in chapter two of the Second Treatise that the individual are not duty bound when his own preservation comes not in competition. Arguably, Locke understands natural law and rights differently making his version of natural law different from that of other natural law thinkers such as Thomas Aquinas⁵⁴⁷

Another angle to justice is axiomation by Jasso.⁵⁴⁸ To him, the justice axiom distinguishes between societies, which value *material things*, and societies, which value *non-material things*. According to Jasso and Wegener,⁵⁴⁹ the axiom begins with the four central questions: what do individuals, societies think is just, and why do they think so? How do ideas of justice shape determination of actual situations? What is the magnitude of the perceived injustice associated with departures from perfect justice? What are the behavioural and social consequences of perceived injustice? Jasso's axiomations are all important in the context of this research. This is because, even though there are common standards of what is just, it can be dependent on individuals and possibly the society. Looking at the Niger Delta issues, one sees that the general thought and feeling is that the Federal Government is not just to the Niger Deltans not

⁵⁴³ John Locke, *Two Treatises of Government* (New edn corrected Rod Hay 1823) Vol V <<http://socserv2.socsci.mcmaster.ca/econ/ugcm/3l13/locke/government.pdf>> accessed 27 March 2017

⁵⁴⁴ Ibid 6

⁵⁴⁵ Natural law theories hold that human beings are subject to a moral law which is about the duty each individual has to abide by the natural law

⁵⁴⁶ John Locke (n 543)

⁵⁴⁷ The fundamentals of Aquinas's natural law doctrine are contained in the Treatise on Law in Thomas's masterwork, the *Summa Theologiae*.

⁵⁴⁸ G Jasso 'Shall We Kill or Enslave Caesar? Analyzing the Caesar Model' (2008) IZA Discussion Paper No. 3460 <<http://ftp.iza.org/dp3460.pdf>> accessed 18 November 2016

⁵⁴⁹ G Jasso and B Wegener, 'Methods for Empirical Justice Analysis: Part 1. Framework, Models, and Quantities' (1997) 10 (4) Social Justice Research 393 <http://download.springer.com/static/pdf/706/art%253A10.1007%252FBF02683292.pdf?auth66=1359296990_f00650d8eddec72fc422bc98dd207600&ext=.pdf> accessed 27 March 2017

only because Niger Delta is the economic base of Nigeria, but also that pollution from exploration activities had caused so many problems which is viewed as big injustice being meted out to them. All these generally cause change in behaviour leading to complaints, theft, militancy, terrorism and many more.

In general, understandings of justice differ in every individual, culture and society. This is because each culture or society's ethics create values, which influence the notion of justice. Though there are some shared principles, they are not enough to create a unitary understanding of justice. This is important because the researcher is reviewing possible application of US laws because these ethics and value influences how the laws are perceived and accepted.

3.2ii Categories/Types of Justice

There are many classifications of justice; however, this research examines the key elements of the ones that will advance argument in the research. Amongst the classifications are Distributive, procedural, social, restorative,⁵⁵⁰ retributive⁵⁵¹ and transitional justice.⁵⁵² Distributive and procedural justices are no doubt elements of environmental justice and will be discussed in more detail while social justice will be discussed because of its relationship to Niger Delta issues therefore will advance argument in the subsequent chapters of this research.

3.2iiia Distributive Justice

To discuss distributive justice, the researcher will highlight briefly the notable theories of distributive justice. Carver⁵⁵³ noted that fundamentally the theories of distributive

⁵⁵⁰ Restorative justice was first discussed by both Barnett: R Barnett, 'Restitution: A new Paradigm of Criminal Justice' (1977) 87 Ethics 279; Eglash: A Eglash, 'Beyond Restitution: Creative Restitution in Hudson J and Galaway B (eds), *Restitution in Criminal Justice*. (DC Heath 1977) Braithwaite: J Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press 1989) and J Braithwaite, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' in M. Tonry (ed), *Crime and Justice: A Review of Research* (University of Chicago Press 1999) 5, Marshall: T Marshall, *Alternatives to Criminal Courts: The Potential for Non-judicial Dispute Resolution* (Gower Publishing Co 1985) Umbreit: MS Umbreit, *Victim Meets Offender: The Impact of Restorative Justice and Mediation* (Criminal Justice Press 1994a) and Zehr: H Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Scottsdale Penn Herald Press 1990) Van and Strong: D Van Ness and KH Strong, *Restoring Justice*' (Andersen Publishing Cincinnati 1997) Llewellyn and Howse: J Llewellyn and R Howse, *Restorative Justice: A Conceptual Framework* (Ottawa: Law Commission of Canada, 1998).

⁵⁵¹ This connotes punishing people for past injustice or wrongdoing to rectify the unfair advantages the offender gained. It is about payback not maximisation of welfare. Ted Honderich argued that retributivism is revenge in disguise: Ted Honderich, *Punishment: The Supposed Justifications* (Hutchinson and Co 1969) 1

⁵⁵² It is judicial and non-judicial approaches adopted by states to address past violations to rebuild and repair a disjointed justice system: See generally Lisa Margarell, *Reparations in Theory and Practice* (International Center for Transitional Justice Report, 2007) < <http://ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf>> accessed 27 March 2017

⁵⁵³ Thomas Nixon Carver, 'Essays in Social Justice' (Cambridge, Harvard University Press 1915) <https://ia902306.us.archive.org/3/items/essaysinsocialju00carvuoft/essaysinsocialju00carvuoft_bw.pdf> accessed 27 March 2017

justice might be grouped under three heads: the aristocratic theory, the socialistic theory, and the democratic or liberalistic theory.

Aristocratic theory opines that the good things of this world belong more particularly to one distinct group or class that have a prior claim over all others; socialistic theory is meant that wealth ought to be distributed according to needs; and the democratic theory meant that wealth ought to be distributed according to productivity, usefulness, or worth.⁵⁵⁴ According to Aristotle, with distributive justice, allocations of things are according to rights, merits and criteria.⁵⁵⁵ Distributive justice regulates how all concerned are exercising rights: individual and the community and presupposes preservation of rights by public authority or community. It means giving all society members a '*fair share*' of the benefits, resources, burdens and privileges. The summation of distributive justice theory is sharing of benefits and burdens. Its meaning brings questions as to what *fair share* means, what goods are distributed, between what entities and what proper distribution means: whether equal, merit or need based. What then is fair share? Before looking into what fair share means, the researcher will first explain what fairness means. Reference to fairness depends on many factors. Lord Nicholls in *Miller v Miller*⁵⁵⁶ said fairness is an elusive concept, an instinctive response to a given set of facts, grounded in social and moral values that cannot be justified or refuted by any objective process of logical reasoning and change from one generation to the next.

The meaning of '*fair share*' depends on many factors. Thompson and Loewenstein's⁵⁵⁷ research on distributive justice shows that people often have an egocentric interpretation of what constitutes a '*fair share*', especially in situations of relatively scarce resource allocation as people always tend to overestimate their contributions and to downgrade others' contributions. As Messick and Sentis⁵⁵⁸ put it, people have an egocentrically inflated perception of the resources that they believe themselves to deserve and this always have negative consequences when defining fair share.⁵⁵⁹ In the researcher's opinion, fair share is what is equitable based on equality in rewards, recognition and need. The basis in researcher's opinion is the combination of three equality principles of Aristotle formulated in reference to Plato. This means treating

⁵⁵⁴ Ibid

⁵⁵⁵ See Russell Kirk, 'The Meaning of Justice' (*The Heritage Lectures*) <http://s3.amazonaws.com/thf_media/1993/pdf/hl457.pdf> accessed 27 March 2017

⁵⁵⁶ [2006] 2 AC 618

⁵⁵⁷ L Thompson and G Loewenstein 'Egocentric Interpretations of Fairness and Interpersonal Conflict' (1992) 51 *Organizational Behavior and Human Decision Processes* 176 <<http://www.sciencedirect.com/science/article/pii/0749597892900105#>> accessed 27 March 2017

⁵⁵⁸ DM Messick and CG McClintock, 'Motivational Bases of Choice In Experimental Games' (1968) 4 *Journal of Experimental Social Psychology* 1

⁵⁵⁹ See the research conducted by Babcock and Loewenstein L Babcock and G Loewenstein 'Explaining bargaining Impasse: The Role of Self-Serving Biases' (1997) 11 (1) *Journal of Economic Perspectives* 109 <<http://www.jstor.org/stable/2138254>> accessed 27 March 2017

like cases as like,⁵⁶⁰ the numerical⁵⁶¹ and proportional⁵⁶² equally. The second is distribution of goods to persons⁵⁶³ and the third one, which is moral equality, which offers each individual his or her due on the basis that everyone deserved the same dignity and respect. The second and the third questions are *what is distributed and to whom?* What is distributed are simply wealth, income, respect, opportunities, cost and combination of these things and are to be distributed equally between individuals, families, nations, races, groups or classes. The last issue is the *proper basis for the distribution of goods*. All the theories of justice agree that people should get what they deserve, but what is the basis for deserving: equality, merit, need or welfare-maximisation? Merit in the sense of what they have contributed, equality in the sense that no matter what you contribute, all are equal and need in the sense that more resources should be given to those in need, no matter their input. Although need could be linked to equality so that all people are treated as having equal needs. To the merit theorist, the distribution of goods, especially wealth and social status is to match individual *merit* such as combination of talent and hard work. According to need-based theories, the distribution of goods, especially such basic goods as food, shelter and medical care is to meet individuals' basic needs for them.⁵⁶⁴ Justice exists within the coordinates of equality; therefore, welfare-maximisation principle allocates rewards according to the degree to which the given individual aids the welfare of society taking everyone good impartially into account. Here demands like human rights would be elements in the calculation of overall welfare. However, Fraser criticized distributive justice as not accounting for injustices caused by cultural domination, non-recognition, and disrespect aimed at a group or an individual by the dominant group.⁵⁶⁵ Fraser argues that culture is a legitimate, even necessary terrain of struggle – a sight of justice in its own right and deeply tied to economic inequality.⁵⁶⁶

3.2.iiiib Procedural Justice

This is simply fair procedure to attain justice. It is generally the amount of perceived control that a procedure affords a disputant in shaping the process and determining an outcome.⁵⁶⁷ The idea of procedural justice is that fair procedure brings fair outcome.

⁵⁶⁰ The generally accepted formal equality principle as can be seen in Aristotle, *Nicomachean Ethics*, V.3. 1131a10-b15; *Politics*, III.9.1280 a8-15, III. 12. 1282b18-23

⁵⁶¹ Treatment of all persons as indistinguishable: granting them the same quantity of a good per capita

⁵⁶² This is distribution or treatment of all relevant persons in relation to their due, specifies formal equality and more comprehensive formulation of formal equality

⁵⁶³ Aristotle, *Nicomachean Ethics*, 1130b-1132b; cf. Plato, *Laws*, VI.757b-c

⁵⁶⁴ See theorist such as Abraham Maslow: See A Maslow, A Theory of Human Motivation (1943) *Psychological Review*, 50, and David McClelland's Need Theory, Toward a Theory of Motive Acquisition (1965) *American Psychologist* 20

⁵⁶⁵ N Fraser, From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age' in C Willet (eds) *Theorizing Multiculturalism: A Guide to the Current Debate* (Malden MA 1998)

⁵⁶⁶ Ibid

⁵⁶⁷ JW Thibaut and L Walker, 'A Theory of Procedure' (1978) 66 *California Law Review* 541

Leventhal and others⁵⁶⁸ itemised some components of procedural justice to include suppression of bias, consistency, and representation of all parties' interests, accuracy of information, ethicality, and correctability. Lind and Tyler⁵⁶⁹ introduced the group-value model and the relational model of procedural justice. The group-value model argues that procedures are fair if they promote within-group relationships and provide participants with information about their own place in the group, while the relational model highlights standing, neutrality, and trust as important antecedents for perceptions of procedural justice. An example of procedural justice is the rule governing the fairness of trials. The outcome may not be too material, but the process is crucial. To arrive at procedural justice, prescribed rules must be followed impartially and consistently to arrive at an unbiased decision. Neutrality and representation in the decision-making process are key words in procedural justice. According to Karabayya and Brett, mediation is a better way of arriving at procedural justice than arbitration and arbitration is better way than adjudication.⁵⁷⁰ The reason for this in the researcher's opinion is that mediation⁵⁷¹ affords the disputants more of an opportunity of resolving the disputes than arbitration⁵⁷² and arbitration affords disputants more opportunity to be involved than adjudication.⁵⁷³ This simply means that disputants are more in control of their cases with mediation⁵⁷⁴ and that make the procedure more just.

The more positive the outcome, the more people evaluate procedure as fair and legitimate. Fair procedure is very important. According to De Cremer and Tyler it promotes social harmony and cohesion between group members.⁵⁷⁵ For Tyler fair procedure creates positive attitude towards authorities and the product is a positive behavioural reaction.⁵⁷⁶ Folger noted that if procedure allows people to air their views,

⁵⁶⁸ GS Leventhal and others 'Beyond Fairness: A Theory of Allocation Preferences' in G. Mikula (ed), *Justice and Social Interaction* (Springer 1980)

⁵⁶⁹ EA Lind and T Tyler *The Social Psychology of Procedural Justice* (Plenum Press 1988)

⁵⁷⁰ R Karambayya and J Brett 'Managers Handling Disputes: Third Party Roles and Perceptions of Fairness' (1989) 32 *Academy of Management Journal* 687

⁵⁷¹ Mediation is simply a flexible method used to resolve disputes without going to court which involves an independent third party helping both sides to arrive at an outcome that both parties are happy to accept.

⁵⁷² Arbitration is a procedure where a dispute is submitted, by agreement of the parties, to arbitrators who make a binding decision on the dispute

⁵⁷³ Adjudication involves neutral person usually empowered by an agency to make binding decisions, examines facts and render a decision or judgment.

⁵⁷⁴ For more discussion on mediation see Bryan Clark, *Lawyers and Mediation* (1st edn, Springer, 2012)

⁵⁷⁵ D De Cremer and TR Tyler 'Managing Group Behavior: The Interplay Between Procedural Justice, Self, and Cooperation' (2005) 37 *Advances in Experimental Social Psychology* <http://ac.els-cdn.com/S0065260105370031/1-s2.0-S0065260105370031-main.pdf?_tid=ec485648-a8c4-11e5-9740-00000aacb35d&acdnat=1450800123_43441c5468519015bbd1a8e6a0188931> accessed 27 March 2017

⁵⁷⁶ T Tyler, P DeGoey and H Smith 'Understanding Why the Justice of Group Procedures Matters: A Test of the Psychological Dynamics of the Group-Value Model' (1996) 70(5) *Journal of Personality & Social Psychology* 913 <<http://web.ebscohost.com/ehost/detail?sid=29b2b2e4-e4ef-4f4a-9c76-cd5ea5bb6cfb%40sessionmgr114&vid=2&hid=106&bdata=JnNpdGU9ZWWhvc3QtbGl2ZQ%3d%3d#db=pdh&AN=1996-01753-002>> accessed 27 March 2017

they tend to say it is fairer than procedures that deny them such an opportunity.⁵⁷⁷ Based on the foregoing analysis, the researcher views fair procedures as a procedure that will not only do justice, but it ensures that justice is seen to be done by an objective thinker.

3.2iiic Social Justice

Social justice means setting up a system of laws established by the society itself, and then having officials enforce the laws. It is also justice of the common welfare or justice of the community. According to Bell, social justice is a goal and a process.⁵⁷⁸ The goal is equal participation of all groups in a society to meet their mutually shaped needs and the process for attaining the goal should be democratic and participatory, inclusive and affirming of human agency and human capacities for working collaboratively to create change.⁵⁷⁹ It also includes a vision of society in which the distribution of resources is equitable and all members are physically and psychologically safe and secure.⁵⁸⁰ The question as it relates to this research going by this meaning is whether distribution of resources are equitable and whether Niger Deltans are physically and psychologically safe and secure. The major problem with social justice is that it allows the majority to create the terms of justice and the ethics of the minorities will usually be less important, or completely ignored.⁵⁸¹ Young's view on social justice emphasised the need to recognise socio-cultural differences among individuals for representing varied social, economic, linguistic, and cultural groups.⁵⁸² This theory of justice is important to the discussion in this research because at the superficial level, it looks beneficial; however, it may not in the context of Niger Delta and Nigeria, because social justice allows the majority to create the terms of justice, it may encourage injustice to the minority.

⁵⁷⁷ R Folger, 'Distributive and Procedural Justice: Combined Impact of "Voice" And Improvement on Experienced Inequity' (1977) 35 Journal of Personality and Social Psychology 108 <<http://web.ebscohost.com/ehost/pdfviewer/pdfviewer?sid=87db761a-d09e-4b70-9077-33fba7c5cf37%40sessionmgr115&vid=2&hid=122>> accessed 27 March 2017. See also J Brockner and others 'The Moderating Effect of Self-Esteem in Reaction to Voice: Converging Evidence from Five Studies' (1998) 75 Journal of Personality and Social Psychology 394

EA Lind and others 'Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments' (1990) 59 Journal of Personality and Social Psychology 952 <<http://web.ebscohost.com/ehost/detail?sid=6190c9da-984f-4571-9bd6-a737dd37137d%40sessionmgr114&vid=2&hid=122&bdata=JnNpdGU9ZWZWhvc3QtbGl2ZQ%3d%3d#d b=pdh&AN=1991-11728-001>> accessed 27 March 2017

⁵⁷⁸ Lee Anne Bell, 'Theoretical Foundation of Social Justice Education' in Maurianne Adams and Lee Anne Bell (eds), *Teaching for Diversity and Social Justice* (2007) vol 2 p 1

⁵⁷⁹ Ibid

⁵⁸⁰ Ibid

⁵⁸¹ An Essay on Justice, <<http://www.thealmightyguru.com/Knowledge/Docs/Justice.html>> accessed 27 March 2017

⁵⁸² IM Young, *Justice and the Politics of Difference* (Princeton University Press 1990)

3.3 CONCEPTUAL FRAMEWORK: ENVIRONMENTAL JUSTICE

To show its relevance in this research, the researcher will give a brief history of EJ, explore its definitions, initial struggle in the US as well as its relationship with enforcement and human rights.

3.3i Initiated, Accepted and Fostered in the United States

The environmental justice concept started from the USA to tackle assumed inequities in the distribution of hazardous waste sites.⁵⁸³ It emerged in response to environmental and social inequities, threats to public health, unequal protection, differential enforcement and disparate treatment received by the poor and particularly people of colour.⁵⁸⁴ Its aim was to attack and eradicate the disparity by injecting equity considerations into environmental enforcement, compliance, policy formation, and decision-making.⁵⁸⁵ The first major struggle according to Szasz and Meuser was about the siting of a landfill containing soil contaminated with Polychlorinated Biphenyl (PCB) in a predominantly African American neighbourhood in Warren County, North Carolina, US, in 1978 and in 1982 resulting in several arrests.⁵⁸⁶ The protests led to an independent investigation and report by the US General Accounting Office and the United Church of Christ Commission for Racial Justice⁵⁸⁷ as the first national study to correlate waste facility sites with demographic characteristics. These civil rights movements eventually led to movement for EJ.

Before the Warren County, there was dumping of chemicals in the residential working-class enclaves over and around the abandoned Love Canal in Niagara Falls. Residents who were mostly lower income groups sought regulatory changes to remedy existing environmental pollution and prevent future hazards.⁵⁸⁸ There were further studies initiated to investigate general spatial relationships between lower income or ethnicity and environmental risk.⁵⁸⁹ The research found that patterns of disproportionate numbers of siting of such facilities in poor, African American or Hispanic areas.⁵⁹⁰ That research influenced the formation of activist networks across the US that

⁵⁸³ See, C Lee ‘Developing the Vision of Environmental Justice: A Paradigm for Achieving Healthy and Sustainable Communities’ (1995) 14 Virginia Environmental Law Journal 573

⁵⁸⁴ RD Bullard, 1994 (n 175) 11

⁵⁸⁵ Ibid, the relationship between EJ and enforcement will be discussed infra

⁵⁸⁶ Andrew Szasz and Michael Meuser, *Environmental Inequalities: Literature Review and Proposals for New Directions in Research and Theory* (1997) 45 (3) *Current Sociology* 99 <<http://csi.sagepub.com/content/45/3/99.P.99-102>> accessed 27 March 2017

⁵⁸⁷ *Toxic Waste and Race in the United States*, in 1987

⁵⁸⁸ The Love Canal story is intertwined with another parallel debate about environmental pollution concerned with the development of the CERCLA.

⁵⁸⁹ Robert Bullard, ‘Solid Waste Sites and the Black Houston Community’ (1983) 53 *Sociological Inquiry* 273 doi: 10.1111/j.1475-682X.1983.tb00037.x

⁵⁹⁰ W Bowen ‘An Analytical Review of Environmental Justice Research: What Do We Really Know?’ (2002) 29 (1) *Environ Manage* 3 and Gordon Mitchell and Danny Dorling, ‘An Environmental Justice Analysis of British Air Quality’ (2003) 35 (A) *Environment and Planning* 909 <http://www.sasi.group.shef.ac.uk/publications/2003/mitchell_and_dorling_air_quality.pdf> accessed 27 March 2017

campaigned for greater consideration of EJ within policymaking with Robert Bullard leading the way.⁵⁹¹

All these events eventually contributed to the signing an Executive Order in 1994 to address EJ issues.⁵⁹² The order requires that federal agencies address EJ as part of their overall mission, and identify and address disproportionately high adverse human health or environmental impacts of their policies, programmes, and activities on minority, low-income and tribal communities' populations in the US and its territories and possessions. The Executive Order also required the agencies to prepare a strategy for integrating EJ into all of their activities. Hence, the creation of an Inter-Agency Working Group on EJ headed by USEPA. It also demanded that those excluded historically from environmental decision-making, traditionally minority, low-income and tribal communities have the same access to environmental decision-makers, decision-making processes and the ability to make reasoned contributions to decision-making process as any other individuals.

Part of the Executive Order is to undertake EJ impact assessments, which are highly focused form of social impact assessment aiming to determine whether a proposed federal activity would affect low-income and minority populations largely than it would impact a community's general population.⁵⁹³ However, there was limited guidance about how to identify an 'environmental justice community' or what methodology to use to make '*a determination of the disproportionate impact to environmental justice communities.*'⁵⁹⁴ The need for EJ impact assessment was subsumed within existing provisions of the US National Environmental Policy Act (NEPA) of 1969. NEPA mandates making environmental impact assessments on FG projects, plans, programmes and policies before taking a decision on whether they should proceed. This shows the importance of public participation as citizens can express their views and agencies can engage with them in dialogue about risk.

Although the issuance of the Order brought legitimacy and attention to the EJ movement and its underlying principles directing agencies to adopt an EJ strategy and implement it, however, not every federal agency has fulfilled the mandates, after twenty-two years. There were also attempts to redefine its purpose by dropping race as a factor in identifying and prioritizing populations by USEPA in 2005. Nevertheless, the Lisa Jackson administration of USEPA in 2008 named EJ a top priority, leading to more awareness of EJ issues. To fortify EJ commitments, the Obama Administration

⁵⁹¹ For a detailed information on the role he played see RD Bullard, 'Race, Class, and the Politics of Place' in RD Bullard (ed), *Dumping in Dixie: Race, Class, and Environmental quality* (Westview Press 1990) and RD Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement* in Bullard RD (ed), *Confronting Environmental Racism: Voices from the Grassroots* (South End Press 1993)

⁵⁹² William J Clinton, *Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (February 11, 1994).

⁵⁹³ Ibid

⁵⁹⁴ Andrew Szasz and Michael Meuser (n 586)

signified commitment to EJ⁵⁹⁵ and issued a Presidential Proclamation during the 20th anniversary of the Order on February 11, 2014.⁵⁹⁶ In effect, there have been giant strides since 1994, but the struggle is continuous.

EJ advocates are concerned with the impact of institutional systemic flaws resulting in decisions, which establish unjust living conditions upon one group because of lack of organisation, power and prominence. They noted that EI is the outcome of an institutional oppression and isolation which have set up an inevitable framework of the powerful oppressing the powerless through a significant occurrence of historical and social realities, have been cut off from the power required even to challenge the causes of EI.⁵⁹⁷ Rasmussen⁵⁹⁸ discussed some of the factors leading to EJ. The first is the commoditization of land, water, energy and air resulting in securing and protecting them for the benefit of those in power. The second is the lack of resources and power in affected communities to protect their interests against those in the contest of authority and affluence. The third problem is unresponsive and unaccountable governmental policies and regulations because of the oppressive power structure and governmental availability to powerful corporations who exert power as an act of self-interest making it almost impossible for the victims to use governmental resources and power to advance their cause. Finally, a piecemeal approach to regulation, which allows loopholes and the consequent ongoing victimisation of low-income populations, poses a problem in combating EI and the implementation of EJ.⁵⁹⁹ As has been discussed in chapter one and two of this research, these factors and characteristics brought up by Rasmussen are evident in the Niger Delta. The LUA commoditized lands in Nigeria, MNOCs pay gas-flaring penalties to Nigeria, not NDs, the NDs are poor making it difficult to challenge the government, the power structure based on the Nigerian constitution is oppressive as NDs cannot have the majority to challenge the government and there has been piecemeal approach to regulation including the current PIGB.

However, Newell observed that EJ concerns are universalizing and operating at a global scale⁶⁰⁰ adopting discourses and strategies because movements around water, food or climate are increasingly adopting EJ language. Claims of EJ and EI are increasingly also deployed within transnational arenas dealing with the issues of trans-

⁵⁹⁵ Emily Yehle, 'EPA: Obama Climate Push Makes Environmental Justice A 'Mainstream' Issue – McCarthy' *E and E Reporter* (Greenwire, September 11 2013) <<http://www.eenews.net/stories/1059987076>> accessed 27 March 2017

⁵⁹⁶ Barack Obama, 'Presidential Proclamation: 20th Anniversary of Executive Order 12898 on Environmental Justice' (Office of the Press Secretary of the White House, February 10, 2014) <<https://www.whitehouse.gov/the-press-office/2014/02/10/presidential-proclamation-20th-anniversary-executive-order-12898-environ>> accessed 27 March 2017

⁵⁹⁷ Larry Rasmussen, 'Environmental Racism and Environmental Justice: Moral Theory in the Making?' (2004) 24 (1) *Journal of the Society of Christian Ethics* 11

⁵⁹⁸ Ibid

⁵⁹⁹ Ibid

⁶⁰⁰ P Newell, 'Environmental Justice Movements: Taking Stock, Moving Forward' (2006) *Environ. Polit.* 15 (4) 656

border trade and investment with consequences for local environmental struggles.⁶⁰¹ In addition, according to Newell,⁶⁰² all this transform the dynamics of inequality: reshaping or entrenching existing forms of inequality, and modifying the spaces available for the pursuit of justice. Against this background, the researcher discusses several definitions of EJ.

3.3ii Definition of Environmental Justice

The original definition of environmental justice emanated from the United States Environmental Protection Agency (USEPA). However, there are now many definitions from other jurisdictions, which the researcher will be exploring in this thesis. According to the USEPA

Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. EPA has this goal for all communities and persons across this Nation. It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.⁶⁰³

There are key elements in this USEPA definition of environmental justice. According to Bryant, the USEPA definition can generally be analysed from the classification of distributive, procedural, corrective, and social justice.⁶⁰⁴ Distributive justice is to enforce equal protection of the law or pollution prevention strategies to avoid disproportionate or inequitable pollution to any community. Procedural justice is to make rules and regulations transparent in order for communities to access the decision-making process and to provide opportunities for participation. Corrective justice is to use legislation, rules and regulations, or lawsuits to reward, compensate, or punish guilty parties for damages done. In addition, social justice attempts to bring about a more just and humane society as a whole. Noteworthy in the USEPA definition also are the elements or phrases '*fair treatment*' and '*meaningful involvement.*' The researcher will examine meaning of these elements in this context.

⁶⁰¹ T Sikor and P Newell, 'Globalizing Environmental Justice?' (2014) 54 *Geoforum* 151
<http://ac.els-cdn.com/S0016718514000888/1-s2.0-S0016718514000888-main.pdf?_tid=c25c68c8-9eb4-11e7-a671-00000aacb361&acdnat=1505988665_8674b710ffc2de2135e713e007dfd414> accessed 27 March 2017

⁶⁰² P Newell, '*Globalization and the Environment: Capitalism, Ecology and Power*' (Polity Press 2012)

⁶⁰³ USEPA, '*Environmental Justice*' (USEPA Publications)
<<http://www.epa.gov/compliance/environmentaljustice/>> accessed 27 March 2017

⁶⁰⁴ See B Bryant, *Environmental Law and Policy, Environmental Justice* (2012) <http://www.eoearth.org/article/Environmental_justice?topic=49477> accessed 27 March 2017

3.3iia Meaning of Fair Treatment

This relates to distributive justice and to substantive EJ. In this context, fairness is the ability to make judgments free from discrimination, bias, injustice or dishonesty or make judgments in conformity with rules or standards. Similarly, '*fair treatment*' here simply means that no population bears a disproportionate share of negative environmental consequences resulting from industrial, municipal and commercial operations, or from the execution of federal, state and local laws, regulations and policies.⁶⁰⁵ It may also have a positive meaning in terms of access to environmental goods.

3.3iib Meaning of Meaningful Involvement

On the other hand, '*meaningful involvement*', which is related to procedural justice, is giving the potentially affected community residents an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment. To USEPA it means that: all people have an opportunity to participate in decisions about activities that may affect their environment and/or health; the public contribution can influence the regulatory agency's decision; their concerns will be considered in the decision making process; and the decision makers seek out and facilitate the involvement of those potentially affected.⁶⁰⁶ And also in the US, National Environmental Justice Advisory Council (NEJAC) suggests that public involvement should include: encouraging public participation in all aspects of environmental decision making, encouraging active community participation, institutionalizing public participation, recognizing community knowledge and utilizing cross-cultural formats and exchanges.⁶⁰⁷

To be meaningfully involved, there should be tools to participate with subject matter knowledge. It generally requires effective access to decision-makers, the ability to make informed decisions and take positive actions to produce EJ for each other.⁶⁰⁸ There is also a need for access to information about a particular development or government process like policy or EIA to understand why and how to make decisions.⁶⁰⁹ The Commonwealth of Massachusetts also noted that the basis of EJ is

⁶⁰⁵ US Department of Energy, *What Is Environmental Justice* (Legacy Management Office Publications) <http://www.lm.doe.gov/Office_of_the_Director/Environmental_Justice/What_Is_Environmental_Justice.aspx> accessed 27 March 2017. See also C Nadal, 'Pursuing Substantive Environmental Justice: The Aarhus Convention as a Pillar of Empowerment' (2008) 10 Env L Rev 28, 36

⁶⁰⁶ USEPA, *Environmental Justice: Learn about Environmental Justice* (USEPA Publication) <<https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>> accessed 27 March 2017

⁶⁰⁷ See Tribal Environmental Regulatory Programs, '*Meaningful Involvement and Fair Treatment*' (NEJAC Report November 15, 2004) at 5 <<https://www.epa.gov/sites/production/files/2015-02/documents/ips-final-report.pdf>> accessed 27 March 2017

⁶⁰⁸ US Department of Energy (n 605)

⁶⁰⁹ E Arconi and G Mitchell, 'Environmental Justice in Australia: When the RATS became IRATE' (2005) 14(3) Environmental Politics 363

that all people have a right to be protected from environmental pollution and to live in and enjoy a clean and healthful environment. It noted that

Environmental justice is the equal protection and meaningful involvement of all people with respect to the development, implementation and enforcement of environmental laws, regulations and policies and the equitable distribution of environmental benefits.⁶¹⁰

This definition is similar to USEPA's definition; however, it clearly mapped out equitable distribution of environmental benefits in addition to enforcement of laws in the definition.

3.3iii Other Definitions of Environmental Justice

The USEPA's definition has been criticised by some. The Economic and Social Research Council (ESRC) for instance noted⁶¹¹ that EJ in USA has four fundamental flaws: first, it did not elaborate formal definitions of the victims of environmental injustices. Secondly, it localised EJ in geographical areas, not taking into account of injustices over larger areas and across the social spectrum. Thirdly, EJ is not in a global and inter-generational issue and fourthly US EJ is mostly tackling pollution from landfills and industrial sites, but that the human race should also take responsibility for ensuring the continued existence of the planet's biodiversity. Another criticism is that it did not deal with environmental goods. Some of these criticisms may be unfounded in the researcher's opinion. On elaboration of the victims, the researcher thinks that there is no need for fixed victims as USEPAs' definition gives room for flexibility. In addition, USEPA is a national agency therefore; it defined EJ to suit the country's need not from the global view, which is justified in the researcher's opinion. Again, it appears that the ESRC assumed the criticism on landfills and industrial sites because there nothing in USEPAs' definition expressly showing this.

There is now some broader definition of EJ to encompass a very wide range of interests, including inter-states distributions, distributions between gender, age, future generation rights and it is still developing though it has retained its fundamental meaning.⁶¹² Capek noted that the foundation of the EJ paradigm is toxic contamination issues unmasked environmental inequities in the US,⁶¹³ with time; Schlosberg noted that it has adopted an international dimension and focusing upon the interaction

⁶¹⁰ Commonwealth of Massachusetts, *Environmental Justice Policy of the Executive Office of Environmental Affairs* (Commonwealth of Massachusetts Environmental Justice Policy, 2002) < <http://www.mass.gov/eea/docs/eea/ej/ej-policy-english.pdf> > accessed 27 March 2017

⁶¹¹C Stephens, S Bullock and A Scott, *Environmental Justice: Rights and Means to a Healthy Environment for All* (ESRC/ERA Special Briefing No 7, November 2001) <http://www.foe.co.uk/resource/reports/environmental_justice.pdf> accessed 6 May 2017

⁶¹² See the United Church of Christ Commission for Racial Justice (n 48)

⁶¹³ SM Capek, 'The Environmental Justice Frame: A Conceptual Discussion and an Application' (1993) 40 SOC. PROBs 5

between EJ and the concerns of disenfranchised populations.⁶¹⁴ For Schlosberg, even where resistance is not couched in justice terms, ‘everyday’ struggles and mobilizations over environmental degradation and natural resource exploitation are often about the distribution of environmental bads and goods, participation in decision making and recognition of particular group identities and histories, which constitute the classic concerns of EJ.⁶¹⁵ In addition, Osofsky noted that the emphasis on equitable distribution of environmental harms has highlighted North-South tensions and effects upon developing countries and poor populations.⁶¹⁶ Walker and Bulkeley⁶¹⁷ noted that ‘*the terminology of environmental justice has now travelled beyond the US and the sites of grassroots activism within which it originated.*’ Its principles now feature at different scales of governance and in broader scope especially its distributive aspects in political, cultural and economic environments.⁶¹⁸ Not only that, Fraser noted that globalizing the phase of contemporary capitalism has reconfigured the geographies of EJ.⁶¹⁹ In addition, Sikor and Newell⁶²⁰ proposes global EJ as a lens to make sense of place-specific environmental struggles in their relation to the sorts of broader political economic processes which are often identified as intensifying or accelerating the production of EI. They noted that place-specific struggles suggest that the core issues at the heart of EJ struggles are universal. Sikor and Newell concluded that EJ might provide a powerful lens through which to make sense of struggles over environments and natural resources worldwide, providing a link between northern literature on EJ and research on southern environmentalisms and between the ‘environmentalism of the poor, liberation ecology and global political ecology.’⁶²¹ They proposes innovative thinking about how to make sense of EI issues as they are experienced by people all around the world.⁶²² Relating this to this research, it is noteworthy that the EI problem in ND is not just a Nigerian problem but goes to the heart of the global economic system. In fact, Bullard explained it thus, ‘*The reality is that no single definition of environmental justice exists.*’⁶²³ For the above stated reasons, the definitions now

⁶¹⁴ David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (OUP 2009)

⁶¹⁵ Ibid

⁶¹⁶ HM Osofsky, ‘Learning from Environmental Justice: A New Model for International Environmental Rights’ (2005) 24 STAN. ENVTL. L.J. 18; CG Gonzalez, ‘Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology’ (2007) 19 GEO. INT’L ENVTL. L. REV. 583 <<http://www.sciencedirect.com/science/article/pii/S0016718505001399>> accessed 27 March 2017

⁶¹⁷ Gordon Walker and Harriet Bulkeley, ‘Geographies of Environmental Justice’ (2006) 37 (5) Geoforum 655 <<http://www.sciencedirect.com/science/article/pii/S0016718505001399>> accessed 27 March 2017

⁶¹⁸ J Agyeman RD Bullard and B Evans (eds), *Just Sustainabilities: Development in an Unequal* (MIT Press 2003)

⁶¹⁹ N Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (Columbia University Press 2009) and see also Gordon Walker and Harriet Bulkeley (n 617)

⁶²⁰ T Sikor and P Newell (n 601)

⁶²¹ Ibid

⁶²² Ibid

⁶²³ RD Bullard, It’s not just Pollution <<http://www.ourplanet.com/imgversn/122/bullard.html>> accessed 27 March 2017

reflect the diversity in the socio-economic or political circumstances of the definer. For example, the Scottish definition is different contextually from that of South Africa, Nigeria and USEPA.

In Scotland, it is defined along two dimensions: That deprived communities, which may be more vulnerable to the pressures of poor environmental conditions, should not bear a disproportionate burden of negative environmental impacts and that all communities should have access to information and the means to participate in decisions which affect the quality of their local environment.⁶²⁴ The Scottish definition clarified meaningful involvement in USEPA's definition by adding ... "*access to information*". While the USEPA's definition takes cognizance of and emphasizes the different categories of ethnic and racial groups, the Scottish definition is more concerned with protecting 'deprived communities' because EJ in Scotland is more about poverty regardless of race. Poustie opined that USEPAs' definition and Scottish working definition are close to each other.⁶²⁵ To him, '*fair treatment*' to some extent equates to the '*distributive justice*' limb of the Scottish Executive/SNIFFER definition with '*meaningful involvement*' equating to '*procedural justice*'.⁶²⁶

In Australia, it focuses on public participation in decision-making before siting hazardous waste facilities around the poor.⁶²⁷ It is concerned with combating particular polluting industries in an area.⁶²⁸ Low and Gleeson discussed EJ in connection between relative poverty, health and environmental risk in Australia.⁶²⁹ Low and Gleeson's analysis shows the distribution of hazardous industries in Melbourne and the high correlation to socio-economic disadvantage and a high proportion of the excluded groups are indigenous aborigines who are more likely to suffer from health problems caused by environmental problems because of location of their homes to hazardous industrial development.⁶³⁰

In the African context, Obiora considers access to resources, restoration of nature and uneven allocation of risk to be fundamental to EJ.⁶³¹ She defines EJ as

⁶²⁴The Scottish Government, *Public Attitudes and Environmental Justice in Scotland* (The Scottish Government Publications) <<http://www.gov.scot/Publications/2005/10/2791230/12314>> accessed 1 February, 2016

⁶²⁵ Mark Poustie, *Environmental Justice in SEPA's Environmental Protection Activities* (Scottish Environment Protection Agency Report, 2004) <<http://strathprints.strath.ac.uk/1047/1/strathprints001047.pdf>> accessed 27 March 2017

⁶²⁶ Ibid

⁶²⁷ E Arconi and G Mitchell (n 609)

⁶²⁸ In Australia, the case study of a dispute between residents, industry and government in the town of Port Kembla provides an example of how EJ can be given specific meaning in a local context.

⁶²⁹ N Low and B Gleeson, 'One Earth: Social and Environmental Justice' (1999) (2) TELA: Social and Environmental Justice 1

⁶³⁰ Ibid

⁶³¹ W Beinart and J McGregor (eds) *Social History and African Environments* (James Currey 2003) 2

The equitable distribution of environmental amenities, the rectification and retribution of environmental abuses, the restoration of nature, and the fair exchange of resources....⁶³²

Obiora's definition is to the researcher restrictive as it mainly relates to the distributive aspect of EJ. From same African context, McDonald defines it thus

Environmental justice is about social transformation directed towards meeting basic human needs and enhancing our quality of life-economic quality, healthcare, housing, human rights, environmental protection and democracy.... the environmental justice approach seeks to challenge the abuse of power which results in poor people having to suffer the effects of environmental damage caused by the greed of others.⁶³³

South Africa has uniquely included EJ principles in the Constitution⁶³⁴ in and within the negotiations and documentation of multilateral environmental agreements, principles of equity and justice.⁶³⁵ There is need to examine these principles to determine their effectiveness;⁶³⁶ however, its inclusion is particularly important in the researcher's opinion especially as South Africa is a developing country like Nigeria.⁶³⁷

⁶³² Amede Obiora, 'Symbolic Episodes in the Quest for Environmental Justice' (1991) 21(2) Human Rights Quarterly 464, 466
<http://muse.jhu.edu/journals/human_rights_quarterly/v021/21.2obiora.html#REF45> accessed 27 March 2017

⁶³³ David A McDonald, *Environmental Justice in South Africa* (Ohio University Press 2002) 4

⁶³⁴ Sections 24, 26 and 27 of 1996 Constitution concentrated on 'health or well-being' and significantly, included protection for present and future generations through reasonable legislative and other measures that prevent pollution and ecological degradation. It also includes right to housing, health, sufficient water and food. <<http://www.gov.za/DOCUMENTS/CONSTITUTION/CONSTITUTION-REPUBLIC-SOUTH-AFRICA-1996-1>> accessed 27 March 2017. EJ concept was imported to South Africa at the Earthlife Africa conference where the Environmental Justice Network Forum (EJNF) was established. South Africa also introduced the principles of citizen suits in section 32 (1) of National Environmental Management Act in 1996.

⁶³⁵ C Okereke, 'Global Environmental Sustainability: Intragenerational Equity and Conceptions of Justice in Multilateral Environmental Regimes' (2006) 37(5) *Geoforum* 725
<<http://www.sciencedirect.com/science/article/pii/S0016718506000066>> accessed 23 December 2015

⁶³⁶ This is outside the focus of this research

⁶³⁷ The inclusion of EJ principles has positively impacted on South African jurisprudence. For instance before the inclusion, South African courts for instance adopted a restrictive standing in PIL. For further discussion, see LJ Kotze, 'Judicial Intervention in Constitutional Environmental Governance – How is South Africa Doing?' (2007) 7 *Cadernos da Escola de Direito e Relacoes Internacionais da UniBrazil* 379; T Ngcukaitobi, 'The Evolution of Standing Rules in South Africa and their Significance in Promoting Social Justice' (2002) 18 *South African Journal of Human Rights* 590 and Tumai Murombo, 'Strengthening Locus Standi in Public Interest Environmental Litigation: Has Leadership Moved From the United States to South Africa?' (2002) 6/2 *Law, Environment and Development Journal* 163 and Michael Kidd, *Environmental law*, (2nd edn, Juta, 2011)

To Bryant, the USEPA definition of EJ addresses short-term problems except in terms of social justice, and is therefore not a solution.⁶³⁸ He defines EJ thus:

Environmental Justice refers to those cultural norms and values, rules, regulations, behaviors, policies, and decisions to support sustainable communities where people can interact with confidence that the environment is safe, nurturing, and productive.... served when people can realize their highest potential...where both cultural and biological diversity are respected and highly revered and where distributed justice prevails.⁶³⁹

This is indeed more encompassing. It deals with short-term and long-term policies with an idea of what an environmentally just community would look like in future.

Dunion's definition is from the point of view of injustice. He noted that environmental injustice exists where '*authorities fail to afford or uphold rights; where people are unable to participate in the decision-making processes which affect them and where the means of redress are inaccessible*'.⁶⁴⁰ To Schlosberg the principle of procedure is central to EJ because that is a way to achieve equity and recognition of the society.⁶⁴¹ He cited some examples where procedural justice was used which includes Love Canal representation in 1982. The procedural element necessitates access to the law to resolve environmental problems, uphold environmental laws and provide an opportunity for people to have a voice in relation to their environment according to Stookes.⁶⁴² Dunion's definition in the researcher's opinion combines both sustainable development and EJ. Also flowing from Dunion's premise, Adeola defines EI as '*any undue imposition of environmental burdens on innocent bystanders or communities not parties to the activities generating such burdens*'.⁶⁴³

As highlighted earlier, the definitions cuts across low income group and Indian tribes in the US,⁶⁴⁴ connection between relative poverty and environmental risk in Australia,⁶⁴⁵ deprived communities and in Scotland⁶⁴⁶ and in Africa, protection for the benefit of present and future generations through reasonable legislative and other measures that prevent pollution. Sikor and Newell,⁶⁴⁷ and Fraser,⁶⁴⁸ see EJ from the global view where many of the burdens are being felt most severely by the less

⁶³⁸ B Bryant, (ed), *Environmental Justice: Issues, Problems, and Solutions* (Island Press 1995)

⁶³⁹ Ibid

⁶⁴⁰ K Dunion, *Troublemakers: The struggle for Environmental Justice in Scotland* (Edinburgh University Press, May 2003) 11

⁶⁴¹ D Schlosberg, *Environmental Justice and the New Pluralism* (OUP 1999) 13

⁶⁴² P Stookes, *Civil law aspects of Environmental Justice* (Environmental Law Foundation 2003) para 7

⁶⁴³ Francis O Adeola, (n 78) 688

⁶⁴⁴ USEPA definition (n 603)

⁶⁴⁵ Low and Gleeson (n 629)

⁶⁴⁶ The Scottish Government (n 624)

⁶⁴⁷ T Sikor and P Newell (n 601)

⁶⁴⁸ N Fraser 2009 (n 619)

economically advantaged/poorest people globally and Walker and Bulkeley⁶⁴⁹ suggest that the core issues at the heart of EJ struggles are universal. Going by all the definitions above and views which cut across many continents of the globe, the researcher concludes that there is no one definition of EJ, but there are shared principles which is based on equity and fairness, which capture the core essence of environmental justice. The bases of the common principles are the procedural and distributive aspects whether present or future or distributing hazards or benefits. For this reason, the researcher will have a brief discussion on procedural and distributive environmental justice.

3.3iv Procedural Environmental Justice

The Environmental Justice Project describes procedural EJ as, *‘the ability for concerned citizens and public interest groups to: access the courts and judicial advice at reasonable cost; be provided with a fair and equitable platform for the treatment of environmental issues and; obtain adequate and effective remedies for environmental offences.’*⁶⁵⁰ This description is restrictive because it focuses on access to justice and not the fundamentals of access to information and public participation, but it captures the essence of this thesis. Meaningful involvement should include information and participatory rights.⁶⁵¹ To this researcher it is a means to an end, as it contributes to making substantive environmental justice a reality. Giving the opportunity to everyone to participate in environmental decision-making means giving them opportunity to defend their substantive environmental rights, making it more difficult to impose unjust environmental burdens through a just procedure than it is through an unjust procedure. Much of EJ literature focuses on substantive EJ and however, in recent times, especially in Europe, there has been shift from the substantive rights to procedural rights, which include access to information, participation and access to justice.⁶⁵² This research focus is also to contributing to filling the gap because procedural EJ is a means of achieving substantive EJ. Looking at the procedural aspect of EJ, FOE observed that research indicates that the procedures and processes needed to tackle negative environmental impacts are neither fully developed nor accessible on an equal basis to different social groups.⁶⁵³ Therefore, that may have caused or exacerbated many EI in the processes of policy design, land-use planning, science and

⁶⁴⁹ Gordon Walker and Harriet Bulkeley (n 617)

⁶⁵⁰ P Castle and others, ‘Environmental Justice Project’ (Environmental Law Foundation and Others Publication, 2004) 23 <<http://www.ukela.org/content/doclib/116.pdf>> accessed 27 September 2017

⁶⁵¹ For discussion on access to information and participatory rights see Etemire (n 166)

⁶⁵² See the works of Adrienne Heritier, ‘Composite Democracy in Europe: the Role of Transparency and Access to Information’ (2003) 10 (3) Journal of European Public Policy 814 DOI: 10.1080/1350176032000124104 and Steve Carver, ‘The Future of Participatory Approaches Using Geographic Information: Developing a Research Agenda for the 21st Century’ in SJ Ventura and others URISA Journal’ (2003) 15 URISA Journal 61 <<http://www.urisa.org/clientuploads/directory/Documents/Journal/vol15apa1.pdf>> accessed 27 March 2017

⁶⁵³ C Stephens, S Bullock and A Scott (n 611)

law;⁶⁵⁴ however, Aarhus Convention made considerable improvements with focus on three tiers of access to information, participation and access to justice.⁶⁵⁵

3.3v Distributive Environmental Justice

Distributive environmental justice is an offshoot of distributive justice discussed above and in EJ scenario; it is ensuring that environmental benefits and burdens are fairly distributed. Bell argues for the distributive justice principle to extend to address distributive EJ concerns based on the link between environmental pollution and health degradation.⁶⁵⁶ To Rawls, primary goods should include health⁶⁵⁷ and to Bell environmental goods are primary goods since exposure to pollution is closely linked to respiratory diseases and carcinogenic illnesses.⁶⁵⁸ Cory and Rahman⁶⁵⁹ in their book summed this principle,⁶⁶⁰ and argued that for institutional framework to create decision making to achieve substantive EJ for facility siting and permit approval, decision making should recognize the rights of host communities to be free from additional environmental risk posed by the applicant facility. Like in the standard distributive justice, some key questions arise here: Who are the recipients of environmental justice? What is distributed? What is the appropriate principle of distribution?

The recipients of EJ are those who have environmental rights and everyone is entitled to environmental rights or those who matter when we think about the distribution of environmental benefits and burdens. Because of the multi-faceted definition of EJ in recent times, this question has a number of possible answers ranging from only current citizens of a state or a single locality in a state to all current and future generations of living beings. A longer history of research showing a correlation between low-income groups, race and colour with pollution exist in the US and globally, many of the burdens are being felt most severely by the less economically/poorest people in the world.

What is distributed? Going by the USEPA's definition, what are distributed should be environmental hazards, toxics, pollution and other environmental burdens. From the emerging definitions, it is no longer about environmental burden, but also environmental benefits, not just basic goods like clean air, water, uncontaminated land but on a more general idea of environmental quality, from '*equal opportunity to be polluted*' to '*no one should be forced to suffer from the adverse effects of environmental hazards*'. In the context of this research, it is important to bring in place-specific struggles over natural resources and environmental mobilizations as it

⁶⁵⁴ Ibid

⁶⁵⁵ The 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters: Articles 4-9. See also the Bali Guidelines

⁶⁵⁶ D Bell, 'Environmental Justice and Rawls' Difference Principle' (2004) 26 Environmental Ethics 287

⁶⁵⁷ J Rawls, *Justice as fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001) 172

⁶⁵⁸ D Bell 2004 (n 656)

⁶⁵⁹ Dennis C Cory and Tauhidur Rahman, *Environmental Justice and Federalism* (Edward Elgar 2012)

⁶⁶⁰ What he calls three deontological principles of EJ

provides communities and environmental activists avenue to resist dispossession from customary land, opposition to polluting industries and struggles for a fair distribution of natural resource revenues even where not couched in EJ terms. This is because struggle against environmental degradation and natural resource exploitation are mostly about the distribution of environmental bads and goods and participation in decision making which constitute the common concerns of EJ.⁶⁶¹ There is now a paradigm shift is from '*bads*', such as pollution, to '*basic goods*' such as clean air and potable water and environmental goods like parks, forests, recreation activities and many more and from equal burdens to equal rights to the basic environmental goods necessary for health.

What is the appropriate principle of distribution? Three principles of distribution are likely to fall in place while discussing EJ. They are equality; guaranteed standard of life; and a guaranteed minimum with variation above that minimum according to personal income and spending choices. The distribution principle is that everyone has a right to a certain minimum standard but beyond that standard, there is room for variation.

3.3vi Environmental Justice and Human Rights

Because EJ issues are embedded on fair and equitable principles, which also relate to typical human rights issues, it is important for the researcher to establish the relationship between human rights, environmental rights and ultimately EJ. It is also important because human rights laws are used in the context of enforcement as a way of addressing environmental injustice especially in the context of some decided cases in Nigeria and elsewhere; however the research is not primarily on human rights.

Right is 'a power, privilege or immunity guaranteed under a constitution, statutes or decisional laws or claimed as a respect of long usage'.⁶⁶² Human rights are rights possessed by people simply as human beings and because they are human beings. They are rights inherent to all human beings of whatever nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. The English Bill of Rights first introduced it in 1688, US Declaration of Independence in 1776 adopted it, and their Constitution adopted it in 1787. The 1793 French Republican Constitution adopted following the revolution of 1789. All this led to the foundation leading to the first widely recognised human right instrument: The UN Declaration on Human Rights 1948 that has been the model for numerous international human rights conventions, declarations, and resolutions.⁶⁶³

⁶⁶¹ David Schlosberg, *Reconceiving Environmental Justice: Global Movements and Political Theories* (2004) 13 (3) *Environ. Polit.* 517 and D Schlosberg 2009 (n 614)

⁶⁶² Black Law Dictionary (6th Edition)

⁶⁶³ See the list of the documents *infra*

The core principles of human rights are universality and inalienability,⁶⁶⁴ interrelated, interdependent and indivisible, equality and non-discriminatory treatment across a non-exhaustive list. There are connections between human rights and environment in many ways. Confirming the relationship between human rights, environmental protection and EJ, Klaus Toepfer noted

Human rights cannot be secured in a degraded or polluted environment. Environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture. It is time to recognize that those who pollute and destroy the natural environment are ... violating human rights as well⁶⁶⁵

In addition, Judge Weeramantry of the International Court of Justice in 1997 said

The protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life 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 human rights instruments⁶⁶⁶

The most 'universal' and fundamental rights are right to life; right to freedom; right to own property with limitation; citizenship rights; rights to standards of good behaviour by governments or protection of the rule of law and social, economic and cultural rights⁶⁶⁷ with right to life being adjudged the most fundamental of them.⁶⁶⁸ Principle 1 of the Stockholm Declaration established a foundation linking human rights, health and environmental protection to life when it stated 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 well-being.*'⁶⁶⁹ With Resolution 45/94, the UN General Assembly followed suit when it stated that all individuals are entitled to live in an environment adequate for their health and well-being.⁶⁷⁰

Flowing from this, the courts in a number of jurisdictions have interpreted the right to life to mean more than mere physical existence and to include human dignity and all

⁶⁶⁴ The inalienability of human rights is though subject to certain specific situations and according to due process.

⁶⁶⁵ Executive Director, UNEP, statement to the 57th Session of the Commission on Human Rights in 2001

⁶⁶⁶ Stephen Clark and others, 'Human Rights and the Environment, (Background paper Prepared for the Consideration of the Advisory Council of Jurists APF 12 on the 12th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions Sydney, Australia, 24-27 September 2007) <http://www.mcmillan.ca/Files/SOCarroll_HumanRightsandtheEnvironment.pdf> accessed 27 March 2017

⁶⁶⁷ Though many developed states do not recognise social, economic and cultural rights as such

⁶⁶⁸ See the Universal Declaration on Human Rights in 1948, Articles 3 and 25

⁶⁶⁹ Stockholm Declaration of the UN Conference on the Human Environment, 16 June 1972. It is however clear that it is not accepted as an international human right.

⁶⁷⁰ UNGA Res 45/94 (14 December 1990) UN Doc A/RES/45/94

that goes along with it.⁶⁷¹ Some courts also interpreted it to include the rights to health,⁶⁷² and unpolluted environment.⁶⁷³ It is interesting that as far back as 1970, this right was already recognised. In *Environmental Defense Fund Inc. v Hoerner Waldorf Corp*,⁶⁷⁴ Judge Murray said

I have no difficulty in finding that the right to life... is constitutionally protected.... and surely a person's health is what, in a most significant degree, sustains life. So it seems to me that each of us is constitutionally protected in our natural and personal state of life and health.⁶⁷⁵

In *Yanomami v Brazil*,⁶⁷⁶ the Inter-American Commission established a link between environmental quality and the right to life. In that case, the government constructed a highway through Yanomani territory, authorised exploitation of its resources leading to the influx of non-indigenous people that brought contagious diseases, which remained untreated due to lack of medical care. The court found violation of Yanomani rights to life, liberty, personal security and the right to the preservation of health and well-being. In *Shela Zia and Others v WAPDA*,⁶⁷⁷ the Supreme Court of Pakistan held that the right to a clean environment is a fundamental right of all citizens covered by the right to life and the right to dignity in Articles 6 and 14 of the Constitution of the 1973. In a procedural environmental rights case of *Zander v Sweden*,⁶⁷⁸ persons who had been denied a remedy for threatened environmental harm resulting from contamination of their well water by cyanide from a neighbouring dump site, successfully challenged the company and got expanded permit for provision of free drinking water if pollution occurred. In *Oneryildiz v Turkey*,⁶⁷⁹ a decomposed rubbish tip exploded and killed many including nine of the applicants' relatives in a slum quarter of Istanbul. The report was that the authorities failed to take measures to

⁶⁷¹ See Justice Bhagwati in the Indian case of *Francis Coralie v Union Territory of Delhi*, AIR (1981) SC 746, 753; *Environmental Defense Fund Inc. v Hoerner Waldorf Corp* 3 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,794 (D. Mont. 1970); *Yanomami v Brazil* 7615 (Brazil), INTER-AM.CH.R., 1984-1985 and many more

⁶⁷² *Parmanand Kataria v Union of India* AIR (1989) SC 2039; *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) 4 SCC 37

⁶⁷³ Health and human Right 'Health and Environmental Protection: Linkages in Law and Practice' (2002) Health and human Right Working Paper Series No.1

<http://www.ifc.org/wps/wcm/connect/6ab71c8048a7e7b3accfef6060ad5911/Focus_ENFCorpGov3.pdf?MOD=AJPERES> accessed 18 November 2016

⁶⁷⁴ 3 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,794 (D. Mont. 1970)

⁶⁷⁵ Ibid, 4

⁶⁷⁶ Case 7615 (Brazil), INTER-AM.CH.R., 1984-1985 *Annual Report* 24, OEA/Ser.L/V/II.66, doc. 10, (1985) for further discussion, see Dinah Shelton, 'Human Rights and the Environment: Jurisprudence of Human Rights Bodies' (Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment 14-16 January 2002 Geneva Background Paper No. 2 Human Rights and the Environment: Jurisprudence of Human Rights Bodies) <http://www.ohchr.org/Documents/Issues/Environment/BP2_TBjurisprudence.pdf> accessed 27 March 2017

⁶⁷⁷ PLD 1994 SC 693

⁶⁷⁸ ECHR (1993), Series A, No. 279B

⁶⁷⁹ (application no. 48939/99) 30 November 2004

prevent an explosion in circumstances where they were aware of the risk of life. The applicants sued that there had been a violation of Articles 2,⁶⁸⁰ 13,⁶⁸¹ 6⁶⁸² and 8 of the Convention.⁶⁸³ The ECtHR held that there had been a violation of Articles 2, 1 and 13 of the Convention. The court noted that the Turkish authorities knew that there was a real risk to persons living near the rubbish, however did not protect them. In addition, there was violation of Article 13 because the compensations to the applicant were not suitable and timely.

Right to life also includes right to livelihood,⁶⁸⁴ free and compulsory education up to the age of 14,⁶⁸⁵ shelter,⁶⁸⁶ clean drinking water,⁶⁸⁷ privacy,⁶⁸⁸ speedy trial,⁶⁸⁹ and other dimensions. Furthermore, some treaties have recognized a right to a healthy environment as a distinct human right.⁶⁹⁰ Other human rights documents linking healthy environment include universal declaration of human rights,⁶⁹¹ International Covenant on Economic, Social and Cultural Rights,⁶⁹² the Convention on the Elimination of All Forms of Discrimination against Women,⁶⁹³ Convention on the Elimination of All Forms of Racial Discrimination,⁶⁹⁴ and the Convention on the Rights of the Child.⁶⁹⁵ In addition, many constitutions across the globe guarantee a right to a clean and healthy environment.⁶⁹⁶ In Argentina, there was recognition of the right to live in a healthy and balanced environment as fundamental attribute of people

⁶⁸⁰ Right to life

⁶⁸¹ Right to an effective remedy

⁶⁸² Right to a fair hearing within a reasonable time

⁶⁸³ Right to respect for private and family life

⁶⁸⁴ *Olga Tellis v Bombay Municipal Corporation* AIR (1986) SC 180; *DTC Corporation v DTC Mazdoor Congress* AIR (1991) SC 101

⁶⁸⁵ *Unni Krishnan v State of AP* (1993) 1 SCC 645

⁶⁸⁶ *Gauri Shankar v Union of India* (1994) 6 SCC 349

⁶⁸⁷ See *Zander v Sweden* (n 678); BBC News, 'Ogoniland Oil Spills: Shell Admits Nigeria Liability' BBC News (London, 03 August 2011) < <http://www.bbc.co.uk/news/world-africa-14391015> > accessed 05 August 2013

⁶⁸⁸ *Yanomami v Brazil* 7615 (Brazil), INTER-AM.CH.R., 1984-1985

⁶⁸⁹ *Hussainara Khatoon (I) to (VI) v Home Secretary, Bihar* (1980) 1 SCC 81, 91, 93, 98, 108 and 115; *Kadra Pahadiya v State of Bihar* AIR (1982) SC 1167; *Common Cause v Union of India* (1996) 4 SCC 33; *Rajdeo Sharma v State of Bihar* (1998) 7 SCC 507

⁶⁹⁰ Art. 24 of the African Charter and Art. 11 of the San Salvador Protocol to the American Convention on Human Rights

⁶⁹¹ See Art. 25

⁶⁹² See Articles 1, 11, 12, 13

⁶⁹³ See specifically Articles 11 and 14

⁶⁹⁴ See Articles 2 and 5

⁶⁹⁵ See Art. 24; see also Art. 27 on child's physical, mental, spiritual, moral and social development

⁶⁹⁶ Examples include Angola's Constitution of 2010: section 39, Argentina: section 41, Colombia Constitution of 2005: Art. 79, Ghana Constitution of 1992: Art. 36(9), South Africa Constitution of 1996: section 24, Slovenia: Art. 72, South Korea: Art. 35, Spain: Art. 45 of the 1978 Constitution, Uganda: Art. 39 and many others.

and any damage to the environment ends up becoming a threat to life itself and to the psychological and physical integrity of the person.⁶⁹⁷

Some European courts and Latin America enforced right to healthy environment in favour of some politically weak and marginalised communities.⁶⁹⁸ It had also led to a comprehensive court-ordered clean up and restoration in Argentina leading to improved living conditions for millions of economically marginalized people.⁶⁹⁹ In that case, a group of residents filed a suit before the Supreme Court of Argentina against the national government, the Province of Buenos Aires, the City of Buenos Aires and forty-four companies seeking compensation for damages resulting from pollution of the basin, stoppage of contaminating activities, and a remedy for collective environmental damage. The Court issued a decision requiring the government to take measures to improve the residents' quality of life, remedy the environmental damage and prevent future damage.

In summary, environmental justice and fundamental human rights are inter-related, as most of human rights issues highlighted here are also EJ issues. This is why the interpretation of fundamental human rights above includes right to health, clean environment and unpolluted environment, human dignity, speedy trial and many others.⁷⁰⁰ It is obvious that when any of these elements are lacking especially in some part of the community, there is EI.

3.3vii EJ Struggles and Initial Challenges in the US

It is surprising that despite all the efforts made in the eighties to create awareness about EJ, its implementation in the USA was not very successful. Class actions brought against public authorities in particular because of unjust planning decisions mostly failed. Even where there was evidence of discrimination, they could not prove intentional discrimination leading to failure of most cases.⁷⁰¹ Most cases relied on

⁶⁹⁷ *Irazu Margarita v Copetro S.A. Camara Civil y Comercial de la Plata*, Ruling of 10 May 1993. See also Indian case of *Charan Lal Sahu v Union of India*, AIR 1990 SC 1480 (1991) and in *Subhash Kumar v State of Bihar*, AIR 1991 SC 420, 1991 (1) SCC 598, where the Court observed that the right to life includes the right of enjoyment of pollution-free water and air.

⁶⁹⁸ See *Tatar and Tatar v Romania* (2009) no. 67021/01, 27/01/09 (ECHR), *Fadeyeva v Russia* (2005) No. 55723/00, 9/07/05 and *Okay and others v Turkey* (2005) No. 36220/97, 12/07/05 (ECHR). See also the Peruvian case of *Pablo Miguel Fabián Martínez and others v Minister of Health and DG of Environmental Health* (2006) Second Chamber of the Constitutional Court, Exp. No. 2002-2006-PC/TC and the Chilean case of 'Defensa de los Derechos Humanos: Caso contaminación en Arica,' Fiscalía del Medio Ambiente, 2012

⁶⁹⁹ *Beatriz Silvia Mendoza v National Government and Others* (2008) M. 1569, 8 July 2008 (Supreme Court)

⁷⁰⁰ Their relationship is also clear in view of the 17 Principles of EJ. See United Church of Christ Commission (n 48)

⁷⁰¹ D Taylor, 'Mobilizing for Environmental Justice in Communities of Color: An Emerging Profile of People of Color Environmental Groups' in Aley J Burch W Conover B (eds) *Field Ecosystem Management: Adaptive Strategies for Natural Resource Organisations in the 21st Century* (Taylor and Francis 1999) 33

Equal Protection Clause of the Fourteenth Amendment, which to the courts, required proof of intentional discrimination resulting in greater environmental risks in minority neighbourhoods. Of importance is that the USEPA Regulations prohibit grant recipients from engaging in activities that have a *discriminatory effect*, regardless of intent.⁷⁰² The EJ litigants also explored the option of suing under Title VI of the Civil Rights Act of 1964 without success.⁷⁰³ The US Supreme Court in *Alexander v Sandoval*⁷⁰⁴ held that there was no private right of action for ‘a failure to comply with regulations promulgated under section 602 that is not also a failure to comply with section 601’ and its intentional discrimination standard. In *Environmental Defense Fund Inc. v Hoerner Waldorf Corp.*,⁷⁰⁵ a class action suit for injunction also failed as the court found that there were no allegations of the government action that could lead to a violation of the plaintiffs' rights. However, where there is prove of intentional discrimination, Title VI of the Civil Rights Act 1964 is useable to challenge siting decisions ‘on the ground of race, color [sic], or national origin’.⁷⁰⁶ Bowen's ⁷⁰⁷ review of these failures showed that the cause of failure was to some extent by poor empirical foundations of EJ analyses.

Despite the problems, EJ is now an important part of policy assessment in the USA and many other states in the developed world,⁷⁰⁸ and has spread around the world in less than three decades. The notion is now very broad and wide especially as it relates to communities that suffer from inequity attributed to environmental inequalities. This is evident from several definitions ascribed to EJ and in recent times the global EJ propositions by Newell and others. It strongly advocates addressing historical and current injustices in environmental settings and provides another framework for communities to pursue their current and future environmental rights in addition to avenues such as pursuit of minority or human rights. EJ is now an important part of policy assessment in the USA, but the question is what has the Executive Order changed?

3.3viia What Has Changed with the Executive Order on EJ?

In general, EJ can mean two things: ensuring that everyone has an equal right to a clean and healthy environment regardless of means, where they live or background. It can also mean being able to secure fair and equitable access to the law/judicial remedies and a chance for all people to have ‘*meaningful involvement*’ in accessing information, participating in decision-making and resolving environmental issues. Its achievement is when we invite the full and fair participation of all potentially affected

⁷⁰² EPA's Title VI Regulations are codified at 40 C.F.R. pt. 7 (2001). For more discussion see R Bullard 1990 (n 591) and RD Bullard (ed.) (1993) (n 591)

⁷⁰³ See *Alexander v Sandoval* 532 U.S. 275, 276 (2001)

⁷⁰⁴ Ibid

⁷⁰⁵ 3 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,794 (D. Mont. 1970)

⁷⁰⁶ Section 601 of Title VI

⁷⁰⁷ W Bowen (n 590)

⁷⁰⁸ UK, Canada Australia and even developing South Africa

stakeholders; minimize unfair negative impacts caused by projects; and fairly distribute the positive and negative impacts of projects and policy decisions. Conversely, where a community suffers unreasonably or disproportionately from environmental harm, injustice will occur. Also, where the distribution of the ‘*social value*’ that the environmental hazard represents has a disproportionate impact and does not benefit the less well off, it will be an injustice.⁷⁰⁹

Despite significant improvements over the years, not only do many people continue to live in unsafe and unhealthy environments, minority/racial/under-privileged communities still bear a disproportionately burden of environmental hazards and are disproportionately denied environmental benefits.⁷¹⁰ Coyne noted that her visit to New Orleans in the spring of 2008 showed Oakville neighborhood where small African-American community, comprised of mostly lower-income families living in trailer homes, is located less than thirty feet away from the industrial pipe landfill showing environmental inequality.⁷¹¹

The question is why is there continued existence of EI even in the US, despite all efforts to curb it.⁷¹² FOE identified some of the reasons for this continued existence. These reasons include a failure of governments and the law to protect people from harm, tendency of certain parts of the private sector to seek to maximise profits by externalising costs, lack of explicit discussion of the distributional impacts of policy actions, inadequacies in the tools and procedures for implementing EJ and inequalities in access to these tools and procedures.⁷¹³ To deal with these policies, regulation and action problems and to address EI, Capacity Global⁷¹⁴ observed that there should be understanding of the demographics of vulnerability of people. These demographics are place and location, health and mobility: type and frequency in discussing EJ. Niger Delta meet with all these demographics: the location is mainly mangrove area, which the Niger Deltans are dependent on, and is already susceptible to pollution, it is a remote area and the pollution affects their health, therefore the demographics are important.

⁷⁰⁹ Rawls 1999 (n 534)

⁷¹⁰ US President’s Taskforce on Environmental Health Risks and Safety Risks to Children, *Eliminating Childhood Lead Poisoning: A Federal Strategy Targeting Lead Paint Hazards 2* (2000) shows that blacks in the USA have a significantly higher prevalence of asthma than the general population, and are more likely to have unsafe levels of lead in their blood.

⁷¹¹ Shannon Coyne, *Example of Oakville, Louisiana: Opportunity and Inequality* <<http://scoyne.weebly.com/environmental-justice.html>> accessed 27 March 2017. This is similar to the minority low income Niger Deltans in Nigeria

⁷¹² The reasons for the failings of EJ in the US is discussed in chapter five under enforcement and EJ in the US

⁷¹³ C Stephens, S Bullock and A Scott (n 611)

⁷¹⁴ Maria Adebawale, *Which People are Most Vulnerable to Climate Change?* (Capacity Global Publications, December 2009) <<http://www.tcpa.org.uk/data/files/macclimatechangeandvulnerability.pdf>> accessed 27 March 2017

Studying EJ involved the examination of hierarchies of power inherent in a given socio-cultural context and the manner in which those hierarchies tolerate or otherwise propagate EI against any number of disadvantaged people or groups. Going by the discussion so far, the researcher identifies many instances of EI in the Niger Delta. The Niger Deltans are disadvantaged minorities that suffer disproportionately from environmental risks and hazards caused by oil and gas exploration.⁷¹⁵ They do not have access to environmental benefits and natural resources and they suffer from violations of environmental human rights.⁷¹⁶ In addition, access to information, and/or participation in decision-making, and access to justice in environment-related matters is problematic and with weak enforcement of the laws, EI is obvious. Further discussion on these points will be in the subsequent chapters of this research. Having discussed EJ issues, the next section will be on the conceptual framework of enforcement because EJ and enforcement are the basis of this research.

3.4 CONCEPTUAL FRAMEWORK: ENFORCEMENT

Better regulatory enforcement facilitates EJ and as can be seen in the original definition of EJ by USEPA above; enforcement of laws is at the core of EJ definition. First, enforcement of environment laws facilitates access to justice, which is part of the procedural aspect of EJ and successful EJ involves achieving both substantive and procedural EJ. Enforcement also inter-twines compliance because better compliance leads to less enforcement actions and non-compliance leads to a more serious enforcement and for this, the researcher discusses them together in the next subsection.

3.4i Compliance and Enforcement

Using enforcement to achieve EJ entails making good laws, complying with the laws and enforcing the laws where there is non-compliance. In its simplest sense, compliance means conformity with mandated or required standards. In environmental regulation, there are many definitions of compliance by many ranging from UNEP,⁷¹⁷ to USEPA,⁷¹⁸ to scholars such as Ogbodo,⁷¹⁹ Wasserman,⁷²⁰ Aalders,⁷²¹ Hutter,⁷²²

⁷¹⁵ The researcher discussed this in chapter one.

⁷¹⁶ KK Aaron 2006 (n 275)

⁷¹⁷See *UNEP, Negotiating and Implementing MEAs: A Manual for NGOs* (UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements, Compliance and Enforcement, Module IX) <<http://www.oas.org/dsd/Toolkit/Documents/ModuleVI/Implementation.%20Monitoring%20and%20Compliance%20of%20MEAs.pdf>> accessed 27 March 2017

⁷¹⁸ USEPA, *Principles of Environmental Enforcement* (USEPA National Center for Environmental Publications, February 1992) <<https://nepis.epa.gov/Exe/ZyNET.exe/9101EGH6.txt?ZyActionD=ZyDocument&Client=EPA&Index=1991%20Thru%201994&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&UseQField=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5CZYFILES%5CINDEX%20DATA%5C91THRU94%5CTXT%5C00000029%5C9101EGH6.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=>

Amodu⁷²³ and many more. Compliance is often subject to negotiation and change.⁷²⁴ According to Amodu, many studies assume that compliance equates to not complying with legal rules,⁷²⁵ but in regulatory contexts, that assumption does little to enhance an understanding of compliance practice. To Amodu, compliance is sufficiently malleable to encompass a range of activities and aspects of regulation including the act of enforcement, the process of securing the underlying aims and objectives of regulations and the negotiation of regulatory outcomes.⁷²⁶ This researcher will adopt Amodu's definition, but whatever definition adopted, there should be focus in its importance. Mulkey observed⁷²⁷ that '*without compliance with the environmental protection choices reflected in environmental law requirements, such requirements are empty gestures at best and misleading shams at worst.*'⁷²⁸ In spite of its importance, many factors including: deterrence, institutional credibility, economic factors, social and psychological factors, knowledge and technical ability, financial or human resources, poor training, lack of support for laws widely viewed as unjust, political uncertainty, lack of political support for stronger enforcement, and corruption affect compliance.⁷²⁹ Some of these factors are outside the scope of this research, however where compliance is not achieved because of any of the factors; there should be enforcement actions leading the research to meaning of enforcement actions.

In its basic sense, enforcement is '*the act of compelling compliance with a law.*'⁷³⁰ To Oxford dictionary, to enforce means to compel observance of or compliance with a law, rule, or obligation.⁷³¹ In the legal field, Conservation International (CI) defined it as a system comprising detection, apprehension, prosecution, and conviction of

p%7Cf&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=20> accessed 27 March 2017

⁷¹⁹ SG Ogbodo, 'Environmental Protection in Nigeria: Two Decades after the Koko Incident' (2009) 15 (1) Annual Survey of International and Comparative Law <<http://digitalcommons.law.ggu.edu/annlsurvey/vol15/iss1/2>> accessed 27 March 2017

⁷²⁰ CE Wasserman, 'The Principles of Environmental Enforcement and Beyond: Building Institutional Capacity' (Third INECE International Conference on Environmental Enforcement Proceedings, Oaxaca Mexico April 1994) 5

⁷²¹ M Aalders, 'Regulation and in-Company Environment Management in the Netherlands' (1993) 15 (2) Law and Policy 75

⁷²² BM Hutter, *Compliance: Regulation and Environment* (OUP 1997)

⁷²³ T Amodu, 'The Determinants of Compliance with Laws and Regulations with Special Reference to Health and Safety' (London School of Economics and Political Science for the Health and Safety Executive Report 2008) <<http://www.hse.gov.uk/research/rrpdf/rr638.pdf>> accessed 27 March 2018

⁷²⁴ Aalders (n 721) and BM Hutter (n 722)

⁷²⁵ T Amodu (n 723)

⁷²⁶ Ibid, 3

⁷²⁷ And the researcher agrees

⁷²⁸ ME Mulkey, 'Judges and Other Lawmakers: Critical Contributions to Environmental Law Enforcement' (2004) 4(1) Sustainable Development Law and Policy 2

⁷²⁹ USEPA (n 718)

⁷³⁰ B Garner (ed), *Black's Law Dictionary* (7th ed, West Group 1999) 549

⁷³¹ Oxford Online Dictionaries, <<http://www.oxforddictionaries.com/definition/english/enforce>> accessed 27 March 2017

lawbreakers⁷³² and to Wasserman it is the application of a set of legal tools, both informal and formal, designed to impose legal sanctions to ensure a defined set of requirements is complied with.⁷³³ International Network for Environmental Compliance and Enforcement (INECE)⁷³⁴ broadly defined it in environmental law context as

the range of procedures and actions employed by a State, its competent authorities and agencies to ensure that organizations or persons, potentially failing to comply with environmental laws or regulations implementing multilateral environmental agreements, can be brought or returned into compliance and, or, punished through civil administrative or criminal action.⁷³⁵

Not only that the last definition is from a reputable organisation, but it is all-encompassing involving a range of procedures broad enough to accommodate any reasonable mechanism that can achieve compliance, deter, sanction and possibly change offenders in environmental law context, therefore the researcher will adopt the definition. This will also align with the researcher's desired outcome: cancel out unfair advantage, discourage the offender and others and restore the environment.

Laws designed to protect the environment are only the first step to an effective environmental policy, but does not automatically guarantee compliance.⁷³⁶ To ensure compliance, lawmakers should consider factors that will enhance compliance before

⁷³²AS Akella and JB Cannon, *Strengthening the Weakest Links: Strategies for Improving the Enforcement of Environmental Laws Globally* (Center for Conservative Government Report, 2004) <<http://www.oecd.org/environment/outreach/33947741.pdf>> accessed 27 March 2017

⁷³³ CE Wasserman, 'An Overview of Compliance and Enforcement in the United States: Philosophy, Strategies, and Management Tools' (1st International Enforcement Workshop, Utrecht the Netherlands, May 1990) 11<<https://nepis.epa.gov/Exe/ZyPDF.cgi/2000CU5D.PDF?Dockey=2000CU5D.PDF>> accessed 27 July 2017

⁷³⁴ INECE is a partnership of government and non-government enforcement and compliance practitioners from more than 150 countries comprising of more than 4,000 members from international organisations, governmental agencies, and NGOs. The Dutch and US environmental agencies found and fund INECE with additional support from UNEP, the World Bank, and the European Commission, as well as Environment Canada and OECD. Its goals are: raising awareness to compliance and enforcement; developing networks for enforcement cooperation; and strengthening capacity to implement and enforce environmental requirements and its mission is to contribute to a healthy environment, sustainable use of natural resources and the protection of ecosystem integrity through effective compliance and enforcement using regulatory and non-regulatory approaches.

