A comparative study of the legal framework governing oil and gas exploration and exploitation in Nigeria

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Thesis submitted in fulfilment of the degree of *Doctor of Laws* in Public Law and Legal Philosophy at the North-West University

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DECLARATION BY CANDIDATE

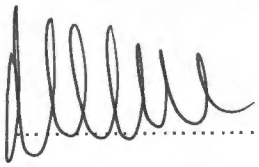
I, Ayodele Oladiran Akinsola declare that this thesis entitled: "**A comparative study of the legal framework governing oil and gas exploration and exploitation in Nigeria**" for the degree of *Doctor of Laws* (LLD) at the North-West University has not previously been submitted by me for a degree at this or any other university, that it is my own work in design and execution and that all materials contained herein have been duly acknowledged.

Ayodele, Oladiran Akinsola

November 2017

DECLARATION BY PROMOTER

I, Professor Melvin L.M. Mbao hereby recommend that this thesis entitled: "A comparative study of the legal framework governing oil and gas exploration and exploitation in Nigeria" by Ayodele, Oladiran Akinsola for the degree of *Doctor of Laws* (LL.D) in the Department of Public Law and Legal Philosophy, be accepted for examination.



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Professor Melvin L.M. Mbao

November 2017

DEDICATION

This thesis is dedicated to the Almighty God and to my faithful wife. She is simply amazing: may the Lord continue to endow her with wisdom and understanding. I also dedicate the work to my children Victor, Victoria and Deborah. I pray that you will live to fulfil the destiny God has purposed you and no man or woman will obstruct your life ambitions in Jesus' name, Amen.

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Oil Pipeline Act 2004

Oil Terminal Dues Act Cap O8 LFN 2004

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Republican Constitution 1963

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USA

American Constitution 1787

Clean Air Act 1970

Coastal Zone Management Act of 1972

Clean Water Act of 1977

Endangered Species Act of 1973

Federal Oil and Gas Royalty Management Act 1982

Federal Submerged Lands Act (SLA) 1953

Gulf of Mexico Energy Security Act (GOMESA) 2006

National Environmental Policy Act of 1969

National Fishing Enhancement Act of 1984

Oil Pollution Act (OPA) 1990

Outer Continental Shelf Deep Water Royalty Relief Act of 1995

Outer Continental Shelf Lands Act (OCSLA) 1953

Australia

Commonwealth of Australian Constitution Act 2003

Environment Protection and Biodiversity Conservation Act 1999

Offshore Petroleum and Greenhouse Gas Storage Act (OPGGSA) 2006

The Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Act 2011

Canada

Canada Oil and Gas Operations Act 2016

Canada Petroleum Resources Act 1985

Canada-Newfoundland Atlantic Accord Implementation Act 1987

Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act 1987

Canadian Constitution 1867

Canadian Environmental Assessment Act 2012 (CEAA)

Canadian Environmental Protection Act 1999 (CEPA)

Energy Safety and Security Act 2016

Fisheries Act 1985

Hazardous Products Act 2015

National Energy Board Act 2010

Oil and Gas Conservation Act 2000

Radiation Emitting Devices Act 1985

Angola

Angolan Constitution 2010

REGULATORY AGENCIES

Nigeria

Department of Petroleum Resources

Environmental Guidelines and Standards for the Petroleum Industry EGASPIN

Federal Ministry of Environment

Ministry of Petroleum Resources (headed by the Minister of petroleum resources)

National Oil Spill Detection and Response Agencies

Nigerian Content Development and Monitoring Board

Australia

National Legislative Compliance Framework (NLCF)

National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA)

National Offshore Petroleum Titles Administrator (NOPTA)

Canada

Canadian Environmental Assessment Agency (CEAA)

National Energy Board

USA

Bureau of Ocean Energy Management, Regulation, and Enforcement

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SPDC v Isaiah and Ors (2001) FWLR (pt 56) 608

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Elliff v. Texon Drilling Co 210 S.W.2d 558, 561–62 (Tex. 1948)

Exxon Shipping Co. v Baker 490 F.3d 1066 (9th Cir. 2007)

Frost-Johnson Lumber Co. v Sailings Heirs (La. 1920) 91 So. 207, 243, 245

Hammonds v Central Kentucky Natural Gas Co., (Ky.1934) 75 S.W.2d 204

In re W. Land Servs., Inc. v. Dep't of Envtl. Conservation, 26 A.D.3d 15, at 17 (N.Y. App. Div. 3d Dep't 2005).

Kelley v. Ohio Oil Co (1897) 57 Ohio St. 317, 49 N.E. 399.

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LIST OF ABBREVIATIONS AND ACRONYMS

AGF	- Attorney-General of the Federation
API	- American Petroleum Institute
APPA	- African Petroleum Producers Association
CAMA	- Companies and Allied Matters Acts
CFRN	- Constitution of the Federal Republic of Nigeria
CITA	- Companies Income Tax Act
CNL	- Chevron Nigeria Limited
EEZ	- Exclusive Economic Zone
EGASPIN	- Environmental Guidelines and Standards for Petroleum Industry in Nigeria
EITI	- Extractive Industries Transparency Initiative
EPA	- Environmental Protection Agency
FAO	- Food and Agriculture Organization
FEPA	- Federal Environmental Protection Act
HCs	- Host Communities
HRW	- Human Rights Watch
ICESCR	- International Covenant on Economic, Social and Cultural Rights
GCC	- German Commercial Code
HCs	- Host Communities
HNDC	- Hope for Niger Delta Campaign
HRW	- Human Rights Watch
ICEE	- Institute for Climate, Environment and Energy
ICESCR	- International Covenant on Economic, Social and Cultural Rights
ICMM	- International Council on Mining and Minerals
IPCC	- International Panel on Climate Change
LEANs	- Less economically advanced nations
LWCF	- Land and Water Conservation Fund
MEANs	- More economically advanced nations
MOSOP	- Movement for the Survival of Ogoni People
EPNL	- Elf Petroleum Nigeria Limited
FG	- Federal Government

FMG	- Federal Military Government
IOC	- International Oil Company
JOA	- Joint Operating Agreement
JV	- Joint Venture
LFN	- Laws of Federation of Nigeria
MOC	- Multinational Oil Company
MOPI	- Ministry of Petroleum Resources Incorporated
NAOC	- Nigerian Agip Oil Company Limited
NDDC	- Niger Delta Development Commission
NESREA	- National Environmental Standards and Regulations Enforcement Agency
NCEMA	- National Centre for Economic Management and Administration
NHT	- Nigerian Hydrocarbon Tax
NOES	- Niger Delta Environmental Survey
NGO	- Non-Governmental Organization
NNPC	- Nigerian National Petroleum Corporation
NLNG	- Nigerian Liquefied National Gas
NNOC	- Nigerian National Oil Corporation
NOC	- National Oil Company
NOSDRA	- National Oil Spill Detection and Response Agency
NPAMC	- Assets Management Company (NPAMC)
NPC	- National Petroleum Company
NPRC	- National Petroleum Regulatory Commission
NWLR	- Nigerian Weekly Law Report
OCS	- Outer Continental Shelf
OCSA	- Outer Continental Shelf Act
OEL	- Oil Exploration Licence
OGIC	- Oil and Gas Sector Reform Implementation Committee
OML	- Oil Mining Lease
OPL	- Oil Prospecting Licence

OSLTF	- Oil Spill Liability Trust Fund
PHCF	- Petroleum Host Community Fund
PIB	- Petroleum Industry Bill
PIGB	- Petroleum Industry Governance Bill
PPTA	- Petroleum Profits Tax Act
PSC	- Production Sharing Contract
RNC	- Royal Niger Company
SERAC	- Social and Economic Rights Action Centre
SERAP	- Socio- Economic Rights and Accountability Project
SPDC	- Shell Petroleum Development Company
TCEQ	- Texas Commission on Environmental Quality
TNOCs	- Transnational Corporations
TOPCON	- Texaco Overseas Petroleum Company of Nigeria Unlimited
UDHR	- Universal Declaration of Human Rights
UN	- United Nations
UNCTAD	- United Nations Conference on Trade and Development
UNDP	- United Nations Development Programme
UNEP	- United Nations Environmental Programme
UNCLOS	- United Nations Convention on the Law of the Sea
WAGPP	- West African Gas Pipeline Projects

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ABSTRACT

Oil and gas remain the bedrock of the Nigerian economy, forming 90% of the total export and about 80% of the Federal Government's revenue. Thus, a good regulatory framework to ensure sustainable development of these valuable resources is *sine-qua-non* to economic well-being of Nigeria. Presently, Nigeria's petroleum industry is faced with many challenges. The huge revenue earned by the government does not translate to the well-being of Nigerians. The oil-rich region of the Niger Delta is heavily polluted through oil spillages and gas flaring. This has led to violent agitations in the Niger Delta. This thesis traces and interrogates the factors that went wrong and what can be done to rectify the situation. This study stemmed from the premise that the laws governing the exploration and exploitation of petroleum resources are inadequate to address the challenges facing the sector and that the Federal Government's poor control of petroleum resources in Nigeria has led to ineptitude and wastage in the sector. The Federal Government is too far removed from the sites of petroleum extraction and is only interested in rents, royalty and other tax collection which foils sustainable development of petroleum resources in the country. To test these assumptions, the thesis discusses the present legal framework in Nigeria to establish their adequacy or otherwise. This research study is triangulation based. This study verifies the findings in extant literature that the present legal framework for the exploration and exploitation oil and gas is inadequate in terms of sustainable development and the benefits accruable to the citizenry. The study conducted in-depth semi-structured interviews and administered questionnaires to find out the causes of the crisis in the Niger Delta and what could be done to bring about a lasting peace to the region. The field work assessed the performance of the government institutions at regulating the petroleum industry so as to achieve sustainable development. From the findings it was discovered that the Federal Government through its agencies could not adequately implement the laws and regulations in the industry and this has encouraged impunity in the oil sector; the oil companies flagrantly violate the rules concerning gas flaring and displayed a carefree attitude to clearing of oil spills that has devastated the Niger Delta environment. Apart from this, other challenges like poor compensation for damages suffered by the people, lack of access to justice on the part of oil pollution victims

and problem of corruption in the sector were also discovered. In an effort to seek a solution to the challenges facing the petroleum industry this study compares the successful legal regimes of Australia, Canada and the United States of America with that of Nigeria to draw important lessons for Nigeria. It is hoped that if Nigeria adopts best practices in these countries to resolve some of the teething challenges in the sector. Based on the findings of the study, useful recommendations were made to help Nigeria achieve sustainable development in its petroleum industry.

CHAPTER ONE

INTRODUCTION

1.0 Background to the study

Ownership and control of oil and gas are crucial to Nigerian's wealth and economic well-being.[1] The provisions of the 1999 Constitution vest ownership and control of oil and gas in the Federal Government of Nigeria, which includes natural gas, under, or upon, any land in Nigeria, its territorial waters and its exclusive economic zone.[2] The primary piece of legislation regulating the exploration, production and distribution of petroleum in Nigeria is the Petroleum Act.[3] Under the Act, all activities ranging from exploration to production and distribution of crude oil and natural gas may only be done with the consent of the Minister of Petroleum Resources who typically acts through the Department of Petroleum Resources in the issuance of licences and permits.[4] The Act gives the Minister power to issue regulations necessary for the discharge of his or her duties under the Act. The Petroleum Drilling and Production Regulations are subsidiary legislation made pursuant to the Petroleum Act and they regulate natural gas exploration and production activities.[5] It is important to say here that oil and gas, and petroleum will be used interchangeably in this thesis.

The relevant legislation and subsidiary legislation with regards to taxes, rents and royalties are the Petroleum Profits Tax Act,[6] the Companies Income Tax (Amendment) Act[7] and the Petroleum Drilling and Production Regulations. The first two regulate the taxation of profits made from the production and distribution of crude oil and natural gas respectively, whilst the latter specifies the rates for royalties and rents. The National Environmental Standards and Regulations Enforcement Agency Act[8] (NESREA) and to a limited extent, the Environmental Impact

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[1] This thesis concerns itself with oil and gas in the upstream sector only.
[2] Section 44(3) of the Constitution of the Federal Republic of Nigeria, 1999.
[3] Cap. P10 Laws of the Federation 2004 (the PA). It should be noted that Oil and Gas and Petroleum shall be used interchangeably in this thesis.
[4] Nigeria, Drilling and Production Regulations, 2016.
[5] Petroleum Act, Cap P10 Laws of Federation of Nigeria, 2004.
[6] Petroleum Profits Tax Act, Cap P 13 Laws of Federation of Nigeria, 2004.
[7] Companies Income Tax (Amendment) Act No. 56 (2007).
[8] National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007.

Assessment Act[9] (EIA) and the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) prescribe environmental and emission standards applicable to activities related to crude oil and natural gas operations in Nigeria.[10] It is important to note here that despite the elegant provisions in the laws, the physical environment in Nigeria is bedevilled with problems of oil pollution and gas flaring. This is one of the areas this thesis focuses on.

The exploration and production of crude oil have generated controversies and crises in the Niger Delta connected to environmental degradation of the region.[11] Communities and groups in the Niger Delta are claiming ownership of oil and gas for themselves and engage in incendiary activities aimed at frustrating the absolute control of oil and gas solely by the Federal Government and its Multi National Oil Company allies. Recently a militant group, Niger Delta Avengers, blew up Agip and Shell's installations in the Niger Delta, declared a sovereign state of Niger Delta Republic and published a new currency for the republic which was an affront on the territorial integrity of Nigeria.[12] The Federal Government has however foiled this plan and the Niger Delta is retained as part of Nigeria, although the group has continued to disrupt production of oil in the area.

The apparent and perceived inefficiencies and unclear policy direction of the government in oil and gas have given the stakeholders in the petroleum industry serious concern about the future of the industry in Nigeria. The need for far reaching reforms of the country's oil and gas industry prompted the Nigerian government in 2004 to craft a new policy on the petroleum industry. In order to bring to fruition its new policy, the government inaugurated the Oil and Gas Sector Reform Implementation Committee (OGIC) and the Committee came up with recommendations that informed the Petroleum Industry Bill (PIB).[13] A segment of the

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[9] Environmental Impact Assessment Decree No 86, 1992. By the provision Section 315 (1) of the Constitution of Federal republic of Nigeria, it is now referred to as Environmental Impact Assessment Act.

[10] The document emanated from the Department of Petroleum Resources (DPR), it prescribes environmental and emission standards applicable to activities related to oil and gas operation in Nigeria.

[11] These agitations championed by the late Ken SaroWiwa led to their arrests, prosecution and eventual convictions in *FMG v. Ken SaroWiwa and* 8 others Unrep. Suit No. OCDT/PH/1/95.

[12] "Breaking News: Niger Delta Avengers strike again" <www.naij.com news> (28 May 2016) PM News accessed 31 May 2016.

[13] Egbogah EO "Oil and Gas sector reforms in Nigeria: what you should know" <www.nigeria.com> Accessed 12 May 2016.

Bill referred to as the Petroleum Industry Governance Bill (PIGB) was passed by the Senate on 25 May 2017.[14]

1.0.1 Background history

Before the discovery and exploitation of oil, Nigeria had an agrarian economy. The history of exploration of oil in Nigeria dates back to 1908, in Ajebamdele near Okitipupa, in the present Ondo State. A German firm known as the Nigerian Bitumen Company explored the area for oil. This exploratory effort was, however, brought to a halt by the hostility between Britain and Germany because of the First World War.[15] It has therefore been argued by *Etikerentse* that the law on exploration of oil in Nigeria was enacted as far back as 1889 for Petroleum Ordinance and 1907 for Mining Regulation (Oil) Ordinance.[16]

In 1937, the Shell D'Arcy (the forerunner of the Shell Petroleum Development Company of Nigeria (SPDC) was awarded the sole concessionary rights covering the territory called Nigeria. The Second World War also affected the activities of this company, but the prospecting work of this company later commenced in 1946.[17] A major discovery in this sector was made in 1956 by Shell-BP in Oloibiri, present day Bayelsa State, in the Niger Delta region of Nigeria. Nigeria's first major export of petroleum was in 1958 with about 5,100 barrels of crude oil per day.[18] Since this discovery, large oil deposits have been found in several states in Nigeria, especially the Niger Delta region.[19] The discovery of oil in large commercial quantities in 1956 in Nigeria heralded full activities in the oil industry. In 1961, Mobil, Agip, Safrap (ELF) and Amoseas (Texaco and Chevron respectively) joined in the exploration both onshore and offshore.[20] The Federal Government hence extended concessionary rights to these companies.[21]

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[14] The Bill becomes law when the same is passed by the House of Representatives and the President assents to it.

[15] See an account of this at page 365, Vol. of the published proceedings (Sweet and Maxwell) of the 1981 Energy Law Seminar held at the Banff Centre, Alberta, and Canada, cited by Mr. FolaSasegbon.

[16] Etikerentse G *Nigerian Petroleum Law*, (2nd edn, Dredew publisher, Lagos 2004) 6.

[17] Etikerentse G (n 16) 6.

[18] Etikerentse G (n 16) 8.

[19] Etikerentse G (n 16) 8.

[20] Fagbohun O *The Law of Oil Pollution and Environmental Restoration: A Comparative Review* (1st edn. Odade Publishers Lagos Nigeria 2010) 153-154.

[21] Etikerentse G (n 16) 12.

However, the entry of Nigeria into the prestigious club of oil producing nations in 1958 following the discovery of oil in commercial quantities by Shell-BP (present day Shell Petroleum Development Company SPDC) severely disrupted the biodiversity in the region. This is because the more the exploitation of crude oil (which is a non-renewable energy) the more depletion of renewable energy upon which the livelihood of the people of Niger Delta depended long before the start of exploration for crude oil in the area.

The Niger Delta is the main oil and gas producing area of Nigeria. Sagay describes the Niger Delta as one of the world's largest wetlands, and is certainly the largest in Africa and third largest in the world.[22] He observed that the area is therefore generally inhospitable, and that it is difficult to develop the communities which inhabit this area.[23] According to him, the local communities are made up mainly of fishers in the purely riverine areas and farmers in the drier areas. They also have some local industries based on the mangrove and the surrounding swamp waters, for example local salt industry; mat-making, etc.[24] The Niger Delta communities are to be found in Delta, Bayelsa, Rivers and Akwa Ibom States. Oil is also produced in Ondo, Edo, Abia, Imo and Cross River States.[25]

Emoyan et al have described the Niger Delta as a well-endowed ecosystem, which contains one of the highest concentrations of biodiversity on the planet, in addition to supporting the abundant flora and fauna as well as arable terrain that can sustain a wide variety of crops and economic trees it has more species of freshwater fish than any ecosystem in West Africa.[26]

The Niger Delta has also been described as a swathe of lush mangrove swamps, rain-forests and swampland and as the site of rich oil and natural gas reserves in

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[22] Sagay IE "The Niger Delta and the case for resource control" (2005) a public lecture delivered in honour of the Honourable Justice Adolphus Karibi-whyte at The University of Ife (now Obafemi Awolowo University, Ile-Ife.) 1-30. <www.profitsesagay.com/...pdf> accessed on 18 July 2016.

[23] Sagay IE "The extraction industry in the Niger delta and the environment (2001) Being the fourth annual lecture of the ANPEZ Centre for environment and development delivered at Port Harcourt <www.profitsesagay.com/pdf/ANPEZ%20PAPER%20(PORT%20HARCOURT).pdf> accessed on 18 July 2016.

[24] Sagay IE (n 22) 1.

[25] Sagay IE (n 22) 1.

[26] Emoyan OO et al "The Oil and Gas Industry and the Niger Delta: Implications for the Environment" (2008) 12(3) *J. Appl. Sci. Environ. Manage* 29 – 37 <www.bioline.org.br/pdf?ja08046> accessed on 18 July 2016.

Nigeria.[27] The Niger Delta oil accounts for about 90 per cent of Nigerian exports and more than 80 per cent of government revenue.[28] Onduku has observed that despite being the richest geo-political region in terms of natural resource endowment, the Niger Delta's potential for sustainable development however remains unfulfilled, and is now increasingly threatened by environmental devastation and worsening economic conditions.[29] According to him the mangrove forest of Nigeria is threatened by oil pollution, the largest in Africa and sixty per cent of which is located in the Niger Delta.[30] According to him also facing extinction are the fresh water swamps and forests of the Delta, which, at 11700 square kilometres are the most extensive in West and Central Africa and the local people depend on this for sustenance.[31]

To compound this ecological devastation is the political marginalisation and total oppression of the people and especially the denial of their rights, including land rights. Onduku has observed that in spite of the enormous wealth accrued from their land, the people continue to live in primitive conditions in the absence of electricity, pipe borne water, hospitals, housing and schools.[32] The late environmentalist and minority rights crusader, Ken Saro-Wiwa, described the pitiable situation of his 500,000 strong Ogoni people in the Niger Delta as having been consigned to slavery and extinction. The internationalisation of the Ogoni case in the 1990s, alerted a global audience to the Niger Delta people's plight.

All over the world, because of the invaluable role oil plays in the economy and industrial advancement of nations, it is seen as a veritable tool for development. Hence, it was expected that with the discovery of large crude oil deposits in the Niger Delta, it should have transformed the area into one of the most developed places in the world, and its people into the best sheltered, best fed, best clothed, best educated and most fulfilled in the world. But the reverse has been the reality in the Niger Delta.

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[27] Onduku A "Environmental conflicts: the case of the Niger Delta" (2001) a presentation at the One World Fortnight Programme Organised by the Department of Peace Studies, University of Bradford, United Kingdom <www.waado.org/nigerdelta/essays/resourcecontrol/Onduku.html> accessed on 18 July 2016.

[28] Onduku A (n 27) 4.

[29] Onduku A (n 27) 4.

[30] Onduku A (n 27) 4.

[31] Onduku A (n 27) 4.

[32] Onduku A (n 27) 4.