⁷³⁵ United Nations, *Guidelines for Strengthening Compliance with and Implementation of Multilateral Environmental Agreements (MEAS) in the ECE Region* (UNECE Environmental Policy: Fifth Ministerial Conference Ukraine, 2003) <<http://www.unece.org/fileadmin/DAM/env/documents/2003/ece/cep/ece.cep.107.e.pdf>> accessed 27 March 2017; See also the UK Department for Energy and Climate Change definition DECC, *Offshore Oil and Gas Environment Unit Enforcement Policy* (DECC, 2014) 6 para 16 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470442/DECC_Offshore_Inspectorate_Enforcement_Policy_-_October_2015.pdf> accessed 27 March 2017

⁷³⁶ Clifford Russell, 'Monitoring and Enforcement in Public Policies for Environmental Protection' in Paul R Portney, (ed.) *Resources for the Future*, (Washington DC, 1990)

enacting law, because impractical implementation will defeat the overall aim of its enactment. To achieve compliance, the regulated comply voluntarily, however, enforcement authorities should possess the power to enforce and with the right enforcement tool. They should have the powers to enter premises, take samples, inspect records, investigate compliance, determine violations and make reports, prosecute and close facilities especially where there is immediate danger to the public or the environment.⁷³⁷ In addition, there is need for development of strategies to monitor compliance and educate the regulated community and the public. The consideration of punishment should be in a consistent, fair, and appropriate manner with standardised and transparent policies, taking into consideration factors such as the appropriate remedy, economic benefit of the violation,⁷³⁸ the gravity of the violation and compensation for any harm caused.⁷³⁹ In addition, enforcement should be fair and consistent between like-regulated entities in similar situations and the enforcement agency must be transparent⁷⁴⁰ and targeted.⁷⁴¹

This is particularly so as many scholars agreed that credible enforcement increases compliance.⁷⁴² Research has shown that even though some people or companies will comply without enforcement, there is need for enforcement to create and maintain a complying majority.⁷⁴³ As observed by Chester Bowles of the wartime Office of Price Administration 5% of individuals will always violate, 20% will always comply, and

⁷³⁷ In chapter five the researcher will be discussing these powers

⁷³⁸ See S Shavell, 'A Note on Marginal Deterrence' (1992) 12 *International Review of Law and Economics* 133; Anthony Heyes, *Implementing Environmental Regulation: Enforcement and Compliance* (2000) 17 (2) *Journal of Regulatory Economics* 107 <<http://www.oecd.org/env/outreach/33947786.pdf>> accessed 27 March 2017

⁷³⁹ For further discussion, see Cheryl Wasserman 1994 (n 720) and Cheryl Wasserman 1990 (n 733)

⁷⁴⁰ They need to understand what is expected of them and the consequences of noncompliance. For further discussion, see Andrew Farmer, *Handbook of Environmental Protection and Enforcement: Principles and Practice* (Routledge 2007) 1

⁷⁴¹ Ibid

⁷⁴² Shimshack and Ward's research found that credible enforcement not only helps compliance, but significantly increases over-compliance, even on other plants: see P Shimshack and MB Ward, 'Regulator Reputation, Enforcement, and Environmental Compliance' (2008) 55 (1) *Journal of Environmental Economics and Management* 90 <<http://www.sciencedirect.com/science/article/pii/S0095069607000800>> accessed 27 March 2017. Gray and Deily also found that greater enforcement leads to greater compliance, while greater compliance leads to less enforcement: WB Gray and M Deily 'Compliance and Enforcement: Air Pollution Regulation in the US Steel Industry' (1996) 31 (1) *J. Environ. Econ. Manage.* 96; SL Stafford, 'The Effect of Punishment on Firm Compliance with Hazardous Waste Regulations' (2002) 44 *J. Environ. Econ. Manage.* 290; See also LW Nadeau, 'EPA Effectiveness at Reducing the Duration of Plant-Level Noncompliance' (1997) 34 *J. Environ. Econ. Manage.* 54; B Laplante and P Rilstone, 'Environmental Inspections and Emissions of the Pulp and Paper Industry in Quebec' (1996) 31 *J. Environ. Econ. Manage.* 19 and W Magat and K Viscusi 'Effectiveness of the EPA's Regulatory Enforcement: the Case of Industrial Effluent Standards' (1990) 33 *J. Law Econ.* 331

⁷⁴³ See C Wasserman 1990 (n 733) 9

75% will comply only if the violators get punishment.⁷⁴⁴ Reliable enforcement is essential for legal certainty, justice, and equality of treatment, credibility of the legislative apparatus and re-affirmation of governmental control. USEPA noted the importance of enforcement as a way of protecting the environmental quality and public health, building and strengthening the credibility of environmental requirements, bringing fairness and reducing cost and liability.⁷⁴⁵ EJ links environmental protection, health and fairness and going by USEPA definition, it is very important to use enforcement as a way of achieving EJ.

3.4ia Framework for Successful/Effective Compliance and Enforcement Programmes

Effective compliance and enforcement programmes involve seven components according to Wasserman.⁷⁴⁶ They are creating environmental laws and requirements that are enforceable; creating awareness of the regulated community and setting priorities; promoting compliance; monitoring compliance; enforcement response to violations; clarifying roles and responsibilities; and evaluating the success enforcement programmes.⁷⁴⁷ These components are important because with no clear definition of who is required to do what, when and how, both the regulated community and enforcement officials may not be able to detect violations. Not being able to detect violation will lead to lapse in enforcement and that could lead to EI.

Maga and Viscusi observed that ineffectively designed policies and laws that are difficult to understand generally cause ineffective regulations.⁷⁴⁸ Regulations should be easily understood, enforcement authorities should publish clear standards of service, provide information and advice in diverse methods, provide an accessible complaints service and publish their enforcement policy.⁷⁴⁹ They also needs to balance resources between compliance promotion and enforcement in the most effective way, establishing responsibility for collecting, analysing, and managing, evaluating, storing, accessing and analysing information.⁷⁵⁰ There is need for monitoring to detect and correct violations, provide evidence to support enforcement actions and evaluate progress.⁷⁵¹ Enforcement response to violations is very important. Developments of response mechanisms are as environmental problems and the actors change to respond to new and different situations. There are several processes used to ensure fairness of

⁷⁴⁴ US Federal Agency in World War II established to prevent wartime inflation. For further discussion, see C Wasserman 1990 (n 733) 9

⁷⁴⁵ USEPA (n 718)

⁷⁴⁶ C Wasserman 1994 (n 720) 5 and C Wasserman 1990 (n 733) 11

⁷⁴⁷ Ibid, 5

⁷⁴⁸ W Magat and K Viscusi (n 742); See also CS Russell (n 736)

⁷⁴⁹ Ibid

⁷⁵⁰ C Wasserman 1994 (n 733)

⁷⁵¹ Ibid

enforcement responses: notices, appeals, and dispute resolution and there may be negotiation between the regulated party and the regulator.⁷⁵²

Enforcement often involves different groups,⁷⁵³ so there is need to clarify roles and responsibilities. Clarification of roles includes centralisation and decentralisation of actions amongst agencies, agencies to be involved, the extent of using citizens and other non-governmental resources, the extent of staff integration and many more. It is also important to have strong and supportive working relationships and good communication among the key players such as the agencies involved, NGOs and industry associations.

Recent scholars argue that to be effective, there is need for multi-faceted enforcement efforts and a holistic approach addressing weakness in the whole enforcement system.⁷⁵⁴ For instance, fines are not always optimal enough to deter in all cases. Shavell⁷⁵⁵ identifies the size of assets; probability of detection and conviction; size of private benefits from illegal activity; probabilities that an act will cause harm; and size distribution of the harm as five factors that help determine if monetary fines are adequate to deter. Some suggested solutions are increasing fines, hiring more detection and enforcement agents, however more enforcement agents may cost more money especially when compared with self-reporting.

On their part, Conservation International (CI) opined and the researcher agrees that an enforcement system will be effective if it generates an enforcement disincentive that is larger than the financial incentives motivating the illegal behaviour.⁷⁵⁶ The researcher opines that to be more effective, there should be quantification of '*the larger financial benefit*' to a minimum of fifty percent.⁷⁵⁷ This will serve three major purposes and

⁷⁵² Ibid

⁷⁵³ Like many government agencies, nongovernment organisations, and industry associations

⁷⁵⁴ This means level of increased enforcement and a mix of preventative and increased enforcement. See AS Akella and JB Cannon (n 732). See also DI Markell and RL Glicksman, 'A Holistic Look at Agency Enforcement' (2014) 93 N.C. L. REV. 1 <http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2361&context=faculty_publications> accessed 27 August 2017; S Schneider, M Beare and Jeremy Hill, 'Alternative Approaches to Combating Transnational Crime' (*Federal Transnational Crime Working Group*) <<https://www.ncjrs.gov/nathanson/etranscrime.html>> accessed 27 March 2017; OR Young (n 22)

⁷⁵⁵ Steven Shavell, 'Criminal Law and the Optimal use of Non-monetary Sanctions as a Deterrent' (1985) 85 Colum. L. REV. 1232

⁷⁵⁶ Conservation International is a nonprofit environmental organisation headquartered in Arlington, Virginia with many centres including the Centre for Conservation and Government, which conducted this research. The centre's aim is to catalyse effective public sector responses to the crisis of biodiversity loss by engaging governments and related public institutions in seeking conservation solutions. CI mission is to protect nature, and its biodiversity, for human benefit. With more than 30 offices around the world, majority of its staff are dedicated to finding innovative, scalable solutions to the global environmental loss that threatens all life on Earth work around the world. <<http://www.conservation.org/about/pages/global-offices.aspx>> and <<http://www.oecd.org/environment/outreach/33947741.pdf>> accessed 27 March 2017

⁷⁵⁷ There may also be need for judicial discretion for a larger disincentive, but 50% should be minimum

deliver the researcher's desired environmental outcome. First, the offender will be divested of all the benefits that he may have gotten for not complying, second, the money will be used to cover the cost of the enforcement processes and thirdly it will serve as a deterrent to the offender and even others well enough to encourage compliance.

3.4ii Challenges of Enforcement

This sub-section is to identify the general challenges of enforcement that the researcher will apply in the enforcement chapter of this research while the research seeks solution to enforcement problems faced by the Nigerian and US regulators in the oil industry as one way of reducing EI. Enforcement can be ineffective due to many reasons discussed here and even wider problems including economic, social, personal, and technological and management factors. The wider problems could be what Matland⁷⁵⁸ tagged political and administrative implementation within the agency that can result in weak political appointments to key management positions and/or fewer resources. CI enforcement research in four biodiversity-rich countries in 2000⁷⁵⁹ is instructive. The findings are in line with global enforcement experts that confirmed common challenges in many countries of biodiversity importance.⁷⁶⁰ According to their research, the five key enforcement weaknesses are poor interagency cooperation, inadequate budgetary resources, and technical deficiencies in laws, agency policies, and procedures, insufficient technical skills and knowledge and lack of performance monitoring and adaptive management systems.⁷⁶¹ The researcher will be discussing each of these in detail below.⁷⁶²

Poor interagency cooperation implies that agencies involved in enforcement poorly cooperate with each other. There may be also jurisdictional issues and confusion among agencies, prosecutorial services, and even courts. Agencies that rarely interact cannot develop strategies for streamlining their handling of environmental violations and this makes some cases weak. Simple discussion among upper management of agencies across the enforcement chain and persuading agencies to act holistically or creation of more integrated agencies could result in procedures that are more efficient and useful.⁷⁶³

Finance also affects enforcement. Firstly, when the salary is low, it does not attract many properly qualified staff and it may breed corruption. In addition, cost issue can

⁷⁵⁸ See Carlos Wing-Hung Lo and others, 'Explaining the Enforcement Gap in China: Local Government Support and Internal Agency Obstacles as Predictors of Enforcement Actions in Guangzhou' (2012) 111 J Environ Manage 227 <http://202.116.197.15/cadalcanton/Fulltext/21203_2014319_102456_103.pdf> accessed 27 March 2017

⁷⁵⁹ With USAID support

⁷⁶⁰ AS Akella and JB Cannon (n 732)

⁷⁶¹ Ibid

⁷⁶² These challenges are discussed in relation to the US and Nigeria/Niger Delta in chapter five

⁷⁶³ AS Akella and JB Cannon (n 732) 20

lead to shortage of personnel and equipment, which might help prosecutions and convictions and it, may increase delays. Finance also affects training, capacity-building programs, monitoring programmes, analysis of material where laboratories are few and ill equipped and many more.⁷⁶⁴ Any determined overhaul of enforcement performance and enduring change will require good funding.⁷⁶⁵

Apart from legitimacy or fairness of laws, technicalities in law also adversely affect enforcement. The first issue is where there is weak and vague legislation, legal powers, legally unclear roles and mandates for enforcement agencies, ambiguities or where there are gaps in enforcement powers provided and outdated or unclearly defined penalties that neither compensate nor contribute to a credible deterrent.⁷⁶⁶ Also there is issue of overlapping or contradicting laws at different levels of government causing problems especially where there is no clear cut rule as to which the laws override the other.⁷⁶⁷ Also of concern are the internal enforcement agency policies and procedures where they do not support good performance, such as where there is lack of good policies regarding training, interagency collaboration or performance monitoring.⁷⁶⁸

The usefulness of having enough staff with technical skills and knowledge can also not be underestimated. Effective investigation and detection requires a range of skills, therefore investigators should know the law well, be able to identify violations, accurately assess the nature of the violation, must be skilled at collecting evidence and must know the agency procedures and capabilities.⁷⁶⁹ There is also issue of staff professionalism⁷⁷⁰ and beliefs about enforcement style.⁷⁷¹ They must also know how to mount proactive investigations, think strategically about optimising use of limited resources to ensure targeted efforts focused on priority areas and threats. Finally, they need also to understand penalties in environmental damages and possibly restoration costs so that they can make appropriate penalty recommendations to judges. CI⁷⁷² in their research found that the detection agents and investigators in their four study sites all had limitations in their individual skills and knowledge and opined that periodic or even one-time intensive training, but had not been.

⁷⁶⁴ This can be seen in the Nigerian case where regulatory agencies do not have laboratories

⁷⁶⁵ AS Akella and JB Cannon (n 732) 22

⁷⁶⁶ Nigeria is a very good example, which the researcher will be, discuss in chapter four.

⁷⁶⁷ As in case of some US laws discussed in chapter five

⁷⁶⁸ AS Akella and JB Cannon (n 732)

⁷⁶⁹ In Scotland for instance, it seemed to be a problem in the past, but there is now a specialist team of prosecutors in the Wildlife and Environmental Crimes Unit, which seems effective.

⁷⁷⁰ R Baldwin B Hutter and H Rothstein, *And Risk Regulation, Management and Compliance: Report of the BRI Inquiry* (BRI Inquiry) <<http://ec2-79-125-112-176.eu-west-1.compute.amazonaws.com/sspp/departments/geography/people/academic/rothstein/riskregulationreport.pdf>> accessed 27 March 2017

⁷⁷¹ The researcher discussed most of these problems in chapter five under the challenges of enforcement in Nigeria.

⁷⁷² AS Akella and JB Cannon (n 732), 24

There is need to strengthen the judiciary because judicial incapacity about environmental issues affects the quality of enforcement. Where judges hear cases without special training in environmental law,⁷⁷³ it many times leads to failure to convict offenders and/or application of meagre penalties where conviction occurs.⁷⁷⁴ Appropriate sentencing and penalties are critical to the effectiveness of an enforcement regime and the judge's role in the enforcement process is very important because with limited knowledge of environmental law, a judge may easily undo the good work of the agencies.⁷⁷⁵ A knowledgeable and effective judge may also be a catalyst in encouraging those agencies to improve their performance. There is also need to make efforts to build the technical knowledge and skills of personnel in agencies throughout the enforcement system to remove low technical capacity as an impediment to enforcement.⁷⁷⁶

Finally, a predominant problem of enforcement is failure to monitor performance or to make any systematic, routine efforts to measure effectiveness and to develop action plans for improving performance. This affects adaptability of enforcement activities to improve effectiveness. Monitoring improved performance, agencies can neither access their past nor present performance nor access those of other enforcers.⁷⁷⁷ Other challenges include political influence, frequency of interaction between the regulators and the regulated,⁷⁷⁸ willingness and capacity of the regulated to comply⁷⁷⁹ and public accountability.⁷⁸⁰

3.4iii Enforcement Mechanisms/Tools and Actions

To achieve compliance, there is a general need to use available tools to ensure, by guidance and advice that those carrying out regulated activities understand the nature and extent of their responsibilities and comply voluntarily. However, in practice, compliance is many times by enforcement action. In taking enforcement actions, there

⁷⁷³ In Europe, European Union Forum of judges for the environment constantly provides such special training. See European Commission, 'Environment: Co-operation with Judges' <<http://ec.europa.eu/environment/legal/law/judges.htm>> accessed 3rd September 2017

⁷⁷⁴ Here, the presumption is that the detectors, investigators and prosecutors all effectively did their job.

⁷⁷⁵ In the UK for example, there is sentencing guidelines for judges in environmental cases; See Sentencing Council, 'Environmental Offences Definitive Guideline' Effective from 1 July 2014 <https://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf> accessed 27 March 2017

⁷⁷⁶ For further discussion, see AS Akella and JB Cannon (n 732)

⁷⁷⁷ Ibid

⁷⁷⁸ Peter Grabosky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (OUP 1986); Bridget M Hutter, *Compliance: Regulation and Environment* (OUP 1997)

⁷⁷⁹ Brent Fisse and John Braithwaite, Corporate Offences: The Kepone Affair in R. Weston (ed), *Combatting Commercial Crime* (Law Book Co 1987)

⁷⁸⁰ K Hawkins *Environment and Enforcement* (OUP 1984)

is employment of many methods ranging from warning letters,⁷⁸¹ enforcement notices,⁷⁸² prohibition notice,⁷⁸³ conditional cautions and seizure as well as criminal prosecutions. There is also penalty notice, improvement notice, enforceable undertakings, fines and other punitive actions⁷⁸⁴ and incapacitation.⁷⁸⁵

Enforcement mechanisms are hierarchical depending on the nature of the offence/violation.⁷⁸⁶ In addition, there are also many factors influencing the methods adopted. On this, Hawkins⁷⁸⁷ classified companies into fourfold: ‘*the socially responsible*’,⁷⁸⁸ ‘*unfortunate*’,⁷⁸⁹ ‘*careless*’⁷⁹⁰ and ‘*malicious*’.⁷⁹¹ In addition, Baldwin and Cave⁷⁹² identified companies as well intentioned/ill-intentioned and familiar/unfamiliar with the rules while Kagan and Scholz identified a threefold classification, which are ‘*amoral calculators*’, ‘*political citizens*’ and ‘*organizationally incompetent*’.⁷⁹³ According to Hans de Bruijn and others,⁷⁹⁴ the common factor in all the typologies is the distinction between well-intentioned and ill-intentioned players. The ill-intentioned deliberately breaks the law to serve their own interests while others break laws because of lack of knowledge or resources, carelessness or misfortune. The ill-intentioned company may regularly use strategic behaviour that may often be secret and sometimes malicious⁷⁹⁵ to get an accommodation rather than a sanction by pretending to be well intentioned. They may also try to find out official strategies to modify behaviour, stress interdependence and strategies to influence opinion and may persuade adoption of an accommodating position. All these sometimes result in enforcement mismatch leading to under-enforcement for ill-intentioned and over enforcement for well intentioned.

⁷⁸¹ Used where there has been regular recurrence of a minor contravention, or where there is need for an action to be taken to achieve compliance

⁷⁸² Used where there is possibility of contravention and where there is a minor contravention aimed at bringing back the operator into compliance

⁷⁸³ May be served when the regulatory body opines that there is the impending risk of serious pollution

⁷⁸⁴ Such as revocation of a permit, particularly wherever there is insistent failure to respond to other enforcement methods

⁷⁸⁵ See N Gunningham and P Grabosky, *Smart Regulation: Designing Environmental Policy* (OUP Press 1998)

⁷⁸⁶ Ranging from simple warning to prosecution

⁷⁸⁷ (n 780)

⁷⁸⁸ Those who will comply as a matter of principle

⁷⁸⁹ Those who find it difficult to comply because of economic, physical or technical inability

⁷⁹⁰ Those that find it difficult to adapt to new rule for not having effective management or supervisory system

⁷⁹¹ Those that deliberately would not comply

⁷⁹² See Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy, and Practice* (OUP 1999) 101

⁷⁹³ R Kagan and J Scholz, ‘The “Criminology of the Corporation” and Regulatory Enforcement Strategies’ in K Hawkins and JM Thomas (eds) *Enforcing Regulation* (Kluwer Nijhoff Publishing 1984)

⁷⁹⁴ Hans de Bruijn Ernst Ten Heuvelhof and Marieke Koopmans, *Law Enforcement: The Game between Inspectors and Inspectees* (Universal Publishers 2007)

⁷⁹⁵ Hutter called it ‘*tricks of the trade*’, McBarnet and Whelan, called ‘*creative compliance*’ and Hawkins called it ‘*protective strategies*’

Enforcement actions are broadly civil and criminal actions. Civil actions mainly lead to prevention of harm, promotion of environmental restoration through preventive works, clean-ups and cost recovery damages. Civil actions are broadly categorised into civil administrative and civil judicial actions. Civil administrative enforcement action is non-judicial enforcement actions that may be in form of notice of violation/warning/notice letter, or administrative directing an individual, a business, or other entity to take action to come into compliance. It can be by administrative settlement: where parties generally agreed on resolution to an enforcement case, monetary assessments,⁷⁹⁶ and suspension of license or even revocation of permit. Civil judicial actions are formal lawsuits filed in courts.⁷⁹⁷ In the US, civil actions are the mainstay of environmental statutes playing a major role in government enforcement programs.⁷⁹⁸ Civil actions many times lead to financial penalties and can sometimes lead to loss of a licence where penalty lead to failing a statutory test to hold a licence. The regulator may link civil financial penalties to the wealth/annual turnover of offenders, degree of fault, or the extent of environmental damage resulting from the offender's act or omission. Licence revocation is the most significant corporal punishment, meant to protect the environment not to punish, however, in reality; it is a greater economic deterrent than a criminal conviction and a modest fine according to Ogus and Abbot.⁷⁹⁹

Criminal enforcement action is for serious violations that are willfully or knowingly committed; where there is key breach of regulations especially where civil/administrative actions had failed to deter adequately. It could go against the company, corporate officers or both and can lead to fines or imprisonment having regard to the company's facilities, past compliance history, revenue, benefits for non-compliance and cost of enforcement. This is normally a last resort for the enforcement agencies mainly because of rigours and cost associated with it. Corporate criminal liability is imposed upon corporations exercising improper risk management because of its deficiencies.⁸⁰⁰ The court in the *US Exxon Valdez Case*⁸⁰¹ held that corporate criminal liability for pollution on defective corporate culture should be within the company that encouraged and benefitted from the incident. Criminal actions are arguably the most effective way of enforcing environmental law⁸⁰² however some

⁷⁹⁶ The USEPA for instance took a civil administrative enforcement action against MSD Energy Inc, and concluded the action on 01/14/2014 with final assessment of \$3,000 for violation. <<http://echo.epa.gov/enforcement-case-report?id=04-2014-1000>> accessed 27 March 2017.

⁷⁹⁷ Such as the ones filed by NOSDRA against PPMC, SPDC and many discussed in chapter five

⁷⁹⁸ Robert Esworthy 'Federal Pollution Control Laws: How are they Enforced?' (2014) Congressional Research <<http://fas.org/sgp/crs/misc/RL34384.pdf>> accessed 27 March 2017.

⁷⁹⁹ A Ogus and C Abbot, 'Sanctions for Pollution: Do We Have the Right Regime?' (2002) 14 (3) Journal of Environmental Law 283

⁸⁰⁰ The Australian Criminal Code imposes corporate liability where the company has expressly, tacitly or impliedly authorised or permitted the incident, irrespective of any personal responsibility for the wrongdoing *Criminal Code Act 1995* (Cth) ss 12.2, 12.3(2)(c).

⁸⁰¹ US Court of Appeals, 9th Circuit (May 23, 2007)

⁸⁰² MA Rabie and others 'Implementation of Environmental Law' in RF Fuggle and MA Rabie, *Environmental Law in South Africa* (Juta and Co 1993) 128; See also Directive 2008/99/EC of the

countries rely on civil penalties.⁸⁰³ In addition, the punishment will depend on the nature of the environmental issue. As opined by Faure and Svatikova,⁸⁰⁴ enforcement through criminal law is preferred when they harm the society, or when they benefit the offender significantly, with low probability of detection, and when criminal law can provide additional stigma and/or an educative role. For example, for a pipeline oil leaks, a civil penalty based on turnover is likely to be more appropriate and effective in causing preventative measures where there is absence of fault than a criminal conviction, but will be inappropriate and effective where there is intentional or reckless environmental damage for financial or personal reasons.⁸⁰⁵

There may be order to pay restitution in addition to criminal penalties to those affected by the violation.⁸⁰⁶ A good example is that a US District Court in New York sentenced father and son for conspiracy to violate the CAA, the Toxic Substances Control Act; the Clean Air Act's Hazardous Air Pollutant Regulations; and the Racketeer Influenced and Corrupt Organization Act.⁸⁰⁷ The court ordered them to forfeit monies and to pay \$23,039,607 and \$22,875,567.46 in restitution to the victims.⁸⁰⁸ This is particularly important for the thesis because, restitution will normally put the victims to as near as possible to the position they were had the incident not occurred. Relating this to oil-related pollution victims, after the stoppage of pollution incident, restoring the environment will stop further impacts and restitution will likely improve the environment and the lives of the victims of the pollution. Furthermore, forfeited monies could improve the victim's lives in addition to getting the monies lost because of the pollution incident in restitution and community service will likely make the polluters feel the impacts and may make victims feel that justice is served. A combination of all or some of these will help in reducing EI. Heine advocates the

European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (Criminal Law Directive) [2008] OJ L328/28.

⁸⁰³ Michael G Faure and Katarina Svatikova, 'Criminal or Administrative Law to Protect the Environment? Evidence from Western Europe' (2012) 24 (2) *Journal of Environmental Law* 253 <<http://jel.oxfordjournals.org/content/24/2/253.full.pdf+html>> accessed 27 March 2017

⁸⁰⁴ Ibid

⁸⁰⁵ For further discussion, see Michael Watson, 'The Enforcement of Environmental Law: Civil or Criminal Penalties?' (2005) 17 (1) 3 *Environmental Law and Management* 1067 <<http://eprints.hud.ac.uk/339/1/WatsonEnforcement.pdf>> accessed 27 March 2017

⁸⁰⁶ See section 190.1 of the Environmental Protection Act of Canada

⁸⁰⁷ See Mesothelioma and Lung Cancer, 'Father and Son Sentenced for Environmental Crimes' (Mesothelioma and Lung Cancer News) <<https://www.mesothelioma-lung-cancer.org/news/mesothelioma-news-0017.htm>> accessed 27 March 2017.

⁸⁰⁸ Ibid: The court also fined Noble Drilling LLC \$12.2 million, imposed community service and a four-year period of probation. See Noble Drilling LLC, EPA Bulletin (EPA Bulletin December 2014) <https://www.epa.gov/sites/production/files/2015-01/documents/december_2014_environmental_crimes_case_bulletin.pdf> accessed 27 March 2017. In addition, a court-ordered payment of \$54,000 for Water Act infractions by a farm company indirectly affiliated with the Aquilini Investment Group of companies in Pitt Meadows. See Neil Corbett, 'Restitution Payment Received' *The News Newspapers* (Pitt Meadows, 20 September 2013) 1 <<https://issuu.com/blackpress/docs/i20130920070210716>> accessed 27 March 2017.

criminal liability for marine pollution⁸⁰⁹ in addition to civil penalties mainly on the compensation of victims.⁸¹⁰ The major difference between civil and criminal sanctions is prison sentence and companies do not get imprisonment unless provisions for corporate officer liability⁸¹¹ are applicable.

There may also be prosecution stigma for a company, reputational knock-on effects and meeting statutory tests for holding permits. From the cost-benefit analysis, Cohen in his study concluded the imposition of criminal sanctions is generally more expensive to both the regulator and the regulated than the use of civil and administrative ones.⁸¹² He quoted various empirical studies that showed that the stock value of publicly traded firms reduced upon the announcement of a bad environmental outcome, such as spill or criminal prosecution.⁸¹³ He also quoted the study by Karpoff and Lott⁸¹⁴ concluding that stock price effects are approximately equal to government-imposed penalties, clean-up costs and private settlements.⁸¹⁵

These enforcement mechanisms/actions serve many purposes. They may be to return violators to compliance, impose sanctions, remove the economic benefit of noncompliance, require specific actions, correct environmental damages, or correct internal company management problems.⁸¹⁶ Therefore the seriousness of the offence; past history; willingness to comply; the consequences of non-compliance; the likely effectiveness of various enforcement options; public interest; views of any relevant persons; and sufficiency of evidence to support the action are being taken into account

⁸⁰⁹ G Heine, 'Marine Oil Pollution: Prevention and Protection by Criminal Law – International Perspectives, Corporate and/or Individual Criminal Liability' in MG Faure and J Hu (eds), *Prevention and Compensation of Marine Pollution Damage* (Kluwer Law International 2006) 41; see also Shane Bosma, 'The Regulation Of Marine Pollution Arising from Offshore Oil and Gas Facilities – An Evaluation of the Adequacy of Current Regulatory Regimes and the Responsibility of States to Implement a New Liability Regime' (2012) 26 (1) Australian and New Zealand Maritime Law Journal 685 <<https://ssl.law.uq.edu.au/journals/index.php/maritimejournal/article/download/179/221>> accessed 23 December 2015. See also DM Ong, 'The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives' (2001) 12(4) European Journal of International Law 685, 705

⁸¹⁰ Ibid, 44

⁸¹¹ Discussed infra

⁸¹² MA Cohen 'Criminal Law as an Instrument of Environmental Policy: Theory and Empirics' in A Heyes (Ed) *The Law and Economics of the Environment* (Edward Elgar 2001a) 198, 200. See also MA Cohen, 'Oil Pollution Prevention and Enforcement Measures and their Effectiveness: A Survey of Empirical Research from the US' in Faure and Hu (eds), *Prevention and Compensation of Marine Pollution Damage* (Kluwer Law International 2006) 37

⁸¹³ Ibid, 213

⁸¹⁴ J Karpoff J Lott and G Rankine, 'Environmental Violations, Legal Penalties, and Reputation Costs' (1998) John M. Olin Law and Economics Working Paper no. 71, second series, University of Chicago Law School

⁸¹⁵ MA Cohen 2001 (n 812), 213

⁸¹⁶ OECD, 'Ensuring Environmental Compliance Trends and Good Practices: Trends and Good Practices' (OECD Publishing, 19 May 2009) 74 < <http://www.oecd-ilibrary.org/docserver/download/9709031e.pdf?expires=1505731884&id=id&accname=ocid177542&checksum=639D33176C57150EEEA542B928642F5D>> accessed 27 March 2017

in taking enforcement actions.⁸¹⁷ Enforcement actions are many, can enhance compliance and their enhanced use in the enforcement of oil and gas laws in Nigeria could be a way of reducing EI.⁸¹⁸ The researcher is aware of the socio-political, socio-cultural and socio-economic problems in Nigeria, however, Nigeria is not living in a different world, therefore some or all the enforcement actions in the developed world could work in Nigeria.⁸¹⁹

3.4iv Enforcement Approach/Strategy/Plan

Enforcement strategies in environmental law, have been dominated by a debate between proponents of accommodative/persuasive/compliance and sanction-oriented strategies. Research has also focused on identifying regime characteristics that elicit compliance. The common debates are the managerial and enforcement approaches;⁸²⁰ however, some scholars think that the two approaches create strong counter expectations.⁸²¹ The reason for discussing them is to know what the researcher may transplant to the Nigerian domestic setting using the theories of transplant discussed in chapter one. The managerial/accommodative/Persuasive/compliance strategies support a ‘co-operative, problem-solving approach’ is based on capacity building, rule interpretation, and transparency to promote compliances⁸²² while enforcement approach involves using coercive strategy of monitoring and sanctions.⁸²³ Regulatory agencies might choose to use one or both approaches in regulation for many different reasons. The researcher will discuss them below.

⁸¹⁷ See generally OECD, *Best Practice Principles for Improving Regulatory Enforcement: Public Consultation on Best Practice Principles for Improving Regulatory Enforcement and Inspections* (OECD Draft Report Submitted to the Public for Comments in 2013) <<http://www.oecd.org/gov/regulatory-policy/Best%20practice%20for%20improving%20Inspections%20and%20enforcement.docx>> or <<https://www.finextra.com/blogposting/7924/oecd-consults-best-practice-in-regulatory-enforcement>> accessed 27 January 2018; See also OECD, *Regulatory Enforcement and Inspections: OECD Best Practice Principles for Improving Regulatory Policy* (OECD Publishing 16 May 2014) <http://www.keepeek.com/Digital-Asset-Management/oecd/governance/regulatory-enforcement-and-inspections_9789264208117-en#.Wmtn8rxl_cs#page2> accessed 27 January 2018

⁸¹⁸ Also the researcher will be discussing the enforcement strategies, mechanisms and actions tried in Nigeria in chapter five of this research

⁸¹⁹ The researcher will be discussing the issues impacting on enforcement in Nigeria extensively in chapter five

⁸²⁰ These terms were first established in the exchange between Chayes and Chayes 1995 and Downs, Locke, and Barsboom 1996; see GW Downs, DM Locke and PN Barsboom ‘Is the Good News about Compliance Good News about Cooperation?’ (1996) 50 Int’l Org. 379, 382

⁸²¹ See scholars such as Axelrod and Keohane; R Axelrod and RO Keohane, ‘Achieving Cooperation under Anarchy: Strategies and Institutions’ (1985) 38 World Politics 226 and GW Downs and Others (n 820)

⁸²² A Chayes and AH Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (OUP 1996) 3

⁸²³ For further discussion, see K Hawkins 1984 (n 780) 3

Managerial/accommodative/persuasive/compliance strategy simply means enforcement primarily by persuasion, negotiation and management. According to the proponents, these strategies should focus on the real causes of non-compliance, which may be inadvertent and manage the problems through positive means; therefore, a problem-solving strategy of dispute settlement, enlightenment, education, capacity building, rule interpretation, and transparency, will resolve the enforcement issues.⁸²⁴ Compliance principally seeks to prevent harm rather than punish for harm. According to Hawkins,⁸²⁵ it is of a serial and incremental nature with gradual improvement in behaviour. Using accommodative strategy means trusting the regulated to fulfil their promise to improve, thereby maintain good relationship. Accommodative style is used so avoid unjust punishment and to avoid making legal mistakes. Persuasive strategy is similar to most conciliatory strategies as described by Kelman.⁸²⁶ There are strong theoretical and practical reasons why cooperative/persuasive strategies may be preferred. First is to cooperate with firms that are willing to comply voluntarily.⁸²⁷ The second is where high proportion of regulated parties maintain reasonable standard.⁸²⁸ The third is where there is high level of consensus and presumably compliance.⁸²⁹ Another reason is its cost effectiveness as the proponents emphasized that coercive enforcement is costly.⁸³⁰ In addition, where there are public and political demands, the influence of third parties⁸³¹ upon the enforcement procedure and issue of social environment where the agencies operate. One criticism is that it downplays the importance of the costs and benefits in individual cases. In addition, though it can prevent breach, it can result in under-enforcement and can result in regulator's capture. Regulatory capture occurs when a regulatory body established to protect the public from abuse, ends up captured by the same firms, which it ought to control.⁸³² Stigler

⁸²⁴ They suggest that gaps in economic, regulatory and technical capacity causes compliance gaps. See Chayes and Chayes (n 822), RO Keohane, PM Haas and MA Levy, 'The Effectiveness of International Environmental Institutions', in PM Haas, RO Keohane and MA Levy (eds), *Institutions for the Earth: Sources of Effective International Environmental Protection* (MIT Press 1993) 3; RB Mitchell, *Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance* (MIT Press 1994); RB Mitchell, 'Sources of Transparency: Information Systems in International Regimes' (1998) 42 (1) *International Studies Quarterly* 109; RB Mitchell and PM Keilbach 'Situation Structure and Institutional Design: Reciprocity, Coercion and Exchange, Rational Design: Explaining the Form of Institutional Organization' (2001) 55 (4) *Special Issue of International Organization*

⁸²⁵ K Hawkins 1984 (n 780) 189

⁸²⁶ S Kelman, 'Enforcement of National Safety and Health Regulations: a Comparison of Swedish and American Practices in K. Hawkins and JM Thomas (eds), *Enforcing Regulation* (Kluwer Nijhoff Publishing 1984)

⁸²⁷ JT Scholz, 'Cooperation, Deterrence, and the Ecology of Regulatory Enforcement' (1984) 18 *LAW and Soc'y Rev.* 179

⁸²⁸ B Hutter, 'Regulating Employers and Employees: Health and Safety in the Workplace' (1993) 20 *Journal of Law and Society* 452

⁸²⁹ S Kelman (n 826)

⁸³⁰ Chayes and Chayes (n 822)

⁸³¹ Although third parties tend to reject the compliance approaching favour of tougher approaches

⁸³² R Smyth and M Soderberg, 'Public Interest versus Regulatory Capture in the Swedish Electricity Market' (2010) 38 *J Regul Econ* 292

first propounded it in 1971;⁸³³ however, Boehm argues that regulatory capture is not a new concept, as similar ideas can be traced back to the eras of Montesquieu and, later, to Karl Marx in the 19th century.⁸³⁴ The theory was refined in a more theoretical manner by various writers of the Chicago school such as Peltzman⁸³⁵ and Becker.⁸³⁶ Capture can come in form of industry paying off regulators to influence outcomes,⁸³⁷ use of undue influence or stick instead of carrots to keep regulators in check by protesting regulatory outcomes,⁸³⁸ channelling of campaign funds to legislators who appoint regulators,⁸³⁹ corruption and lobbying⁸⁴⁰ and many more.⁸⁴¹

Sanctioning Strategy on the other hand, means enforcing through punishing to ensure future compliance by the person or others. Downs and colleagues advance the sanctioned-oriented model.⁸⁴² Downs and others argued for the need for sanctions where there is strong inducement for noncompliance. The proponents of sanctioning strategy are the enforcement theorists. For them, enforcement deters evasion with monitoring and sanctions and this constitutes the central elements of enforcement strategy.⁸⁴³ Monitoring increases transparency and exposes possible violators and sanctions raise the costs of evasion and make non-compliance a less attractive option because possible violator knows that punishment will follow, therefore capable of deterring and compelling compliance.⁸⁴⁴ Responding to the critique by managerial theorists that sanctions are seldom effective, they advance the "depth-of-cooperation" hypothesis that affects both the incentives for non-compliance and the need for enforcement. They view cooperative approach as weak because it offers policy advice

⁸³³ G Stigler, 'The Theory of Economic Regulation' (1971) 2 (1) Bell Journal of Economics and Management Science 3

⁸³⁴ F Boehm, 'Regulatory Capture Revisited- Lessons from Economics of Corruption' (2007) A Working Paper. <<http://www.icgg.org/downloads/Boehm%20-%20Regulatory%20Capture%20Revisited.pdf>> accessed 10 September 2017

⁸³⁵ S Peltzman, 'Toward a more general theory of regulation' (1976) 19 Journal of Law and Economics 211

⁸³⁶ G Becker, 'A Theory of Competition among Pressure Groups for Political Influence' (1983) 98 (3) Quarterly Journal of Economics 371

⁸³⁷ J Hauge and others (2011) 'Oust the Louse: Do Political Pressures Discipline Regulators' <http://warrington.ufl.edu/centers/purc/purcdocs/papers/1006_Hauge_Oust_the_Louse.pdf> 10 September 2017

⁸³⁸ Ibid

⁸³⁹ RJP De Figueiredo and GA Geoff Edwards, 'Does Private Money Buy Public Policy? Campaign Contributions and Regulatory Outcomes in Telecommunications' 16 (3) Journal of Economics and Management Strategy 547

⁸⁴⁰ F Boehm (n 834)

⁸⁴¹ For further discussion on regulatee capture, see I Ayres and J Braithwaite, *Responsive Regulation* (OUP 1992)

⁸⁴² GW Downs and others (n 820): Justice Holmes also adopted the deterrence/sanction arguing that the law needed to be tailored with a mind that is not toward good men, but with a mind toward bad men that would try to evade the legal strictures of society; Corporate Crime Reporter, 18 April, 1988 cross ref in Ayres and Braithwaite (n 841)

⁸⁴³ GW Downs and others (n 820) and R Axelrod and RO Keohane (n 821)

⁸⁴⁴ GW Downs and others (n 820), 385

without sufficient evidence.⁸⁴⁵ Past negative experience or experience with other companies motivates sanctioning strategy. Here, the cause of breach is not in consideration, so even a co-operative attitude will result in sanctions and this may cause relationship strain.

A major disadvantage of sanctioning style is that there is a risk of dry -up of information flows. Therefore, an agency that uses sanctioning strategy should have access to multiple sources of information, to be able to gather information through external sources.⁸⁴⁶ This gives the agency a better insight of what happens internally, may expose any cover story, makes the agency less dependent on the regulatee and enables the agency to gauge the effectiveness of particular types of intervention. Because the agency has outsider information, there is great reduction of cases of incorrect information from the company. A problem will arise where the enforcement agency does not have another source of information especially in a highly technical industry like oil and gas. An enforcement agency can find out information through data linking and contextualization. Data linking simply means combining different kinds of inspection data at the same time while contextualization means involving third parties by gathering information. It also involves cost. Realistically, many agencies use a mix of these strategies starting with where possible but resorting to sanctions where needed. Bell and McGillivray⁸⁴⁷ discussed alternative sanctions of naming and shaming of corporate offenders by the Enforcement Agency. For example, the Environmental Agency in England and Wales published a 'league table' of environmental offenders who committed environmental crime the previous year. According to Davenport, there was issue of achieving required two-thirds majority in the US Senate during the negotiations prior to the Paris Conference and Obama administration decided to forego a binding Treaty and promoted a strategy to 'naming and shaming' states into cutting their emissions.⁸⁴⁸ In the oil and gas industry, Gunningham highlighted a successful shaming when Shell proposed the disposal of the Brent Spar oil platform in the deep sea in North Sea; the proposal involved letting the platform sink rather than to dismantle and dispose of it onshore. Greenpeace started a powerful campaign resulting in, among other things, a widespread boycott of Shell Gas Stations in Northern Europe, which in turn made Shell abandon the plan.⁸⁴⁹ This could affect the company's reputation, the share value and enhanced deterrence value.

⁸⁴⁵ Ibid, 382

⁸⁴⁶ This could be difficult to achieve in reality.

⁸⁴⁷ Stuart Bell and Donald McGillivray, *Environmental law* (7th ed., OUP 2008)

⁸⁴⁸ Coral Davenport, 'Obama Pursuing Climate Accord in Lieu of Treaty' *The New York Times*, (New York, 26 August, 2014) < <https://www.nytimes.com/2014/08/27/us/politics/obama-pursuing-climate-accord-in-lieu-of-treaty.html> > accessed 27 March 2018

⁸⁴⁹ N Gunningham, 'Environment Law, Regulation and Governance: Shifting Architectures' (2009) 21 (2) *Journal of Environmental Law* 179; See also I Rosen-Zvi, 'You Are Too Soft: What Can Corporate Social Responsibility Do for Climate Change' (2011) 12 *Minnesota Journal of Law, Science and Technology* 527

3.4v Enforcements Views and Models/Theories

Recognising that deterrence, inspections, monitoring, fines and prosecution used in enforcement actions shape compliance in many ways, the researcher will analyse enforcement views and models to see how they affect enforcement and compliance. The first view is the economic view. The basis of economic view is that the benefits of regulation should always exceed its costs and the benefits achieved by a regulatory program should ideally approximate those that consumers would purchase if a market in regulatory benefits existed.⁸⁵⁰ Aligning with this is Cohen's study of the prevention of oil pollution on the US coast that found that the estimated marginal cost of preventing the release of one gallon of oil is \$5.50, however, 27.6% is the enforcement cost associated with the US Coast Guard having to operate patrols that are more frequent.⁸⁵¹ In the UK, an individual benefited £58,000 for abandoning 184 drums of toxic waste in 2000. Not only that the fine of £30,000 was less, it cost authorities £167,000 to clean up.⁸⁵² In this case, the defendant was not made to clean-up and was not made to pay for the cost of clean-up despite the provisions of section 59 of the Environmental Protection Act, 1990.⁸⁵³ The examination of Cohen's study and the UK example given shows that economically, both enforcement actions are not beneficial. This view is been criticized for oversimplification.⁸⁵⁴

For the activist view, both the substantive standards and the enforcement practices of the agencies fall short of protecting society from unacceptable harm from pollution because observers are more sympathetic to the regulatory mission causing laxity, indecision and drift by the agencies. In the USA for instance, USEPA chose the leniency against toughness by not issuing effluent guidelines despite a legislatively imposed one-year deadline by the Clean Waters Act (CWA) until NRDC compelled them through a judicial decision in 1975.⁸⁵⁵

⁸⁵⁰ Economists generally favour taxes on harmful activities instead of command-and-control regulation because taxes target the incentive structure of regulated firms more directly and efficiently than general regulations. See A Kneese and C Schultze, *Pollution Prices and Public Policy* (Washington DC 1975)

⁸⁵¹ See MA Cohen, 'The Costs and Benefits of Oil Spill Prevention and Enforcement' (1986) 13 *Journal of Environmental Economics and Management* 167, 185

⁸⁵² For further discussion, see Tim Swanson, 'Cost-effective Attainment of Environmental Compliance: Governance Solutions for Environmental Objectives in the Peoples Republic of China' (2013) CIES Research Paper 13 Graduate Institute of International and Development Studies, Geneva <https://repository.graduateinstitute.ch/record/12888/files/CIES_RP_13_Swanson.pdf> accessed 18 November 2016

⁸⁵³ See schedule 4 of the Environmental Damage (Prevention and Remediation) Regulations 2009 for improved provision on remediation: The UK Government, *The Environmental Damage (Prevention and Remediation) Regulations 2009* (The UK Government Publications, 2009) <<http://www.legislation.gov.uk/ukxi/2009/153/schedule/4/made>> accessed 27 March 2017

⁸⁵⁴ Michael Block and Gregory Sidak, 'The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?' (1980) 68(5) *Georgetown Law Journal* 1131 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=301191> accessed 27 March 2017

⁸⁵⁵ *NRDC v Train*, 510 F.2d 692 (D.C. Cir. 1974)

The behavioural view recognises that actors in regulatory enforcement exist within complex social and political structures that create and distort incentives; therefore, the treatment of both the regulated firm and the regulating agency cannot be in isolation. On the agency side, there is tension between high-level policymakers and the street-level bureaucrats who do the agencies work at operational level writing permits, conducting inspections, recommending prosecutions and negotiating with the industry.⁸⁵⁶ From the regulated firms, sanctions may not penetrate to the appropriate operational levels of the company because of intervening bureaucratic or social processes.⁸⁵⁷ These views lead the researcher to discussion of enforcement theories/models, which are inspectability and compliance, self-reporting, deterrence and economic theories/models.

3.4va Inspectability and Compliance Theory/Models

Compliance models provide a link between changes in policy instruments and environmental performance. Heyes describes a causal relationship from penalties and inspection probabilities to compliance, to operationalise his models in the USA.⁸⁵⁸ To Heyes, frequent inspection may not detect non-compliance because monitoring technology for inspectors is inaccurate; therefore, the right degree of thorough inspections and investment in inspectability is necessary to induce firms to acquire more transparent technologies that will increase detection, save time and money spent on frequent inspections. However, Heyes concluded that optimal targeting of inspection effort would require compliance history, allowing the regulatory agency to set penalties and prison sentences to deter firms from treating financial penalties as a cost of doing business. Kambhu's model also shows that a non-compliant firm may decide to invest in good lawyers to escape liability in court,⁸⁵⁹ showing that frequent inspection may achieve compliance. Other scholars however think that more inspections lead to better compliance. For instance, Gray and Deily in their study of the US steel industry found that covered enforcement and monitoring activity

⁸⁵⁶ Wilson distinguished among three basic types of government officials: careerists, concerned with the agency survival, politicians using their administrative position as a stepping-stone to other offices and professionals concerned with developing competence in a technical discipline. See J Wilson, (ed.) *The Politics of Regulation* (Basic books Inc 1980)

⁸⁵⁷ For further discussions, see C Stone, *Where the Law Ends: The Social Control of Corporate Behaviour* (1975) and CD Stone, 'Large Organisations and the Law at the Pass: Toward a General Theory of Compliance Strategy' [1981] WISC. L. REv. 861

⁸⁵⁸ A Heyes, 'Making Things Stick: Enforcement and Compliance' (1998) 14(4) *Oxf Rev Econ Policy* 50 <<http://oxrep.oxfordjournals.org/content/14/4/50.full.pdf+html>> accessed 27 March 2017. See also Anthony Heyes, 2000 (n 738) and AS Malik, 'Avoidance, Screening and Regulatory Enforcement' (1990a) 21(3) *RAND Journal of Economics* 341, 353 <<http://bi.galegroup.com/global/article/GALE%7CA53728282/dad505c9ec855934ddaf1035ff9c6c8b?u=ustrath>> accessed 27 March 2017

⁸⁵⁹ J Khambu, 'Regulatory Standards, Compliance and Enforcement' (1989) 1(2) *Journal of Regulatory Economics* 103 and J Khambu, 'Direct Controls and Incentives Systems of Regulation' (1990) 18 (2) *Journal of Environmental Economics and Management* 72

increased plant compliance.⁸⁶⁰ Magat and Viscusi⁸⁶¹ as well as Laplante and Rilstone⁸⁶² studies showed that inspections, the threat of inspections and associated enforcement actions have a strong positive effect on both pollution levels and rates of compliance. Mendeloff and Grayon their part came up with combined effect of inspection and penalties in manufacturing plants and concluded that US occupational safety and health administration (OSHA) inspection imposing a penalty reduced lost workday injuries.⁸⁶³ Gray and Scholz studied the enforcement by the OSHA and noted that inspection can spur overall standards of compliance mostly, where there is penalty imposition.⁸⁶⁴ They found that inspections imposing penalties induce a 22% decline in injuries in the inspected plant during the following few years.

3.4vb Self-Reporting Theory/Model

Self-reporting in legal enforcement is from Kaplow and Shavell's⁸⁶⁵ argument that self-reporting improves upon simpler random inspection thereby saving enforcement resources and reducing risk. However, the practical problems with relying too much on self-reporting is that companies may be inclined not to tell the truth. Additionally, harsh penalty for non-compliance by the regulator will discourage self-reporting. Its major weakness is that penalty may not be weighty enough to deter violation because the regulator may not identify lies if any without inspection. Where the regulator identifies lies, the punishment might be mild to encourage future self-reporting. In many developed countries, companies self-report for many reasons. For instance, the empirical research of Harrington⁸⁶⁶ noted that despite the fact that USEPA do not almost always pursue the violator and the expected penalty faced is small compared to the cost of compliance, firms still comply many times.⁸⁶⁷ One wonders why. The first reason is that 'voluntary' behaviour can benefit in other ways, which generally go unmeasured.⁸⁶⁸ Secondly, polluters may overestimate the probability of detection of wrongdoing, civil penalties or even criminal prosecution. The third is an unmeasured cost to violation, which may come from customers, investors, and employees'

⁸⁶⁰ WB Gray and M Deily (n 742): See also LW Nadeau (n 742)

⁸⁶¹ W Magat and K. Viscusi (n 742)

⁸⁶² B Laplante and P Rilstone (n 742)

⁸⁶³ WB Gray and JM Mendeloff, 'The Declining Effects of OSHA Inspections on Manufacturing Injuries, 1979-1998' (2005) 58(4) *Industrial and Labor Relations Review* 571

⁸⁶⁴ WB Gray and JT Scholz, 'Does Regulatory Enforcement Work — A Panel Analysis of OSHA Enforcement Examining Regulatory Impact' (1993) 27 *Law and Society Review* 177

⁸⁶⁵ Louis Kaplow and Steven Shavell, 'Optimal Law Enforcement with Self-Reporting of Behavior' (1994) 102(3) *Journal of Political Economy* 583, 606; see also J Livernois and CJ McKenna, 'Truth or Consequences Enforcing Pollution Standards' (1999) 71(3) *Journal of Public Economics* 415

⁸⁶⁶ W Harrington, 'Enforcement Leverage when Penalties are Restricted' (1988) 37(1) *Journal of Public Economics* 29

⁸⁶⁷ This so-called Harrington paradox is perhaps the best-known empirical 'result' in this field.

⁸⁶⁸ Seema Arora and Timothy N Cason 'Why do Firms Volunteer to Exceed Environmental Regulations? Understand Participation in EPA's 33/50 Program' (1996) 72 (4) *Land Economics* 413

responses.⁸⁶⁹ There is also regulatory dealing where over-compliance is in exchange for the agency '*turning a blind eye*' somewhere else.⁸⁷⁰

3.4vc Deterrence Theory/Model

Deterrence theory is about how a little well placed enforcement actions can have a multiplier effect. It many times achieves enforcement beyond the company in view. Common deterrence theory is that for an enforcement program to achieve full deterrence it must demonstrate three principles:⁸⁷¹ penalties must be certain; they must exceed the benefit from the illegal conduct and penalties are promptly applied.⁸⁷² To Wasserman, deterrence theory identifies four ingredients: credible likelihood of detection, swift and sure response, appropriate sanctions and perception of the first three.⁸⁷³ The magnitude of deterrent effect in inducing others to comply depends on these principles and ingredients.⁸⁷⁴ Various researches support the contention that the violator would have perceived these risks associated with the illegal conduct⁸⁷⁵ and that sanctions can have a deterrent effect beyond the company on which they are imposed. Shimshack and Ward's⁸⁷⁶ study of the impact of a fine for water pollutant violations showed that imposition of fine on a company would bring similar companies into compliance. The spill-over effect to other plants showed that a single fine on one plant strongly enhances the regulator's credibility with all plants in the same state or regulatory jurisdiction that they respond nearly as strongly to a sanction as the fined firm itself with about two-thirds reduction of non-compliance in the following year. Gray and Deily⁸⁷⁷ also investigated whether plant compliance rates influence regulatory behaviour and whether plant characteristics influence compliance and found that covered enforcement activity increased compliance. Stafford⁸⁷⁸ in her research looked at how potential legal liability affected compliance and it showed that an increase in the maximum possible penalty decreased violations for hazardous waste pollutants.

⁸⁶⁹ Badrinath and Bolster estimated that 86% of the penalty for environmental prosecution in the USA is reputational. See SG Badrinath and P Bolster 'The Role of Market Forces in EPA Enforcement' (1996) 10 (2) Journal of Regulatory Economics 165; Also Grabosky emphasized the loss in brand image and the loss of morale among employees that prosecution may apply: See PN Grabosky, 'Green Markets: Environmental Regulation by the Private Sector' (1994) 16(4) Law and Policy 419

⁸⁷⁰ For further discussion, see Heyes and Rickman's model of regulatory dealing and Harrington Paradox.

⁸⁷¹ C Beccaria, *On Crimes and Punishment* (New edn, Hackett Publishing Co 1986) 7; K Ebeku, 'Biodiversity Conservation in Nigeria: An Appraisal of the Legal Regime in Relation to the Niger Delta Area of the Country' (2004) 16 JEL 361, 374

⁸⁷² Prompt penalty makes the violator to feel the impact more. For further discussion, see C Beccaria (n 871) 14; A Salu, 'Can Laws Protect the Environment in Nigeria?' (1998) 2 (2) MPJFIL 153, 159

⁸⁷³ C Wasserman 1990 (n 733) 10

⁸⁷⁴ C Wasserman 1990 (n 733) 10

⁸⁷⁵ S Rosseau, 'Empirical Analysis of Sanctions for Offences' (2009) 3 IRERE 161, 162

⁸⁷⁶ P Shimshack and Michael B Ward (n 742)

⁸⁷⁷ Gray and Deily (n 742); the study included non-monetary enforcement actions

⁸⁷⁸ SL Stafford (n 742)

3.4vd Economic Theory/Model

Penalties should be weighty enough to deter violations to be effective and should exceed the benefits of the violation.⁸⁷⁹ This is because economists believe and the researcher agrees that a person is more likely to commit an offence or crime if he benefits more.⁸⁸⁰ Becker first proposed the economic model in his article about optimising penalties to deter criminal activity.⁸⁸¹ To Becker, potential offenders respond to both the probability of detection and the severity of punishment.⁸⁸² To him, compliance is characterised as an ‘economic decision’, and is fundamentally a function of the magnitude of penalties/sanctions and the probability of enforcement. Evidence had shown that a company is not likely to comply if the penalty is less than the cost of compliance.⁸⁸³ The assumption is that would-be polluters act to minimize the sum of expected compliance costs and expected penalties. Since Becker proposed this model, it has been at the core of the analysis of environmental regulation that some scholars think those polluters treat fine and penalties as any other cost of doing business.

In the environmental law setting Shimshack and Ward,⁸⁸⁴ noted that a rational economic decision-maker violates its effluent standard when the benefits exceed the expected penalties or cost.⁸⁸⁵ The reason is that benefits are known, costs or penalties are uncertain because, certain factors influence the decision on whether penalties or how penalties are to be imposed.⁸⁸⁶ In addition, in many cases, fines are in ranges and optional such as where a law sets a minimum or maximum penalty. In that case, the person-imposing fine is at liberty to impose fine within the ambit of the law. Minimum or maximum penalty may sometimes help justice delivery as up to maximum penalty can take account of different circumstances, however because of its subjective nature; a violator may not get appropriate punishment. Sentencing guidelines are helpful in guiding the judge’s discretion for an effective justice delivery.⁸⁸⁷ Kleit and others in their research examines the factors that influence the legislatures’ decision in setting fines and found that higher penalties are mostly for repeated occurrences.⁸⁸⁸ However

⁸⁷⁹ Anthony G Heyes, ‘Eight things about Enforcement that Seem Obvious but May Not Be in *An Introduction to the Law and Economics of Environmental Policy: Issues in Institutional Design* (Emerald Group 2015) 519

⁸⁸⁰ See Gary Becker ‘Crime and Punishment: An Economic Approach’ (1968) 76 *Journal of Political Economy* 169; I Ehrlich, ‘The Deterrent Effect of Criminal Law Enforcement, (1972) 1 *Journal of Legal Studies* 259; WM Landes, ‘[Legality and Reality: Some Evidence on Criminal Procedure](#)’ [1974] *Journal of Legal Studies* 287

⁸⁸¹ Gary Becker 1968 (n 880)

⁸⁸² Ibid

⁸⁸³ CI conducted enforcement research with USAID support AS Akella and JB Cannon (n 732)

⁸⁸⁴ P Shimshack and Michael B Ward (n 742)

⁸⁸⁵ To be discussed in detail while discussing the penalties in the Nigerian laws on environmental protection

⁸⁸⁶ Ibid, there may be even breach without penalty, but benefit is certain

⁸⁸⁷ See *R v McNaughton* (2006) 66 NSWLR 566

⁸⁸⁸ A Kleit M Pierce and R Hill ‘Environmental protection, agency motivations, and rent extraction: the regulation of water pollution in Louisiana’ (1998) 13 (2) *J. Regul. Econ.* 121

in environmental offence 'objective circumstances' can be used to describe the circumstances of the offence whether repeated or not.⁸⁸⁹

Applying these theories in the oil and gas industry, which mainly involves the transnational companies, needs a careful analysis. Looking at the inspectability theory, acquisition of more transparent technologies is not likely to promote compliance and EJ in Nigeria because of capacity issues and technical nature of the oil and gas industry. Regarding self-reporting theory, again, even if this works in the developed countries such as US, it is highly unlikely that it will help so much in enforcing oil pollution laws because of enormous problems faced by developing countries as will be discussed in chapter five. Deterrence theory deals with how little well placed enforcement actions can have a multiplier effect. Against the backdrop of the discussions herein, and the nature of operation of the MNOCs, sanctioning one MNOC can have effect on another regardless of if developed or developing country is involved. In the researcher's opinion, the sanction may differ, but once the sanction is strong enough to deter, it will likely have a multiplier effect. In fact, it is particularly useful for a developing country such as Nigeria because of capacity issues, socio-political issues and many more that will affect taking enforcement actions against different MNOCs. Finally, the researcher thinks that the economic theory will be useful because it promotes higher sanctions. However, the challenge is that because of weakness of national laws of many developing countries and even international law, MNOCs many times do not get penalties that are strong enough to deter. Sometimes, combinations of these theories achieve better results. All these enforcement theories/models shape enforcement strategies used by the enforcement agencies. That leads the researcher to development in enforcement.

3.4vi Developments in Enforcement

The standard face of regulation is command and control reserved to the State.⁸⁹⁰ The discussion on the standard face or nature of regulation and its changing aspect is important to justify the use of less state controlled enforcement actions. Baldwin has defined command and control regulation as the exercise of influence by imposing standards backed by criminal sanctions.⁸⁹¹ With the changes in environmental management, the effectiveness and efficiency of command and control has been under scrutiny. These changes in environmental management are because of many reasons, which include the changing economic and social climate,⁸⁹² increasing scepticism and lack of confidence in the regulatory systems. In addition, with evolving technology it is very difficult for the regulatory agency to stay current with the most effective

⁸⁸⁹ See for instance, *R v McNaughton* (2006) 66 NSWLR 566

⁸⁹⁰ J Black, 'Critical Reflections on Regulation' [2002] Discussion Paper no 4 London School of Economics and Political Science, London

⁸⁹¹ R Baldwin, 'Regulation: after Command and Control' in K Hawkins (eds), *The Human Face of Law. Essays in Honour of Donald Harris* (Clarendon Press 1997) 65

⁸⁹² Andrew Farmer (n 740) 3

methods. It is also more cost effective to educate people and negotiate with them.⁸⁹³ However, these reasons are wider in the context of different countries especially where developing countries are involved. Acknowledging these contextual differences, Jha and Whalley⁸⁹⁴ noted that environmental management systems in developing countries repeatedly depend on informal social norms.⁸⁹⁵ Transferring western models of legal structures has often been ineffectual in developing countries for many reasons including economic issues, corruption, resources, political will and many others.⁸⁹⁶ Therefore transplanting these western models without looking into these issues could cause some implementation problems. All the stated reasons, has affected the effectiveness of the command and control in environmental regulation and sometimes does not yield desired results hence, need to change regulatory focus. This raises the questions concerning what to do and the entire problem hitherto discussed ushered in responsive regulation, smart regulation and meta-regulation as proposed by Ayres and Braithwaite,⁸⁹⁷ Kagan, Gunningham and Grabosky.⁸⁹⁸

Ayres and Braithwaite first initiated responsive regulation in 1992 best described in form of the '*enforcement pyramid*'. 'The pyramid employs advisory and persuasive measures at the bottom, mild administrative sanctions in the middle, and punitive sanctions at the top.'⁸⁹⁹ The central idea is that business is willing to comply, therefore enforcement agencies should start from the bottom or the least punishment, and changes depending on the response of the regulated with provision of more flexible and more measured state intervention.⁹⁰⁰ In the researcher's opinion, it illustrates some sorts of carrots and sticks or proportionate approach of enforcement invoked by an agency in an increasing manner.

The Enforcement Pyramid for responsive regulation

⁸⁹³ Robert Baldwin and Martin Cave (n 792)

⁸⁹⁴ J Jha, and J Whalley, 'The Environmental Regime in Developing Countries' [1999] National Bureau of Economic Research, Cambridge <<http://www.nber.org/chapters/c10610.pdf>> accessed 27 March 2017. See also A Ogus, 'The Importance of Legal Infrastructure for Regulation (and Deregulation) in Developing Countries' (Working Paper No. 65, Centre on Regulation and Competition, University of Manchester, 2004) <<http://ageconsearch.umn.edu/bitstream/30603/1/cr040065.pdf>> accessed 27 March 2017

⁸⁹⁵ Unlike developed countries that are more formal

⁸⁹⁶ R Jha and J Whalley (n 894): the researcher will be discussing this more in chapter five from the lens of transferring US models to Nigeria.

⁸⁹⁷ I Ayres and J Braithwaite (n 841)

⁸⁹⁸ N Gunningham and P Grabosky (n 785)

⁸⁹⁹ See figure 2 below

⁹⁰⁰ See I Ayres and J Braithwaite (n 841)

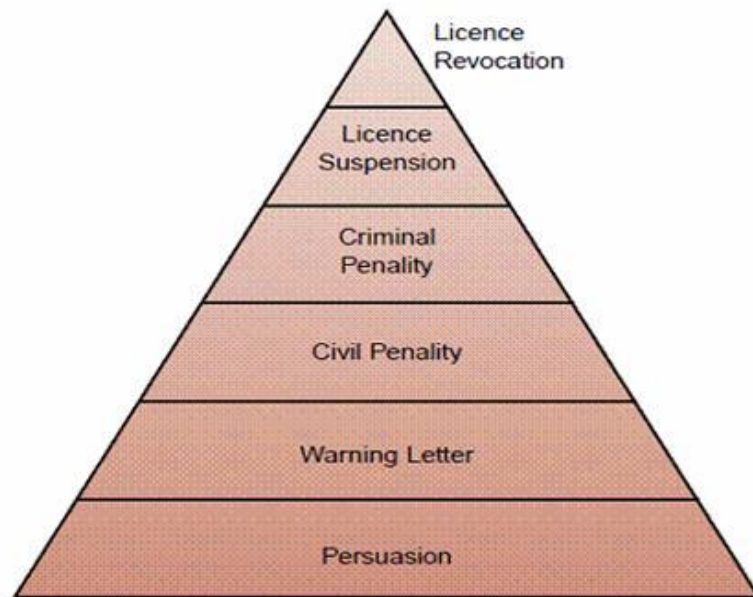


Figure 2: Pyramid of Enforcement Responses

(Source: Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* OUP, 1992) 35

In addition to responsive regulation, other scholars came up with a similar but modified enforcement pyramid. A good example is Gunningham and Grabosky smart regulation pyramid.⁹⁰¹ The ideas of the pyramids are that for business that is willing to comply voluntarily, there will be mild enforcements like letters and warnings. If that fails with those reluctant compliers, the recalcitrant or the incompetent, there will be increase in deterrence-orientated strategies. The explanation of the pyramid is that some companies will respond to persuasion and warning, others to enforcement notices while even others will respond to suspension or revocation of licenses. Here there will be gradual escalation of the pyramid to a sufficiently powerful action to deter even the most egregious offender. Smart regulation is an improvement to responsive regulation with a central idea that instead of using single instrument, several instruments should be used using different parties. Smart regulation means focusing attention of broader interest like international standard organisation, self-regulation, peer groups, civil society and many more. It simply means that beyond the enforcement roles of the state, second and third parties can act as a quasi-regulator. In the case of oil industry that relates to this research, the standards set by American Petroleum Institute and American Society of Mechanical Engineers will be useful.

⁹⁰¹ N Gunningham and P Grabosky (n 869)

Meta-regulation⁹⁰² moves a step further from the Smart regulation. Here, companies are encouraged to use their internal management to manage risks. Its norms seek to regulate institutional processes at the firm level using environmental self-management and environmental disclosure for the regulators to evaluate.⁹⁰³ Meta-regulation has many challenges, but the pressures of protest movements, NGOs, unions as well as economic sanctions are important.⁹⁰⁴ Responsive Regulation, Smart Regulation and Meta-Regulation are ‘pick-and-mix’ blend of different enforcement mechanism similar to bringing together the accommodative style and the sanctioning style. Responsive analysis suggests consideration of five fundamental tasks in implementing regulation, which are detecting, responding, enforcing, assessing and modifying approaches accordingly.⁹⁰⁵

Ogus and Abbot⁹⁰⁶ somewhat broadened regulatory enforcement with what is called optimal enforcement. They are of the view that there is a discernible shift from co-operative/informal enforcement to a more formal enforcement. Optimal enforcement concerns itself with securing compliance with the least amount of interference and designation of optimal punishment to press the right buttons in respect of the particular offender. It simply means invoking different responsive enforcement depending upon whether one is dealing with leaders, reluctant compliers, the recalcitrant or the incompetent. Regulated enterprises have different motivations and capabilities, therefore regulators must invoke enforcement actions that successfully deter egregious offenders, while encouraging virtuous employers to comply voluntarily and rewarding those who are going beyond compliance. Ogus and Abbot further argued for the introduction of civil penalties to deal with many of the lesser offences.

3.4vii Corporate Officer Liability⁹⁰⁷

The predication of corporate criminal liability is upon corporations exercising improper risk management because of its deficiencies.⁹⁰⁸ Where the act or omission of

⁹⁰² This is also the Reflexive law theory of Gunther Teubner. See Gunther Teubner, ‘Global Bukowina: Legal Pluralism in the World Society’ in Gunther Teubner, ed, *Global Law without a State* (Darmouth: Brookfield, 1997) 1, 3

⁹⁰³ Gunther Teubner, “Self-Constitutionalizing TNCs? On the Linkage of ‘Private’ and ‘Public’ Corporate Codes of Conduct” (2011) *Ind J Global Legal Stud* 617, 637

⁹⁰⁴ For further discussion, see Amiram Gill, “Corporate Governance as Social Responsibility: A Research Agenda” (2008) 26 *Berkeley J Int'l L* 452, 463 and Ramon Mullerat, *International Corporate Social Responsibility: The Role of Corporations in the Economic Order of the 21st Century* (Netherlands: Wolters Kluwer, 2010) 224, 453.

⁹⁰⁵ Julia Black and Robert Baldwin, ‘Really Responsive Risk-Based Regulation’ (2010) 32 *Law and Policy* 181 < <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9930.2010.00318.x/full> > accessed 27 March 2017

⁹⁰⁶ Anthony Ogus and Carolyn Abbot, ‘Pollution and Penalties’ (Symposium on Law and Economics of Environmental Policy, University College London, September 2001) <http://www.ucl.ac.uk/cserge/Ogus_and_Abbot.pdf> accessed 27 March 2017

⁹⁰⁷ Corporate officer liability is not the focus of this research, but mentioned here as an avenue of enforcement.

the employer causes pollution, the individual might be liable; however, one of the conditions is that the employee will have sufficient seniority to act as a controlling mind of the company.⁹⁰⁹ The controlling mind must have consented to, or connived at the commission of the offence or its commission was due to his neglect.⁹¹⁰ Corporate officer liability is to discourage corporate officers from taking greater environmental risks and because of the technical nature of oil industry; there is even a greater need for this liability. One of the difficulties of determining who is in a position of authority in practice is that the enforcement agencies may not have the detailed and sophisticated understanding of the company's internal working and rule making procedures. This was one of the issues in the recent Dutch case of *Nigerian Farmers v Shell*.⁹¹¹ In some cases, the controlling minds go to prison not the company and relating this to the reason for enforcing environmental laws which is to stop environmental harm, one will be save to argue that individuals' responsibility will not advance enforcement. Where the employer causes pollution, the company will be vicariously liable;⁹¹² however, where the officer is a controlling mind, he could be liable. More so, many offences are committed for economic motives and going against the company will be in the interest of justice, and might work against their public image, which might lead to more monitored future actions.

3.4vi Strengthening Enforcement

Strengthening enforcement is simply one of the ways of getting to the desired result by eliminating or reducing undesired activities. In this research, it is very important to discuss enforcement strengthening because that helps in using enforcement to achieve EJ. CI⁹¹³ proposed preventative measures like developing alternative legal sources of income,⁹¹⁴ improving public awareness and support for the laws, reducing the opportunity for law breaking, lowering the demand for illegal products, reducing the profits of illegal activities, and reforming the law to legalize hitherto illegal activities. CI also proposed a multi-faceted and holistic approach requiring a good detection, effective investigation, prosecution, conviction and application of penalties for a

⁹⁰⁸ The Australian Criminal Code imposes corporate liability where the company has expressly, tacitly or impliedly authorised or permitted the incident, irrespective of any personal responsibility for the wrongdoing *Criminal Code Act 1995* (Cth) ss 12.2, 12.3(2)(c).

⁹⁰⁹ See *Tesco supermarket v Nattras* (1972) AC 153; *Woodhouse v Walsall Metropolitan Borough Council* (1994) Env LR 30 and *R v Boal* [1992] 3 All ER 177

⁹¹⁰ This is the position under some subsisting environmental laws in the UK: See section 157 EPA 1990, section 217 Water Resources Act 1991. In *Armour v Skeen* [1977] IRLR 310 the 'Director of Roads' for Strathclyde Regional Council was successfully prosecuted for neglecting to produce a written safety policy for his department, despite being required to do so by the Council.

⁹¹¹ C/09/337050/HA ZA 09-1580

⁹¹² *National River Authority v McAlpine Homes East Ltd* 1994 Env LR 198, See also *Shanks and McEwan Ltd v Environmental agency* [1997] Env. LR 305

⁹¹³ AS Akella and JB Cannon (n 732)

⁹¹⁴ This is particularly important in this research because offering employment to the aggrieved youths can help in enforcing anti-sabotage law especially with evidence that pollution had destroyed their source of income as shown in Amnesty Report 2011 (n 46) and UNEP Report 2011(n 107)

resilient enforcement. To CI, legal and procedural reform, compensation, legal aid, public outreach, innovative co-management, anticorruption efforts, and support for alternative legal livelihoods may ease the enforcement challenge therefore should be considered.⁹¹⁵ The researcher will classify these points into two: preventative activities that directly improve compliance while reducing enforcement challenge and activities designed to ensure that the laws and their enforcement are workable and fair.

According to Conservation International, strengthening enforcement in isolation can lead to enforcing unjust or counterproductive laws, hence the need for legal reform.⁹¹⁶ CI opined that generally, enforcement-strengthening efforts should not be on disputed laws, as it will likely stir opposition to enforcement strengthening. Some other problems with enforcement are with the application especially where local stakeholders⁹¹⁷ are not adequately involved in decision-making. In such situations, CI suggest co-management approaches for instance, where there are natural resources or where there are protected areas, local support should be built.

In other cases, there may be unequal enforcement of appropriate and fair laws, with the rich and powerful or the enforcement agency staff themselves avoiding justice such as where the rich afford better lawyers. Here, there is need for legal assistance to those who are unable to afford lawyers. In addition, there is need to put more resources into the enforcement agencies to equip them effectively. Unequal application of the law may also be because of corruption especially in developing countries. Better enforcement makes corruption more expensive and more difficult. Fighting corruption needs to be integral to enforcement strengthening and may start by cleaning up the enforcement agencies themselves to bring greater confidence and trust. To do this, there is need to increase transparency and participation measures, NGOs or civil societies might help in enforcing the laws or prosecuting offenders or even challenging the lawmakers to improve their law making. This is very important in the context of EJ because, EJ is about the deprived, so they truly need external help as the issue of EJ mainly comes from the government meant to protect them.⁹¹⁸ Other efforts in the enforcement system include introducing appropriate checks and balances, ensuring pay and bonus structures to create appropriate incentives, revising staffing procedures, and making public the enforcement information needed to evaluate performance.

There is also need to clean up the judiciary, as effective judiciary will encourage well-intentioned enforcement agents knowing that judicial decisions might expose ineffective regulatory enforcement. Relating this to this research, Angstadt discussed judicial role in addressing substantive EJ more comprehensively, expeditiously and accurately as having led to many countries increasingly embracing institutional

⁹¹⁵AS Akella and JB Cannon (n 732)

⁹¹⁶ Ibid

⁹¹⁷ For the importance, see J Young and others, 'Does Stakeholder Involvement Really Benefit Biodiversity Conservation?' (2013) 158 *Biological Conservation* 359

⁹¹⁸ NGOs role is fully discussed in chapter six

solutions such as specialised courts.⁹¹⁹ Baum advocated that complex subject matter have potentiality in relieving caseload pressures on existing courts, developing judicial expertise and providing uniform interpretation,⁹²⁰ may help to determine success⁹²¹ and may support improved outcomes at lower judicial levels.⁹²² To support this is a study of the implications of judicial specialisation⁹²³ that showed more than 350 authorised environmental courts in 41 countries in 2009⁹²⁴ that increased to more than 800 by 2012.⁹²⁵ The study concluded that scholars observed that the benefits of environmental courts include access to justice for vulnerable populations and improved recognition of human rights and their interconnection with environmental issues.⁹²⁶ All these will help in enhancement and strengthening of enforcement.

3.5 CONCLUSION

This chapter examined the theoretical issues of justice, environmental justice and enforcement with some references to human rights. The researcher discerns two major perspectives of EJ: procedural which is meaningful involvement and distributive,

⁹¹⁹ Michael Angstadt, 'Securing Access to Justice through Environmental Courts and Tribunals: A Case in Diversity' (2015-2016) 17 Vt. J. Envtl. L. & Policy 1667, 1671; [file:///H:/Conferences/Call%20for%20papers/Environmental%20Courts.pdf](http://H:/Conferences/Call%20for%20papers/Environmental%20Courts.pdf) accessed 27 March 2017

⁹²⁰ See Lawrence Baum, 'Probing the Effects of Judicial Specialization' (2009) 58 DUKE L.J. 1667, 1671; Lawrence Baum, 'Judicial Specialization, Litigant Influence, and Substantive Policy: The Court of Customs and Patent Appeals' (1977) 11 LAW & SOC'Y REV. 823, 824

⁹²¹ BJ Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 (3) JEL 365, 367

⁹²² Arti K Rai, 'Specialized Trial Courts: Concentrating Expertise on Fact' (2002) 17 BERKELEY TECH. L.J. 877, 878; RL Revesz, 'Specialized Courts and the Administrative Law making System' (1990) 138 U. PA. L. REV. 1111, 1166 (noting the fact-finding role of trial courts, as justification for judicial specialization)

⁹²³ George W Pring and Catherine G Pring, 21st Century Environmental and Natural Resource Dispute Resolution: There is an ECT in Your Future, (2015) 33 J. of ENERGY & NAT. RESOURCES 10

⁹²⁴ George Pring and Catherine Pring, Greening Justice: Creating and Improving Environmental Courts and Tribunals (The Access Initiative/World Resources Institute 2009), xiii, 1 <www.law.du.edu/ectstudy> accessed 27 March 2017. See also George Pring and Catherine Pring, Environmental Courts and Tribunals: A Guide for Policy Makers (UNEP Publication, September 2016) <<http://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courts-tribunals.pdf?sequence=1>> accessed 27 September 2017

⁹²⁵ 320 was reported in China; 138 existing courts designated as environmental courts in Pakistan; 76 in Malaysia; 11 additional in Brazil, five environmental tribunals in India; two ECs in Chile, and one environmental tribunal each in Bolivia and in England and Wales. A 2010 Bangladesh law provides for at least one environmental trial court in each of the country's 64 districts plus an open number of environmental appellate courts. In 2012, Kenya became the first nation in the world to authorise an EC in its Constitution, swore in 15 Land and EC judges and advertised for 30 more, 16 operating ECs, and plans to establish at least one in each of its 47 counties. In 2014, El Salvador passed final legislation to create three trial-level ECs and one appeals-level EC by 2015. Also in 2014, Hawaii's legislature overwhelmingly authorised ECs.

⁹²⁶ George Pring and Catherine Pring, 2009 (n 924), 2 See also Nicholas A Robinson, 'Ensuring Access to Justice through Environmental Courts' (2012) 29 Pace Envtl. L. Rev. 363, 372

which is fair treatment whether present or future, or whether distributing hazards or benefits. The analysis in the chapter links distributive and procedural EJ by showing that the use of procedural EJ can secure distributive justice, enables enforcement and can serve as a means of making public bodies accountable. The chapter exposes the elements of fair treatment, equal protection, equity, meaningful involvement and enforcement as fundamental to this research because with equal and fair treatment, with equitable distribution of environmental benefits and burdens, public participation in decision-making process, access to information rights and accessible means of redress, EI will greatly be reduced giving room for EJ to be achieved. This conclusion will also highlight the usefulness of using EJ theory and EJ lens given the challenges faced by developing countries in balancing oil-related pollution with much needed investment when MNOCs are involved. This is because; as highlighted in chapter one, national laws especially of developing countries are relatively weak to deal with the problems of oil pollution and international laws do not bind the transnational companies. Therefore, addressing the problems through the lens of EJ and human rights is to the researcher a very important and relatively easier way addressing the problems particularly for developing nations such as Nigeria.

Given the importance of enforcement in achieving EJ as seen in many definitions, the researcher further analysed the theoretical element of enforcement and found that stronger enforcement improves compliance, enhances EJ and reduces the causes of EI. To achieve EJ using enforcement, the chapter also found that an understanding of enforcement process, its challenges, and system's weaknesses is critical before designing and implementing enhanced enforcement programmes. The chapter also critically analysed enforcement mechanisms, strategies and recent development in enforcement. The idea behind this analysis is to review command and control and examine why there has been shift to responsive regulation, smart regulation and meta-regulation. The enforcement model are analysed as a basis for recommendation of enforcement model for Nigeria in EJ cases. This chapter concludes that to improve the whole element of enforcement, the analysis shows that there is need for recognition of holistic nature of enforcement process and the researcher will discuss the subsequent chapters on enforcement bearing in mind the debate of role managerial and sanction-oriented theorists that dominated the arena over the years.

In the next chapter, the researcher will compare the US and Nigeria pollution abatement laws and regulations relating to this research identifying their possible strengths and weaknesses as well as the internationally acceptable standards.