Unlike other oil producing nations of the world, oil has been a curse to the people of the Niger Delta. Its exploration and exploitation since 1958 has set in political, ecological and socio-economic conditions that generate abject poverty, misery and backwardness in the Niger Delta. These have led to pockets of protests and violence in the Niger Delta. However, the issue assumed a more prominent role in the 1990s. This was due mainly to the sustained struggle by the Niger Delta oil-producing communities, more prominently exemplified by the Ogoni struggle under the auspices of the Movement for the Survival of the Ogoni People (MOSOP).[33] This group was led by the late Ken Saro-Wiwa, (a writer and an activist) who was executed by the Nigerian Government for organizing peaceful protests against of the massive abuse of human rights and environmental degradation in Ogoniland by transnational oil corporations.[34] MOSOP helped to popularise and internationalise the resource control controversy in the Niger Delta.[35]

The unlawful execution of the Ogoni activists was challenged in court by the "Centre for Constitutional Rights (CCR)" and co-counsel from "Earth Right International" on behalf of relatives of murdered activists who were fighting for human rights and environmental justice in Nigeria.[36] The cases were brought against the Royal Dutch Petroleum Company and Shell Transport and Trading Company (Royal Dutch/Shell); the head of its Nigerian operation, Brian Anderson; and the Nigerian subsidiary itself, Shell Petroleum Development Company (SPDC).[37] The defendants were charged with complicity in human rights abuses against the Ogoni people in Nigeria, including summary execution, crimes against humanity, torture, inhumane treatment, arbitrary arrests, wrongful death, assault and battery, and infliction of emotional distress.

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[33] Dibua JI "Citizenship and resource control in Nigeria: the case of minority communities in the Niger Delta" (2005) 40 (1) *Africa Spectrum* 5-28 *Institute of African Affairs at GIGA, Hamburg/Germany* accessed 14 June 2016.

[34] Bribena EK "Nigeria, oil and gas exploration and the Niger Delta question: A study in corporate social responsibility" being a thesis submitted for the degree of Doctor of Laws in the School of Post Graduate Studies and Research, Faculty of Law North-West University Mafikeng Campus, South Africa, 2011.

[35] Saro-Wiwa K 1992; UNPO, 1995; Apter, 1998, MacIntyre 1996 <www.goggle.com/search?q=Saro-Wiwa> accessed 20April 2016.

[36] *Wiwa v. Royal Dutch Petroleum* I. *Wiwa v. Anderson*; and *Wiwa v. Shell Petroleum Development Company* Federal High Court of Nigeria Benin Judicial Division Suit No: FHC/B/CS/53/05 (Judgment of 14 November, 2005) <www.climatelaw.org/cases/case-documents/nigeria/ni-pleadings.doc> accessed on 18 July 2016.

[37] Business and Human rights Centre 'Gas flaring lawsuit (re oil companies in Nigeria)" (2005) <https://business-humanrights.org/en> accessed on 18 July 2016.

The Centre alleged that in 1995, the company and its subsidiary colluded with the Nigerian government to bring about the arrest and execution of the Ogoni 9. The Ogoni 9 was a group of activists who were hanged on November 10, 1995 after a *"trial"* before a special military tribunal based on fabricated charges.[38] Other incidents of torture and detention include that of Owens Wiwa, who was detained for more than a year under false charges to prevent him from protesting. During his detention, he was beaten repeatedly. Michael Vizor, then a NYCOP vice-president, was beaten by police in front of his children when he would not confess to a false charge. He was further tortured and denied medical assistance during his wrongful detention. Another plaintiff, Uebari N-nah, was shot and killed in October 1993 near a Shell flow station at Korokoro, Rivers State, Nigeria.[39]

Other plaintiffs were attacked by troops summoned by Royal Dutch/Shell during a peaceful demonstration against Shell and the Nigerian military regime for bulldozing farmland in Bira Gokana for a pipeline contracted by Willbros West Africa, Inc. One of the protestors, Karalolo Kogbara, was shot by Nigerian troops while she was speaking out against the bulldozing of her crops. Michael Tema Vizor, one of the plaintiffs was arrested, beaten and detained for four days without charge for participating in the same protest.[40] In this case that was filed in 1996 and settled out of court on June 8, 2009, the parties agreed to a settlement for all three lawsuits. The settlement provided a total of $15.5 million to compensate the plaintiffs, establish a trust for the benefit of the Ogoni people, and cover some of the legal costs associated with the case.[41]

Two broad levels of the struggle can be identified, namely, the governmental level and the non-governmental level. The non-governmental level includes pan-Niger Delta groups, ethnic and communal mass-based associations, youth groups and environmental activist groups. In virtually all the cases, the struggle has been projected in the form of citizenship rights and sustainable development.[42]

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[38] *Wiwa v Royal Dutch Petroleum* (n 36). The case was file by Centre for Constitutional Rights on behalf of the Wiwa family and the Ogoni activists that were executed with Ken SaroWiwa by the Nigerian government. <file:///E:/WiwaRoyal%20Dutch%20Petroleum> accessed on 18 July 2016.
[39] *Wiwa v Royal Dutch Petroleum* (n 36) 2.
[40] *Wiwa v Royal Dutch Petroleum* (n 36) 2.
[41] *Wiwa v Royal Dutch Petroleum* (n 36) 2.
[42] Dibua JI (n 33) 6.

However, the different groups involved in the struggle for resource control reveal some form of contradictions and tendencies in the movement. Many of the mass-based ethnic and communal movements and some of the youth groups are largely motivated by the marginalisation of the rights of their people in terms of the use and control of the resources located in or on their land.[43] The same cannot be said of the state-led agitation. Given the activities and orientation of the State Governors since they assumed office in the fourth republic,[44] it can be argued that they were more interested in resource control for the sake of patronage and primitive accumulation rather than the rights of their people.[45]

Similarly, part of the leadership of the mainly elitist pan-Niger Delta movements are in cohort with the federal government and are, therefore, accomplices in the exploitation of their people. They nevertheless want to be relevant at the local scene and retain the loyalty of their people by posing as champions of the agitation for resource control and the attendant citizenship rights. For some people, therefore, the agitation has become a form of opportunism used to embark on self-serving and self-aggrandising movements.[46]

At the non-governmental level in 1996 the Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) took the case against Nigeria to the African Commission for breach of human rights and environmental degradation.[47] The group alleged that the military government of Nigeria has been directly involved in oil production through the State Oil Company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations have caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People.[48]

In this case, Nigeria was taken to the African Commission on 14 March 1996 for violation of the rights of the inhabitants of Niger Delta. SERAC alleged that the

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[43] Dibua JI (n 33) 6.
[44] The Nigerian fourth Republic began in 1999.
[45] Dibua JI (n 33) 6.
[46] Dibua JI (n 33) 6.
[47] *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR2001)*<www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf> (para 1) 1 accessed on 13 July 2016.
[48] *SERAC*'s case (n 47) (para 1) 1.

military government of Nigeria was guilty of, amongst other things, violations of the right to health, the right to dispose of wealth and natural resources, the right to a clean environment and family rights, due to its condoning and facilitating the operations of oil corporations in Ogoniland. Nigeria admitted the claim of violation of economic and environmental rights of the people of Niger Delta brought against it and on that basis the African Commission found the Federal Republic of Nigeria in violation of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter on Human and peoples' Rights. The commission appealed to the government of the Federal Republic of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoniland by:

1. Stopping all attacks on Ogoni communities and leaders by the Rivers State Internal Securities Task Force and permitting citizens and independent investigators free access to the territory;
2. Conducting an investigation into the human rights violations described above and prosecuting officials of the security forces, NNPC and relevant agencies involved in human rights violations;
3. Ensuring adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government-sponsored raids, and undertaking a comprehensive clean-up of lands and rivers damaged by oil operations;
4. Ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and
5. Providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.

The Nigerian Government promised that corrective measures will be taken by the new civilian administration, which included establishing a Federal Ministry of Environment with adequate resources to address environment-related challenges prevalent in the Niger Delta area and to establish the Niger Delta Development Commission (NDDC) with adequate funding to address the environmental, social and economy related problems of the region and other oil producing areas in Nigeria. The government also promised to set up a Judicial Commission of Inquiry to investigate the alleged of human rights violations.[49] Nevertheless, the story of woes because of environmental degradation and human rights violations persist in the Niger Delta.

[49] SERAC's case (n 47) (para 30) 3.

The Ijaw youth in 1998, in continuation of the struggle against the unguarded devastation done to the fragile natural environment of the Niger Delta, met and signed a document which they called the Kaiama Declaration.[50] The Declaration was a resolution of all Ijaw Youths Conference that was held in the town named Kaiama.[51] The participants were drawn from over five hundred communities from over 40 clans that make up the Ijaw nation and representing 25 organisations.[52] They deliberated on the best way to ensure the continuous survival of the indigenous people of the Ijaw ethnic nationality of the Niger Delta within the Nigerian state. They, therefore, demanded that all oil companies stop all exploration and exploitation activities in the Ijaw area because they were tired of gas flaring, oil spillages, blowouts and being labelled saboteurs. An ultimatum was issued to the multinational oil companies to leave the Niger Delta. This Declaration and ultimatum led to the military bombardment of the region by the Nigerian state and culminated in a lot of bloodshed.

A civic approach was adopted when Jonah Gbemre (representing the Iwherekan community) brought a claim against Shell Petroleum Development Company Nigeria (SPDC) and NNPC in the Benin Judicial Division of the Federal High Court of Nigeria.[53] The plaintiff alleged that gas flaring violated the right to life and human dignity guaranteed by the Nigerian Constitution and the African Charter. The plaintiff further claimed that gas flaring negatively impacted on human health, the environment, food, water and housing. On 14 November 2005, the court issued a judgment confirming that gas flaring violated the right to life and dignity of persons. The court ordered the defendants to take immediate steps to stop gas flaring in the community. On 11 April 2006, the Court ordered SPDC and NNPC to end flaring by April 2007 and ordered the managing director of SPDC and NNPC as well as government officials to appear in court on 31 May 2006 to present a programme for stopping gas flaring in the community.[54]

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[50] Onduku A (n 27) 6.
[51] Onduku A (n 27) 7.
[52] Onduku A (n 27) 7.
[53] *Mr. Jonah Gbemre v Shell Petroleum Development Company Nigeria Ltd, Nigerian National Petroleum Corporation, Attorney General of the Federation* Suit No: FHC/B/CS/53/05.
[54] Business and Human rights Centre "Gas flaring lawsuit (re oil companies in Nigeria)" (2005) <https://business-humanrights.org/en> accessed on 18 July 2016.

The most recent militia group formed is named Niger Delta Avengers (NDA). This group blew up trunk lines belonging to the Nigerian Agip Oil Company (NAOC) and Shell Petroleum Development Company (SPDC)[55] claiming that they are demanding a sovereign state and not pipeline contracts.[56] In a related development, the Nigerian military were said to have invaded Oporoza, the traditional headquarters of Gbaramatu Kingdom at about 1.52am on the morning of 28 May, 2016 demanding from the people to produce the former militant leader, Government Ekpemupolo, (alias Tompolo) and members of the Niger Delta Avengers.[57] Crude oil production has since fallen to 1.65 million barrels per day (bpd) from 2.2 million bpd due to these militant attacks according to Finance Minister, Kemi Adeosun.[58]

As indicated earlier, the issue of ownership and control of the oil and gas resources has been a sore point between the federal Government of Nigeria, the oil producing states and the oil producing communities. Different approaches have been adopted over time to address the issue, but none appears to have resolved the problem of agitation for resource control leading to sundry deadlocks. Even though the law on State ownership of mineral resources is not unique to Nigeria, the application of this law in practice has been a source of sore controversy.