CHAPTER FOUR

BUILDING THE LEGAL FOUNDATION FOR OIL-RELATED POLLUTION ABATEMENT IN NIGERIA: IN COMPARATIVE VIEW

4.1. INTRODUCTION

The last chapter dealt with EJ and enforcement, which are the fundamentals of thesis. This chapter will compare the relevant aspects of oil-pollution laws in the US and Nigeria with the aim of answering the question as to what extent the Nigerian oil-pollution abatement laws are adequate to aid enforcement with a view of achieving EJ in Nigeria. This chapter also considers the challenges of transplanting from western culture as presented in chapter one. Here, the analyses will show that the reform will not result in a mere copy or replacement of the existing laws: but to transplant practicable and relevant laws. Virtually all the oil and gas activities in both the upstream and downstream sectors are prone to pollution.⁹²⁷ The Nigerian oil-related pollution situation seems abnormal owing to poor environmental management, poor response to spills and avoidable gas flaring.⁹²⁸ The comparison of the US with Nigeria is to establish that the Nigerian laws are comparatively weak and highlight how it affects enforcement. This will serve as a backbone for the discussion of enforcement and its challenges in the subsequent chapters. This chapter will generally focus on three key aspects: comparison of the relevant aspects of Nigerian and US laws; examination of the IAS in the oil industry with a view of finding out if Nigerian laws and regulations meet these standards; and analysis of possible reforms underway in Nigeria. The comparison will help the researcher to conclude whether there is a connection between the relevant laws in Nigeria and EI either wholly or partly, how the laws affect enforcement if any and will help the researcher in tailoring recommendations with a view of enhancing EJ in Nigeria. The researcher examines legal provisions pertaining to oil pollution prevention, preparation, response and restoration/remediation of the environment as basis for discussing the enforcement issues in this research. This will bear in mind that the US regulates its oil industry through a myriad of environmental, health, and safety laws.⁹²⁹ The researcher will also examine the defences/ exemptions in the US that might foster EI, ⁹³⁰criminal and civil

⁹²⁷ This was discussed in chapter 2

⁹²⁸ UNEP Report 2011 (n 107); RT Ako, 'Resource Exploitation and Environmental Justice in Developing Countries: The Nigerian Experience' in F Botchway (ed), *Natural Resource Investment and Africa's Development* (Edward Elgar 2011) 72

JG Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (Hamburg: LIT VERLAG Munster, 2000) 164 J Frynas, 'Corporate and State Responses to Anti-Oil Protests in the Niger Delta' (2001) 100 (398) *African Affairs* 27; J Frynas, 'A Socio-Legal Approach to Natural Resource Conflicts – Environmental Impact of Oil Operations on Village Communities in Nigeria' (*African Environments: Past and Present*, 1999); Human Rights Watch, 1999 (n 339) and JF Fekumoh (n 339)

⁹²⁹ See USEPA Office Compliance Enforcement, *Profile of the Oil and Gas Extraction Industry* (USEPA Publication, Washington DC, 2000)

⁹³⁰ For example 42 U.S.C: §9601(14), CERCLA exempts petroleum and the toxic components of crude from classification as hazardous substances unless there is increase in concentration by contamination or by addition after refining and the oil extraction industry is exempted from reporting toxic chemical

liabilities and penalties, compensation principles, enforcement powers as well as laws and regulations in the gas industry bearing in mind different social, political and economic situations in both jurisdictions. To give effect to the comparative analysis, the comparison will be thematic in nature.

4.2 CRITICAL COMPARISON OF US AND NIGERIAN LEGAL REGIME WITH A VIEW OF ENHANCING EJ

4.2i Prevention

Preventive measures are the most appropriate strategy for environmental protection. It essentially addresses a variety of issues such as improved structural design, traffic monitoring and navigation, safety standards, certification and licensing, operational failures, liability/financial responsibility and monitoring and inspection. In the US, OPA mandated comprehensive pollution prevention requirements to reduce the potential future pollution and to take immediate control of spills when they occur.⁹³¹ It also provides for higher liability and financial responsibility.⁹³² In Nigeria, the provisions of the Petroleum (Drilling and Production) Regulations 1969 is substantially similar to OPA as it mandates every licence holder to adopt all practicable precautions including the provision of up-to-date equipment to prevent oil pollution and to take prompt steps to end the effects where it occurs.⁹³³ It is interesting because Nigerian made her law in 1969 and the US made OPA in 1990. So one wonders the reason why more than forty-five years after, oil pollution is predominant in Nigeria more than the US.

4.2ii Preparedness/Reporting

In the USA, the CWA requires the immediate report of a spill to the appropriate US agency⁹³⁴ by the person in charge of a vessel of an onshore or offshore facility as soon as he has knowledge of it following federal reporting requirements.⁹³⁵ In Nigeria, operators should write a report of spill to the nearest NOSDRA zonal office to the impacted site and to the NOSDRA National Control and Response Centre within

releases to the toxic release inventory. See also other exemptions under CAA, CWA Standards, RCRA and many more. For more explanation see USEPA Office of Compliance Enforcement *Profile of the Petroleum Refining Industry* (USEPA Publication GPO 1995) and USEPA, Office of Solid Waste, EPA530-K-01-004, 'Exemption of Oil and Gas Exploration and Production Wastes from Federal Hazardous Waste Regulations 2002' <[https://yosemite.epa.gov/oa/eab_web_docket.nsf/Attachments%20By%20ParentFilingId/945EF425FA4A9B4F85257E2800480C65/\\$FILE/28%20-%20RCRA%20E%26P%20Exemption.pdf](https://yosemite.epa.gov/oa/eab_web_docket.nsf/Attachments%20By%20ParentFilingId/945EF425FA4A9B4F85257E2800480C65/$FILE/28%20-%20RCRA%20E%26P%20Exemption.pdf)> accessed 27 August 2017

⁹³¹ (Homan, 2007; US Department of Transportation 2001)

⁹³² This helps to improve compliance which in turn likely to reduce and prevent the spills.

⁹³³ Reg 25, 40; See also sections 1, 3 and 5 of ONWA

⁹³⁴ 33 U.S.C. §1321(b) (5), 40 C.F.R. §110.10, see also §4301(a) and (c) of OPA. The appropriate process will be report to the National Response Centre (NRC) or USEPA regional office or the US Coast Guard Marine Safety Office in the area where the incident occurred.

⁹³⁵ The federal reporting requirements found in two USEPA Regulations: 40 CFR parts 110, Discharge of Oil Regulation, and 40 CFR parts 112, Oil Pollution Prevention Regulation.

twenty-four hours.⁹³⁶ These two provisions from US and Nigeria appear similar in the sense that they give feeling of urgent report/action; however, '*as soon as he has knowledge*' appears more urgent than within twenty-four hours. The US provision appears better because faster actions after spill will likely reduce the impacts of pollution. Based on the researcher's findings discussed in chapter two, complying with the twenty-four hours is even problematic in Nigeria.

4.2iii Response

In the US, the USEPA generally deals with lands spills while the USCG deals with the waterways and the boundaries of waterways. USEPA/USCG determines the lands by agreements and identifies them in federal regional contingency plans.⁹³⁷ The US uses the national response system to coordinate response actions with the Federal on-scene-coordinator⁹³⁸ through the National Response Centre (NRC). The on-scene-coordinator⁹³⁹ assesses and monitors, helps response, evaluates during and after spill incidents and ensures a speedy and effective response to spills. The National Pollution Fund Centre then disburses funds and ensures its proper use twenty-four hours a day. In addition, the National Contingency Plan (NCP)⁹⁴⁰ was amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) and section 311(d) of the CWA as amended by the OPA to ensure an efficient response to pollution incident. In Nigeria, NOSDRA collaborates with other agencies to supervise; assess damage, grants approval for dispersant, monitor response and the clean-up operations, undertake a post-spill impact assessment and helps in mediation between communities and the spiller.⁹⁴¹ Oil companies must submit an environmental evaluation report,⁹⁴² contain spill,⁹⁴³ inform DPR within twenty-four hours with initial remediation action plan and commence clean-up within twenty-four hours, assess site contamination and then start recovery, treatment, monitoring and rehabilitation programmes.⁹⁴⁴ A major difference is that in the US, the regulatory agencies are empowered to be active to ensure fewer impacts, but in Nigeria, the agencies are almost dormant directing polluters on what to do. There is disbursement of fund as immediate response with its usage monitored twenty-four hours in the US, but not in Nigeria and there is clear delineation of duty between USEPA and USCG regarding spills in land and waterways, but there is no such delineation in Nigeria. For these reasons, the US provisions is likely to reduce pollution more than Nigeria.

⁹³⁶ See section 6 (2) and (4) of the NOSDRA Act, Reg 4 of NOSDRA Regulation and Part VI B, 4.4.1 and Part VIII B, 6.0 of EGASPIN

⁹³⁷ See US Code 40 CFR § 300.5

⁹³⁸ The OSC coordinates and directs response and other efforts at the scene of a discharge or release

⁹³⁹ A federal official from the USCG for coastal zone spills and from USEPA for land-based spills

⁹⁴⁰ Executive Order 11735 amended the CWA in 1973 to provide for a federal spill response mechanism.

⁹⁴¹ Section 19 (1) See also Reg. 5 of NOSDRA Regulation for JIV requirement

⁹⁴² Part VIII A, 2.0

⁹⁴³ Part VIII B, 2.6.1.

⁹⁴⁴ Part VIII B, 6.0; the researcher will be discuss what happens in practice in chapter five

4.2iv Restoration, Clean-up and Remediation

Globally, failure to clean-up is mostly a reflection of regulatory failure and it usually results in litigation and penalties.⁹⁴⁵ In the US, the US president can approve up to \$50 million each year to fund removal activities without adoption of the Congress. Where the \$50 million is insufficient, the Maritime Transportation Security Act of 2002 granted authority to advance up to \$100 million from the Principal Fund to fund removal activities. In addition, CERCLA⁹⁴⁶ authorises two kinds of response actions: removal and remedial actions. Removal actions address releases or threatened releases requiring prompt response. Removal actions are emergency, time-critical and non-time critical. Remedial actions are to reduce the risks associated with releases or threats of releases of hazardous substances significantly. Where clean-up is not in accordance with the requirements, sanctions and penalties are imposed.⁹⁴⁷ To ensure reduction of damage to the environment in the US, the owner, operator or FG can remove spills, however, the FG will recover cost subject to prescribed limit⁹⁴⁸ of maximum of \$50 million.⁹⁴⁹ One area that relates to EJ is that CERCLA provided for public participation by providing for comment on the selection of remedial actions at individual sites.⁹⁵⁰ This is very important, as public participation will help in achieving EJ for the affected persons. It also authorises technical assistance grants of up to \$50,000 for community groups to help the public understand technical information.⁹⁵¹ SARA in 1986, added some amendments, clarifications, and technical requirements, which includes additional enforcement authorities. Also, section 4201 of OPA amended section 113(c) of the CWA providing the president and the USCG with the authority to perform clean-up immediately using federal resources, monitor the response efforts or direct the spiller's clean-up activities.

In contrast with Nigeria, under EGASPIN, a spill must be cleaned-up no matter the cause,⁹⁵² and the environment remediated to DPR acceptable standard⁹⁵³ or there will be penalty for corporate bodies and tanker owners under the NOSDRA Act,⁹⁵⁴ however, the company is not strictly liable. The company is also required to keep a

⁹⁴⁵ See very many penalties cases in both developed and developing countries such as Erika spill, recent Gulf of Mexico and many more. For more see Dagmar Schmidt Etkin, 'A Worldwide Review of Marine Oil Spill Fines and Penalties' [2003] Environmental Research Consulting 1 <http://www.environmental-research.com/erc_papers/ERC_paper_10.pdf> accessed 27 March 2017

⁹⁴⁶ USEPA drafted CERCLA and enacted by the Congress to give the Federal Government the authority and funding to clean up sites contaminated by hazardous waste because the CWA provided for federal response only to those spills involving US waters and their adjoining shorelines.

⁹⁴⁷ Sanctions include permanent or temporary closure of facilities or specific operations, increased monitoring/reporting, revocation of existing permits or denial of future permits, and barring of receipt of federal contract funding or other federal assistance.

⁹⁴⁸ 33 U.S.C.\$1321(f)

⁹⁴⁹ 33 U.S.C.\$1321(b) (6)

⁹⁵⁰ Section 117

⁹⁵¹ Section 117(e) of CERCLA

⁹⁵² Part VIII B 4.1

⁹⁵³ Art. 4.6.2, Part VII, B, 2.11.3 (i), (ii) and (iii)

⁹⁵⁴ Art. 6 (3)

daily log of events until they conclude clean-up;⁹⁵⁵ they will now submit the costs of the clean up to the DPR.⁹⁵⁶ The operator responsible must conduct an environmental evaluation study after spill.⁹⁵⁷ A critical examination of the Nigerian laws reveals that they do not provide for emergency, time-critical and non-time critical removal actions, which is very important in the researcher's opinion because it directs the focus of the spiller. The provisions of Nigerian laws are mild and there seem to be no punishment for failure to remediate in a timely manner. Part VIII B.8.1 of EGASPIN provided for spillers' liability for damage he caused.⁹⁵⁸ Where an individual punctured a pipe and it causes spill, the punishment can only be under a different law such as the Petroleum Production and Distribution (Anti-Sabotage) Act.⁹⁵⁹ One major difference is that in the US, the president and USCG can perform clean-up using federal resources without waiting for the spiller, but NOSDRA can only monitor clean up. With the NOSDRA Amendment Bill if passed into law, failure to clean-up to all practical extent will attract at least N3 million (about \$8,300) daily or maximum of 3 years imprisonment or up to three times the costs incurred by National Oil Pollution Management Agency (NOPMA).

4.2v Liability and Compensation

4.2va Civil/Criminal Penalty for Failure to Report Spill

Failure to notify a discharge in the US carries a criminal liability of a maximum of \$250,000 for an individual or \$500,000 for an organisation with five years maximum prison term.⁹⁶⁰ In Nigeria, failure to report spill as required by law carries a daily civil penalty of N500, 000 (US\$2,489.53).⁹⁶¹ There are three discernible differences in these provisions between the jurisdictions compared. The first is the level of fines, the second is criminal and civil penalties as there is no prison terms in the NOSDRA Act and the third is the difference in the individual and corporate penalties. Not only that the penalties imposed by the US laws are higher, they are hierarchical and clearer. One seems not to understand how the same multi-nationals will pay US\$2,489.53 and \$500,000 for a similar offence, despite political, social and economic differences in the countries under discussion. It is however important to note that even though NOSDRA penalties appear smaller, it could be bigger than the US penalty if the non-reportage last up to a year. The sad news however, is that lasting for a year means more damage to the environment. It may not be the major reason why EI thrives in Nigeria, but it will likely increase pollution incidences that might increase EI in Nigeria, therefore better enforcement could clearly provide more of an opportunity for Environmental Justice.

⁹⁵⁵ EGASPIN, Part VIII B, 2.10.1

⁹⁵⁶ EGASPIN, Part VIII B, 2.10.2

⁹⁵⁷ EGASPIN, Part VIII B, 7.0

⁹⁵⁸ A pipeline owner might be strictly liable under the rule in *Rylands v Fletcher* (1866) LR 1 EX. 265; see *Ogiale v Shell BP* (1997) 1 NWLR (Pt. 48) 148

⁹⁵⁹ Section 2

⁹⁶⁰ §4301(a) and (c) of OPA

⁹⁶¹ Section 6 (2) NOSDRA Act; the amendment Bill increased it to N10 million

4.2vb Other Criminal Liability/Penalties

Criminal penalties in the USA are mainly applicable for negligent or intentional violations. For negligent violations, there can be imprisonment of up to two years in addition to fines or both.⁹⁶² For intentional violations, the minimum fine is \$5,000 and \$50,000 maximum per day of violation or maximum imprisonment of three years or both.⁹⁶³ For knowingly placing another person in imminent danger of death or serious bodily injury, the fine is up to \$250,000 and maximum imprisonment of fifteen years.⁹⁶⁴ There is also criminal liability in strict liability offences.⁹⁶⁵ The Nigerian regime provides for various criminal liabilities; however, most of the punishments are not good enough to deter in the researcher's opinion. For all the laws and regulation prior to 1988 the maximum liability is N2, 000 (US\$6) or six months imprisonment or both⁹⁶⁶ and additional N400 (\$1.2cents) on conviction for failure to report.⁹⁶⁷ The post 1988 laws provide for higher, but still low penalties. There are significant punishments in the EIA Act, 1992 and EGASPIN, 2002.⁹⁶⁸ For EIA, it is N100, 000 (US\$310) or five years imprisonment for individuals and N50, 000 (US\$165) and maximum of N100, 000 (US\$310) for corporate organisations.⁹⁶⁹ For EGASPIN, a royalty of at least N500, 000 (US\$1,575) is payable and an additional daily fine of N100, 000 (US\$310) until avoidable spillage is stopped. There is also a maximum of 2 years imprisonment of effluent liquid N5, 000.00(US\$15.75) for every 50m³ of water discharged for the first offender of illegal disposal⁹⁷⁰ and revocation of licence and/or permit.⁹⁷¹ Under the Harmful Waste Act, 1988 penalties include corporate officers' punishment life imprisonment, forfeiture, civil penalties and exclusion of diplomatic immunity.⁹⁷² The maximum prison sentence in the US is fifteen years imprisonment and maximum fine is \$250,000 as against two years and US\$1,575 in Nigeria. This gives an insight of how insignificant the Nigerian penalties are in comparison with that of the US and that can explain why there may be more pollution, violations and EI.

4.2vc Civil Penalties

In the US, the minimum administrative penalty is \$25,000 or \$10,000 of each day of violation.⁹⁷³ Penalties are likely more where there is failure to operate within clean-up

⁹⁶² 33 U.S.C. 1319(c) (1)

⁹⁶³ 33 U.S.C. 1319(c) (2)

⁹⁶⁴ 33 U.S.C. 1319(c) (3)

⁹⁶⁵ See *US v Coastal State crude gathering Co.* 643 F.2d 1125 (5th Cir. 1981), see also *US v Marathon Pipeline Co.*, 589 F.2d 1305 (7th Cir.1978)

⁹⁶⁶ See reg. 45, Section 6 (2) (3) ONWA and Regulation 4 of Petroleum Refining Regulations 1974

⁹⁶⁷ S.10 ONWA; unfortunately, it is still the position.

⁹⁶⁸ But see section 18 of the Water Resources Act, 1993

⁹⁶⁹ Section 62

⁹⁷⁰ Art. 4.6.2.2 of EGASPIN

⁹⁷¹ EGASPIN, Part IX, 4.7.

⁹⁷² See section 7, 6, 12 and 9

⁹⁷³ 33 U.S.C.1321(b) (6)

guidelines.⁹⁷⁴ CWA imposes liability for the costs of the removal of oil and hazardous substances, and imposes administrative and civil penalties for unlawful discharges and for failure to carry out orders issued under the Act.⁹⁷⁵ USEPA revised the statutory penalties under OPA,⁹⁷⁶ by increasing the civil penalty to up to \$37,500 daily or \$1,100 per barrel-discharged oil⁹⁷⁷ from January 13, 2009, and if there is gross negligence, the minimum civil penalty is \$140,000 daily or up to \$4,300 per barrel of oil or unit of reportable quantity of hazardous substance discharged.⁹⁷⁸ Failure to remove or carry out a governmental order to remove discharged oil attracts a penalty of up to \$37,500 per day of violation or an amount triple the cost incurred by the Oil Spill Trust Liability Fund (OSTLF).⁹⁷⁹ In addition, section 2704 (d) of OPA empowers the US president by Regulations to adjust liability to reflect significant increases in the consumer price index, issued not later than 3 years after July 11, 2006, and not less than every 3 years thereafter.⁹⁸⁰ All these are obviously lacking in the Nigerian laws. By contrast with the US regime, in Nigeria, the maximum civil liability under NOSDRA Act is N500, 000 (US\$1,575) for each day of failure to report spill⁹⁸¹ and fixed sum of N1, 000, 000 (US\$3100) for failure to clean-up.⁹⁸² There is also forfeiture under the Associated Gas Reinjection Act 1979.⁹⁸³ Not only that Nigerian penalty is far below that of US, with exception of clean-up penalty, the penalty in the NOSDRA Act is failure to report and not for violation. In the researcher's opinion, it means that the spiller can report a spill but continue to be in violation. It is more worrisome as there is no provision to review penalties despite high inflation rate in Nigeria.⁹⁸⁴ To

⁹⁷⁴ The US fined Exxon \$1.7 million for failing to respond rapidly enough to a pipeline fracture which spilled 1,500 tonnes of oil into the Yellowstone River in addition to estimated \$134 million in clean-up costs. Brazilian local government fined Petrobras a maximum R50 million (\$28 million). Chinese Regulator demanded Rm 1.7 billion (\$269 million) from Conoco/Phillips for spills in Bohai Bay and a further Rm 113 million for clean-up and remediation in 2011.

⁹⁷⁵ These are strict liability offences with few exceptions. See section 311 (b) (6) CWA and also section 107 of CERCLA

⁹⁷⁶ USEPA, Civil Monetary Penalty Inflation Adjustment Rule 73 FR 75340 (12/11/08), 75345 (USEPA Publication, 2008) <<http://www.gpo.gov/fdsys/pkg/FR-2008-12-11/pdf/E8-29380.pdf>> assessed 30 September 2017

⁹⁷⁷ Ibid; 33 U.S.C. 1321(b) (7)(A)

⁹⁷⁸ Ibid, 33 U.S.C. 1321(b) (7) (D)

⁹⁷⁹ Ibid, 33 U.S.C. 1321(b) (7) (B)

⁹⁸⁰ Consumer price index as compiled by Numbeo is 96.02 for Washington DC; 89.86 for Houston and 57.26 for Lagos, groceries index are 94.01, 88.10 and 57.82 respectively while local purchasing power are 130.91, 121.27 and 36.17: See Numbeo, 'Consumer Price Index: Cost of Living' <<http://www.numbeo.com/cost-of-living/>> accessed 27 March 2017. Also according to Worlbank Report about 54% live on less than 1 dollar per day in Nigeria: See P Francis and S Sardesai, Republic of Nigeria Niger Delta Social and Conflict Analysis (World Bank Report draft May 2008) <http://siteresources.worldbank.org/EXTSOCIALDEV/Resources/3177394-1168615404141/3328201-1172597654983/Niger_Delta_May2008.pdf> assessed 30 September 2017

⁹⁸¹ Section 6 (2)

⁹⁸² Section 6 (3)

⁹⁸³ See section 4

⁹⁸⁴ The USA laws provides for reviews of civil monetary penalties every four years taking into account inflation. USEPA's initial inflationary adjustments were published in the December 31, 1996, 61

buttress this point, US\$1 on 12/10/2001 was officially equivalent to between N111.85 and N112.85;⁹⁸⁵ today US\$1 is equivalent to between N304 to N305.⁹⁸⁶ It is ironic that the US with very insignificant inflation will see the need for regular penalty review while Nigeria with high inflation rate does nothing. Hope is on the way if the PIB⁹⁸⁷ eventually becomes law as its section 219 (8) provides for regular review.

4.2vd Civil or Criminal Liability Regime

Under section 2704 (a) of OPA, there is a combination of civil and criminal liability penalties limits ranging from \$600 per gross ton to \$1200 and \$2 million to \$75 million depending on whether there is gross negligence, willful misconduct, violation of applicable laws, report of the incident, reasonable co-operation to remove and compliance with order regarding to removal activities.⁹⁸⁸ For EGASPIN, it is also both civil and criminal liabilities, fines, imprisonment⁹⁸⁹ and revocation of licence and/or permit.⁹⁹⁰ However, EGASPIN is a guideline and this research is not aware of a successful legal proceeding in Nigeria based on the provisions of EGASPIN.

4.2ve Civil Liability: Compensation/Damages

On compensation, the responsible party pays compensation, removal cost and damages under OPA.⁹⁹¹ The US president can also approve up to \$50 million each year to fund third party damage claims, removal activities and initiate NRDAs without adoption of the Congress. In comparison with Nigeria, EGASPIN and other laws provide for payment of adequate compensation to the community and landowners.⁹⁹² A major difference is that damage claim under OPA is more specific. For instance, damage claim covers natural resources, real and personal property, and loss of subsistence of

Federal Register 69360; subsequent adjustments were published in 69 *Federal Register* 7121, February 13, 2014, and 73 *Federal Register* 75340, December 11, 2008 (as corrected 74 *Federal Register* 626, January 7, 2009). The current one was published on 1st July, 2016: USEPA, The 2016 Civil Monetary Penalty Inflation Adjustment Rule 2016': 81 *Federal Register* 43,091 <<https://www.epa.gov/sites/production/files/2017-01/documents/finalpenaltyinflationguidance.pdf>> accessed 27 July 2017

⁹⁸⁵ Central Bank of Nigeria, *Nigerian Naira Exchange Rate Archives* (Central Bank of Nigeria Publications) <<http://www.cenbank.org/rates/ExchangeArchives.asp>> accessed 27 July 2017

⁹⁸⁶ Ibid, and unofficially N320: see also Oanda Currency Converter <<http://www.oanda.com/currency/converter/>> accessed 27 July 2017

⁹⁸⁷ Now divided into five Bills

⁹⁸⁸ 33 U.S.C. § 2704(1) (1), (2)

⁹⁸⁹ Art. 4.6.2.2

⁹⁹⁰ EGASPIN, Part IX, 4.7.

⁹⁹¹ 33 U.S.C. § 2702(a); OPA provides for adequate provision of funds for expeditious federal response to spills, payment of damages and established a liability and compensation regime that will serve as a deterrent to potential RP. It also established OSLTF to ensure achievement of these aims. See also Jones Walter, 'Oil Spill Compensation and Liability Legislation: When Good Things Don't Happen to Good Bills' (1989) 10 *Environmental Law Reporter* 10333; See also AI Mendelsohn and ER Fidell, 'Liability for Oil Pollution—United States Law' (1979) 10 (4) *Journal of Maritime Law and Commerce* 475

⁹⁹² Part IX 4.6.2, Part VIII F 6.5.3 and VIII B 8.3.1 and Oil Pipeline Act, Section 18 Water Resources Act, 1993

natural resources, loss of revenues to government, loss of profit or impairment of earning capacity due to the injury, destruction, or loss, or natural resources, damages for net costs of providing increased or additional public services during removal.⁹⁹³ Natural resources include amongst others things land, fish and drinking water supply⁹⁹⁴ and the claimant does not need to be the owner of the natural resources, reliance on them for subsistence suffices.⁹⁹⁵ A potential claimant under the OPA will be quite aware of what he/she is claiming for, not compensation that is based on the power of negotiation of the vulnerable victims of oil pollution, which increases injustice in Nigeria. For small releases, there is no assessment of natural resource damage under either CERCLA or OPA. To show regulatory seriousness, USEPA argued that not charging for natural resource damage gives incorrect price signals to potential polluters.⁹⁹⁶ There is provision of correct economic incentives where the calculated value of the assessment equals the average harm done. In addition, some states⁹⁹⁷ have enacted compensation formulas basing charges on spilled volumes, the nature of the receiving waters, and other factors.⁹⁹⁸ This is very significant for this research as the US legal/federal system gave the States such powers. Almost all the mentioned points here are non-existent in Nigeria, section 11 of NOSDRA Amendment Bill⁹⁹⁹ provides similar thing to CERCLA with exception of loss of revenues to government and damages for net costs of providing increased or additional public services during removal if eventually passed into law. All this are major setbacks for enforcement and enhancement of EJ in Nigeria.

4.2vi Others

4.2viA Liability Trust Fund

OPA on its enactment authorises the use of OSLTF, consolidated the liability, compensation and supporting funds of some federal oil pollution laws and the consolidation and tax collection on the petroleum industry.¹⁰⁰⁰ It authorised the OSLTF to pay up to \$1 billion for prompt oil removal and uncompensated damages per incident. The usage of the fund is for removal costs incurred by the regulatory agencies; payments to regulatory agencies and Indian tribe trustees to conduct natural resource damage assessments and restorations; payment of claims for uncompensated removal costs and damages; research; and other specific appropriations. OSLTF apply

⁹⁹³ 33 U.S.C. § 2702(b)(2)

⁹⁹⁴ 33 U.S.C. § 2701(20)

⁹⁹⁵ 33 U.S.C. § 2702(b)(2) (c)

⁹⁹⁶ USEPA National Center for Environmental Economics, 'The US Experience with Economic Incentives for Protecting the Environment' (USEPA Publication, EPA-240-R-01-001 January 2001) <[https://yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0216B-13.pdf/\\$file/EE-0216B-13.pdf](https://yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0216B-13.pdf/$file/EE-0216B-13.pdf)> accessed 27 March 2017

⁹⁹⁷ Alaska, Washington, Florida, and Texas

⁹⁹⁸ For further discussion, see National Center for Environmental Economics (n 799)

⁹⁹⁹ Discussed infra

¹⁰⁰⁰ Ramseur observed that damage recovery after pollution incidence was difficult for private parties before OPA: see JL Ramseur, *Oil Spills in US Coastal Waters: Background, Governance, and Issues for Congress* (Congressional Research Service Report, Order Code RL33705, 23 August 2007).

where a RP denies a claim or fails to settle a claim within ninety days. OPA broadened the scope of damages; including NRDs for which polluters are liable and established, a higher liability limits for spills proportionate changes to financial responsibility requirements to meet the maximum amount of liability as provided by section 2704.¹⁰⁰¹ The RP shall also establish and maintain evidence of financial responsibility sufficient to meet the maximum amount of liability to which the RP could be subjected under section 2704 (a) and (d).¹⁰⁰² Sheenan discussed the usefulness of this fund after ten years and concluded that it is useful,¹⁰⁰³ however, the Macondo spill, opened up its weaknesses.¹⁰⁰⁴ The OSLTF sources of revenue are barrel tax,¹⁰⁰⁵ transfers, interest, cost recoveries and penalties.¹⁰⁰⁶ This provision of OSLTF is lacking in Nigeria. Niger Deltans are helpless in event of spills that are not cleaned-up and on time. The issue of compensation is even worse considering how long it takes.¹⁰⁰⁷ That is indeed a disproportionate burden on the claimants, hence environmental injustice. Hope is on the way with a proposed amendment of the NOSDRA Act if it becomes law. Different liability lies with the Amendment Bill up to a maximum of fifteen billion naira (N15 billion)¹⁰⁰⁸ if passed into law. Saraki, the presenter of the bill has this to say on one occasion, which in the researcher opinion is positive:

We have in addition under this Bill incorporated the establishment of a contingency fund which when established should help operate like the American SUPERFUND to provide cushion for managing the cost of oil spills especially ones with significant impact on the environment with the criteria that will be developed as part of the Fund later.¹⁰⁰⁹

4.2viB Recovered Funds

Under CERCLA and CWA, money recovered for the costs of replacing or restoring natural resources is for restoration¹⁰¹⁰ and monetary penalties collected are with the US

¹⁰⁰¹ 33 U.S.C. § 2716 compare with the PIB

¹⁰⁰² 33 U.S.C. § 2716

¹⁰⁰³ DF Sheehan, 'The Oil Spill Liability Trust Fund: How Effective an Instrument of U.S. Public Policy has it Been?' (International Oil Spill Conference, 1999) <<http://ioscproceedings.org/doi/pdf/10.7901/2169-3358-1999-1-655?code=ampi-site>> accessed 27 March 2017

¹⁰⁰⁴ Discussed infra

¹⁰⁰⁵ Barrel tax is from the oil industry on petroleum produced in or imported to the US. It was originally 5%, but now increased to 8% by The Energy Improvement and Extension Act of 2008.

¹⁰⁰⁶ Under OPA, the Federal Water Pollution Control Act, the Deepwater Port Act, and the Trans-Alaska Pipeline Authorization Act 1973, RPs may incur fines and civil penalties in addition to for clean-up costs, which are deposited into the OSLTF

¹⁰⁰⁷ This was discussed in the first chapter

¹⁰⁰⁸ \$ 41,527,400 using Oanda Currency Converter < <https://www.oanda.com/currency/converter/>> accessed 25 October 2017

¹⁰⁰⁹ ThisDay, 'N' Delta Oil Spills: Senate Takes the Gauntlet, Moves to Amend NOSDRA Act 2006' *ThisDay Newspapers* (Lagos, 04 Nov 2012 <<http://www.thisdaylive.com/articles/n-delta-oil-spills-senate-takes-the-gauntlet-moves-to-amend-nosdra-act-2006/129571/>> accessed 27 March 2017

¹⁰¹⁰ See for example, 33 U.S.C. §1321(f) (5).

Treasury.¹⁰¹¹ In Nigeria, all the discussed legislations appear to be silent on the usage of recovered funds. Again, this could contribute to EI as not using the recovered funds for the benefit of the degraded environment could mean continued pollution in favour of the whole Nigeria to the detriment of the Niger Deltans.

4.2viC Defences/Third Party Damage

There are different defences in both Nigeria and the US. Under the CWA, to avoid clean-up liability, there are defences of an act of God, war, negligence by the government or a third party.¹⁰¹² Under Nigerian ONWA, it is a defence to secure a vessel or save a life, where there is absence of negligence, sabotage, or effluent produced from a refinery with reasonable impracticability to dispose by any other means and with all reasonable practical steps taken to eliminate oil from the effluent or by wreck receiver.¹⁰¹³ There are significant differences between the provisions in the US laws and that of Nigeria. Under OPA, the defence is qualified: acts or omission of a third party is a defence, but a RP will need to prove that there was due care and precautions taken against foreseeable damage of a third party.¹⁰¹⁴ In Nigeria, there is no qualification of the defence making Niger Delta vulnerable to the MNOCs that allege sabotage in many cases. The *Nigerian Farmers case* in Hague is instructive. In addition, RPs needs to report the incident, provide reasonable help to remove the pollution and comply with orders concerning removal of pollutants; else, the defence will not apply¹⁰¹⁵ and this not the case in the Nigerian laws. However, the owner/operator has a right to proceed against the third party.¹⁰¹⁶ This is a justifiable position in the researcher's opinion and can be transplanted or at least diffused into the Nigerian laws despite different political, socio-economic context between the US and Nigeria. Such provision will serve three major purposes. First, it will keep the MNOCs on their toes to take all necessary steps to reduce sabotage knowing the difficulty it may face recovering money from the third party. Secondly, it will remove the burden of using FG resources to deal with third parties and it will reasonably remove EI because by punishing the vandals or the vandals will pay for their illicit activities if they have the resources and not the helpless villagers/communities who on many occasions suffer this brunt. In summary, Nigerian laws should not allow operators to shift liability to the government or to Niger Deltans for failure to take due care against foreseeable third party damage.

¹⁰¹¹ Under the Miscellaneous Receipts Act (31 U.S.C. §3302(b)), all court, or administratively imposed penalties must be paid by the government official receiving the monies to the U.S. Treasury.

¹⁰¹² 33 U.S.C. §1321(f), but will still pay removal cost and shall be entitled by subrogation to all the FG rights to recover cost by section 33 U.S.C. §1321(g)

¹⁰¹³ Section 4(3), (4), (5) and (6), this is still the same in the amendment Bill

¹⁰¹⁴ 33 U.S.C. § 2703(a)

¹⁰¹⁵ 33 U.S.C. § 2703(c)

¹⁰¹⁶ 33 U.S.C. 1321 (g) (h) (1)

4.2viD Gas Flaring

The Regional Supervisor must give approval to vent/flare in the US. The exceptions are leasing or using the gas as an additive necessary to burn waste products, during the restart of a shutdown facility caused by weather conditions or during the blow down of transportation pipelines downstream of the royalty meter. Other exceptions include during the unloading or cleaning of a well; when properly working equipment yields flash gas which cannot be economically be recovered and when equipment fails to work properly, during equipment maintenance and repair, or when you must relieve system pressures.¹⁰¹⁷ In Nigeria, the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations, 1985 provided for conditions for the continued flaring of gas in Nigeria in its regulation 1 (a)-(e). Amongst the conditions are the directions for effective utilization or conservation of more than 75% of the produced gas,¹⁰¹⁸ where the produced gas contains more than 15% impurities rendering it unsuitable for industrial purposes¹⁰¹⁹ and where equipment failure is infrequent.¹⁰²⁰ This simple explanation is automatic approval to flare about 25% of gas shows non-consideration of environmental implications, but economic benefits. In the US, § 250.1160 (b) of the Mineral Lands and Mining Regulations,¹⁰²¹ provides that an operator must not flare/vent gas over approved volume in its Development Operations Coordination Document (DOCD) or its Development and Production Plan (DPP) submitted to Bureau of Ocean Energy Management (BOEM). In addition, where there is negligence or flaring without approval, there will be payment of royalties on the loss or waste.¹⁰²² § 250.1161 provides that approval from the regional supervisor to flare for an extended period of time not exceeding one year, where it ensures the conservation of natural resources and consistent with national interests relating to development and production of minerals. There are many similarities with the Nigerian laws. Section 3(2) of the Associated Gas Re-Injection Act, 1979 empowers the Minister can consent to flaring where utilisation or re-injection is inappropriate or not feasible in any particular field, however, the approval in the US will not exceed one year while in Nigeria, it is open-ended, and this implies limitless pollution.

4.2viE Constitutional Right to a Healthy Environment

Both the US Constitution and Nigerian Constitution do not guarantee a legally enforceable right to a healthy environment, which can help to boost enforcement and promote environmental justice by ensuring a minimum standard of environmental quality for all.¹⁰²³ The US Supreme Court has also interpreted the Constitution to

¹⁰¹⁷ § 250.1160 of US Code 30

¹⁰¹⁸ Regulation 1(a)

¹⁰¹⁹ Regulation 1(b)

¹⁰²⁰ Regulation 1(c)

¹⁰²¹ US Code 30 <<https://www.law.cornell.edu/cfr/text/30/250.1160>> accessed 27 March 2017

¹⁰²² § 250.1160 (e) 30 CFR Code

¹⁰²³ *Long Beach v New York*, 445 F. Supp. 1203, 1212 (D.N.J. 1978)

provide no guarantee of a certain minimal level of safety and security.¹⁰²⁴ In Nigeria, by virtue of ratification and domestication of African Charter by Nigeria, the African Charter, which provides for healthy environment is now part of the Nigerian laws,¹⁰²⁵ but it is still not a constitutional right. This led to a suit by environmental action group to the Inter-American Commission on Human Rights by citizens of Mossville, Louisiana, US.¹⁰²⁶

4.2viF Enforcement Powers

There are many agencies involved in the enforcement of oil pollution laws in the US and Nigeria.¹⁰²⁷ However, enforcement power in the US mainly resides with USEPA in collaboration with the Department of Justice and States. Under OPA,¹⁰²⁸ States can also enforce controls in relation to the navigable waters of the State, with access to federal funds (up to \$250,000 per incident) for immediate removal, mitigation or prevention of a discharge. However, USEPA has the power to develop clean-up guidelines, containment and preventative measures, therefore spills are subject to USEPA directives. USEPA's power extends to setting and reviewing monetary penalties with the DOJ periodically based on inflation under the Debt Collection Improvement Act of 1996.¹⁰²⁹ It is also to establish the method to monitor, assist and enforce oil and gas regulations and standards. USEPA was empowered by Section 106(a) of CERCLA to issue an administrative order, or pursue judicial order through the DOJ to enhance enforcement, require a potentially responsible parties (PRPs) to take clean-up actions to address '*an imminent and substantial endangerment to the environment*' arising from release of a hazardous substance.¹⁰³⁰ In addition, section 122 of CERCLA allows for voluntary/administrative binding settlement agreement

¹⁰²⁴ *DeShaney v Winnebago County Dept. of Social Serv.*, 489 U.S., 195-96 (1998); and *Culver-Union Township Ambulance Service v Steindler*, 629 N.E.2d 1231 (Ind. 1994); *Lindsey v Normet*, 405 U.S. 56 (1972); *Benzman v Whitman*, 523 F.3d 119 (2d Cir. 2008); *Lombardi v Whitman*, 485 F.3d 73, 83-85 (2d Cir. 2007)

¹⁰²⁵ See The Federal Ministry of Justice, *Nigeria's 4th Periodic Country Report: - 2008-2010 on the Implementation of The African Charter on Human and Peoples' Rights in Nigeria* (The Federal Ministry of Justice Report, Abuja) August 2011 <http://www.achpr.org/files/sessions/50th/state-reports/4th-2008-2010/staterep4_nigeria_2011_eng.pdf> accessed 27 March 2017

¹⁰²⁶ *Mossville Environmental Action Now v United States* (2010) Petition 242-05, Inter-Am. C.H.R. Admissibility Decision, Report no. 43/10. The researcher will be discussing this in chapter six.

¹⁰²⁷ They are discussed in the next chapter on enforcement

¹⁰²⁸ Section 1019

¹⁰²⁹ Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 as amended by the Debt Collection Improvement Act of 1996 (DCIA), 31 U.S.C. 3701, requires each federal agency to adjust statutory civil monetary penalties for inflation every four years under the laws administered by that agency. This is a major difference in Nigerian case, as NOSDRA do not have this power.

¹⁰³⁰ 42 U.S.C. § 9606(a)

with USEPA.¹⁰³¹ USEPA is also empowered to take cost-recovery actions¹⁰³² that are consistent with the National contingency plan.¹⁰³³

This is not same in Nigeria. The AG of Nigeria can prosecute and enforce ONWA. He can consent to institution of the matter,¹⁰³⁴ or exceptionally Harbour or Ports Authority within harbour can prosecute.¹⁰³⁵ The simple implication of this for EJ is that the AG who is a political appointee¹⁰³⁶ might withhold such approval for any reason he wishes thereby defeating the purpose of the Act and AG's decision is not subject to judicial review. This is evident from the Supreme Court decision of *State v Ilori*;¹⁰³⁷ where it interpreted section 191 (3) of the 1979 Constitution¹⁰³⁸ to mean declaration of unquestioned discretion in the exercise of AG's powers to institute or discontinue proceedings except for public opinion and the reaction of the government that appointed him.¹⁰³⁹ Also, waiting for approval delays administration of justice and may lead to EI. Minister and Ministry of Transport who is still a political appointee can also enforce the Act.¹⁰⁴⁰ Unfortunately, this law is still operational today with no amendment. NOSDRA Act empowers NOSDRA to enforce it and enforcement of EGASPIN is by the DPR.¹⁰⁴¹ In practice, this provision appears a farce as even where NOSDRA is to monitor a spill; it depends on the oil company's facilities and expertise to do so.¹⁰⁴² This according to UNEP is '*inherently inappropriate*.'¹⁰⁴³ It is important to note that there are two Amendment Bills currently with the Nigerian legislature seeking to amend NOSDRA Act.¹⁰⁴⁴

Summing up the discussion in this sub-section in the light of challenges of enforcement discussed in chapter three, one would see more challenges in the Nigerian laws than the US laws and will likely have negative effects on enforcement in Nigeria,

¹⁰³¹ See BP settlement after Deepwater Horizon incident and settlement with Coastal Energy Corporation in 2015; K Lenexa, *EPA Reaches Settlement with Coastal Energy of Willow Springs, Mo., for Clean Water Act, Emergency Planning Violations* (USEPA Publications, 18 August 2015) <<http://yosemite.epa.gov/opa/admpress.nsf/ab2d81eb088f4a7e85257359003f5339/192cfcc87b5d95e585257ea50070df58!OpenDocument>> accessed 27 March 2017

¹⁰³² Section 107 (a)

¹⁰³³ Recovery includes cost of health effects; damages for injury to, destruction of, or loss of natural resources Section 104(i) of CERCLA

¹⁰³⁴ S.12 (1)

¹⁰³⁵ S 12(2)

¹⁰³⁶ The Secretary of Justice in the US is also a political appointee

¹⁰³⁷ [1983] 1 SCNLR 94, 106

¹⁰³⁸ Now Sections 211 of the 1999 Constitution

¹⁰³⁹ See Justice Eso lead judgment at 109. For further discussion on this see Osita Mba, 'Judicial Review of the Prosecutorial Powers of the Attorney-General in England and Wales and Nigeria: An Imperative of the Rule of Law' (2010) *Oxford University Comparative Law Forum* 2 <<http://ssrn.com/abstract=2056290>> accessed 27 March 2017

¹⁰⁴⁰ Sections 55(3) and 11

¹⁰⁴¹ Discussed more in the preceding chapter

¹⁰⁴² Ibid

¹⁰⁴³ See UNEP Report 2011(n 107), 139

¹⁰⁴⁴ This is discussed infra

which could lead to EI. The US laws are more robust in the light of researcher's opinion; however, the researcher will discuss these US laws in the light of the Gulf of Mexico spill, to examine US laws in action.

4.3 EFFECTIVENESS OF THE US REGIME: THE GULF OF MEXICO SPILL CASE STUDY

OPA was deemed an excellent piece of legislation until Gulf of Mexico spill.¹⁰⁴⁵ The spill led to a 398 page comprehensive report by Anderson and others in less than twelve months.¹⁰⁴⁶ BP estimated the combined spill costs; clean up, natural resource and economic damages, potential penalties, and other obligations to be approximately \$41 billion, far more than the liability limit in OSLTF.¹⁰⁴⁷ In addition to response cost already incurred, BP eventually, \$18.7 billion was agreed with the US government, five Gulf Coast states and more than 400 local governments over 18 years. BP will still pay a civil penalty of \$5.5 billion under CWA over 15 years; pay \$7.1 billion for natural resource damages, \$4.9 billion to settle economic and other claims and \$1 billion to more than 400 local government entities making it almost \$54billion.¹⁰⁴⁸ It is interesting to note that the agreement was subject to public comment before court approval according to the then US Attorney General Loretta Lynch.¹⁰⁴⁹ The spill led to at least six different types of law suits against BP which included loss of business profits and individual income, environmental damage, property damage, health problems and health risks from oil and chemical dispersants, injuries and health risks from clean-up, wrongful death and injury claims by rig workers and their families and BP shareholder lawsuits. The incident¹⁰⁵⁰ raised many issues, which includes the ability of the existing oil spill liability and compensation framework to deal with

¹⁰⁴⁵ DS Etkin (n 945). There were however some about the liability limits because it proved lower than what was experienced with Exxon Valdez spill.

¹⁰⁴⁶ J Anderson and others, Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling (National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling Report to the President 11 January 2011) <www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/content-detail.html> <https://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>> accessed 27 March 2017

¹⁰⁴⁷ The laws distribute the costs of spill between the RP and the OSLTF. In fact as at the end of December 2014, BP had paid more than \$13bn in claims, advances and settlements < <http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration/claims-information.html>> accessed 27 March 2017

¹⁰⁴⁸ The Wall Street Journal reported that the settlement 'brings BP's total tab for the spill to \$53.8 billion, more than its combined profits since 2012.' Daniel Gilbert and Sarah Kent, 'BP Agrees to Pay \$18.7 Billion to Settle Deepwater Horizon Oil Spill Claims Settlement of all Federal and State Claims Brings Total Costs to Nearly \$54 Billion' *The Wall Street Journal* (New York, 2 July 2015) <<http://www.wsj.com/articles/bp-agrees-to-pay-18-7-billion-to-settle-deepwater-horizon-oil-spill-claims-1435842739> <http://www.wsj.com/articles/bp-agrees-to-pay-18-7-billion-to-settle-deepwater-horizon-oil-spill-claims-1435842739>> accessed 27 March 2017

¹⁰⁴⁹ Ibid

¹⁰⁵⁰ The spill released more than 200 million gallons into the Gulf and was the largest oil spill into U.S. waters.

catastrophic spill.¹⁰⁵¹ With the spill, many residents and businesses throughout the Gulf Coast suffered financial losses. The issues included clean-up responsibility and economic and natural resource damages responsibility; defining costs and damages, the degree to which the costs and damages are limited and/or shared by other parties, including general taxpayers, claim process and many more were raised.¹⁰⁵²

According to Ramseur, these challenges made 111th Congress to consider solutions to deal with more catastrophic spills. The House of Representatives conducted at least thirty-three hearings in ten committees and the Senate conducted at least thirty hearings in eight committees.¹⁰⁵³ Members introduced more than one hundred and fifty legislative proposals to address many related issues including the ninety-day wait times for impacted parties before OSLTF can come into play with many suggesting forty-five days.¹⁰⁵⁴ One of the legislative proposals eventually led to the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act (RESTORE Act) 2012. The RESTORE Act creates a Gulf Coast Restoration Trust Fund (RTF), which will receive 80% of any CWA civil and administrative penalties paid by BP and other companies responsible for the Deepwater Horizon spill. The RTF will support a variety of ecological and economic restoration and recovery projects in the Gulf. With RESTORE Act, there will be distribution of 35% of RTF equally directly to the Gulf Coast States.¹⁰⁵⁵ The usage of the funds is for ecological and economic restoration and each State must submit a multi-year implementation plan. Thirty percent (30%) of the RTF with 50% of the interest earned will go to a Gulf-wide Restoration Council composed of federal officials and the governors of the Gulf States will use the fund to carry out a science-based plan to restore and protect natural resources. Another 30% will go to the Gulf States based on the impacts of the spill for ecological and economic restoration usage. Each State must submit a funding plan to the Restoration Council for approval. The remaining 5% plus 50% of the interest earned will fund scientific research and monitoring through a Restoration Science Program and Centres of Excellence. The RESTORE Act provides several formal opportunities for the public to participate thereby promoting environmental rights.¹⁰⁵⁶

Other options considered included shifting unlimited liability for offshore facilities to the individual company. The second is replacing/supplementing the system with an industry-financed fund. The third was a combination of increasing the offshore facility liability limit and corresponding financial responsibility demonstration through a

¹⁰⁵¹ Until the incident, no individual spill threatened the framework

¹⁰⁵² Jonathan L Ramseur, 'Liability and Compensation Issues Raised by the 2010 Gulf Oil Spill' (2011) Congressional Research Service <<https://fas.org/sgp/crs/misc/R41679.pdf>> accessed 27 March 2017

¹⁰⁵³ Ibid

¹⁰⁵⁴ Bills that passed the House with a 45-day clock include Oil Spill Accountability and Environmental Protection Act of 2010 (H.R. 5629 and Consolidated Land, Energy, and H.R. 3534 Aquatic Resources Act of 2010 (CLEAR Act, 2010)

¹⁰⁵⁵ SEC. 1605 of RESTORE Act 35 (1) (a)

¹⁰⁵⁶ Ibid

staggered approach, to allow more time for the market to adjust, remove or raise the per-incident cap on the trust fund or increasing the level of funds available in the OSLTF. The challenge with the first option that the RP would fail to meet its obligations and the OSLTF would continue to provide funds and the insurance companies might not cope with significant increase in the liability.¹⁰⁵⁷ Some argued that increased liability limits will put companies that cannot self-insure in a disadvantaged position as insurance may become cost-prohibitive or even unobtainable therefore might preclude smaller companies from offshore operations.¹⁰⁵⁸ Others think that if companies cannot afford to bear the potential costs of their activities, they should not be in business.¹⁰⁵⁹ The second option, which is replacing/supplementing the existing system with an industry-financed fund, was not viable because even with increase in per-incident cap, the existing and projected level of funds in the OSLTF may not be sufficient to address costs from a catastrophic spill.¹⁰⁶⁰ Raising or removing the liability limits would also not guarantee success. Furthermore, the demerit of the third option is that if there is complete removal without making a corresponding change to the financial responsibility requirements, RP could comply and still go bankrupt before paying for even small segment spill damage.¹⁰⁶¹ Others argue that increasing the liability limit provides incentives that may increase the likelihood of spill.¹⁰⁶² The US eventually made some core legislative changes in the Consolidated Land, Energy, and Aquatic Resources Act of 2010 (CLEAR Act). These changes include removal of the \$75 million liability cap for offshore facilities, leaving current OPA-90 limits for vessels, providing for periodic review of liability limits and COFRs, expansion scope of damages and definition of RP, changing the standard of review for NRDA claims and expansion of repeal of single-hull exemption for tank vessels.¹⁰⁶³ The US Congress went ahead to amend OPA in 2016 with Big Oil Bailout Prevention Unlimited Liability Act of 2016 by removing the cap of \$75 million for the RPs, making RPs liable for all covered damages.¹⁰⁶⁴

Another issue exposed by the Gulf oil spill is the compensation and economic loss provision that does not clearly show the link between the spill and the loss, or how

¹⁰⁵⁷ Robert P Hartwig, *Testimony before the House Committee on Transportation and Infrastructure*, June 9, 2010; Ron Baron (Willis, Global Energy Practice), *Testimony before the Senate Committee on Environment and Public Works*, June 9, 2010

¹⁰⁵⁸ TW Merrill 'Insurance and Safety Incentives' (Working Paper for the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, January 2011)

¹⁰⁵⁹ Ibid

¹⁰⁶⁰ Like the Gulf of Mexico with estimated \$41 billion

¹⁰⁶¹ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, 'Liability and Compensation Requirements under the Oil Pollution Act' (Staff Working Paper No. 10, March 2011).

¹⁰⁶² Michael Greenstone, *Testimony before the House Committee on Transportation and Infrastructure* (Massachusetts Institute of Technology June 9, 2010)

¹⁰⁶³ CB Anderson, *Current Challenges in Providing Adequate Insurance Coverage in Major Environmental Disasters: Limitation of Liability for Oil Pollution: Does it Have A Future?* (Maritime Law Association of the United States Fall Meeting, 2013)

¹⁰⁶⁴ This include damages for loss of natural resources, property, revenue, or profits; or costs of providing increased public services during or after removal activities, such as fire protection.

courts should limit recoverability for pure economic losses. With approximately one-third of the US Gulf territory closed to commercial fishing, leaving many fishers without gainful employment according to Anderson,¹⁰⁶⁵ and with caught fish in the Gulf commercially stigmatized, one can only imagine the magnitude of the problem.¹⁰⁶⁶ This led to setting up of the independent claims facility of the Gulf Coast Claims Facility (GCCF) by BP and the Government financed by BP with incremental payments totalling \$20 billion to provide a faster and fairer way to pay damage claims. GCCF only pay for harm or damage proximately caused by the spill with the final claim methodology including assumptions on expected ecosystem and economy recovery.¹⁰⁶⁷ Despite the efforts, many people at that time think that claimants were not receiving adequate payments and in a timely manner according to Ramseur research.¹⁰⁶⁸

The spill and its consequences also exposed the uncertainty of language used in dealing with pure economic loss claims. It failed to define how courts should deal with liability. GCCF took a liberal approach by allowing recovery for businesses that were not only physically unaffected by the spill, but were miles from the maximum reach of the spill in the Gulf of Mexico. This liberal approach makes it somewhat problematic in terms of cost and the ability of the companies to pay in catastrophic situations. Nevertheless, in the researcher's opinion it is a better approach putting into consideration the economic hardship a claimant who relies on the Gulf for sustenance will likely face. This is not the same in Nigeria. The researcher is not oblivious of the fact that claim process may be more difficult in the Niger Delta because Nigeria is a developing country with more data challenges, socio-economic challenges and many more. Because of those challenges, the spillers should even take more steps further to make sure that compensation is duly paid.

In summary, the Gulf of Mexico spill exposed six weaknesses of the OPA. These are the statutory limits on RPs liability, insufficient funding for OSLTF, poor claims procedures, uncertainties in preservation rights under state and admiralty law, non-penalty provision when RP fail to pay claims in a timely fashion and lack of an express provision for recovery of attorney fees. The discussion herein shows that the US oil pollution regime though may be robust, has flaws. However, a clear thing is that the legislators, Government, BP, private individuals and many more consistently searched

¹⁰⁶⁵ Brett Anderson, Louisiana Seafood Shortage Lamented Far From the Gulf *the Times Picayune* (New Orleans, 26 September 2010) at A1; Justin Gillis and Campbell Robertson 'On the Surface, Oil Spill in Gulf is Vanishing Fast' *N.Y. TIMES*, (New York US, 28 July 2010) A1.

¹⁰⁶⁶ For further discussion, see AB Davis, 'Pure Economic Loss Claims under the Oil Pollution Act: Combining Policy and Congressional Intent' (2011) 45 (5) *Columbia Journal of Law and Social Problems*

<<http://www.columbia.edu/cu/jlsp/pdf/Fall%202011/Andrew%20Davis%20Note%2045.1.pdf>> accessed 27 March 2017

¹⁰⁶⁷ See Gulf Coast Claims Facility *GCCF Report* <<http://www.gulfcoastclaimsfacility.com/>> accessed 10th January 2015

¹⁰⁶⁸ Jonathan L Ramseur 2011 (n 1052)

for solution and found it in the researcher's opinion. This is important to this research as it shows a positive side to the ill of oil pollution. Hands are on deck to find the most effective way/s of dealing with catastrophic spills. Having observed this, the researcher still thinks that the current regime is good enough to deal with most spills, as catastrophic spills do not occur regularly at least in the US. In addition, catastrophic spills are mainly offshores that in the context of this research is minimal compare to onshore spills.

Despite all these weaknesses, Nigerian legislations are nowhere close to being as good as OPA based on the comparison done in this chapter. It is also interesting to note that the US matched every major oil pollution incident with corresponding reactions. Exxon Mobil spill led to the passage of OPA, 1990 and the Macondo spill led to the enactment of the RESTORE Act 2012, CLEAR Act of 2010 and Big Oil Bailout Prevention Unlimited Liability Act of 2016. In Nigeria, massive Bodo spill, Bonga spill and many more led to no substantive action including non-enactment of any legislation. However, the Nigerian government through NOSDRA and AG Federation recently filed a suit against Shell Nigeria Exploration and Production Company (SNEPCo) because of Bonga spill.¹⁰⁶⁹ The question is why, even as 1988 Koko incident in Nigeria led to legislative change during the military era. The legislative change after Koko suggests that the military regime was more responsive to the environment than the democratic regime; however, the researcher opines that it was because it is easier to enact a Decree than making laws in a democratic regime; also, the government has limited economic interest where no oil is involved. The legislative actions after Koko incident shows Nigeria's environmental consciousness, however, with government economic interest in oil, the government could be slow and this shows a pattern of EI in the researcher's opinion. The researcher is also aware of NOSDRA Amendment Bill 2012 and Petroleum Industry Bill 2012 with the Nigeria legislature. These two Bills have been with the legislature for six years, so there is doubt about likelihood of enactment,¹⁰⁷⁰ but it is important to examine some of their relevant sections.

4.4 NIGERIAN PETROLEUM INDUSTRY BILL (PIB) 2012,¹⁰⁷¹ THE NOSDRA AMENDMENT BILL 2012 AND THE FORESEEABLE CHANGES

The original introduction of PIB was in 2008 and it has been in one form or the other as a Bill until today. It seeks to address the administrative structure and institutional arrangement for up-stream and down-stream oil and gas sub-sectors. The main

¹⁰⁶⁹ Innocent Anaba, 'Bonga Oil Spills: FG Institutes N1.3trn Suit against Shell' *Vanguard Newspaper* (Lagos, 3 May, 2016) <<http://www.vanguardngr.com/2016/05/bonga-oil-spills-fg-institutes-n1-3trn-suit-against-shell/>> accessed 27 March 2017

¹⁰⁷⁰ The PIB has been there for at least eight years with its name changing from time to time.

¹⁰⁷¹ It is now Petroleum Industry Governance Bill 2016. The legislature had modified this severally with the utmost hope that the very popular one of 2012 will be passed to no avail. It is now modified many times and now PIGB, 2017.

objectives include amongst others to enhance exploration and exploitation of petroleum resources; create a peaceful business environment; create efficient regulatory entity; engender transparency and accountability; and promote health, safety and environmental issues.¹⁰⁷² The relevant sections are 16 and 46 that deal with the powers of the inspectorate, which includes enforcement of upstream and downstream petroleum operations and regulations administered by the DPR; sections 41 and 71 on premises search, seizure and arrest with or without warrant. As a condition precedent, Section 203 provides that before granting a license, company will contribute to an environmental remediation fund depending on the size of their operation and a reasonable level of environmental risk. This will be used for environmental remediation where the licensee fails to do so which will be assessed and increased annually using an independent assessor if needed. This appears to be similar to CERCLA however, there are concerns. The first is that it is silent on the amount of contribution and the second is that upstream companies alone contribute. Unfortunately, this Bill still exempts MNOCs where there is vandalism, sabotage or other civil unrest.¹⁰⁷³ The researcher thinks that it is the responsibility of the MNOCs to protect their installations. Section 298 deals with penalties and sanctions and section 265 criminalises sabotage with a fine of N100, 000, 000 for intentional damage and N2, 000, 000 for negligent damage or six months imprisonment for failure to pay fine, however, there is still no provision for corporate officer's offences.

The PIB prohibits gas flaring after a 'flare-out date' specified by the Minister via regulations.¹⁰⁷⁴ However, by section 277 (2), the Minister can extend flaring as deems fit in cases of start-up operations, equipment failure, shut down, safety flaring or due to inability of gas customer to off-take gas or there will be a fine which is the value of the gas flared or more.¹⁰⁷⁵ Section 196 deals with enforcement procedure. It begins with notice, specifying remedy and the period for compliance with notification of intention to issue an enforcement order for failure to stop. Neglect of enforcement order leads to litigation in the Federal High Court. To the delight of the researcher, PIB vide a regulation can adjust from time to time the penalty in order to reflect current rates of inflation.¹⁰⁷⁶

The legislature re-introduced the Bill in 2015 as the Petroleum Industry Governance and Institutional Framework Bill 2015 with the aim to create “*commercially oriented and profit driven petroleum entities*” and close loopholes that breed corruption. The Bill includes amongst others, curtailment of ministerial powers, the splitting of NNPC into two separate entities: the Nigeria Petroleum Assets Management Co (NPAM) and a National Oil Company (NOC). The NOC will be an integrated oil and gas company operating as a fully commercial entity, keeping its revenues and paying

¹⁰⁷² Sections 289-298

¹⁰⁷³ Section 118(5)

¹⁰⁷⁴ Section 275

¹⁰⁷⁵ Section 277 (3) and section 281

¹⁰⁷⁶ Section 196 (7); This is closer to review of penalties every four years by USEPA

dividends to the government. The name was changed again in 2016 to Petroleum Industry Governance Bill, 2016 (PIGB) with other amendments. The PIGB, 2016 focus on five key governing issues including separating the roles of the government in the industry,¹⁰⁷⁷ clarifying the Minister's role, creating a new and independent regulatory institution to allow independent decision with limited political influence as well as independence from regulated entities and unbundling of NNPC. Despite all these efforts, the passage of the Bill in whatever name it will eventually bear is not in sight for few of the reasons the researcher will highlight here. The first is the removal of the host community fund from the 2012 version of the Bill, which is causing more disagreements. The second is the internal wrangling between the Legislature and the Executive, a power play centred on which arm of government is responsible for its passage.¹⁰⁷⁸ Thirdly, the Bill was split into three as at August 2016,¹⁰⁷⁹ and into five in 2017.¹⁰⁸⁰ All these exist because of the economic interest of Nigeria, particularly with other ethnic groups not affected by oil pollution and the minority status of the Niger Deltans in the legislature. It is interesting to note that the US had her own initial problems in this regard as effort from mid-1970s to 1989 to create fund for all spills did not move out of the US Congress mainly because of whether state oil-spill liability laws should be pre-empted by federal law, limitation of oil companies' liability and regulatory coherence and efficiency.¹⁰⁸¹ However, with the *Exxon Valdez* spill, public anger ended the logjam and drove regulatory changes that led to enactment OPA.¹⁰⁸² This shows that not all hope is lost for Nigeria if the country is determined to improve the law.

The core objectives of PIGB, 2017 are similar with that of 2012, 2015 and 2016 version with separate roles; establishment of commercially oriented and profit driven petroleum entities; transparency and accountability; and favourable business environment¹⁰⁸³ at the front burner. The PIGB, 2017 creates the Nigerian Petroleum

¹⁰⁷⁷ There is currently no clear separation of roles in the industry leading to potential conflicts of interest.

¹⁰⁷⁸ See ThisDay Newspapers, 'Supremacy Battle between Presidency, N'Assembly Stalls Legislation on PIB' ThisDay (Abuja, 11th August 2016) <<http://www.thisdaylive.com/index.php/2016/08/11/supremacy-battle-between-presidency-nassembly-stalls-legislation-on-pib/>> accessed 27 March 2017

¹⁰⁷⁹ Clara Nwachukwu, 'Government to Unveil Three New PIBs' *The Guardian* (Lagos, 15 August, 2016) <<http://guardian.ng/news/government-to-unveil-three-new-pibs/>> accessed 27 March 2017

¹⁰⁸⁰ They are the Petroleum Industry Governance Bill (PIGB) 2017, Petroleum Industry (Upstream Petroleum Administration Reforms) Bill, Petroleum Industry (Downstream Petroleum Administration Reforms) Bill, Petroleum Industry (Fiscal Framework and Reforms) Bill and Petroleum Industry (Revenue Management Reforms) Bill.

¹⁰⁸¹ In *Askew v American Waterways Operators, Inc.* (411 U.S. 325, 1973), the Supreme Court held that existing federal spill laws did not preempt or preclude states from enacting their own spill cleanup and liability schemes

¹⁰⁸² TA Birkland, *After Disaster: Agenda Setting, Public Policy and Focusing Events* (Georgetown University Press 1997)

¹⁰⁸³ Petroleum Industry Governance Bill 2017 (As Passed by the Senate) 28th May, 2017

Regulatory Commission in its section 4. By its section 5, it shall promote the healthy, safe and efficient conduct of all petroleum operations in an environmentally friendly and sustainable manner; promote the efficient, safe, infrastructural development; ensure compliance with all applicable laws and regulations; determine and ensure the implementation and maintenance of technical standards, codes and specifications in line with global best practice; ensure that regulations are fair and balanced for all and ensure strict implementation of environmental policies, laws, regulations and standards as pertains to oil and gas operations among others. By its section 6.5a, the Commission shall have responsibility over all aspects of health, safety and environmental matters in respect of the petroleum industry, consolidating such roles in the DPR, the Petroleum Products Pricing Regulatory Agency (PPPRA), and some environmental regulations driven by NOSDRA. Powers of the Commission include enforcing permit conditions; issuing penalties and fines; enforcing the provisions; instituting legal proceedings against any permit holder; making and enforcing regulations¹⁰⁸⁴ and issuing guidelines as prescribed by the Act or any other enactment or regulation.¹⁰⁸⁵

PIGB fortifies economic interest of the FG, improved on the enforcement powers and procedures; yet it still fails to address important issues of pollution abatement and interest of the host communities. The positive part of the newly carved out Bills will be the separation of the roles of the government in the industry and the creation of a new and independent regulatory institution to allow limited political influence. This in my view is a transplantation of western models to Nigeria.¹⁰⁸⁶ The current PIGB does not effectively provide penalties for pollution, which has been a major hindrance for effective enforcement of oil-related pollution. However, the NOSDRA Amendment Bill 2012 this appears to cover this aspect.

The NOSDRA (Amendment) Bill 2012¹⁰⁸⁷ seeks to amend the NOSDRA Act with a proposal to establish NOPMA to replace NOSDRA. It is also to widen its scope to include gas flaring, leakages and other hazardous substances in the sector, coordinate private sector participation in oil pollution management, have access to the Oil Spill Liability Trust Fund¹⁰⁸⁸ as well as preventing, detecting, minimizing and responding to spills and pollution. The Bill is particularly important because of its focus on oil pollution management and other environmental devastation arising in the petroleum sector. To achieve its aim, it amends several sections of NOSDRA Act and added new sections. The structure of the Bill is significantly towards CERCLA and OPA, which is like a legal transplant, but diffused to suit Nigeria owing to the cultural, socio-legal and economic differences. An important amendment relating to this research is section

<<https://www.thisdaylive.com/index.php/2017/05/28/final-copy-of-petroleum-industry-governance-bill-2017/>> accessed 30 May 2017

¹⁰⁸⁴ After conducting a public hearing on the subject matter: Section 8

¹⁰⁸⁵ Section 7

¹⁰⁸⁶ This has been done in the US, UK and Australia.

¹⁰⁸⁷ Bukola Saraki, *A Bill for an Act to Amend NOSDRA Act 2006 and for Other Matters Connected Therewith* (National Assembly Journal Abuja, 28th May 2012 (C4585) No.59 vol.8

¹⁰⁸⁸ Section 2(2) of the Amendment Bill 2012

6 and the important additions are sections 8, 9, 10, 11, 27, 28, 29 and 30. It empowers NOPMA to co-opt vital ministries and public and private agencies to battle serious spills, providing the functions of such ministries and agencies during such event.¹⁰⁸⁹ There is a provision of cost recovery from the spiller in accordance with the '*Polluter Pays Principle*'.¹⁰⁹⁰

One significant provision of the Bill in the researcher's view is increased penalties and provision of criminal penalties. Section 8 provides that RP is subject to pay liability limits and all removal costs except as otherwise provided in the section.¹⁰⁹¹ The maximum penalty is N150, 000 per barrel for a vessel of 3, 000 gross tons or less and N250, 000 per barrel for others. The RP is also to pay removal cost plus N5 billion for offshore facility except a deep-water port and N15 Billion for onshore facility and/or a deep-water port. This provision in the researcher's opinion shows that Nigeria is edging towards a better legislation, which will help reduce EI. It is important to note that RP will pay more for onshore pollution. The exceptions are as provided by ONWA thereby seems to remove strict liability. Another improvement to NOPMA Bill as against NOSDRA Act is that where RP fails or refuses to report the incident as required by law; fails to provide all reasonable cooperation and help requested by a responsible official in connection with removal activities; fails to comply with an order issued under the section, there will be punishment.

Another significant increase is that failure to report a spill and unauthorised gas release or leakage will attract a daily penalty of N10million (US\$ 31,508.2).¹⁰⁹² Failure to clean-up attracts at least N3 million daily (US\$ 9,452.45) or maximum of 3 years imprisonment or up to thrice the cost incurred by NOPMA n-up.¹⁰⁹³ Section 2 created Oil Spillage Liability Trust Fund, but without explaining how it is going to work in practice.¹⁰⁹⁴ Section 11 provides that RP shall be liable in compensation for damages to real or personal property, loss of subsistence use of natural resources, loss of profits and earning capacity due to injury, destruction, of personal property or natural resources, severance. The section also provides liability for lost opportunities for both private and public in nature arising because of an oil spill or unauthorised gas release or the removal cost. Again, this is similar to the provisions of the US OPA. Compensation claim are within three years first to the RP, which may pay or send a formal rejection notice to NOPMA for an independent verification and valuation.¹⁰⁹⁵ In addition, a compensation payment subrogates the polluter to all rights, claims and

¹⁰⁸⁹ Section 27 (4, 5, 6, 7 and 8)

¹⁰⁹⁰ Section 8

¹⁰⁹¹ There is no similar provision in the current NOSDRA Act

¹⁰⁹² Section 8(6)(a) and (b); This is far above N500, 000 (US\$ 1,575.41) provided by section 6 of the current NOSDRA Act

¹⁰⁹³ Not only that the penalty is significantly higher, it now includes criminal liability again showing that Nigeria is moving towards a better regime if eventually passed

¹⁰⁹⁴ When compared with CERCLA, CERLA made it clear on how to use the fund.

¹⁰⁹⁵ Section 11 (h)

causes of action that the claimant has under any other law.¹⁰⁹⁶ NOPMA Bill is an example of transplant and diffusion analysed in chapter one. Here, attempt is made to transplant the provisions of OPA and CERCLA to Nigeria, however, it is not a mere copy as some of the provisions are not included in NOPMA while the punishment in the provisions, though significantly higher, are not as high as the punishments prescribed by the US OPA and CERCLA laws. In the researcher's view, the provisions of the Bill are a significant copy of the idea behind the laws, but adapted to Nigerian circumstances considering other factors that will make it work. This was the idea of Watson when he noted that it is rules, institutions, legal concepts and structures that are borrowed.

The NOPMA Bill is an attempt to transplant some of the US provisions and it is a step in the right direction, however, taking into account the economic, socio-political situation in Nigeria, some of the provisions may pose challenges in practice. NOPMA Bill also ought to harmonize oil pollution laws; however, its section 30 purports to repeal any written law in force relating to oil, oil pollution management, gas leakages that are inconsistent with any of its provisions.¹⁰⁹⁷ Unfortunately, like the PIB/PIGB, this Bill is yet to be passed five years on and it is still not clear when or if it will be passed. The minority status of the Niger Deltans legislators in both the Nigerian lower and upper legislative houses is connected to inability of both houses to enact the Bill and this is a hindrance to achieving EJ. When analysed with the factors that hinders reduction of EI one sees that the unresponsive and unaccountable governmental policies and regulations is because of the oppressive power structure making it almost impossible for the victims to use governmental resources and power to advance their cause that causes the consequent ongoing unfair treatment of the minority.

The researcher's general observation is that Nigeria is neither proactive nor reactive in dealing with oil pollution management like the US and other countries that are very reactive even when not too proactive. The effect of Exxon Mobil spill led to the passage of OPA. Erika 1996 spill and Prestige spill of 2002 led to inclusion of criminal responsibility, insurance and deterrent penalties in a new legislation Ordinance n°2012-1218 of 2 November 2012 and improved way of estimating spill economic damages. Recently, The Macondo spill saw the enactment of the RESTORE Act 2012 and others.¹⁰⁹⁸ These are all steps in the right direction, but in Nigeria, despite several heavy spills, no serious legislative enactment has taken place. All these corroborate

¹⁰⁹⁶ Section 11(b)

¹⁰⁹⁷ How this section will be reconciled with all the versions of PIB/PIGB is still not clear

¹⁰⁹⁸ They also led to some legislative reforms in the EU including two communications concerning the safety of maritime oil transports issued by the European Commission and communication including a proposal on the establishment of a European compensation fund for oil pollution damage in European Waters and Related Measures COM (2000)142 final and COM (2000)802 final. See H Ringbom, 'The Erika Accident and its Effects on EU Maritime Regulation' in MH Nordquist and JN Moore (eds), *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea* (F and F 2001) 275

Ong¹⁰⁹⁹ position that certain states that have suffered environmental damage from the activities of the MNOCs have responded by reasserting their domestic regulatory powers, however states such as Nigeria are unable to achieve the same level of effective enforcement due to their weaker political and economic bargaining positions.¹¹⁰⁰ Ong effectively used the US Deepwater spill, France Erika spill and Nigeria to show different response levels by the MNOCs involved in each of the case studies.¹¹⁰¹ Ong opines that in international arena non-compliance of environmental norms abroad shows that there is need for configuration of direct enforcement against private transnational actors in foreign jurisdictions in international law.¹¹⁰²

4.4i Challenges of Legislative Reforms

The discussion so far not only show weak laws and a pattern of EI, but also shows that the legislative reforms have proved difficult. The question then is why Nigerian legislative reforms more difficult than that of the US? The PIB is about ten years in one form or the other and NOPMA Bill is now six years, yet no one knows when and whether the Bills will become law. The researcher highlighted above that one of the problems associated with EI in Nigeria is difficulty in legislative reform because exploration activities only take place in a few states of Nigeria and because of the political structure. The political structure in Nigeria has always been in favour of the people of the Northern Nigeria who had dominated the government since independence. The government is also unresponsive and unaccountable in their policies, regulations because of the oppressive power structure as enshrined in the Constitution, and other laws make the reforms even more difficult. For example, most laws requires two-third majority to either make or amend. Even where the law requires simple majority, the Niger Deltans will not still make impact because of division based on many ethnic groups. Recently attempts by the legislature to amend the LUA failed because of LUA attachment to the Constitution, supersedes all other laws and requires two-third majority to amend.¹¹⁰³ In addition, the military made many of the laws as Decrees without democratic processes, which Nigeria adopted as Acts of the National Assembly. Suffice to say that heads of most military government were from the Northern part of Nigeria, therefore screwed most laws in their favour and making amendment difficult.¹¹⁰⁴ In addition, apart from the political dominance, Nigeria is dependent on oil and the proceeds mainly used to develop the northern part of Nigeria even as oil-related pollution do not directly affect the north and this is clearly one main

¹⁰⁹⁹ DM Ong, 2015 (n 152)

¹¹⁰⁰ Ibid

¹¹⁰¹ Ibid

¹¹⁰² This is not mainly the focus of this research. For further discussion, see DM Ong, 'International Law for Environmental Protection' in Basak Cali (ed), *International Law for International Relations* (OUP 2009) 306

¹¹⁰³ ThisDay Newspapers, Politics of Amending the Land Use Act' Thisday Newspapers 1 August 2017) <<https://www.thisdaylive.com/index.php/2017/08/01/politics-of-amending-the-land-use-act/>> accessed 31st August 2017

¹¹⁰⁴ Some of the laws are the 1999 Constitution, the LUA, the Petroleum Act and many more.

reason of this research work. In addition, many people in the lower and upper legislative houses may not be aware of the extent of damage oil pollution causes in the Niger Delta.

Apart from the reasons discussed above, there is problem of conflict of interest and potential regulatory capture as many lawmakers may have one personal interest or the other in the MNOs. Other impediments to reforms are corruption, incapacity, weak democratic institutions and ineffectiveness after decades of military rule that caused poor culture of accountability and transparency, abuse of human rights and many more.

The points raised here shows that there are many factors militating legislative reforms. It is also worthy of note that the current PIGB still conflicts with some aspects of NOPMA Bill showing that the end to the current conflict is not near. The challenges bedevilling the system affect enforcement of the laws and in effect affect reduction of EI. This informed the researcher's quest to continue to seek for solution leading to the next subsection on the internationally acceptable standards to see whether it can be helpful in enforcement with a view of achieving EJ.

4.5 THE NIGERIAN LAWS AND THE INTERNATIONALLY ACCEPTABLE STANDARDS IN THE OIL INDUSTRY

Considering the very many problems already highlighted in the Nigerian laws, it is important for the researcher to continue to seek for solution to fill the gap in order to enhance enforcement of the laws with a view of achieving EJ. IASs are soft laws. Soft law is a non-binding agreement, recommendation or resolution that the states, non-governmental organizations or other international entities such as the UNEP issue.¹¹⁰⁵ Soft laws have emerged as an important source of international environmental law, because of diversity and complexity of the problems to be addressed and may contribute to the formation of binding international law.¹¹⁰⁶

There are many categories of soft laws, which include declarations, principles and standards, supplementing binding agreements referring to existing treaty obligations¹¹⁰⁷ and authoritative interpretation of the obligations in pre-existing treaty provisions.¹¹⁰⁸ Soft law norms also may become hard law through adoption by states in their domestic law, or by the incorporation into private/business binding

¹¹⁰⁵ Pierre-Marie Dupuy, 'Soft Law and the International Law of the Environment' (1991) 12 Mich J Int'l L 420, 423

¹¹⁰⁶ For instance, the Rio Declaration on Environment and Development in the preambles repeated almost verbatim Principle 21 of the Stockholm Declaration, 1972. See also Art. 3 of the Convention on Biological Diversity, 1992

¹¹⁰⁷ Like the Helsinki Accords that led to the Organisation for Security and Cooperation in Europe and the Zangger Committee for Multilateral Weapons Control

¹¹⁰⁸ The World Bank Operational Standards, the Inter-American and Universal Declarations of Human Rights, as they relate to the OAS and UN Charters, and the more recent ILO Declaration on Fundamental Principles and Rights at Work.

agreements.¹¹⁰⁹ It is in the context of the last category that governs business activities that this research brings in IAS in the oil and gas industry. IAS guides and influences the industry operation and they constitute *good oilfield practice* referred to by the Nigerian laws and regulations.¹¹¹⁰

Standards, codes and guidelines in the petroleum industry generally contain one or more of three broad types of standards or guidelines, which are standards for equipment and products, standard addressing environmental practices and standards on improvement of environmental performance. Currently there are many internationally recognised standards and regulation in the industry. Some of them are those of the API, ASME standards for all petroleum production and transport operations, US HCAs, the Best Available Technology (BAT) industry standards for petroleum industry¹¹¹¹ and the IOGP standards.¹¹¹² Others are guidelines of different NGOs and IGOs like the World Conservation Union, IUCN, the International Standards Organisation (ISO), UNEP, the World Bank, the International Chamber of Commerce (ICC) and the World Business Council for Sustainable Development (WBCSD). The best practices of the first four US organisations relating to pipeline integrity, sabotage, prevention and spill response are particularly relevant to prevention of oil-related pollution in Nigeria because they cause most pollution incidents in Nigeria.