1.1 Statement of the problem

Nigeria inherited colonial laws vesting ownership of natural resources in the Federal Government.[59] These laws have undergone many revisions through constitutional amendments, various commissions and agencies, but still retain centralised control of oil and gas resources.[60] The investiture of ownership and control of oil and gas in the hands of the Federal Government has proved to be most contentious in recent times in Nigeria.[61] The continued exploitation of crude oil in the Niger Delta has led

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[55] "Breaking News: Niger Delta Avengers strike again" www.naij.com news, (30 May 2016) PM News accessed 31 May 2016.

[56] "Breaking News: Niger Delta Avengers strike again" (n 55).

[57] "Breaking News: Niger Delta Avengers strike again" (n 55).

[58] From the report titled "Nigeria's crude oil production crashes to 1m barrels a day" <www.orientalnewsng.com> accessed 02 May, 2016.

[59] The Minerals Act of 1958 and also the Petroleum Act of 1969 Cap. 350 Laws of Federation of Nigeria (1990).

[60] Ayodele-akaakar FO "Appraising the Oil and Gas Laws: A Search for Enduring Legislation for The Niger Delta Region" <www.jsdafrica.com/Jsda/Fallwinter2001/articlespdf> accessed on 11 July 2018.

[61] Adigbuo ER "Nigeria's Sovereignty: the Emergence of Niger Delta Militancy<www.wiscnetwork.org> accessed 11 July 2016.

to environmental degradation, disruption of the biodiversity and subsequent deprivation of the means of livelihood. Consequently, a lot of conflict and disenchantment exemplified in armed struggle and ethnic militia in the region. The Federal Government has responded by putting in place legal and institutional frameworks to deal with the situation. The government set up the Niger Delta Development Commission (NDDC)[62] in order to develop the Niger Delta region, but that body has achieved very little since its inception. This research examines the reasons for the poor performance of the NDDC and the need for sustainable development of petroleum resources in Nigeria.

Furthermore, in order to attract foreign direct investment (FDI) Nigeria put up a weak regulatory framework. Some statutes make provisions for lower standards (for example, Federal Environmental Protection Agency FEPA, Department of Petroleum Resources and Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN)) than the standard envisaged by the Nigerian Minerals Oil (Safety) Regulations. There is also poor enforcement and implementation of regulations. In the enforcement of law, the economic interests of the IOCs supersede the health and general well-being of the inhabitants of the Niger Delta who are the victims of gas flaring. Though Nigeria obtained large proceeds from the sales of crude oil, she is ranked very low in economic development with the majority of her populace poor (earning less than one dollar per day which is about N400). Instead of being a blessing, crude oil has been a curse for Nigeria.

The Nigerian legal regime is bedevilled by challenges such as litigation in compensation claims for oil and gas operation; gas flaring, environmental corporate social responsibility and the rights to healthy environment free from oil pollution; legal difficulties in prosecuting transnational pollution; sustainable development; property ownership and rights of the people of Niger Delta; the effectiveness of criminal sanctions and civil remedies under environmental law in Nigeria. This thesis interrogates the level of compliance with environmental best practices and sustainable development since the verdict of the African Commission on Nigeria in 2000.

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[62] NDDC was set up purposely to develop the Niger Delta and was inaugurated in 2001, by President Olusegun Obasanjo.

The Petroleum Industry Bill (PIB) provides more revenue to the government in terms of taxes and royalties, yet it appears that the PIB does nothing to address key grievances of the oil producing communities, particularly around active participation, environmental liability, revenue distribution and socio-economic development.[63]

The government puts so many legislations, policies and programmes in place, but the problem persists. It is precisely because these legislations have failed to resolve the Nigerian dilemma that this thesis undertakes a comparative study of the legal framework governing oil and gas exploration and exploitation in Nigeria. It is important to reiterate that it is only the principal laws regulating the oil and gas upstream[64] activities that are unpacked, compared and critically analysed in this study. This is done by analysing and comparing the United States of America, Canada and Australia with Nigeria's primary laws regulating oil and gas exploration and production activities. The comparison analyses the ownership structure, local communities' participation and benefits from the proceeds from oil and gas and environmental challenges. The thesis focuses on how the United States, Canada and Australia could utilize the legal/regulatory framework to encourage sustainable development of the oil and gas resources for the benefit of their societies. These three cases are success stories and Nigeria would do well to emulate their laws and regulatory practices for sustainable development of the oil and gas sector.

In addition to considering the mixed ownership system of some federal structures, (the systems allow for private ownership, constituents/states ownership and federal government ownership) the study advocates a return to true federalism, especially pre-1970 in Nigeria wherein 1960 and 1963 Constitutions, sections 134 and 140 respectively, the Continental Shelf of Nigeria extending to 200 nautical miles was deemed part of a region for the purposes of paying 50 per cent derivation. As pointed out earlier in the background to this study, the Constitution stated that for the purpose of derivation, a state that has a coast is deemed to be the owner of the continental shelf. If the states are left to manage their resources it will de-emphasise

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[63] Aladeitan L "Ownership and control of oil, gas, and mineral resources in Nigeria: between legality and legitimacy" (2013) 38 *Thurgood Marshall Law Review* 159 accessed 15 April 2016.

[64] It is important to note that this comparative analysis will be limited to the regulation of the upstream activities of the petroleum sector, that is, exploration, exploitation, development and production. Downstream and midstream activities such as pipelines, transportation, refinery and so, on are beyond the scope of this study.

greater reliance on the oil revenue that they receive from the federal government and enable the states to develop at their own pace.

1.2 Aims and objectives of the study

1.2.1 General aims

The first part of the study is an overview of the issue of ownership of oil and gas in Nigeria and traces the history of the vesting of ownership of oil and gas in the federal government, thereby examining the effects of exploration, prospecting and exploitation of oil and gas on the environment and people of the Niger Delta. The study analyses the existing laws governing the development of oil and gas in Nigeria and examines the reform agenda of the Federal Government in resolving the challenges in the oil industry. This overview sheds light on where Nigeria got it wrong and what needs to be done to ameliorate the situation.

The second part of the study investigates issues and challenges associated with the implementation of legislative and regulatory frameworks for sustainable development of oil and gas in Nigeria and consider what can be done to protect the environment and safeguard the rights of individuals and communities in the Niger Delta.

The third part of the study is a comparison of the principal laws regulating oil and gas in some federal jurisdictions like the United States of America, Canada and Australia. The purpose is to help to draw important lessons and best practices in protecting the resources from unsustainable exploitation and ensuring that the resources benefit the peoples who have sovereign rights to the resources. The purpose of this exposition is also to recommend the adoption of true federalism as a lasting solution to the crisis in the oil and gas sector of the economy. This comparative study is bound to assist the Nigerian government in its law and policy revisions.

The fourth part fills the gaps in the existing literature by conducting in-depth semi-structured interviews and administers questionnaires to probe into the causes of agitations in the Niger Delta region and suggest probable solutions to ending the crisis permanently.

1.2.2 Specific aims

The specific aim of this thesis is to examine the legal framework vesting the ownership of oil and gas in the Federal Government of Nigeria with a view to

determining its adequacy or otherwise in solving the problems associated with oil and gas exploration and exploitation in the Niger Delta in particular and Nigeria in general.

1.2.3 Objectives of the study

This study seeks to achieve a number of inter-related objectives, namely:

1. To undertake a critical appraisal of the legal and regulatory framework of upstream oil and gas sector and advocate people-oriented and international standard oil and gas law that will interface with oil and gas industry policies to ensure enduring peace, security and sustainable development in Nigeria.

2. To examine the issues and challenges in the implementation of law for the development of oil and gas in Nigeria.

3. To undertake a comparative study of the juridical regime on oil and gas in Nigeria with that of the United States, Canada and Australia with the hope of adopting the lessons from these countries to achieve an enduring peace and stability in the Niger Delta.

4. To advocate for the revision of laws governing oil and gas extraction to guarantee sustainable development in line with international oil and gas best practices.

1.2.4 Research questions

This thesis argues that the absolute control of oil and gas resources by the federal government without reconfiguring and ploughing back into oil producing communities is the root cause of the crisis in the Niger Delta region of Nigeria. This thesis also answers the following research questions:

1. What are legal and regulatory frameworks governing the upstream oil and gas industry in Nigeria?
2. What are the issues and challenges in implementing the laws for the development of oil and gas in Nigeria?
3. What are the lessons Nigeria could learn from the United States, Canada and Australia's oil and gas juridical framework?
4. What reforms and implementation strategies could be proffered regarding the legal framework to guarantee sustainable development of oil producing areas in line with the international oil and gas best practices?

1.3 Rationale and justification of the study

The petroleum industry is the mainstay of the Nigerian economy, contributing about 90% of the country's revenue.[65] The matters of oil and gas exploration and production remain topical; especially given the cry of the people of the Niger Delta for resource control and the protection of their environment from degradation caused by oil and gas operation in that region. A study of the legal regime governing the exploration and exploitation of oil and gas resources is of particular interest to policy makers, legislators, regulators, and the citizens. This study, therefore, examines the legal regime governing the exploration and exploitation of oil and gas resources in Nigeria and suggests how the law (as a mechanism of social engineering) can be used to resolve the burning issues and bring positive change in the Nigerian oil and gas sector.

This thesis researches for the best ownership and regulatory model suitable for the Nigerian petroleum sector, hoping to contribute to the body of knowledge and literature, especially with regards to ownership and management of oil and gas in Nigeria.

By way of comparative paradigm, this thesis draws lessons from the United States, Canada and Australia for the proper regulation of the upstream oil and gas industry's activities and this could assist the Nigerian Government in policy development.

This study is also significant in that the results could help in reforming the existing legal framework in order to bring about sustainable development and ensure international best practices in the field of oil and gas industry in Nigeria. The study is therefore important for the proper regulation of the oil and gas industries' upstream activities in Nigeria.

Research into existing laws and associated institutional frameworks has revealed that the existing legal framework is either out-dated or one sided and does not reflect the yearnings of the downtrodden people of Nigeria, especially in the Niger Delta region. In fact, successive governments have used the law to effectively wrest control of land, including petroleum resources from the inhabitants of the Niger Delta.

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[65] Usman A et al "Evidence of Petroleum Resources on Nigerian Economic Development (2000-2009)" (2015) 6 (2) *Business Economic Journal* 2. <http://astonjournals.com/manuscripts.pdf> accessed 13 July 2016.

For instance, while the Constitution maintains unequivocally that oil resources belong to the Federal Government,[66] the Land Use Act generally vests ownership of land in the State. Government permits land to be expropriated for any oil-related activities subject to payment of compensation. This study contributes to the body of knowledge by interrogating the tenets of federalism and how adherence to such tenets could bring peace and stability to the Niger Delta and Nigeria in general.

The inefficient regulation of activities of oil companies in the oil and gas industry is responsible for the unsustainable exploitation of petroleum in Nigeria. A good regulatory agency must have the expertise to recognise dangerous practices and understand the technology of the industry it controls. Therefore, this thesis examines the regulatory agencies to identify why the agencies have failed to perform. The study is therefore important to law and policy makers for a total overhaul of the regulatory system to ensure strong, viable and robust regulation in the industry.

The study identifies the reasons for the inadequacies of the National Oil Company (NOC) and suggests ways to improve its performance through political, administrative and legal reforms to enable it compete favourably with other NOCs across the world. With the efforts being made by the Nigerian government to privatise the NNPC through the yet-to-be passed Petroleum Industry Bill (PIB), this study recommends a shift in the focus of government action towards re-structuring the NNPC instead of a sale or privatization.

The study evaluates the performance of the NDDC, an institution established by the Federal Government with the aim of developing the Niger Delta and recommends how NDDC could perform better. If the law and policy makers implement these recommendations it is hoped that the aim of the Federal Government to develop the Niger Delta region would be achieved.

1.4 Literature review

This section reviews selected literature on juridical regimes governing oil and gas exploration and exploitation in Nigeria. It identifies the gaps in the literature while at the same time tracing their strengths and significance. It also provides a point of departure from the existing literature to justify further research.

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[66] Section 44(3) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999.

Ownership and control of oil and gas has attracted extensive attention from several scholars because of the importance of these resources and commodities worldwide.[67] Ownership as a concept in property law has been defined by several writers as a complete or absolute real right to property limited only by law.[68] Ownership is also defined as "the collection of rights allowing one to use and enjoy property, including the right to convey it to others."[69] It also "implies the right to possess a thing, regardless of any actual or constructive control."[70] It is the most comprehensive and complete relation that can exist in respect of anything, implying the fullest amplitude of rights of enjoyment, management and disposal over property. Ownership has an allodia[71] character.[72] According to *Tobi JCA* (as he then was) in the case of *Chief Joseph Abraham* v *Ishau Amusa Olorunfunmi*,[73] the owner of the property is not subject to the right of another person. Because he/she is the owner, he/she has the full and final right of alienation or disposition of the property, and he/she can exercise the right without seeking the consent of another party, because, as a matter of law and fact, there is no other party's right over the property that is higher than his/hers.[74]

In Nigeria during the colonial era, the "usufructuary" rights[75] to land were held under community ownership, although the treaty of cessation of Lagos ceded land in Lagos to the crown.[76] Also, the subsequent proclamation of the protectorates of Northern and Southern Nigeria in 1900 and 1906 respectively ceded the territories to Great Britain; leaving "usufructuary" rights in the community.[77] At that time, an effort was made to define the British Crown's title on land in the case of *Amodu Tijani v Secretary, Southern Provinces*[78] which has since become the *locus classicus* on the

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[67] Etikerentse G (n 16) 6; Gao Z *International Petroleum Contracts: Current Trends and New Directions* (Graham & Trotman 1994) 1; Odularu GO "Crude Oil and The Nigerian Economic Performance Oil and Gas Business" 1 (2008) <www.ogbus.ru/eng/> accessed on 14 July 2016.

[68] Megarry R *et al The law of real property* 4th ed. (Stevens and sons limited, London, 1975) 13.

[69] Edu OK "Ownership of oil and gas in Nigeria: Matters arising" (2007) 7 (1) *the Constitution* 17.

[70] Garner AG (ed) *West Group* (Paul Minnn 1999) 1131.

[71] An estate held in absolute ownership, without acknowledgement to a superior. Allodia is plural noun of allodium.

[72] Land in absolute ownership, free from such obligations as rent or services due to an overlord.

[73] (1972) AC 824.

[74] Edu OK (n 69) 65.

[75] It means a limited right found in civil law and mixed jurisdictions that unites the right to use or enjoy a thing possessed by selling crops, leasing immovable or attached movable thereon.

[76] Elias TO *Nigerian land law* 4th ed. (Sweet and Maxwell, London, 1971 (reprinted in 1981)) 7.

[77] Elias TO (n 76) 18 and 27.

[78] (1921) 3 NLR 21; (1921) 2 A.C 399.

whole subject of the nature of Crown ownership of colonial lands. In that case, Chief Oluwa, the plaintiff, the head chief of the Oluwa family and one of the land-owning White-cap Chiefs of Lagos, claimed compensation under the Public Lands Acquisition Act of 1903 in respect of the family land at Apapa, Lagos, that was acquired by the Colonial Government. The court held that Chief Oluwa was entitled to compensation on behalf of the Oluwa family. In that case Viscount Haldane held:

> No doubt there was a cession to the British Crown, along with the Sovereignty, of the radical or ultimate title to the land, in the new Colony, but this cession appears to have been made on the footing that the rights of the property of the inhabitants were to be fully respected...[79]

The Minerals Act of 1945 in Nigeria, however, appropriated the entire property and control of mineral oil for the Crown (State). The citizens who were the owners of the land where mineral oil was discovered were, however, entitled to compensation upon the acquisition of such land. Section 3 of the Act provides:

> The entire property in and control of all minerals, and mineral oils, in, under or upon any lands in Nigeria, and of all rivers, streams and water-courses throughout Nigeria, is and shall be vested in the Crown (State), ...

This position of the law was inherited under the Independence and the Republican constitutions of 1960 and 1963 respectively, but with 50% of the revenue apportioned to the region from where the natural resources were derived. The 50% accrued to the government of the region and not to the people or families or communities in the region. In 1969, the then military government enacted the Petroleum Act 1969 and the Petroleum (Drilling and Production) Regulations 1969. This Decree retained the colonial legacy of vesting the oil and gas resources in the state. Under the Land Use Act of 1978, ownership of land is vested in the governments of the federating states. Land held under the jurisdiction of a state government belongs to that state and it is held in trust for the people.[80] Nevertheless, the Land use Act recognises ownership of land held under customary law. Where land is held under native law and custom, the owner is deemed to be the owner of the land. However, the state government has an unrestraint right to acquire land within its jurisdiction for public purpose. Likewise section 1 of the Petroleum Act and section 44 (3) of the 1999 Constitution vest ownership of petroleum resources in the

[79] (1921) 3 NLR 21; (1921) 2 A.C 399.

[80] Section 1 of the Land Use Act, Laws of Federation of Nigeria, 2004.

Federal Government subject to payment of compensation for compulsory acquisition. The position was substantially the same under the 1979 and 1999 constitutions.[81]

Hayton, D J has also defined ownership in terms of the rights of the owner on the land. According to him, 'he who owns the soil is presumed to own everything "up to the sky and down to the centre of the earth."[82] The owner can dispose of his land or part of it as he wishes. In common law jurisdictions,[83] property ownership rights were, in accordance with the *ad coelum* principle, traditionally deemed to extend to anything found under the ground, as well as above it into the atmosphere.[84] Hayton, however, explained that the Crown is entitled at common law to all gold and silver occurring in any mine. A statute such as the Petroleum (Production) Act 1934 in Great Britain also deprived the owner of the land of the petroleum and natural gas found therein.[85] The state ownership of oil and gas in Great Britain was reinforced by section 2 of the Petroleum Act of 1998, which provides that '(the state) has the exclusive right of searching and boring for and getting petroleum which 'exists in its natural condition in strata in Great Britain or beneath the territorial sea area adjacent to the United Kingdom.'

However, under the civil law system, rather than relying on judicial legal precedents, as is the case under the common law systems, reliance is on codified laws.[86] Under the civil law, private ownership to the centre of the earth and to the sky is recognized.[87] These laws, however, have been codified and most states in civil law

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[81] An elaborate discussion of the provisions of these laws shall be done in the subsequent chapters of this thesis.

[82] Hayton DJ *Megarry's manual of the law of real property* (6thed, Stevens and sons ltd, 1982), 550 - 551 and 566.

[83] The countries common law jurisdictions include Great Britain and its former colonies like Nigeria and Ghana.

[84] Edu OK (n 69) 66.

[85] Section 1 of the Petroleum (Production) Act 1934.

[86] Miller DW "The Historical Development of the Oil and Gas Laws of the United States" 15(3) (1963) *California Law Review* 506-534. See also Kramer BM "The Interaction between the Common Law Implied Covenants to Prevent Drainage and Market and the Federal Oil and Gas Lease" 15 (1995) *Journal of Energy, Natural Resources & Environmental Law* 1; Salter JR *U.K. Onshore Oil and Gas Law* (London Sweet & Maxwell 1986) 7.

[87] Sprankling JG "owning the center of the earth owning the center of the earth" (2008) 55 *UCLA Law Review* 980- 891, <http://www.uclalawreview.org/pdf/55-4-4.pdf> accessed on 14 July 2016.

jurisdictions have eventually passed particular legislation to reserve subsurface rights in oil and gas to the state.[88]

On the question of whether or not oil and gas can be legally owned due to their escapee nature, it has been argued that oil and gas may not be owned because they are fugacious substances and therefore wander from one place to another beneath the surface of the earth.[89] As a result of the nature of oil and gas, the court in the United States came up with the rule of capture explained in the United States of America case of *Elif v Texan Drilling Co*,[90] wherein the court stated that the owner of a tract of land acquires title to the oil and gas which he produces from wells on his own land, though part of the oil and gas may have migrated from adjoining lands.[91] It has been argued that it is naïve to conclude that petroleum is incapable of ownership because it is in a fugacious nature.[92]

Under Islamic jurisprudence, ownership of property in general is governed by the *Qur'an* and under the *Hanafi* school of thought; ownership of minerals follows ownership of land.[93] Ownership of oil and gas, under Islamic Law, belongs to the state and the state holds it in trust for the people and must be managed to better the peoples' lives because Allah will hold the government liable for mismanagement.[94] The *Shariah* being one of the globally recognized legal systems agrees with the majority of the common law countries that the ownership of mineral resources

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[88] The civil law states include: the Netherlands, France, Germany, and China. In Africa these civil law states includes Algeria (civil and religious law), Gabon, Burkina Faso, Burundi, Chad, Republic of Congo, Democratic Republic of Congo, Code d'Ivoire, Central African Republic, Ethiopia, Equatorial Guinea, Guinea (based on French law), Guinea-Bissau, and Cape Verde, Angola and São-Tomé (all based on Portuguese civil law).

[89] Atsegbua L *Oil and Gas Law in Nigeria: Theory and Practice.* (New Era Publications, Benin: 2004) 5.

[90] (1948) .146 tex. 575,210 S.W. 2d 558.

[91] Edu OK (n 69), 66.

[92] See Iweri O "What Effect does the Ownership of Resources by the Government have on its People: a case Study of Nigeria" <www.dundee.ac.uk/cepmlp/gateway/files.php?file=CAR-11_37 pdf> 4 accessed 19 May 2010.

[93] In *Saudi Arabi v Arabian American Oil Co*, the *Aramco* case 27 I.L.R., (1963), p. 116, as quoted by Al-Jumah n 148 *supra* at 233, the arbitration court stated that "the regime of mining concessions, and consequently, also of oil concessions, has remained embryonic in Muslim Law and is not the same in different schools.