The API developed its standards from 1924 and now has about 600 standards covering all sections of the oil and gas industry.¹¹¹³ It represents all aspects of America's oil and natural gas industry, its standards are recognisable globally as a good oilfield practice, not least because of its involvement with the ISO a global federation of more than 100 standards and state and federal regulations incorporated many of its standards.¹¹¹⁴ The API Standards should be applicable in Nigeria because Nigerian laws¹¹¹⁵ recognised them. The API's Environmental Stewardship Program based on 11 Principles exemplified its commitment to protect the environment. It is contained in the *API Environmental and Safety Mission and Guiding Principles*,¹¹¹⁶ which then became part

¹¹⁰⁹ For example, in Europe, the 1997 Seville Process for review Best Available Techniques (BAT) Reference documents, has been enshrined into law with the adoption on 8 November 2010 of the Industrial Emissions Directive (IED), 2010/75/EU. See European Commission, 'Origin and Mission of the European IPPC Bureau' <http://eippcb.jrc.ec.europa.eu/about/more_information.html> accessed 27 March 2017

¹¹¹⁰ See the Oil pipelines Act, Mineral Oil Safety Regulations, 1968, EGASPIN, Associated Gas Reinjection Act 1979 and many more

¹¹¹¹ Shell also does business in Alaska

¹¹¹² IOGP (n 195)

¹¹¹³ API produces standards, recommended practices, specifications, codes and technical publications, reports and studies covering each segment of the industry

¹¹¹⁴ See API website <<http://www.api.org/globalitems/globalheaderpages/about-api/api-overview>> accessed 27 March 2017

¹¹¹⁵ One of such laws is Petroleum Regulation 1967

¹¹¹⁶ See also the API's *Environmental Stewardship Program Pledge for CAREFUL Operations* and *API Onshore Oil and Gas Production Practices for Protection of the Environment* (Washington DC, API, 2nd ed, 1995)

of API's Bylaws in 1990. API members are responsible for obeying all laws and best practices and acceptance of the Principles is one of the conditions of becoming API member.

The ASME has also a prominent record of developing standards for the oil and gas pipeline industry with about 125,000 members globally. It developed its first pipeline code for Pressure Piping in 1935. The rules expanded to include operation, inspection, corrosion control, and maintenance of pipelines. The IOGP represents oil and gas companies worldwide with several oil and gas operations guidelines, which represent internationally acceptable operating practices including amongst others guidelines addressing oil operations in tropical rainforests,¹¹¹⁷ exploration and production operations in mangrove areas¹¹¹⁸ and oil exploration in arctic and subarctic onshore regions.¹¹¹⁹ The Alaska BAT industry standards require petroleum companies to incorporate best technology that was available at the time into all oil field operations. Its promulgation was in 1980 and with update in 1997. There is also World Bank's *Pollution Prevention and Abatement Handbook 1998*. The World Bank's guidelines include amongst others describing industry practices, processes that can reduce, prevent and control pollution.¹¹²⁰ These standards will be explained briefly below as they touch relevant areas of this research, which are pipeline integrity, sabotage, spills and flaring.

4.5i Standards on Pipeline Integrity

The international best practice for pipeline integrity is in three prominent US codes: The ASME, API and BAT. For the purpose of this research, the relevant codes are ANSI/ASMEB31.4¹¹²¹ and ANSI/ASMEB31Q for Pipeline Personnel Qualification 2014. The next is the US Law on Integrity Management and High Consequence Areas (HCAs) that is in the US Code of Federal Regulation May 29, 2001 for managing pipeline integrity.¹¹²² HCAs are areas with high human population, navigable waterways, or environments unusually sensitive to spills. There is need for constant monitoring, assessment, evaluation and identification of preventive and mitigated measures to protect HCAs. It also allows 'pipeline integrity management in HCAs'

¹¹¹⁷ World Bank, *E&P Forum Oil Industry Operating Guideline for Tropical Rainforest*, (Report No. 2.49/170, April 1991)

¹¹¹⁸ *Oil and Gas Exploration and Production in Mangrove Areas: Guidelines for Environmental Protection* (Gland, Switzerland: IUCN/E&P Forum, Report No. 2.54/184: 1993)

¹¹¹⁹ *Oil and Gas Exploration in Arctic and Subarctic Onshore Regions: Guidelines for Environmental Protection* (Gland, Switzerland; Cambridge, UK: IUCN/E&P Forum, Report No. 2.55/185: 1993)

¹¹²⁰ World Bank, 'Industry Sector Guidelines: Oil and Gas Development (Onshore)' *Pollution Prevention and Abatement Handbook 1998*, in collaboration with the UNEP and the United Nations Industrial Development Organization, 361 <http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/1999/06/03/000094946_990409050_52283/Rendered/PDF/multi0page.pdf> accessed 27 March 2017

¹¹²¹ Pipeline Transportation Systems for Liquid Hydrocarbons and Other Liquids, 1998 (last updated 2009) and Pipeline Transportation Systems for Liquids and Slurries 2012

¹¹²² Title 49 CFR § 195.452

that rupture could affect. Furthermore, it requires operators to have a means of detecting pipeline leaks for HCAs. API 1160 standard¹¹²³ also provides guidance to all API members¹¹²⁴ to implement the IM program, recommending evaluation of all pipeline segments with a company's IM program. A Leak Detection System standard personified in API publication 1130 named Computational Pipeline Monitoring (CPM) 1995.¹¹²⁵ It is codified by API; considered '*good oilfield practice*' therefore should be applied in Nigeria. Almost all the Niger Delta area meets the U.S. HCA criteria; therefore, all of MNOC's pipelines needs to conform with to the US Integrity Management (USIM) standard, it is not the case. BATs are available in Alaska;¹¹²⁶ codified by API and require incorporation of continuous monitoring in addition to the US Integrity Management requirement.

4.5ii Intentional Third Party Damage/Sabotage/Illegal Bunkering

'*Good oil field practice*' additionally obliges operator consideration of the potential for third party damage which is faced by several regions of the world.¹¹²⁷ To deal with these issues, the API in collaboration with the US Department of Homeland Security developed guidelines called API Security guidance for petroleum industry 2003 after the 9/11 terror to help protect pipeline facilities.¹¹²⁸ Here, the owner/operators should ensure the security of facilities and protection of the public, the environment, workers, and the continuity of the business through the management of security risks.¹¹²⁹ The guidance amongst others includes product theft and hostile threat, use of video/CCTV to monitor remote areas putting into consideration the level of threat, vulnerability, possibility of an incident, and the desirability of the asset to adversaries.¹¹³⁰ This research did not show that MNOC's have adopted these measures in Nigeria.¹¹³¹

4.5iii Prevention of Spill and Oil Spill Response

Standards here mean that oil companies must be prepared to respond in a prompt and effective manner to a maximum probable discharge of oil.¹¹³² There are several legal requirements in the world, but most of them were fashioned around the API and ASME.

¹¹²³ Published in November 2001

¹¹²⁴ Shell is a member of API

¹¹²⁵ Updated 2002

¹¹²⁶ Shell does business in Alaska as well

¹¹²⁷ Like Mexico, Columbia, the Middle East, Asia, and Africa.

¹¹²⁸ API Security Guidance for Petroleum Industry 2003
<http://www.state.nj.us/dep/rpp/brp/security/downloads/API%20Security_Guidance2003.pdf> accessed 27 March 2017

¹¹²⁹ Ibid

¹¹³⁰ See also the US Common Ground Alliance (CGA) Damage Prevention Best Practices, 1999

¹¹³¹ The decision of Nigerian *Farmers v Shell* is a case in point.

¹¹³² See polluter pays principle and Rick Steiner and Kurt Byers, *Lessons of the Exxon Valdez* (University of Alaska Sea Grant Report SGED 08 1990)
<http://oilspill.fsu.edu/docs/Lessons_of_the_Exxon_Valdez_Steiner_1990.pdf> accessed 27 March 2017

4.6 HOW BINDING ARE IAS ON THE MNOCS?

It is important to note that internationally and nationally non-legally binding norms, principles or standards, guidelines or declarations of principles and codes of practice as soft laws.¹¹³³ However, Wawryk¹¹³⁴ opines that these standards are not only soft laws, but can harden into binding law.¹¹³⁵ She observed that this is by incorporating them into a treaty or when they are legally authoritative by many countries over a period, they may become binding through their application by national courts. In the oil industry, Wawryk argued and the researcher agrees that if industry guidelines are generally endorsed and implemented by international oil companies, national courts can use the guidelines as evidence of industry ‘best practice’ in litigation and in interpreting legislative provisions that require the use of good international practice, therefore becomes binding.¹¹³⁶

In the case of API, industry operators make funding available and make its standards. Industry operators are the only members, they generally endorse guidelines and the US Government accepts and adopts them except where it is not contrary to existing laws and policies.¹¹³⁷ The US Government has adopted about one quarter of its policies with some originally proposed by the government making compliance mandatory.¹¹³⁸ In January 2016, the US Government released a revision of OMB Circular A-119 named Federal Participation in the Development and Use of Voluntary Consensus Standards in Conformity Assessment Activities.¹¹³⁹ This is to encourage federal agencies to benefit from the expertise of the private sector and promote federal agency participation in Standards bodies. It is also to support the creation of useable standards by federal agencies and minimize reliance on government-unique Standards where an existing Standard would meet the federal government’s objective.¹¹⁴⁰ This release is in

¹¹³³ See P Dupuy (n 1105); P Szasz, ‘International Norm-Making’ in Brown Weiss E (ed), *Environmental Change and International Law: New Challenges and Dimensions* (UN University Press 1992) 69 for soft law discussion

¹¹³⁴ AS Wawryk, ‘The Adoption of International Environmental Standards by Transnational Oil Companies: Reducing the Impact of Oil Operations in Emerging Economies’ (2002) 20 (4) *Journal of Energy and Natural Resources Law* 402 <<http://www.tandfonline.com/doi/pdf/10.1080/02646811.2002.11433308?needAccess=true>> accessed 27 March 2017. See also Seville Process (n 1109)

¹¹³⁵ IGOs and NGOs that have mechanisms for monitoring compliance with environmental norms may be able to shame governments and corporations into abiding by the norms

¹¹³⁶ AS Wawryk (n 1134)

¹¹³⁷ Stacia Dickson, ‘The Role of Democracy in Public Policy Making by Private Groups: A Case Study of the American Petroleum Institute (API)’ (2007) 1 *New Voices in Public Policy* 1 <<file:///H:/Conferences/Call%20for%20papers/54-54-1-PB.pdf>> accessed 27 March 2017

¹¹³⁸ Ibid

¹¹³⁹ Office of Management and Budget, ‘OMB Circular A-119’ (Executive Office of the President, WhiteHouse Publication, January, 27 2016) <https://www.whitehouse.gov/sites/default/files/omb/inforeg/revised_circular_a-119_as_of_1_22.pdf> accessed 27 March 2017

¹¹⁴⁰ Ibid

addition to the National Technology Transfer and Advancement Act, 1996 that made it clear that federal agencies should rely upon private voluntary standards whenever feasible,¹¹⁴¹ except if compliance is inconsistent with applicable law or otherwise impractical.¹¹⁴²

Question arises where the national court is yet to implement generally endorsed guidelines, as may be the case in Nigeria, what then happens to the companies that breach these guidelines? In other words, to what extent does the industry association reprimand members that fail to observe the standards. Should the industry association monitor its member's performance? Should they revoke the company's membership and how will revocation affect the company? Research shows that the natural consequence will be reduced demand for products, as operators will seek to buy API-certified equipment.¹¹⁴³ However, where adopted as laws by the government, the consequences of noncompliance become more formal, with fines being a common penalty. In the case of API, it engages in active cooperation with regulators and government agency experts, its members and industry representatives, to fashion acceptable standards for all stakeholders making them more acceptable and binding where incorporated into laws. For instance, the US Chemical Safety and Hazard Investigation Board released API 752 Standards on June 30, 2006 following a March 2005, BP North America Inc. refinery explosion¹¹⁴⁴ in Texas that killed 15 workers and injured 170 around, resulting in a fine of \$21.36 million paid to OSHA. In addition, API cooperated with government to make three new Regulations aftermath of the 2005 hurricane season. It is not clear that API can on its own sanction non-complaint members, however it is pertinent to note that API's members choose which committees to serve on based on their interests, and send teams of experts to help craft the standards. Based on this, the researcher opines that API should sanction erring members as that will help in compliance and will help developing countries with weaker enforcement powers to reduce pollution and thereby reduce EI caused by pollution.

Also in looking at the effect of the standards, research shows that evidence of industry standards are useful in defining a standard of care for member company defendants in negligence cases and admissible even where imposed by Statute or Regulation,¹¹⁴⁵ however violation of an industry standard does not constitute negligence.¹¹⁴⁶ Additionally, proof of a general custom and usage may be admissible even where law

¹¹⁴¹ Section 12 (a)(3) and (b)(3)

¹¹⁴² Section 12 (c)

¹¹⁴³ For further discussion, see S Dickson (n 1137)

¹¹⁴⁴ The Bureau of National Affairs, *CSB Releases Data on 2005 BP Trailer Explosion Damage* (The Bureau of National Affairs, Daily Report for Executives Washington, DC: July 5, 2006)

¹¹⁴⁵ See *Ruffiner v Material Serv. Corp.*, 506 N.E.2d 581, 584 (1987); *Elledge v Richland/Lexington School District Five*, 534 S.E.2d 289, 291 (Ct. App. S.C. 2000). *Hansen v Abrasive Engineering and Manufacturing, Inc.*, 856 P.2d 625, 628 (Sup. Ct. Or. 1993)

¹¹⁴⁶ See *St. Louis-San Francisco Railway Company v White*, 369 So.2d 1007, 1010 (Dist. Ct. App. Fla, 1979)

prescribes certain minimum safety requirements, which the custom exceeds.¹¹⁴⁷ In the US, BP Exploration (Alaska) Inc pleaded guilty to the criminal plea and civil claims stem from the injection of hazardous wastes on Endicott Island and the court held that BP must use best environmental practices to protect workers, the public, and the environment as part of decision.¹¹⁴⁸ IGOs and NGOs that have mechanisms for monitoring compliance may also shame governments and corporations into following the norms. IAS may also become a model for national legislation, thereby raising the standard expected of other companies seeking to operate. The Thai Government for instance used Texaco's procedures as a model for drafting the Ministerial Regulations concerning Petroleum Environmental Management¹¹⁴⁹ and Nigeria can do this. In Nigeria, even though IAS is not a model in any law, but some laws recognised API Standards and ASME Standards, therefore the researcher opines that Nigeria can use them in enforcing oil pollution laws in Nigeria.

Despite all these identified applicability of industry standards, there are associated problems in using them in emerging economies according to Wawryk¹¹⁵⁰ because of absence of rule of law which undermines the effectiveness of national environmental laws, and this impede its translation into binding national law. To her and the researcher agrees its potential depends on the existence of a strong and independent judiciary that will interpret '*good oilfield practice*' to mean the strictest level of behaviour outlined in guidelines and codes and hold oil companies accountable for their actions.

The researcher not only had established here that IAS could be binding, but also based on the relevant Nigerian laws discussed herein, they indicate standards of compliance and hence are relevant in the context of enforcement. Adoption of IAS in Nigeria raises the standard of operation for the MNOs, may lower EI and litigation especially as the current trend of extra-territorial litigation appears to be going negative.¹¹⁵¹

4.7 CONCLUSION

Based on the above comparison, the researcher finds that the US laws protect the environment and people more than Nigerian laws, which may have led to continuous

¹¹⁴⁷ *Duncan v Corbetta*, 178 A.D.2d 459, 577 N.Y.S.2d 129 (1991)

¹¹⁴⁸ Oil and Gas Journal, 'BP Amoco Admits Environmental Lapse', *Oil and Gas Journal* (4 October 1999) <<http://www.ogj.com/articles/print/volume-97/issue-40/in-this-issue/general-interest/bp-amoco-admits-environmental-lapse.html>> accessed 27 March 2017

¹¹⁴⁹ The Oil industry: Operating in Sensitive Environments, *Texaco Exploration in North East Bangkok* (IPIECA/E&P Forum, Report No 2.73/255, London, May 1997)

¹¹⁵⁰ AS Wawryk (n 1134)

¹¹⁵¹ Two Niger Delta Communities: Bille and Ogale in March 2016 sued Royal Dutch Shell in London for pollution damage. See Leigh Day, 'Two New Legal Actions Launched against Shell over Nigerian Oil Pollution' *LeighDay News* (London, 1 March, 2016) <<https://www.leighday.co.uk/News/News-2016/March-2016/Two-new-international-legal-actions-launched-again>> accessed 27 March 2017 or William Watkinson, 'Two Nigerian Communities Sue Shell for Oil Spills in Niger Delta' *The International Business Times* (London, 2 March 2016) <<http://www.ibtimes.co.uk/two-nigerian-communities-sue-shell-oil-spills-niger-delta-1546978>> accessed 27 March 2017

oil-related pollution, however, Nigeria, can transplant or diffuse some of the US laws following Twining's analysis of diffusion. Twining noted that diffusion might take place between many kinds of legal orders and across different geographical levels. In this research, the researcher had seen no reason that will stop diffusion of US laws into the Nigeria oil and gas regulations. This chapter also found that the development of the US prevention law is more democratic than Nigeria, which the researcher believes, is one reason why the laws in the US are better. There are many laws in both jurisdictions, however pollution is more in the Niger Delta and the significant problems in the Nigerian laws include inadequate sanctions; wide defences, absence of criminal sanctions, institutional problems and many waivers, which may be encouraging pollution. MNOCs have exploited this lacuna to continue degrading the environment and by extension causing EI. The researcher vies governmental efforts as being incapable of reducing EI because Nigeria is yet to address the root cause of the problem and it is more than double misfortune for the oil producing communities to lose their land, lose the resources and still face environmental pollution, which eventually cause EI.

Based on the facts herein, this chapter advances the argument that weak oil pollution laws in Nigeria are a major contributor to weak regulatory enforcement and resultant EI. With little or no punishment provided in the current laws, it may be discouraging to pursue vigorous enforcement actions.¹¹⁵² In an attempt to find solution, this chapter examines the effectiveness of US regime in the light catastrophic spills using Gulf of Mexico case study, examined the NOSDRA amendment Act and PIB/PIGB and the challenges of enacting/amending the laws and it showed that there are many challenges facing Nigeria. In the light of that, the researcher sought for best practice that may be relevant and concluded that the IAS discussed here is relevant in the context of enforcement with a view of achieving EJ. It also concludes that beyond laws that fortifies regulatory enforcement are wider problems making even the relatively weak laws to be ineffectively enforced driving the research to the concerns of enforcement, which the research will be examining in the next chapter.

¹¹⁵² There are however other factors affecting enforcement.

CHAPTER FIVE

ENFORCEMENT OF OIL POLLUTION LAWS

5.1 INTRODUCTION

Having established the relevance of enforcement in chapter three, and having compared the relevant aspects of oil-pollution laws in the US and Nigeria, this chapter will compare the regulatory enforcement practices in both jurisdictions with a view to answer the question on the nature of regulatory enforcement and to what extent regulatory enforcement can contribute to achieving EJ in Nigeria. According to Webb,¹¹⁵³ there is a misconception that failure to apply pollution laws always suggests that either the legislation or its administrators/regulators are deficient. He dispelled the conception by observing that government may decline to apply legislation for political, constitutional or strategical reasons using part II of the Canada Water Act, 1970 as an example.¹¹⁵⁴ However, Frate and Norberry opined that causes of inadequate and inconsistent enforcement are the desire to enhance industrial development especially in the developing nations, inequalities of bargaining power; government and public attitudes to pollution and the way business enterprise is characterised especially where the public is concerned with more immediate priorities, such as food and employment.¹¹⁵⁵ Other causes include where other strategies such as alternative dispute resolution or education are preferred; where there are resource constraints; varying approaches of different agencies or different levels of government; judicial processes/attitudes and many more.¹¹⁵⁶

In Nigeria, the last two decades have seen the emergence of stricter environmental regulation; however, facts have shown that despite that, pollution persists and one wonders why. Evidence shows serious non-compliance with the laws and ineffective enforcement for some of the reasons mentioned by Frate and Norberry above. According to a 2010 research,¹¹⁵⁷ Dr Orike who works for one of the oil companies in the Niger Delta decried the level of pollution released through discharge of associated water during drilling and pipelines leakages caused by government weakness to enforce relevant environmental laws and unwillingness of oil companies to comply fully with regulations. In addition, SPDC in 2004 acknowledged that oil companies in

¹¹⁵³ Kernaghan Webb, *Pollution Control in Canada: The Regulatory Approach of the 1980s* (Law Reform Commission of Canada, Report 1988) 23
<https://archive.org/stream/pollutioncontrol00webb/pollutioncontrol00webb_djvu.txt> accessed 27 March 2017

¹¹⁵⁴ Ibid

¹¹⁵⁵ A. Alvazzi Del Frate and J Norberry (eds.), *Environmental Crime, Sanctioning Strategies and Sustainable Development* (Rome: UNICRI publication N0 50, 1993)
<http://www.unicri.it/services/library_documentation/publications/unicri_series/n50.html> accessed 27 March 2017

¹¹⁵⁶ Ibid

¹¹⁵⁷ Fidelis Allen, 'Implementation of Oil-Related Environmental Policy in Nigeria: Government Inertia and Conflict in the Niger Delta' (PhD Thesis, University of Kwazulu-Natal 2010)
<http://researchspace.ukzn.ac.za/xmlui/bitstream/handle/10413/1190/Allen_F.pdf.txt;jsessionid=363A4F3434C74E7872D50FB84595DA93?sequence=3> accessed 27 March 2017

Nigeria were violating guidelines and standards set by the DPR in the areas of offshore disposal of produced water, non-availability of a functional Environmental Sensitivity Index mapping protocol and gaseous emissions.¹¹⁵⁸ For this and many more, there is need for effective enforcement. However, effectiveness of enforcement depends on many factors ranging from the laws, the approaches and mechanisms adopted, people involved in enforcement activities, capacity and many more. In this chapter, the researcher highlights the key actors in enforcement, compliance monitoring, mechanisms, strategies and factors that affect enforcement of pollution laws in Nigeria in comparison with the US. This will be with a view to understand the nature of regulatory enforcement in both jurisdictions and to find out whether to transfer any or some of the practices to Nigeria bearing in mind the socio-cultural, socio-legal, political and economic issues in Nigeria.

5.2 THE KEY ENFORCEMENT ACTORS

In the USA, the framework for enforcing oil pollution laws comprises many federal authorities, state authorities, and tribal and citizens enforcement. In general, USEPA deals with pollution in inland waterways, the US Coastguards that deals with pollution in the sea and the Department of Transport under Pipeline and Hazardous Materials Safety Administration (PHMSA) deals with transportation and pipeline pollution. There are also the US Department of Justice that prosecute the cases and the Department of Homeland Security (DHS) responsible for the safety and security of the US from terrorist attacks and other disasters. The Bureau of Safety and Environmental Enforcement (BSEE) works to promote safety, protect the environment, and conserve offshore resources through vigorous regulatory oversight and enforcement and the Federal Energy Regulatory Commission (FERC) deals with Natural Gas environmental safety. There are many other federal and state agencies, tribal government, citizens and regulated communities; however, the USEPA primarily enforces most pollution laws with USEPA and the states¹¹⁵⁹ mainly authorised to issue administrative penalties and orders subject to appeal. These bodies have different powers ranging from entering premises, taking samples, inspecting records, investigating compliance, determining violations and making reports, prosecuting mainly through DOJ and closing facilities where necessary. They also collaborate in enforcement because sometimes violation or pollution cut across each other role. For instance, a pipeline spill can pollute both the inland waterways and the sea therefore USEPA, Coastguard and PHMSA all have jurisdiction. PHMSA confirmed that it works together with USEPA and other agencies where it stated that it collaborates, coordinates and signs memorandums of understanding (MOUs) with certain federal agencies with similar jurisdictions and interconnected responsibilities, goals, and objectives to create a clear understanding of each party's purpose and of their

¹¹⁵⁸ See Shell, 2004 *People and the Environment* (Shell Annual Report, 2004) 11 <http://www.npr.org/documents/2005/aug/shell_people_2004.pdf> accessed 27 March 2017

¹¹⁵⁹ See section 1019 of OPA authorising states to enforce on the navigable waters of the state.

commitments.¹¹⁶⁰ PHMSA also stated that states assume intrastate regulatory and enforcement responsibility through annual certifications and agreements and confirms that strong partnerships are critical to a successful national pipeline safety program.¹¹⁶¹ In general, the federal laws set national standards for environmental protection providing that state can assume primary enforcement responsibility adopting similar or more stringent standards. USEPA has oversight functions over the states and works/cooperates with the states and tribes to enforce, by drafting regulations after passage of a law to clarify how to put it into effect for better effective enforcement. USEPA also continues to support approved state programs through grant funding and sharing the work.¹¹⁶² Below are the key enforcement agencies in the US oil and gas industry, however, this research will concentrate on USEPA and PHMSA as these agencies roles relates to inland pollution which contributes to the EJ issues being discussed in this research.¹¹⁶³

Table I. Federal Agency Jurisdiction for Oil Spill Prevention and Preparedness Duties, by Source

Potential Source of Oil Spill	Responsible Agency
Vessels	Coast Guard
Onshore, non-transportation facilities	Environmental Protection Agency
Onshore, transportation facilities	Coast Guard and Department of Transportation
Deepwater ports ^a	Coast Guard and Department of Transportation
Offshore facilities (oil/gas extraction)	Bureau of Ocean Energy Management within the Department of Interior
Offshore pipelines directly associated with oil extraction activities (i.e., "production lines") ^b	Bureau of Ocean Energy Management within the Department of Interior
Offshore pipelines <i>not</i> directly associated with oil extraction activities (i.e., "transmission lines")	Office of Pipeline Safety within the Department of Transportation
Inland pipelines	Office of Pipeline Safety within the Department of Transportation

Source: Jonathan L Ramseur, 'Oil Spills in U.S. Coastal Waters: Background and Governance' < <https://fas.org/sgp/crs/misc/RL33705.pdf>> accessed 27 March 2017

In Nigeria, focus on environmental law enforcement generally started with the creation of the inspectorate and enforcement department by FEPA in 1991. With the abolition of FEPA and creation of NESREA, DPR took charge of enforcement in the oil and gas industry and with the establishment of NOSDRA by the NOSDRA Act 2006;

¹¹⁶⁰ See The US Department of Transport, *Pipelines, Hazardous Materials Safety and Administration, Federal Agencies* (The US Department of Transport Report) <<http://primis.phmsa.dot.gov/comm/Federal.htm>> accessed 27 March 2017

¹¹⁶¹ See The US Department of Transport, *Pipelines, Hazardous Materials Safety and Administration, State Pipeline Safety Regulators* < <http://primis.phmsa.dot.gov/comm/StateRegulators.htm>> accessed 27 March 2017

¹¹⁶²USEPA, 'Introduction: Environmental Enforcement and Compliance' (USEPA Pacific Southwest, Region 9 publication) <<http://www3.epa.gov/region9/enforcement/intro.html>> accessed 27 March 2017

¹¹⁶³ The US agencies will be compared with the Nigerian

NOSDRA was empowered to regulate the area of oil spills. Therefore, the main enforcement actors are government agencies both in the US and Nigeria. NESREA¹¹⁶⁴ generally deals with the enforcement of environmental protection and pollution laws,¹¹⁶⁵ and the DPR and NOSDRA enforces the laws in the oil and gas industry. The NESREA through NESREA Act of 2007 confers the Agency with wide-ranging powers for environmental protection, but sections 7 and 8 excluded the oil and gas sector. The researcher sought clarification from NESREA because section 7(c) of NESREA Act provided for enforcement in the oil and gas; NESREA confirmed that it does not have such powers.¹¹⁶⁶ The DPR regulates the oil industry as well as generate revenue for Nigeria¹¹⁶⁷ while NOSDRA regulates oil spills. As in the US, NOSDRA and DPR could enter premises, take samples, inspect records, investigate compliance and determine violations. They can as well prosecute through the Ministry of justice or the Attorney General. NESREA, NOSDRA and DPR enforce with the help of other agencies such as the police, the state and local governments, private citizens and other security agencies like the armed forces, the State Security Services and Nigerian Security and Civil Defence Corps. The Police are involved for various reasons, first: police are the chief law enforcement body in Nigeria¹¹⁶⁸ and some laws specifically require police involvement.¹¹⁶⁹ Having discussed the actors, the researcher will now discuss the compliance monitoring in the US and Nigeria by these actors.

5.3 COMPLIANCE MONITORING IN THE US AND NIGERIAN OIL AND GAS INDUSTRY

To monitor compliance in the oil and gas industry technically means to prevent and prepare. Monitoring compliance is by assessing whether facilities have the necessary equipment, using oversight tasks, such as evaluating facility response plans,

¹¹⁶⁴ It came into being in July 2007, to replace FEPA as provided by S. 36 of NESREA Act.

¹¹⁶⁵ In the cause of this research, NESREA clarified that it does not enforce oil-related laws; email communication from the office attached

¹¹⁶⁶ Official response; NESREA/I&E/307/I; e-mail communication attached

¹¹⁶⁷ The creation of DPR was by virtue of a power under the NNPC Act to oversee the oil industry. Nigeria carved out the Petroleum Inspectorate from NNPC to the ministry of petroleum resources and renamed DPR. It is to formulate and implement government policy and general management of the operations of the petroleum industry with powers delegated by the Minister of Petroleum. It performs many functions, which includes overseeing the activities of oil companies, monitoring, supervising and control of oil industry operations and enforcement of all Acts and Regulations relating to oil operations in Nigeria. These Acts includes Oil Pipelines Act 1956, Oil Terminal Dues Act 1969, Hydrocarbon Oil Refineries Act 1965, ONWA 1968, Petroleum Act 1969 with its amendments and all regulations, Associated Gas Re-injection Act 1979; the 1985 Regulations, Crude Oil (Transportation and Shipment) Regulations 1984, Oil and Gas pipelines Regulations 1995, Mineral Oils (Safety) Regulations 1997 and many more. See Department of Petroleum Resources, *About DPR* (n 438)

¹¹⁶⁸ By section 4 of the Police Act 2004, the police shall be employed for the prevention and detection of crime, apprehension of offenders, preservation of law and order, protection of life and property and enforcement of all laws and regulations with which they are directly charged.

¹¹⁶⁹ Section 10 of the Harmful Waste Act, 1988 is a good example. See also Funmi-Yemi Ale, 'NESREA Partners Police to Prosecute Environmental Crimes in the FCT' *Daily Trust* (Abuja, 21 February 2010) <<http://www.dailytrust.com.ng/sunday/index.php/news/11201-nesrea-partners-police-to-prosecute-environmental-crimes-in-the-fct>> accessed 27 March 2017

developing and maintaining contingency plans and personnel training. Monitoring aids compliance and compliance reduces pollution and this could reduce EI caused by regulation. For this reason, this subsection compares how the industry is monitored both in the US and Nigeria.

In the US, compliance monitoring is a key component of any effective compliance and enforcement program.¹¹⁷⁰ USEPA administers all pollution programs to prevent possible pollution and provide procedural guidelines where necessary. Its compliance monitoring, evaluations, inspections and investigations are to identify violations, provide insights into potential priority areas and determine compliance.¹¹⁷¹ USEPA assesses and documents compliance, supports enforcement process by collecting evidence, monitors compliance with enforcement orders and decrees, creates deterrence and provides feedback on implementation challenges. It reduces pollution through a comprehensive compliance-monitoring program in conjunction with the involved companies, the states, municipalities and other federal agencies.¹¹⁷² It generally performs its regulatory role through legislative development,¹¹⁷³ strategic planning,¹¹⁷⁴ permitting,¹¹⁷⁵ monitoring,¹¹⁷⁶ inspection,¹¹⁷⁷ enforcement¹¹⁷⁸ and reporting.¹¹⁷⁹ In addition, it determines compliance through inspections, routine self-reporting, targeted information gathering, investigations, citizen complaints and remote sensing. For example, USEPA works with its federal, state and tribal regulatory partners in monitoring CWA/OPA compliance through announced or unannounced inspections on randomly chosen facilities, information review and compliance assistance program. This is to ensure compliance based on risk factors such as facility proximity to drinking water or environmentally sensitive areas, or the age of facility infrastructure or as a follow up to a spill, or citizen complaints. USEPA inspectors generally request and review the Spill Prevention Control and Countermeasures (SPCC) Plans as established by USEPA's Oil Pollution Prevention Regulation,¹¹⁸⁰ interview facility personnel and conduct a facility walk-through inspection to ensure

¹¹⁷⁰ USEPA, 'Compliance Monitoring Programs: Assuring Compliance with Environmental Laws' (USEPA Publication) <https://19january2017snapshot.epa.gov/compliance/how-we-monitor-compliance_.html> accessed 22 January 2018

¹¹⁷¹ Ibid

¹¹⁷² USEPA, 'Clean Air Act Compliance Monitoring' (USEPA Publication) <<https://www.epa.gov/compliance/clean-air-act-caa-compliance-monitoring>> accessed 27 March 2017 and USEPA, Air Enforcement (USEPA Publication) <<https://www.epa.gov/enforcement/air-enforcement>> accessed 27 March 2017

¹¹⁷³ This involves development of regulations and may include the development of guidance to interpret legislation.

¹¹⁷⁴ Strategic planning involves strategies and plans required to implement legislation.

¹¹⁷⁵ Permitting encompasses setting conditions

¹¹⁷⁶ Monitoring includes a range of procedures and practices to determine compliance with permits.

¹¹⁷⁷ Inspection involves a range of supervisory practices by the enforcement authority.

¹¹⁷⁸ Enforcement involves actions taken against noncompliant activities.

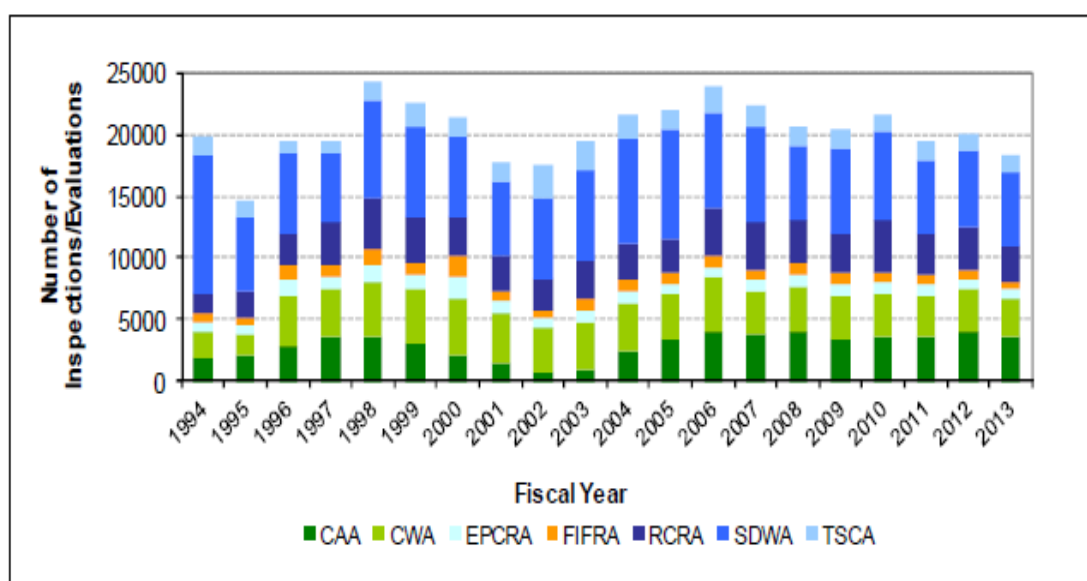
¹¹⁷⁹ Procedures through which derived data are publicized

¹¹⁸⁰ The regulation requires that all regulated facilities as specified in 40 CFR 112.1(c)) have a fully prepared and implemented SPCC Plan.

implementation of its SPCC or Facility Response Plan (FRP).¹¹⁸¹ Where there are accidental releases, it conducts inspections and reviews the facility to verify compliance and certify the quality of the general preparedness, prevention and response.

A comprehensive USEPA's federal inspections covering 20 years period of between 1994 and 2013 below and actions involving CWA 1972¹¹⁸² and CAA 1970 are particularly important. Also, USEPA acknowledged in their 2014 enforcement reports that because of tight budget circumstances, it focused on inspections at larger facilities or facilities which posed greater risks, leading to fewer inspections overall.¹¹⁸³

Figure B-2. Number of EPA Federal Inspections and Evaluations by Statute, FY1994-FY2013



Source: Compiled by CRS. FY2012 and FY2013 data provided directly to CRS by EPA's Office of Congressional and Intergovernmental Relations (OCIR), most recently on March 18, 2014, for FY2013. Data for fiscal years prior to FY2012 are from *National Enforcement Trends: EPA Long Term Trends: FY1994-FY2011 Federal Inspections and Evaluations*, which is no longer maintained by EPA on its website.

Source: USEPA, *Civil Cases and Settlements by Statute* (USEPA Publication, 2014)

¹¹⁸¹ USEPA, 'Clean Water Act (CWA) Compliance Monitoring'

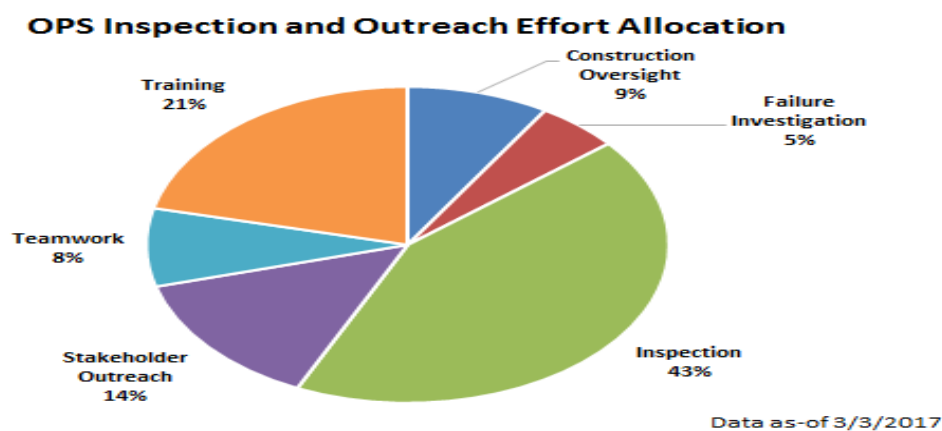
<<https://www.epa.gov/compliance/clean-water-act-cwa-compliance-monitoring#oil>> accessed 27 March 2017

¹¹⁸² This includes OPA as OPA amended the CWA with enforcement powers being derived from CWA §311(e) and §311(c) and criminal fines may be imposed for violations of OPA under CWA §309; see also EPA, *Enforcement: Oil Pollution Act and Federal Facilities* (USEPA Publications) <<http://www2.epa.gov/enforcement/oil-pollution-act-opa-and-federal-facilities>> accessed 27 March 2017

¹¹⁸³ USEPA, *FY 2014 Enforcement and Compliance Annual Results Federal Inspections and Evaluations Conducted by EPA FY 2010 – FY 2014* (USEPA Publication) <<https://www.epa.gov/sites/production/files/2014-12/documents/fy-2014-enforcement-annual-results-charts-12-08-14.pdf>> accessed 27 March 2017

< <https://cfpub.epa.gov/enforcement/cases/index.cfm?templatePage=12&ID=4>>
accessed 10 August 2017

Apart from USEPA, the Hazardous Liquid Pipeline Act, 1979 granted authority to the Department of Transport (DOT) through PHMSA¹¹⁸⁴ to regulate various matters regarding spills from pipelines. DOT compliance scheme is assured through facility and programmatic inspections, construction projects; procedures, and processes; investigations of incidents and dialogue with operator management. PHMSA noted that through its oversight programs, serious pipeline incidents decreased by 37% in 2014 and by 39% in 2015.¹¹⁸⁵ PHMSA pipeline safety personnel initiated 1,071 inspections in 2015¹¹⁸⁶ and by 2016; it increased to 1,175 as can be seen in the diagram below with 43% of the time used in inspecting pipeline facilities for compliance.¹¹⁸⁷



Source: <<https://www.phmsa.dot.gov/pipeline/inspections/inspections-overview>>
accessed 10th August 2017

All these actions seem to have helped in spill decline despite steady oil consumption and import rise causing increased oil transportation.¹¹⁸⁸ API also presented a comprehensive data of production, usage and spillage from 1969 to 2007 based on EIA data.¹¹⁸⁹ According to the report, the US produced an average of 2.017 billion barrels of crude oil and imported 4.082 billion barrels annually between 1998 and

¹¹⁸⁴ PHMSA is a US Department of Transportation agency that develops and enforces regulations for the safe, reliable, and environmentally sound operation of pipeline transportation system and shipments of hazardous materials by land, sea and air. See The US Department of Transport, *Pipelines, Hazardous Materials Safety and Administration, About PHMSA* <<http://www.phmsa.dot.gov/about/agency>> accessed 27 March 2017

¹¹⁸⁵ The US Department of Transport, *Pipelines, Hazardous Materials Safety and Administration, Pipeline Inspection 101* (The US Department of Transport Report) <<http://phmsa.dot.gov/pipeline/inspections>> accessed 27 March 2017

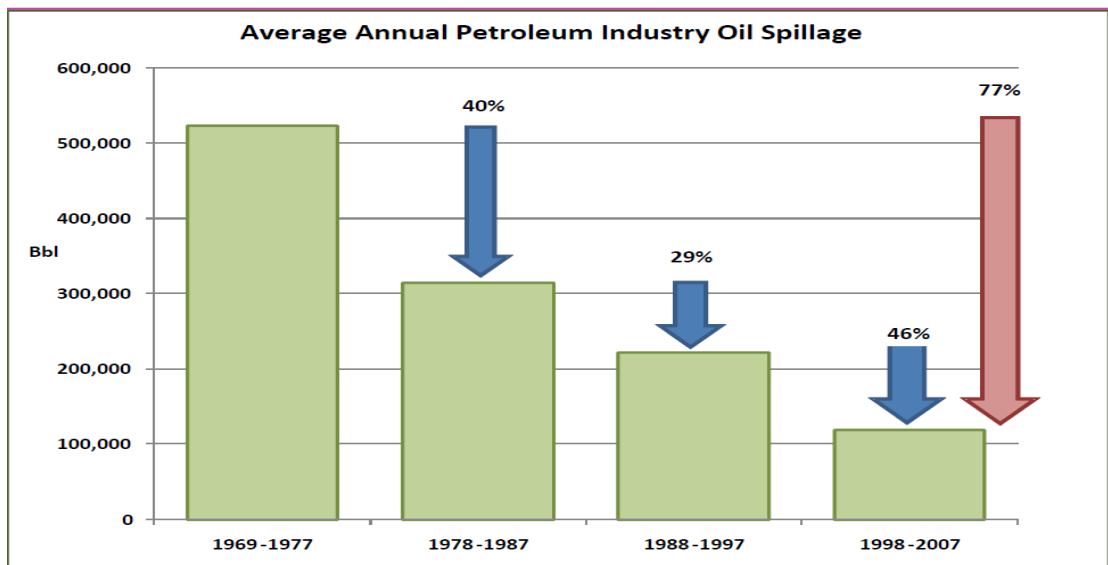
¹¹⁸⁶ Ibid

¹¹⁸⁷ Ibid <<https://www.phmsa.dot.gov/pipeline/inspections>> accessed 10th August, 2017

¹¹⁸⁸ The rise is shown in a diagram infra

¹¹⁸⁹ Ibid 1

2007 of which 0.00003barrels spilled from all sources and 60.8% of that spilled from petroleum industry sources.¹¹⁹⁰ The API document below also showed a steady reduction from spills related to oil exploration and production platforms and offshore pipelines; coastal and inland pipelines, oil transport by tank vessels, railroads, and tanker trucks; oil refineries; and spillage at gas stations.



API Publication 356, (2009) < <http://www.api.org/environment-health-and-safety/clean-water/oil-spill-prevention-and-response/~media/93371EDFB94C4B4D9C6BBC766F0C4A40.ashx> > accessed 27 March 2017

Based on the figure above, the total petroleum industry spillage has decreased consistently over the last 40 years. It shows seventy-seven percent less spill since the 1970s and forty-six percent less since the decade before the last decade in the figure above.¹¹⁹¹ In addition, information from US EIA shows that within the period presented by API above, there is no significant decrease in oil production¹¹⁹² and in general, there was steady reduction of spill. The researcher is aware that the analysis ended in 2007, however considering the fact that it was continuous downward trend of four decades, nothing shows that anything contrary will happen to change the analysis.

¹¹⁹⁰ Ibid 1

¹¹⁹¹ API Publication 356, (2009) < <http://www.api.org/environment-health-and-safety/clean-water/oil-spill-prevention-and-response/~media/93371EDFB94C4B4D9C6BBC766F0C4A40.ashx> > accessed 27 May 2017

¹¹⁹² US Energy Information Administration 'Petroleum and Other Liquids' (US Energy Information Administration Data Report, December 2015) <<http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=MCRFPUS2&f=A>> accessed 27 March 2017

In Nigeria, the NOSDRA Act and the Petroleum Act did not clearly spell out monitoring mechanisms. However based on EGASPIN¹¹⁹³ and Petroleum Regulations of 1969,¹¹⁹⁴ the DPR should inspect, monitor and audit to monitor compliance.¹¹⁹⁵ It can also seal-up premises, seize offending substances, impose penalties, require the clean-up and shutdown a polluting/offending facility until there is compliance. In practice, the DPR adopts remedial/corrective tools like compliance monitoring within the framework of the laws and the model clauses incorporated into the licence through the Petroleum (Drilling and Production) Regulations. NOSDRA is to specifically address spill detection, monitoring, implementation, ensure compliance, enforcement, and impose penalties and strengthen spill response.¹¹⁹⁶

In its capacity as the organ that monitors spills, NOSDRA has advanced from presumed toothless watchdog since 2011 because from its creation in 2006, there was no known administrative or civil judicial enforcement until 2011.¹¹⁹⁷ Examining their roles, the researcher found that NOSDRA lacked the wherewithal to monitor spills effectively.¹¹⁹⁸ Information in the NOSDRA website did not show a systematic monitoring system.¹¹⁹⁹ NOSDRA lacks facilities such as laboratories for its inspection and monitoring responsibilities therefore depend on guesses and laboratories accredited but not owned by NOSDRA.¹²⁰⁰ When compared with the US authorities, the US authorities conduct random inspections based on risk factors such as environmentally sensitive areas, or the age of facility infrastructure or as spill follow-up, or citizen complaints.¹²⁰¹ This makes US compliance regime more robust than Nigeria. In the Bodo case for instance,¹²⁰² Amnesty International enquired from NOSDRA about penalties imposed on SPDC, and NOSDRA claimed that Shell complied with the regulations without evidence of how NOSDRA monitored the

¹¹⁹³ Part A1.4.3 and part VIII A1.4.3ii.

¹¹⁹⁴ Regulation 105 provides for right to enter and inspect premises by authorised officer or an inspector of police

¹¹⁹⁵ For the powers and functions of DPR see, Department of Petroleum Resources, *Functions* (DPR Publication) <<https://dpr.gov.ng/index/functions-of-dpr/>> and Department of Petroleum Resources *Safety and Environment* (DPR Publication) <<https://dpr.gov.ng/index/offshore-training-centres>> and accessed 23 January 2018/

¹¹⁹⁶ Sections 5 and 6 of NOSDRA Act

¹¹⁹⁷ Because NOSDRA is an agency that really starts its work with spillage, monitoring here relates to monitoring of clean-ups and other actions taken by the companies after spill.

¹¹⁹⁸ It took SPDC at least four weeks to stop Bodo spill according to UNEP Report and NOSDRA did nothing

¹¹⁹⁹ See UNEP Report 2011 (n 107), 139 and 206

¹²⁰⁰ NOSDRA, 'Rebuttal of Amnesty International Report on Clean It Up: Shell's False Claims about Oil Spills Response in the Niger Delta' NOSDRA News Report (Abuja, 1 April 2016) <<http://nosdra.gov.ng/press1.html>> accessed 27 March 2017. See also UNEP Report 2011(n 107) 139

¹²⁰¹ NOSDRA lacks the technology, human resource, infrastructure and many more. The researcher will be discussing this infra.

¹²⁰² See chapter six for Bodo case discussion.

spill.¹²⁰³ Agencies wait for the oil companies to bring vehicles to convey their staff from one location to the other. In Bodo case, NOSDRA confirmed to Amnesty International that they were waiting for response from SPDC to prepare and fix time for damage assessment, unfortunately, without success.¹²⁰⁴ The statement shows that NOSDRA relies on SDPC to carry out the damage assessment. It also corroborates UNEP observation when it said ‘*both DPR and NOSDRA suffer from a shortage of senior and experienced staffs who understand the oil industry and can exercise effective technical oversight.*’¹²⁰⁵ In its report, UNEP noted:

The agency has no proactive capacity for oil-spill detection and has to rely on reports from oil companies or civil society concerning the incidence of a spill. It also has very little reactive capacity – even to send staff to a spill location once an incident is reported.¹²⁰⁶

Analysing this, Sunny Ofehe¹²⁰⁷ had this to say ‘*So, you cannot get an independent report that would really tell the true situation of what is happening.*’¹²⁰⁸ The oil companies supply even data used by the agencies as they lack expertise and laboratories to analyse these data.¹²⁰⁹

As explained in chapter two, many clean-ups also do not start within twenty-four hours as provided by the NOSDRA Regulation 2011.¹²¹⁰ Where there are clean-ups, it has shown to be below standards¹²¹¹ using RENA instead of RBCA.¹²¹² As discussed in chapter two, the UNEP report which surveyed dozens of oil spill sites in Ogoniland also found that some documented assessed and cleaned-up sites did not show any

¹²⁰³ In Bodo, there was conflicting evidence concerning when the spill started; however from the date agreed by SPDC, it took SDPC four weeks to stop the spill and that was after Bodo community instructed their solicitors and after a letter was sent to NOSDRA urging them to inspect the site. Date of 28th August 2008 was confirmed by NOSDRA to Amnesty International, however, Shell said October, 2008: See Amnesty Report 2011(n 46) 30

¹²⁰⁴ NOSDRA wrote Shell in May and June 2009 to accelerate plans damage assessment. This letter was made available to Amnesty International

¹²⁰⁵ UNEP Report 2011 (n 107) 139

¹²⁰⁶ Ibid, 140

¹²⁰⁷ Founder/Executive Director, Hope for Niger Delta Campaign

¹²⁰⁸ Malachi News, ‘NOSDRA, DPR are Handicap, They Rely on Shell to Compile Their Data, says Ofehe, Niger Delta Environment Activist’ *Malachi News Online* (Nigeria, 21 January 2014) <<http://malachinews247.wordpress.com/2014/01/21/nosdra-dpr-are-handicap-they-rely-on-shell-to-compile-their-data-says-ofehe-niger-delta-environment-activist/>> accessed 27 March 2017

¹²⁰⁹ Ibid

¹²¹⁰ Regulation 36 of Oil Spill Recovery, Clean-Up Remediation and Damage Regulations, 2011

¹²¹¹ UNEP Report showed that the clean-up standard used by SPDC is below the standard set out in the Nigerian laws and SPDC’s own standards; UNEP Report 2011 (n 107) 135 and 144. See also Richard Steiner (n 116)

¹²¹² Discussed in chapter two: ENI: another oil Company operating in Nigeria confirmed that they also use RENA. See ENI, *NAOC Sustainability: Response to Oil Spills* (Sustainability Report) <http://www.eni.com/en_NG/sustainability/environment/response-to-oil-spills/response-to-oil-spills.shtml> accessed 27 March 2017

obvious difference from the site awaiting clean-up.¹²¹³ In addition, in January 2013 an IUCN Panel asked by Shell to review environmental issues in the Niger Delta also found that regulators signed off a polluted site with chemicals of special concern levels far higher than standards of EGASPIN in Soku.¹²¹⁴ In some cases, clean-ups are abandoned. According to Niyi,¹²¹⁵ ExxonMobil abandoned clean-up of oil-polluted site in Akwa Ibom State for economic reasons. Chief Willian Mkpa, a community leader in Ibeno, Akwa Ibom State noted.

It is disheartening to note that Mobil never cared about the health of the community while it suspended clean up due to cost considerations... their major interest is to cut cost at the expense of human beings... For two weeks, work was stopped because they refused to engage enough hands.... The result is that the level of contamination has worsened because the water current is dynamic and has washed the oil in diverse directions.¹²¹⁶

All these evidence show ineffective monitoring despite rebuttal by NOSDRA that it engaged in monitoring of remediation of impacted sites and ensures remediation to appropriate standards.¹²¹⁷ It is also important to note that monitoring in Nigeria refers to monitoring already polluted environment unlike the US that monitors compliance before pollution incident. This ineffective monitoring shows lax regulatory enforcement and may increase EI. Because of these points, the researcher thinks that the relevant agencies need to do more regarding monitoring of compliance in Nigeria. Looking at many of the reasons for poor monitoring, one sees many capacity issues that are not very evident in the US. This shows that Nigeria cannot reasonably borrow all aspects of the US monitoring systems, but can borrow some aspects including better training and focused monitoring. Having discussed this, the next step will be mechanisms used by the enforcement agencies in their enforcement activities.

5.4 ENFORCEMENT MECHANISMS COMPARED

Here, the researcher will compare the enforcement mechanisms used by the US enforcement agencies with mechanisms used in Nigeria to identify the difference. This will help the researcher to arrive at a recommendation of what Nigeria might keep or discard in enforcing pollution laws and what Nigeria might learn from the US. As noted earlier, USEPA enforces most US federal environmental laws including the ones in oil and gas industry,¹²¹⁸ however, focus will be using USEPA and PHMSA because,

¹²¹³Ibid, 150 See also Henry Clark Report (n 342)

¹²¹⁴ IUCN, *Sustainable Remediation and Rehabilitation of Biodiversity and Habitats of Oil Spill Sites in the Niger Delta* (IUCN independent - Niger Delta Panel (IUCNNDP) report to SPDC January 2013 <https://cmsdata.iucn.org/downloads/ndp_executive_summary_170113_final_2_.pdf> accessed 27 March 2017. See also Bodo case.

¹²¹⁵ Information Nigeria, (n 526)

¹²¹⁶ Ibid

¹²¹⁷ NOSDRA, 'Rebuttal of Amnesty International Report (n 1200)

¹²¹⁸ The oil and gas related laws are the CAA, CWA/OPA, CERCLA and Superfund Amendments and Reauthorization Act (SARA)

USEPA deals with issues with inland pollution while PHMSA deals with pollution as it relates to pipelines. In Nigeria, the focus will be on NOSDRA and the DPR because the DPR generally governs the oil industry and NOSDRA deals with issues of spills, which also causes pollution.

In the US, USEPA takes civil or criminal enforcement action where necessary and enforces nine principal environmental laws at the federal levels, which include CWA/OPA and the CERCLA¹²¹⁹ while the PHMSA enforces the pipeline related laws.¹²²⁰ In comparison with Nigeria, DPR enforces all the numerous laws in the Nigerian Oil and Gas industry while NOSDRA only enforces NOSDRA Act.

In the USA, federal laws are generally enforced by USEPA, however where the state enforces, USEPA oversees state enforcement with the right to bring a direct action where it believes that an appropriate and timely action has not been taken or where a state or local agency requests USEPA's involvement.¹²²¹ In Nigeria, however, federal agencies tackle all enforcement of oil pollution laws.¹²²²

In the US, USEPA and DOT develop mechanisms to enhance enforcement of US environmental laws based on the provisions of the enabling laws and/or USEPA's guidelines.¹²²³ This is not similar to Nigeria, however, most Nigerian laws do not provide for such powers. While US enforcement mechanisms seem clear, the Nigerian enforcement mechanisms are not very clear. With no provision of mechanism to halt spills, NOSDRA can only monitor, assist or direct the response to mobilise the necessary resources to save lives, protect threatened environment, and clean-up to the best practical extent of the impacted site.¹²²⁴

USEPA mainly addresses most environmental pollution control violations administratively in a progressive order that could be formal or informal.¹²²⁵ The formal action generally includes warning letters, notice of violation, administrative order or revocation of permit and/or assessment of penalty for noncompliance depending on the power granted by the enabling statutes. For instance, the CWA provides for issuance of notice of violation, compliance order, civil action and criminal penalties.¹²²⁶ There

¹²¹⁹USEPA relies more on settlements, remedy, focuses more on pollution control technologies and judicial actions on haughtier and other complex cases that are likely to bring better environmental benefits. See USEPA, *EPA Needs to Improve Its Recording and Reporting of Fines and Penalties* (EPA's Office of Inspector General Audit Report No 10-P-0077, March 9 2010) <<http://www.epa.gov/sites/production/files/2015-11/documents/20100309-10-p-0077.pdf>> accessed 27 March 2017

¹²²⁰ The US Department of Transport, *Pipelines, Hazardous Materials Safety and Administration, Inspections and Enforcement* <<http://www.phmsa.dot.gov/inspect-enforce>> accessed 27 March 2017

¹²²¹ USEPA, 'EPA Needs to Improve (n 1219)

¹²²² These agencies are the DPR and NOSDRA

¹²²³ The mechanisms are discussed below

¹²²⁴ Section 5 (c)

¹²²⁵ USEPA, *Overview of the Enforcement Process for Federal Facilities* (USEPA Publication) <https://www.epa.gov/enforcement/overview-enforcement-process-federal-facilities#Enforcement> Response

¹²²⁶ 33 U.S. Code § 1319, section 309 (g)

may be administrative assessment up to \$157,500¹²²⁷ in line with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, issuance of compliance or correction action orders, revocation and termination or suspension of permits where USEPA has formal/full enforcement powers provided in the statutes.¹²²⁸ However, where USEPA has limited enforcement powers, it issues notice of violation that mainly results in negotiated settlements in form of a consent agreement or final administrative order/penalty.¹²²⁹ When it comes to hazardous waste, ¹²³⁰CERCLA¹²³¹ provides three main enforcement mechanisms, which are judicial or administrative orders to clean-up, voluntary settlement agreements and cost-recovery actions.¹²³² PHMSA generally issue warning letters and fines for less serious violations,¹²³³ impose corrective action orders,¹²³⁴ notices of amendment,¹²³⁵ safety orders¹²³⁶ and notices of probable violation.¹²³⁷ These mechanisms are not available to Nigerian enforcement agencies.

USEPA also uses voluntary settlement actions in Supplemental Environmental Projects (SEPs) which include restoration of other environmental resources, funding of a community environmental organisation, a community clean-up or beautification project, or a citizen-monitoring programme.¹²³⁸ In the oil and gas industry, USEPA's

¹²²⁷ Was originally up to \$25,000 in the Code: See 33 U.S. Code § 1319 (g) (2) <<https://www.law.cornell.edu/uscode/text/33/1319>> accessed 27 March 2017

¹²²⁸ USEPA, Overview of the Enforcement Process for Federal Facilities' <https://www.epa.gov/enforcement/overview-enforcement-process-federal-facilities#Enforcement> Response

¹²²⁹ Ibid

¹²³⁰ Including oil-pollution

¹²³¹ Its central elements are cost recovery, seeking judicial order or taking administrative actions requiring private persons to abate an endangerment, negotiated settlements, and allow citizens' suits enforcement and actions for damages to natural resources by natural resource trustees: EPA, *CERCLA and Federal Facilities* (EPA Publications) <<http://www.epa.gov/enforcement/comprehensive-environmental-response-compensation-and-liability-act-cercla-and-federal>> accessed 27 March 2017

¹²³² Between 2007 and 2014 alone, USEPA took eighty-six civil enforcement actions under CERCLA. This is discussed infra

¹²³³ The federal hazardous materials transportation law authorises PHMSA's Chief Counsel to assess a civil penalty of not less than \$250 and not more than \$50,000, or to refer matters for criminal prosecution.

¹²³⁴ Warning letters are issued to take specific actions especially following pipeline accidents or inspection: It uses computer-based pipeline inspection priority program (PIPP) not only to develop a good basis for enforcement actions, but investigates pipeline accidents to decide violations or whether regulations should be revised

¹²³⁵ This is closed within 30 days of satisfactory amendment

¹²³⁶ See Title 49, Part 190, Subpart B "Enforcement" in the Code of Federal Regulations especially where there is concerning situation for operators to address potential weaknesses

¹²³⁷ This is beginning of enforcement process and may carry a civil penalty and/or compliance order with expected response within 30 days; otherwise, there will be a final order with compliance order, civil penalty or finally conducting a hearing.

¹²³⁸ Settlement with Coastal Energy Corporation was valued at more than \$200,000: \$25,000 in cash to resolve violations of the CWA and EPCRA: K Lenexa (n 1031). Shell Oil Deer Park on 6/6/14 agreed to install and operate an open path air monitor on the fenceline of the covered facilities and implements a

petroleum refinery initiative for instance led to reduction of air emissions in the sector when it reached the first of the settlements in 2000 by approximately 75%.¹²³⁹ USEPA entered into 32 settlements with US companies that have over 90% of US petroleum refining capacity. The settling companies also agreed to invest more than \$6.5 billion in control technologies, to pay civil penalties of more than \$93 million and perform SEPs of over \$80 million between 1999 and 2011.¹²⁴⁰ Again, the enforcement agencies do not have the power to impose SEPs in Nigeria and this makes a lot of difference in EJ discussions as SEPs can restore environment directly.

Attempts made by the researcher to find out mechanisms that NOSDRA adopt only showed imposition of administrative penalties and civil judicial mechanisms provided by the Act.¹²⁴¹ The DPR on its own has the power to revoke a permit which can be used in extreme cases where there is a persistent violation;¹²⁴² however, DPR deals with each violation on a case by case basis according to an e-mail response from the DPR.¹²⁴³ According to DPR official, DPR cannot use monetary sanctions as wished because of non-approval. He noted

.... Monetary sanctions and production deferments are other options which are also being considered but are not approved by the Government presently. Hopefully post PIB the DPR will be fully equipped and empowered to deploy these tools as means of enforcing compliance.¹²⁴⁴

This is because based on the provisions of the Petroleum Act, 1968 and the relevant subsidiary Regulations; the DPR is not empowered to impose the penalties.¹²⁴⁵ There is also audit and withdrawal of permits that DPR can employ.¹²⁴⁶ This research did not

project designed to reduce diesel emissions from school buses and/or non-school bus publicly owned vehicles near the Covered Facilities. <<http://www.epa.gov/region6/6en/14-seps.pdf>> accessed 27 March 2017

¹²³⁹ USEPA *Petroleum Refinery National Case Results* (USEPA Publication) <<http://www2.epa.gov/enforcement/petroleum-refinery-national-case-results>> accessed 27 March 2017

¹²⁴⁰ Ibid

¹²⁴¹ Oral informal interview/discussion with an official in NOSDRA on 21st of March 2013 confirms the use of administrative penalties and litigation all of which it had exercised on many occasions as can be seen in many cases pursued by NOSDRA discussed below

¹²⁴² See section 25(1) of the first schedule of the Petroleum act of 1969. DPR works under the Petroleum Minister.

¹²⁴³ Response was on 16th April 2013

¹²⁴⁴ Email communication attached

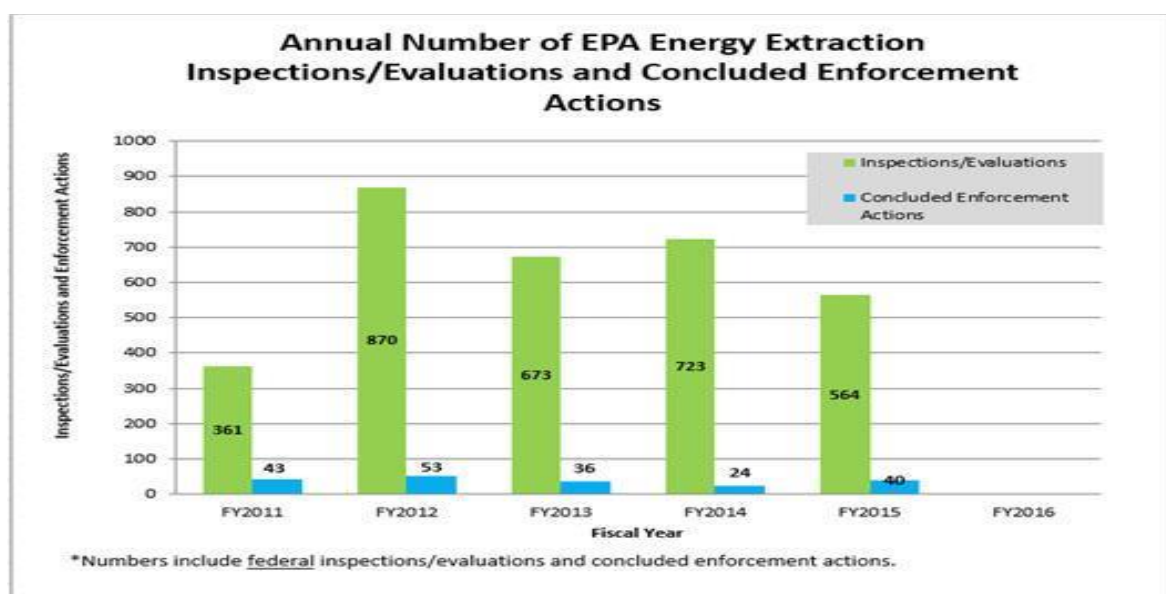
¹²⁴⁵ See Reg. 27, 41 and 47 of the Mineral Oils (Safety) Regulations and Reg. 9 Crude Oil (Transportation and Shipment) Regulations, 1984. However, part IX 4.7.1 of EGASPIN provides for criminal penalties and can revoke license

¹²⁴⁶ Audit involves regular checking of management systems, operational systems and their impact focusing on the organisational structure, responsibilities, practices, processes and available resources and equipment for enforcing environmental governance and withdrawal of permit is a mechanism used mainly where operators failed to obey earlier mechanisms: See W Prince and D Nelson 'Developing an Environmental Model: Piercing Together the Growing Diversity of International Environmental

show any permit withdrawn and in reality, the enforcement agencies monitor and inspect without clear mechanisms apart from administrative penalties, litigation, audit and withdrawal of permits.

Administrative orders are through an administrative adjudicatory process, filed before an administrative law judge, or in the regions, by USEPA's regional judicial officers in the US. USEPA also has Office of Administrative Law Judges, which is an independent office within the agency with Judges appointed by the USEPA administrator. There is provision for review of its and appeals can be made to the Environmental Appeals Board, which also functions independently of USEPA.¹²⁴⁷ In 2014 alone, USEPA concluded 2,275 civil judicial and administrative cases, which is the least for five years because of higher concentration on serious cases.¹²⁴⁸ Nigerian agencies do not file cases to administrative law judge as in the US, but the AG can file cases.¹²⁴⁹ This could make some positive difference as the administrative courts might deal with the cases speedily.

In addition, USEPA conducts inspection in the gas industry. Below are USEPA's energy extraction inspections/evaluations as well as concluded enforcement actions between 2011 and 2015 showing its progress in addressing incidences of noncompliance from natural gas extraction and production activities.



USEPA, National Enforcement Initiative: Ensuring Energy Extraction Activities Comply with Environmental Laws <<https://www.epa.gov/enforcement/national-enforcement-initiative-ensuring-energy-extraction-activities-comply#progress>> accessed 27 March 2017

Standards and Agendas Affecting Mining Companies' (1996) 7 (247) Journal of International Environmental Law and Policy 292

¹²⁴⁷ Title 40 C.F.R. Part 22 Subpart A §22.8

¹²⁴⁸ USEPA, *FY 2014 Enforcement and Compliance Annual Results* (n 1183)

¹²⁴⁹ See Bonga case infra

DPR regulates the gas industry in Nigeria; however, there is no comprehensive data of inspections similar to USEPA.

In the US, there is also, enforcement discretion and ability to pay considerations used by USEPA,¹²⁵⁰ which the Nigerian agencies do not use. CERCLA¹²⁵¹ allows USEPA to use the most effective enforcement mechanism in achieving clean-up objectives including pursuing the liability of all, some, or only one party where there are multiple PRPs, but can still recover full amount of clean-up costs through joint and several liabilities.¹²⁵² In addition, USEPA is empowered to consider a PRP's financial capability in sharing the clean-up costs. USEPA formulated its first guidance document on this in 1995¹²⁵³ based on court interpretations of the intent of the clean-up liability provisions of CERCLA,¹²⁵⁴ and balancing two important interests: ensuring that a PRP cleans-up, without creating an undue financial hardship on that party, or its dependent. In comparison with Nigeria, there is no such provision or powers under the oil pollution or any environmental law.

In summary, one sees that there are fewer enforcement mechanisms available to agencies in Nigeria when compared to more robust formal or informal mechanisms in the US. That may also justify why the Energy Information Administration report cited Nigeria as one of the key oil-producing countries with weak environmental laws and weak enforcement.¹²⁵⁵ O'Rourke and Connolly also found that environmental and health regulations in developing countries, although almost impossible to evaluate systematically, appear to be even weaker to US regulations.¹²⁵⁶ Nigeria should borrow a lot from the US, but because of the robustness, Nigeria may not meet with the same level of success, but there might be improvement in the researcher's opinion. US agencies use very wide mechanisms depending on the nature of the violation, risk, and seriousness of incident, health effects, damages for injury, destruction or loss of natural resources and many more and this allow the use the most effective enforcement mechanism. This helped in achieving greater results seen and will help in reducing EI compare to limited mechanisms in Nigeria.

¹²⁵⁰ This is a tool used by USEPA to consider the polluters' ability to pay the penalty

¹²⁵¹ See also OPA

¹²⁵² USEPA usually pursues the liability of parties that contributed more to the pollution and/or are more capable of cleaning-up or paying for the clean-up, however, the party can recover from other parties involved: See sections 113(f) (1), (2), (3) (B) of CERCLA

¹²⁵³ Revised in 1997

¹²⁵⁴ See *US v Bay Area Battery*, 895 F. Supp. 1524 (N.D.Fla. 1995)

¹²⁵⁵ Energy Information Administration 2002, 'Nigeria: Environmental Issues' <<http://www.eia.doe.gov/emeu/cabs/nigenenv.html>> accessed 27 March 2017. However, this was before the NOSDRA and NESREA Act

¹²⁵⁶ D O'Rourke and S Connolly, 'Just Oil? The Distribution of Environmental and Social Impacts of Oil Production and Consumption' (2003) (28) *Annu. Rev. Environ. Resour.* 587 <<http://nature.berkeley.edu/orourke/PDF/JustOil-final.pdf>> accessed 27 March 2017

5.5 ENFORCEMENT STRATEGIES/APPROACHES COMPARED

Comparing these strategies will help the researcher to identify the key difference in both jurisdictions to arrive at a recommendation for Nigeria. Achieving enforcement goals generally requires setting up strategies/approaches. In the US, USEPA and PHMSA set up EJ strategic goals but this is not the case with NOSDRA or DPR. From 2010 until 2019, the USEPA's strategic goals revolves around clean-up, pollution prevention and enforcement.¹²⁵⁷ It sets four cross-agency strategies which are working toward a sustainable future, working to make visible difference in communities, launching a new era of state, tribal, local, and international partnerships and embracing USEPA as a high-performing organisation.¹²⁵⁸

USEPA also uses most effective civil and criminal enforcement strategies that target the most serious pollution hazards in communities,¹²⁵⁹ combining accommodative/persuasive/compliance and sanctioning strategies depending on severity of the violation.¹²⁶⁰ Here, the managerial and enforcement theories discussed in chapter three comes into play as USEPA manage pollution problems where it thinks that managing the cause of pollution problems will yield greater results and uses sanctions where it thinks otherwise. This simply means regulating with a mixture of the theories. Despite that, deterrence theory has served the primary basis for the enforcement of federal pollution laws in the US.¹²⁶¹ In Nigeria, the inspectorate and enforcement department by FEPA in 1991 adopted '*carrot and stick*'¹²⁶² enforcement

¹²⁵⁷ Discussed infra

¹²⁵⁸ See USEPA, USEPA, *EPA Strategic Plan: Achieving Our Vision Fiscal Year 2011–2015* (USEPA Publications, September 30, 2010) <<http://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P1008YOS.PDF>> and <<http://www2.epa.gov/planandbudget/strategicplan>> accessed 27 March 2017

¹²⁵⁹ USEPA's 2014- 2018 strategic goal are addressing climate change and improving air quality, protecting America's waters, cleaning up communities and advancing sustainable development, ensuring the safety of chemicals and preventing pollution and protecting human health and the environment by enforcing laws and assuring compliance. For further information see USEPA, *EPA Strategic Plan: Fiscal Year 2014–2018* (USEPA Publications, April 10, 2014) <https://www.epa.gov/sites/production/files/2014-09/documents/epa_strategic_plan_fy14-18.pdf> accessed 27 March 2017

¹²⁶⁰ Enforcement is generally through frequent inspections using stringent penalties or offering incentives to those who are out of compliance called compliance assistance.

¹²⁶¹ Rechtschaffen and Markell established that enforcement agencies such as USEPA have relied on deterrence strategies to implement major pollution control programs: See C Rechtschaffen and DL Markell, 'Improving State Environmental Enforcement Performance through Enhanced Government Accountability and Other Strategies' (2003) 33 ENVTL. L. REP. 10

¹²⁶² It is adopted for many reasons which includes saving cost and time and fostering good relationship with the regulated party, but where this approach fails to work, a more serious enforcement approach is necessary: De Geest and Darri-Mattiacci carrots and sticks are both transfers of wealth that induce the citizen to comply with a rule. To them, *carrot* is a payment to the citizen by the lawmaker simply used where monitoring reveals compliance while a *stick* is a payment by the citizen to the lawmaker used where monitoring found violation; see Gerrit De Geest and Giuseppe Dari-Mattiacci, 'The Rise Of Carrots And The Decline Of Sticks' (2013) 80 (1) University of Chicago Law Review 341

strategies¹²⁶³ which was sustained by the DPR when FEPA was abolished and oil and gas law enforcement transferred to DPR¹²⁶⁴ and NOSDRA with civil administrative and judicial enforcement strategies.¹²⁶⁵ This carrot and stick is similar to US strategies of compliance and sanctioning, however, the US combines innovative strategies that include compliance assistance, incentives, monitoring and enforcement tools¹²⁶⁶ making US strategies more robust. In 2015, Cynthia Giles, Assistant Administrator of the USEPA's Office of Enforcement and Compliance Assurance (OECA) explained how better compliance strategy helps in reducing pollution and in effect reduce enforcement actions.¹²⁶⁷

The sanctioning strategy used by USEPA includes pursuing civil judicial actions in federal district court through DOJ, with many ending as negotiated settlements as in civil administrative enforcement. USEPA uses criminal enforcement where there is intent or negligence that may result in fine and/or imprisonment.¹²⁶⁸ In 2013, for instance, USEPA's special trained agents who are empowered to enforce in accordance with the guidelines established by the AG of the US opened 297 new environmental crime cases.¹²⁶⁹ USEPA also uses a penalty policy whose purpose is to make pollution abatement failures strong enough to deter. USEPA's 1984 penalty policy emphasises the '*economic law enforcement*' that calculate penalties with a view of depriving the violator of any financial gains from non-compliance.¹²⁷⁰ Here, USEPA use two main factors: the economic benefit factor and a gravity factor, calculated separately, added, and adjusted to reflect the strength of the agency's case.¹²⁷¹ The economic benefit includes the estimated benefits from delayed costs, avoided costs and competitive advantage.¹²⁷² The economic benefit penalty puts the violator in the same position as if s/he had originally complied; and the gravity factor will discourage violations. The gravity factors are actual/potential environmental harm, the importance of the violated provision, the amount appropriate given the impact and other programme-specific

¹²⁶³ See A Ahmad, 'Policing Industrial Pollution in Nigeria' (Essay submitted to the Harvard Law, School, and Cambridge MA, USA in partial fulfilment of the award of LLM degree, 2001).

¹²⁶⁴ See powers of DPR discussed above

¹²⁶⁵ This is the researcher's opinion though not written expressly. See generally section 6(b) of the NOSDRA Act 2006

¹²⁶⁶ See USEPA, 'Introduction: Environmental Enforcement and Compliance' (EPA Pacific Southwest, Region 9 Publication) <<http://www3.epa.gov/region9/enforcement/intro.html>> accessed 27 March 2017

¹²⁶⁷ Cynthia Giles, *Next Generation Compliance Strategy at the U.S. Environmental Protection Agency* (Columbia Law School Report, 2015) <https://www.law.columbia.edu/media_inquiries/news_events/2015/march2015/epa-compliance> accessed 27 March 2017

¹²⁶⁸ 33 U.S. Code § 1319 (1) (2) <<https://www.law.cornell.edu/uscode/text/33/1319>> accessed 27 March 2017

¹²⁶⁹ EPA, *Enforcement Annual Results for Fiscal Year (FY) 2013* (EPA Publications) <<http://archive.epa.gov/enforcement/annual-results/web/pdf/eoy2013.pdf>> accessed 27 March 2017: see also EPA, *Criminal Enforcement: Special Agents* (EPA Publications) <<http://www2.epa.gov/enforcement/criminal-enforcement-special-agents>> accessed 27 March 2017

¹²⁷⁰ Economists generally favour taxes on harmful activities. See, A Kneese and C Schultze (n 850)

¹²⁷¹ EPA Civil Penalty Policy of 1984, ENV'T REP. (BNA) 41:2991 (Feb. 16, 1984) 2996

¹²⁷² Ibid

factors.¹²⁷³ In addition to economic and gravity factor, there will be adjustment factor. Adjustment factor includes factors such as negligence/wilfulness, cooperation or non-cooperation with enforcers, ability to pay, noncompliance history and the strength of the agency's case.¹²⁷⁴ To determine the economic benefit, USEPA-OECA developed five computer models¹²⁷⁵ using independent economic expert depending on whether a violator is an individual, municipality, individual facility, or business entity used in conjunction with the policies and guidelines for calculating civil penalties.¹²⁷⁶ These models are BEN,¹²⁷⁷ ABEL,¹²⁷⁸ PROJECT,¹²⁷⁹ INDIPAY,¹²⁸⁰ and MUNIPAY.¹²⁸¹ The first three models which are for calculating economic advantage, for measuring ability to afford compliance costs, clean-up costs, and civil penalties and calculating cost to a violator of undertaking a SEP are the relevant ones to this research work and this will be discussed in line with Nigeria. In Nigeria, NOSDRA had imposed penalties based on the provision of NOSDRA Act since 2011, however its success is doubtful because many of the penalties imposed were not either paid or are subject to litigation¹²⁸² and there are no criminal penalty provisions in the NOSDRA Act.

How effective is carrot and stick? In the US, the usage of carrot (compliance) and stick (sanction) depends on the context, economic benefit, environmental harm and the need for deterrence. In *Chesapeake Bay Foundation v Gwaltney*,¹²⁸³ for instance, the district

¹²⁷³ Ibid, 2999

¹²⁷⁴ Ibid, the adjustments are not to exceed the gravity component. EPA can reduce the factor for good-faith efforts. See EPA, *US EPA Memorandum, Guidance on Calculating Economic Benefit* (EPA Publications, 1999) <<https://www.epa.gov/sites/production/files/2015-01/documents/econben20.pdf>> accessed 27 March 2017; In reality, the gravity calculations is difficult because of some subsidiary factors that go into assessment.

¹²⁷⁵ EPA, *EPA, Penalty and Financial Models* (EPA Publications) <<https://www.epa.gov/enforcement/penalty-and-financial-models>> accessed 27 March 2017

¹²⁷⁶ see EPA Office of Enforcement Compliance and Assurance, *Guidance on Calculating the Economic Benefit of Noncompliance by Federal Agencies* (February 13, 2006) <http://www.epa.gov/Compliance/resources/policies/federal/facilities/enforcement/cleanup/guid-econ-ben-noncomp-2-13-06.pdf>

¹²⁷⁷ For calculating economic advantage from delaying or avoiding compliance and pollution control expenditures. In the UK, guidelines on sentencing for environmental offences promoted that fines for similar offences should be devised to have an 'equal economic impact' on companies of different sizes, with the possibility of fines being expressed as a percentage of corporate turnover, profitability or liquidity. The Council Framework Decision suggest percentage of 1% to 10% in less serious violations and 10% to 20% in the most serious cases of the previous year turnover or assets and in proportion with the economic capacity of the organisation ensures that fines are dissuasive.

¹²⁷⁸ For measuring ability to afford compliance costs, cleanup costs, and civil penalties

¹²⁷⁹ For calculating cost to a violator of undertaking a SEP

¹²⁸⁰ For measuring an individual violator's ability to afford compliance costs, cleanup costs, and civil penalties

¹²⁸¹ For measuring a noncompliant municipality's ability to afford compliance, cleanup and civil penalties

¹²⁸² PPMC appeal against NOSDRA is still on appeal up until 8 May 2014 when I discussed this with NOSDRA Director.