[94] *Saudi Arabi v Arabian American Oil Co* (n 93).

belongs to the state.[95] *Shariah* law is not applicable to ownership of petroleum resources in Nigeria because Nigeria is a secular state.[96]

Ownership and control of oil and gas in Nigeria has been a controversial issue. This controversy is usually referred to as 'resource control'. Sagay has defined it as the power and the right of a community or state to raise funds by way of tax on persons, services and materials within its territory.[97] According to him resource control is the exclusive right of the ownership and control of resources, both natural and created within its territory and also of the right to customs duties on goods destined for its territory and excise duties on goods manufactured in its territory.[98] According to Sagay resource control is not merely one:

> Struggle for increased revenue from the proceeds of one's resources, but more importantly, it is a move by the people of the Niger Delta to take their destinies into their hands in order to ensure the environmental protection and restoration of the Niger Delta territory to a productive and living one, and to insist on environmentally friendly and best oil field practice in the oil and gas extraction process. It is a programme to work for the re-investment of proceeds from petroleum sales in infrastructure development, environmentally sensitive industries, and in agriculture and aquaculture...[99]

Furthermore, on the meaning of resource control, the governors of the 17 southern states in their communiqué at the end of the summit organized in Benin City, Edo State capital define resource control as "the practice of true federalism and natural law in which the federating units express their rights to primarily control the natural resources within their borders and make agreed contribution towards the

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[95] Mohammed GB "Ownership and control of Mineral Resources under the Shariah and Nigerian Statute: A comparative analysis" (2011) Being a long essay submitted to the Faculty of Law, University of Ilorin, Ilorin Nigeria, in Partial fulfilment of the requirement for the Award of the degree of Bachelor of laws (LL.B Hons.) in common and Islamic law.

[96] Section 10 of the 1999 Constitution Federal Republic of Nigeria.

[97] Sagay IE "Nigeria: Federalism, the constitution and resource control" (2001), 10 <www.nigerdeltapeoplesworldcongress.org/articles/nigeria_federalism_.pdf> accessed on 05 August 2016.

[98] Sagay IE (n 97) 10.

[99] Sagay IE "Federalism, the Constitution and Resource Control: My Response," the Guardian Newspapers online edition, 13 August 2001 unknown page <www.ngrguardiannews.com> accessed on 14 August 2015; Sagay IE "Nigeria: Federalism, the Constitution and Resource Control", being a text of speech delivered at the fourth sensitization programme organized by the Ibori Vanguard at the Lagoon Restaurant, Lagos. <www.waado.org> accessed on 24 October 2005. See also, Douglas O "A Community Guide to Understanding Resource Control."

maintenance of common services of the government at the Centre.[100] The host governor had this to say in an interview he granted to the press:

> Resource control means that if I as a *Bini* man goes to *Kebbi* State and finds gold, the resource should belong to me and not the state or the federal government. All I owed the Federal Government is to pay taxes and royalties. The same principle should apply if a Kano man who comes to Edo, Delta or *Bayelsa* and strikes oil. He only pays royalties and taxes to the state or the federal government.[101]

There is a significant difficulty and conceptual ambiguity when engaging in the 'resource control' discourse from the purview of the Niger Delta. There are three broad notions of resource control that may be inferred from numerous definitions proffered since the *Ijaw* Youth Council's (IYC) *Kaiama* Declaration[102] that expressly employed the phrase in connection with oil resources and the Niger Delta for the first time. These include 'absolute' and 'principal' resource control as well as increased derivation.[103] Proponents of 'absolute resource control' took the stance proffered by the *Kaiama* Declaration that '[E]very region should control its resources 100 per cent...'[104] Advocates of 'principal resource control' defined resource control as the Niger Delta region having 'a direct and decisive role in the exploration for, the exploitation and disposal of, including sales of the harvested resources'.[105]

Resource control is also defined in terms of the right to control or manage the revenue accruing from oil and other natural resources in line with the tenets of true federalism.[106] The governors of the southern states in Nigeria also refer to this notion of 'true federalism' in the discourse of resource control.[107] However, they did so to promote their agenda that states ought to control their resources and contribute (usually a smaller percentage of such revenues) to the federal coffers. In some way,

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[100] The communiqué issued at the end of its third summit in Benin City, the Edo State Capital, March 27, 2001, Governors of the 17 southern states proclaimed its preference for fiscal Federalism based on the principles of national interest, need and derivation.

[101] The communiqué (n110).

[102] Onduku A (n 27) 6.

[103] Ako R "The Struggle for Resource Control and Violence in the Niger Delta", in Obi C and Rustad S (eds.) *Oil and Insurgency in the Niger Delta: Managing the Complex Politics and Complex* (London: Zed Books, 2011) 42.

[104] Paragraph (5) of the Kaiama Declaration. The text of the Declaration is available online at <www.unitedijawstates.com/kaiama.html> accessed on 23 May 2015.

[105] Sagay IE Nigeria: Federalism (n 97) 8.

[106] Sagay IE Nigeria: Federalism (n 97) 8.

[107] Adesopo A and Asaju A "Natural Resource Distribution, Agitation for Resource Control Rights and the Practice of Federalism in Nigeria" 4 *Journal of Human Ecology* 277-289.

they have elevated the notion of resource control to be synonymous with 'true' federalism.

According to Dafinone, the issues at stake in Nigeria's economic philosophy are that the current formula for the distribution of the nation's wealth is unacceptable.[108] As members of the same family, the President of the Federal Republic of Nigeria owes it as a duty to call all shades of opinion to decide the matter rather than the action it took in pursuing the matter through the legal process. The action of the Federal Government in dragging the 36 State Governments and the Federal Capital Territory to the Supreme Court to seek judicial interpretation of the constitutional provision on the matter might turn out to be an ill wind which could cause a tremor that the Federal Government cannot control.[109] He advised the Federal government to abide by the Act No. 106 of 1992 of Federation Account Amendment Act which states:

> For the purpose of subsection (2) of this Section and for the avoidance of any doubt, the distinction hitherto made between onshore oil and offshore oil mineral revenue for the purpose of revenue sharing and the administration of the fund for the development of the oil producing areas is hereby abolished.

Dafinone, also suggested that the federal Government should, as a matter urgency, clean up the oil spills in the Niger Delta and put in place infrastructural facilities to ameliorate the suffering of the people.

Obasanjo's regime, had on coming to power in 1999, refused to apply the derivation principle to offshore oil revenue. Rather, the government approached the apex court to decide whether or not the principle is applicable to offshore oil revenue in accordance with the 1999 Constitution.[110] In a judgment delivered on April 5, 2002, the Supreme Court decided that the derivation principle should not be applied to offshore oil revenue.[111]

It also ruled that the deduction of some "first line items" (funding of the judiciary, funding of oil joint venture operations and NNPC priority projects, servicing of external debt and allocation to the FCT) from onshore oil revenue before the

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[108] Dafinone DO "Resource Control: The Economic & Political Dimension" (2001) <UrhoboHistory@waado.org> accessed 07 September, 2015.

[109] (2003) WRN Vol. 19, p1.

[110] Nwaneri F "Onshore/offshore dichotomy: The law Kwankwaso won't let go" Published in National Mirror of 01 May, 2013. <Nationalmirroronline.net> accessed 22 September, 2015.

[111] *Attorney-General of the Federation v Attorney-General of Abia State and 35 Ors.* (2001)SC 28.

application of the derivation principle was illegal, ordering that the 13 per cent derivation should be applied to onshore gas production which had hitherto been excluded from the derivation.

In real sense, the dichotomy is still in place to the extent that the Abrogation Act of 2004 drastically reduced the constitutional provisions and the internationally recognized boundary definition of the continental shelf from 200 nautical miles to 200 feet isobaths (which is a mere measure of the low water mark (depth) of the land surface of a littoral state rather than the areal measurement).[112]

The United Nations' resolutions on permanent sovereignty of nations over resources (PSNR) and the national laws of each member state endorsed the state ownership of mineral resources. The theory of state ownership is based on the doctrine of PSNR. The essence of PSNR is that in international law, and thus in its relations with other states and non-nationals, a state exercises supreme authority, power or control over natural resources under its jurisdiction.[113] This is based on related international law concepts, namely the principle of state sovereignty and a state's right to self-determination.[114] This was supported by the United Nations (UN) General Assembly Resolution (UNGAR) No. 626 (VII) of 21 December 1952 and its Resolution on 12 December 1958, whereby the UN established a Commission to conduct a full survey of the status of PSNR over natural wealth and resources as a basic constituent of the right to self-determination, with recommendations, where necessary, for its strengthening.

Etikerentse has opined that in discussing the PNSR in Nigeria, it is necessary to consider the influence of the international bodies, especially the legacy of its former colonial master, that is, Great Britain.[115] In his view, because of its colonial legacy,

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[112] Umanah A "Onshore/offshore dichotomy: A threat to Nigeria's survival (1)" <www.vanguardngr.com> accessed on 05 August 2016.

[113] Smith EE "World Energy Resources: Ownership, Control and Development" in Smith et al (eds) International Transactions 2nd ed (Rocky Mountain Mineral Law Foundation 2000) 28 and 38, as quoted by Martin T in Werner J & Ali AH (eds) A Liber Amicorum: Thomas Wälde: Law Beyond Conventional Thought (1946 -2008) 172.

[114] Thomashausen A "Investment Policy and Protection Aspects of Natural Resources: (Foreign) Investment Strategies in Africa" Paper presented at International Conference on Permanent Sovereignty over Natural Re-sources – Development of a Public International Law Principle and its Limits', Siegen, Germany 29th to 30th of January 2013, available <www.wiwi.uni-siegen.de/rechtswissenschaften/oerecht/tagungen/psnr/fokos-wp2013-03-thomashausen.pdf.>

[115] Etikerentse G (n 16) 10.

Nigeria adopted the British model of control of its national resources by vesting ownership of natural resources in the state. In addition to vesting ownership of natural resources in the state, Nigeria at independence and under the Republican Constitution adopted the derivative principle whereby fifty percent of revenue derived from natural resources went to the region that produced the resources. [116]

In 1971, however, the Federal Military Government promulgated the Offshore Oil Revenue Decree which overturned the provisions under both the Independent and Republican constitutions.[117] The Decree vested the rights in the minerals of territorial waters, continental shelf as well as royalties, rents and other revenues derived from petroleum operations in the Federal Government (the rights in the minerals were vested in the states before the promulgation of this Decree). In order to achieve this absolute control of the petroleum resources, the Decree (now law) stipulated that only the Minister of Petroleum Resources by virtue of sections 2(1), 3 and 4 of the Petroleum Act, or the Presidency by virtue of the then Federal Government policy, may grant or revoke a license or lease. It is submitted that the provisions left no one in doubt that ownership of oil and gas in the Federal Government of Nigeria is absolute.

The situation was not different in the 1979 and 1999 Constitutions, where the Federal Government of Nigeria retained ownership of oil and gas as contained in sections 40(3) and 44(3) of the 1979 and 1999 Constitutions respectively:

> ..., the entire property in and control of all minerals, mineral oils and natural gas, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly."[118]

Etikerentse criticised the present framework that does not accommodate any iota of control or semblance of participation in management by the natives of oil-and gas-producing areas, where not even a Commissioner of Petroleum Resources at the

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[116] Nigeria got her independence from Great Britain in 1960 and declared itself a Republic in 1963.
[117] Etikerentse G (n 16) 12.
[118]This is contained in Sections 40(3) and 44(3) OF 1979 and 1999 Constitutions respectively.

state level could exercise the power granted in section 8 (1) (f) of the Petroleum Act to order the suspension of operations so as to prevent danger to life or property.[119]

Mailula did a comparative analysis of the primary laws regulating oil and gas exploration and production activities in Angola, Nigeria and South Africa in order to determine their effectiveness in protecting the continent's depleting petroleum resources. He argued that the independent African states have sovereign control over their natural resources and that this is the position of United Nations with regards to the principle of permanent state sovereignty over natural resources, including petroleum. In essence, the principle is that the state exercises supreme authority, power or control over natural resources under its jurisdiction.[120] He however observed that a state cannot exercise PSNR if its natural resources are under the control of IOCs.[121]

Mailula has argued that state ownership of petroleum resources is ideally essential and effective for the protection of Africa's petroleum resources from exploitation, abuse and depletion; however, Angola and Nigeria systems are not effective for the protection of their petroleum resources.[122] This is due to the abuse of state ownership by the respective governments of the two countries through corruption, maladministration, lack of transparency and mismanagement of resources.[123] He observed that instead of promoting the development of infrastructure in the countries and in the oil producing areas such as the Niger-Delta in Nigeria and Cabinda in Angola, oil revenues are siphoned by the elite few and squandered through collusion between the governments and oil companies. In African states, according to him, ownership of petroleum resources alone is therefore not an effective or appropriate means of protecting petroleum resources from irresponsible foreign exploitation.[124]

Mailula's study dwelt heavily on comparison of the petro-dollar states and their failure to protect the oil and gas resources against foreign exploitation by the

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[119] Section 8 (1) (f) of the Petroleum Act.
[120] Mailula DT *Protection of petroleum resources in Africa: a comparative analysis of oil and gas laws of selected African states* (LLD-dissertation University of South Africa 2013) 1-536 at 56-60.
[121] Mailula DT (n 120) 56-60.
[122] Mailula DT (n 120) 61-63.
[123] Mailula DT (n 120) 61-63.
[124] Mailula DT (n 120) 7.

Multinational Oil Companies.[125] The point of departure from Mailula's work is that this study assesses NNPC performance as a commercial entity (though at sometimes NNPC combined commercial and regulatory functions) and not as a regulator. It assesses the performance of the Department of Petroleum Resources (DPR) as the regulator of oil and gas sector in Nigeria. Another point of departure is that this study employs questionnaires and interviews in order to fill in the gaps in the written sources, traces the root causes of the crisis in the Niger Delta and makes recommendations for a lasting solution to the problems confronting the oil and gas industry in Nigeria. This thesis is also a comparative study of the legal framework of oil and gas in Nigeria and the United States, Australia and Canada in order to produce information and generate knowledge on the subject and provide insights for law and policy reforms in Nigeria.

Closely related to the principle of Permanent State Sovereignty over Natural Resources discussed by Mailula are the licensing regimes and contractual models. Omorogbe has identified the following objectives as the guiding principles of any model adopted by a state: 'commercial and increased production, how to maximise the use of the revenues earned from the industry and also to maximise revenue collection and to ensure control over petroleum resources.'[126] The host government contracts range from the traditional concession, modern concession, production sharing contract/agreement, service contract, joint venture and the hybrid contract.[127] She opined that practically every country's rights over mineral resources including petroleum are vested in the state as sovereign, with the exception being the United States legal regime under which rights may be privately owned by individuals.[128] It was however argued that an ideal petroleum production contract is the one that satisfies the aspirations of the parties, regardless of who they are, whilst proving mutually profitable during the periods of both high and low prices.[129]

Akinjide-Balogun, in her article entitled "Nigeria: Legal Framework of the Nigerian Petroleum Industry" traces the history of the legal framework to the discovery of oil in

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[125] Petrol-dollar states of Nigeria, Angola and South Africa.
[126] Omorogbe Y *The Oil and Gas Industry: Exploration and Production contracts* (1st ed. Florence &Lambard (Nigeria) Limited, Lagos, 2008), 22.
[127] Omorogbe Y (n 126) 58-65.
[128] Omorogbe Y (n 126) 58.
[129] Omorogbe Y (n 126) 66-70.

commercial quantities at *Oloibiri* now in Bayelsa State by Shell Petroleum Development Corporation, a company of Anglo/Dutch origin.[130] She wrote that in the 1960s, government interest in the oil industry was limited to the collection of taxes, royalties and lease rentals. However, in 1962 the General Assembly of the United Nations passed a resolution on Permanent Sovereignty over Natural Resources.[131] This United Nations' resolution later inspired the passing of the1969 Petroleum Act which vested the entire ownership and control of all petroleum in, under or upon all land or Nigerian territorial waters in the Nigerian government.

The shortcoming of her work relative to this thesis is that she did not examine whether the legal framework effectively ensures Nigerian control of its petroleum resources. She also fails to stress the neglect of the people of Niger Delta and non-provision for them in the existing framework in terms of community participation which is the focus of this thesis. Although she observed that the host community was neglected for a long time until the Federal Government enacted the Niger Delta Development Commission Act in year 2000 to set up the Niger Delta Development Commission to ensure the development of Niger Delta. However, she did not assess the performance of body to see whether the body justify the reason(s) for its establishment or not.

Bribena has contributed insightfully to the literature on the causes of crisis in the Niger Delta. He has stressed the need for corporate social responsibility on the part of the Multinational Companies and the Nigerian National Petroleum Corporation (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC) and other Multinational Companies.[132] He evaluated the negative impact of petroleum and pollution on human rights in the Niger Delta. Bribena further recommended that an Oil Pollution Liability Trust Fund should be established by the Federal Government in concert with oil companies and that the fund should be used in ameliorating the conditions of the impacted environment and people.[133] Despite the suggestions and recommendations of Bribena, there is still unscrupulous human and environmental rights violations resulting in kidnappings

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[130] Akinjide-Balogun O "Nigeria: Legal Framework of the Nigerian Petroleum Industry" (2001) unknown page <www.mondaq.com/Nigeria> accessed 12 May 2016.
[131] O Akinjide-Balogun, (n 130).
[132] Bribena EK (n 34) 173.
[133] Bribena EK (n 34) 284-289.

and killings of oil workers (and other inhabitants of the region) and disruptions of extraction of oil in the region. This calls for further research to explore the flux and instability in the region with the aim of establishing the reasons for the incessant crisis. There is also a dire need to take necessary proactive steps in finding lasting solutions to the crisis in the Niger Delta region in particular and Nigeria in general.

The point of departure therefore is that this thesis uses questionnaires and interviews to gather information on the effects of oil extraction on the people and the environment. This thesis engages in a comparative analysis of the legal framework of oil and gas in the United States, Australia, Canada and Nigeria to see how the models adopted in these states have sustained the oil and gas industry in those countries. This is aimed at recommending reform of the oil industry in Nigeria; law, being a mechanism for social engineering and change. This analysis of the current legal framework of oil and gas and the current reform efforts through the Petroleum Industry Bill establishes a viable legal framework in line with 21st century global oil industry.

Dibua, in his article entitled 'Citizenship and resource control in Nigeria: the case of minority communities in the Niger Delta,'[134] observed that little effort has been expended in interrogating the significance and implications of resource control for the citizenship rights of Nigerians, in particular, the people of the oil-producing riverine communities.[135] According to him the marginalisation of citizenship rights of the minority oil-producing communities helped to fuel the agitation for ethnic citizenship rights and resource control.[136] The author states that the success of a true federalism in Nigeria has to be accompanied by meaningful devolution of power at the local level, to ensure that the common people have control over the wealth derived from their natural resources.

Dibua's article is a significant contribution to the body of new knowledge but it does not state how the devolution of power at the local level would ensure that the common people have better control over the wealth derived from their natural resources. The author does not deal specifically with legal and institutional frameworks on resource control. As a point of departure this thesis focuses on the

[134] Dibua JI (n 33) 5-28.
[135] Dibua JI (n 33) 5-28.
[136] Dibua JI (n 33) 5-28.

legal and regulatory framework so as to identify the flaws in the laws and institutional capabilities and recommend ways out of the Niger Delta imbroglio.

Sagay, in "Nigeria: the unfinished federalism project,"[137] described federalism as a system where there is no hierarchy of authorities, with the central government sitting on top of the others, all governments have a horizontal relationship with each other. He argued extensively on what a federal state should look like and examined Nigerian federalism, concluding that Nigeria has moved from federalism towards a more unitary system that gives enormous power to the Federal Government.[138] He observed that under the 1960 and 1963 Constitutions, there was a true federal system made up of strong states or regions and a Central or Federal "state" with limited powers.

According to him, both the 1960 (Independence) Constitution and the 1963 (Republican) Constitution were the same on their provisions for ownership and control of oil and gas. He has further observed that although the 1960 Constitution did not provide for the ownership and control of mineral resources by the producing state or community, the entitlement of the producer state to 50% of the proceeds, and a share in another 30% with the Federal Government being entitled to only 20%, was a true reflection of the derivative principles which is the economic indication of true federalism.[139]

Sagay has argued that the Niger Delta crisis would simmer down to a considerable degree with the restoration of true federalism.[140] However, the author does not discuss the need for ownership and control of mineral resources by the people who bear the brunt of environmental pollution and degradation. He also failed to consider the legal and institutional and regulatory frameworks on resource control in Nigeria.

Ikpang in his work entitled "the legal chasm between resource control and the determination of the seaward boundaries of the littoral states in Nigeria,"[141] tried to

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[137] Sagay IE "Nigeria: the unfinished federalism project" (2008) delivered at the Eighth Justice Idigbe Memorial Lecture at Akin Deko Auditorium, University of Benin, Benin City.
[138] Sagay IE (137).
[139] Sagay IE (137).
[140] Sagay IE (137).
[141] Ikpang AJ 'the legal chasm between resource control and the determination of the seaward boundaries of the littoral states in Nigeria' Nnamdi Azikiwe University Journal of International Law and Jurisprudence, Vol 2 (2011), www.ajol.info accessed 04 June 2016, 77- 85.

correct an erroneous impression describing the legal suit between the Federal Government and the 36 States of the federation in 2001 as a resource control suit, whereas it was a suit based on the determination of the seaward boundary of a littoral state for the purpose of calculating revenue accruable to such state for offshore oil.[142] The focus of his work, therefore, was to address that problem and to direct the thinking of the people along the proper line of nomenclature, therefore, in true federalism, the component states constitutionally control their resources and they pay a certain percentage of revenue derived from such resources to the Federal Government.[143] Practically, therefore, resource control rests in the component states of the Federation.

According to Ikpang, the vesting of control of mineral resources in the Federal Government of Nigeria by the Constitution of the Federal Republic of Nigeria 1999 and various other enactments is anti-federalism.[144] He has however failed to point out the fact that the people sought to be protected from poverty and environmental deprivation were at the receiving end even with the increased derivation and the establishment of various institutional and regulatory bodies set up to better the lot of the people of Niger Delta. The article does not attempt a comparative study of Nigerian federalism with any other federal system.