¹²⁸³ *Chesapeake Bay Foundation, Inc. v Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 308 n. 9 (4 Cir.1986)

court applied the USEPA's penalty policy to arrive at \$1.3 million penalty for longstanding violations and of that, less than five percent was economic benefit to the defendant from delayed compliance. Worthy of note is that NGO brought the case and the court applied USEPA's penalty policy to ensure a uniform approach in enforcement. In comparison with Nigeria, the DPR appears to impress on the oil companies to comply with EGASPIN, which is carrot despite its power, penalise in EGASPIN, ONWA and the Petroleum Act, 1968. Though the penalties are meagre to deter, the DPR would be doing its job within the ambit of the laws if they actually impress on the oil companies. For instance, UNEP Report showed that total petroleum hydrocarbon concentration in Ogoni exceeds EGASPIN value, with no evidence of action taken by the DPR.¹²⁸⁴ UNEP Report noted

Over the course of more than a year of fieldwork in Ogoniland, the presence of hydrocarbon sheen was an everyday reality and it is clear that the above provision is not enforced....¹²⁸⁵

The reason is not far from the economic role of oil revenue and the implication of challenging the oil companies: the resource issue, time constraints, weak penalties and more.¹²⁸⁶

There are many examples of failures of Nigerian approach as most litigation by NOSDRA failed. The first is the case involving PPMC and NOSDRA where PPMC¹²⁸⁷ neither paid one million (\$3,276.00) imposed penalty for discharge of loading Low Pour Fuel Oil (LPFO) from its Ijala jetty Delta nor undertook clean-up and remediation of the affected areas over 15 months after the spill leading to warning and eventual lawsuit between NOSDRA and PPMC.¹²⁸⁸ NOSDRA got judgment at the lower court,¹²⁸⁹ however, PPMC appealed and the matter is still pending. PPMC also failed to pay a penalty of forty million Naira (\$131,040.00) for spillages that occurred at it various sites in Kaduna between November 5 and December 4, 2011.¹²⁹⁰ In addition, in the case of system 2A pipeline at Eko-Amukpe,¹²⁹¹ NOSDRA imposed civil penalty of N21.5million (\$70,434.1) for failure to report spill and non-compliance

¹²⁸⁴ UNEP Report 2011 (n 107) table 39, 175

¹²⁸⁵ Ibid, 174

¹²⁸⁶ This was discussed in the introductory chapter

¹²⁸⁷ PPMC is an agency of the Federal Government of Nigeria. If PPMC litigates leaving the environment polluted, what then do we expect of the MNOC's that are mainly in the business to make money?

¹²⁸⁸ The spill resulted from the PPMC ship: J.S Amazing on 6 July 2009 when it was loading LPFO.

¹²⁸⁹ NOSDRA v PPMC FHC/Asb/18/105/10

¹²⁹⁰ Ibid

¹²⁹¹ See Florence Lawrence, 'Agency Fines PPMC N21.5M Over Oil Spill Penalty' *The Guardian Newspapers* (Lagos, 11 September 2011) <<http://odili.net/news/source/2011/sep/11/9.html>> accessed 27 March 2017. See also The Vanguard, 'Oil Spill: NOSDRA Fines PPMC N21. 500m' *Vanguard Newspaper* (Lagos, 09 September 2011) (Last <<http://www.vanguardngr.com/2011/09/oil-spill-nosdra-fines-ppmc-n21-500m/>> accessed 18 May 2013

on PPMC. PPMC did not pay and NOSDRA went to court, got judgment,¹²⁹² PPMC appealed and the matter is still pending according to NOSDRA's Director of Legal whom the researcher met in his office on 20th March 2013 and still pending as at May 2015.

Furthermore, SNEPCo refused to pay \$5 billion NOSDRA imposed for Bonga oil spill of December 20, 2011.¹²⁹³ Shell disagreed with the fine and said that law did not back it.¹²⁹⁴ This had led to a lawsuit against SNEPCo¹²⁹⁵ and the parent company. NOSDRA demanded N784billion (\$2,568,390,000) as compensation for the affected communities, N495billion (4 1,621,620,000) as restitution and restoration of the economic zone of the Nigeria territorial waters, and N50million (\$163,800) as cost of legal action.¹²⁹⁶ The matter is still in the high court of Abuja Nigeria. NOSDRA also imposed N68 million (\$222,768) penalty on Sterling Energy and Exploration Production Limited (SEEPCO) for failing to report a spill from its facilities in Okpai-Oluchi, in Delta State which lasted for 136 days¹²⁹⁷ which was not paid and it became is subject to litigation. Delivering judgment on October 29, 2015 in the case filed by NOSDRA for enforcement of regulatory sanctions, Justice Olatoregun-Ishola upheld the submissions by NOSDRA that SEEPCO was in breach of Section 6(2) of NOSDRA Act. This is because it failed to report in writing the oil spill incident at OKWC however; there is no record of whether it was paid or on appeal. NOSDRA also imposed N1 million (\$3,276.00) on AGIP for failure to contain spill from its gas plant at Obrikom Omoku in Rivers State and it is not clear whether it was paid or not.¹²⁹⁸

It is not surprising that notwithstanding the penalties, spills do not appear to be abating¹²⁹⁹ as not only that they are insignificant; most of them are not paid. It is even

¹²⁹² Suit No: FHC/ASB/18/105/10 on March 22, 2012 through Honourable Justice I.N Buba

¹²⁹³ The Vanguard, 'Bonga Oil Spill: FG fines Shell \$5bn' *The Vanguard Newspapers* (Lagos, 17 July 2012) 1

¹²⁹⁴ Innocent Anaba (n 1069) or Thisday, 'FG Slams N1.3tn Claim on Shell for Bonga Spill' *Thisday Newspaper* (Lagos 4 May, 2016) <<http://www.thisdaylive.com/index.php/2016/05/04/fg-slams-n1-3tn-claim-on-shell-for-bonga-spill/>> accessed 27 March 2017

¹²⁹⁵ A subsidiary of Shell

¹²⁹⁶ Innocent Anaba (n 1069)

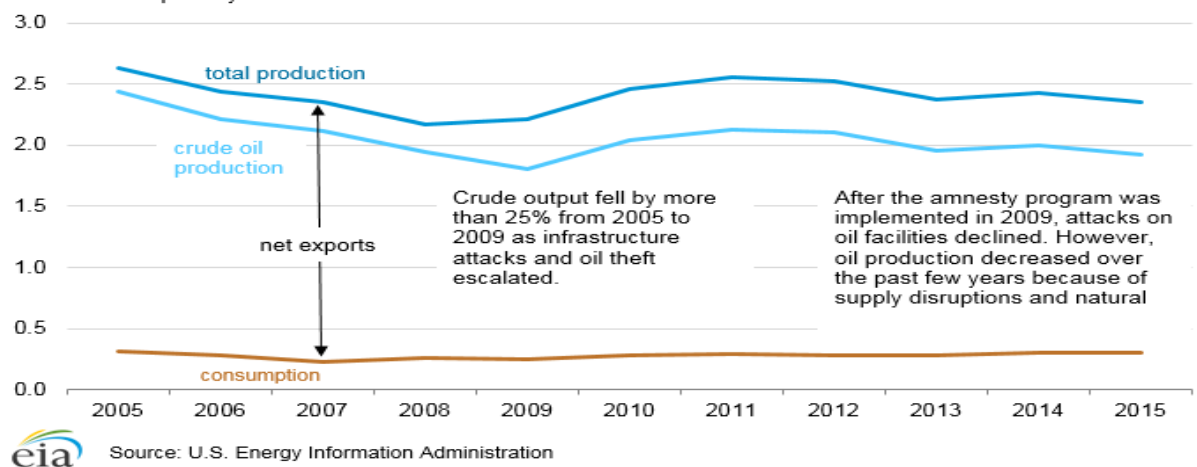
¹²⁹⁷ Premium Times, 'Court orders Sterling Oil to Pay NOSDRA N68 million over oil spill' *Premium Times* (Abuja, 10 November 2015) <<http://www.premiumtimesng.com/news/top-news/192944-court-orders-sterling-oil-to-pay-nosdra-n68-million-over-oil-spill.html>> accessed 27 March 2017

¹²⁹⁸ With all this problems, former President Goodluck Jonathan called on the UN to urgently aid Nigeria in handling the environmental pollution occasioned by the spills in Ogoniland for the past 50 years: Austin Amuzie, 'UNEP Report that Helped Uncover the Environmental devastation in Ogoni Land' *Nigerian News* (August 2011) <<http://cartoonist-blogger.blogspot.co.uk/2011/08/unep-report-that-helped-uncover.html>> accessed 27 March 2017

¹²⁹⁹ According to NOSDRA DG, Shell alone had recorded 513 spills in recent years: Ben 'Shell Spill Worst in a Decade, Says Nigerian Regulator' *Platform* (London, 22 December 2011) <<http://platformlondon.org/2011/12/22/shell-spill-worst-in-a-decade-says-nigerian-regulator/>> accessed 27 March 2017. The guardian newspapers reported that more than 7,000 oil spills in the low lying swamps and farmland since 1989; see John Vidal August 2011 (n 110). See also Shell Spill data between 2007 and 2013, Shell Petroleum Development Company, *Oil Spills in the Niger Delta* (Shell

more worrisome as production is going downwards.¹³⁰⁰ The figure below is from the US Energy Information Administration with figures between 2005 and 2015 showing downward trend.¹³⁰¹

Figure 3. Petroleum and other liquids production and consumption in Nigeria
million barrels per day



US EIA, *Nigeria Country Analysis Brief* (US EIA Report, May 2016) 5
<http://www.ieee.es/Galerias/fichero/OtrasPublicaciones/Internacional/2016/EIA_Nigeria_6may2016.pdf> accessed 27 March 2017

The visible oil pollution in the Niger Delta is an indication of failure of both *carrot and stick* adopted by the enforcement agencies. It is fair to say that there appear reasonable enforcement efforts by NOSDRA at least, but the laws are actually weak because it does not provide a full range of enforcement mechanisms and strategies especially in comparison with the USA.

5.6 IMPACTS OF ENFORCEMENT ACTIONS IN THE US AND NIGERIA

Based on the figures above, there is reduction in oil pollution incident in the US, but the question to ask is whether the activities of the US enforcement agencies had really influenced the reduction as this will help to determine whether the US enforcement actions enhances EJ. The researcher could not find any empirical research to establish the reason for reduction; however, examining the implementation of OPA, Turan observed that although there are some problems with its enforcement, enforcement efforts are good enough to result in a declining trend of spills.¹³⁰² Turan opined that

Petroleum Development Company Monthly Spill Report) <<http://www.shell.com.ng/environment-society/environment-tpkg/oil-spills/monthly-data.html>> accessed 27 March 2017

¹³⁰⁰See OPEC *Annual Statistical Bulletin 2014* (OPEC Publications, 2014), 29 for Nigerian oil production<https://www.opec.org/opec_web/static_files_project/media/downloads/publications/ASB2014.pdf> accessed 27 March 2017

¹³⁰¹US EIA, *Country Analysis Brief: Nigeria* (US Energy Information Administration Report, May 2016) <<http://www.eia.gov/beta/international/analysis.cfm?iso=NGA>> accessed 27 March 2017

¹³⁰² See Murat Turan, *Turkey's Oil Spill Response Policy: Influences and Implementation* (The UN Publication, 2009)

comprehensive preparedness, response, compensation and prevention, legal framework and their effective implementation and enforcement help in reducing pollution incidents.¹³⁰³ In addition, API document discussed above showed a reduction of spill in the transport section from 1969 to 2007 corroborating PHMSA initiation of higher enforcement cases between 2002 and 2007.¹³⁰⁴ Though the corresponding period covers just five years, it will be fair to conclude that enforcement activities may have positive influence as even for the years up until 2017, spills from pipelines are still reducing. The table below is the PHMSA enforcement actions between 2002 and 2017 showing a high-level summary of PHMSA's overall enforcement activity which PHMSA generally initiate in response to an accident or when an inspection identifies probable violations of safety statutes or regulations in the years under review.

Enforcement Activity: 2002-2017 ⁽¹⁾		
Year	Cases Initiated	Cases Closed
2002	160	108
2003	144	122
2004	223	142
2005	297	265
2006	233	271
2007	255	263
2008	182	206
2009	181	241
2010	199	243
2011	207	218
2012	276	265
2013	266	267
2014	154	184
2015	197	195
2016	164	176
2017	144	123

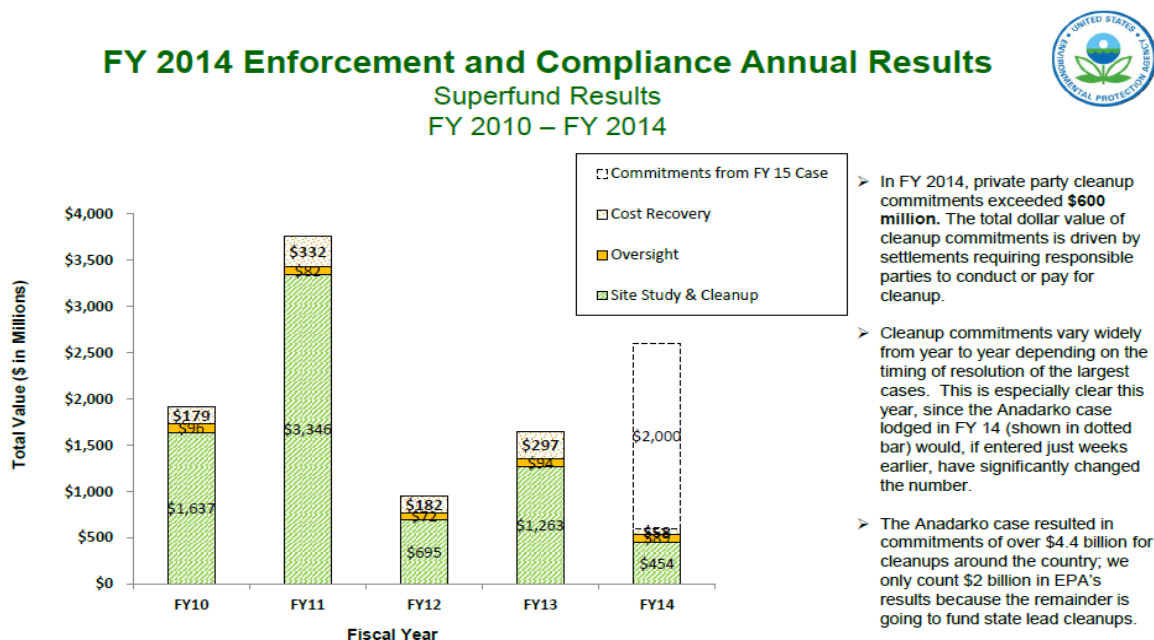
Source: PHMSA Safety Monitoring and Reporting Tool (SMART) for the Pipeline Safety Enforcement Tracking System as of August 10, 2017
 <<https://primis.phmsa.dot.gov/comm/reports/enforce/EnfHome.html?nocache=1270>
 > accessed August 10, 2017

<http://www.un.org/depts/los/nippon/unnnff_programme_home/fellows_pages/fellows_papers/turan_0809_turkey.pdf> accessed 10th September 2017

¹³⁰³ Ibid

¹³⁰⁴ See enforcement activity information from PHMSA website.

CERCLA's result below also shows USEPA's enforcement history relating to hazardous waste that includes pollution from oil and gas industry from 2010 to 2014. The figure identified site study, clean-up actions, oversight actions, cost recovery and commitment. This figure shows more concentration on serious cases limiting the number of enforcement actions; however, its result is better in the light of penalties and cost of enforcement.



Source: USEPA, *FY 2014 Enforcement and Compliance Annual Results Federal Inspections and Evaluations Conducted by EPA FY 2010 – FY 2014* (USEPA Publication) < <https://www.epa.gov/sites/production/files/2014-12/documents/fy-2014-enforcement-annual-results-charts-12-08-14.pdf>> accessed 27 March 2017

There is no breakdown of this result specifically to the oil industry, however, that will not change the narrative as Nigeria do not even have any fund similar to CERCLA neither in the oil industry nor in general hazardous waste sites. There is also no such comprehensive list of enforcement actions by neither NOSDRA nor DPR as attempts made by the researcher to get such list or data failed.

Supporting this researcher's finding is what Cynthia Giles said during Superfund thirty-five year's anniversary in 2015. She noted that by placing the burden of cleanup on the RPs, USEPA saves taxpayers money and protects the environment and for every one dollar spent on Superfund civil enforcement activity, USEPA obtains approximately eight dollars for cleaning-up contaminated sites across the US.¹³⁰⁵ USEPA had eighty-eight civil enforcement actions under CERCLA between 1999 and 2014: one in 1999, no other until 2002, one in 2007, and two in 2008 with steady rise

¹³⁰⁵ USEPA, 'Enforcing the Superfund Law, Past and Present' USEPA Blog 8 December 2015 <<https://blog.epa.gov/blog/2015/12/enforcing-the-superfund-law-past-and-present/>> assessed 15th August, 2017

until 2014 and 2014 was the highest at that time.¹³⁰⁶ The reasons for the rise were strengthening of Superfund enforcement program through statutory revisions and administrative reforms and policies.¹³⁰⁷ For instance 1986 SARA promoted the use of voluntary settlements, thereby reducing prolonged litigious interaction with PRPs.¹³⁰⁸ Second is that in addition to creating the new federal facilities provisions to ensure that federal agencies cleaned-up like private parties, SARA imposes additional requirements on federal facilities, including waiver of sovereign immunity to permit individuals and states to bring citizen suits.¹³⁰⁹ USEPA also established three rounds of administrative reforms that created a faster, fairer, and more efficient clean-up program and addressed several critical enforcement issues addressing allocation of responsibility, handling small waste contributors, and providing orphan share compensation in the mid-1990s.¹³¹⁰ According to USEPA, these revisions and EPA's "enforcement first" approach proved critical to accomplishing the Superfund program.¹³¹¹ Analysing the benefits of CERCLA enforcement, recent academic research also confirmed that investment in CERCLA clean-ups reduces the incidence of birth defects for those living within 2,000 meters of a site.¹³¹² In addition, another study found increase in the value of residential property within three miles of CERCLA sites when sites were cleaned-up.¹³¹³ Emergence of fracturing may have increased pollution; however, spill is still generally reducing. For instance, a 2017 report has it that a state-level spill data research at 31,481 wells hydraulically fractured in the four states¹³¹⁴ between 2005 and 2014 identified 6,648 spills showing that each

¹³⁰⁶ USEPA, 'Civil Cases and Settlements by Statute: CERCLA' <https://cfpub.epa.gov/enforcement/cases/index.cfm?templatePage=12&ID=4> assessed 15th August, 2017

¹³⁰⁷ Ibid

¹³⁰⁸ Ibid

¹³⁰⁹ Discussed in chapter six

¹³¹⁰ USEPA, 'Enforcing the Superfund Law 2015 (n 1305)

¹³¹¹ USEPA, Superfund Enforcement: 35 Years of Protecting Communities and the Environment: 'Evolution and Implementation of the Agency's "Enforcement First" Policy' <<https://www.epa.gov/enforcement/superfund-enforcement-35-years-protecting-communities-and-environment>> accessed 27 August 2017. USEPA noted that on its 35 years anniversary, Superfund enforcement has evolved from its early days of seeking cost recovery to getting RPs do the work because of significant changes to Statutes, perspectives, practices through case laws, to understanding of threats through new science, and most recently, changes through budget restrictions. Since 1980, the Superfund enforcement program has obtained over \$35.1 billion in private party commitments for clean-up and over \$6.9 billion in cost recovery.

¹³¹² J Currie, M Greenstone and E Moretti, 'Superfund Cleanups and Infant Health' (2011) 101(3) American Economic Reviews 435 Doi: 10.1257/aer.101.3.435

¹³¹³ Shanti Gamper-Rabindran and Christopher Timmins 'Does Cleanup of Hazardous Waste Sites Raise Housing Values? Evidence of Spatially Localized Benefits' (2013) (65) (3) Journal of Environmental Economics and Management 345 <<http://www.sciencedirect.com/science/article/pii/S0095069612001167>> accessed 27 March 2017

¹³¹⁴ Colorado, New Mexico, North Dakota and Pennsylvania

year, 2% to 16% of hydraulically fractured wells spill hydrocarbons, chemical-laden water, hydraulic fracturing fluids and other substances.¹³¹⁵

In Nigeria, based on the researcher's finding, one cannot say that the enforcement actions by the agencies are making much positive impacts. First, there are no comprehensive data published by the enforcement agencies for the researcher to examine the impacts, however, the researcher relied on data from independent sources and research.¹³¹⁶ NOSDRA for instance generally states that it engaged in monitoring, ensures that remediation to appropriate standards by collecting and analysing samples independently to ascertain the level of contaminants before certification, but without verifiable evidence.¹³¹⁷ NOSDRA noted that it has inspected more than 1,150 impacted sites and has issued remediation certificates for 269 unnamed sites.¹³¹⁸ NOSDRA did not give the names of the sites and in the researcher's opinion; many sites remediation were not effective remediated based on many other independent researches.¹³¹⁹ In addition, SPDC claimed that as at October 1st 2011, it had completed and certified 71 out of the 74 spill incidents that happened before 2005, and that the last three were at various stages of completion with confident that they would complete them.¹³²⁰ These claims conflicts with the findings as stated in UNEP Report in the researcher's opinion as most of these impacted sites before 2005 are in Ogoni. This is because, many of the sites which the UNEP Report found to be cleaned-up inadequately were sites in respect of which the responsible companies had certificates from responsible agencies as being cleaned-up adequately. According to Amnesty International report,¹³²¹ between 1999 and 2006, SPDC claimed to have identified 1,516 sites requiring remediation; remediated 1,338 and the joint certification team certified 715.¹³²² Examination of these claims with evidence based on the available research especially UNEP report and Amnesty International shows conflict. Even if SPDC claim were true, there is no evidence that it was cleaned-up because of enforcement actions of either NOSDRA or DPR. In addition, one can imagine how long it is taking to get these sites cleaned-up and remediated. This causes even more environmental harm to the Niger Delta environment while Nigeria sustains the whole country with the proceeds of oil. This of

¹³¹⁵ L Patterson and others, 'Unconventional Oil and Gas Spills: Risks, Mitigation Priorities and States Reporting Requirements' (2017) 51 Environ. Sci. Technol. 2563 <<http://pubs.acs.org/doi/pdf/10.1021/acs.est.6b05749>> accessed 27 August 2017

¹³¹⁶ See Amnesty Report 2011 (n 46), UNEP Report 2011 (n 107) and others

¹³¹⁷ NOSDRA, 'Rebuttal of Amnesty International Report (n 1200), IUCN Report (n 1214)

¹³¹⁸ NOSDRA, 'Achievements of NOSDRA' < <http://nosdra.org.ng/achievement.html>>accessed 27 March 2017

¹³¹⁹ UNEP Report 2011(n 107) and Amnesty Report 2011 (n 46)

¹³²⁰SPDC, *Environment: Remediation Issues in the Niger Delta* (SPDC Report) <<http://www.shell.com.ng/environment-society/environment-tpkg/remediation.html>> accessed 27 March 2017

¹³²¹ Amnesty International, *Bad Information Oil Spill Investigations in the Niger Delta* (Amnesty International Reports, 2013) < <https://www.amnestyusa.org/wp-content/uploads/2017/04/afr440282013en.pdf>> accessed 2nd August 2017

¹³²² This claim has been questioned by many including Shell headquarters in The Hague according to Amnesty International that conducted interview with their headquarters on 15 September 2008.

course shows substantive EI. Enforcement actions by the Nigerian agencies in reality appear not to be robust as the regulatory agencies enforcement claims has been countered by many especially Amnesty International.¹³²³ There are a host of decided cases and civil penalties both in the Nigerian courts and abroad on failed clean-up and failed regulatory actions.¹³²⁴

Not only that because of absence of strong enforcement, the impacts are not greatly felt in Nigeria, but also because the enforcement agencies do not effectively publish their enforcement actions to somewhat discourage other potential violators. One of the reasons may be incapacity leading UNEP report to recommend capacity building through actions such as increasing human resources and equipment, and improving the technical skills of staff.¹³²⁵ It is interesting to note that the FG had not fully implemented any of the twenty-seven recommendations of UNEP report and only three were partially implemented according to report by Amnesty International.¹³²⁶ While comparing the impacts of the enforcement actions, it is important to discuss the two recent catastrophic spills in the US and Nigeria.

5.6i US Deepwater Spill and Nigeria Bonga Spill Enforcement Actions

Both the Deepwater spills and Nigerian Bonga spill were catastrophic spills. Deepwater Horizon spill occurred on 20th April 2010 killing 11 workers and released millions of barrels of crude oil into the Gulf of Mexico. BP capped the well in mid-July and BP sets aside \$42 billion to pay for clean-up costs, damages and penalties. The first regulatory action was the Coast Guard direction of BP to establish a single claims facility through the GCCF for all RPs to centralize claims processing for claimants without exonerating other RPs of liability. BP created a USD\$20 billion escrow account in June 2010 to satisfy claims resolved by the GCCF and other claims with the establishment of irrevocable trust designating that is to pay some OPA-compensable claims and other claims for personal injuries that are not included in OPA, but for which BP would be liable under other US laws. BP pleaded guilty to 14 criminal charges in November 2012. BP then agrees to pay \$4.5 billion in fines and other penalties, thereby settling the criminal cases. However, the US DoJ filed criminal charges against three BP employees in connection with the accident in a separate charge. The US government also banned BP from new federal contracts. The court

¹³²³ See Amnesty International, *Nigeria: No Progress: An Evaluation of the Implementation of UNEP's Environmental Assessment of Ogoniland, Three Years On* (Amnesty International Report, 2014) <<https://www.amnesty.org/en/documents/afr44/013/2014/en/>> <http://www.amnesty.org.uk/sites/default/files/unep_briefing_2014_niger_delta.pdf> accessed 27 March 2017

¹³²⁴ *Ejamah-Ebubu Community v Royal Dutch/shell; NOSDRA v PPMC* (high Court judgment unrep) but see Nnenna Ezeah (n 118). NOSDRA also fined Mobile Producing Unlimited Ten Million Naira (N10,000,000) for sundry violation of the provisions of the Agency's enabling Act and it's Oil Spill Recovery, Clean Up, Remediation and Damage Assessment Regulations 2011 including non-remediation; see NOSDRA, 'Non-Compliance to Environmental Mobile Laws' NOSDRA Press Release (Abuja 3 November, 2015) <<http://nosdra.gov.ng/apage.html>> accessed 27 March 2017

¹³²⁵ UNEP Report 2011(n 107)

¹³²⁶ Amnesty International, 2014 (n 1323)

decided the class action in December 2012 with individuals and businesses claiming to have lost money and property. BP initially estimated that it will pay \$7.8 billion to settle more than 100,000 claims, but did not cap the amount as pay-outs may grow substantially, in part because of pay-outs to many claimants who suffered no harm, and files numerous legal challenges to the agreement.¹³²⁷ By February, 2013, three-phase civil trial over how blame should be apportioned between BP, Transocean Ltd, which owned the drilling rig, and Halliburton Co, which did cement work took place and by September 2013 the second phase begins to determine how much oil was spilled. On 4th of September, 2014 BP was found grossly negligent assigning 67% of the fault to BP, 30% to Transocean and 3% to Halliburton and on 15th January 2015, 3.19 million barrels was determined by the court as the size of the spill and will be used for damage calculation. BP appealed on 24th February 2015 and on 2nd July 2015, BP reached settlement of about \$18.7 billion for the five states: Louisiana, Mississippi, Alabama, Texas, Florida, and the US Government. There are three core actions worthy of note here. First, BP swiftly admitted liability; second, it accepted multi-billion dollar liability and thirdly established GCCF to manage compensation claims even before enforcement actions.¹³²⁸

Bonga oil spills of Nigeria on the other hand occurred on 20 December 2011, yet until 3rd May 2016 when Nigeria dragged Shell/SNEPCo to court demanding N1.3tn, there was no resolution.¹³²⁹ SNEPCo challenged the original penalty of about \$5 billion imposed by NOSDRA in 2011 for not being backed by law.¹³³⁰ The spill affected at least 285,000 persons from 350 communities. The spill occurred due to rupture in the course of SNEPCo exploration activities within OML 118 approximately 120 kilometres off the coast of Guinea. SNEPCo reported the spill the day it occurred. SNEPCo admitted spewing out 40,000 barrels of crude oil into the sea, causing devastation and degradation of the aquatic life, marine environment including the territorial waters of Nigeria along Niger Delta axis and destroying the seabed and aquatic lives in the continental shelf within the Nigeria exclusive economic zone.¹³³¹ There were severe disruptions to communities, persons, properties and lives of people in the shoreline area because of the spill. SNEPCo did not do much and after investigations, SNEPCo did not pay total of \$1.8

¹³²⁷ This means that non-impacted persons can challenge the agreement

¹³²⁸ Discussed in chapter four under effectiveness of the us regime: the Gulf of Mexico spill case study

¹³²⁹ ThisDay, 'FG Slams N1.3tn Claim on Shell for Bonga Spill' *ThisDay Newspaper* (Abuja, 4 May 2016) <<http://www.thisdaylive.com/index.php/2016/05/04/fg-slams-n1-3tn-claim-on-shell-for-bonga-spill/>> accessed 27 March 2017 see also Innocent Anaba (n 919)

¹³³⁰ African Globe, 'Nigeria Fines Shell US\$5 Billion for Oil Spill' *African Globe* (17 July 2012) <<http://www.africanglobe.net/business/nigeria-fines-shell-5-billion-oil-spill/>> accessed 27 March 2017

¹³³¹ The admission was because the regulatory agencies cannot ascertain the quantity on their own due to incapacity unlike the Deepwater case that was determined by the court based on evidence.

billion for compensation to the 350 communities and sanction NOSDRA asked it to pay,¹³³² hence the court action.

It is important to note that the two case study spills were catastrophic; however, despite very many issues that arose in BP spill, they reached all decisions within five years including that of many claimants who suffered no harm, but filed numerous legal challenges to the agreement. In the case of Bonga Oil spill, five years on, nothing significant happened including non-settlement of any claim with the first known legal action starting in the fifth year. This case study shows the true state of affairs in Nigeria and the US. One now questions why BP and the US treated the issues promptly, but SNEPCo and Nigeria did not. Better inspection, monitoring, penalty and prosecution, could be achieved with improved enforcement but there could be more to it, as it was not proved that the Gulf of Mexico spill was because of lax enforcement.¹³³³ The two case study spills were accidental, so why was resolution faster in the US? The researcher still thinks that there are other challenges. Examining the USEPA's enforcement actions in line with the BP action after the Deepwater Horizon spill gives an insight on how the US regulatory enforcement action can trigger compliance and therefore help in achieving EJ. It is interesting to note that decisions taken to resolve the issues were based on BP's acceptance of blame, not judicial processes. This is because BP knew enforcement will take place and would have envisaged higher penalty or negative publications if the regulatory agencies spend more resources and time to enforce. The acceptance however is positive as it made it easy to resolve the very many complex problems raised by the spill and this is one justification for considering US regulatory system as advanced. In the case of Nigeria, Nigeria and SNEPCo did not do much with a view of giving justice to the affected victims leading this research to the next point, which is to examine of wider problems affecting enforcement of oil pollution laws.

5.7 IMPEDIMENTS TO EFFECTIVE ENFORCEMENT IN THE US AND NIGERIA

This researcher so far, had highlighted the problems with the laws that affect enforcement. The researcher also discussed the compliance and enforcement strategies and mechanisms in both US and Nigeria. The researcher will now examine the challenges faced in enforcement chain for the researcher to be able to make well-rounded recommendations with a view of achieving EJ for the Niger Deltans. In chapter four, some problems with the oil-related pollution legislations in the US and Nigeria were identified, with the reservation that continued existence of EI in Nigeria is not solely because of the laws but enforcement and other factors. This is because despite the existence of regulatory frameworks creating obligations,¹³³⁴ there are

¹³³² It includes cost of restoration, restitution and redemption of the environment statutorily assessed by the plaintiffs.

¹³³³ It could be tagged anticipated enforcement

¹³³⁴ Though not robust

several impediments to enforcement itself. For instance, when the researcher visited NOSDRA headquarters Abuja, there were no reliable records of matters in courts and actions it has undertaken to stop or reduce spill in Nigeria,¹³³⁵ the researcher got oral information that three matters were pending in court, which were PPMC, SEEPCO and Chevron Nigeria Limited. In the introduction of this chapter, the researcher also highlighted some of the problems of enforcement observed by Frate and Norberry especially concerning developing nations.¹³³⁶ In their work, they highlighted some of the enforcement problems that the researcher sees in Nigeria including requirements that industry pay substantial discharge fees with obvious revenue advantages to government. In addition, where the government herself in one way or the other cause inadequate resources or where there is lack of infrastructure, government agencies may hesitate to sanction polluters. The researcher will discuss the reasons for this inadequate or lack of enforcement under three major sub-headings: challenges of the law, challenges of capacity to enforce and other challenges.

5.7i Porous Oil-Related Pollution Laws

According to Adebawale,¹³³⁷ inequality of environmental law affects the proper enforcement. Sometimes the laws may be non-practicable that its implementation will be problematic. Challenges of the laws in the US and Nigerian were discussed in chapter four where the researcher compared the relevant legal regime and findings were that there were more challenges in Nigeria than in the US. One challenge that is evident in both US and Nigeria is no constitutional rights to a healthy environment. In comparison with Nigeria, the implementation of the African Charter grants right to a healthy environment, making it easier for Nigerians to enforce pollution related laws in the African court. This is very positive as it helps to close the gap for Nigerians while seeking EJ. However, challenges such as inadequate sanctions, weak penalties, wide defences, weak and incomprehensive enforcement powers and administrative mechanisms are minimal in the US. In the case of Nigeria, Bonga spill discussed below is a case study of how legislative weakness can affect enforcement as attempts to impose higher penalties failed leading to the current lawsuit. In that case, SNEPCo's spokesperson Mr Tony Okonredo said that there was no infraction of Nigerian law to warrant the imposed fine.¹³³⁸ Corroborating his point was Bukola Saraki,¹³³⁹ former chairperson of Nigeria Senate Committee on Environment. Saraki said

¹³³⁵ In the USA, USEPA listed civil cases and settlements on the EPA's website. See EPA, Civil Cases and Settlements <<http://cfpub.epa.gov/compliance/cases/>> accessed 27 March 2017

¹³³⁶ (n 1155)

¹³³⁷ Maria Adebawale, *Using the Law: Access to Environmental Justice Barriers and Opportunities* (Capacity Global Publications, 2004) <<http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-23/Amicus%20brief/AnnexBEJUsingtheLaw009Capacity04.pdf>> accessed 27 March 2017

¹³³⁸ Adeola Yusuf, 'Shell Disagrees with Nigeria on \$5b fine' *Daily independent* (Lagos, 17 July 2012) <<http://dailyindependentnig.com/2012/07/shell-disagrees-with-nigeria-on-5b-fine/>> accessed 27 March 2017

Fines amounting to \$8 billion sought by Nigeria from Royal Dutch Shell Plc (RDSA) and Chevron Corp. (CVX) for oil spills are not backed by law. Under the existing law, there is no penalty for oil spills apart from just to clean it up. You only pay 1 million naira (\$6,362) for late reporting.¹³⁴⁰

Saraki also promised a review of the law, but six years after, the Bill he introduced is still with the legislature. Presenting his Bill, Saraki noted

It is unfortunate that millions of Nigerians are struggling to make ends meet simply because their source of livelihood is impacted by what is going on in their land.... The story is that of the destruction of the right of communities to live in a safe environment, to live decently and in good health.¹³⁴¹

5.7ii Capacity to Enforce

5.7iia Paucity of Human and Financial Resources

To get the right human resources necessary for effective enforcement, availability of funds is very important. The reward for those involved in regulation should also be possibly at similar level with the industry. The main challenge faced by the US in enforcement of its environmental laws in general and pollution laws in particular is financial resources needed by USEPA, DoJ, and the states to effectively enforce the major federal environmental pollution control laws. Congress specifies funding levels aspects of USEPA enforcement activities, or requires the agency to undertake certain actions under annual appropriations. One USEPA top enforcement officer in 2002 resigned in frustration over the agency's reduction in inspections caused by underfunding and understaff.¹³⁴² Budget reduction also affected 2014 enforcement result according to USEPA.¹³⁴³ As at 1970, USEPA had 4,084 staffs it is employment and the budget was \$1,003,984,000. The staff strength rose to 18,110 in 1999 with budget of \$7,590,352,000, however, the staff strength started declining from then to 15,408 in 2014 with budget of \$8,200,000,000.¹³⁴⁴ USEPA's 2015 \$8,139,887,000 budget was about 21% lower than \$10,297,864,000 in 2010.¹³⁴⁵ Below is USEPA's budget from 2003 and 2015.

¹³³⁹ In interview in Abuja on Jan. 29 2013 as reported by Elisha Bala-Gbogbo; Elisha Bala-Gbogbo, 'Nigerian Spill Fines on Shell, Chevron, Not Backed by Law' *Bloomberg Business* (New York, 1 February 2013) <<http://www.bloomberg.com/news/articles/2013-02-01/nigeria-fines-on-shell-chevron-not-backed-by-law>> accessed 27 March 2017

¹³⁴⁰ Ibid

¹³⁴¹ ThisDay, N' Delta Oil Spills: (n 1009)

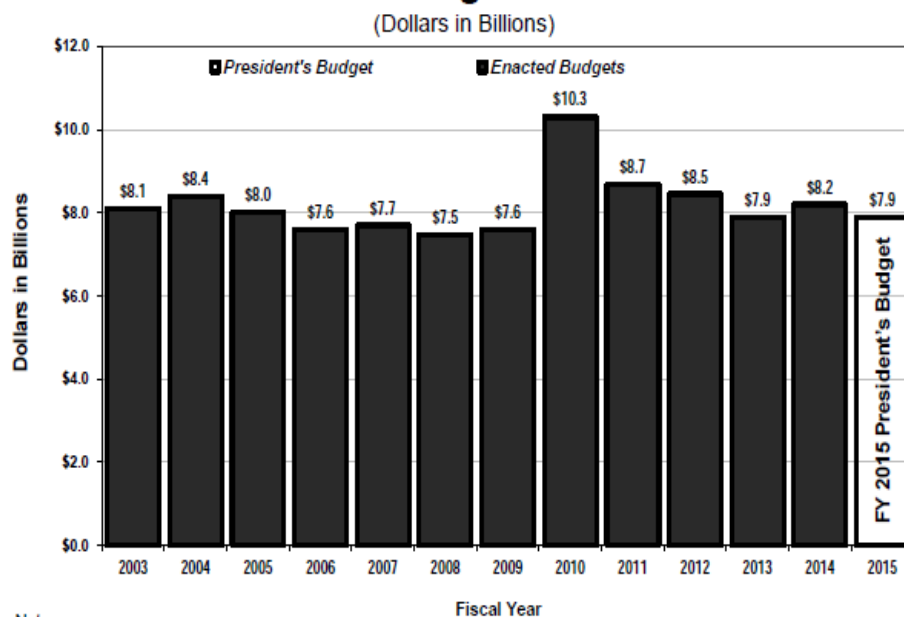
¹³⁴² E Schaeffer, CBS News 13 June 2002

¹³⁴³ USEPA, *USEPA, FY 2014 Enforcement and Compliance Annual Results Federal Inspections and Evaluations Conducted by EPA FY 2010 – FY 2014* (USEPA Publication) <<https://www.epa.gov/sites/production/files/2014-12/documents/fy-2014-enforcement-annual-results-charts-12-08-14.pdf>> accessed 27 March 2017

¹³⁴⁴ For full table see: USEPA, *EPA's Budget and Spending* (USEPA Reports) <<https://www.epa.gov/planandbudget/budget>> accessed 27 March 2017

¹³⁴⁵ Ibid

EPA's Enacted Budget FY 2003 to 2015



EPA Budget in Brief:
[<file:///H:/5th%20PhD/EPAs%20Enacted%20budget%202003%20to%202015.pdf>](file:///H:/5th%20PhD/EPAs%20Enacted%20budget%202003%20to%202015.pdf)
 accessed 27 March 2017

It is even more worrisome with Trump administration as he proposed a 31% cut to USEPA's 2018 budget, eliminate some \$100 million in spending on research and international programs on combating climate change and seeks to trim initiatives to protect air and water quality and climate change.¹³⁴⁶ President Trump also seeks to clear away regulations he claims are hobbling US oil drillers, coal miners and farmers.¹³⁴⁷ His proposal would not only slash funding for enforcing regulations, fighting water pollution, cleaning-up contaminated sites and promoting energy-efficient appliances, but would eliminate 3,200 USEPA employees, or 19% of USEPA workforce.¹³⁴⁸

Regarding funding of DOT/PHMSA, Nesmith and Haurwitz tags DOT an underfunded and understaffed agency and laments that the US is relying on such agency to monitor over 2 million miles of oil and gas pipelines.¹³⁴⁹ Jim Hall, the former chairperson of the National Transportation Safety Board, also stated that there is almost an absence of

¹³⁴⁶ V Volcovici and T Gardner, 'EPA Hit Hardest as Trump Budget Targets Regulations' Washington Routers (Washington DC, 16 March, 2017) <<http://www.reuters.com/article/us-usa-trump-budget-epa-idUSKBN16N0E1>> assessed 9th August, 2017

¹³⁴⁷ Ibid

¹³⁴⁸ Ibid

¹³⁴⁹ J Nesmith and RKM Haurwitz, 'Spills and Explosions Reveal Lax Regulation of Powerful Industry' *American-Statesman*, (Austin, Texas, July 2001)

regulation for oil pipelines.¹³⁵⁰ However according to PHMSA, it has 208 federal inspection and enforcement staff and 345 state inspectors responsible for regulating nearly 3,000 companies that operate 2.7 million miles of pipelines, 148 liquefied natural gas plants, and 7,571 hazardous liquid breakout tanks.¹³⁵¹ It does appear to the researcher that the agencies are underfunded, but based on the enforcement actions listed on the DOT/PHMSA and USEPA website; they still make the best of the fund they get.

In Nigeria, research also shows that NOSDRA and DPR have limited human and financial capacity.¹³⁵² Financial resources affect detection, sampling and monitoring equipment, setting up or contracting out work to laboratories and training. It also affects the monitoring exercise by the DPR and NOSDRA leading to lengthy delays in reaching many pollution sites.¹³⁵³ This is evident in the inability of the agencies to carry out effective and regular monitoring exercise without depending on external sources for the provision of facilities and resources. Notable is that most oil-related pollution in Nigeria and elsewhere occurs at the state and local level, but regulatory agencies are concentrated mainly in the capital cities.¹³⁵⁴ However, NOSDRA has debunked the fact that it does not have enough human capacity by noting that it has staff strength of 547 senior technical officers.¹³⁵⁵ It was almost impossible to compare the staffing level and funding with USEPA because of non-availability of the comprehensive number of DPR and NOSDRA staff and information on allocated budgets. NOSDRA appropriated budget for 2016 was N123, 838,103 (\$337,474) and N840, 078,633 (\$2,289,320) for the DPR,¹³⁵⁶ but the researcher could not get data or information on the previous years and the staffing level. Therefore, the total budget for both NOSDRA and DPR for 2016 was about \$2,626,794. When compared with USEPA budget, one sees that USEPA budget for 2016 was \$8,139,887,000 with staffing level of 15,376.¹³⁵⁷ This shows that the Nigeria budget for similar agency was

¹³⁵⁰ Ibid

¹³⁵¹ The US Department of Transport, *Pipelines, Hazardous Materials Safety and Administration, Pipeline Inspection 101* (The US Department of Transport Report) <<https://www.phmsa.dot.gov/pipeline/inspections>> accessed 10th August, 2017

¹³⁵² UNEP Report 2011(n 107)

¹³⁵³ See UNEP report already discussed extensively

¹³⁵⁴ NOSDRA offices are in Abuja, Port-Harcourt, Warri, Lagos, Akure, Kaduna and Uyo <<http://nosdra.org.ng/zones.html>> accessed 27 March 2017. While DPR offices are Lagos, Abuja, Port-Harcourt, Enugu, Warri, Kaduna, Maiduguri and Owerri <<https://dpr.gov.ng/index/contact-us-2/dpr-offices-nationwide/>> accessed 27 March 2017. Of all the offices, only Warri and Port-Harcourt are close to areas of most degradation.

¹³⁵⁵ Rebuttal of Amnesty International Report (n 1200): The senior technical officers are 98 engineers and 449 environmental scientists.

¹³⁵⁶ Using Oanda currency converter on 9th August, 2017: See Federal Ministry of Budget and National Planning, *Total Capital Release* (The Federal Ministry of Budget and National Planning News Report) <<http://www.nationalplanning.gov.ng/index.php/budget-office/policies-and-reports>> accessed 27 March 2017

¹³⁵⁷ For full table see: USEPA, *EPA's Budget and Spending* (USEPA Reports) <<https://www.epa.gov/planandbudget/budget>> accessed 27 July 2017

about three thousand one hundred (3098) times less than USEPA budget. It is noteworthy that the 2016 budget is with budget cut for USEPA. The researcher is aware that USEPA deals with general US environmental problems; however, one could see the enormous difference and even where all Nigerian environmental agencies budget are summed-up together it is still very insignificant.¹³⁵⁸

5.7iib Incapacity of the Regulatory Institutions

Another problem faced in the US is institutional incapacity. Enforcement of laws is by agency trained to enforce, therefore the agency must have enough mandate and enabling environment to operate. The agency must have the drive and incentives to enforce competently. The inspectors for key segments of oil industry are scarce; ambient air sampling around facilities is limited; and monitoring of leaks, point sources and accidents is low.¹³⁵⁹ This is because federal inspectors cannot monitor all, leading to resort to self-reporting of emissions, leaks, and accidents.¹³⁶⁰ The challenge of self-reporting was highlighted by the researcher in chapter three, though it may work, but according to Nesmith and Haurwitz industry metering systems are not accurate enough to detect most leaks leading to the operation of leaking pipelines, unreported spills, and an increase in spills and incidents over 10 years.¹³⁶¹ They justified the claim by citing an audit conducted for the California State Assembly showing actual pipeline spills outnumbering industry reported spills by ten to one.¹³⁶²

In Nigeria, many of the reasons for weak enforcement highlighted by the researcher in chapter three are manifest. NOSDRA and DPR do not have the institutional capacity to enforce as can be seen in Bodo case.¹³⁶³ It lasted for four weeks before SPDC went to stop the spill.¹³⁶⁴ The repeated letters¹³⁶⁵ written by NOSDRA to SDPC to prepare and fix time for damage assessment in Bodo spill case shows lack of capacity to assess the damage in the researcher's opinion, unfortunately, without success. The case of DPR to the researcher is even shoddier. The Petroleum Act, its amendments and Regulations conferred some powers on the DPR; however, there are challenges. The first challenge is that even though petroleum legislations make certain obligations and references to issues, the Police and the Federal Ministry of Justice are jointly responsible for prosecuting infringements of laws, so DPR can only act administratively. Its role then is mostly advisory and it includes identifying infringements and bringing the same to

¹³⁵⁸ Nigeria NESREA budget for the 2016 is N168, 000, 000 (\$457,820). This means that the budget of the entire federal government enforcement agencies budget was \$3,084.614, therefore about 2638 times less than USEPA budget for 2016, also bearing in mind that this does not include PHMSA budget.

¹³⁵⁹ D O'Rourke and S Connolly (n 1256)

¹³⁶⁰ Ibid

¹³⁶¹ J Nesmith and RKM Haurwitz (n 1349)

¹³⁶² Ibid

¹³⁶³ Discussed in chapter six

¹³⁶⁴ This is contrary to the provisions of NOSDRA Act and EGASPIN. Spill was stopped on 7th November 2008

¹³⁶⁵ Letter from NOSDRA to SPDC, dated 9 June 2009 (n 524)

the attention of the government agencies possessing the appropriate enforcement authority.¹³⁶⁶ The law did not also clearly state that the Police and the Federal Ministry of Justice prosecute infringement and this is a challenge.¹³⁶⁷ They are not even equipped to prosecute these matters; most of them do not have the knowledge of environmental law let alone the technicality in prosecuting in oil and gas pollution matters. What is more is that this research did not show real collaboration with agencies instead NOSDRA alleged that DPR actions negate their enforcement actions.¹³⁶⁸

5.7iic Combination of Licensing, Governance and Enforcement Roles

This research exposed the danger of having a regulatory cum enforcement responsibilities aimed at protecting the environment and operational responsibilities, aimed at achieving economic growth. Separation of raising revenue, expertise to recognise dangerous practices, understanding all the technology of the industry it controls and the ability to enforce in the researcher's opinion a catalyst to effective enforcement. History has it that fusion of these roles created some problems in many countries of the world. Enquiry into Montara spill in Australia raised the issue of separation of roles because state governments who were also licensing at that time mainly controlled environmental regulation.¹³⁶⁹ This led to setting-up of new independent regulator by central government.¹³⁷⁰ In the UK, the Department of Energy was principally responsible with the encouragement of North Sea oil development and with developing a health and safety regime and environmental best practice, which contributed to Piper Alpha 167 deaths.¹³⁷¹ The Cullen Inquiry into the causes made recommendations, which included removal of regulation of safety from the Department of Energy to an independent specialist regulator, the Health and Safety

¹³⁶⁶ See DPR website <<http://dprnigeria.org.ng/about-dpr/activity-scope-of-dpr/>> accessed 27 March 2017

¹³⁶⁷ In Scotland, SEPA and Crown Office signed MOU to resolve similar issue and in the US, MoUs are signed

¹³⁶⁸ NOSDRA DG Nduka disclosed that his agency had taken the DPR and the PPMC to court over incessant oil-related clashes. See Tordue Salem, Nigeria: 'Army Protects Militants, Illegal Bunkering in N'Delta' *Leadership Newspaper* (Abuja, 27 November 2011) <<https://www.nigeriaa2z.com/2011/11/27/%E2%80%98nigerian-army-protects-militants-illegal-bunkering-in-n%E2%80%99delta%E2%80%99/>> accessed 27 March 2017

¹³⁶⁹ Australian Government, *Final Government Response to the Report of The Montara Commission of Inquiry* (Commonwealth of Australia, 2011) <<http://www.industry.gov.au/resource/Documents/upstream-petroleum/op-environment/assurance/FinalMontaraCommissionInquiryReport.pdf>> accessed 27 March 2017

¹³⁷⁰ Ibid

¹³⁷¹ The Hon. Lord Cullen, *The Public Inquiry into the Piper Alpha Disaster: Report to Parliament by the Secretary of State for Energy by Command of Her Majesty* (The Piper Alpha Report November 1990) Chap. 16. See also M. Elisabeth Pat C-Cornell, 'Learning from the Piper Alpha Accident: A Postmortem Analysis of Technical and Organizational Factors' (1993) 13 (2) Risk Analysis 215 <<http://engineeringfailures.org/files/Learning%20from%20the%20Piper%20Alpha%20Accident.pdf>> accessed 27 March 2017

Executive.¹³⁷² The same happened after the 2010 Deepwater Horizon disaster in the US. The US separated profit making from offshore safety, inspections and environmental management under the Bureau of Ocean Energy Management, Regulation and Enforcement by splitting the Minerals Management Service of under the US Department of the Interior into three. With the split, the Bureau of Safety and Environmental Enforcement (BSEE) is responsible for offshore inspections, safety enforcement and environmental management, Office of Natural Resources Revenue is in charge of royalty management and the Bureau of Ocean Management (BOEM) is responsible for planning the environmental exploitation, including licensing and permits.

In Nigeria, these roles are still fused. The DPR is a non-independent department of the Federal Ministry of Petroleum Resources¹³⁷³ in charge of raising money for Nigeria by developing Nigeria's energy resources, maximising revenues for the government and enforcing the applicable laws and regulations including pollution laws. This is a conflict between economic regulation to facilitate development and environmental regulation. This role is like approbating and reprobating, therefore, the researcher opines that Nigeria should separate them based on the approach failure in the UK, Australia and the USA and it is failing in Nigeria.¹³⁷⁴

5.7iid Conflicts amongst the Regulatory Institutions

In the US, there are delineated boundaries and the relevant agencies interact with each other which likely lead to minimal conflicts. In the US, USEPA enforces the laws or directs state agencies; also formulates enforcement guidelines and signs MOU with PHMSA where there are similar responsibilities.¹³⁷⁵ The US agencies have also used several Executive Orders to establish various agency responsibilities.¹³⁷⁶ In Nigeria, there is no clear directive delineating the operational boundaries between NOSDRA and the DPR.¹³⁷⁷ In the absence of delineation, NOSDRA and DPR continue to deal with spill and contingency management, contaminated site clean-up and more. UNEP Report noted that unclear mandates leads to conflicts amongst the enforcement agencies and in extreme cases institutions take differing approaches to the rules.¹³⁷⁸ These had resulted in calls to either scrap NOSDRA or merge it with either DPR or

¹³⁷² Ibid

¹³⁷³ It is subject to the Minister of Petroleum instructions

¹³⁷⁴ It is the researcher's opinion that the DPR regulatory powers regarding oil pollution management be transferred to NOSDRA or NOPMA as earlier discussed

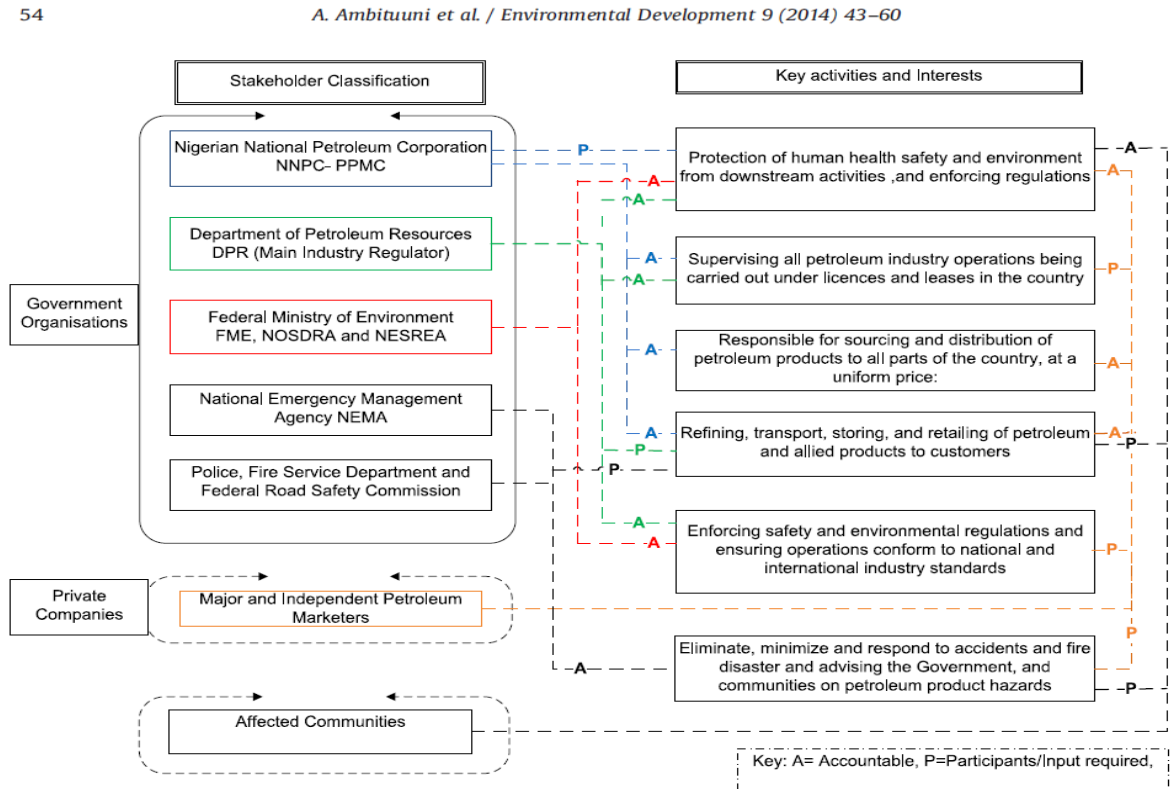
¹³⁷⁵ The US Department of Transport, *Pipelines, Hazardous Materials Safety and Administration, Federal Agencies* (n 1160)

¹³⁷⁶ For example, Executive Order (EO) 12777 (October 18, 1991) delegates authorities pursuant to the Oil Pollution Act of 1990. This order was amended by EO 13286 (March 5, 2003), which reorganized duties in response to the creation of the Department of Homeland Security.

¹³⁷⁷ These laws were analysed in the last chapter

¹³⁷⁸ UNEP Report 2011(n 107) 139 and 142

FMoE.¹³⁷⁹ To Oronsanye committee, NOSDRA functions duplicate some of DPR function and NOSDRA lays redundant waiting for occurrence of spills.¹³⁸⁰ Conflicts also exist between the Nigerian federal and state agencies over competency with regard to damage caused by exploration activities.¹³⁸¹ Below are the industry interlinkages as drawn by Ambituuni and others.¹³⁸²



A combination of all the discussed problems affects the enforcement thereby affecting reduction of EI. To the researcher, NOSDRA role is more of environmental protection and DPR is economic growth therefore to use enforcement to achieve EJ, Nigeria should widen and reinforce NOSDRA power and obligation. In addition, remove any conflicting obligation regarding environmental protection from the DPR and transfer to NOSDRA leaving DPR with economic growth issues.

¹³⁷⁹ Oronsaye Committee, *Main Report* (Oronsaye Committee's Report, 2006) <<http://agora.nigeriagovernance.org/wp-content/uploads/2015/04/Oronsaye-Main-Report.pdf>> accessed 27 March 2017

¹³⁸⁰ Ibid

¹³⁸¹ A Ambituunia, J Amezagaa and E Emeseh, 'Analysis of Safety and Environmental Regulations for Downstream Petroleum Industry Operations in Nigeria: Problems and Prospects' (2014) 9 *Environmental Development* <<http://www.sciencedirect.com/science/article/pii/S2211464513001280%20-%20bib28>> accessed 27 March 2017

¹³⁸² Ibid

5.7iie Delay in Administration of Justice

Most environmental litigation is to prevent or lessen harm, therefore, needs to be determined in a timely manner. Delays in administering justice result in injustice and in fact, denial of justice through delay is the biggest mockery of justice delivery system. Lord Denning MR (as he then was) noted

All through the years, men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Dickens tells how it exhausts finances, patience, courage, hope....¹³⁸³

In addition, Agbede noted that access to the court is on the notion of equality before the law and on the absence of unwarranted delay and unaffordable cost of litigation.¹³⁸⁴ Some delays are necessary for preparation of cases, but will be adverse when delay is inordinate.¹³⁸⁵ Enforcement decisions in the US are faster compare to Nigeria as seen in Gulf of Mexico case and many cases discussed in chapter six. In Nigeria, delay is generally the case therefore regulatory agencies may be reluctant to pursue enforcement in court.¹³⁸⁶ For this and more, many pollution matters are in court for years including *PPMC v NOSDRA* that has been in the court since 2011.¹³⁸⁷ Looking at delay issue generally, Morka noted

On average in Nigeria, any case filed in the High Court will take 5-10 years to get a verdict. The courts are terribly congested, are not computerised, and the facilities are lean. Daily, a judge has 60-70 cases – so you can imagine how much time we get before them! It's a terribly slow process, which is why we are not usually in a hurry to go to the courts.¹³⁸⁸

Furthermore, an empirical research of Onyema established that cases at times spend up to 29 years in the Nigerian High Court in attributable to the congestion and the slow nature of the justice delivery.¹³⁸⁹ Because of this and many more, the researcher proposes a fuller range of enforcement options that may not involve courts such as many administrative actions used by USEPA.

¹³⁸³ *Allen v Sir Alfred McAlpine and Sons Ltd* [1968] 2 QB 229, 245

¹³⁸⁴ IO Agbede 'The Rule of Law: Fact or Fiction' in Yakubu JA (ed), *Administration of Justice in Nigeria: Essays in Honour of Justice ML Uwais* (Malthouse Press Ltd 2000) 114

¹³⁸⁵ *Alsthom and anor v Saraki* (2005) 3 NWLR (pt 911) 208 ratios 3, 4 and 5

¹³⁸⁶ *Anare's case* lasted 30 years in court and *Ejama Ebubu case* lasted over 40 years. See several cases pursued by NOSDRA discussed earlier in chapter

¹³⁸⁷ PPMC appealed against high court ruling of 2012 and it is still in court

¹³⁸⁸ F Morka, *Social Justice and Litigation Strategies in Malcolm Langford Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (Centre on Housing Rights and Evictions Report, 2003) 115 <<http://globalinitiative-escr.org/wp-content/uploads/2012/06/Litigating-ESCR-Report.pdf>> accessed 27 March 2017

¹³⁸⁹ E Onyema, 'The Multi-Door Court House (MDC) Scheme in Nigeria: A Case Study of the Lagos MDC' (2013) 2 *Apogee Journal of Business, Property and Constitutional Law*, 96 <http://eprints.soas.ac.uk/14521/1/Final_Report_on_LMDC_2012.pdf> accessed 27 March 2017

5.7iii Other Challenges

5.7iiia Conflicts between States and Federation

The design of US laws are that federal laws are superior to state laws to the extent of conflict and that is the same in the Nigerian legal system. In dealing with environmental enforcement in the US, USEPA generally oversees all enforcement and makes regulations on the applicability of environmental laws that state will follow. Where there is a gap, states can enact laws to fill the gap. However, in some pollution law legislations, such as CWA, Congress explicitly intended that the states should be primary administrators and enforcers¹³⁹⁰ although the federal statute and USEPA regulations comprehensively regulate. Congress also granted USEPA concurrent enforcement authority¹³⁹¹ without pre-emption doctrine to resolve conflicts between them and this has generally caused enforcement problems where courts have turned to common-law and equitable doctrines to deal with the issues.¹³⁹² There is also problem of oversight functions and collaboration with the states. Environmental results and the state review framework have also found that enforcement levels across states varied considerably. USEPA's oversight of state programs has focused mainly on how well states address the largest direct discharge facilities that have continuing problems. This poses enforcement problems as evidence shows that some states rarely take enforcement action against facilities in significant noncompliance, while other states do.¹³⁹³ Claims are rife that there are different levels of compliance and performance.¹³⁹⁴ There are documents largely through anecdotal reports showing variations in regulatory enforcement with some stating that Texas and Louisiana have the weakest enforcement agencies despite being the largest oil refining states and California agencies being more effective.¹³⁹⁵ Not only are these inconsistencies problematic, it shows the governance problems faced by USEPA in enforcing some of the pollution laws in conjunction with the states. Because all oil-related pollution laws are governed the federal laws, there is no similar conflict in Nigeria. Suffice to say that this challenge is one challenge that is not evident in enforcing oil pollution laws in Nigeria.

¹³⁹⁰ CWA § 101(b), § 1251(b), § 402(b) (c), § 1342(b) (c)

¹³⁹¹ CWA § 402(i), 33 and § 1342(i)

¹³⁹² For further discussion, see DR Hodas, 'Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd when Enforcement Authority is Shared by the United States, the States, and their Citizens?' (1995) 54 MD. L. REV. 1552 <<http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2970&context=mlr>> accessed 27 March 2017

¹³⁹³ For CWA enforcement, 28 states entered some data into the national system, which showed about 45% rate of serious noncompliance and states enforcement action report against less than 6% of these facilities with a serious noncompliance.

¹³⁹⁴ LN Epstein S Greetham and A Karuba *Ranking Refineries: What Do We Know About Oil Refinery Pollution from Right to-Know Data?* (Environ. Def. Fund 1995)

¹³⁹⁵ Texas Sustain Energy Economic Development Coalition, *Crude Polluters: A Survey and Analysis of the US Refinery Sector and a Blueprint for Refinery Reform* (Texas SEED Coalition, 2001)

5.7iiib Conflict of Interest of the Government

In Nigeria, there is the problem of economic interest because Nigerian government holds 60% interest in most joint venture agreement except that it holds 55% in Shell.¹³⁹⁶ For this, there is a likelihood that enforcement actions will not be effective as enforcing the laws strictly, will mean enforcing against the government. In addition, government is dependent on oil proceeds for over 90% of foreign exchange earnings.¹³⁹⁷ Many had seen non-enforcement of pollution laws as one of the reasons why oil related pollution persists; but not giving enough attention to the fact that the enforcement failure stems from the fact that Nigeria is a mono economy. A case in point is *Allar Iron v Shell-BP*¹³⁹⁸ where the court refused an injunction because granting injunction means stopping oil extraction to the detriment of the Nigeria economy. In *Allar's case*,¹³⁹⁹ the court noted

To grant an order [of injunction]...would amount to asking the defendants to stop operating in the area.... It is needless to say that mineral oil is the main source of this Country's [Nigeria] revenue....

Carter¹⁴⁰⁰ argues that '*governments frequently talk "green" but, in practice, usually give priority to economic growth over environmental protection.*' Ikein¹⁴⁰¹ observed that the almighty power of the MNOCs in partnership with the Nigerian government continues to pursue profit at the expense of the inhabitants' lives and property, environmental decay, and dislocation of indigenous economy. To buttress this point is 2014 published financial contribution from Shell alone.

¹³⁹⁶ There are currently six joint ventures, Nigeria holds 60% in 5 and 55% in just Shell. The five are Chevron, Mobil, AGIP, Texaco and Elf Petroleum. See NNPC website: <<http://www.nnpcgroup.com/nnpcbuisness/upstreamventures.aspx>> accessed 27 March 2017

¹³⁹⁷ Central Bank of Nigeria, *Reserve Management; Meaning of Reserves* (Central Bank of Nigeria Publications 2011) <<http://www.cenbank.org/IntOps/ReserveMgmt.asp>> accessed 27 March 2017

¹³⁹⁸ Unreported Suit No W/89/71 Warri High Ct) delivered on 26 Nov.1973

¹³⁹⁹ Ibid. See also *Chinda v Shell BP (1974)* 2 RSLR 1 at 14 where request for stopping of flaring within 5 miles of the plaintiffs' village was rejected, despite affecting their building and crops.

¹⁴⁰⁰ N Carter, *The Politics of the Environment: Ideas, Activism and Policy* (Cambridge University Press 2001) 2

¹⁴⁰¹ AA Ikein *The Impact of Oil on a Developing Economy: The Case of Nigeria* (Praeger 1990) 55

SHELL'S ECONOMIC CONTRIBUTION

The Shell Petroleum Development Company of Nigeria Ltd (SPDC, Shell interest 30%) is the operator of a joint venture between the government-owned Nigerian National Petroleum Corporation (NNPC, 55%), Shell (30%), Total (10%) and ENI (5%). Shell Nigeria Exploration and Production Company (SNEPCo, 100% Shell-owned) hold interests in a number of offshore licences including the Shell-operated Bonga field (Shell interest 55%), Nigeria's first deep-water project. Shell also has a 25.6% interest in Nigeria Liquefied Natural Gas (NLNG) which exports LNG around the world.

\$48 billion: revenues from SPDC to the Nigerian government from 2010 to 2014.

\$3 billion: Shell share of royalties and taxes paid to the Nigerian government in 2014 (SPDC \$1.8 billion, SNEPCo \$1.2 billion).

95%: share of revenue after cost that goes to the Nigerian government from each barrel of oil that SPDC produces.

Shell Sustainability Report 2014: <http://reports.shell.com/sustainability-report/2014/servicepages/downloads/files/nigeria_shell_sr14.pdf> accessed 27 March 2017

The only point close to this conflict of interest in the US is sovereign immunity that sometimes affects enforcement. Suffice to say that some laws such as 1986 SARA includes federal government's waiver of sovereign immunity to permit individuals and states to bring citizen suits and that had reduced the problem of sovereign immunity.¹⁴⁰²

5.7iiic Political and Socio-Economic Factors

As noted in chapter two, there are political, socio-legal and socio-economic issues in Nigeria that the researcher will highlight here. Generally, no matter how impressive legislation is, it takes the political willpower and resource allocations to enforce. Discussing factors affecting pollution law implementation in Canada, Garner and Galbraith pointed out that the legislation-making process is a product of political compromise, with the result that pollution control legislation contains sweeping, politically attractive but administratively impractical statements about environmental protection, and then leaves the tough decisions to the bureaucrats and courts.¹⁴⁰³ In addition, Prof Pross noted that governments found it necessary to draft minimal legislation, which leaves out the regulatory provisions whose precision would arouse opposition, which appeases all and satisfies none.¹⁴⁰⁴ In addition, revolving door syndrome, public opinion and economic prosperity are other factors, which can affect implementation. Political and socio-economic issues are some of the problems

¹⁴⁰² The researcher will be discussing this in chapter six

¹⁴⁰³ JF Garner and AR Galbraith, 'Judicial Control of the Administrative Process' (The Ditchley Foundation Conference Report, 1969 Oxfordshire) 18

¹⁴⁰⁴ P Pross, 'Water and Environmental Law: Bureaucratic Constraints' in S Guppy Y Fern and B Wildsmith (eds.) *Water and Environmental Law* (Dalhousie University Institute for Resource and Environmental Studies, 1979) 139, 167

affecting enforcement of oil pollution laws. As highlighted in chapter two, the focus of the Nigerian government is on economic gains and this advertently or inadvertently subdues the minorities. Oil activities mainly take place in two out of the six current geo-political zones in Nigeria,¹⁴⁰⁵ meaning that the consequent pollution may not affect remaining four geo-political zones; therefore, they always thwart moves to checkmate the consequent effect.¹⁴⁰⁶ Findings from the DPR showed that the DPR enforcement decisions are always political and economic, thereby undermining the public interest and by extension encouraging EI. According to a DPR official, the Nigerian Government did not approve the move by the DPR to give monetary penalties, which is more robust, so DPR is incapacitated. He noted '*the economic interest stems from the fact that Nigeria has a mono-economy.*'¹⁴⁰⁷ This places Nigerian economy before protection and/or justice for the Niger Deltans meaning that they bear disproportionate burden of exploration activities. On this Hawkins noted

The essence of regulation is a conception that law is the means by which some notion of the public good is to take precedence over narrow economic interest.... What is of relatively recent origin, however, is the creation of bureaucracies equipped with legal sanctions to regulate economic life.¹⁴⁰⁸

Accordingly, Uwais explained that prosecuting MNOCs is erroneously viewed as action indirectly against the government,¹⁴⁰⁹ therefore prosecutors contend with the dilemma of choosing between collective '*survival*' with rigorous enforcement and the sustenance of our '*good life*' with tolerance of the pollution caused by oil-related activities. This is against the general principle of regulation.

In addition, there has been political instability, which affects both the enactment of pollution prevention laws and their enforcement. Nigeria has witnessed many military coups since her independence,¹⁴¹⁰ with a caretaker government and many civilian governments. Widely acclaimed is also the use of divide and rule policy by both the government and the MNOCs.¹⁴¹¹ Human Rights Watch reported that both the FG and the MNOCs had incited internal strife and conflict among the local people.¹⁴¹² Where there is need for approval, political and socio-economic factors also affect the approval of enforcing the relevant laws. Government and industry often have an extremely close relationship with common objectives and attitudes as governments are hungry for

¹⁴⁰⁵ Not states, geo-political zones in Nigeria are mainly six states that are closely located

¹⁴⁰⁶ See recent discussion on PIB as discussed in chapter four

¹⁴⁰⁷ E-mail communication attached

¹⁴⁰⁸ K Hawkins 1984 (637)

¹⁴⁰⁹ M Uwais, 'Recent Development in Nigeria Strengthening Legal and Institutional Framework for promoting Environmental Management' (The Global Judges Symposium on Sustainable Development and the Role of Law held in Johannesburg South Africa, 18-20 August, 2002)

¹⁴¹⁰ Her independence was on the 1st October 1960.

¹⁴¹¹ Human Rights Watch 1999 (n 339) See also JI Elaigwu, 'Sub-National States and the Future of Federalism in Nigeria' (1983) 1(2) Journal of Political Economy 26

¹⁴¹² Ibid

revenue and employment-generating projects in Nigeria. All these problems may be in the US, however not clearly manifest.

5.7.iii Corruption

The issue of corrupt practices by the US enforcement agencies are not manifest as it is not one of the points popularly raised as a factor or impediment. However, as pointed in chapter one and two, it is not news that corruption affects every sector in Nigeria.¹⁴¹³ This is evident that Transparency International's has consistently rated Nigeria as one of the top most corrupt countries in the world.¹⁴¹⁴ According to Ayobolu, it is one of the many unresolved problems.¹⁴¹⁵ Considering how it has eaten deep into the facets of Nigerian society, Odinkalu noted that the damages are astronomical, and that because of democratic institutions weakness and ineffectiveness after decades of military rule, reforms have been difficult.¹⁴¹⁶ The weakness in the system might explain why the US fined SNEPCo¹⁴¹⁷ for corrupt practices in Nigeria in November 2012.¹⁴¹⁸ Obayelu summed it up thus

Corruption strangles economic growth... and endangers loss of revenue.... It devalues the quality of human life.... It aggravates inequality, desecrates the rule of law and undermines the legitimacy and stability of Government. It slows down administrative processes thereby making ineffective the implementation of government reform policies.¹⁴¹⁹

Obayelu's summation touches this research greatly when it mentioned inequality, administrative processes and ineffective implementation of reform policies. More so, holding these corrupt officials accountable proves difficult because of various governance problems in Nigeria. Accordingly, Emeseh noted that weak governance prevents individuals and civil society groups from effectively holding public officers accountable for dereliction of their regulatory functions owing to authoritarian governments, poverty and other capacity deficits, and lack of effective frameworks or

¹⁴¹³ Transparency International ranked Nigeria 136 in both 2016, 2015 and 2014, 144 in 2013 and 139 in 2012 in its corruption index: See Transparency International, *Corruption Perceptions Index* (Transparency International Report, 2016) <<http://www.transparency.org/research/cpi/overview>> accessed 27 September 2017

¹⁴¹⁴ Ibid

¹⁴¹⁵ Jide Ayobolu, 'EFCC, Corruption and the Due Process' (*Segun Toyin Dawodu blog*, 2006) <<http://segun.bizland.com/ayobolu15.htm>> accessed 27 March 2017

¹⁴¹⁶ A Odinkalu, 'Corruption and Governance in Africa: How do we Break the Cycle in Nigeria' (CLEEN Foundation Conference Proceedings on Corruption and Governance Challenges in Nigeria, Nigeria, 2010) 14

¹⁴¹⁷ A subsidiary of Royal Dutch Shell

¹⁴¹⁸ *U.S. v SNEPCo Ltd* No. 4:10-cr-767 (S. D. Tex. 2010)

¹⁴¹⁹ Abiodun Elijah Obayelu, 'The Effect of Corruption and Economic Reforms on Economic Growth and Development: Lessons from Nigeria' (2007 African Economic Conference 15-17 November 2007)

forums for accessing justice.¹⁴²⁰ The issue of strong power of polluters make it worse. They have the resources to influence matters: ranging from community leaders that can speak for the community, legislators who can amend laws and even the judges who deliver the judgment. To tackle corruption in Nigeria, Nigeria enacted the Independent Corrupt Practices and Other Related Offences Commission (ICPC) Act 2000 and the Economic and Financial Crimes Commission (EFCC) Act 2004; however, they have not achieved a lot in the researcher's opinion.¹⁴²¹ In addition, Nigeria launched Nigeria's Extractive Industries Transparency Initiative (NEITI) as part of a global initiative backed by the UK Department for International Development to improve governance in resource-rich countries in February 2004 with focus on eliminating all forms of corruption through transparency and accountability in the extractive industry.

Currently, regulatory agencies are still the main enforcers of oil pollution laws in Nigeria, therefore the proposal of Ogun¹⁴²² of institutional design might help reduce corruption may be very useful. This means designing institutional structures and procedures to reduce opportunities for undesirable behaviour. Corruption within the institution was evident from the findings of House of Representatives ad-hoc committee on subsidy that recommended investigation and prosecution of all the staff of DPR involved by Anti- Corruption Agencies for negligence, collusion and fraud.¹⁴²³ It also recommended that the regulatory capacity of the DPR be strengthened and be made autonomous by the legislature.¹⁴²⁴ The recommendations also include that the DPR should brace up to its regulatory role and compel the NNPC/PPMC to comply with all the regulations issued to ensure transparency and accountability.¹⁴²⁵ With this indictment, one calls to question the wisdom in further assigning the DPR with the role of leading government's response to spills and other pollution incidence.

¹⁴²⁰ Ambisisi Ambituunia, Jaime Amezagaa and Engobo Emeseh 2014 (n 1381); see also E Emeseh 2011(n 402)

¹⁴²¹ For further discussion on the failures of the Corruption initiatives, see P Inokoba and W Ibegu, 'Economic and Financial Crimes Commission and Political Corruption: Implications for the Consolidation of Democracy in Nigeria' (2001) 13(4) *Anthropologist* 283; D Enweremadu and E Okafor (eds), *Anti-Corruption Reforms in Nigeria Since 1999: Issues, Challenges And The Way Forward* (IFRA 2009) vol 3; Victor Dike, *Corruption in Nigeria: A New Paradigm for Effective Control* (African Economic Analysis Publication, 2001) <http://www.afbis.com/analysis/corruption_dike.htm> accessed 16 November 2015

¹⁴²² Ogun, 2004 (n 894)

¹⁴²³ House of Representatives report of the ad-hoc committee to verify and determine the actual subsidy requirements and monitor the implementation of the subsidy regime in Nigeria" resolution no. (hr.1/2012) <http://www.premiumtimesng.com/docs_download/KGB%202015%20subsidy.pdf> 189 accessed 27 March 2017

¹⁴²⁴ Ibid Recommendation 55, 200

¹⁴²⁵ Ibid Recommendation 57, 201

5.7iiiie Inadequate Public Interest Participation and Opaqueness in Decision-Making

Most US pollution enforcement laws provides for public participation through citizens suit.¹⁴²⁶ This research also shows that USEPA consults with Tribal Communities and individuals at many stages of enforcement process and USEPA regularly publish in the websites how individuals can get involved in the process. In Nigeria, not only that communities are not consulted in an effective manner many times,¹⁴²⁷ Niger Deltans who bear most of the brunt of the degradation are most times not part of the decision making process because of under-representation in key sectors. Sagay, describing the situation noted that Nigeria treat Niger Delta like an appendage since the Nigerian independence despite being the main source of foreign exchange earnings.¹⁴²⁸ In addition, they do not communicate information to the host communities on the state of the environment in areas designated as sensitive ecosystems, but there exist no kind of structured mechanisms for doing that except through the public review of draft EIA documents.

5.7iiif Court Decisions/Stay of Enforcement

Because of the nature of state and federal enforcement in some statutes, some court decisions in the US increased USEPA's challenges in enforcing pollution laws. Problems mainly arise where there are incompatible/inconsistent/counterproductive pollution controls for the exercise of judicial power to stay an enforcement action. Practically, a stay of the federal action can cause more than a temporary delay and can end to USEPA's abatement/enforcement efforts.¹⁴²⁹ Under section 309 (g) of CWA, a state administrative action will bar USEPA from seeking judicial civil penalties.¹⁴³⁰ This challenge is peculiar to the US because there are no state administrative actions in Nigeria. With this conclusion, the researcher will examine the strategies as used in the US.

5.8 EXAMINATION OF THE MANAGERIAL AND ENFORCEMENT STRATEGIES RELATING TO THE US

This sub-section reviews the US enforcement approach with a view to transplant where necessary. As noted before, the US uses most effective civil and criminal enforcement strategies that target the most serious pollution hazards, combining managerial and

¹⁴²⁶ See for example section 117 of CERLA

¹⁴²⁷ For discussion, see U Etemire, (n 4)

¹⁴²⁸ Itse Sagay, 'Nigeria: Federalism, the Constitution and Resource Control' (Speech delivered at the Fourth Sensitisation Programme Organised by the Ibori Vanguard at the Lagoon Restaurant, Lagos Nigeria) <<http://www.waado.org/nigerdelta/essays/resourcecontrol/sagay.html>> accessed 27 March 2017

¹⁴²⁹ For instance, a settlement of an earlier state action mandating installation of one type of pollution control equipment may preclude USEPA from insisting on different pollution control equipment, ending USEPA's abatement efforts.

¹⁴³⁰ 33 U.S.C. § 1319(g)(6) (A) (ii)

sanctioning strategies depending on severity of the violation.¹⁴³¹ The managerial approach is innovative because not only that it includes a combination of compliance assistance and incentives,¹⁴³² according to Giles there are promotion of compliance through more effective rules, advanced technology for monitoring pollutants and toxins, electronic reporting and record-keeping, more transparency and innovative means of enforcement.¹⁴³³ According to Giles, the innovative approach had helped in reducing pollution and reducing enforcement actions in 2015.¹⁴³⁴ In addition to managerial approach, USEPA uses sanctions where necessary to achieve compliance. A good example of this approach is that Giles said that USEPA developed a program that looked for major violations in public water systems and gave them six months to comply or face enforcement actions. This helps to reduce the number of serious violators. The innovative managerial strategy also includes settlements and voluntary agreement is SEPs. Few examples of SEPs are; settlement with the Coastal Energy Corporation,¹⁴³⁵ Shell Oil Deer Park¹⁴³⁶ and settlements with 32 US companies that have over 90% of US petroleum refining capacity to invest more than \$6.5 billion in control technologies, pay civil penalties and perform SEPs of over \$80 million between 1999 and 2011.

Using sanctioning strategy, USEPA uses a penalty policy to make pollution abatement failures strong enough to deter emphasising the '*economic law enforcement*'. USEPA for instance took a civil enforcement action against MSD Energy Inc, with final assessment of \$3,000. Between 2007 and 2014, USEPA took eighty-six civil enforcement actions under CERCLA and in 2014 alone; USEPA concluded 2,275 civil judicial and administrative cases, which is the least for five years because of higher concentration on serious cases.¹⁴³⁷ Again, in the researcher's opinion, by focusing on these serious cases, USEPA manages its limited resources better. In addition, a US District Court sentenced father and son, ordered them to forfeit monies and to pay \$23,039,607 and \$22,875,567.46 in restitution.¹⁴³⁸

Managerial approach allows the violators to make amends and sanctions follow in absence of amendments. Because deterrent effect that is at the core of US enforcement, there is need for sanctions where necessary. A combination of both also makes enforcement easier in the researcher's opinion as it will make enforcement agencies spend less, will enable them maintain good relationship with the operators while eliciting compliance and only take serious actions where they are recalcitrance. It is

¹⁴³¹ See USEPA, *EPA Strategic Plan 2014* (n1259)

¹⁴³² See USEPA, USEPA, *Introduction: Environmental Enforcement and Compliance* (EPA Pacific Southwest, Region 9 Publication)

¹⁴³³ Cynthia Giles, *Next Generation Compliance Strategy* (n 1267)

¹⁴³⁴ Ibid

¹⁴³⁵ Kan Lenexa (n 1031)

¹⁴³⁶ <<http://www.epa.gov/region6/6en/14-seps.pdf>> accessed 27 March 2017

¹⁴³⁷ USEPA, FY 2014 Enforcement and Compliance Annual Results note (n 1183)

¹⁴³⁸ See Mesothelioma and Lung Cancer (n 807). Court also fined Noble Drilling LLC \$12.2 million, imposed community service and a four-year period of probation. See Noble Drilling (n 808)

particularly important for a country like Nigeria not only because Nigeria is reliant on the proceeds of oil, but also because of more limited resources, more capacity problems, socio-political problems and many more because as noted earlier, the US enforcement agencies face less enforcement challenges when compared with Nigeria. Despite its usefulness especially as it promotes capacity building, the researcher will not generally recommend managerial approach for Nigeria because, it will likely breed more corruption that has already engulfed Nigeria and it may lead to capture. The researcher thinks that the mix approach by the US agencies is worth transplantable to Nigeria; however, there should be due consideration to problems associated with transplant and diffusion discussed in chapter one which includes capacity and other impediments.

This research is to find out if enforcement of pollution laws can aid EJ in the Niger Deltans. The researcher had discussed monitoring, mechanisms and strategies of enforcement, impacts of enforcement and the associated problems both in the US and Nigeria, the next section will evaluate whether enforcement enhance EJ in the US.

5.9 ENVIRONMENTAL JUSTICE AND ENFORCEMENT IN THE US

According to the directive of the 1994 Executive Order 12898 (EO), federal agencies are to make achieving EJ part of their mission by making its actions address EJ in minority and low-income populations¹⁴³⁹ and to give greater weight to EJ concerns using the existing legal framework.¹⁴⁴⁰ The US also issued MOU on EJ and EO 12898 to underscore certain provisions of existing law that can help ensure all communities and persons live in a safe and healthy environment and outlined a potential enforcement mechanism for the EO that encompassed the use of NEPA 1969¹⁴⁴¹ and Title VI.¹⁴⁴² USEPA leads responsibility for enforcing the EO with its Office of EJ located in OECA. Several subjective accounts and evaluative reports however showed several limitations and failures of EO. For instance, a 2004 Office of the Inspector General's report admonished USEPA for its unclear EJ implementation strategy arguing non-fulfilment of the letter and spirit of EO 12898 because of USEPA's lack of EJ enforcement under Title VI of the Civil Rights Act.¹⁴⁴³

¹⁴³⁹ William J Clinton 'Executive Order (n 592)

¹⁴⁴⁰ C Waterhouse, 'Abandon all Hope ye that Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice' (2009) 20 Fordham Env'tl. Law Rev. 51

¹⁴⁴¹ NEPA mandated an analysis of federal action have to include assessment of the impact on minority and low-income communities.

¹⁴⁴² USEPA, EPA Insight Policy Paper: Memorandum from President Clinton (EPA-175-N-94-001) (USEPA Publication February 11, 1994) <<https://www.epa.gov/fedfac/epa-insight-policy-paper-executive-order-12898-environmental-justice>> accessed 1 September 2017

¹⁴⁴³ OIG, *EPA Needs to Consistently Implement the Intent of the Order on Environmental Justice* (OIG Report #2004-P-00007 March 1, 2004) <<https://www.epa.gov/sites/production/files/2015-10/documents/20040301-2004-p-00007.pdf>> accessed May 30, 2017; See also US Commission on Civil Rights, *Not in My Backyard: Executive Order 12898 and Title VI as Tools for Achieving Environmental Justice* (Report October, 2003) <<http://www.usccr.gov/pubs/envjust/ej0104.pdf>> accessed 27 March 2017

O'Rourke and Connolly brought the enforcement issues close to EJ by analysing USEPA's Sector Facility Indexing Project (SFIP)¹⁴⁴⁴ preliminary data, which showed that high minority communities¹⁴⁴⁵ were subject to fewer inspections and enforcement actions than the ones in predominantly white communities¹⁴⁴⁶ indicating a correlation between race and regulatory enforcement. Konisky's empirical work on EJ identified regulatory enforcement of pollution control laws such as CAA, CWA and RCRA as an important area of research focus,¹⁴⁴⁷ and some studies found that the USEPA and state governments perform less compliance monitoring and impose fewer punitive actions for violations towards regulated facilities when they are located in some traditional EJ communities.¹⁴⁴⁸ Geltman and others' in their research evaluated federal agencies including USEPA and DOT from the date of promulgation of the EO until February 1, 2015 using random selection and data in Regulations.gov.¹⁴⁴⁹ They also found very little activity on EO except the USEPA and no instance of creation of plan of compliance with EO in all federal agencies.¹⁴⁵⁰ Their report showed that between 1993 and 2007, USEPA processed only 211 Title VI complaints, with 81% closed in 2007. The court rejected 60% of the closed cases, and dismissed 21%.¹⁴⁵¹ Environmental advocacy groups also argued that the implementation of EJ regulations is often inadequate, particularly in poor communities¹⁴⁵² and Konisky observed that when advocacy organisations are present, firms located in relatively more risky Hispanic communities receive more regulatory attention.¹⁴⁵³ However, a 2001 study by Professor Binder¹⁴⁵⁴ relied on survey data to find a great difference across federal agencies in implementation of EO and concluded that USEPA, Housing and Urban Development and DOT consistently performed at a higher level among federal

¹⁴⁴⁴ It provides data on the demographics of populations living in proximity to oil refineries in the US

¹⁴⁴⁵ Those communities with over 30% minority populations within 3 miles of a refinery

¹⁴⁴⁶ D O'Rourke and S Connolly (n 1256)

¹⁴⁴⁷ DM Konisky, 'Environmental Justice Delayed: Failed Promises, Hope for the Future' (2016) 58 (2) *Environment: Science and Policy for Sustainable Development* 4; J Chakraborty, JA Maantay, and JD Brender, 'Disproportionate Proximity to Environmental Health Hazards: Methods, Models and Measurement' (2011) 101 (S1) *American Journal of Public Health* 27 and EJ Ringquist, 'Assessing Evidence of Environmental Inequities: A Meta-Analysis' (2005) 24 (2) *Journal of Policy Analysis and Management* 223

¹⁴⁴⁸ DM Konisky and C Reenock, 2015 (n 177)

¹⁴⁴⁹ EAG Geltman, G Gill and M Jovanovic, 'Beyond Baby Steps: An Empirical Study of the Impact of Environmental Justice Executive Order 12898 (2016) 39 (3) *Family and Community Health* 143
<http://academicworks.cuny.edu/sph_pubs/144> accessed 1 September 2017

¹⁴⁵⁰ Ibid

¹⁴⁵¹ This result somewhat corroborates the OIG's Report, the US Commission on Civil Rights and DE Neal that all noted a significant lack of EJ enforcement mechanisms as an impediment to the success of EO 12898

¹⁴⁵² J Doyle, *Crude Awakenings: The Oil Mess in America: Wasting Energy Jobs and the Environment* (Friends of the Earth US 1994)

¹⁴⁵³ Konisky 2017 (n 177)

¹⁴⁵⁴ D Binder and others, *A Survey of Federal Agency Response to President Clinton's Executive Order No. 12898 on Environmental Justice*, 31 ELR 11133 (2001)

agencies in implementing EO 12898. Under the CAA, USEPA invited public comment evaluating EJ pursuant to EO 12898 in 2014-2015 with 366 rulemakings that year. In addition, there were 37 regulatory actions with a statement of compliance. USEPA also sought comment on all aspects of the proposal, including comments considering human health or environmental effects on minority or low-income populations on a proposed rule regarding ‘Managing Emissions: Oil and Gas Production in Indian Country.’¹⁴⁵⁵ This, to the researcher is interesting because despite the economic value of oil and gas, USEPA sought comments. Another interesting point from Binder’s research is that despite poor enforcement of EO, USEPA is still the best enforcing agency. This proves that EO makes positive EJ impacts in the US despite its shortcomings. Konisky and Reenock in 2017¹⁴⁵⁶ research suggested the need to reconfigure USEPA enforcement strategies by insisting that states should adopt similar strategy despite having incorporated demographic considerations using developed information tools such as its EJSCREEN model into USEPA enforcement initiative. This is because most enforcement federal pollution control programs occurs at the state level.

On reviewing EO enforcement, the researcher found that during President Bush administration, EJ was not a priority, rather the regime criticized EJ for being an excessive thorn in the sides of economic development,¹⁴⁵⁷ and this stagnated EJ movement until 2008 when President Obama invigorated its discussion during his campaign.¹⁴⁵⁸ President Obama reinstated the Interagency Working Group on EJ and included representatives of 17 federal agencies and the White House in 2010 to boost EJ enforcement actions.¹⁴⁵⁹ The White House on August 4, 2011 announced the signing of MOU on EJ and EO 12898 by the heads of 17 agencies to add more structure and efficiency; processes and procedures to efficiently assist communities; and guide the agencies to coordinate their EJ activities and various commitments better.¹⁴⁶⁰ Also with the Obama administration, USEPA drafted a roadmap for EJ

¹⁴⁵⁵ USEPA, *Memorandum of Understanding on Environmental Justice and Executive Order 12898* <<https://www.epa.gov/sites/production/files/2015-02/documents/ej-mou-2011-08.pdf>> accessed August 30, 2017; although EO 12898 was found inapplicable at that stage, it opened the door for EJ

¹⁴⁵⁶ DM Konisky and C Reenock, 2015 (n 177)

¹⁴⁵⁷ U.S. Commission on Civil Rights (n 1443)

¹⁴⁵⁸ L Jacobson, EPA makes Environmental Justice High Priority, but Key Settlement Disappoints Advocates’ *Politifact* (November 30th, 2012) <www.politifact.com/truth-o-meter/promises/obameter/promise/267/strengthen-federal-environmental-justice-programs> accessed 27 September 2017

¹⁴⁵⁹ OIG (n 1443); Obama also issued a proclamation reiterating his commitment to EJ efforts in commemoration of its 20th anniversary as discussed in chapter three.

¹⁴⁶⁰ USEPA, *Memorandum of Understanding on Environmental Justice and Executive Order 12898* <https://www.epa.gov/sites/production/files/2015-02/documents/ej-mou-2011-08.pdf> or <<https://www.epa.gov/environmentaljustice/memorandum-understanding-environmental-justice-and-executive-order-12898>> accessed 27 August 2017

called ‘*Plan EJ 2014*’¹⁴⁶¹ that sought to create a systemic, cross-agency approach to incorporating EJ into federal activities. USEPA incorporated EJ throughout its FY2014-FY2018 Strategic Plan¹⁴⁶² and initiated its implementation as a strategy for expanding efforts to integrate EJ into its various programs in its effort to improve the environmental conditions and public health in overburdened communities.¹⁴⁶³ USEPA also issued annual reports with the progress made toward meeting Plan EJ 2014 beginning with FY2013,¹⁴⁶⁴ released an informational publication in February 2013,¹⁴⁶⁵ developed the EJ strategic enforcement assessment tool¹⁴⁶⁶ as a draft tool in development to consistently identify possible EJ areas of concern and assist USEPA in making fair enforcement and compliance resource deployment decisions.¹⁴⁶⁷ It also heightened evaluation of environmental conditions and demographic characteristics using USEPA’s EJView.¹⁴⁶⁸ The points above showed that the USEPA puts EJ at the forefront of its enforcement activities. However despite all the efforts, investigations revealed USEPA’s failure to consider distributional impacts on poor and minority populations,¹⁴⁶⁹ failure to ensure targeted regulatory enforcement especially ensuring that the state agencies are directing enforcement attention to pollution sources located in minority and low-income communities,¹⁴⁷⁰ and have been ineffective in broadening public participation to low-income and minority communities.¹⁴⁷¹ Reflection of EJ concerns in federal agencies have not been as effective as it should be, more than two decades after EO 12898; however, it has gone a long way especially with USEPA and DOT. Overall, although there were problems of enforcement over the years, US have made considerable progress. There are no similar efforts currently applicable in

¹⁴⁶¹ EPA Plan EJ 2014 was released September 2011; see EPA *Plan EJ 2014* (EPA Publication, 2012) <<http://www.epa.gov/compliance/environmentaljustice/plan-ej/index.html>> accessed May 30, 2017

¹⁴⁶² USEPA had previously incorporated EJ in its FY2011-FY2015 Strategic Plan as a Cross-Cutting Fundamental Strategy: USEPA, *FY2011-2015 EPA Strategic Plan*

¹⁴⁶³ EPA Plan EJ 2014 (n 1287)

¹⁴⁶⁴ EPA, *FY2014 Plan EJ 2014 Progress Report* (EPA Publications) <<https://www.epa.gov/environmentaljustice/plan-ej-2014-progress-report-fy2014>> accessed 27 March 2017

¹⁴⁶⁵ EPA, *Smart Growth* <<https://www.epa.gov/smartgrowth>> accessed 27 March 2017

¹⁴⁶⁶ EPA-OECA, *Environmental Justice Strategic Enforcement Assessment Tool* (EJSEAT) (EPA Publications)

¹⁴⁶⁷ Ibid, OEJ published a toolkit for assessing potential EI allegations to assist staff. See EPA-OECA, Office of Environmental Justice (EPA Publications EPA 300-R-04-002) <<http://www.epa.gov/environmentaljustice/resources/policy/ej-toolkit.pdf>> accessed 27 March 2017

¹⁴⁶⁸ EPA-OECA, *EJ View* (EPA Publications) <<http://www.epa.gov/compliance/environmentaljustice/mapping.html>> accessed 27 March 2017

¹⁴⁶⁹ HS Banzhaf, ‘Regulatory Impact Analyses of Environmental Justice Effects’ (2011) 27 (1) *Journal of Land Use and Environmental Law* 1

¹⁴⁷⁰ DM Konisky, ‘The Limited Effects of Federal Environmental Justice Policy on State Enforcement’ (2009) 37 (3) *Policy Studies Journal* 475 and DM Konisky and C Reenock, 2015 (n 177), 173

¹⁴⁷¹ DM Daley and TC Reames, ‘Public Participation and Environmental Justice: Access to Federal Decision Making’ in DM Konisky (ed.) *Failed Promises: Evaluating the Federal Government’s Response to Environmental Justice* (MIT Press 2015) 143

Nigeria; therefore, it is worthwhile for Nigeria to move towards that direction to help in achieving of EJ.

5.10 CONCLUSION

In this chapter, the researcher discusses in detail the specialised agencies and their enforcement powers and practices with the aim of bring into fore their enforcement strengths and weaknesses. The enforcement strategies and mechanisms used in the USA and Nigeria were compared which revealed that the US has a more robust and innovative mechanisms allowing US authorities to use the most effective enforcement mechanism in achieving enforcement objectives and this naturally helps in reducing EI. Nigeria revealed less robust and less clear mechanisms. Regarding strategies, USEPA generally uses vigorous civil enforcement and criminal enforcement in collaboration with the DOJ targeting most serious pollution hazards. USEPA does this by combining compliance and sanctioning strategies depending on severity of the violation. It uses penalty policy's purpose to make pollution abatement failures strong enough to deter using economic benefit factor, gravity factor and adjustment factor to strengthen this purpose. USEPA considers economic benefits; the extensiveness of punishment; aggravating and mitigating factors; the extent they reduce or aggravate capture, rules and standards for departures; previous violations and the aggravating factors which helps in alleviating the problems that causes EI. USEPA has more detailed strategies in comparison with the *carrot and stick* and civil administrative and judicial strategies used in Nigeria. An examination of the Nigerian situation found failures of the *carrot and stick approach* as no permits were withdrawn, most fines not paid, clean-up and remediation either not done or not properly done and shows delay in litigation.

Also examining the difficulties in implementation, one sees fewer problems with the laws, enforcements and even wider problems in the US. Problems of delays, conflict of interest, economic and social factors, corruption, insufficient technical skills and knowledge and lack of performance monitoring and adaptive management systems, deficiencies in agency policies and procedures and inadequate public/interest group participation are not manifest in the US. A clear issue that is manifest in Nigeria is the confusion caused by the division of roles between NOSDRA and DPR and the DPR conflict of interest, which affects enforcement. The US and other countries dealt with these problems by separating roles. However, there are problems of incapacity to enforce including human and financial resources, conflicts between states and the federation and courts judgment which is manifest in both countries, however it is more prominent in Nigeria and there is generally less enforcement problems in the US which will likely help in reducing EI in the US. This chapter also revealed several reports of failures of EO enforcement, however, it showed that USEPA reasonably enforced the laws, and showed how the invigoration by Obama administration helped to bring EJ to the forefront of USEPA's enforcement activities proving that despite some

enforcement shortcomings, US has made considerable progress in achieving EJ using enforcement.

The chapter shows fewer and less adequate mechanisms and strategies in Nigeria. It also shows systemic problems of regulatory enforcement in Nigeria and after a careful examination, the researcher opines that Nigeria should move towards a more robust mechanism as used in the US as a way of reducing EI because they are better. The research recommends reforms of removing enforcement powers from the DPR to NOSDRA or creation of another agency for that purpose. Enforcement agencies can also sign MoUs as in the US as a way of boosting enforcement with the aim of reducing EI. Having noted that, this the chapter advances the argument that the causes of enforcement problems in Nigeria is however beyond mechanisms and strategies, but total system failure including governance issues, finance, societal problems and many more, therefore, further solution will be sought. With all this in mind, the researcher moves to the next chapter on private enforcement in a quest to find if private enforcement can help in achieving EJ for the Niger Deltans.

CHAPTER SIX

PRIVATE ENFORCEMENT AND THE ROLE OF NGOS IN THE STRUGGLE FOR ENVIRONMENTAL JUSTICE IN NIGERIA

6.1 INTRODUCTION

Regulatory enforcement is important to secure and maintain the protection of public interests; however, research has shown that enforcement of pollution control laws presents special problems for public enforcers in many countries.¹⁴⁷² Because of this, there may be use of private enforcement where this public enforcement is inadequate. In the last chapter, the researcher showed several regulatory enforcement weaknesses that add to EI in Nigeria and one way of addressing these weaknesses could be through private enforcement.¹⁴⁷³ This chapter examines the nature of involvement of private parties and the NGOs in the enforcement process and how can they be empowered to help in the enforcement of environmental protection laws in Nigeria with a view of achieving EJ. The values of private enforcement may be for the safeguard and the benefits of the public, it may also be to protect private rights; however, in reality, many environmental regulations provide for individual enforcement against any violation of the rights.¹⁴⁷⁴

In the environmental law paradigm, private enforcement has played important roles in the enforcement process. According to Roberts and Dobbins, citizens are one of a nation's greatest resources for enforcing environmental laws because they know the country's land and natural attributes more intimately than a government ever will and are larger in number than the largest government agency.¹⁴⁷⁵ Additionally, environmental burdens affect them more than the state; therefore, they may also have a stronger interest than government. To corroborate this, Cynthia Giles noted that *'Pollution violations tend to be extensive and serious, outstripping federal and state capacity to regulate.'*¹⁴⁷⁶ In addition, Cafaggi and Renda¹⁴⁷⁷ noted that private regulation is emerging as a viable option for some problems and can be loftier to command and control due to informational asymmetries,¹⁴⁷⁸ superior coordination and

¹⁴⁷² MR Gelpe, 'Pollution Control Laws against Federal Facilities' (1989) 13 Harvard Environmental Law Review 69

¹⁴⁷³ Private enforcement in this research mainly refers to purposive enforcement of a legal rule and the protection of individual rights in a dispute, and not limited to the private enforcement of private rights by individual victims in tort law. The main reason for this choice is that the research is focusing on broader impact that can drive reforms with a view of enhancing EJ and not individual remedies.

¹⁴⁷⁴ Algeria, China, Chile, Cuba, Ghana, Ecuador, India, Iran, Korea, Malaysia are good examples

¹⁴⁷⁵ E Roberts and J Dobbins, *The Role of the Citizen in Environmental Enforcement* (Environmental Law Institute) <<http://www.inece.org/2ndvol1/roberts.htm>> accessed 27 March 2017

¹⁴⁷⁶ Cynthia Giles (n 1267)

¹⁴⁷⁷ Fabrizio Cafaggi and Andrea Renda, Public and Private Regulation Mapping the Labyrinth CEPS; Working Document No. 370 (CEPS September 2012) <<https://www.ceps.eu/system/files/WD370%20Renda%20Public%20and%20Private%20Regulation.pdf>> accessed 18 September 2017

¹⁴⁷⁸ This is the study of decisions in transactions where one party has more or better information than the other.

the need for trans-national cooperation and standardization.¹⁴⁷⁹ Furthermore, Hüscheletrath and Peyer¹⁴⁸⁰ opines that private enforcement provides better information and greater incentives to litigate, brings more resources for enforcement and strengthens the deterrent effect¹⁴⁸¹ and Casey-Lefkowitz and others thinks that if citizens are not encouraged to assume an enforcement role, even the most sophisticated environmental protection laws may exist only on paper.¹⁴⁸²

In environmental law, private enforcement helps to maintain environmental quality where there is a drop in public enforcement,¹⁴⁸³ and sometimes acts as oversight functions on public authorities, indirectly check the polluters, lessens the attractiveness of bribing and brings less state capacity¹⁴⁸⁴ that reduces regulatory capture discussed in chapter three.¹⁴⁸⁵ In many cases, private enforcers such as NGOs act as enforcement watchdogs. In Europe, the Aarhus Convention visualises a practice that enables NGOs to seek judicial remedies for environmental harms against governments and private entities thereby helped in liberalising standing.¹⁴⁸⁶ Environmental Courts established by many countries¹⁴⁸⁷ have provided equal access to states, individuals, NGOs and corporations to enhance the role of NGOs and individuals in the enforcement process. Importantly, it sometimes helps impoverished and politically deprived communities in

¹⁴⁷⁹ Because of informational asymmetries, regulated companies may not disclose all the necessary information and private enforcers may use private information to detect violations.

¹⁴⁸⁰ Kai Hüscheletrath and Sebastian Peyer, 'Public and Private Enforcement of Competition Law: A Differentiated Approach' (April 2013) CCP Working Paper 13 <<http://competitionpolicy.ac.uk/documents/8158338/8235394/CCP+Working+Paper+13-5.pdf/86d76261-eda5-4de7-af2a-51d9684e0c45>> accessed 18 November 2016

¹⁴⁸¹ Ibid

¹⁴⁸² S Casey-Lefkowitz S and others, 'The Evolving Role of Citizens in Environmental Enforcement' (Fourth International Conference on Environmental Compliance and Enforcement Chiang Mai, Thailand, April 1996) < <http://www.inece.org/4thvol1/futrell.pdf> > accessed 16 August 2015

¹⁴⁸³ There was a slowdown of government enforcement of the CWA in 1981 and 1982 and according to Naysnerski and Tietenberg 1992, private enforcement increased. See Wendy Naysnerski and Tom Tietenberg, 'Private Enforcement of Federal Environmental Law' (1992) 68(1) Land Economics 28 <<http://www.jstor.org/stable/pdfplus/3146741.pdf?acceptTC=true&jpdConfirm=true>> accessed 10 August 2015

¹⁴⁸⁴ For further discussion, see BB Boyer, 'Too Many Lawyers, Not Enough Practical People' The Policy-Making Discretion of the Federal Trade Commission (1983) 5 Law and Policy 9

¹⁴⁸⁵ See also Barry Boyer and Errol Meidinger, 'Privatising Regulatory Enforcement: A Preliminary Assessment of Citizen Suits under Federal Environmental Laws' (1985) 34(3) Buffalo Law Review 833, 843 <<http://web2.law.buffalo.edu/faculty/meidinger/scholarship/citsuit.pdf>> accessed 27 March 2017

¹⁴⁸⁶ The 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. See also Guideline 18 of UNEP Bali Guidelines. The Governing Council of UNEP adopted Bali Guidelines, in February 2010. They are 26 voluntary guidelines aimed to provide general guidance to States on promoting the effective implementation of their commitments to Principle 10 of the 1992 Rio Declaration on Environment and Development within the framework of their national legislation and processes. To UNEP, the Guideline underline recognition of the need to fill gaps in legal norms and practices to encourage broad access to information, public participation and access to justice in environmental matters within the framework of national legislation and processes.

¹⁴⁸⁷ England and Wales, India, New Zealand, China, some states in the US and many more

enforcing their rights against environmental pollution. Citizens' participation in enforcement might provide the missing element essential to make a country's environmental protection aims a reality. In summary, Burbank and others noted that private enforcement could multiply resources devoted to prosecuting enforcement actions, shifts regulation cost onto the private sector and take advantage of private information to detect violations, and encourage legal and policy innovation.¹⁴⁸⁸ To them, this will emit a clear and consistent signal that prosecution will follow violation, limit direct and visible intervention by the bureaucracy in the economy and society, and facilitate participatory and democratic governance.¹⁴⁸⁹

However, there are arguments that not only doubts whether private enforcement can advance statutory policy goals, but, in its strongest form, suspects that private litigation may actually discourage compliance efforts. This school of thought argue that it empowers judges, who lack policy expertise to make policy, and it tends to produce inconsistent and contradictory doctrine from courts.¹⁴⁹⁰ It also weakens the administrative state's capacity to articulate a coherent regulatory scheme by pre-empting administrative rulemaking; usurp governmental prosecutorial discretion; discourage cooperation with regulators and voluntary compliance; weaken oversight of policy implementation by the legislative and executive branches; and lack democratic legitimacy and accountability.¹⁴⁹¹

In this chapter, the researcher deals with private involvement in environmental law enforcement, public interest litigation and the US extension called citizens' suits. It will then progress to public interest litigation in Nigeria, private enforcement of oil pollution laws including a comparison of two prominent US and Nigerian cases. It will further look at the role of NGOs and the African Court of Human Rights; ECOWAS Community Court of Justice and the Inter-American Court of Human Rights and conclude with the role of NGOs and civil society groups in fostering EJ in Nigeria. The aim of this discussion is to prove or refute the value of private enforcement in pursuing enforcement of pollution laws with a view of fostering EJ in Nigeria.

6.2 PUBLIC INTEREST IN ENVIRONMENTAL LAW ENFORCEMENT

The public's involvement in environmental enforcement is because of presumed failure of governmental regulatory enforcement to provide the optimal enforcement. This is because of constraints caused by various reasons including scarce resources, limited information, political pressures¹⁴⁹² and many more. Citizens can supplement and strengthen the environmental enforcement process. Analysing the importance of

¹⁴⁸⁸ See S Burbank, S Farhang and HM Kritzer, 'Private Enforcement of Statutory and Administrative Law in the United States (and Other Common Law Countries)' (2013) 17 (3) *Lewis and Clark Law Review* 637, 662 <https://gspp.berkeley.edu/assets/uploads/research/pdf/Lewis_and_Clark.pdf> accessed 27 March 2017

¹⁴⁸⁹ *Ibid*

¹⁴⁹⁰ *Ibid*

¹⁴⁹¹ *Ibid*, 667

¹⁴⁹² See DR Hodas (n 1392), 1651

private enforcement, Mashaw and Stigler developed several interrelated theories to support the conclusion that they are more efficient than regulatory agencies.¹⁴⁹³ The theories observed that it may be less costly, may increase resources available for prosecution and its threat will stimulate public enforcement efforts.¹⁴⁹⁴

Avenues of public involvement in environmental enforcement are many. They include collection of information, participation in government regulatory action including identifying and reporting violations, provision of comments on settlements reached between the federal government and violators, and recourse to courts.¹⁴⁹⁵ Some countries¹⁴⁹⁶ engage citizens in enforcement by establishing complaint hotlines, offer rewards for citizen information and involve citizens in enforcement campaigns.¹⁴⁹⁷ The most viable avenue relevant to this research is recourse to courts mostly known as public interest litigation (PIL) because it is more of direct involvement of the citizens in enforcement and it has also been used in both the US and Nigeria. Moreover, it is easier for public to have recourse to courts (though with some challenges) than to get to MNOCs and government to act especially in Nigeria.

6.2i Overview of Public Interest Litigation in Environmental Law

PIL is the use of litigation or legal action, which seeks to advance the cause of minority or disadvantaged or which raises issues of broad public concern.¹⁴⁹⁸ PIL uses the law strategically to effect social change.¹⁴⁹⁹ According to PILS Project, PIL provide access to justice, reform the laws by challenging laws that violate equality or human rights standards, seek clarification on an untested point of law, identify gaps in the law or challenge the existing interpretation or enforcement, challenge government policies and procedures, provoke political system into responding to a problem hitherto ignored, raise awareness and bring about pressure for social and legislative change outside the court room, empower the disadvantaged by providing them an opportunity for people to challenge the disadvantages and injustices as well as save them cost.¹⁵⁰⁰ Summing up this, the researcher describes PIL as a way public interest litigant press for application of laws in a manner that transform or re-shape society.

¹⁴⁹³ See the theoretical writings of George Stigler, Regulation: The Confusion of Means and Ends in G Stigler (ed), *The Citizens and the State: Essays on Regulation* (University of Chicago press 1975); JL Mashaw, 'Private Enforcement of Public Regulatory Provisions: The "Citizen Suit"' (1975) 4 Class Action Rep. 29

¹⁴⁹⁴ Ibid

¹⁴⁹⁵ Robert Esworthy (n 798). Citizens may also petition for judicial review

¹⁴⁹⁶ Countries like China and the US through Citizen suits

¹⁴⁹⁷ BV Rooij, *Regulating Land and Pollution in China: Lawmaking, Compliance, and Enforcement; Theory and Cases* (Leiden University Press 2006)

¹⁴⁹⁸ The PILS Project, 'Advancing Human Rights and Equality through Public Interest Litigation' <<http://www.pilsni.org/about-public-interest-litigation>> accessed 27 March 2017

¹⁴⁹⁹ Ibid

¹⁵⁰⁰ Ibid

In environmental law, PIL serves as a mechanism for reducing environmental harm with the main purpose of preventing, mitigating, remediating or compensating for harm done to the environment. It promotes environmental law implementation: seeks judicial protection and protects public interests by using private environmental powers to direct enforcement. Environmental public interest litigation (EPIL) brings checks and balances by forming a kind of triangular relationship between the government, business and the public because the government or its agencies supervises, implements and enforces the laws in the business environment, however, the public is to urge the government to better fulfil this responsibility. Private enforcers may create awareness about environmental safety and inspire participation. With private enforcers serving like a watchdog, both the government enforcers/authorities and the polluters envisage the possibility of being sued. All these ideas in EPIL are existing means of achieving environmental justice.

To be successful, laws must provide a foundation for EPIL: provide for civil and criminal actions; cover the subject matter, be effective and enforceable by citizens, address substantive and procedural aspects of subject matter and enable the achievement of any intended outcome.¹⁵⁰¹ There is an important need for liberal standing, good access to factual and expert opinion evidence, a liberal approach to interlocutory practice and adequate redress and remedies because they are fundamental to achieving access to EJ.¹⁵⁰² The cause of action must be justiciable by the courts, plaintiffs must be willing and able to sue and there should be knowledgeable, experienced and willing lawyers.¹⁵⁰³ Duties imposed or rights conferred should be enforceable, remedy or punish wrongs including orders restraining, remediating or compensating for environmental harm and judicial or merits review.¹⁵⁰⁴ However, there are sometimes limitations.

6.2ii Limitations to Public Interest Enforcements

Although PIL is a viable tool in enforcing environmental laws and a positive way of pursuing EJ, it is not without potential problems/limitations. Rhode¹⁵⁰⁵ highlights some of the problems when she noted

.... The gap between our rhetorical commitments and daily practices regarding access to justice is a function of inadequate funding, restrictions on cases and activities by government-funded legal aid programs, insufficient concern by

¹⁵⁰¹ BJ Preston, 'Environmental Public Interest Litigation: Conditions for Success' (International Symposium towards an Effective Guarantee of the Green Access: Japan's Achievements and Critical Points from a Global Perspective, Awaji Island Japan, March 2013) <http://greenaccess.law.osaka-u.ac.jp/wp-content/uploads/2013/04/13en_preston.pdf> accessed 27 March 2017

¹⁵⁰² See Principle 10 of the Rio Declaration on Environment and Development

¹⁵⁰³ BJ Preston 2013 (n 1501)

¹⁵⁰⁴ Ibid

¹⁵⁰⁵ Deborah Rhode, 'Whatever Happened to Access to Justice' (2009) 42 Loy. L.A. L. Rev. 869 <<http://digitalcommons.lmu.edu/llr/vol42/iss4/2>> accessed 27 March 2017

courts, overbroad restrictions on non-lawyer services, and inadequate pro bono involvement by lawyers and law students.

Flowing from Rhode's quotation will be the researcher's discussion of these limitations.

6.2iia Cost

The first and important limitation is cost. When the cost of litigation is so high,¹⁵⁰⁶ citizens can hardly afford adequate legal representation to pursue a legal matter especially where there is delay in justice delivery as the case in Nigeria. In the environmental law arena, cost is one of the major initial barriers to both public and private enforcement.¹⁵⁰⁷ Expert practitioners generally need more money to remain afloat and as Brooke LJ noted in *Burkett's case*,¹⁵⁰⁸ maintaining the viability of their practices is an important aspect of ensuring access to EJ and the existing level of 'pro bono' while laudable in itself, is not consistent enough and cannot bring a long-term solution. Commenting on the cost issue in environmental law cases, Sir Carnwath remarked '*Litigation through the courts is prohibitively expensive for most people, unless they are either poor enough to qualify for legal aid, or rich enough to be able to undertake an open-ended commitment to expenditure running into tens or hundreds of thousands of pounds.*'¹⁵⁰⁹ There is also a threat of adverse costs orders,¹⁵¹⁰ which has been an impediment to achieving access to EJ.¹⁵¹¹ Reviewing cost orders, the Environmental Justice Report suggests that cost rules; represent the single largest barrier to EJ.¹⁵¹²

¹⁵⁰⁶ Including legal fees, filing fees, cost of movement, mobilising witnesses and many more

¹⁵⁰⁷ M Comino, 'Improving Access to Justice for Environment' (1996) 12 Environmental and Planning Law Journal 233

¹⁵⁰⁸ *R v London Borough of Hammersmith and Fulham* [2004] EWCA Civ. 1342

¹⁵⁰⁹ Robert Carnwath, 'Environmental Litigation – A Way through the Maze?' (1999) 11(1) Journal of Environmental Law 3

¹⁵¹⁰ Developments in the common law have ameliorated these impacts in PIL cases. See P McClellan, 'Access to Justice in Environmental Law - An Australian Perspective' (Commonwealth Law Conference, London, 11-15 September 2005) <<http://www.austlii.edu.au/au/journals/NSWJSchol/2005/13.pdf>> accessed 27 March 2017; Jeff Smith, 'The Changing Nature of Environmental Law: Recent Developments in Public Participation' (Enterprise Sustainability Conference, Sydney, 2 June 2004) <http://www.edonsw.org.au/the_changing_nature_of_environmental_law_recent_developments_in_public_participation> 27 March 2017

¹⁵¹¹ See *Caroona Coal Action Group v Coal Mines Australia Pty Ltd (No 3)* (2010) 173 LGERA 280, 287; *Delta Electricity v Blue Mountains* (2010) 176 LGERA 424; *Oshlack v Richmond River Council* (1998) 193 CLR 72; For further discussion, see C Tollefson, D Gilliland and J DeMarco, 'Towards a Costs Jurisprudence in Public Interest Litigation' (2004) 83 Canadian Bar Review 473; and Chris Tollefson, 'Costs in Public Interest Litigation Revisited' (2011) 39 The Advocate's Quarterly 197

¹⁵¹² P Castle and others, 'Coalition for Access to Justice for the Environment' (Environmental Law Foundation and Others Publication, 2004) <https://www.foe.co.uk/sites/default/files/downloads/caje_general_briefing.pdf> accessed 27 March 2017

Under the US common law, each party pays its cost, however, environmental NGOs or a large community of lawyers' practices provides free service to those who cannot afford to pay and many of the environmental law provisions provide for recovery of attorney's fees in citizen suits.¹⁵¹³ In Nigeria, cost is still an impediment to PIL and that impede access to justice in oil pollution matters and ultimately access to EJ. Individuals and NGOs still bear their cost in Nigeria, but with a possibility of judges awarding cost.

6.2iib Locus Standi

Locus standi simply means 'standing to sue'.¹⁵¹⁴ This is to ensure that the litigant is the proper person to initiate proceedings. To have standing, the person must show an infringement or danger of infringement of his civil rights and obligations. However, it could create a legal challenge especially in PIL cases involving NGOs. As Stein observed, liberalising the rules will remove barriers to EJ.¹⁵¹⁵ The good news is that the traditional restrictions have been meaningfully relaxed and liberalised for environmental groups and NGOs in many common law developed countries¹⁵¹⁶ following Principle 10 of the Rio Declaration.¹⁵¹⁷ Some developing countries such as India,¹⁵¹⁸ Pakistan,¹⁵¹⁹ Bangladesh,¹⁵²⁰ the Philippines,¹⁵²¹ South Africa,¹⁵²² Sri Lanka¹⁵²³ and Malaysia¹⁵²⁴ are also granting liberal standing; however, it is still a barrier in many developing countries. Kenya,¹⁵²⁵ South Africa,¹⁵²⁶ Egypt¹⁵²⁷ and many more developing countries integrated Principle 10 into their laws.

¹⁵¹³ CWA § 1365 (D) provides for award of cost including expert witness

¹⁵¹⁴ It refers to the right of a party to have an action heard before a court of law or tribunal without any inhibition, obstruction or hindrance

¹⁵¹⁵ P Stein, 'Down Under Perspectives of the Environmental Court' (The UK Environmental Law Association Seminar on the Final Report Environmental Court Project, UK, 27th June 2000)

¹⁵¹⁶ For US see *Sierra Club v Morton* 405 US 727 (1972) and *FOE v Laidlaw*, 120 S. Ct. 693 (2000); for New Zealand cases see *Environmental Defence Society v South Pacific Aluminium* (No. 3) (1981) 1NZLR 216. For English cases see *R v HM Inspectorate of Pollution, ex parte Greenpeace* (No. 2) [1994] 4 All ER 329, *R v Secretary of State for the Environment, ex parte FOE* [1994] 2 CMLR 760; *R (Buglife) v Thurrock Thames* [2008] EWHC 475 (Admin) and *Environment East Gippsland Inc v VicForests* [2010] VSC 335.

¹⁵¹⁷ See also Art. 9 Aarhus Convention and Guideline 18 of UNEP Bali Guidelines

¹⁵¹⁸ *M.C. Mehta v Union of India* (1987), 1 SCC 395; *Subhash Kumar v State of Bihar*, AIR (1991) SC 420

¹⁵¹⁹ *Shela Zia v WAPDA*, PLD (1994) SC 416

¹⁵²⁰ *Farooque v Govt. of Bangladesh* (1997) 49 DLR (AD) 1

¹⁵²¹ *Minors Oposa v Sec. the Department of Environment and Natural Resources*, 33 ILM (1994), 173

¹⁵²² *Wildlife Society of Southern Africa and others v Minister of Environmental Affairs and Others*, Case 1672/1995 (1992)

¹⁵²³ *Mendis v Dublin de Silva* (1990) 2 Sri R 249

¹⁵²⁴ *KPJ Sekitar and Anor v Kajing and Ors* (1997) 3 MLJ 23

¹⁵²⁵ Articles 10 (2), 174 and 184(1) (c); Kenya now explores oil

¹⁵²⁶ Section 32 and 34 of the Constitution, National Environmental Management Act, 1998 and the Promotion of Access to Information Act, 2000; South Africa also has EJ challenges.

¹⁵²⁷ Art 87 of 2014 Constitution

In the US, standing has its origins in private common law and has resulted in preclusion of EPILs for failing to prove standing to bring suits purely for protecting the environment as ‘actual or imminent’ injury to their members needs to be shown.¹⁵²⁸ The US Constitution¹⁵²⁹ followed this common law position and added that the litigant will show ‘injury-in-fact’. The US Supreme Court developed this over time in many cases and followed by the US federal courts.¹⁵³⁰ In addition to showing an ‘injury-in-fact’,¹⁵³¹ Article III, Section 3 of the US Constitution requires a prospective litigant to show that such injury is concrete and particularised; actual and imminent, not conjectural or hypothetical; fairly traceable to the challenged action; and must be likely that a favourable judicial decision will prevent or redress the injury.¹⁵³² With the statutory citizen suits provisions, standing are better for the litigants including the NGOs.¹⁵³³

In Nigeria, common law standing rules are also generally applied which also had posed many problems for NGOs. The test case on standing in PIL was the 1961 case of *Olawoyin v AG Northern Region*¹⁵³⁴ where the Federal Supreme Court dismissed the case for lack of standing to institute PIL among other reasons. Also in the oil pollution case of *Amos v SPDC*,¹⁵³⁵ the court expected the plaintiff to prove ‘special damages by way of personal injury, property or pecuniary damage over and above that suffered by the general public. The Supreme Court in *Adesanya v President of the Federal Republic of Nigeria*¹⁵³⁶ while interpreting section 6 (6) (b) of the 1979 Constitution¹⁵³⁷ also denied standing by holding that public right can only be asserted by the Attorney-General as representative of the public.¹⁵³⁸ The above decisions led to denial of

¹⁵²⁸ *Summers v Earth Island Institute*, 552 US 128 S.Ct. 1118 (2008)

¹⁵²⁹ Art. III, Section 3

¹⁵³⁰ *Sierra Club v Morton* 405 U.S 727, 92 S.Ct. 1361 (1972); *Lujan v Defenders of Wildlife*, 504 U.S 555 (1992); *FOE v Laidlaw* 528 U.S 167(2000), *NRDC v EPA*, 440 F.3d 476 (2006), but see *NRDC v EPA* appeal case 464 F.3d1, 373 (2006). See generally BC Mank, ‘Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come?’(2009) 34 Columbia Journal of Envtl. Law 1

¹⁵³¹ See *Lujan case*.

¹⁵³² This strict approach was restated in *Summers case above* by a majority of five against four dissenting showing gradual shift on standing citing Laidlaw’s decision

¹⁵³³ Discussed Infra

¹⁵³⁴ (1961) 1 NSCC 165

¹⁵³⁵ (1974) 4 ECLSR 48, (1977) S.C. 109

¹⁵³⁶ [1981] 2 NCLR 358

¹⁵³⁷ Now 1999 Constitution

¹⁵³⁸ However, Fatayi Williams JSC gave a dissenting judgment allowing standing leading to different confusing interpretations; see NJ Aduba, ‘A Critical Appraisal of Judicial Interpretation of the Principle of Locus Standi in Nigeria’ (The 1988 General Assembly of the Social Science Council of Nigeria, NISER Ibadan, July 1988); BA Susu, ‘Locus Standi, the Constitution (1979) and Confusion in the Courts’ (1983) 40(2) Nigerian BJ 83; JO Akande, ‘The Problem of Locus Standi in Judicial Review’ [1982] Nigerian CLR 53; NJ Aduba, ‘Judicial Interpretation of the Principle of Locus Standi in Matters Relating to Local Government in Nigeria’ (1993) 4(3) Justice 36

standing for many individuals¹⁵³⁹ from then until the famous case of *Fawehinmi v Akilu*¹⁵⁴⁰ where the Supreme Court broadened standing scope. The Supreme Court followed *Akilus' case* in *Adeniran and Anor v Inter-Land Transport Limited*.¹⁵⁴¹ Despite *Akilu* and *Adeniran decisions*, there was still confusion on the interpretation of standing; however, some successive court pronouncements have followed this broad-minded trend.¹⁵⁴² In environmental pollution cases, there have also been controversies and inconsistencies in judicial decisions regarding standing, but more restrictive¹⁵⁴³ especially where NGOs are involved for not meeting direct injury requirements, thereby denying many aggrieved victims of environmental pollution access to judicial redress.¹⁵⁴⁴ This was the case of *Oronto Douglas v SPDC*.¹⁵⁴⁵ The Court of Appeal set aside the trial court decision and ordered a retrial because of breach of some procedural rules by the trial court.¹⁵⁴⁶ Unfortunately, by the time the appellate court delivered its judgement, the project was completed. The decision in *Gbemre v SPDC and others*¹⁵⁴⁷ brought hope alive for the Niger Deltans. In that case, Justice Nwokorie, granted leave to the applicant to institute proceedings in a representative capacity for him and for the community to apply for an order enforcing or securing the enforcement of their fundamental rights to life and human dignity. This case is positive, but not the judicial trend in enforcement of pollution laws in Nigeria.

The standing rule has been changing since then with judicial proceedings highlighted above and so many others as well as the Fundamental Rights (Enforcement Procedure) Rules of 2009, but there is still no clear standing rule regarding PIL in Nigeria. In the recent case of *Centre for Oil Pollution Watch v NNPC*,¹⁵⁴⁸ the court still denied standing despite some recent rulings favouring standing. The US approach has been improved by citizen suits but could be widened and the Nigerian cases improved by the FREP Rules only in human right issues.¹⁵⁴⁹ It is important that Nigeria should give effect to Principle 10 of the Rio Declaration that liberalised standing in environmental cases to enhance access to justice in environmental matters particularly where NGOs are involved. Nigeria should consider usefulness of the relevant provision of Bali

¹⁵³⁹ *Oloriode v Oyebi* (1984) 5 SC 1; *Thomas v Olufosoye* (1986) 1 NWLR (pt. 18) 669; *AG Kaduna State v Hassan* (1985) 2 NWLR (pt. 8) 483; *Orogan v Soremekun* (1986) 5 NWLR (pt. 44) 688; and *Egbe v Adefarasin* (1987) 1 NWLR (pt. 47) 1; and *Bolaji v Bamgbose* (1986) 4 NWLR (pt. 37) 632

¹⁵⁴⁰ (1987) 12 SC 136 and *Akilu v Fawehinmi* (No.2) (1989) 2 NWLR (pt 102) 122

¹⁵⁴¹ (1991) 9 NWLR, (pt 214) 155

¹⁵⁴² *SPDC v Nwauka* (2001) 10 NWLR (pt. 720), 64

¹⁵⁴³ See *SPDC v Chief Otokoto and others* (1990) 6 NWLR (pt. 159) 693; *N.N.P.C. v SELE* (2004) ALL FWLR (pt. 223) 1859 CA, but see *SPDC v Elder Banigo and Anor* (2011) LPELR-9783(CA, 1380

¹⁵⁴⁴ See the cases discussed herein

¹⁵⁴⁵ Suit No FHC/25C/573/93, unreported, and delivered on 17th February 1997

¹⁵⁴⁶ *Douglas v Shell* Unreported Suit No. CA/L/143/97

¹⁵⁴⁷ (2005) Suit No. FHC/B/CS/53/05

¹⁵⁴⁸ (2013) 15 NWLR (Pt.1378) 556

¹⁵⁴⁹ The Fundamental Rights (Enforcement Procedure) Rules of 2009

Guidelines¹⁵⁵⁰ and its implementation guide¹⁵⁵¹ designed to help State nationals in interpreting standing widely as this will help in enhancing EJ for the Niger Deltans.

6.2iic Delay

Delay can be an impediment to private enforcement because it takes longer time, cost more and may be frustrating.¹⁵⁵² There are many aspects of delay, which can be an impediment to PIL in environmental law. The first is delay in instituting a case because of several laws with limitation period. In Nigeria, for instance *John Eboigbe v NNPC*¹⁵⁵³ failed because of statute of limitation in the NNPC Act, 1977. To aggravate this is the problems of the access to courts caused by inadequate funds, difficulty in accessing lawyers, coordination and many other problems. Another dimension of delay is where a case last longer in court.¹⁵⁵⁴ Establishment of an environmental court or allocation of cases to certified environmental judges, efficient case management and improvement of funding of EJ cases could help a judiciary that understood environmental law to overcome these delay.¹⁵⁵⁵ In the US, states such as Texas, New York, Hawaii, and Washington all established environmental courts/tribunals with different names and at national level, USEPA established two environmental tribunals including USEPA Office of Administrative Law Judges and USEPA Environmental Appeals Board,¹⁵⁵⁶ but that is not the case in Nigeria. Nigeria can borrow these concepts and structures, adapt it to suit the Nigerian situation to reduce delays and make enforcement better. In addition, eCourt processes that include a clear, comprehensive and current court website providing all necessary information for parties could help.

6.2iic Location Barrier

Location can act as a barrier to private enforcement or PIL in many ways. First, rural and remote communities most times are far from the seat of government. In addition, location can affect the ability to challenge decisions because most courts and tribunals are in the capital cities of each state necessitating several hours of travel to attend court or administrative sitting. The location or geography can also affect access and choice

¹⁵⁵⁰ Guideline 18 for this subsection: see Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation, and Access to Justice in Environmental Matters

¹⁵⁵¹ UNEP collaborated with UNITAR and the World Resources Institute (WRI) to develop a guide that seeks to offer assistance to governments towards the implementation of the Guidelines. See Stephen Stec and others, *Putting Rio Principle 10 into Action: An Implementation Guide for the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters* (UNEP Report 2015)

¹⁵⁵² See *SPDC v Ambah* (1997) 66 LRCN 390; *Elf v Silo and Etsemi* (1994) 6 NWLR (pt 350) 258

¹⁵⁵³ (1994) 5 NWLR (Pt 347) 649

¹⁵⁵⁴ See JG Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (Hamburg: LIT VERLAG Munster 2000)

¹⁵⁵⁵ This includes setting timelines in the proceedings; case management conferences; alternative dispute resolution and case review by the court to assure ensure that deadlines are met. For further discussion, see Brian J Preston, 'Benefits of Judicial Specialisation in Environmental Law: the Land and Environment Court of NSW as a Case Study' (2012) 29 Pace Environmental Law Review 396, 419

¹⁵⁵⁶ For further discussion, see George Pring and Catherine Pring 2016 (n 926)

of lawyers and experts, and the costs of obtaining their services. In the US, the challenges of location appears better as state courts do deal with pollution issues unlike Nigeria where many cases take place in federal high courts.

6.2iie Non-expert Practitioners and Judicial Officers

The quality of justice dispensed largely depends on the quality of the people that dispense justice. In the environmental law cases, judges interpret laws or determine laws on standing and the award of costs and damages, injunctions, evidential rules and so many others.¹⁵⁵⁷ Few expert practitioners and judges understand the issues involved even in developed countries.¹⁵⁵⁸ In England for instance, the UK Environmental Justice Project raised concerns about judge's expertise in handling environmental cases, and the deficiency in judicial comprehension of key tenets of environmental law.¹⁵⁵⁹ Lord Woolf's report also stated concern about judicial 'myopia'¹⁵⁶⁰ in this regard at that time. Many analysts have also voiced their concerns about this.¹⁵⁶¹ Sometimes, Judges are corrupt, lack real independence, and are very executive-minded, therefore easily influenced by the executive/government.¹⁵⁶² Looking at the issues of corrupt judges, Oputa JSC noted

It is a calamity to have a corrupt judge.... Honesty and judicial rectitude are therefore the very minimal requirements of the judicial office.¹⁵⁶³

Non-expert practitioners or corrupt judges will affect achievement of EJ even with best infrastructures and legal instruments. Incidentally, judges are not compelled to give reasons for decisions in many jurisdictions, though they usually provide guidelines to control and regulate their choices, making it more difficult to access EJ.

Having highlighted the general problems that could be faced by public litigants and enforcers, it will be important to discuss them as they relate to the US and Nigeria. In

¹⁵⁵⁷ John Bonine "The Public's Right to Enforce Environmental Law" in Stephen Stec (ed), *Handbook on Access to Justice under the Aarhus Convention* (The Regional Environmental Center for Central and Eastern Europe Publishing 2003) <<https://www.unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/handbook.final.pdf>> accessed 27 March 2017

¹⁵⁵⁸ Ibid

¹⁵⁵⁹ P Castle and Others, (n 1512), 33

¹⁵⁶⁰ H Woolf, 'Are the Judiciary Environmentally Myopic?' (1992) 4 (1) 4th Annual Garner Lecture, *Journal of Environmental Law*

¹⁵⁶¹ M Grant, *Urban Planning Law* (Sweet and Maxwell 1982) 334; M Adebawale 2004 (n 1337) and H Fenwick and G Phillipson, 'Public Protest, the Human Rights Act and Judicial Responses to Political Expression' [2000] *Public Law* 627

¹⁵⁶² See for instance see, Abiyemo Blog, 'Justice Binta Nyako Accused of Collecting \$2 Million from Diezani's Ally, Jide Omokore' National News <<http://abiyamo.com/justice-binta-nyako-accused-of-collecting-2-million-from-diezani-ally-jide-omokore/>> accessed 27 March 2017

The role of the court in enforcing pollution laws and achieving independence is discussed infra

¹⁵⁶³ Chukwudifu A Oputa, *In the Eyes of the Law* (Friends Law Publishers, 1992) 12

the US, most relevant issues in the oil industry are creation of the statutes; therefore, the researcher will discuss the points under the US citizen suits.

6.3 US CITIZEN SUITS

The US Congress statutorily extended private persons involvement using citizen suits.¹⁵⁶⁴ By citizen suits, private citizens and NGOs possess the power to sue polluters for violations of environmental statutes. Citizen suits emanated from the CAA because of lack of diligent enforcement by the government enforcers.¹⁵⁶⁵ The court held in *NRDC v Train*¹⁵⁶⁶ that its provision reflected a deliberate choice by Congress to widen citizen access to the courts and to supplement and effectively assure the implementation and enforcement the Act.¹⁵⁶⁷ Originally, citizen suits were generally for injunction save for the provision of the CWA.¹⁵⁶⁸ Sunstein viewed it as a mechanism for controlling unlawfully inadequate enforcement of law.¹⁵⁶⁹ The empirical research by Greve¹⁵⁷⁰ under the CWA in the 1980s showed that environmental NGOs filed most citizens' suits cases because they possess sufficient expertise and resources. However, there was no particular trend in the number of lawsuits brought against USEPA in the US Chamber of Commerce between 1995 and 2010 according to a study of environmental litigation against the USEPA showing that this may have changed.¹⁵⁷¹ Citizen's suits generally fills enforcement gaps, strengthens other forms of citizen participation in environmental enforcement, helps towards

¹⁵⁶⁴ Citizen Suit is a creation of statute.

¹⁵⁶⁵ Recognizing that government enforcement alone may not ensure achievement of enforcement goals, it is to ensure that enforcement failure by the agencies will not be the end to enforcement action; See Timothy Belevetz, 'The Impact on Standing Doctrine in Environmental Litigation of the Injury in Fact Requirement in *Lujan v. National Wildlife Federation*' (1992) 17/1 William and Mary Environmental Law and Policy Review 103

¹⁵⁶⁶ 51 0 F.2d 692 (1974)

¹⁵⁶⁷ Ibid 700

¹⁵⁶⁸ Section 404 (s) (3)

¹⁵⁶⁹ CR Sunstein, 'What's Standing after *Lujan*? of Citizen Suits, "Injuries," and Art. III' (1992) 91 (2) MICH. L. REV. 163

¹⁵⁷⁰ MS Greve, 'The Private Enforcement of Environmental Law' (1990) 65 Tul. L. Rev. 339; See also JG Miller, 'Private Enforcement of Federal Pollution Control Laws' (Pt 111) (1984) 14 ELR 10407. Several NGOs such as NRDC, *Sierra Club*, *the Environmental Defense Fund*, *the Chesapeake Bay Foundation*, *Trial Lawyers for Public Justice*, *the Atlantic States Legal Foundation* and *Friends of the Earth* filed majority of suits from May 1984 to September 1988. In addition, majority of penalties collected between 1988 and 1993 were obtained in cases brought by four groups: See PH Lehner, 'The Efficiency of Citizens Suits' (1995) 2 Alb. L. Envtl. Outlook 4

¹⁵⁷¹ See Government Accountability Office, *Environmental Litigation: Cases against EPA and Associated Costs over Time* (GAO Publication 13 2011) <<http://www.gao.gov/new.items/d11650.pdf> accessed 27 March 2017> accessed 27 March 2017. The figure were trade associations (25%), private companies (23%), local environmental and citizens groups (16%), and national environmental groups (14%) dominated the lawsuits brought under CAA over the study period. See also Stephen Johnson, 'Sue and Settle: Demonizing the Environmental Citizen Suit' (2014) 37 Seattle University Law Review 891 <<http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2226&context=sulr>> accessed 7 May 2017

implementing environmental controls and may influence regulatory agency to negotiate with the citizens or induce a polluter to change behaviour.¹⁵⁷²

Allowing citizen access to court remedies is to help to guarantee the protection of their rights and improves the quality and fairness of the enforcement process. Citizen suits are like a double-edged sword because government thinks that citizen involvement may disrupt its enforcement efforts or are concerned about being shamed if a citizen suit succeeds; therefore tries to improve their enforcement efforts and citizens think that government agencies do not properly fulfil their enforcement responsibilities and sue as well. Here, citizen suits help in enforcement as government's desire to prevent citizen action, enhances regulatory enforcement steps and the public's suspicion that government may not vigorously implement certain laws may lead to regulation granting citizens a statutory right to bring a lawsuit to require the government to perform its assigned regulatory duties.

Environmental citizen-suit provisions do not provide for financial rewards but provided for recovery of attorneys' fees and litigation costs. Also under the CWA, suits may produce fines up to \$25,000 per violation, per day payable to the Treasury irrespective of whether USEPA or citizens litigated the matter.¹⁵⁷³ This payment is important in achieving compliance and thereby reducing EJ because according to the court in *Hudson v US*¹⁵⁷⁴ all civil penalties have some deterrent effect. Worthy of mention is that apart from injunctions and legal costs, the relief is to remedy the violation or other illegal action and not compensation. Despite its positive side, there are challenges faced with citizen suits.

6.3i Potential Difficulties of Citizen Suits

The main potential difficulty is its tendency to interfere with government enforcement activities. This can be in many ways including potential interference with ongoing or planned enforcement actions; potential filing of ill-founded actions which could establish unfavourable judicial precedents that could hinder the government's subsequent enforcement activities; sovereign immunity and potential creation of congestion in courts with frivolous claims and creation of atmosphere of adversarial hostility that may discourage future cooperation and standing.¹⁵⁷⁵ The statutes cover some of these potential difficulties. To deal with interference with government enforcement activities, citizens cannot file citizen suit where government enforcement action is already underway¹⁵⁷⁶ to allow the government to perform its enforcement

¹⁵⁷²In the US, mere notification of intended citizen suit often prompts compliance. See E Roberts and J Dobbins (n 1475)

¹⁵⁷³ See 33 U.S.C. § 1319(d) (1994).

¹⁵⁷⁴ 522 U.S. 93, 102 (1997)

¹⁵⁷⁵ For further discussion, see RI Van Heuvelen and LK Breggin, 'Citizen Participation in U.S. Environmental Enforcement' (2nd INECE International Conference on Environmental Enforcement Proceedings, Budapest, September 1992) <<https://old.inece.org/2ndvol1/vheuuele.htm>> accessed 27 March 2017

¹⁵⁷⁶ See CWA § 505(b) (1) (B)

actions without interruption.¹⁵⁷⁷ However, citizens can intervene where there is standing¹⁵⁷⁸ and in a timely manner.¹⁵⁷⁹ Worthy of note is that Rule 24(b) of the US Federal Rules of Civil Procedure provides for permissive intervention allowing a citizen to intervene if he or she has a claim or defence that has a question of law or fact in common with the government's action. Some statutes also bar citizen suits when the government has undertaken certain administrative enforcement activities.¹⁵⁸⁰ With the doctrine of sovereign immunity, where regulatory action is targeted to prompt or to challenge implementation of statutory objectives or where government engages in activities that may pollute the environment, the government may be shielded unless the immunity is waived by the government.¹⁵⁸¹ To deal with sovereign immunity problems, some statutes removed immunity from the government.¹⁵⁸² The US Congress also used numerous mechanisms discussed hereunder, including notice requirements, bar, delay and attorney fees awards to ease these problems.

6.3ia Mechanisms of Dealing with Interference with Government Enforcement Activities

There is a sixty-day notice before commencing a citizen suit to inform the president or the state where the alleged violation occurs.¹⁵⁸³ This will enable them to either stop the violations, or at least negotiate with the potential plaintiff. There must also be failure or need to prove delay from the regulatory agency to perform any non-discretionary act or duty.¹⁵⁸⁴

The second mechanism is the barring of citizen suits action where government has commenced action and is '*diligently prosecuting*'¹⁵⁸⁵ an enforcement action¹⁵⁸⁶ '*to require compliance*'.¹⁵⁸⁷ This is very significant to this research because diligent prosecution will help reduce EI and therefore the researcher will evaluate this. In some cases, only court actions may bar a citizen suit and in other cases, a statute may preclude a citizen suit because the government has commenced one of several listed enforcement actions.¹⁵⁸⁸ Additionally, to bar a citizen's suit, prosecution should be in good faith and with deliberate speed.¹⁵⁸⁹ However, on commencement of a citizen suit,

¹⁵⁷⁷ Van Heuvelen (n 1575)

¹⁵⁷⁸ Not permitted if the citizen's interest is adequately represented by existing parties

¹⁵⁷⁹ Rule 24(a) of the Federal Rules of Civil Procedure

¹⁵⁸⁰ CWA § 505(b) (1) (B)

¹⁵⁸¹ Private enforcement sometimes necessitates bringing lawsuits against the government in its regulatory or proprietary capacity.

¹⁵⁸² SARA 1986

¹⁵⁸³ See section 310(d) (1) of CERCLA, but the notice period differ. For instance RCRA by its § 6972(b) (2)(A) (2000), requires ninety-day post-notice delay.

¹⁵⁸⁴ See Section 310(a) (2) of CERCLA and the CAA 42 US Code 7604

¹⁵⁸⁵ This happens where there is no dispositive ruling, merit decision, or consent decree on a matter and it is not on appeal

¹⁵⁸⁶ Section 310(d)(2)

¹⁵⁸⁷ See, e.g., CAA, 42 U.S.C. § 7604(b)(1) (B) (2000)

¹⁵⁸⁸ These exclusions are only for listed enforcement actions.

¹⁵⁸⁹ US Senate Report, S. REP. No. 91-1196, at 65 (1970), reprinted 1974

the subsequent commencement of a government enforcement action does not preclude citizen's enforcement.¹⁵⁹⁰ A question then is how diligently must the government prosecute to bar a citizen suit? What is important is whether the government is moving steadily, with reasonable speed, energy, effectiveness and professionalism to secure compliance.¹⁵⁹¹ In *State v Indiana Waste Sys., Inc.*,¹⁵⁹² a state court interpreted 'diligent prosecution' to mean the degree to which the government remained involved in the case after commencing the action.¹⁵⁹³ This in the researcher's opinion is the extent that the government is doing what ought to be done while prosecuting the case after filing. This appears to be the reasoning of the court in *Hudson Riverkeeper Fund v Harbor at Hastings Associates*,¹⁵⁹⁴ where a decision had been pending for two years before the plaintiffs filed their citizen suit. In the *Hudson's case*,¹⁵⁹⁵ the court held that New York State's diligent prosecution barred a Resource Conservation and Recovery Act (RCRA), 1976 because not only that the parties had engaged in significant settlement discussions, but also the state had obtained an interlocutory order and moved for contempt before the defendant filed for bankruptcy.

Where there is diligent prosecution to bar citizen suits,¹⁵⁹⁶ the next question would be whether the enforcement agency diligently prosecuted to seek compliance. Where an order whether from government or a court that does not require compliance or that is without a sufficient penalty to deter continuing violations cannot bar citizens' suit.¹⁵⁹⁷ This is because insufficient penalties or higher economic benefits for non-compliance will not likely deter violations. In the landmark decision of *FOE Inc. v Laidlaw*,¹⁵⁹⁸ the penalty of \$100,000 was held not be sufficient under the circumstances¹⁵⁹⁹ therefore the matter was not diligently prosecuted to bar a citizen suit. In the matter, the South Carolina Department of Health and Environmental Control initially sought a penalty of \$120,000. There was no written record of how it arrived at the figure, and without consideration of several factors including economic benefit because of noncompliance set forth and approved by their Board in December 1991. The court entered \$100,000 as Consent Order and did not order an injunction requiring the defendant to comply with its permit, but requires only that the defendant make "every effort" to comply. The presupposition is that if the state had diligently prosecuted, the penalty would have been higher. For a settled government action to bar citizen suits there should be an

¹⁵⁹⁰ *Freeport-McMoRan, Inc. v K. N. Energy, Inc.*, 498 U.S. 426, 428 (1991), See also *Acme Printing Ink Co. v Menard, Inc.*, 881 F. Supp. 1237, 1244

¹⁵⁹¹ But see *New York Coastal Fisherman's Association v New York Sanitation Department* 772 F. Supp. 162 (S.D.N.Y. 1990)

¹⁵⁹² 603 N.E.2d 181, 189 (Ind. App. 1992)

¹⁵⁹³ See also *Gardeski v Colonial Sand and Stone Co* 501 F. Supp. 1159 (S.D.N.Y. 1980)

¹⁵⁹⁴ 917 F. Supp. 251/(S.D.N.Y. 1996), 256

¹⁵⁹⁵ *Ibid*

¹⁵⁹⁶ CAA § 304(b)(1) (B), 42 U.S.C. § 7604(b)(1) (B) (2000)

¹⁵⁹⁷ *Gwaltney of Smithfield, Ltd. v Chesapeake Bay Foundation, Inc* 484 U.S. 49, 57 (1987)

¹⁵⁹⁸ 890 F. Supp. 470 (D.S.C. 1995)

¹⁵⁹⁹ *Ibid*, see also *Atl. States Legal Found., Inc. v Universal Tool and Stamping Co.*, 735 F. Supp. 1404 (N.D. Ind. 1990)

injunction requiring compliance or/and an adequate deterrent penalty and for a penalty to coerce compliance and deter violations; it must recover from a violator more than the economic benefit.¹⁶⁰⁰ This is also the view of the researcher. In addition, where an enforcement action did not result in compliance over a prolonged period, it is not diligent. Conversely, viewing agency action as inadequate will make the court to consider the citizen action notwithstanding any pending agency action.¹⁶⁰¹ Administrative orders do not bar citizen suits unless they prevent the continuance of violations alleged in the citizen suits¹⁶⁰² because it is never self-enforcing, making non-compliance to lead to judicial enforcement.

Another mechanism is attorney fees award in citizen suits. Under the common law PIL in the US, each party pays its cost. However, many citizen suits provisions provide for recovery of attorney's fees. This attorney's fee is very important because costs can be daunting, therefore without recovering; many citizens may not afford to enforce environmental legislation thereby likely to defeat the aim of the law and could lead to EI. However, recovering attorney's fee may not be very easy in practice.¹⁶⁰³

In oil pollution cases, section 206 of SARA added section 310 to CERCLA authorising citizens to challenge the adequacy of a clean-up action in court,¹⁶⁰⁴ after selected clean-up action¹⁶⁰⁵ and may not be where there is a remedial action.¹⁶⁰⁶ This may help in reducing pollution caused by exploration activities, but also not interfere with potential government action. As explained earlier, fear of private enforcement alone can trigger compliance.

6.3ii Achieving Enforcement Goals through Citizen Suits

As already discussed, a citizen suits can be a valuable enforcement tool. According to Roberts and Dobbins, '*citizen suits can serve as the microphone that helps citizen views to be heard.*'¹⁶⁰⁷ Because citizen suits are cost intensive,¹⁶⁰⁸ time consuming and requires expert knowledge, citizens sometimes tries to explore other options such as confronting the polluter directly or approaching the media with information, to

¹⁶⁰⁰ See *FOE v LaidLaw*, 120 S. Ct. 693 (2000 and *Atl. States Legal Found., Inc. v Eastman Kodak Co.*, 933 F.2d 124, 128 (2d Cir. 1991)

¹⁶⁰¹ S. REP. No. 91-1196 note... 37 (1970), reprinted in 1 CAA legislative history, at 401, 437 (1974). [Vol. 28

¹⁶⁰² See *N. Cal. River Watch v Sonoma County Water Agency*, 1998 WL 886645; *Culbertson v Coats American, Inc.*, 913 F. Supp. 1572, 1578–79 (N.D. Ga. 1995)

¹⁶⁰³ For full discussion see: KD Florio, 'Attorneys' Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?

<http://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bcealr/27_4/03_TXT.htm>

accessed 27 March 2017

¹⁶⁰⁴ 42 U.S.C. § 9659

¹⁶⁰⁵ 42 U.S.C. § 9613(h)(4), Section 113(h)(4)

¹⁶⁰⁶ Nigeria could do that as well

¹⁶⁰⁷ E Roberts and J Dobbins (n 1475)

¹⁶⁰⁸ Although attorney's fee may be recovered, there are many other cost associated with litigation

embarrass the polluter into compliance or approach the government for enforcement action before court actions.

Before 1982, most citizen suits were against the regulator to adopt tougher standards vis-à-vis regulated industries,¹⁶⁰⁹ or to compel government or its agencies to take regulatory actions that they had failed to take.¹⁶¹⁰ There are many reasons for that. Cases against regulators will have broader policy impact, more so there may be many companies to sue. More importantly is that not only is proving ongoing site-specific violations is very difficult and costly, it mainly requires the alleged violator's cooperation, therefore may be difficult. Most US environmental statutes include citizen suits and provide for penalties through their several amendments.¹⁶¹¹ Senator George Mitchell who authored the amendment of RCRA thought that there was dire need for the amendment when he said

Only EPA can sue to abate an imminent hazard under current law. If EPA does not act, the endangerment continues.... this simply does not make sense. The Environmental Protection Agency clearly does not have the resources to deal with all of these sites, nor do the States....¹⁶¹²

How frequently do citizens sue? Citizens' involvement is dependent on many factors including interest, government role, resources and the cause of the problem: whether it is lack of applicable standards or a perceived government failure to act. In addition, whether citizens sue depends on what that citizen wants to achieve whether to sue for monetary damages, to halt the violation, and to seek civil penalties or to compel regulatory action.¹⁶¹³ The researcher will discuss this in detail below.

6.3iia Lawsuits to Obtain Monetary Damages

One aim of a citizen lawsuit is getting compensation for damages for environmental harm.¹⁶¹⁴ This is mainly achieved through common law remedies based on the violation of private rights as the US citizen suits provision do not allow plaintiffs to

¹⁶⁰⁹ Until 1978, only 25 cases were brought directly against alleged polluters under the CAA and CWA. See DA Feller, 'Private Enforcement of Federal Anti-Pollution Laws Through Citizen Suits: A Model' (1983) 60 DEN.L.J. 553. See also Environmental Law Institute, *Citizen Suits: An Analysis of Citizen Enforcement Actions under EPA-Administered Statutes* (Environmental Law Institute publications III, 1984)

¹⁶¹⁰ Few suits brought against alleged violators in subsequent years with main increase in the 1980s.

¹⁶¹¹ The CWA, RCRA, Sec 310 CERCLA, Sec 206 SARA, Sec 304 CAA, Sec 1449 Safe Drinking Water Act

¹⁶¹² D Riesel, *Environmental Enforcement: Civil and Criminal* (Law Journal Press New York 1997) Ch. 15, 18 quoting 130 Cong. Rec. 59150 (daily ed. July 25, 1984)

¹⁶¹³ They can still settle matters out of court instead of expensive and time-consuming lawsuit. Where there is a consent decree, it can include legally enforceable provisions governing the future conduct of the parties.

¹⁶¹⁴ This can considerably strengthen citizen's power to cause compliance. A potential judgment for personal injury resulting from pollution can include compensation for medical expenses, lost wages or reduced earning capacity and more. Furthermore, there may be additional award where there is prove of malicious act. See *Browning-Ferris Indus., Inc. v Kelco Disposal, Inc.*, 492 U.S. 257 (1989)

recover any personal damages for violations of environmental laws and regulations. The elements to be established include intentional or negligent violation of an expected standard of conduct, which caused actual damage to the plaintiff. The burden of proof can be high. Some courts or judicial rules can lessen the burden for public interest. Example is that judicially established fact that certain kinds of polluting activity cause certain kinds of physical damage and this might allow a plaintiff to recover without proving conclusively that the defendant's practice was the actual cause of injury.¹⁶¹⁵ Additionally, statutory or regulatory environmental standards can assist a plaintiff as well as demonstration of negligence.

6.3iib Lawsuits to Halt Violations

This is simply an injunctive lawsuit meant to stop violations. In the US, before initiating a suit, most laws provide for advance notice of up to 120 days to the alleged violator, state and federal environmental officials.¹⁶¹⁶ To order injunctive relief, the suit needs to prove a violation of law, and establish entitlement to that injunctive relief. The court has the discretion to select the appropriate method of achieving compliance. It is also possible to obtain an injunction in a common law cause of action brought to redress a private environmental injury, such as a private nuisance.¹⁶¹⁷

6.3iic Citizen Enforcement Suits Seeking Civil Penalties

These penalties are payable to the government and are there to remove any profit earned by the violator for polluting activities, mitigate harms and punish the violator.¹⁶¹⁸ Monetary penalties imposition was originally reserved for government enforcement agencies. In the US, many laws have civil penalty provisions in their citizen suit clauses¹⁶¹⁹ with some amounting up to \$25,000 per day, per violation whether instituted by citizen or USEPA.¹⁶²⁰ Allowing civil penalties is a step in the right direction as it makes enforcement powers of government and the citizen equal. It ensures consistency in enforcement practices, treats violators equally, and prevents violators from evading full enforcement where citizens enforce the law and in some cases award costs to citizen litigants such as including reasonable attorney and expert witness fees.¹⁶²¹

¹⁶¹⁵ TA Brennan, Causal Claims and Statistical Links: The Role of Scientific Uncertainty in Hazardous Substance Litigation. (1988) 73 CORNELL L. REV. 469

¹⁶¹⁶ U.S. courts take this requirement very seriously. See *Hallstrom v Tillamook City.*, 493 U.S. 20 (1989)

¹⁶¹⁷ For further discussion, see E Roberts and J Dobbins (n 1475)

¹⁶¹⁸ Under the section 304(g) (2) CAA, judges may assign up to \$100,000 of these penalties to a fund which will be used for 'beneficial mitigation projects consistent with' the Act.

¹⁶¹⁹ CWA section 505(a); RCRA § 7002(a); CAA section 304(a), CERCLA

¹⁶²⁰ See CERCLA discussed in chapter 4

¹⁶²¹ See the CWA § 1365 - Citizen Suits

6.3iId Suits to Influence Government Action

This is sub-divided into non-discretionary and discretionary agency decisions. Where it is a non-discretionary action, citizens could go to court to force agencies to perform their specific statutory assignments¹⁶²² after notifying the agency to take regulatory action first. In *Environmental Defense Fund v Thomas*,¹⁶²³ the court held that USEPA must take a decision regarding the revision of national ambient air quality standards whether the review is likely to prompt revision or not because CAA provides that an agency "shall complete a thorough review" of air quality criteria. Regarding discretionary actions, private enforcers can challenge discretionary decisions about whether and how to regulate either under particular environmental statutes or under a generalized Act governing the procedures by administrative agencies.¹⁶²⁴ However, this is more difficult to challenge, but reversal can be on points of law, arbitrariness and procedural flaws.¹⁶²⁵ This threat of citizen challenge to discretionary decisions might force the agency to take care about the procedures it employs in reaching results, therefore increasing compliance.¹⁶²⁶

6.3iii Parties to Citizen's Suit

Apart from the standing rules, it is important that the plaintiff will represent the public interest fairly and thoroughly in citizen suits and that, the judiciary does not decide cases where there is no real injury suffered.¹⁶²⁷ For this reason, plaintiffs bringing a lawsuit must allege that: the actions had injured them or are likely to injure them; the challenged action caused the injury; and there is the likelihood of redress in the event of a positive decision.¹⁶²⁸ The defendants can be violators or the government, in its regulatory or other capacities such as business owner capacity. Parties may sue the government if the intent is to prompt or to challenge implementation of statutory objectives or as a business owner where government engages in polluting activities. However, the doctrine of 'sovereign immunity' prevents citizen suits against the government unless the government under the Foreign Sovereign Immunities Act of 1976 waives it explicitly or impliedly.¹⁶²⁹

¹⁶²² See CAA § 304(a) (2). This can be through mandamus. See *Heckler v Chaney*, 470 U.S. 821, 833 n.4 (1985)

¹⁶²³ 870 F.2d 892 (2d Cir. 1989)

¹⁶²⁴ See the US CAA § 307(b)(1)

¹⁶²⁵ E Roberts and J Dobbins (n 1475)

¹⁶²⁶ Suits seeking judicial review of agency decisions have been an important way of forcing agencies to consider the environmental impacts of their actions under the NEPA. See *Calvert Cliffs Coordinating Comm. v Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971) that established the right of citizens to bring suits to enforce the environmental assessment requirements NEPA. That was followed by numerous suits for failure to file an EI statement, or for filing an inadequate one leading to 116 injunctions in the 1980s. For more information see Environmental Law Institute, 'Environmental Impact Assessment: Integrating Environmental Protection and Development Planning' (1991) ELI Working Paper

¹⁶²⁷ NGOs and PILs can sue on behalf of the public

¹⁶²⁸ *Valley Forge Christian College v Americans United for Church and State*, 454 U.S. 464 (1982)

¹⁶²⁹ This has been relaxed by SARA 1986

6.3iv Requirements for Effective Citizen Enforcement

For a successful citizen suit, there is a need for a sound legal framework and independent judiciary, adequate resources, support from other institutions within the environmental protection system especially with regard to information necessary for effective litigation and even more.

6.3iva A Good Legal Framework and Judiciary

For citizen participation to be truly effective there must be a provision of avenues allowing citizens to go to court to force agency action, challenge the results of the regulatory agency decisions, or prosecute violators. To succeed, the laws should be clear and unambiguous for a private person to know when there is a breach.¹⁶³⁰ A sound legal framework needs an independent judiciary as this gives a sense of confidence enforcement system. For instance, the court shuts its door to citizen litigants where there is restrictive ruling of standing. The award of damages, injunctions and many more counts as it really encourages or discourages future suits. Overall, a strong legal system aids citizens to participate effectively in environmental enforcement through judicial and non-judicial mechanisms.¹⁶³¹

6.3ivb Adequate Resources, Knowledge and Confidence

The usefulness of adequate resources cannot be underestimated. Many times, because of finances, environmental organisations or ‘public interest law firms’ are the only actors with the resources and expertise to pursue citizen suits and many other associated enforcement actions. For citizen suits to succeed there may be need for provision of legal aid to enable individuals and small local group to participate. There may also be need for public education program especially in initial matter. To deal with resource issue, government can subsidise citizen environmental enforcement litigation directly, allow a tax deduction for the costs of enforcement programme and can make cost-shifting provisions to enable individuals to initiate their enforcement actions¹⁶³²

6.4ivc Support from Other Institutions

Support from other institutions manifest itself in giving out information especially with the right framework. Non-availability of access to information about potential violations stalls citizen suits.¹⁶³³ Self-reporting can be one good source of information

¹⁶³⁰ For example, where a statute, regulations, or permits, specifies emission levels, it will be easier to identify and prove the violation.

¹⁶³¹ E Roberts and J Dobbins (n 1475); Bali Guidelines especially 15-26 also provides for avenues that State nationals can use to help achieve this.

¹⁶³² Ibid

¹⁶³³ ELI 2002 report on citizen suits identified lack of readily accessible information as the single most important factor inhibiting citizen enforcement. See Environmental Law Institute, *A Citizen's Guide to Using Federal Environmental Laws to Secure Environmental Justice* (ELI Research Report No. 981624, 2002) <http://www.epa.gov/environmentaljustice/resources/reports/annual-project-reports/citizen_guide_ej.pdf> accessed 27 March 2017

as data submitted through that means can help to initiate and win cases. Where such data exist, the government should ensure that they are easily available to the public. A Freedom of Information Act can ensure that citizens obtain such data and government can disseminate environmental data collected in the course of its regulatory duties.¹⁶³⁴

6.3v Measuring the Success of the Citizens' Suit in the US

Citizen suit provisions were lying latent from the 1972¹⁶³⁵ when it was enshrined in the CWA until towards the end of 1970's when citizens started using it as a tool of enforcing environmental laws. By 1984, the Environmental Law Institute recorded more than 350 private enforcement actions.¹⁶³⁶ In the same vein by 1987, Naysnerski and Tietenberg¹⁶³⁷ reported institution of over 1,200 citizen enforcement cases.¹⁶³⁸ Of all the cases brought, Gardner found that Sierra Club alone had litigated 20 cases to conclusion under the CWA since citizen suits were authorised.¹⁶³⁹

Despite this number, there were problems such as coordination of public and private enforcement and financial and organisational incentives to attract or retain members. In addition, standing rule¹⁶⁴⁰ was always a problem for the environmental NGOs until the decision of *FOE v Laidlaw*, regarded as a win for the environment at least for environmental NGOs for reducing the strict rule of standing. To many environmentalists, the standing rule was one of the '*most profound setbacks for the environmental movement in decades*.'¹⁶⁴¹

The question is whether NGOs role met with success in reducing environmental hazards using the citizen suits or whether in reality citizen suits benefit the environment. To answer this question, the researcher will examine some reported citizen suits as well as examine some available research. Several pieces of research exist with different data from different years and using different criteria measuring the success of citizen's suit. Smith in 2004¹⁶⁴² and May in 2003¹⁶⁴³ relied on the 1994

¹⁶³⁴ see Environmental Law Institute, 'Public Access to Environmental Information' (1992) ELI Working Paper

¹⁶³⁵ Citizen suit started with 1970 CAA Amendments (42 U.S.C. § 7604 (2012))

¹⁶³⁶ Environmental Law Institute (n 1609); RE Schwartz and DP Hackett, 'Citizen Suits against Private Industry under the Clean Water Act' (1984) 17 Nat. Resources L. 32

¹⁶³⁷ Wendy Naysnerski and Tom Tietenberg (n 1483)

¹⁶³⁸ Ibid

¹⁶³⁹ PJ Gardner, 'Citizen Suit Enforcement in a Mixed System: Evidence from the Clean Water Act' [2014] Working Paper Princeton University <

http://scholar.googleusercontent.com/scholar?q=cache:HbZdwE6gzIEJ:scholar.google.com/&hl=en&as_sdt=0,5> accessed 27 March 2017

¹⁶⁴⁰ Discussed above

¹⁶⁴¹ William Glaberson, 'Novel Antipollution Tool is Being Upset by Courts' *New York Times* (New York, 5 June 1999) A1

¹⁶⁴² KM Smith, 'Who's Suing Whom: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought under EPA-Administered Statutes, 1995- 2000' (2004) 29 Colum. J. Envtl. L. 359

study by the Environmental Law Institute of late 1970s and early 1980s to identify early counts of citizen suits. Farhang relied on data from the Administrative Office of the U.S. Courts in his own research¹⁶⁴⁴ while Gardner¹⁶⁴⁵ relied on two sources of data from 1972 to 2012, which are decided cases from Westlaw¹⁶⁴⁶ and data obtained from the USEPA notices of intent to sue through a Freedom of Information Act (FOIA) request, which are available from 2003 to 2012.¹⁶⁴⁷

Enumerating some points from some other researchers as his reasons, May believed citizen suits are important and successful.¹⁶⁴⁸ To him, citizen suits foster the rule of law and compliance especially in a time of limited government resources.¹⁶⁴⁹ He also sees citizen suits as making agencies and even unelected governmental agencies accountable thereby motivating agencies to act.¹⁶⁵⁰ Furthermore, it encourages representational democracy.¹⁶⁵¹ In addition, citizen suits will guarantee that public officials are making good on national commitment to provide meaningful environmental protection.¹⁶⁵² Lastly, it enhances public participation,¹⁶⁵³ helps educate law students,¹⁶⁵⁴ shapes public opinion,¹⁶⁵⁵ and encourages responsible environmental stewardship.¹⁶⁵⁶

May in his research examined jurisprudential and statistical trends in citizen suits, which reveal that citizen suits are more challenging to litigate. Challenges found are

<http://heinonline.org/HOL/Page?handle=hein.journals/cjel29&div=15&g_sent=1&collection=journals> accessed 27 March 2017

¹⁶⁴³ James May, Now More than Ever: Trends in Environmental Citizen Suits at 30' (2003) 10 (1) Widener Law Review <<http://ssrn.com/abstract=1334221>> accessed 27 March 2017

¹⁶⁴⁴ Sean Farhang, 'Legislative-Executive Conflict and Private Statutory Litigation in the United States: Evidence from Labor, Civil Rights, and Environmental Law' (2012) 37(3) Law and Social Inquiry 657

¹⁶⁴⁵ (n 1639)

¹⁶⁴⁶ Because it is the only available source of data that can be used to make determinations about changes over time

¹⁶⁴⁷ He used USEPA data because most potential citizen suits are settled before filing

¹⁶⁴⁸ James May (n 1643)

¹⁶⁴⁹ DR Hodas (n 1392) 1651

¹⁶⁵⁰ 116 CONG. REC. 33,103 (1970) (statement of Sen. Muskie); See also C Rechtschaffen and DL Markell (n 1261)

¹⁶⁵¹ Where laws enacted by Congress are faithfully executed with controversies resolved by a Judiciary

¹⁶⁵² Quoting Sen. Scott at the 116 CONG. REC. 33,102 (1970); JJB Ruhl, Thinking of Environmental Law as a Complex Adaptive System: How to Clean up the Environment by Making a Mess of Environmental Law' (1997) 34 HOUSTON L. REV. 933

¹⁶⁵³ NAF Popovi, 'The Right to Participate in Decisions that Affect the Environment' (1993) 10 PACE ENVTL. L. REV. 683

¹⁶⁵⁴ RF Kennedy Jr. and SP Solow, 'Environmental Litigation as Clinical Education: A Case Study' (1993) 8 J. ENVTL. L. & LITIG. 319

¹⁶⁵⁵ IS Russell, 'The Role of Public Opinion, Public Interest Groups, and Political Parties in Creating and Implementing Environmental Policy' (1993) 23 ENVTL. L. REP. 10,665

¹⁶⁵⁶ RR Kuehn, 'Shooting the Messenger: The Ethics of Attacks on Environmental Representation' (2002) 26 HARV. ENVTL. L. REV. 417; RR Kuehn, 'Interference in Environmental Representation' (2003) 33 ENVTL. L. REP. 10, 598; OA Houck, 'Are Humans Part of Ecosystems?' (1998) 28 ENVTL. L. 1; cf JM Gaba, 'We Do Not Hold the Earth in Trust' (2003) 33 ENVTL. L. REP. 10, 325

statutory and common law preclusion, constitutional challenges such as standing, mootness, sovereign immunity and separation of powers, remedies, attorney fees and many more. His research also found that despite the challenges, statistical trends showed growth. May's research found that three out of every four judicial opinions stemming from the US principal environmental enforcement laws involves at its core, a citizen suit.¹⁶⁵⁷ He used a table¹⁶⁵⁸ to show that reported judicial opinions in environmental citizen suit cases from 1970-2002 accounted for more than 1,500 reported federal decisions in civil environmental cases and between 1993-2002, federal courts issued opinions in an average of 110 civil environmental cases a year.¹⁶⁵⁹ He also found that there were at least 850 citizen suit legal events including judicial opinions, notices of intent to sue, complaints, and consent orders a year.¹⁶⁶⁰ From 1995 until May 2003, citizens filed 426 suits, earned 315 compliance-forcing judicial consent orders, under the CWA and CAA, and submitted more than 4,500 notices of intent to sue, including more than 500 and 4,000 against agencies and members of the regulated community, respectively.¹⁶⁶¹ USEPA refer fewer cases to DOJ for enforcement at that time¹⁶⁶² and DOJ brought comparably fewer civil environmental cases¹⁶⁶³ with lower civil penalties in SEPs, administrative penalty, and injunctive relief values.¹⁶⁶⁴ He also found that citizen suits influence federal laws and that five citizen suit decisions by the Supreme Court was cited as authority in federal courts more than 10,000 times in court between 1973 and 2002.¹⁶⁶⁵ The research concluded that regulatory agencies enforce environmental laws less vigorously and less often at the time of his research especially with its enforcement budget slashed and priorities changed. He generally concluded in line with Houck¹⁶⁶⁶ that environmental citizen suits have left an indelible imprint on modern federal jurisprudence.¹⁶⁶⁷

Gardner's analysis shows that interest groups affect the development of the law in many ways. The research focuses on the role of actors particularly courts and the

¹⁶⁵⁷ James May (1643) 4

¹⁶⁵⁸ Ibid, 8

¹⁶⁵⁹ Using ELR, Westlaw and Lexis search of citizen suit and civil cases reported under the statutes (last searched May 15, 2003).

¹⁶⁶⁰ His research was in 2003

¹⁶⁶¹ James May (n 1643)

¹⁶⁶² The number of CWA and CAA cases USEPA referred to DOJ fell 25% overall, with a 55% decline for the CWA alone

¹⁶⁶³ DOJ civil enforcement actions were down 20%

¹⁶⁶⁴ Judicial orders were down by 40%, civil penalties declined 62%, SEP values decreased by 70% and injunctive relief and administrative penalties values fallen about 15%. USEPA expressed concerns about diminishing inspections and criminal referrals, down 15 and 40%, respectively. The decrease of pollution burden from USEPA enforcement slowed to unbelievable 90%.

¹⁶⁶⁵ James May (n 1643) 4 and 7. The cases include 2,728 for *Sierra Club v Morton*, 1,882 for *Tennessee Valley Authority v Hill* 437 U.S. 153 (98 S.Ct. 2279), 809 for *Gwaltney of Smithfield, Ltd. v Chesapeake Bay Foundation, Inc.*, 3,916 for *Lujan v Defenders of Wildlife*, and 603 already for *Laidlaw* at three years at that time

¹⁶⁶⁶ Oliver A Houck, 'Unfinished Stories' (2002) 73 U. COLO. L. REV. 867

¹⁶⁶⁷ James May (n 1643) 7

interest groups in citizen suit activity. Gardner's analysis shows that private enforcement allows actors that are more political into the enforcement arena and the initiatives drove USEPA's regulatory agenda by forcing USEPA to react in various ways to enhance judicial developments with weighty effect on implementation and interpretation CWA regulatory program in all the cases.¹⁶⁶⁸ One major disadvantage found from Gardner's research is that private enforcement shifts resource burdens onto private plaintiffs, which may lead to under-enforcement.¹⁶⁶⁹

Coplan's research supports the findings of Gardner's research. Coplan's work examined the role of citizen enforcement litigation in the development of CWA regulatory scheme focusing on four examples where citizen enforcement litigation effected initiation of the regulatory process and drawing responses from both USEPA and Congress.¹⁶⁷⁰ His case studies include enforcement litigation brought to apply under-enforced CWA regulation of recreational shooting ranges, CAFO manure spreading, and pesticide water transfers.¹⁶⁷¹ Each of these enforcement initiatives involved enforcement against activities of or actors, such as gun owners with political lobbies that may have caused USEPA under-enforcement, and citizen enforcement was successful leading to an USEPA regulatory response.¹⁶⁷² Citizen's notice to sue under a CWA citizen suit provision alone forced Remington Arms to close down permanently.¹⁶⁷³ What is important to the researcher is that polluting activities by the Company and other shooting facilities had been going on unchallenged by USEPA and state agencies until Remington's case. Remington Arms proposed to switch from lead shot to steel shot and continue operation, but the Connecticut Coastal Fishermen's Association (CCFA) sued under both the CWA and RCRA. The appeal court held that an administrative order cannot preclude a citizen's suit, but there was no ongoing violation therefore CCFA suit failed,¹⁶⁷⁴ but Remington Arms still closed down following final irrevocable decision made by it in 1988 never to reopen the gun club in future. According to Boyer,¹⁶⁷⁵ it may be because the gun owners belong to one of the most powerful political organisations in the US.¹⁶⁷⁶ Coplan's study showed that NGOs

¹⁶⁶⁸ For further discussion, see KS Coplan, 'Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law' [2014] Pace Law Faculty Publication, Pace University School of Law <<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1932&context=lawfaculty>> accessed 27 March 2017

¹⁶⁶⁹ As discussed above, this is one major initial barriers to private enforcement; see S Burbank, S Farhang and HM Kritzer, (n 1488); M Comino (n 1507).

¹⁶⁷⁰ Ibid

¹⁶⁷¹ KS Coplan (n 1668) 121

¹⁶⁷² NRDC's lawsuits seeking to compel USEPA to issue regulations establishing effluent limitations for toxic pollutants led to a statutory amendment and a complete restructuring of CWA regulatory priorities.

¹⁶⁷³ *Conn. Coastal Fishermen's Ass'n v Remington Arms Co.*, 989 F.2d 1305, 1308 (2d Cir. 1993)

¹⁶⁷⁴ Ibid

¹⁶⁷⁵ Barry Boyer and Errol Meidinger (n 1485)

¹⁶⁷⁶ See Sari Horwitz and James V Grimaldi, 'NRA-led Gun Lobby Wields Powerful Influence over ATF' *Washington Post* (Washington United States 15 December 2010)

enforcement initiatives forced USEPA to engage in a public, adversarial rule-making process that it would have foregone under the pure bilateral regulatory model.¹⁶⁷⁷ NGO citizen suits spurred even more modest agency actions in some cases.¹⁶⁷⁸ In 2008, USEPA granted part of a petition from the Bluewater Network requesting a comprehensive assessment of the water quality impacts of various wastes from cruise ships.¹⁶⁷⁹ NGOs petition from NGO requesting that USEPA publish revised water quality criteria pursuant to section 304(a) (2) led to response by USEPA in 2009 requesting for public comments concerning the potential promulgation of ocean acidification criteria.¹⁶⁸⁰

Smith attributed the rise of citizen enforcement actions to two possible factors.¹⁶⁸¹ The first was that the level of government enforcement decreased under the Reagan administration¹⁶⁸² and the second was the maturation of environmental groups. Based on Austin study,¹⁶⁸³ from 1981 to 1983, there was a decline in the number of enforcement actions initiated by the USEPA as well as a high-pitched reduction in USEPA enforcement activities. It was also found that there was perceived laxness in USEPA enforcement and environmental groups moved from litigation to force USEPA to promulgate legally required effluent limitations to violations by industrial dischargers.¹⁶⁸⁴ Because of citizen suits/private enforcement of the eighties and possible change of government from Ronald Reagan in 1989, it appears that USEPA budget increased making it USEPA more active in the nineties. The researcher found that between 1995 and 2003, USEPAs' budget was higher and as highlighted by May in his research, researcher found that the data showed a near continuous rise in the number of staffs and closely knitted budget till 2012 and it started reducing from 2013 showing both budget cut and staff reduction which negatively affected regulatory

<<http://www.washingtonpost.com/wp-dyn/content/article/2010/12/14/AR2010121406045.html>>

accessed 27 March 2017

¹⁶⁷⁷ KS Coplan (n 1668)

¹⁶⁷⁸ Ibid

¹⁶⁷⁹ See Letter from Benjamin H. Grumbles, Assistant Administrator, EPA, to Russell Long, Program Advisor, and Teri Shore, Clean Vessels Campaign Director, Bluewater Network (Jan. 31, 2008), See *Draft Cruise Ship Discharge Assessment Report*, 72 Fed. Reg. 72,353 (Dec. 20, 2007)

¹⁶⁸⁰ See Letter from Benjamin H Grumbles, Assistant Administrator, EPA, to Miyoko Sakashita, Attorney, CBD (Jan. 16, 2009), <http://www.biologicaldiversity.org/campaigns/ocean_acidification/pdfs/EPA_Response_to_CBD_Ocean_Acidification_Petition.pdf> accessed 27 March 2017

¹⁶⁸¹ KM Smith (n 1642)

¹⁶⁸² Elizabeth R Thagard, 'The Rule that Clean Water Act Civil Penalties Must go to the Treasury and How to Avoid It' (1992) 16 Harv. Env'tl. L. Rev. 512 (stating that during the Reagan Administration, the number of enforcement attorney positions dropped from 200 to 30 and the enforcement budget went from \$1.4 billion to \$1.16 billion)

¹⁶⁸³ JL Austin, 'The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General' (1987) 81 Nw. U. L. Rev. 220, 233

¹⁶⁸⁴ For further discussion, see Diana C Lee, 'Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation: Its Implications for Citizen Suits under the Clean Water Act' (1989) 16 (2) Ecology L.Q. 570 <<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1358&context=elq>> accessed 27 March 2017

enforcement.¹⁶⁸⁵ In the researcher's opinion, the combined effect of USEPA staff and budget reduction resulted in a drop off USEPA enforcement that pushed up by the activities of the private enforcers. Going by May, Gardner and Coplan research, researcher sees a link between citizen's actions and regulatory enforcement.

Boyer's research examined the impact of citizen's suit on penalty calculations and the use of penalty funds under the CWA.¹⁶⁸⁶ He reiterated that the designation of citizen suits is to change behaviour: to ensure compliance, bring actions against non-compliance and against non-enforcing agencies. In terms of penalty calculations, his research showed that penalties calculated in private enforcement are much higher than the one in public enforcement despite USEPA's penalty calculations guidelines of 1980 and revised 1984¹⁶⁸⁷ and one is inclined to ask why. The reason for widely divergent results from the same USEPA's 1984 penalty policy guideline is the emphasis on '*economic law enforcement*', which may have been the focus of private enforcers. Economic law enforcement aims at depriving the violator of any financial gains from noncompliance,¹⁶⁸⁸ using two main factors: the *economic benefit factor* and a *gravity factor*. Boyer's research found that calculating the two separately, adding, and adjusting them cause divergent results making citizen groups' damage figures to run ten to one hundred times higher than the amounts the USEPA customarily receives in settled cases leading resentment and opposition from citizen suit defendants.¹⁶⁸⁹

The economic benefit includes the estimated benefits from delayed costs, avoided costs and competitive advantage¹⁶⁹⁰ while the gravity factors are actual/potential environmental harm, the importance of the violated provision and other programme-specific factors. Then there will be addition of adjustment factors such as negligence/wilfulness, degree of cooperation, ability to pay and many more.¹⁶⁹¹ All these create discretionary gaps where interested parties can inject enforcement philosophies and with that, citizen suit plaintiffs generally interpret the penalty policy to achieve its goal of deterrence. His research reveals that government agencies appear to be more interested in reducing the problem while citizens' litigants are interested in

¹⁶⁸⁵ See: USEPA, *EPA's Budget and Spending* (n 1344)

¹⁶⁸⁶ BB Boyer, 1983 (n 1484)

¹⁶⁸⁷ See EPA Civil Penalty Policy of 1984. In Gwaltney's appeal case, the Court considered that Gwaltney's penalty ought to be increased, not reduced, because of wilfulness and imposed a \$1.3 million civil penalty on Gwaltney to deter possible future violations by Gwaltney or other similarly situated polluters. The analysis of the penalty in *Chesapeake Bay Foundation v Gwaltney of Smithfield, Ltd.*, shows that of \$1.3 million penalty for longstanding violations, less than 5% represented the supposed economic benefit from delayed compliance with others was for court's assessment of the environmental harm and the need for deterrence. On appeal, the US Supreme held that a citizen-plaintiff might sue if the complaint alleges in good faith an ongoing violation at the time of filing: see *Gwaltney of Smithfield, Ltd. v Chesapeake Bay Foundation* 108 S. Ct. 376 (1987).

¹⁶⁸⁸ Economists generally favour taxes on harmful activities. See A Kneese and C Schultze (n 850)

¹⁶⁸⁹ Barry Boyer and Errol Meidinger (n 1485) 925

¹⁶⁹⁰ EPA, *Civil Penalty Policy* (Feb. 16, 1984) 2996

¹⁶⁹¹ *Ibid* 2999; the policy provides that adjustments should not to exceed the gravity component, and sets percentage limits for types of adjustments and levels of justification.

making violators pay higher penalties.¹⁶⁹² He found that the discrepancy between the USEPA's and the private enforcers' penalty calculations deters settlement.¹⁶⁹³ This in the researcher's opinion is good although it shows inconsistencies in the courts' approach to imposing penalties, and even though settlement decongest the court, it may not really improve compliance and because research generally shows that higher penalties discourage violation,¹⁶⁹⁴ the violator would perceive these risks of violation¹⁶⁹⁵ and comply.

To support the positive role of citizens' NGO is Konisky's research. His research found that minority communities receive more regulatory attention when mobilized through the presence of environmental justice advocacy organisations.¹⁶⁹⁶ CWA's citizen suit provided that recovered penalties in a private enforcement action should go to the Federal Treasury,¹⁶⁹⁷ however despite that provision, settlements are usually incorporated into judicial decrees to ensure enforceability. However, courts usually give parties freedom to negotiate terms of their agreements leading to the possibility of creating '*environmental funds*' to fund conservation-related work in the area where the violations took place instead of disappearing into the Federal Treasury, where it could be diverted to different uses. In practice, representatives from the regulated community indicate that settlements have been split among the Federal Treasury, State environmental and natural resource agencies, plaintiff organisations, and charitable, educational, or public environmental entities,¹⁶⁹⁸ therefore it is less clear what environmental benefits are being realised from the funds.

Some scholars have conversely argued that citizen suits provisions create incentives for environmentalist plaintiffs to pursue their self-interest, in the form of settlements,

¹⁶⁹² This is what defendants called '*a cash register approach*' according to one defence lawyer. For further discussion, see Barry Boyer and Errol Meidinger (n 1485) 924

¹⁶⁹³ The settlement for the *Sierra Club v Unocal* totalled over \$5 million. See 'Mark A Stein, 'Unocal to pay \$5.5 Million to End Lawsuit: Environment: Civil Settlement is the Largest Reached under the Clean Water Act' *Los Angeles Times* (Los Angeles, 23 February 1990).

¹⁶⁹⁴ See some research discussed in the enforcement section of chapter three

¹⁶⁹⁵ C Beccaria (n 871); K Ebeku, 2004 (n 871); S Rosseau (n 875); SL Stafford (n 742); P Shimshack and Michael B Ward (n 742); Gray and Deily (n 742); AG Heyes, Eight Things about Enforcement; Gary Becker 1968 (n 880)

¹⁶⁹⁶ Konisky and Reenock 2013 (n 179)

¹⁶⁹⁷ See S. REP. No. 414, 92d Cong., 2d Sess. 80, reprinted in 1972 U.S. CODE CONG & AD. NEWS 3668, 3745

¹⁶⁹⁸ According to data collected by industry sources, from January 1983 to May 1985, 29 controversies resulted in settlements of little less than one million dollars. Of this, public sector received slightly less than half, the U.S. Treasury about 22% and state/local agencies getting 20% (\$201,950), 21 of the 29 settlement agreements had special monitoring requirements, and many had negotiated penalty provisions for future violations. For further discussion see Barry Boyer and Errol Meidinger (n 1485) 933. In addition, DOJ data showed that direct fines in *American Canoe Association v Greensboro North Buffalo Waste Water* were \$3,000, with the settlement cost of \$129,000, which included local conservation projects and legal fees. Fines in *American Canoe Association v City of Wilson (NC) Wastewater Treatment* were approximately \$135,000. In *Waste Action Project v City of Anacortes (CA)*, the settlement required the defendant to pay approximately \$100,000 to non-party organisations for water monitoring and environmental projects.

remediation projects, and attorneys' fees, or to pursue symbolic victories with other value.¹⁶⁹⁹ Adler argues that because substantial portions of citizen suit settlements involve direct transfer payments to environmental groups, they could benefit.¹⁷⁰⁰ He also argues that large fines facilitate rent extraction,¹⁷⁰¹ through private settlements that subvert the intended scheme of citizen suits.¹⁷⁰² Adler¹⁷⁰³ proposed extension of property rights in environmental resources in three ways: property-based environmental protection, property-based standing and pollution prevention and coasian bargaining¹⁷⁰⁴ using Elizabeth Brubaker's study on the use of property rights to protect environmental quality in Canada.¹⁷⁰⁵ To him, with defined property rights, rights holders develop contractual relationships that address their specific needs or concerns. As Brubaker observed in her empirical study, when such rights are enforced, they provide a powerful incentive for firms to curtail pollution and reduce the harms it can cause.¹⁷⁰⁶ This proposition needs a test in practice.

Given the above analysis, some authors believed and the researcher agrees that the US citizen suits has been successful and may have added to other enforcement actions that helps in reducing EI in the US. For instance, Kravchenko noted that the success of the citizen suits has informed the adoption of citizen suit authority by other countries;¹⁷⁰⁷ Dernbach noted that it help to shape international legal norms¹⁷⁰⁸ and Bonine noted that its litigators have inspired, and help support public interest advocacy worldwide.¹⁷⁰⁹ Dernbach paper is of particular importance to this research because of the four aspects of citizen suits he focused on, the first three relates to this work. This first three are the manner it allow access to US courts, the rules concerning standing and the purposes of the laws authorising citizen enforcement.¹⁷¹⁰

¹⁶⁹⁹ JH Adler, 'Stand or Deliver: Citizen Suits, Standing, and Environmental Protection' (2000) 12 (39) Duke Environmental Law and Policy Forum <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1146&context=delpf>> accessed 23 December 2015

¹⁷⁰⁰ Ibid

¹⁷⁰¹ This means using resources of a company, organisation or an individual to obtain economic gain without reciprocating any benefits to the society through wealth creation.

¹⁷⁰² See MS Greve (n 1570)

¹⁷⁰³ JH Adler (n 1699)

¹⁷⁰⁴ Well-defined and enforced property rights can play a key role in stopping and preventing pollution.

¹⁷⁰⁵ See E Brubaker, *Property Rights in Defense of Nature* (Earthscan Publications Limited 1995) for full understanding. See also Guido Calabresi and AD Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 HARV. L. REV. 1089

¹⁷⁰⁶ Ibid, 19

¹⁷⁰⁷ S Kravchenko, 'Citizen Enforcement of Environmental Law in Eastern Europe' (2004) 10 Widener Law Review 475

¹⁷⁰⁸ JC Dernbach, 'Citizen Suits and Sustainability' (2004) 10 (2) Widener Law Review 503

¹⁷⁰⁹ See generally JE Bonine, 'Public Interest Environmental Lawyers – Global Examples and Personal Reflections' (2004) 10 WIDENER L. REV. 451 and JE Bonine, 'Private Public Interest Environmental Law: History, Hard Work, and Hope' (2009) 26 Pace Env'tl. L. Rev. 465

¹⁷¹⁰ JC Dernbach (n 1708)

6.4 PUBLIC INTEREST LITIGATION (PIL) IN NIGERIA

The US provides for citizen suits in the enabling laws, however, PIL in environmental cases exists by virtue of common law in Nigeria. The history of PIL stems from the attempts made decades ago by the Independence Constitution of Nigeria to include Bill of Rights enabling people to bring actions to enforce their rights. However, the initial interpretation was that by virtue of the Petition of Rights Act of 1958 (as amended) in 1964,¹⁷¹¹ suits against the government could only go on with the consent of the government raising *locus standi* issues.¹⁷¹² The Supreme Court decisions of *Lakanmi Kikelomo v AG Western Region*¹⁷¹³ and *Ademolekun v The Council of University of Ibadan*¹⁷¹⁴ however showed that the courts have the power to question the validity of a military Edict.¹⁷¹⁵ With ouster clauses to forestall judicial inquiry into actions of the military governments,¹⁷¹⁶ individuals started resorting to treaties such as African Charter as can be seen in *Abacha v Fawehinmi*.¹⁷¹⁷ In *Abacha v Fawehinmi*, the Supreme Court inventively asserted the courts' jurisdiction to hear a challenge to the military governments' detention powers by relying on the African Charter supremacy over the ouster provisions of Decree No 2 of 1984.¹⁷¹⁸ Return to civilian rule in 1983 saw a significant amount of PILs cases with *Adesanya v President of the FRN*¹⁷¹⁹ on standing being prominent at that time. In that case, the Supreme Court denied the plaintiff standing based on section 6(6) (b) of the then 1979 (now 1999) Nigerian Constitution because '*standing will only be accorded to a plaintiff who shows that his civil rights and obligations have been or in danger of being violated or adversely affected by the act complained of*'. Many other cases relating to standing and PIL followed with conflicting decisions and reasoning.¹⁷²⁰

¹⁷¹¹ This was the English Petition of the Rights Act 1860 applied as Statutes of General application in force before January 1900. The key point here is that government cannot be sued without government consent; See *Lahan v AG Western Region* (1961) WNLR 39

¹⁷¹² For further discussion see A Ojo, 'Constitutional Law and Military Rule in Nigeria' (Evans Brothers Nigeria Publishers Ltd), (1989) 247

¹⁷¹³ [1970] NSCC, Vol 9, 143

¹⁷¹⁴ (1967) 1 All NLR 213

¹⁷¹⁵ The focus is the competence of court to deal with ouster clauses in the military decrees as a background to reasons for extrajudicial matters by Nigerians

¹⁷¹⁶ Section 1 (2) of Decree no 28 of 1970

¹⁷¹⁷ [2001] CHR 20; According to Popoola, Gani Fawehinmi brought over three hundred PIL cases. See A Popoola, 'Public Interest Lawyering in Nigeria' (Access to Justices Sensitization Workshop on Public Interest Litigation in Nigeria, August 2009)

¹⁷¹⁸ See also *The Registered Trustees of the Constitutional Rights Project v Nigeria* 3 IHR Reports (1996) 137 where a high court stay execution of seven persons sentenced to death by a tribunal whose constitution and trial failed to satisfy key due process standards, pending the consideration of a Communication filed by the Constitutional Rights Project to the African Commission on the conviction and that led to a successful release

¹⁷¹⁹ (1981) All NLR 1

¹⁷²⁰ *Ukaegbu v NBC* [2007] 14 NWLR (Pt 1055) 551, *Akilu v Fawehinmi* and *Adeniran and Anor v Inter – Land* and many more

All these problems led to collaboration of Access to Justice Advocacy Organisation and the Nigerian Bar Association to push for reform, urging for inclusion of liberal standing rules to aid PILs; better legal space for representative actions and easier, faster procedures for enforcing fundamental rights. The collaboration yielded a result with the promulgation of the Fundamental Rights (Enforcement Procedure) Rules 2009 (FREP Rules)¹⁷²¹ pursuant to section 46(3) of the 1999 Constitution by the Chief Justice of the Federation, signed on 11th November 2009 and came into force with immediate effect. This rule carries the same force as the constitutional provisions, making it higher than other laws: therefore, in the event of inconsistency, the FREP Rules prevails. The FREP Rules was introduced because of the difficulties experienced with the 1979 FREP Rules with the main one being mandatory requirement of leave as a precondition for the enforcement of human rights which was discouraging aggrieved persons from pursuing their human rights. The 2009 FREP Rules made significant improvements including minimising technicalities and laying credence to substantial justice. It brought about three significant changes relevant to this research; (1) Paragraph 3 (b) of the Preamble, enlarged the sources of human rights jurisprudence from which the court can draw to make its judgments better. This includes municipal, regional and international Bills of Rights cited, brought to their attention or even the ones that court is aware of whether these Bills constitute instruments in themselves or form parts of larger documents. (2) Paragraph 3(e) obliged the courts to encourage and welcome PIL relating to human rights by stating that no human rights case may be dismissed or struck out for want of locus standi.¹⁷²² Thirdly, paragraph 3 (d) provides that the court shall proactively pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated, and the unrepresented.

With the discussion so far, one could see that PIL including environmental governance suffered some setbacks in Nigeria; however, there is emerging trend in NGOs being active in the enforcement of pollution laws in Nigeria to bridge the gap. The FREP Rules sets the stage for better NGOs involvement in matters of human rights abuses generally and in particular as it relates to oil-pollution laws in Nigeria as it relates to this research. Apart from the FREP Rules discussed above, there are no laws that mainly provided for NGOs involvement in environmental governance, but the EIA Act¹⁷²³ provides for access to information¹⁷²⁴ and public participation¹⁷²⁵ in environmental governance. The foregoing discussion, lays background for the

¹⁷²¹ The Constitution of the Federal Republic Of Nigeria, 1999, Fundamental Rights (Enforcement Procedure) Rules, 2009 under Chapter IV of the Constitution

<<http://www.refworld.org/pdfid/54f97e064.pdf>> accesses 15 January 2018

¹⁷²² This means that any interested person or group including human rights activist can institute human right cases.

¹⁷²³ EIA Decree No. 86 of 1992

¹⁷²⁴ Sections 9 (3) and 57

¹⁷²⁵ Section 7

discussion of PIL and oil pollution issues in Nigeria using FREP Rules and common law provisions.

6.4i Public Interest, the NGOs and Environmental Governance in Nigeria

As discussed in chapter five, government authorities are the primary enforcers of environmental laws and regulations in Nigeria. There are however avenues of private enforcement, PIL and public participation. The NGOs have used those avenues to enforce environmental laws in Nigeria.¹⁷²⁶ By way of history, civil societies surfaced in the ND to fight the perceived injustice meted out to the Niger Deltans. They were protesting non-ownership and non-control of oil, disproportionate distribution of benefits and burdens coming from it including challenging policies and practices that disadvantage the region, destroy its environment and impoverish its people.¹⁷²⁷ They notably started from Adaka Boro uprising through now established many NGOs. It ranges from communal and ethnic groups through pan-ethnic civil society and finally international civil groups and NGOs. These groups have been categorised into three: the Niger Delta-based groups or community based NGOs such as the Movement for South-South Peoples Conference and Niger Delta Women for Justice, national civil rights such as Civil Liberties Organisations (CLO) and international civil groups and NGOs such as Human Rights Watch, ERA, SERAP, Amnesty International and many more.¹⁷²⁸

The NGOs have been at the forefront of generally developing environmental laws in Nigeria including advocacy programmes and enforcement despite some challenges.¹⁷²⁹ According to Oshionebo and the researcher agrees pressure exerted by NGOs is often one of the factors, which produce successful regulatory outcomes.¹⁷³⁰ For instance, the CLO and Media Rights Agenda, which are NGOs, shaped or re-shaped the Freedom of Information Act, 2011 with their inputs.¹⁷³¹ They have used several channels to

¹⁷²⁶ Discussed below

¹⁷²⁷ For more on the emergence of civil societies in Nigeria in the mid-1980s, see MI Abutudu, *The State, Civil Society and the Decentralization Process in Nigeria* (CODESRIA Monograph Series Dakar 1995)

¹⁷²⁸ The community-based NGOs mainly deals with issues of resource control and deprivation of justice in terms of compensation causing them to always struggle against both the state and oil companies for fair or non-discriminatory treatment. The national and international NGOs mainly take the issue of breach of human or environmental rights of the Niger Deltans.

¹⁷²⁹ There are many NGOs in Nigeria challenging government policies including SERAC, SERAP, CESR, Amnesty International and many more.

¹⁷³⁰ Evaristus Oshionebo, 'Transnational Corporations, Civil Society Organisations and Social Accountability in Nigeria's Oil and Gas Industry' (2007) 15 (1) *African Journal of International and Comparative Law* 107

¹⁷³¹ The Freedom of Information Bill was drafted by a group of NGOs led by Media Rights Agenda: see Transcripts of Interview with IW, 30 August, 2001. See also Civil Liberties Organisation, *Accounts and Activities for 1999*, Lagos, CLO, 2000, 50. For further discussion, see OC Okafor, 'Modest Harvests: On the Significant (but Limited) Impact of Human Rights NGOs on Legislative and Executive Behaviour in Nigeria' (2004) 48(1) *Journal of African Law* 24.

influence ways that the Government, MNOCs and even individuals address Niger Delta problems. This they do by influencing policy makers and even acting as whistle blowers in some cases; thereby determining the outcome of some policy decisions. A good example of such influence is that SPDC revised its code of conduct to include mention of human rights for the first time.¹⁷³² They fund and engage in research on environmental matters and spur their membership networks to demand action by government.¹⁷³³ Their actions range from the use of litigation,¹⁷³⁴ publication and dissemination of information,¹⁷³⁵ lobbying of the MNOCs and the State,¹⁷³⁶ and public awareness campaigns such as environmental education programmes; amongst other strategies¹⁷³⁷ have helped in policy changes, formulation, and implementation, enforcement of pollution laws and fight for justice for the NDs.¹⁷³⁸ Also, because of perceived importance of oil, the Nigerian judiciary seem not to be proactive in deciding environmental cases, but NGOs role appear to have positively impacted on the judiciary as they now grant injunctions and award higher compensation¹⁷³⁹ and many more.¹⁷⁴⁰ With their advocacy roles, the government seem to have become more sensitive to the responsibilities of MNOCs to the Niger Delta people. Their activism has also played the role of naming and shaming which many times put the MNOCs on their toes because of social sanctions. Examining their role, Ikelegbe stated that civil groups have reconstructed the Niger Delta agitation into a broad, participatory, highly mobilised and coordinated struggle for self-determination, equity and environmental rights.¹⁷⁴¹ In addition, Ekhator stated that NGOs are playing major roles in the awakening of the international community to the plight of victims of environmental degradation in the Niger Delta.¹⁷⁴² All these actions are in line with Tatiana Nenova's research on corporate governance showing limited empirical evidence that suggests

¹⁷³² DF Murphy and J Bendell, 'New Partnerships for Sustainable Development: The Changing Nature of Business-NGO Relations, in P Utting, (ed.) *The Greening of Business in Developing Countries: Rhetoric, Reality and Prospects* (2002) 216, 227

¹⁷³³ See several Amnesty International researches, Human Rights Watch research, ERA and many others.

¹⁷³⁴ *SERACs case*

¹⁷³⁵ Amnesty Report on Bodo, UNEP Report and many more

¹⁷³⁶ Shell revised its code of conduct to include human rights and now it (and other MNOCs) regularly organises training and consultation with stakeholders based on MOSOP influence. For further discussion, see E Oshionebo 2007 (n 1730)

¹⁷³⁷ *Ibid*

¹⁷³⁸ As noted below, standing severely hinder NGO involvement in Nigeria.

¹⁷³⁹ See *Shell v Isaiah* [1997] 6 NWLR (Pt 508) 236; *Edamkue and others v Shell* Suit No. FHC/PH/84 & 85/94, Judgment dated 28 June, 1999 and many more

¹⁷⁴⁰ JG Frynas, Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria, 43(2) *Journal of African Law* (1999) 121, 122

¹⁷⁴¹ A Ikelegbe, 'Civil Society, Oil and Conflict in the Niger Delta Region of Nigeria: Ramifications of Civil Society for a Regional Resource Struggle' (2001) 39(3) *Journals of Modern African Studies* 437

¹⁷⁴² EO Ekhator, Improving Access to Environmental Justice under the African Charter on Human and Peoples' Rights: The Roles of NGOs in Nigeria (2012) 22 (1) *African Journal of International and Comparative Law* 63 <<http://www.eupublishing.com/doi/pdfplus/10.3366/ajicl.2014.0080>> accessed 27 March 2017

that private tools are more effective than public forms of enforcement in the typical environment of most developing and transition countries.¹⁷⁴³

Of all these roles, use of litigation is important in this research work as it helps in enforcing some laws. This they do by funding litigation, bringing their expertise, mobilising witnesses, and many more. The NGOs have been involved in many oil pollution cases; nationally, regionally and internationally but the researcher will examine their roles in few cases. Locally, the involvement of NGOs has led to successful judicial enforcement of the laws thereby giving justice to the victims.¹⁷⁴⁴ One good example is the case of *Gbemre v Shell*¹⁷⁴⁵ where ERA/FOE Nigeria and the Climate Justice Programme supported the plaintiffs legally and scientifically. Ako argued and the researcher agrees that without the involvement of NGOs *Gbemre v Shell* may not have succeeded.¹⁷⁴⁶ The *Gbemres*' case was decided by the Federal High Court in November, 2005, on noticing that gas was still being flared thirty two days after the decision, *Gbemre* went to court for contempt proceedings against SPDC and NNPC. On 10th April 2006, the Federal High Court granted a conditional stay of execution to allow the defendants one year to achieve a quarterly phase-by-phase stoppage of its flaring activities in Nigeria under the supervision of the court and with detailed submission of a detailed phase-by-phase technical scheme of arrangement by Shell and NNPC amongst other conditions. Shell and NNPC appealed the conditional stay, but the Court of Appeal did not sit to decide appeal for stay, the government transferred the judge on the matter and the case file went missing and case remained in limbo as it were.¹⁷⁴⁷ Nigeria still flares gas in 2018, meaning that the FG is yet to comply therefore the success is questionable.

Regionally, the role of NGOs is manifest in the case of *SERAC v Nigeria*¹⁷⁴⁸ where they funded litigation to the African Court of Human Rights against the Nigerian Government in that matter for its actions and inactions causing environmental harms and human right abuses in Ogoni Niger Delta. NGOs have utilised the judgment as a basis for social activism to pressure the government, its agencies and oil MNOs operating in the Niger Delta region.¹⁷⁴⁹ Internationally, the NGOs are still at the forefront of enforcement of the laws. The NGOs are now championing extra-territorial

¹⁷⁴³ IM Millstein and others, 'Enforcement and Corporate Governance: Three Views' (Focus: Global Corporate Governance Forum 2005)

<http://www.ifc.org/wps/wcm/connect/6ab71c8048a7e7b3accfef6060ad5911/Focus_ENFCorpGov3.pdf?MOD=AJPERES> accessed 27 March 2017

¹⁷⁴⁴ See *Gbemre v Shell* Suit No. FHC/BC/135/05

¹⁷⁴⁵ Ibid

¹⁷⁴⁶ RT Ako, 'Enforcing Environmental Rights under Nigeria's 1999 Constitution: The localisation of Human Rights in the Niger Delta Region' in Feyter K and others (eds), *The Local Relevance of Human Rights* (Cambridge University Press 2011) 287

¹⁷⁴⁷ Friends of the Earth, 'Archived Press Release FOE Press and Media' *Friends of the Earth Trust* (02 May 2007) <https://www.foe.co.uk/resource/press_releases/shell_fails_to_obey_gas_fl_02052007> accessed 27 March 2017

¹⁷⁴⁸ 155/96 ACmHPR October 27, 2001

¹⁷⁴⁹ This case will be analysed infra

cases suggesting that they are not meeting with success in Nigeria. Among the prominent cases are *Nigerian Farmers v Shell*, *Wiwa v Shell*,¹⁷⁵⁰ *Bodo Community v Shell and Kiobel v Shell and Ogale v Shell*. The researcher will be discussing these cases briefly to gain an insight into NGOs role and to know if these cases had in anyway helped in getting EJ especially in torts for the aggrieved persons.

6.4ia *Nigerian Farmers v Royal Dutch Shell and SPDC* (2013)¹⁷⁵¹ (2015)¹⁷⁵² and *Bodo Community v SPDC* (2012)

In the *Nigerian Farmers case*,¹⁷⁵³ FOE Netherlands helped the Nigerian farmers to file a civil law suit for pollution damage against Shell in the Netherlands where a Dutch court ruled in favour of one out of the four Nigerian farmers in 2013. The courts interestingly stated that SPDC had breached its duty of care by failing to take reasonable action to prevent third parties from tampering with oil wells.¹⁷⁵⁴ This ruling is positive because, it removed absolute defence of sabotage from Shell/SPDC and by extension, other MNOCs that normally evade their responsibilities because of sabotage claim. It also established jurisdiction of Dutch courts over both Shell's parent company and the Nigerian subsidiary, however applying the Nigerian law, it dismissed parent company liability for its subsidiary because under Nigerian law a parent company is not obliged to prevent its subsidiaries from injuring third parties abroad.¹⁷⁵⁵ This also shows the impact of laws on enforcement. The court of first instance not only denied the request by three other farmers to some key Shell documents to buttress their points, but also relied on Shell's own spill investigation reports leading to initial failure of their case.¹⁷⁵⁶ NGO still spearheaded the appeal where the Court of Appeals in November 2015 allowed the farmers to jointly sue Shell in the Netherlands. The court also allowed all disputable procedural issues including access to internal company documents, making it first time in legal history to obtain access internal company documents in court.¹⁷⁵⁷ The case is a landmark that sets a precedent in the fight against

¹⁷⁵⁰ 626 F. Supp. 2d 377 (S.D.N.Y. 2009)

¹⁷⁵¹ See also *Akpan and others v RDS and SPDC*

¹⁷⁵² *Dooh and Milieudefensie v RDS*

¹⁷⁵³ Case/docket number: C/09/337050/HA ZA 09-1580 (2013); See also the Court of Appeal of the Hague Cases: of 17 December 2015 ECLI:NL:GHDHA:2015:3586 (Dooh/Shell); ECLI:NL:GHDHA:2015:3587 (Shell/Akpan); ECLI:NL:GHDHA:2015:3588 (Oguru-Efanga/Shell)

¹⁷⁵⁴ This is in tandem with the US case of *Union Oil Co. v Oppen* 501 F. 2d 558 in which the Ninth Circuit held that the defendant oil company owed commercial fishers a duty to refrain from negligent drilling operations.

¹⁷⁵⁵ This was and has been a major setback for the NGOs.

¹⁷⁵⁶ Shell was happy with the outcome: BBC News 'Shell "Happy" with Nigeria Oil Leaks Verdict' *BBC News Africa* (London, 30 January 2013) <<http://www.bbc.co.uk/news/world-africa-21259497>> accessed 27 March 2017

¹⁷⁵⁷ EcoWatch, 'Nigerian Farmers Cleared to Sue Shell over Oil Spills in Landmark Court Ruling' *EcoWatch* (Ohio, 18 December 2015) <<http://ecowatch.com/2015/12/18/nigerian-farmers-shell/>> accessed 27 March 2017

the excesses of MNOCs in developing countries, which might open up avenues for extra-territorial litigation.¹⁷⁵⁸

The *Bodo v SPDC* case¹⁷⁵⁹ rose because of the 2008 and 2009 Bodo spill. Through the help of NGOs, Bodo Community challenged the RDS by class action in London, United Kingdom.¹⁷⁶⁰ In that suit, Shell accepted that the cause of the spill was equipment failure and accepted full responsibility.¹⁷⁶¹ SPDC also offered to pay compensation.¹⁷⁶² Accordingly, the Bodo community's UK lawyer had this to say about the spill *'this is one of the most devastating oil spills the world has ever seen and yet it had gone almost unnoticed until we received instructions to bring about a claim against Shell in this country.'*¹⁷⁶³ Information at the disposal of the researcher¹⁷⁶⁴ showed that several efforts made to resolve the issues in Nigeria yielded no result. These efforts ranged from actions of NOSDRA to that of host communities and even civil societies group. According to Lazarus Tamana *'before dragging Shell to London, SPDC highest offer in compensation was N250 million. It was when they knew the case was already here that they raised their offer to N3 billion.'*¹⁷⁶⁵

The question is why the wait until the company was challenged extra-territorially to accept responsibility and why the decision to challenge extra-territorially where it will likely cost more to litigate? Was all hope of getting justice in Nigeria lost? These are questions begging for answers. Even with acceptance of responsibility, NGOs helped to still pressure SPDC to offer reasonable compensation by going back to court, which led to Judge Akenhead planned visit to locus-in-quo¹⁷⁶⁶ to take evidence before ruling on the extent of damage. Shell did not wait for the visit to locus by Judge Akenhead, rather Shell intensified negotiation that resulted in increase in the compensation amount. The final negotiated figure was N81 billion (£55million).¹⁷⁶⁷ In the

¹⁷⁵⁸ However the matter is over seven years in court and the substantive suit is yet to be decided

¹⁷⁵⁹ [2014] EWHC 1973 (TCC)

¹⁷⁶⁰ The matter started in the high court on 6/4/11 and SDPC accepted responsibility under the Oil Pipelines Act in August 2011 and was willing to pay compensation under the Act. Jurisdiction here was based on the UK Civil Jurisdiction and Judgments Act 1982 and the parties consent

¹⁷⁶¹ See R Mason (n 333) See also BBC News, 'Ogoniland Oil Spills: Shell Admits Nigeria Liability' *BBC News* (London, 03 August 2011) < <http://www.bbc.co.uk/news/world-africa-14391015> > accessed on 05 August 2013

¹⁷⁶² Ibid

¹⁷⁶³ Martyn Day, Leigh Day and Co Solicitors, 3 August 2011.

¹⁷⁶⁴ For the statement of claim for this matter with the material facts is attached see Platform London < <http://platformlondon.org/wp-content/uploads/2012/06/The-Bodo-Community-and-The-Shell-Petroleum-Development-Company-of-Nigeria-Ltd.pdf> > accesses 01 February 2018

¹⁷⁶⁵ J Donovan, *Shell v Bodo Community: British Court to Hear Evidence in Nigeria* (Royal Dutch Shell Publication, July 26th, 2014) < <http://royaldutchshellplc.com/2014/07/26/shell-vs-bodo-community-british-court-to-hear-evidence-in-nigeria/> > accessed 27 March 2017

¹⁷⁶⁶ Port-Harcourt Nigeria

¹⁷⁶⁷ See Premium Times, 'Shell Offers to Pay N81 Billion for Oil Spill in Bodo, Nigeria' *Premium Times* (Abuja, 21 June 2014) < <https://www.premiumtimesng.com/news/163293-shell-offers-pay-n81->

researcher's opinion, the visit to locus would have exposed more pollution damage by SPDC to the world. The researcher also thinks that the agreement six years after spill is to protect Shell's international image. NGOs help to initiate this case in London brought reprieve to Bodo community and other ND communities as many ND communities are now suing MNOCs extra-territorially.

6.4IB *Kiobel v RDS (2013) and Ogiale v Shell (2017/2018)*

Despite *Bodo case* and *Nigerian Farmers cases*, expectations are waning following the court ruling in *Kiobel v RDS*¹⁷⁶⁸ and *Ogiale v Shell* in 2017.¹⁷⁶⁹ Invoking a presumption against applying statutes extraterritorially, the five-member majority ruled that the US Alien Tort Statutes (ATS) does not generally allow federal courts to recognize causes of actions for torts committed in foreign countries. In *Kiobel*, the court held that no corporation has been liable of human rights breach under the customary international law. The court noted that corporate liability has not attained a discernible, much less universal, acceptance among nations in their relations and cannot form the basis of a suit under the ATS. The court concluded that not only that the violation of the laws of nations cannot stand since the claims is under the ATS against corporations, but also the plaintiffs' claims fall outside the limited jurisdiction provided by the ATS.¹⁷⁷⁰ ATS plain language does not exclude any defendant and does not require the court to examine international law to determine its jurisdiction. That may justify why four concurring Justices expressly opined that the ATS confers jurisdiction, within limits, to recognize causes of action for torts committed abroad by American nationals,¹⁷⁷¹ and it does not seem to exclude corporations.¹⁷⁷² A very important point raised in *Kiobel* is whether Americans or American corporations are liable for torts committed abroad under ATS.¹⁷⁷³ In view of *Kiobel decision*, non-extraterritorial applicability of ATS stands and it is an impediment to achieving EJ through extraterritorial litigation by the Niger Deltans even with the assistance of the NGOs.

In *Ogiale v Shell*,¹⁷⁷⁴ the NGO called Stakeholders Democratic Network (SDN) also helped the Ogiale community to pursue the matter extra-territorially.¹⁷⁷⁵ However, the

billion-oil-spill-bodo-nigeria.html> accessed 27 March 2017. The settlement appears to be the largest payout to any African community following environmental damage.

¹⁷⁶⁸ *Kiobel v Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1662 (2013)

¹⁷⁶⁹ *HRH Okpabi and Others v RDS and SPDC Ltd* [2017] EWHC 89 (TCC)]; This case is on appeal and UK and Dutch jurisdiction may still allow extra-territorial suits if the appeal comes out successful

¹⁷⁷⁰ 621 F.3d 111, 120 (2d Cir. 2010) p 48. The Supreme Court affirmed this.

¹⁷⁷¹ *Ibid*, 1662

¹⁷⁷² Justice Breyer opined that a "minimal and indirect American presence" by a foreign corporation, through trading of its shares on the New York Stock Exchange and having an office in New York run by an affiliate, did not suffice to justify ATS jurisdiction. *Ibid*, 1671

¹⁷⁷³ *Kiobel* was a suit by foreign plaintiffs, against foreign defendants, for foreign conduct. For further discussion, see Doug Cassel, 'Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open' (2014) 89 (4) Notre Dame L. Rev. 1773

¹⁷⁷⁴ *HRH Okpabi and Others v RDS and SPDC Ltd* [2017] EWHC 89 (TCC)]

judge struck out the claims against RDS and its Nigerian subsidiary for want of jurisdiction as SPDC argued that the case concerned Nigerian plaintiffs and a Nigerian company similar to *Kiobel*, despite the plaintiff's argument that rampant corruption in Nigeria prevents them from achieving justice in Nigeria. The courts however gave the communities permission to file an appeal. The court also exonerated the parent company as not being responsible for the actions of its Nigerian subsidiary, despite RDS profiting from decades of abuses. The implication of the recent London ruling could be grave including improper clean-up¹⁷⁷⁶ and less payment for damages even with favourable judgment in Nigeria. The submission of Shell was that in *Bodo case*, the agreed applicable law would be the Nigerian law and that claims against RDS be abandoned, but not in *Ogiale case*.¹⁷⁷⁷ *Bodo case* exposed Shell's corporate impunity therefore SPDC is getting smarter as it argued that the new case involve damage from sabotage and theft. It is the researcher's opinion that there is no justifiable reason why SPDC will agree to jurisdiction in *Bodo case* and not in *Ogiale case* and it is for the court to decide if there is sabotage or not. Not only that *Ogiale* may lose the case in Nigeria because of all the impediments already discussed in this research, Shell may not be fighting with public image and may take the advantage to pay very little in compensation and this is a setback to EJ for the Niger Deltans.

Shell also argued that the novel duty of care argued by the claimants in *Ogiale* would constitute a radical or historic expansion of the law and open floodgates to litigation. Shell also contended that asking the English court to intervene and order remediation covering the same ground as the UNEP implementation plan is a direct challenge to the internal political acts and decisions of Nigeria, and its sovereign right to determine, within its own territory, the appropriate future path for the Ogoni community.¹⁷⁷⁸ The

¹⁷⁷⁵ This was confirmed by the solicitors to *Ogiale Community*: Leighday solicitors through email communication to the researcher on 20 February, 2018

¹⁷⁷⁶ The UNEP found groundwater contamination in *Ogale* was more than 450 times the legal limit and was still not cleaned-up even after four years of UNEP Report; Amnesty International, 'Niger Delta: Shell's Manifestly False Claims about Oil Pollution Exposed Again' (UNEP Publications, 2015) <<https://www.amnesty.org/en/latest/news/2015/11/shell-false-claims-about-oil-pollution-exposed/>> accessed 27 March 2017

¹⁷⁷⁷ *HRH Okpabi and Others v RDS and SPDC Ltd* [2017] EWHC 89 (TCC): Under the English law (Civil Procedure Rules (UK) (CPR), r. 11(5), a defendant may submit to the jurisdiction of the court by acknowledging service without applying for an order of the court declaring that it lacks jurisdiction, or by instructing a solicitor to accept service on its behalf and parties can also contractually agree to submit to court jurisdiction. For more discussion see Elena Merino Blanco and Ben Pontin, 'Litigating Extraterritorial Nuisances under English Common Law and UK Statute' (2017) 6 (2) *Transnational Environmental Law* 285 <<https://www.cambridge.org/core/services/aop-cambridge-core/content/view/E82C46C78BC08284720B6111BC347635/S2047102516000303a.pdf/div-class-title-litigating-extraterritorial-nuisances-under-english-common-law-and-uk-statute-div.pdf>> accessed 27 March 2017

¹⁷⁷⁸ Oliver Tickell, '53,000 Nigerian Oil Spill Victims Press New Shell Lawsuits' *Ecologist* (UK, 2nd March 2016) <http://www.theecologist.org/News/news_round_up/2987329/53000_nigerian_oil_spill_victims_press_new_shell_lawsuits.html> accessed 27 March 2017

plaintiff lawyer appealed to the Court of Appeal¹⁷⁷⁹ because it is contrary to the decisions of the court in *Shell Petroleum NV v European Commission*¹⁷⁸⁰ and *Dooh and Milieudefensie v RDS and SPDC*.¹⁷⁸¹ The Court of Appeal in a split decision¹⁷⁸² upheld the trial court ruling that Ogale cannot pursue RDS and SPDC in English courts over a Nigerian spill.¹⁷⁸³ Again, the appellant/plaintiff intends to appeal to the UK Supreme Court. A significant thing to the researcher is that HRH Okpabi of the Ogale reiterated that the English courts were the only hope, as that they “cannot get justice” in Nigeria.¹⁷⁸⁴

The questions then is how the decision of *Kiobel* and *Ogale* affect the search for EJ in Nigeria’s Niger Delta and is the victims hope of suing MNOCs abroad dashed against the background of *Kiobel* and recent *Ogale* decision?¹⁷⁸⁵

6.4ii NGOs Role, Extraterritorial Nigeria, Government Reactions and the Implications

It is now pertinent to note that the Nigerian government seem not to be troubled much despite all extra-territorial litigation that makes mockery of Nigeria, as despite all these extra-territorial litigation, there seem to be no official government reaction from the government. The only known reaction after the Bodo case was by the then Chairman, Senate Committee on Environment and Ecology, Senator Bukola Saraki.¹⁷⁸⁶ He commended SPDC for agreeing to compensate the Bodo community noting that he led his committee members on an unscheduled oversight visit to the Niger-Delta in October 2012 to inspect and assess the impact of spills, leading to series of calls and meetings with Shell leading to commitments made by them.¹⁷⁸⁷ He also noted that the Committee also followed up to ensure that the MNOCs delivered on their pledges to

¹⁷⁷⁹ Leigh Day, ‘Court of Appeal to Hear Nigerian Villagers’ Pollution Claims against Shell’ *Leigh Day News* (London, 21 November 2017) <<https://www.leighday.co.uk/News/News-2017/November-2017/Court-of-Appeal-to-hear-Nigerian-villagers-pollut>> accessed 22 January 2018; Leigh Day, ‘Lawyers for Nigerian Villagers to Appeal against Judgment Barring them from Bringing Claims Against Shell in the UK’ *Leigh Day News* (London, 26 January, 2017) <<https://www.leighday.co.uk/News/News-2017/January-2017/Lawyers-for-Nigerian-villagers-to-appeal-against-j>> accessed 27 March 2017

¹⁷⁸⁰ Delivered 27 September 2012 in Case T-343/06 (Case C-585/12 P)

¹⁷⁸¹ Delivered on 18 December, 2015 with case numbers 200 126 843 (case c) + 200 126 848 (Case d)

¹⁷⁸² Rt. Hon. Lord Justice Sales dissented.

¹⁷⁸³ Libby George and Tife Owolabi, ‘Appeal Court Rules Nigerians cannot Pursue Shell Spill Claim in England’ *Reuters* (London, February 15, 2018) <<https://www.reuters.com/article/us-shell-nigeria-court/appeal-court-rules-nigerians-cannot-pursue-shell-spill-claim-in-england-idUSKCN1FY1V0>> accessed 27 March 2018

¹⁷⁸⁴ Ibid

¹⁷⁸⁵ The researcher will be discussing this in chapter seven

¹⁷⁸⁶ S Onogu, ‘Shell’s \$84m Payment: Saraki Blames Fed Govt’ *The Nation Newspaper* (Abuja, January 09, 2015) <<http://thenationonline.net/shells-84m-payment-saraki-blames-fed-govt/>> accessed 27 March 2017. See also Ogoni News, ‘Saraki Lauds Ogoni Compensation Decision’ <<http://www.ogoninews.com/ogoni/200-saraki-lauds-ogoni-compensation-decision>> accessed 27 March 2017

¹⁷⁸⁷ Ibid

compensate the victims.¹⁷⁸⁸ The researcher would observe that Bukola Saraki and committee follow-up to ensure MNOC pledges to compensate as noted by Saraki above yielded little or no result, hence the Bodo case abroad. While reacting to Bodo compensation news Saraki noted

As commendable as these recent developments are, it is also crucial to point out the fact that without clear-cut and sustainable policies in place, such compensation might only be one-off occurrences. What Nigeria needs right now to operate in line with international best practices is a comprehensive law that works to ensure that oil-spill compensation are not arbitrary, but equitable for all affected parties.¹⁷⁸⁹

He also registered his dismay that the communities had to seek redress outside the shores of Nigeria without any assistance from the FG to be able to get compensation despite having an executive branch of government with the constitutional power to protect and defend Nigerians. He concluded that Nigeria should push for a comprehensive reform in the oil spill management and clean-up regime to ensure non-continuation of such problems in event of such accidents.¹⁷⁹⁰

The implication of Nigerian government non-reaction to these cases further shows the need for this research as it shows how unconcerned the Nigerian government is to the plight of the Niger Deltans leading to EI. It is heartrending that the government did not react to a landmark decision such as Bodo decision. Senator Saraki's observation was apt when he noted the abandonment of Bodo Community to their fate despite having government with constitutional powers to protect them. Nigeria and her government need to do more in the wake of all these extra-territorial litigations to find solution within Nigeria. Without a well-defined private lawsuit to bring about compliance, there is more threat to environmental law and EJ.¹⁷⁹¹ While waiting for the decision of Ogiale, it is also important to examine the regional courts and the role of NGOs in achieving EJ using these regional courts.¹⁷⁹²

6.5 THE ROLE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (IACHR), AFRICAN COURT OF HUMAN RIGHTS (ACHR) AND ECOWAS COMMUNITY COURT OF JUSTICE (ECCJ)

Inter-American Court of Human Rights (IACHR) was created by the American Convention on Human Rights, adopted in the Inter-American Specialised Conference on Human Rights, in San José, Costa Rica, on November 22, 1969 and the Court

¹⁷⁸⁸ Ibid

¹⁷⁸⁹ Ibid

¹⁷⁹⁰ Ibid

¹⁷⁹¹ I Ogowewo, 'Wrecking the Law: How Art. III of the Constitution of the United States Led to the Discovery of a Law of Standing to Sue in Nigeria' (2000) 26 (2) Brooklyn J. Int'l 527, 529 and accompanying notes noting the incongruity and confusion by Nigerian courts in the application of locus standi rule in Nigeria

¹⁷⁹² Because the comparison is focusing on Nigeria and the US, the researcher will not discuss the European Court of Human Rights, which is one of the regional courts in the world.

started its operations in 1979.¹⁷⁹³ The conditions to be met before admissibility of a petition are that there should be exhaustion of domestic remedies; must be submitted within a period of six months; with the subject matter not being pending from another international settlement procedure. Furthermore, in the case of Article 44, the petition should contain the name, nationality, profession, address and signature of the person or persons or legal representative of the entity submitting the petition. However, where there is no due process of law in the domestic law of the State concerned for the protection of the right or rights allegedly infringed, where access to the remedies was not granted or prevented under domestic law or where there is unwarranted delay in the decision on the said resources, cases will still be admitted.¹⁷⁹⁴ With IACHR, any person or group of persons or legally recognised NGOs may submit petitions containing complaints of the convention by the state party.¹⁷⁹⁵ The Court's verdicts are final¹⁷⁹⁶ and State parties would undertake to comply.¹⁷⁹⁷ The Court periodically inform the General Assembly of the Organisation of the American States its power to monitor compliance by revision of periodic reports forwarded by the State and objected by the victims and the Commission. From 2007, the Court started the practice of holding hearings for the monitoring compliance of its verdicts. Until date, the US has not acknowledged the Court's jurisdiction¹⁷⁹⁸ and this was one of the issues in *Mossville* case below.

In the Nigerian context, both the ACHR and ECCJ are routes to seeking EJ justice for the Niger Deltans by individuals or NGOs outside the domestic laws. However, both courts have different procedures for admitting cases. The establishment of ACHR by the Protocol¹⁷⁹⁹ was to complement and reinforce¹⁸⁰⁰ the African Commission on Human and Peoples' Rights. It gives States Parties automatic access to the Court,¹⁸⁰¹ while individuals and NGOs can only institute cases with the discretion of the court if the State Party concerned makes a declaration accepting the competence of the Court to receive such cases.¹⁸⁰² The researcher observes this as one impediment to accessing this court for justice for the Niger Deltans as Nigeria must have made such declaration and the Court still has the discretion to admit the case. The researcher observes that to play this complementary role, ACHR mechanisms must be accessible to all players

¹⁷⁹³ Inter-American Human Rights Court, *Petitions and Consultations* <<http://www.corteidh.or.cr/index.php/en/about-us/how-to-access-the-inter-american-system/denuncias-consultas>> accessed 27 September 2017

¹⁷⁹⁴ Art 46

¹⁷⁹⁵ Art 44

¹⁷⁹⁶ Art 67

¹⁷⁹⁷ Art. 68

¹⁷⁹⁸ Inter-American Human Rights Court (n 1793)

¹⁷⁹⁹ Art. 1 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted June 1998, entered into force Jan. 2004, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III)

¹⁸⁰⁰ Preamble to the African Protocol, para 7

¹⁸⁰¹ Art. 5(1)

¹⁸⁰² Art. 5 (3) and Art 34 (6) of the African Protocol and Arts 30 and 45(2) of the African Charter

equally, individuals and NGOs included¹⁸⁰³ knowing that states are generally unwilling to surrender or succumb to structures and processes that would expose them to international scrutiny. Nigeria did not declare that court might receive cases directly from individuals and NGOs and this raises the enforceability issue in the case of SERAC.¹⁸⁰⁴ This qualified access to the court leaves aggrieved individuals hostage to the state. Second, these provisions are likely to undermine the utility of the African Court in protecting human rights. It is also important to note that the individual or NGOs would have sought and exhausted local remedies or demonstrate that such remedies are unavailable¹⁸⁰⁵ and the Commission is only competent to receive communications alleging violation of the Charter. Apart from the problems cited above, the Commission holds only two sessions every year, and may hold an extraordinary session if need be. There is no legal obligation on the Commission to exercise right to bring cases to the African Court. The current ACHR is a Court for states in the researcher's opinion, as there is nothing compelling the court to give individuals and NGOs standing. In addition, it does seem that the ACHR stopped at establishing norms without incorporating mechanisms for supervision and adjudication of individual complaints, where appropriate.¹⁸⁰⁶ This is one area where this research distinguishes from Ekhatior research as his research simply noted the use of ACHR by civil societies without further examining its place or usefulness in effective justice delivery.

On its part, the establishment of ECCJ was to ensure the observance of law and principles of equity. It is also for interpretation and application of the provisions of the revised Treaty and all other subsidiary legal instruments adopted by ECOWAS Community.¹⁸⁰⁷ It is accessible to individuals or persons who are victims of human rights violations occurring in any Member State amongst others.¹⁸⁰⁸ It gained its jurisdiction in 2005 with the implementation of Supplementary Protocol A/SP.1/01/05,

¹⁸⁰³ D Juma, 'Access to the African Court on Human and Peoples' Rights: A Case of the Poacher turned Gamekeeper' (2007) 4 (2) Essex Human Rights Review <<http://projects.essex.ac.uk/ehrr/V4N2/juma.pdf>> accessed 27 March 2017. See also D Shelton, *Remedies in International Human Rights Law* (OUP 1999)

¹⁸⁰⁴ Only eight of the thirty States Parties to the Protocol had made the declaration recognizing the competence of the Court to receive cases from NGOs and individuals as at July 2017 and Nigeria is not amongst them. The eight states are; Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, Tanzania and Rep. of Tunisia. <<http://www.african-court.org/en/index.php/12-homepage1/1-welcome-to-the-african-court>> accessed 27 October 2017

¹⁸⁰⁵ See I/A Court H.R., *Exceptions to the Exhaustion of Domestic Remedies*, Advisory Opinion OC-11/90 of 10 August 1990 (Series A, No. 11).

¹⁸⁰⁶ R Bilder, 'An Overview of International Human Rights Law' in H Hannum (ed) *Guide to International Human Rights Practice* (3rd Edition Transnational Publishers 1999)

¹⁸⁰⁷ Community Court of Justice, 'About us' <http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=2&Itemid=5> accessed 27 March 2017

¹⁸⁰⁸ Ibid, see also Art. 3(4) of the Supplementary Protocol A/SP.1/01/05 amending the preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and Art. 4 paragraph 1 of the English version of the said protocol

which followed the adoption of Protocol A/SP1/12/01 on Democracy and Good Governance. In comparison to ACHR, it does not provide for exhaustion of domestic remedies and the decisions are binding on the member states indicating national authority to enforce the decisions unless appealed or revised by the Court.¹⁸⁰⁹ However, third parties may object to it. The main requirements are that the application is not to be anonymous and the matter must not be pending before another international court.¹⁸¹⁰ The Court's decisions on human rights matters interpret the African Charter, considered by Article 1(h) of Protocol A/SP1/12/01 to contain 'constitutional principles shared by all Member States' as legally binding on ECOWAS Member States.¹⁸¹¹ Corporations and individuals can submit complaints alleging human rights violations by the Community or Member State actors. The fact that there is no domestic exhaustion of remedies requirement limiting the court's jurisdiction can explain why it has taken many decisions in recent times in comparison with the ACHR.¹⁸¹² By article 15(4) of the ECOWAS revised Treaty; judgements of the ECCJ are binding on the Member States, Community Institutions and on individuals and corporate bodies.

By way of comparison, IACHR has most of the limitations of the ACHR, but the striking difference is that any person or group of persons or legally recognised NGOs may submit petitions. The researcher's observation is that the ACHR and IACHR being two of the three existing regional courts has very similar provisions,¹⁸¹³ however, it is pertinent to note from this research, that the US has more robust democratic principles which can be used to deal with human rights issues and by extension EJ issues than Nigeria. Because of that, ECCJ would be a better forum for victims of EJ in Nigeria to access the courts outside the domestic courts in Nigeria for many reasons. Apart from exhaustion of local remedies, which is not applicable, anyone can bring a case/directly submit complaints to the ECCJ thereby obviating the need of State Party approval. In addition, the provision leaves the ECCJ with no choice to accept or reject cases for any reason except where the applicant did not meet the simple conditions. By way of contribution, after examining the two regional courts that Nigeria can use, the researcher reasons that ECCJ is a better avenue to pursue EJ matters as the provisions enhances standing and access to justice. The contribution is particularly important because one of the reasons of establishing the ECCJ was to

¹⁸⁰⁹ Community Court of Justice, 'About us' <http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=2&Itemid=5> accessed 27 March 2017

¹⁸¹⁰ Art. 4 (d) of the Supplementary Protocol; See also *Hadijatou Mani Koraou v Niger*, Judgment No. ECW/CCJ/JUD/06/08, 27 October 2008.

¹⁸¹¹ Art. 24 of the Supplementary Protocol A/Sp.1/01/05 provides for the method of implementation of Judgments of the Court

¹⁸¹² It decided 28 cases in 2015, 2 cases in 2013, 18 cases in 2012 and 15 cases in 2011. See Community Court of Justice, 'List of decided cases from 2004 till date' <http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=157&Itemid=27> accessed 27 March 2017

¹⁸¹³ The third one is the ECHR

ensure the observance of law and principles of equity, which is a major tenet of EJ. The NGOs had led and initiated many cases in these two prominent regional courts with the two most relevant ones in this research being *SERAC v Nigeria* and *SERAP v FGN*. With this explanation of the roles of these courts, the researcher will examine and compare two important cases from the US and Nigeria led by NGOs to these regional courts. These cases are *Mossville Environmental Action v US* and *SERAC v Nigeria*

6.5i *Mossville Environmental Action Now v US 2005 and SERAC v Nigeria 2001*

Mossville claim was that of disproportionate siting and permitting of toxic industrial plants clustered in and nearby the small Calcasieu Parish African American community of Mossville, Louisiana¹⁸¹⁴ and facilitated by generous industrial tax incentives showing pattern of EI.¹⁸¹⁵ Despite scientific evidence supporting the serious and disproportionate levels of chemicals in the blood of Mossville residents¹⁸¹⁶ and high levels of respiratory and other illnesses connected with the released chemicals and exposure to chemicals, there was no remedy provided.¹⁸¹⁷ In Louisiana, 80% of African Americans live within three miles of a toxic facility, even though they make up only 34% of the state's population.¹⁸¹⁸ Not only are those polluting facilities sited there under USEPA permits, but also USEPA did not use its powers under environmental law to clean-up the pollution nor revoke or modify the permits to reduce the amount of contaminants and that arguably showed unequal protection by the USEPA and the regulations as applied and enforced.¹⁸¹⁹ There is no right to healthy environment in the US Constitution¹⁸²⁰ and that has been interpreted by the US Supreme Court as providing no guarantee of a certain minimal level of safety and security¹⁸²¹ and does not guarantee a legally enforceable right to a healthy environment.¹⁸²² In addition, the US Supreme Court has held that only intentional acts of discrimination violate the equal protection clause under the Constitution, not acts

¹⁸¹⁴ Historic community founded in the 1790's by African-Americans. They fish, farm, hunt and developed cultural and religious traditions based on preserving environmental conditions.

¹⁸¹⁵ Mossville Petition (n 1026) 77

¹⁸¹⁶ Both government and academic research shows this pattern; See RD Bullard 1994 (n 175). Elliot and Others 2004 study also found that there was a stronger correlation between the racial makeup of the community rather than the income level and it cited findings that there was a greater risk of accidents in African American communities located facilities; MR Elliott and others, 'Environmental Justice: Frequency and Severity of US Chemical Industry Accidents and the Socioeconomic Status of the Surrounding Communities' (2004) (58) J. of Epidemiology and Community Health 24

¹⁸¹⁷ 91% of persons surveyed reported at least one health related problem caused by the chemicals, 84% present nervous system problems, 71% cardiovascular problems, 57% skin problems and the toxic exposure also impacts the mental health of some Mossville residents

¹⁸¹⁸ Mossville Petition (n 1026) 78

¹⁸¹⁹ Ibid, 80

¹⁸²⁰ *Long Beach v New York*, 445 F. Supp. 1203, 1212 (D.N.J. 1978)

¹⁸²¹ *DeShaney v Winnebago County Dept. of Social Serv.*, 489 U.S., 195-96 (1998); and *Culver-Union Township Ambulance Service v Steindler*, 629 N.E.2d 1231 (Ind. 1994).

¹⁸²² *Lindsey v Normet*, 405 U.S. 56 (1972); *Benzman v Whitman*, 523 F.3d 119 (2d Cir. 2008); *Lombardi v Whitman*, 485 F.3d 73, 83-85 (2d Cir. 2007)

that only result in discriminatory effect.¹⁸²³ *Mossville Environmental Action Now* (an NGO) took the matter to the Inter-American Commission on Human rights arguing that the US had failed to protect the rights to life and health of Mossville residents against the American Declaration, the American Convention on Human Rights and ICCPR: right to life and American Declaration/ CERD right to health. There was establishment of jurisdiction regarding domestic legal effect and the right to humane treatment under Article 2 and 5 of the Declaration thereby declaring the petition admissible. An important aspect of the proceeding for the research is that for the first time, an international judicial authority has jurisdiction over EJ issues in the US putting environmental regulatory system on trial.

In *SERAC v Nigeria*, Social and Economic Rights Action Centre (SERAC) in 1996 brought a case against Nigeria to the ACHR alleging that the Military Government exploited oil reserves in Ogoni through its business relationship with SPDC with no regard for their health or environment resulting in widespread pollution. This pollution affected the local habitat, seriously affected their food production and resulted in serious short and long-term health consequences for the Ogoni, without safeguards or additional provisions for healthcare. In addition, the FG used its armed forces to effect violent reprisals against Ogoni protestors challenging the oil company's practices. The Commission found that Nigeria had violated many of the rights enshrined in the Charter¹⁸²⁴ and appealed to FG to protect fully the environment, health and livelihood of the Ogonis, stop its attacks on them, undertake effective investigations into the human rights violations, assure reparations for the victims, and put safeguards to prevent future violations. Adequate compensation should also be made including relief and resettlement assistance, and undertake a clean-up. In addition, make appropriate environmental and social impact assessments before future oil activities and inform the population about possible health and environmental risks. It is worthy of note that the Commission interpreted right to life,¹⁸²⁵ right to health¹⁸²⁶ and the right of all peoples to their economic, social and cultural development¹⁸²⁷ as encompassing the right to food and interpreted the right to health¹⁸²⁸ as implying concrete obligations for States, to take the necessary measures to protect the health of their people.

The interesting thing in the two cases is that Mossville succeeded to the extent of its admissibility; however, the Charter does not bind the US.¹⁸²⁹ SERAC generally succeeded, but the FG has largely failed to implement all the recommendations sixteen years after.¹⁸³⁰ The argument is that UNEP Report is because of SERAC decision, but

¹⁸²³ See *McClesky v Kemp*, 481 U.S. 279, 292 (1987); and *Washington v Davis*, 426 U.S. 229

¹⁸²⁴ Articles 2, 4, 14, 16, 18(1), 21 and 24

¹⁸²⁵ Art. 4

¹⁸²⁶ Art. 16

¹⁸²⁷ Art. 22

¹⁸²⁸ Art. 16

¹⁸²⁹ It seems that nothing happened thereafter as investigation by the researcher showed no further action taken

¹⁸³⁰ This raises the question of enforceability of these foreign cases in Nigeria.

Nigeria has not taken any tangible action. An interesting thing is that the case of *Mossville* is still recent therefore shows that there is still EI issues in the US despite all the efforts. Unfortunately, there was no prove of EI, as it was admissibility decision, therefore, it may be difficult to conclude that the siting in *Mossville* is an EJ issue. A very important point in *Mossville case* and *SERAC case* is that there is no right to healthy environment in the US constitution and Nigeria and US did not submit to IACHR jurisdiction. For domesticating African Charter, Nigeria ought to respect SERAC decision, which would ideally be an effective avenue of reducing EI in Nigeria,¹⁸³¹ but the main challenge is that Nigeria did not make a declaration accepting the competence of ACHR to receive the case directly from SERAC. To the researcher, this closes that route as a route to enhancing environmental justice for the Niger Deltans. In the US, by virtue of USEPA enforcement actions, EI is reduced unlike in Nigeria where much seem not to be happening looking at the problems and level of regulatory enforcement. Nigerian laws empower only authorities to enforce environmental laws and in the case of oil industry regulation, the DPR and NOSDRA. In addition to all the impediments discussed above, this limits private litigants' power to help in enforcement with a view of achieving EJ. It is now pertinent to examine NGOs role with the view of finding out whether it has helped in any way to reduce EI or enhance EJ in Nigeria.

6.6 NGOS ENFORCEMENT ROLES AND ENVIRONMENTAL JUSTICE IN NIGERIA

So far, the researcher has shown that NGOs have helped in taking enforcement roles within and outside Nigeria. They have played a vital role in helping aggrieved individuals and communities in challenging both the oil companies and Nigeria. The question then is how successful¹⁸³² is their enforcement roles and how has it helped in fostering EJ for the victims of oil pollution in Nigeria? The few cases reviewed above showed that the NGOs in Nigeria have been successful in many cases at least in theory; however, practically their success is limited. In the researcher's opinion, among the cases discussed above, *Bodo v Shell* appears to be the only one with successful implementation.¹⁸³³ This is because other cases are either pending on appeal or there is complete neglect of the ruling. Nigeria still flares gas, showing non-compliance of *Gbemre v Shell* ruling. In addition, the Nigerian Government has not fully implemented the decision of *SERAC v Nigeria*.¹⁸³⁴ Even *Nigerian Farmers v*

¹⁸³¹ Art. 24 of the African Charter confers justiciable environmental rights therefore infringement or threat of infringement should confer standing on the individuals or NGOs to protect it.

¹⁸³² Successful as simply defined by Cambridge dictionary as achieving the results wanted or hoped-for. See Cambridge Online Dictionary <<http://dictionary.cambridge.org/dictionary/english/successful>> accessed 27 March 2017

¹⁸³³ Premium Times 'Shell Offers to Pay N81 Billion (n 1767)

¹⁸³⁴ Presumably the invitation of UNEP to conduct an environmental assessment in Ogoni was partly of the FGN's response to the case

Shell is still on appeal,¹⁸³⁵ therefore, not yet successful in full, though with positive outcomes.¹⁸³⁶ The positive outcomes are relevant for the researcher as they could serve as ways of strengthening enforcement with a view of achieving EJ. First, establishment of extraterritorial jurisdiction serve as one way of seeking and possibly improving EJ. In addition, established breach of SPDC duty of care places responsibility on MNOCs, thereby may improve Niger Deltans experience in pursuit of EJ. Furthermore, the Nigerian courts could follow the Court of Appeal ruling that allowed access to internal company documents especially in a highly technical oil industry. Having carefully examined *Bodo v Shell* case and its outcome, the researcher concludes that successful negotiation after many years is for SPDC to redeem its corporate image and reduce or avoid adverse publicity and not to reduce the problems caused to Bodo community. Because of this conviction, the researcher thinks that naming and shaming can also help as an indirect way of enforcement by the NGOs. This is particularly useful because of the porous laws and ineffective legally enforceable rules in Nigeria. Most successful shaming concerns corporations that are in direct contact with their consumers and MNOCs are not, therefore, the strategy should name and shame the MNOCs on one hand and the Nigerian Government for poor regulation on the other hand. According to Ikelegbe, through the efforts of the NGOs, there is a vastly increased level of sensitivity on the part of the Nigerian Government to the abuses in the Niger Delta peoples and their environment.¹⁸³⁷ Ikelegbe also explained that the establishment of Oil Mineral Producing Areas Development Commission (OMPADEC) in 1992 was because of much NGO agitation and even increased the percentage of the national allocation derivation revenue from 1.5% to 3%¹⁸³⁸ and to 13% in 1999 showing government's vastly increased sensitivity to the Niger Delta problem. Also in 2000, their continued agitation led to setting up of the Niger Delta Development Commission (NDDC) to accelerate the development of the region to replace OMPADEC.¹⁸³⁹ However, these actions are not good enough to curb existing EJ. Okafor however concluded that the major role played by NGOs in this regard was mainly to raise the tempo of the public and legal discourse on the abuse of the Niger Delta, and maintain its currency as a national discursive question, which contributed to the mobilisation of favourable public opinion.¹⁸⁴⁰ From the environmental rights cum human rights view, the courts have produced what Okafor called '*pro-human rights alterations and reformations*'.¹⁸⁴¹ The argument advanced by Okafor is that the sustained efforts of these NGOs have constituted one critical factor in the production of the pro-human rights alterations and reformations that he observed in Nigeria during

¹⁸³⁵ Case/docket number: C/09/337050/HA ZA 09-1580; See also the Court of Appeal of the Hague Cases: of 17 December 2015 ECLI:NL:GHDHA:2015:3586 (Dooh/Shell); ECLI:NL:GHDHA:2015:3587 (Shell/Akpan); ECLI:NL:GHDHA:2015:3588 (Oguru-Efanga/Shell)

¹⁸³⁶ The researcher discussed the positive outcomes above in subsection 6.4 a

¹⁸³⁷ Augustine Ikelegbe (n 1741)

¹⁸³⁸ Ibid

¹⁸³⁹ Ibid

¹⁸⁴⁰ OC Okafor (n 1731)

¹⁸⁴¹ Ibid

the period of his research.¹⁸⁴² He also observed special analytical difficulty that is involved in accounting for the influence of human rights NGOs.¹⁸⁴³

Despite the non-implementation or non-enforcement of many rulings, positive outcomes of the role of NGOs abound. The cases sponsored by the NGOs have led to improvement of EJ.¹⁸⁴⁴ The NGOs in *SERAC case* used the provisions of the African Charter to enforce the fundamental rights of the Ogonis despite the non-provision of right for healthy environment¹⁸⁴⁵ as human right in the Nigerian Constitution¹⁸⁴⁶ by holding the government responsible for environmental injustice meted out to them.¹⁸⁴⁷ Article 24 of African Charter did not only fill that lacuna,¹⁸⁴⁸ but also by its subsequent domestication by the Nigerian legislature.¹⁸⁴⁹ However, before *SERAC case*, no Nigerian had challenged the FGN based on that Treaty. According to Ekhatior and I agree, the decision of the ECCJ in *SERAP v FGN*¹⁸⁵⁰ serves as one strategy by which NGOs can promote and improve environmental justice in the Niger Delta region of Nigeria.¹⁸⁵¹

To this end, the NGOs can have recourse to the African Charter as a means of improving private enforcement of pollution-related laws and environmental laws in general thereby fostering EJ. With the decision of *SERAC v Nigeria*¹⁸⁵² and *SERAP v FGN*,¹⁸⁵³ Niger Delta victims of environmental injustice can seek justice directly from the ACHR and ECOWAS Court. The courts made orders against the Nigerian Government, although the court could not hold the oil companies liable because they are not parties to the African Charter. Their role has opened an opportunity for victims of environmental injustices in Nigeria to by-pass the Nigerian courts and try to obtain justice. It is however worthy to observe that the FGN seems not be giving attention to them, despite some optimism of *SERAC and SERAP cases*.

¹⁸⁴² Ibid, 24

¹⁸⁴³ Ibid

¹⁸⁴⁴ See for instance the cases of *Nigerian Farmers v Shell* and *Bodo v Shell* discussed earlier

¹⁸⁴⁵ Section 20

¹⁸⁴⁶ The Constitution is the grundnorm: means basic norm, order, or rule that forms an underlying basis for a legal system as created by Hans Kelsen, a jurist and legal philosopher.

¹⁸⁴⁷ It has not been acted upon, but it has presumably exposed the dangers of the practice in Nigeria and shows that Nigerians can challenge breach of their human rights in the court

¹⁸⁴⁸ It provides that all peoples shall have the right to a general satisfactory environment favourable to their development

¹⁸⁴⁹ The African Charter was adopted in 1981 and domesticated by Nigeria in 1983 pursuant to Section 12(1) 1979 Constitution as the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act No. 2 of 1983 and now contained in Cap A9 LFN, 2004.

¹⁸⁵⁰ Judgment No ECW/CCJ/JUD/18/12
<http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2012/SERAP_V_FEDERAL_R_EPUBLIC_OF_NIGERIA.pdf> accessed 27 March 2017

¹⁸⁵¹ EO Ekhatior 2012 (n 1742)

¹⁸⁵² [2001] AHRLR 60

¹⁸⁵³ (No ECW/CCJ/JUD/18/12) dated December 14, 2012

In *SERAP case*, SERAP alleged violation of many human rights of the people of Niger Delta and the failure of the defendants to enforce laws and regulations to protect the environment and prevent pollution. SERAP alleged that Nigeria violated twenty-nine articles from a variety of international human rights instruments; however, the ECCJ limited its judgment to Articles 1¹⁸⁵⁴ and 24¹⁸⁵⁵ of the African Charter. Nigerian Government objected to ECCJ ruling on instruments outside of the Treaties, Conventions, and Protocols of ECOWAS, however, the Court assumed jurisdiction based on the new Article 9(4) of the Protocol as amended by Supplementary Protocol A/SP.1/01/05. The key preliminary issues were locus standi and the three-year statute bar in line with the new paragraph 3, Article 9 of the 2005 Supplementary Protocol. The court found out that the spills and pollution were continuous therefore cannot be statute barred and that SERAP has standing as NGO. A key ruling was that despite all the laws adopted by Nigeria and all the agencies created, FGN could not show a single action taken in recent years to hold accountable any of the perpetrators of the many acts of environmental degradation in the Niger Delta Region. The ruling of ECCJ is to the researcher an indictment of the Nigerian regulatory agencies.

The ECCJ demanded that the FGN should protect its citizens' right to an adequate environment, fix environmental damage in the Niger Delta, protect them against further environmental damage, and hold the perpetrators of environmental damage accountable. The ECCJ opinion connects enforcement of legislation and regulations against oil companies to degradation of the environment. The ruling required Nigeria to enforce environmental regulations against oil companies operating within Nigeria, thereby holding foreign companies liable for domestic human rights violations.¹⁸⁵⁶ With this decision, the ECCJ has shown that it will hold its Member State to their obligations to protect the rights of citizens under Article 1 of the African Charter, including by enforcing existing laws and regulations and holding them responsible for the violations of human rights by international companies operating within the State. Nigeria has yet to use its domestic implementation system for ECCJ decisions. This ruling had shown a way to justice outside the various impediments to environmental justice already discussed in chapter five of this research. With their role, the Nigerian courts may become more pro-active in using the African Charter provisions to hold the government and oil MNOCs culpable for environmental injustice caused by oil related activities in the Niger Delta. In addition, Okafor observed that NGOs have made Nigeria more sensitive to the environmental responsibilities of oil companies,¹⁸⁵⁷ and Ikelegbe noted that MNOCs should negotiate and reach MoU with host communities, honour agreements, and be more responsive to their problems.¹⁸⁵⁸

¹⁸⁵⁴ States' obligation to ensure rights

¹⁸⁵⁵ The right to an adequate environment

¹⁸⁵⁶ This decision is in line with Article 14 of the ECOWAS revised Treaty

¹⁸⁵⁷ OC Okafor (n 1731)

¹⁸⁵⁸ A Ikelegbe (n 1741)

With NGO involvement, the MNOCs are sometimes more careful and that leads to improvement in their actions. As Williams noted, NGOs are changing the social context in which companies operate, are changing the way companies think about their strategic challenges and are changing the norms of appropriate industry action with respect to important questions such as environmental protection, security arrangements for pipelines and plants, and financial arrangements with host countries.¹⁸⁵⁹ There are enforceability issues with *SERAC* and other decision especially where treaties are used, however it has added to a growing jurisprudence on protection of the environment and access to environmental justice in Nigeria.

Despite the presumed influence or success of NGO involvement, there are many barriers. Many individual cases in pollution matters failed for various reasons including reasons listed by Uwais CJN (as he then was) which are cost, ignorance, government interest and remoteness of institutions¹⁸⁶⁰ and Ogbodo¹⁸⁶¹ added non-existence of viable NGOs which command the requisite resources and reputation to effectively pursue PILs. The researcher disagrees with Ogbodo on this point, rather considers that the NGOs are viable, but do not have enough tools to enforce with a view of achieving EJ in Nigeria. The challenges include issues within the Nigerian legal system: access to courts, delay in administration of justice, corruption, interpretation of the laws, weak fines/inadequate sanctions, wide defences, political factors and incomprehensiveness of the regulatory frameworks.¹⁸⁶² In addition, there are issues of oil MNOCs bringing in objections or instituting unnecessary cases, painfully sometimes colluding with the FG: thereby depriving the victims' justice through the judiciary.¹⁸⁶³ The researcher's position can be justified following the fact that many of the cases brought by NGOs outside Nigeria succeeded at least in principle. Also clear is that for reasons not the focus of this research, the regulatory agencies have either failed to seek justice for victims of oil pollution or failed to secure justice for them. Because of various limiting factors, individuals and communities negotiate settlement with their oppressors instead of seeking justice¹⁸⁶⁴ except where NGOs help.

Furthermore, findings in this research show that the major roles played in the struggle for environmental justice, are limited to enforcing human rights or compensation rights

¹⁸⁵⁹ CA Williams, 'Civil Society initiatives and "Soft Law" in the Oil and Gas Industry' (2004) 36 N. Y. U. J. Int'l L. & Pol. 457, 461

¹⁸⁶⁰ See M Uwais (n 1409)

¹⁸⁶¹ (n 719)

¹⁸⁶² Discussed in chapter 5

¹⁸⁶³ The Nigerian National Assembly ordered Shell to pay US\$1.5 billion as compensation for damages arising from its activities in the case won by the plaintiffs in the high court but Shell appealed and sought an unconditional stay of execution of the judgment: See *Pere Ajunwa (on behalf of Ijaw Aborigines) v Shell Nigeria*, SC 290/2007. The Supreme Court held for Shell on 16 December 2011 and remitted the case to the federal High Court for determination of the substantive suit and Shell continued to institute procedural objections and claims against the judgment.

¹⁸⁶⁴ For further discussion on this see E Emeseh 2011 (n 402)

relying on the existing laws and on one occasion relied on the FREP Rules 2009 to seek EJ for oil pollution victims. One wonders why this FREP rules has been utilised only once. One could see that despite this provision and other efforts made from several quarters to achieve EJ for the Niger Deltans, EJ abounds. This thesis attempts to address this gap, hence the need to take some further steps by the NGOs.¹⁸⁶⁵ Where there is breach, individuals or NGOs can rely on the FREP Rules to bring in IAS or standards in the industry not just to ask for compensation, but also to enforce their fundamental human rights. This means taking proactive actions on perceiving that breach of the IAS or any other instrument that raises a human right concern. NGOs can improve the use of FREP Rules in many ways to enhance access to EJ with a view of achieving EJ for the Niger Deltans. This is because Niger Deltans are mainly poor, illiterates and uninformed and some of them are incarcerated because of their struggle for EJ. Because FREP Rules removed standing barriers, NGOs can use their power more widely and can resort to the FREP Rules in anticipated breach. The FREP Rules enlarged the sources of human rights jurisprudence; therefore, the NGOs should make effective use of opportunities provided by it to bring to the courts attention municipal, regional and international bills of rights in pursuing environmental human right matters because this can serve as an effective way of achieving EJ. In addition, the researcher argues that the NGOs can possibly pursue the agenda of making the makers/developers of industry standards to use the provisions of the standards to sanction or expel the members who breach the standards.

NGOs action have contributed to enforcement by suing polluters to recover monetary damages for the victims of oil pollution as in *Gbemre v Shell* and by bringing a legal action against authority entrusted with responsibility for implementing the laws as in *SERAC v FGN*. However, this research did not show any case against oil companies/polluters in Nigeria to bring them into compliance or accessing the court in private enforcement cases to halt the violation or seek criminal penalties. The reason for this is not far-fetched; the NGOs do not have power backed by statutes to compel these actions. When compared with the US, one will see the power of the citizen suits provisions in enhancing the position of aggrieved or victims in achieving EJ in the USA, which is not the case in Nigeria.

Citizen's suit can help NGOs to be more successful in private enforcement in Nigeria. A major advantage of citizen suits is that it is a creation of statutes, therefore will limit the inconsistencies of judicial decisions by the Nigerian courts, and hopefully reduce injustice as most citizen suits provisions will be unambiguous enough to clarify who should have standing in court. The researcher is not unaware of the challenges¹⁸⁶⁶ that might be associated with citizen suits in Nigeria because of general enforcement

¹⁸⁶⁵ This will bear in mind some of the challenges in achieving EJ includes knowledge, capacity, commitment and security gap

¹⁸⁶⁶ These challenges were discussed in chapter six

problems already discussed, however, it will a veritable tool towards achieving EJ for the Niger Delta people.

6.7 CONCLUSION

The finding herein shows that government agencies retain a dominant position in defining and implementing enforcement policy in the USA, but have lost their enforcement monopoly, but Nigeria regulators somewhat enjoy the monopoly because there are no Statutes removing the monopoly. This chapter showed some differences and similarities between the US common law position/citizen suits and Nigerian position which either enhances or retards PIL both in the US and Nigeria. Because the provisions in many US environmental statutes relevant to this research are '*strict liability*', it is relatively easy for the NGOs to prove legal violation, not environmental damage.¹⁸⁶⁷ In Nigeria's EPIL system is tort liabilities, therefore NGOs needs to prove damages or negligence, which may be difficult, particularly in oil pollution cases considering the technical nature of the industry. For matters under the common law in the US, establishment of standing is based on '*injury in fact*' is similar to the Nigerian common law position, but they are not many. The US citizen suits provided for reasonable attorneys' fees, but not in Nigeria and this could hamper EPIL that could help in achieving EJ. Also under the major environmental laws, courts can issue remedies for citizen suits: injunctive relief and civil penalties up to \$37,500 daily per violation, challenge polluter, but not in Nigeria as NGOs are not empowered by statute to challenge either the regulatory bodies or the polluters. There is natural resource damages recovery in the US even where PIL sues, but not in Nigeria. In addition, courts have the discretion to determine the numeric penalty amounts even where NGO sues using USEPA civil penalty assessment making calculations relatively simple, but not in Nigeria. It is uncertain how courts award damages in Nigeria also, unlike the US where received funds go to the Treasury; there is no clear way of managing settlement fund in Nigeria.

This research in general shows that the growth of private enforcement spurs government enforcers, increases government enforcement efforts, embolden the government to maintain and sharpen its focus on environmental protection and this has positive impacts on the enforcement of US pollution laws in the researcher's opinion. Examined cases and research also showed that private enforcement invigorated latent citizen suits provisions thereby shifting policymaking of USEPA to policing with additional determination to abate violations. In addition, citizen suits helped in reducing capture; widened decisions and led to imposition of higher penalties in the US. In Nigeria, private enforcement undoubtedly has improved enforcement of pollution laws; however, there is need to do more. Considering the achievement without strong legislative backing, the researcher concludes that statutory empowerment of NGOs would serve as a veritable tool towards achieving EJ especially when combined with other recommendations that the researcher will be

¹⁸⁶⁷ See section 311 (b) (6) CWA and also section 107 of CERCLA and the *US v Marathon Pipeline Co.*, 589 F.2d 1305 (7th Cir.1978)

making in this research. It may be the vital ingredient necessary to transform environmental protection statutes and regulations from aspirations into reality. With the conclusion of this chapter, the researcher will now move to the conclusion of this thesis bringing together all the arguments and points raised and then proposing a model for achieving environmental justice for the Niger Deltans.

CHAPTER SEVEN

SUMMARY, CONCLUSION, LESSONS AND RECOMMENDATIONS

7.1 INTRODUCTION

Bearing in mind that EJ is rooted in fair and equitable principles of law, this study is to find a connection between oil pollution and EI and to facilitate descriptions of situations identifiable as instances of EI in the Niger Delta area of Nigeria. Furthermore, bearing in mind that fair and equitable principles are integral part of environmental human rights law, the study is also to provide an understanding of the role of the laws in enforcement and the connection between the enforcement and EJ. In addition, given the potential positive impact of enforcement on achieving EJ, it aimed at recommending reforms after a focused examination of the Nigerian laws and enforcement processes relating to oil pollution as a necessary contribution to prompting and sustaining EJ in the Niger Delta. The thesis reviewed current enforcement practices in the Nigerian oil and gas sector, the US and some international environmental regimes, which Nigeria ought to adopt or improve their implementation because they are either binding or Nigeria is committed to them. In doing the review, the researcher considers the role of regulators and private enforcers in striving to achieve EJ. This study brings to the fore a clear relationship between oil polluting activities and EJ by showing a clear pattern and a strong link between oil pollution activities, government legislative and enforcement actions and actions of the stakeholders.

The research revealed that the Nigerian laws, their enforcement and regulatory system are weaker than the US. The research found that factors leading to EI discussed in this thesis are mostly evident in the Niger Delta. The LUA, Constitution, Minerals Act all commoditized the land for those in power. Niger Deltans are minorities in Nigeria and many communities are poor. The government is unresponsive and unaccountable in their policies and regulations because of the oppressive power structure from the colonial times; the corporations appear more powerful in alliance with the government because of government interest and there is a piecemeal approach to regulation and amendments proves very difficult. For this, the researcher concludes that the oil pollution management has been ineffectual in promoting EJ in Nigeria. The researcher also showed that only enhanced regulatory enforcement would only do little in reducing EI considering the impediments to enforcement in the Nigeria. The researcher suggests two major factors to consider in redefining the position to boost enforcement in addition to regulatory actions: (1) The enforcement options that move towards depriving the companies of unjust enrichment gained by polluting the environment, which in effect causes EI in addition to (2) institutional reforms and amendment of the laws to widen private enforcement powers.

This concluding chapter begins with a summary of the key points that emerged from each chapter of the research and lessons learnt. It then considers how these findings translate to the task of eradicating EI by making a case for optimal enforcement of the Nigerian oil-pollution laws. It provides an impression of the relationships between

conclusions drawn from the different chapters and recommendations on addressing EJ concerns in the ND. Finally, this chapter will suggest directions for subsequent research.

7.2 SUMMARY OF THE KEY POINTS IN THE SUBSTANTIVE CHAPTERS

The question posed in the first chapter of the thesis was to what extent could improvement of enforcement assist in reducing environmental injustice that has arisen because of oil exploration in the Niger Delta? The US has been the focal point of comparison accompanied by reference to additional cases where appropriate and a survey of literature on EJ, enforcement and the IAS. This summary bears in mind the common/technical phrase in the oil industry that is to prevent, prepare, respond and restore. Survey of relevant literature identifies neither a significant degree of focused oil pollution law nor improved enforcement of the available laws to prevent, prepare, respond and restore in Nigeria. Also, a review of oil pollution management in the US and Nigeria showed that oil companies operating in Nigeria do not genuinely prevent pollution or even prepare for it; act fast to stop pollution and or even remediate or clean-up as required by the law and enforcement is not strong enough to compel compliance. The thesis has engaged with a range of theoretical literature, including on the concept of interpretive and enforcement approaches and mechanisms used by the enforcement agencies to achieve compliance. The thesis also brought to fore literature on transplants and diffusion of laws with view of considering factors that may affect effective working of transplanted laws and ways of making transplanted laws to work in the transplanted environment. Each substantive chapter herein aimed to contribute to answering the questions posed in chapter one, with the aim of generally helping in understanding of how oil-pollution had caused EI in the Niger Delta and how regulatory and governmental responses had not contributed enough to cushion problems caused by exploration activities thereby contributing to EI. Below is the summary of these chapters.

Chapter two started with the historical, cultural, political and economic context within which Nigeria stands highlighting the impacts of colonialism and its contributions to inequities in Nigeria today. It linked the problems associated with oil-related activities with EJ by identifying the health, environmental and socio-economic impacts of oil-related pollution, and linking them to EJ. It also successfully invoked EJ issues by evaluating how reporting, response, JIV and clean-up are dealt with. The chapter identified recurring incidences of pollution caused by oil-related activities with little or no benefit to the communities, faulted non-robust compensation regime, thus sentencing the affected Niger Deltans to a life of bearing disproportionate burden for Nigeria. It was particularly shown that linking compensation payment to the result of JIV which is proven to be led by industry operators will likely lead to EI because there is likelihood of reporters being economical with the truth especially with the facts that expertise of other members of the team is doubtful. This chapter also proved that clean-ups are mostly below the standard; therefore worsens devastation impacts and by

extension causes more deprivations leading to EI. Another key point that emerged is that the industry laws originally focused on economic benefit and are not robust enough to reduce oil-related pollution even if enforced. The laws did not also provide opportunities for meaningful and transparent public participation showing substantive and procedural EI. The findings in chapter two showed that some of the five basic principles to be adhered to when discussing EJ are breached with the main ones being that no disproportionate environmental burden should be borne by any particular group and the level of environmental protection should be adequate to sustain human health and wellbeing. The findings generally showed many deficiencies in the laws including weak penalties and mechanisms leading to unfair share of benefits/unequal distribution of goods and burdens.

Chapter three is the theoretical framework of EJ and enforcement, which also aimed to show the link between EJ and enforcement. This was achieved by first reviewing differing definitions in the US and differing approaches to EJ in many jurisdictions which found that they all mainly include fair treatment and meaningful involvement of everyone, implementation, and enforcement of laws, regulations, and policies. The researcher purposefully discussed the foundation of EJ in the US to see how legal change came and why. This chapter also established the relationship between EJ and human rights by showing that EJ require conformity with the human rights principles because EJ is rooted in fair and equitable principles and discussed the initial challenges of EJ application in the US. This chapter not only established the importance of enforcement in achieving EJ but also established that stronger enforcement improves compliance and better compliance enhances EJ. This chapter made important analysis of enforcement views and theories, mechanisms and strategies with a view of finding out what the researcher will recommend for Nigeria focusing on the managerial and enforcement theorists debate without leaving out impediments to enforcement. The chapter discussed development in enforcement and ended by emphasising the importance of recognising the holistic nature of enforcement process as a way of improving the whole enforcement element and as a way to likely enhancing EJ.

A key point that emerged from the discussion in chapter four is that the provision of the laws contributes to EI largely because many Nigerian laws are obsolete with very many weaknesses and fall short of best practices. The research revealed a pattern of rulemaking in the US that is proactive and reactive which the researcher calls it reactive-proactive regulatory response. Their strong oil-related pollution legislations prove the proactive nature. The legislative steps taken where there are major pollution incidences as evident with the enactment of CLEAR Act 2010 and RESTORE Act 2012 after the 2010 Macondo spill shows reactive nature. More so, there was passing of OPA, 1990 after the 1989 Exxon Mobil spill. The new legislative actions were recognition of loopholes and proactively stopping or reducing chances of future occurrence. This reactive-proactive regulatory response is lacking in Nigeria. The chapter revealed that despite all the pollution problems, PIB/PIGB and NOSDRA Amendment Bill still fails to adequately address pollution abatement issues even if

eventually passed; as such shows that the benefits of environmental protection are not equally available to all concerned in Nigeria showing a pattern of EI. A further examination of '*good oilfield practice*' and IAS found that the defence of intentional third party damage by industry operators should not stand. The study revealed that Nigeria had not given any special attention to Niger Delta as required by USIM despite the industry operators being members of API. Advancing the argument that weak oil pollution laws are a major contributor to weak regulatory enforcement and resultant EI, the researcher recommends the adoption of IAS by the regulatory agencies and the courts in enforcement as one of the ways to overcome legislative reform challenges. In addition, courts should use the practices of the MNOC's elsewhere as a yardstick in deciding cases related to the standards to reduce pollution incidences and by extension reducing EI.

The key point that emerged in chapter five is that in addition to the established fact that the oil pollution laws are not robust, the enforcement mechanisms, strategies and processes add to the injustice meted out to the Niger Deltans. An examination of the Nigerian situation not only found failures of the carrot and stick approach adopted in Nigeria, but also showed non- independence of the process of verifying the oil industry infrastructure causing continued violation of the already weak laws. It also showed no permits withdrawn, heavy sanctions not imposed, most fines not paid, clean-up and remediation either not done or not properly done and shows delay in litigation. In addition, it generally emerged that most enforcement models discussed in chapter three cannot achieve optimal result in Nigeria, therefore the researcher reviews US approach with a view of transplanting them to Nigeria where necessary. The chapter further exposes more impediments to enforcement in Nigeria than that of the US proving that achieving EJ for the Niger Deltans goes beyond robust laws and regulations. The chapter found also that despite some shortcomings and failures of EO enforcement in the US especially with the Bush administration, the US made considerable progress combining managerial and enforcement approaches and Nigeria can still learn many lessons especially as it concerns the enforcement mechanisms and strategies. Analysing the points, shows that Nigeria is in breach of the fourth principle of EJ that everyone should have access to effective remedies and with fair enforcement of laws without regard to the political or economic power of any wrongdoer, therefore there is EI.

Considering that the primary aim of this research is to achieve EJ for the Niger Deltans using enforcement, an important fact that emerged from chapter six is that private enforcement can address regulatory enforcement failure to some extent. It showed how private enforcers had helped in achieving better enforcement in Nigeria and the US however; in Nigeria, it is limited to enforcing rights, recovering monetary damages, bringing legal actions against polluters and government, but with little result because there are no statutes empowering them to sue the government for not enforcing the laws or the polluters for non-compliance. This is because the laws still stand as impediments to private enforcers even with FREP Rules and the African Charter. The

findings shows that the growth of private enforcement spurs government enforcers, positively influence US enforcement, invigorated latent citizen suits provisions, reduced capture, widen decisions and led to higher penalties. In Nigeria, many suits are still based on tort liabilities, had not yielded many good results as although corporations have been found guilty, there is no successful case to bring them into compliance by private enforcers because PIL is normally directed against government bodies and this leaves a gap. For all this and other problems already discussed, there is continued EI in the Niger Delta and the chapter advances the argument that citizen suits provisions or other legislative backing can help achieve EJ by improving standing, holding companies accountable and recovery of litigation cost that will spur the NGOs. It also explores the role of the regional courts and extraterritorial litigation in the MNOCs home country as way of achieving EJ and found that in absence of citizen's suit, the ECCJ could be an avenue of achieving EJ for the Niger Deltans.

7.3 LESSONS LEARNED FROM THE UNITED STATES

This comparison exposes some important facts about the US and Nigeria regulatory regimes. The first important lesson learnt in this research is how regulatory change happened in the US. Not only has EO emerged because of NGO movement, but also NGOs in the US over the years has sustained EJ practice and enforcement of the laws with a view of enhancing EJ.

The second lesson learnt is that major spills are the trigger for the improvement of the laws and policies in the US. This improvement has made protection of the environment better in the US compared to Nigeria thereby reducing pollution and EI. A good example is that transferring enforcement powers to BSEE reduced pollution in the US.

The third lesson learnt is the importance of having robust response policy in reducing pollution. This research showed how comprehensive legal framework and strong institutions helps in implementation and enforcement of the policies and how that helps in reducing EI.

Another lesson is the incorporation of industry standards into the US laws where necessary and when they are not in conflict with the US laws. This will boost enforcement.

In addition, the researcher learnt that despite the shortcomings of the US laws on pollution abatement, management and EJ, the US has a more advanced system to prevent and deal with pollution and protection of the environment compared to Nigeria due to many reasons including institutional robustness, stronger economy, better political institutions and effectiveness of the national legal system.

More so, the research showed the US looked within US in dealing with oil pollution and EJ problems as seen in the case of Mossville and it seems more effectual than Nigeria. Despite the fact that Nigeria is a developing country it could work. This is particularly so as this research showed that extra-territorial litigation is becoming more

difficult for the Niger Deltans even with the help of the NGOs. Furthermore, international soft law criticism especially concerning enforcement mechanisms justifies seeking for solutions within Nigeria.

Furthermore, this research learnt that economic law enforcement has more deterrent effect and have improved compliance in the US and other countries. It also learnt that USEPA uses independent economic expert to compute benefits using BEN model.

Another lesson learnt is the effectiveness of targeting in times of limited enforcement resources with a combination of managerial and enforcement approaches in the US.

Finally, another lesson is the power of citizen suits in boosting to enforcement in the US.

7.4 FINDINGS

In addition to points already raised in this research, it is important to highlight these other important findings. The research findings showed that oil-related pollution had caused disproportionate environmental burdens in Nigeria. It also showed unequal and inadequate environmental protection to sustain human health and wellbeing. It also showed no meaningful and transparent public participation in decision-making, inequitable accessibility of procedures and processes needed to tackle negative environmental impacts, and shows inadequate enforcement of the laws in Nigeria. All these contributed to EI by causing threats to life and health, deaths, hardship, hunger, forced migration and many more.

The research also shows loopholes in the Nigerian laws, the difficulty in amending the laws and under-representation of the Niger Deltans in key places. More disappointing finding is the unclear usage of 13% derivation resource based on the revenue accruing to the Federation Account directly from any natural resources as not only that the allocation is not enough to justify the burdens, it is allocated to the states without provision on how it will be used. Finding herein also showed that weak laws and weak regulatory enforcement is attributed to minority and low-income status of the ND partly caused by colonialism, long military rule, politics, and undemocratic democracy in Nigeria. The comparison also revealed a significant level of government hesitation or weak political will to enforce the already weak Nigerian laws and some binding treaties such as African Charter to give effect to fair and equitable principles to which EJ is rooted. It generally finds the use of procedural EJ to secure distributive EJ in the US and relies on it to conclude that Nigeria is not achieving both substantive and procedural EJ.

Examining the US legal system, the socio-legal, socio-political and socio-economic culture with that of Nigeria, the researcher found many important similarities that justifies transplant. The researcher found similarities in both legal systems, with Nigeria having legal pluralism with customary law, which does not stand where repugnant to natural justice, equity and good conscience. Highlighting this point is important because natural justice and equity are foundational to EJ, and the Nigerian

courts had already recognised that absence of equity and natural justice impairs customary laws. The US and Nigeria are also both common law countries. For this reason, relevant US laws are transferable to Nigeria. Of course, Nigeria is a developing country with less political maturity and the US is economically better, however, because environmental protection is for all and the polluting companies are mainly MNOCs, US practices could be transferable to Nigeria in whole or as diffused with a view of achieving EJ.

This research also found that enforcement failures from both within and outside Nigeria contribute to EI. It found that *Gbemre v Shell* in Nigeria failed, *SERAC* and *SERAP* cases using regional courts failed as well despite positive rulings and extraterritorial cases also failed considering the outcome of *Kiobel v Shell*, *Wiwa v Shell*, *Nigerian Farmers v Shell* and *Ogale v Shell*. The contribution herein especially as it pertains extraterritorial enforcement is that the extraterritorial litigation does not really provide safe terrain for enforcement. The basis for admissibility of the *Bodo* case was UK laws and submission of SPDC to the UK court jurisdiction meaning that their non-submission would have stopped the extraterritorial litigation. The *Kiobel* and *Wiwas'* cases based on Alien Tort Claims Act in the US also did not meet with that expected level of success. For these, the researcher's recommendation is that change has to start from within Nigeria to use enforcement to achieve EJ irrespective of all the impediments highlighted in this research.

Examination of EGASPIN, revealed its comprehensive nature in the governing of the Nigerian oil industry, however the legal status is not clear, as there is no court decision to clarify this. However, based on the antecedents of making new laws or even regulations, this research makes a case for the adoption of EGASPIN by the Nigerian legislature as an easier fix upon which to base enforcement.

The research identified the importance of the African regional courts, which are the ECCJ and the ACHR. The narratives of using the two courts as alternate ways to EJ found two important points. The first is that the ECCJ opinion connects enforcement of legislation and regulations against oil companies as the ruling required Nigeria to enforce environmental regulations against oil companies operating within Nigeria, thereby holding oil companies liable for domestic human rights violations. This means that the era of complete reliance on Nigerian laws are over. Furthermore, where enforcement is through the regional court, the analysis proved that going to the ECCJ would be better than ACHR. This is because, the ECCJ provides easy access for all, thereby reducing problems of standing that is faced in the local courts and even ACHR where both the court and State Parties can play a role of restricting access. ECCJ procedure are more straight, it does not provide for exhaustion of domestic remedies and the decisions are binding on the member states indicating national authority to enforce the decisions unless appealed or revised by the Court.

7.5 CONTRIBUTION TO KNOWLEDGE: A CASE FOR OPTIMAL OIL-POLLUTION ENFORCEMENT MODEL IN NIGERIA

A valuable contribution of this study is the comparative and reform-oriented methodological approach it employs to assess and recommend improvements to the laws and enforcement practices relating to oil exploration with a view of achieving EJ in Nigeria. In addition, to justify the use of norms from the US with some references from other regulatory regimes, the research drew on a body of IAS principles that are relevant to Nigeria putting into consideration the social, economic and political structure of Nigeria. This comparative approach served many purposes. First, is the assessment of whether or not the Nigerian laws and their enforcement is related to the US laws and the IAS and if it does, to what extent and that formed the basis for recommending actions to be taken using the reform-oriented approach. This methodological approach also helped to understand reason for ineffectiveness of the laws, regulatory and private enforcement in Nigeria. This methodology also brought to the fore the usefulness of the IAS standards and its interpretation as authoritative set of principles and rules that could be enforcement standards against polluting companies that are signatories to it. It also proved that the US Government uses these standards especially where they are not in conflict with any US laws. Some Nigerian laws also refer to these standards; therefore, Nigeria should apply them in enforcement, as they are no longer soft laws, but hard laws.

While discussing the challenges of enforcement in Nigeria, the comparative approach showed some positive aspects; however, the comparative discussion equally uncovers weaknesses and gaps in many provisions of the relevant laws in Nigeria. These findings led to recommendations for the improvement of the laws and implementation, in line with US laws and IAS to enhance EJ. Secondly, the analysis of the issues concerning regulatory enforcement unravelled the problems before the pre-1988 regimes in Nigeria and showed that Nigeria have made little progress in ensuring achievement of EJ despite the existence of the laws and are largely inadequate in achieving EJ. In addition, the comparison revealed that the provisions of Nigerian laws are largely outdated; hence provide the researcher opportunity to recommend reforms with a view of enhancing EI. The discussion uncovered how colonialism changed land ownership giving government a very significant interest in land and how colonial masters gave Nigeria ownership of oil and all this contributes to EJ. With the Nigerian economic and social climate, political issues, scepticism and lack of confidence in the Nigerian regulatory systems, evolving technology, cost issues found in this research, using regulatory enforcement to achieve EJ in Nigeria is doubtful; hence the need for optimal enforcement. The research generally found a low level of political will and enormous challenges Nigeria will surmount before using enforcement of the already weak laws to achieve EJ in Nigeria.

Relying on these findings from all the chapters, the researcher contributes to knowledge by proposing a multi-faceted and holistic approach to enforcement, combined with revision of the laws and regulations to arrive at optimal enforcement

aimed at reducing pollution in the Nigerian oil and gas industry. This will use regulatory and private enforcers and will move towards depriving the companies of unjust enrichment by polluting the environment in addition to amending the laws and regulations. This will aim at balancing environmental protection and economic interest of Nigeria. Nigeria should regulate to reduce pollution impacts; manage both the benefits and devastation costs to help determine the wealth, health, and safety of the Niger Deltans; understand the distribution of its impacts; regulatory effectiveness to advance more democratic control over oil and to maximising the benefits of oil while minimising its adverse impacts.

In view of the multi-faceted and holistic approach, the researcher revisited optimal enforcement models discussed in chapter three and their role in helping to achieve EJ for the Niger Deltans. The researcher found that Nigeria need to do more to achieve optimal enforcement, which includes restructuring of the government agencies, revising the laws, implementing the revised laws and provision of adequate resources for implementation. The researcher however evaluates the problems associated with making equitable laws, enforcing them with a view of reducing the prevalence of EI and the issue of prioritization of economic growth above environmental protection and proposes two models of enforcement that will be used together to reduce EI in the Niger Delta. The researcher calls these two models the economic model and citizen suit model of enforcement. The proposal was after analysing the models explained in chapter three of this thesis. The researcher found that because the self-reporting models carries with it problems of under reportage, personal liability model has the problem of not knowing the company's internal working and rule making procedures and inspectability models although helps because of acquisition of more transparent technologies, its efficient usage could be a problem. The proposed models are unique because, the usage of economic model is to optimise penalties as a way of ensuring compliance and enforcement while the citizen's suit model optimises citizen enforcement as a way of using the economic model to get desired justice. Before recommending the use of these two models, the researcher carefully examined the managerial model discussed in chapter three. The managerial model recommends capacity building, persuasion, negotiation and management to promote compliance, however the researcher prefers a stronger enforcement model especially considering the level of oil-related pollution in Nigeria and bearing in mind all the factors militating against enforcement in Nigeria. These factors are very well considered and are one of the main reasons why the researcher thinks that private actors have some important roles to play in enforcement with a view of achieving EJ.

The economic model touches on the view of some scholars discussed herein. It will rely on Heyes and Becker's discussion that penalties should exceed the benefits of violation. The research findings brought to the fore general support for the view that increased penalties result in higher compliance rates and improved environmental performance. Furthermore, deterrence theories discussed in chapter three shows that

achieving maximum deterrence means that an enforcement programme must have certain detection and penalties with the severity of penalties exceeding the benefits of illegal pollution activity. Fulton and Gilberg also justify this approach as they identified the necessary characteristics of an enforcement programme that is being strong enough to have an impact on the regulated, change behaviour and deliver environmental compliance. The USEPA's 1984 penalty policy also emphasises the '*economic law enforcement*' that calculates penalties with a view of depriving the violator of any financial gains from non-compliance. Finally, this study while examining the US citizen suits found that to bar citizen suits, settled government action should have adequate deterrent penalty that coerce compliance, deter violations and recover from a violator more than the economic benefit. The economic law enforcement is a win situation for both Nigeria and the Niger Deltans because, Nigeria will not entirely lose out as the penalties will still generate revenue for Nigeria and the Niger Delta environment will be protected. In addition, the MNOCs' use similar or higher standards in other jurisdictions especially the developed countries; therefore, Nigeria is not likely to lose investment as Nigeria is just asking for fairness in the ways they do business. In Nigeria, actions or inactions of the regulated companies mainly cause oil-related pollution. Oil companies are business organisations, so where penalties do not exceed the benefit of violation, enforcement actions would have failed using the researcher's measurement of effective enforcement, which includes outputs and outcomes or changes in the behaviour of actors relevant to the problem. Examining problems faced by both the Niger Deltans and the regulatory agencies, this research exposed the ineffectiveness of regulatory enforcement for several reasons discussed in chapter five, therefore citizen suits can help the judiciary make decisions on the nature and extent of firms' deviation from the law as discussed by Garvie and Keeler's model of environmental enforcement. With all the analyses, the researcher concludes that to optimally deter potential offenders and reduce EI caused by oil business, the first step is ensuring that the businesses do not benefit from the violation using economic model of enforcement.

If Nigeria adopts economic model of enforcement, the next question is how Nigeria calculate economic benefit. Following lessons learnt from the US, this study found that USEPA established the BEN model using an independent economic expert to compute benefits with addition to recalcitrance and consideration of seriousness of the violation, violation history, good-faith efforts and the economic impact of the penalty and it is improving enforcement. In addition, because this research is advancing the argument that the existence and extent of the economic benefit is factual, Nigeria should follow these footprints in measuring and calculating the economic benefit using a similar model that quantified the larger financial benefit. The researcher understands that Nigeria may be a more difficult terrain as the MNOCs allege, therefore targeting a percentage of their profit makes enforcement easier as with this, penalty will be similar to the US penalties and Nigeria will not lose out. The penalties divesting economic benefit, generating enforcement disincentive larger than the financial incentives motivating the violation serves three major purposes: (1) divesting the polluter of all

the benefits gotten by non-compliance, (2) covering enforcement processes cost and (3) serving as a deterrent to the offender and others.

The second model, which the researcher calls the citizen suits enforcement model, is to ensure that the economic model yields the desired result through enforcement. This research brought to the fore several problems associated with regulatory enforcement in Nigeria and the reviewed literature shows that the few successful regulatory or private enforcement actions have NGOs' influence in one way or the other. This model will likely checkmate both the polluting companies and the government to some extent and likely reduce capture and corruption that is generally widespread in Nigeria. The NGOs have powerful influence because they are independent of the legislature, the executive and the judiciary and that shows that there will be fewer hurdles for Niger Deltans, with the main one being getting the right legislation framework that will include citizen suit provision. This proposal is with reservation that not all NGOs have the influence and not all might help in citizen suits, however citizen suit provision will provide for enhanced NGOs access thereby overcoming the hurdles of the NGOs standing.

In addition, with clearer provisions of the laws, the interpretative role of the judiciary will be less burdensome, with the judiciary having less hiding place to misinterpret the laws. A provision similar to FREP Rules in Nigeria, CWA, CAA, and RCRA in the US in the enabling legislations will also be helpful. The researcher's view is that with successful targeting of the polluter's profits in civil/criminal penalties or civil liabilities, polluters will weigh business options and will be more likely to comply. Apart from general problems of regulatory enforcement, multiple and weighty problems highlighted in this study will make it difficult for Nigeria to solely relying on regulatory enforcement until some of the identified problems are tackled and because of concerns in tackling the problems, using regulatory enforcement alone to achieve EJ is doubtful. As developed as US is, regulatory enforcement alone does not suffice. Hence, this proposal of using citizen suit model that will likely influence public enforcement or even spur public enforcers into taking regulatory actions.

Bearing in mind that the aim of this research is to assist in enhancement the enforcement of oil pollution laws to contribute to achieving EJ for the Niger Deltans, the rest of this chapter focuses on proposing solutions to EI based on lessons learnt from the US and other jurisdictions and even Nigeria over time.

7.6 RECOMMENDATION: ADDRESSING ENVIRONMENTAL JUSTICE CONCERNS IN THE ND

This study has revealed a number of challenges associated with oil industry legislations and enforcement, which partly contributes to EI. It also revealed that even in the US, EJ faced initial struggles and challenges, but the US overcame that, therefore Nigeria can. Leaning on that premise and for the government to fairly deal with EJ and governance concerns, the researcher makes the following recommendations. This research broadly recommends institutional reforms, legal

reforms that include improving penalties and private enforcement powers and general enforcement reforms. The sub-headings below are the recommendations.

7.6i Action to be taken by the Organs of Government

This means actions by the legislature to make suitable laws, the executive to execute those laws and the judiciary to uphold and enforce the laws and facilitate EJ. A good start towards addressing EJ concerns is reforming and improving the laws. Nigeria can borrow from other countries such as South Africa discussed or referred to in the study to add EJ principles in her constitution or takes a revolutionary step by making an Order similar to the 1994 US Executive Order. This is particularly so as South Africa is also a developing country with a mixed legal system including common law.

Taking into account the socio-economic and political realities in Nigeria, there is need for government interventions, to improve the laws by increasing penalties to exceed the benefits of violation, as the current penalties are mockery of enforcement process. They are so inadequate that they cannot deter and constitute what an economist calls absence of market-based incentives because it costs more to stop pollution than to pay fines or damages, or even remediate, the fines are not also reviewed to reflect the inflation rates. Because, higher penalties would motivate enforcers and discourage polluter, the researcher proposes similar punishment criteria with the US considering that same MNOCs trade in same global market and the laws should provide for review of penalties using agreed rate, which will also reflect the rate of inflation. In addition, there is need to amend the laws to include corporate officers' liability because officers liability may discourage officers from taking higher risks that may cause pollution.

In addition, though compensation is not the focus of this research, the research identified that non-payment for economic loss and reliance on polluted land for sustenance contributes to EI. Amending the laws to include compensation for economic loss, could affect the MNOC's profit, will help enforcement and enhance EJ as economic loss payment will likely bring long-term solution for the Niger Deltans. There should be removal of the clause of no compensation for pollution for sabotage to align with the requirement of some IAS that provides that the MNOCs are to protect their installations. This will increase self-monitoring by the MNOCs, remove the burden of using federal government resources and agents to checkmate vandals and reasonably reduce EI. In addition, government should go beyond the surface issues and address the underlying causes of sabotage by reaching an agreement with the MNOCs on how to deal with such situation possibly by insurance. The laws also should be robust enough to cover government role in catastrophic spill, enforcement powers and delineation of duties of the enforcement agencies. The laws should deal with polluters, hold the management of the polluting companies liable where necessary and deal with corrupt enforcement officials. Modification of the Constitution to state the usage of the 13% derivation fund from natural resources or a percentage of it should be used to ameliorate the effect of pollution is desirable.

The adequacy of oil-pollution control legislation in Nigeria should be re-examined forward thinking by similar pollution control legislations in the USA. This research

has taken the position that the basic legal framework for the control of oil pollution is largely not in place, however, with amendments, firm and binding commitment to enforce including funding, staff allocations and political will, application of IAS in Nigeria could be one quick fix. Some Nigerian laws referred to IAS and are stringent than the Nigerian laws. Nigeria should amend the existing laws or make new legislation to revise the penalties, increase the administrative and judicial powers giving them fuller range of powers, enhance the scope of the activities covered by existing legislation, increase the power of private enforcers and improve public involvement in the pollution control process in view of Bali Guidelines and the US laws.

Laws should be made or amended with regular updates to require the enforcement agencies to publish enforcement and compliance policy for oil pollution control legislation indicating enforcement procedure, the roles and functions of differing units, the relationship with other departments and agencies of the same jurisdiction, the relationship with other governments agencies and the channels for citizen participation if any. The law should also require the regulatory agencies to include an inventory of all enforcement actions taken, cost of enforcement action and compliance progress report, describing the improvement or otherwise and explaining the reason for the changes in their annual reports. This will make it easier to weigh practicability of civilly imposed sanctions, including examination of the administrative, constitutional, legal, political and economic implications of such a regime. As seen in the US, stronger laws helped their enforcement and strengthening the laws such as CERCLA with SARA fortified EO 1994 that helped in reducing EI.

Furthermore, the researcher recommends the adoption of the Nigerian 2015 INDC Policy submitted by Nigeria before Paris Conference by the Nigerian legislature. In addition, in addition to using mitigation actions in enforcing existing policies/strategies on flaring restrictions, the researcher recommends additional regulatory changes, which include development of Gas-to-Power Plants at flare sites.

Finally, in addition to legislative amendments, the research proposes OPA model as a model of oil pollution control legislation from which Nigeria derive her regime with modifications to adapt to Nigerian local circumstance where necessary to boost the enforcement powers to help achieve EJ. This will provide both regulatory and private persons empowerment in enforcement as despite some challenges in OPA/CWA enforcement; its merit is more. All this will make the oil economy more just and equitable and this will foster EJ.

7.6ii Improving and Strengthening Regulatory Enforcement in Nigeria

Fortifying the enforcement powers of the regulatory agencies is the first step towards effective enforcement; however, the researcher recommends that strengthening of regulatory enforcement can enhance compliance and in effect could reduce EI. This is particularly so considering the enforceability issues surrounding extraterritorial matters. To achieve this, there is need for a creation of integrated regulatory agencies

or the existing agencies should act holistically. The researcher recommends transfer of the DPR's enforcement powers to NOSDRA or any other agency created for that purpose to reduce conflicts of interest, but with proper financial and human resource. There is also need to widen NOSDRA powers to deal with all oil pollution issues in Nigeria. Also, leaning on lessons from the US, solutions such as signing of MoUs, categorised mechanism and application of different strategies should be adopted by the enforcement agencies to reduce conflicts, pending when new laws are made.

Regarding approach, the researcher recommends and aligns with CI by suggesting a multi-faceted holistic approach and preventative measures to tackle the wider problems. There is also need to improve capacity, introduce appropriate checks and balances to reduce corruption, poverty, illiteracy and other problems. Regulatory system should also ensure appropriate incentives, revision of staffing procedures, and publishing enforcement information needed to evaluate performance. In addition, to strengthen enforcement, legal and procedural reform, compensation, legal aid, public outreach, innovative co-management, and increase in anticorruption efforts are desirable. To deal with corruption, the researcher recommends more transparency measures to ensure public accountability including reducing discretion and informal rules, using committees and regular movement of bureaucrats/officials between various offices as well as stringent punishment for corrupt regulators and improving salaries to reduce the temptation of bribes. The enforcement agencies need to pursue and maintain standard operational procedures for the industry. NOSDRA should also be equipped for timely detection of spills and rapid response. In view of the finding in this research, that NOSDRA already consults Ghana in spill response; the researcher recommends formal collaboration with Ghana for effective enforcement response.

All these points will generally be summarised into two: (1) preventative activities that directly improve compliance while reducing enforcement challenge and (2) activities designed to ensure that the laws and their enforcement are workable and fair to enhance EJ.

7.6iii Implementable Institutional Reforms

There is also need for implementation of institutional reforms including reformation of regulatory institutions, separation of roles, establishment of environmental courts, judicial training and many more. While reforming these institutions, the socio-legal and socio-economic situations in Nigeria and Niger Delta should be considered to avoid its failure in line with Twining and Watson's discussion on diffusion and transplant. This reform will be a direct response to regulatory enforcement problems that had encouraged inequality. This will involve stakeholders, other government officials and international development specialists building on lessons learnt. There may be small town hall meetings for workable policy formulation. In general, the researcher recommends that the DPR should concentrate on generating revenue for Nigeria while NOSDRA should be a single body to regulate and manage environmental oil pollution issues for Nigeria.

There should be court reform by increasing the number of judges cum specialist judges, enhancing wages and rewards to lessen the likelihood of corruption and improvement of the entire judicial process. The reform should have the inclusion of means of dealing with corrupt individuals in the judicial process. Strengthening the judiciary will encourage well-intentioned public enforcement agents because regulatory enforcers will envisage that judicial decisions might expose ineffective regulatory enforcement. With that, the courts can use its inherent powers to liberalise standing, make timely decisions and grant prompt, adequate and effective remedies, imprison controlling minds that encourage pollution, award alternative sentences, direct offender to publish conviction facts or perform community service and help in achieving timely and effective enforcement even in absence of new legislative enactments. There is also need for judicial training including environmental litigation techniques and dispute resolution, share information, experience, and best practices on identical issues faced by judges worldwide. This will be in tandem with the voluntary Bali Guidelines made with State nationals in mind.

An environmental court could devise approaches that include prior consultation, fact-finding or locus in-quo visits, commissions of inquiry, conciliation, mediation, noncompliance procedures and arbitration as a way of achieving EJ. This recommendation follows the researcher's believe that such moves will drive compliance as the case of Bodo Community where the researcher had already opined that SPDC offered higher compensation because of planned locus in-quo visit. It is more in training judges than establishing environmental courts because environmental courts without trained judges will do little or no justice where desired. Trained judges will have knowledge of environmental laws, increase punishment where desirable considering the cost of environmental rehabilitation, cost recovery or market value, upward revision for increased scientific appreciation of environmental harm or inflation and not relying on the penalties in the laws legislated over four decades ago. This will stop polluters from benefiting from polluting activities and will help in reducing EI. More importantly, pending review of the laws, there should be punishment for polluters who inflict EI despite the law is porous. Trained judges will know when to invoke common tort principles to bring the polluters to justice in line with the reasoning of Bell and McGillivray¹⁸⁶⁸ and this will act as a deterrent that improves risk prevention and increases ease of prosecution. This is particularly the researcher's view especially owing to all the technicalities in the oil and gas industry making it difficult for untrained enforcers to challenge the oil companies.

7.6iv Expanding and Exploring Enforcement Frontiers by NGOs/ Private Enforcers

Examination of private enforcement role in the US and citizen suits brought to the fore several weaknesses being experienced in Nigeria. The study examined several cases pursued by the NGOs for the Niger Deltans and several cases pursued under the US

¹⁸⁶⁸ S Bell and D McGillivray (n 847)

under citizen suits. The examination measured the successes in both countries and found that the US private enforcers recorded more successes. The research showed that the power granted by the enforced Statute makes helped the US private enforcers achieve more. Based on that, the researcher recommends incorporation of citizen suits provision in the Nigerian pollution laws. Bearing in mind the problems associated with bipolar transplant discussed in chapter one, the researcher recommends transplant or diffusion of the relevant citizens' suit provisions that will remove the impediments to successful private enforcement in Nigeria. This is vital because of extensive impediments to the regulatory enforcement, which need addressed in Nigeria. There will be a more detailed assessment of obstacles faced by private enforcers in Nigeria but without affecting the regulatory body's role as primary enforcer. Already, the impact of private enforcers in Nigeria is evident in this research and the furtherance of citizen suits provisions will likely enhance their role with a view of achieving EJ.

Furthermore, findings herein show that the major roles played in the struggle for EJ by the NGOs are limited to enforcing human rights or pursuance of compensation rights relying on the existing laws and on one occasion relied on the FREP Rules 2009 to seek for EJ for oil pollution victims. Reliance on the FREP Rules by NGOs could also be useful to bring actions against MNOC in the breach of industry standards to enforce the fundamental human rights of the Niger Deltans as a quick fix. NGOs can use their power more widely and can resort to the FREP Rules in anticipated breach. Private enforcers can also move from seeking compensation for pollution to proactive and reactive actions on perceiving breach of the IAS that raises EJ concern. Because the FREP Rules enlarged the sources of human rights jurisprudence, NGOs can also bring to the courts attention municipal, regional and international bills of rights as a way of enhancing EJ. NGOs should also promote global awareness of EJ issues caused by oil-related activities in the ND, generate action to prevent EI using local, national and international links for democratic control over corporations, human rights and EJ, provide analysis, continue to conduct and fund research and provide stronger network with the ND. NGOs should also maintain websites documenting violations, monitor government actions and pressure them and MNOCs to reduce EJ. NGOs can use technologies to innovate and develop new strategies to stop EI, encourage reform measures by motivating people to get public support. NGOs pressure is particularly important because as Montesquieu noted, characteristics of governance shape the law, therefore different institutional, governmental and economic structures affects enforcement. Not only could all these actions help in enforcing the laws, it could help in challenging the lawmakers to improve their law making. There should be expansion of regulatory space for NGOs by improving the laws such as including citizen suits provisions already discussed to allow more NGO participation to pressure underperforming regulators into action and support them as well as exerting pressure on polluting firms through legal or political means with support from state. Enforcement options should also explore more frontiers of including recovering economic gains as the case in the US. The researcher opines that these

recommendations will be easier if private enforcers get powers by the enabling statutes.

7.7 SUGGESTION FOR FURTHER STUDY

The Outcomes of the Thesis Suggest some Directions for Further Research.

Undoubtedly, this study showed questions concerning the role of the MNOCs in preventing pollution in their business environment, the role of the state in protecting citizens from business and role of both the business actors and the state to remedy harm where it occurs. This would lead to a further research on the applicability of Ruggie Principles, OECD and Principles 1, 2, 7-10 of UN Global Compacts as a way of reducing EI especially when considered with the decision *Nigerian Farmers* that found that failure to protect/prevent oil wellhead/pipeline can cause damage. This research did not follow that path, but research on the applicability of these principles could be an alternative to NGOs enforcement and could be a way of reducing EJ existing in the Niger Delta. In addition, there is ongoing discussion on the formation of binding treaty at the UN through its Open-Ended Intergovernmental Working Group and IUCN Global Pact for the Environment that will be a subject of future research on how Nigerians can avail that opportunity as a way of using its enforcement to achieve EJ if the Treaty becomes law.

The analysis herein showed that impacts of pollution disproportionately affect Niger Deltans; however, there is need for further research to specify the distribution of socio-economic impacts especially its role in displacing the inhabitants of Niger Deltans and human rights implications of that.

A third avenue for further research is the proposition of extension of property rights in environmental resources. Adler suggested three ways of property-based environmental protection, property-based standing and pollution prevention and coasian bargaining using Elizabeth Brubaker's study on the use of property rights to protect environmental quality in Canada.¹⁸⁶⁹ This proposal seem not to have been tested, but considering the fact that loss of land use right with the enactment of LUA is seen as one of the causes of EI, these property rights could be a veritable way of curbing EI.

A fourth avenue for future research will be the compensation principles. EJ is concerned with distribution of goods and bads and the procedure taken to address environmental issues and one of the principles of EJ is compensation for wrongs. There is need for further research into the use of compensation as an enforcement mechanism, which can aid in the pursuit of EJ.

Another avenue is exploring the option of establishing a World Environmental Court with international jurisdiction to address the gap in the Nigerian laws especially with Nigeria not having a very independent judiciary or a binding environmental rights Treaty with enforcement powers over state parties and non-state petitioners and defendants.

¹⁸⁶⁹ JH Adler (n 1699)

Another avenue for future research is to research into the impact of naming and shaming as mechanisms for penalising noncompliance in voluntary approaches.

Finally, an empirically based comparative study of legislative regimes and enforcement practices for pollution control should be undertaken to reveal the different approaches to oil pollution control in Nigeria to examine the advantages and disadvantages of litigation and negotiation-oriented approaches, legislative and administrative deficiencies fairly.

7.8 GENERAL CONCLUSION

The world is a global village especially with all the technological advancement and the internet; and this is one more reason to compare jurisdictions. More so, with globalisation, Nigeria will need to act in line with other nations of the globe. In addition, with global environmental law and global environmental justice taking the centre-stage in the legal field, there is need for comparison. A good example is the climate change issues. Global and cross-jurisdictional investments are also on the rise. In Nigeria for instance, major reasons for EI are multi-national business, trade, profit making and economy. For this, there is a need for different jurisdictions to learn from each other to understand how they deal with the problems and externalities, which may arise from the activities of global business.

This study exposed complex problems of regulation not only in Nigeria, but also in the US. Knowledge of what other jurisdictions are doing to ameliorate these problems is useful to reduce EI or attempt to resolve EI issues once they occur. The research developed economic model and citizen suit model for reduction of EI. It might be apposite for the Nigerian legislators, regulators and the private parties to have knowledge of these models for resolving the issue of EI manifest in the Niger Delta. The economic theory is relatively simple because the violator weighs costs and benefits of violation in deciding whether to violate because a rational prospective violator and increase in the expected costs of business may deter a prospective offender and in effect reduce pollution and EI.

Conclusively, the findings in this thesis might be very useful if brought to the attention of the NGOs whom the researcher believes will push for reforms through the Nigerian legislative assemblies. NGOs should also develop techniques to push for reforms through the courts using IAS as enforcement standards. The NGOs could also use ECCJ if they do not meet with success in Nigeria. This is in preference to litigating in the home countries of the multi-nationals and further pushing for enforcement of the court decisions.

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APPENDICES

Appendice A

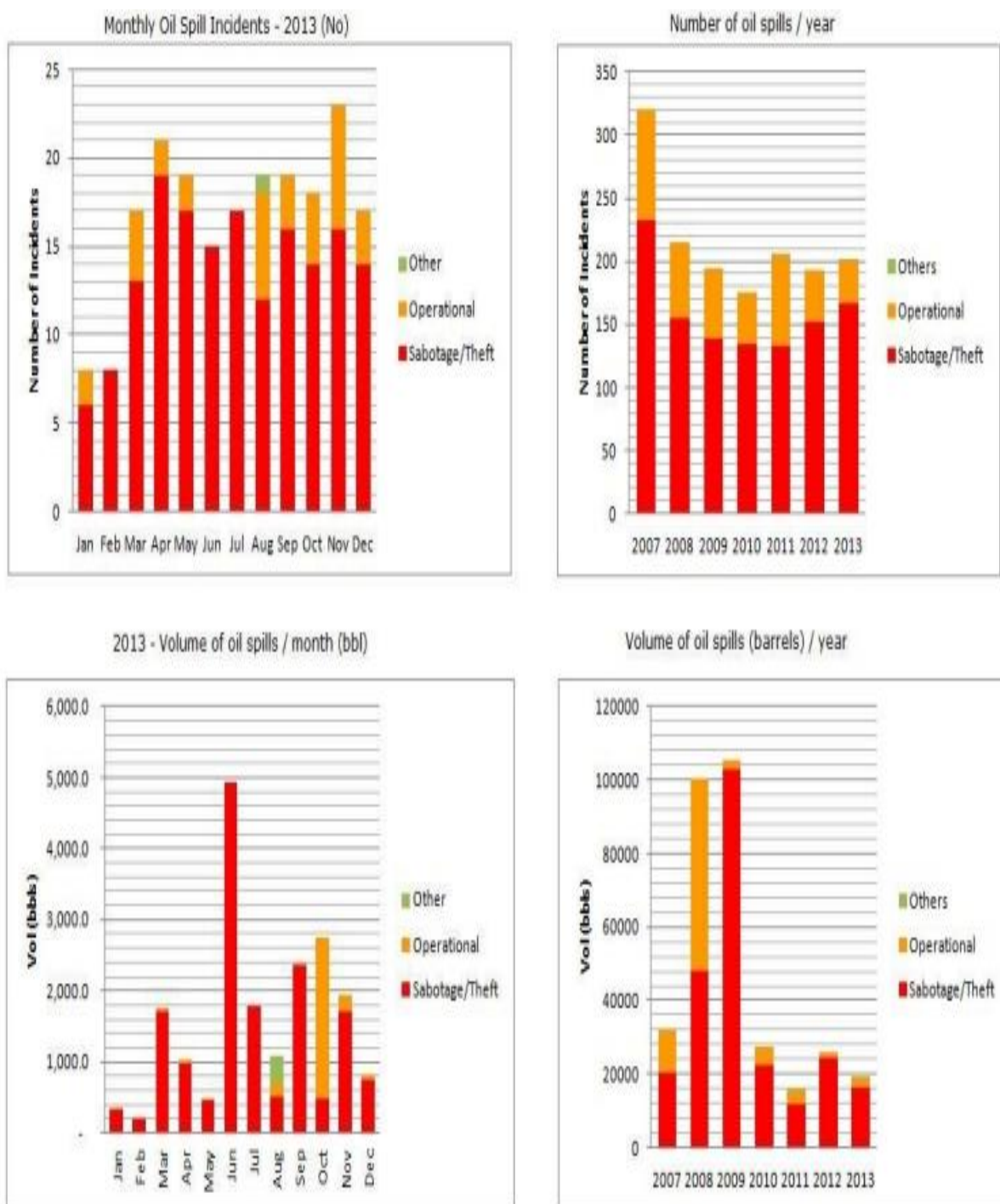
Figure 1



Source: C Cragg: Gas Flaring – Towards an Alternative Solution (SDN Publication 2010)

<<http://www.stakeholderdemocracy.org/gas-flaring-towards-an-alternative-solution/>>
accessed 03 October 2017

Figure 2



Source: RDS Shell's Economic Contribution

<<http://reports.shell.com/sustainability-report/2014/our-activities/nigeria/shells-economic-contribution.html>> accessed 03 October 2017

Appendice B

EMAIL FROM NESREA

From: iande@nesrea.org [iande@nesrea.org]
Sent: 17 December 2012 10:56
To: Eloamaka Okonkwo
Cc: dg@nesrea.org
Subject: NESREA POWERS

NESREA/I&E/307/I

I am directed to acknowledge the receipt of your e-mail dated 12th December, 2012 seeking for more clarification on the NESREA Act.

2. In view of the above, I am further directed to inform you as follows:

- It is a settled principle of interpreting a law that its provisions should not be read in isolation and that there must be a cumulative reading for better understanding of the matter; and
- The provision of section 7 of the enabling Act has conspicuously provided that the Agency has no power to enforce any environmental legislation in the field of oil & gas. In applying the “blue pencil rule” inclusion of oil & gas under Para C’ in Section 7 does not confer any power on the Agency to enforce in oil & gas.

3. So far, the Agency has restricted its activities to the non - oil & gas sector as provided by its enabling act. It is therefore expected that the above explanation has settled the matter.

4. Please accept the assurances of the Director General/CEO’s best regards.

Emenyonu, Vincent C.
for;Director (Inspection and Enforcement)

EMAIL FROM DPR OFFICIAL

Actions

To:

M

[Eloamaka Okonkwo](#)

Inbox

16 April 2013 07:38

You replied on 18/05/2014 18:04.

Good morning, first allow me apologize for not returning your calls. I have been swarmed up with work. I also ought to have communicated with you via e-mail for over a week now. Please pardon this delay.

As discussed, we presently do not have a robust/concise and clearly spelt out sanction regime for environmental non-compliance with environmental laws by operating companies. Rather we apply the carrot and stick approach and treat non-compliance issues on a case by case basis. You may wish to note that the non-existence of a robust sanction regime for erring operators stems from the fact that Nigeria is a mono-product economy hence oil must flow.

Invariably as regulators and environmental advocates we still impress it on operators to ensure compliance with all local laws and regulations failing which certain permits and approvals are withheld which could impact on their project timelines and invariably result to increased costs which would be borne solely by the operator i.e. non-recoverable from the Joint Venture account . However these situations occur often and are not documented per se hence the statistics is not readily available.

Monetary sanctions and production deferments are other options which are also being considered but are not approved by the Government presently. Hopefully post PIB the DPR will be fully equipped and empowered to deploy these tools as means of enforcing compliance.

Thank you.

PRINCIPLES OF ENVIRONMENTAL JUSTICE

WE, THE PEOPLE OF COLOR, gathered together at this multinational People of Color Environmental Leadership Summit, to begin to build a national and international movement of all peoples of color to fight the destruction and taking of our lands and communities, do hereby re-establish our spiritual interdependence to the sacredness of our Mother Earth; to respect and celebrate each of our cultures, languages and beliefs about the natural world and our roles in healing ourselves; to ensure environmental justice; to promote economic alternatives which would contribute to the development of environmentally safe livelihoods; and, to secure our political, economic and cultural liberation that has been denied for over 500 years of colonization and oppression, resulting in the poisoning of our communities and land and the genocide of our peoples, do affirm and adopt these Principles of Environmental Justice:

The Principles of Environmental Justice (EJ)

- 1) **Environmental Justice** affirms the sacredness of Mother Earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction.
 - 2) **Environmental Justice** demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias.
 - 3) **Environmental Justice** mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things.
 - 4) **Environmental Justice** calls for universal protection from nuclear testing, extraction, production and disposal of toxic/hazardous wastes and poisons and nuclear testing that threaten the fundamental right to clean air, land, water, and food.
 - 5) **Environmental Justice** affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples.
 - 6) **Environmental Justice** demands the cessation of the production of all toxins, hazardous wastes, and radioactive materials, and that all past and current producers be held strictly accountable to the people for detoxification and the containment at the point of production.
 - 7) **Environmental Justice** demands the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation.
 - 8) **Environmental Justice** affirms the right of all workers to a safe and healthy work environment without being forced to choose between an unsafe livelihood and unemployment. It also affirms the right of those who work at home to be free from environmental hazards.
 - 9) **Environmental Justice** protects the right of victims of environmental injustice to receive full compensation and reparations for damages as well as quality health care.
 - 10) **Environmental Justice** considers governmental acts of environmental injustice a violation of international law, the Universal Declaration On Human Rights, and the United Nations Convention on Genocide.
 - 11) **Environmental Justice** must recognize a special legal and natural relationship of Native Peoples to the U.S. government through treaties, agreements, compacts, and covenants affirming sovereignty and self-determination.
 - 12) **Environmental Justice** affirms the need for urban and rural ecological policies to clean up and rebuild our cities and rural areas in balance with nature, honoring the cultural integrity of all our communities, and provided fair access for all to the full range of resources.
 - 13) **Environmental Justice** calls for the strict enforcement of principles of informed consent, and a halt to the testing of experimental reproductive and medical procedures and vaccinations on people of color.
 - 14) **Environmental Justice** opposes the destructive operations of multi-national corporations.
 - 15) **Environmental Justice** opposes military occupation, repression and exploitation of lands, peoples and cultures, and other life forms.
 - 16) **Environmental Justice** calls for the education of present and future generations which emphasizes social and environmental issues, based on our experience and an appreciation of our diverse cultural perspectives.
 - 17) **Environmental Justice** requires that we, as individuals, make personal and consumer choices to consume as little of Mother Earth's resources and to produce as little waste as possible; and make the conscious decision to challenge and reprioritize our lifestyles to ensure the health of the natural world for present and future generations.
- More info on environmental justice and environmental racism can be found online at www.ejnet.org/ej/**

Delegates to the First National People of Color Environmental Leadership Summit held on October 24-27, 1991, in Washington DC, drafted and adopted these 17 principles of Environmental Justice. Since then, the Principles have served as a defining document for the growing grassroots movement for environmental justice.

EXECUTIVE ORDER 12898 ON ENVIRONMENTAL JUSTICE

Federal Register

Vol. 59, No. 32

Wednesday, February 16, 1994

Presidential Documents

Title 3—

Executive Order 12898 of February 11, 1994

The President

Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1—*Implementation.*

1–101. *Agency Responsibilities.* To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately 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 and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands.

1–102. *Creation of an Interagency Working Group on Environmental Justice.*

(a) Within 3 months of the date of this order, the Administrator of the Environmental Protection Agency (“Administrator”) or the Administrator’s designee shall convene an interagency Federal Working Group on Environmental Justice (“Working Group”). The Working Group shall comprise the heads of the following executive agencies and offices, or their designees: (a) Department of Defense; (b) Department of Health and Human Services; (c) Department of Housing and Urban Development; (d) Department of Labor; (e) Department of Agriculture; (f) Department of Transportation; (g) Department of Justice; (h) Department of the Interior; (i) Department of Commerce; (j) Department of Energy; (k) Environmental Protection Agency; (l) Office of Management and Budget; (m) Office of Science and Technology Policy; (n) Office of the Deputy Assistant to the President for Environmental Policy; (o) Office of the Assistant to the President for Domestic Policy; (p) National Economic Council; (q) Council of Economic Advisers; and (r) such other Government officials as the President may designate. The Working Group shall report to the President through the Deputy Assistant to the President for Environmental Policy and the Assistant to the President for Domestic Policy.

(b) The Working Group shall: (1) provide guidance to Federal agencies on criteria for identifying disproportionately high and adverse human health or environmental effects on minority populations and low-income populations;

(2) coordinate with, provide guidance to, and serve as a clearinghouse for, each Federal agency as it develops an environmental justice strategy as required by section 1–103 of this order, in order to ensure that the administration, interpretation and enforcement of programs, activities and policies are undertaken in a consistent manner;

(3) assist in coordinating research by, and stimulating cooperation among, the Environmental Protection Agency, the Department of Health and Human Services, the Department of Housing and Urban Development, and other agencies conducting research or other activities in accordance with section 3–3 of this order;

(4) assist in coordinating data collection, required by this order;

(5) examine existing data and studies on environmental justice;

(6) hold public meetings as required in section 5-502(d) of this order; and

(7) develop interagency model projects on environmental justice that evidence cooperation among Federal agencies.

1-103. *Development of Agency Strategies.* (a) Except as provided in section 6-605 of this order, each Federal agency shall develop an agency-wide environmental justice strategy, as set forth in subsections (b)-(e) of this section that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. The environmental justice strategy shall list programs, policies, planning and public participation processes, enforcement, and/or rulemakings related to human health or the environment that should be revised to, at a minimum: (1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations; (2) ensure greater public participation; (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify differential patterns of consumption of natural resources among minority populations and low-income populations. In addition, the environmental justice strategy shall include, where appropriate, a timetable for undertaking identified revisions and consideration of economic and social implications of the revisions.

(b) Within 4 months of the date of this order, each Federal agency shall identify an internal administrative process for developing its environmental justice strategy, and shall inform the Working Group of the process.

(c) Within 6 months of the date of this order, each Federal agency shall provide the Working Group with an outline of its proposed environmental justice strategy.

(d) Within 10 months of the date of this order, each Federal agency shall provide the Working Group with its proposed environmental justice strategy.

(e) Within 12 months of the date of this order, each Federal agency shall finalize its environmental justice strategy and provide a copy and written description of its strategy to the Working Group. During the 12 month period from the date of this order, each Federal agency, as part of its environmental justice strategy, shall identify several specific projects that can be promptly undertaken to address particular concerns identified during the development of the proposed environmental justice strategy, and a schedule for implementing those projects.

(f) Within 24 months of the date of this order, each Federal agency shall report to the Working Group on its progress in implementing its agency-wide environmental justice strategy.

(g) Federal agencies shall provide additional periodic reports to the Working Group as requested by the Working Group.

1-104. *Reports to the President.* Within 14 months of the date of this order, the Working Group shall submit to the President, through the Office of the Deputy Assistant to the President for Environmental Policy and the Office of the Assistant to the President for Domestic Policy, a report that describes the implementation of this order, and includes the final environmental justice strategies described in section 1-103(e) of this order.

Sec. 2-2. *Federal Agency Responsibilities for Federal Programs.* Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.

Sec. 3-3. Research, Data Collection, and Analysis.

3-301. Human Health and Environmental Research and Analysis. (a) Environmental human health research, whenever practicable and appropriate, shall include diverse segments of the population in epidemiological and clinical studies, including segments at high risk from environmental hazards, such as minority populations, low-income populations and workers who may be exposed to substantial environmental hazards.

(b) Environmental human health analyses, whenever practicable and appropriate, shall identify multiple and cumulative exposures.

(c) Federal agencies shall provide minority populations and low-income populations the opportunity to comment on the development and design of research strategies undertaken pursuant to this order.

3-302. Human Health and Environmental Data Collection and Analysis. To the extent permitted by existing law, including the Privacy Act, as amended (5 U.S.C. section 552a): (a) each Federal agency, whenever practicable and appropriate, shall collect, maintain, and analyze information assessing and comparing environmental and human health risks borne by populations identified by race, national origin, or income. To the extent practical and appropriate, Federal agencies shall use this information to determine whether their programs, policies, and activities have disproportionately high and adverse human health or environmental effects on minority populations and low-income populations;

(b) In connection with the development and implementation of agency strategies in section 1-103 of this order, each Federal agency, whenever practicable and appropriate, shall collect, maintain and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding facilities or sites expected to have a substantial environmental, human health, or economic effect on the surrounding populations, when such facilities or sites become the subject of a substantial Federal environmental administrative or judicial action. Such information shall be made available to the public, unless prohibited by law; and

(c) Each Federal agency, whenever practicable and appropriate, shall collect, maintain, and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding Federal facilities that are: (1) subject to the reporting requirements under the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. section 11001-11050 as mandated in Executive Order No. 12856; and (2) expected to have a substantial environmental, human health, or economic effect on surrounding populations. Such information shall be made available to the public, unless prohibited by law.

(d) In carrying out the responsibilities in this section, each Federal agency, whenever practicable and appropriate, shall share information and eliminate unnecessary duplication of efforts through the use of existing data systems and cooperative agreements among Federal agencies and with State, local, and tribal governments.

Sec. 4-4. Subsistence Consumption of Fish and Wildlife.

4-401. Consumption Patterns. In order to assist in identifying the need for ensuring protection of populations with differential patterns of subsistence consumption of fish and wildlife, Federal agencies, whenever practicable and appropriate, shall collect, maintain, and analyze information on the consumption patterns of populations who principally rely on fish and/or wildlife for subsistence. Federal agencies shall communicate to the public the risks of those consumption patterns.

4-402. Guidance. Federal agencies, whenever practicable and appropriate, shall work in a coordinated manner to publish guidance reflecting the latest scientific information available concerning methods for evaluating the human health risks associated with the consumption of pollutant-bearing fish or

wildlife. Agencies shall consider such guidance in developing their policies and rules.

Sec. 5-5. *Public Participation and Access to Information.* (a) The public may submit recommendations to Federal agencies relating to the incorporation of environmental justice principles into Federal agency programs or policies. Each Federal agency shall convey such recommendations to the Working Group.

(b) Each Federal agency may, whenever practicable and appropriate, translate crucial public documents, notices, and hearings relating to human health or the environment for limited English speaking populations.

(c) Each Federal agency shall work to ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public.

(d) The Working Group shall hold public meetings, as appropriate, for the purpose of fact-finding, receiving public comments, and conducting inquiries concerning environmental justice. The Working Group shall prepare for public review a summary of the comments and recommendations discussed at the public meetings.

Sec. 6-6. *General Provisions.*

6-601. *Responsibility for Agency Implementation.* The head of each Federal agency shall be responsible for ensuring compliance with this order. Each Federal agency shall conduct internal reviews and take such other steps as may be necessary to monitor compliance with this order.

6-602. *Executive Order No. 12250.* This Executive order is intended to supplement but not supersede Executive Order No. 12250, which requires consistent and effective implementation of various laws prohibiting discriminatory practices in programs receiving Federal financial assistance. Nothing herein shall limit the effect or mandate of Executive Order No. 12250.

6-603. *Executive Order No. 12875.* This Executive order is not intended to limit the effect or mandate of Executive Order No. 12875.

6-604. *Scope.* For purposes of this order, Federal agency means any agency on the Working Group, and such other agencies as may be designated by the President, that conducts any Federal program or activity that substantially affects human health or the environment. Independent agencies are requested to comply with the provisions of this order.

6-605. *Petitions for Exemptions.* The head of a Federal agency may petition the President for an exemption from the requirements of this order on the grounds that all or some of the petitioning agency's programs or activities should not be subject to the requirements of this order.

6-606. *Native American Programs.* Each Federal agency responsibility set forth under this order shall apply equally to Native American programs. In addition, the Department of the Interior, in coordination with the Working Group, and, after consultation with tribal leaders, shall coordinate steps to be taken pursuant to this order that address Federally-recognized Indian Tribes.

6-607. *Costs.* Unless otherwise provided by law, Federal agencies shall assume the financial costs of complying with this order.

6-608. *General.* Federal agencies shall implement this order consistent with, and to the extent permitted by, existing law.

6-609. *Judicial Review.* This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance

of the United States, its agencies, its officers, or any other person with this order.

William Clinton

THE WHITE HOUSE,
February 11, 1994.

[FR Citation 59 FR 7629]

NIGERIAN MAP WITH NIGER DELTA STATES IN DIFFERENT COLOURS