Inokoba and Imbua in their article entitled 'Vexation and Militancy in the Niger Delta: The Way Forward' discussed oil exploration and the under-development of the Niger Delta.[145] They demonstrate that the Niger Delta region is a political area made up of oil producing states of Akwa-Ibom, Bayelsa, Cross-River, Delta, Edo, and Rivers. This implies that the region traverses the South-South division of Nigeria.[146] They said the position of the Nigerian State to smuggle in Abia, Ondo and Imo states as reflected in the Niger Delta Development Commission (NDDC) Act is a grand design by the political class of the majority ethnic nationalities of *Igbo* and *Yoruba* descent to lay claim to the benefits accruing from the vast hydrocarbon resources located in

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[142] Ikpang AJ (n 141) 77- 85.
[143] Ikpang AJ (n 141) 77- 85.
[144] Ikpang AJ (n 141) 77- 85.
[145] Inokoba K and Imbua DL "Vexation and Militancy in the Niger Delta: The Way Forward" (2010) 29(2) *J Hum Ecol* 101-120.
[146] Nigeria was divided into six geo-political zones by the regime of General Sanni Abacha.

the heart of the Niger Delta.[147] They were of the view that unlike other oil producing nations of the world, oil has been a curse to the people of the Niger Delta. Its exploration and exploitation since 1958 has created political, ecological and socio-economic conditions that generate abject poverty, misery and backwardness in the region.[148]

They have argued that the Niger Delta Development Board (NDDB) of 1961 which later metamorphosed in 1976 into Niger Delta Basin Development Authority (NDBDA), the Oil Minerals Producing Areas Development Commission (OMPADEC), the Petroleum Trust Fund (PTF) and today's Niger Delta Development Commission (NDDC) have all failed to address the developmental needs of the people because they are based on dubious and faulty premises. They made some recommendations, including, among other things initiating a credible sustained dialogue on control of resources with Niger Delta civil society, including militants and this should be accompanied by the following measures:

1. Repeal all undemocratic, exploitative and repressive laws governing the oil industry-the Petroleum Act, Land Use Decree, etc.
2. Consider the South-South proposal of 50 percent derivation of mineral resources made during the National Political Reform Conference.[149]
3. Increase should start from 25 percent with a marginal increase of 5 percent yearly until it gets to 50 percent; this is done so in order to avoid budgetary shock to non-oil producing states and to encourage exploration and production of other mineral resources throughout Nigeria.[150]

This study, having identified underdevelopment as one of the reasons for protests and crisis in the Niger Delta and the claims that various bodies set up by the Nigerian Governments have failed in improving the living standards of the people, assesses the performance of the Niger Delta Development Commission (NDDC) in the development of the Niger Delta region through questionnaire and interview methods. The thesis also compares the juridical regime governing oil and gas in Nigeria with that of the United States, Canada and Australia with the aim of adopting lessons learnt from these systems in Nigeria.

Idowu in his article entitled "Niger Delta Crises: Implication for Society and Organizational Effectiveness" traces the impacts of the crises on the Nigerian

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[147] Inokoba K and Imbua DL (n 145) 101-120.
[148] Inokoba K and Imbua DL (n 145) 101-120.
[149] Inokoba K and Imbua DL (n 145) 101-120.
[150] Inokoba K and Imbua DL (n 145) 101-120.

economy, human resource utilization and organizational effectiveness.[151] A historical approach was employed to examine the institutional framework used by the Federal Government in responding to the long-term neglect to invest in the social wellbeing of the Niger Delta people. The survey of oil and gas companies in terms of their performances was also carried out using indices of performance like output, sales and profit including Nigeria's economic performance.[152]

The study found that the enormous wealth of Nigeria's Niger Delta does not match the abject poverty being witnessed by its people. Neglect, deprivation, environmental degradation, lack of social infrastructure of the Niger Delta has been met by violent resistance to the *Adaka Boro* Niger Delta (1966) revolution, *Kaima* Declaration, *Ogoni* Bill of Rights to the present militant response through arms. The Federal Government responses through institutional framework like Oil Minerals Producing and Development Commission (OMPADEC), Niger Delta Development Commission (NDDC), amnesty and empowerment of selected ex-militants have been considered as social responsibilities foisted on the people and may not meet the aspirations of the Niger Delta people for dialogue, resource control, autonomy and justice.[153]

Ondotimi Songi in his work on "Resource control, community participation and Nigeria's Petroleum Industry Bill" examined resource control and community participation to ascertain whether or not the Petroleum Industry Bill (PIB) currently before the National Assembly offers any hope to host communities regarding ownership, participation and management, particularly the proposed 10% equity stake for communities under the PIB in the interests of peace and stability.[154] An analytical approach was adopted in examining the domestic legal regime on mineral resource ownership rights; issues of resource control and community participation, and the provisions of the PIB are also analysed in that study.[155]

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[151] Idowu OF "Niger Delta Crises: Implication for society and organizational effectiveness" (2012) 7 (II) *British journal of Arts and Social Sciences,* British journal publishing, Inc. 2012ISSN: 2046-9578, <www.bjournal.co.uk/BJASS.aspx>.

[152] Idowu OF (n 151).

[153] Idowu OF (n 151).

[154] Songi O "Resource control, community participation and Nigeria's Petroleum Industry Bill" <www.eisourcebook.org/cms/Nov%202013/Nigeria,%20Resource%20Control,%20Community%20Participation%20&%20the%20PIB.pdf> accessed on 26 July 2016.

[155] Songi O (n 154).

Ondotimi Songi argued that the PIB as originally proposed is exclusionary as it denies host communities the right to ownership and control, and did not provide for their active participation. If the proposed 10 percent equity participation is eventually included as a substantive provision in the PIB, it would be a great step towards achieving resource control rights and active participation by HCs.[156] The paper looks at the alternatives of Equity Participation (EP) and Community Development and Participation Agreements (CDPAs) in striking a balance between the conflicting interests of the communities and the government in line with best international practices. Though the propositions in the PIB seem impressive, the fact remains that it is a bill and not law. In fact, the Bill has over stayed in the National Assembly awaiting passage into law since 2012.[157]

This thesis therefore analyses the current laws governing oil and gas in Nigeria with the aim of bringing these laws to the standard expected of a 21st century oil and gas industry. It further suggests that in the face of difficulties in passing the PIB the legislature could pass into law any of the laws that would ensure that, that is an improvement in the living standard of the people of the Niger Delta and that the environment is safe. The thesis suggests solving the problems in the Niger Delta once and for all, by recommending mixed ownership of oil and gas between the Federal Government, the State Governments and the communities and individual landowners in the Niger Delta as obtainable in some of the federal systems.

As discussed above many scholars have written on this area of law concluding that the right of the community over the land and the mineral resources found there under is inalienable. This assertion is supported by the Nigerian constitution. One of such is the right to development. This is captured by Section 16 of the Constitution of the Federal Republic of Nigeria (CFRN) of 1999. The economic objectives contained in section 16 of the Constitution include the provisions for judicious management of the economy and material resources of communities for the common good of all including the oil-bearing communities. In section 17(2) (d), the Constitution forbids the exploitation of natural resources for purposes other than the good of the community and Nigeria in general. Section 17(2) (d) provides that 'exploitation of

[156] Songi O (n 154).

[157] A segment of the PIB called Petroleum Industry Governance Bill (PIGB) has been passed by the National Assembly awaiting the signature of the President.

human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented.'

The African Charter on Human and People's Rights (HCHPR) is part of Nigerian Law by virtue of Chapter 10 of the Laws of the Federation of Nigeria (LFN), 1990, where Nigeria is a signatory to the Charter. Article 21 of the Charter provides for the rights of the community to own their resources and when exploited, it should be for their benefit. For the purpose of emphasis article 21 provides as follows:

> 1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it
>
> 2. In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

This is a regional law which, by virtue of its domestication, becomes effective in Nigeria and was upheld by the Supreme Court in the case of *Abacha v. Fawehinmi.*[158] The court in that case said that the right of a person to the existence and enjoyment of their natural resources was not negotiable.

This position was popularised by the declaration of the United Nations in 1966 when it adopted the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Article 1 of both Covenants provides as follows:

> All peoples have the right to self-determination. By virtue of the right, they can freely determine their political status and freely pursue their economic, social and cultural development.

This position was further enhanced by the United Nations Declaration on Permanent Sovereignty over Natural Resources which provides inter alia:

> The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the state concerned.[159]

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[158] (2000)6 NWLR (Pt. 660) 228.
[159] Article I, United Nations Declaration on Permanent Sovereignty over Natural Resources.

Akaninyene,[160] in his thesis has observed the need to pacify the people of Niger Delta by fashioning an acceptable revenue allocation formula for Nigeria. He examines the Supreme Court's decision in *A.G. Federation v. A.G. Abia state and 35 ors*,[161] wherein the issues of resource control and revenue allocation were decided upon. It also discusses the reasons for the perennial crisis in the Niger Delta and what he proffers as a solution. He sought answers to the following questions:

- Is the issue of resource control merely a struggle to increase in revenue or the control of the resources of the Niger Delta?
- Is resource control the panacea to the perennial crises in the region?
- Is there an acceptable revenue allocation formula for Nigeria?[162]

The shortcoming of the thesis is the over-emphasis on revision of revenue allocation which is in line with the demands of the state governors. This position has been criticized for not working; it only created few rich people who are mere collaborators with the Federal Government leaving the inhabitants of the oil rich region poorer.[163] This thesis goes beyond revenue allocation alone to looking at the need for a permanent solution by proposing an amendment to the 1999 Constitution to allow for mixed ownership of oil and gas as obtainable in the United States of America, Canada and Australia. Therefore, the thesis engages in comparative analysis of the USA, Canada and Australia's oil and gas regulatory models and that of Nigeria to bring out the similarities and differences and recommends that Nigeria borrow a leaf from these jurisdictions.

Ile and Akukwe[164] have argued that the Niger Delta issue is a complex web of political betrayals at all levels of government (local, state, and federal), endless economic marginalization, and massive environmental insensitivity and neglect. They therefore posed this question: should Nigerians who occupy the source of enormous national wealth enjoy an equitable standard of living, pursue economic

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[160] Akaninyene TS *The Right of the Niger Delta People of Nigeria to Resource Control* (Master's Thesis Malmo University, Sweden 2010) accessed 12th May 2016.
[161] (2001) 11NWLR 689.
[162] Akaninyene TS (160).
[163] Akaninyene TS (160); Dibua JI (n 33) 6.
[164] Ile C and Akukwe C "Niger Delta, Nigeria: Issues, Challenges and Opportunities for Equitable Development" (2001) <www.nigeriaworld.com> accessed 12 May 2016.

freedoms with minimal discomfort, and live a healthy life, free from avoidable environmental hazards?[165]

According to them, the answer to the above question is that the people in the Niger Delta should enjoy a healthy living free from environmental hazards, which presently is not the case. Then, the question is, what went wrong in the Niger Delta since 1956?[166] How and when did it go so wrong? Can anything be done to rectify the wrong and assure that it will never happen again? They traced the problem in the Delta to the 1978 Land Use Decree that unilaterally legitimized the transfer of all minerals, oil and gas in Nigeria to the Federal Government. The other problem is the decision of the Federal Government to directly negotiate terms of oil exploration with Multinational Companies, leaving host communities as oppressed bystanders and the disproportionate share of the federal revenue that goes to the Federal Government in Nigeria.[167]

Having traced the history of the crisis they concluded that the Niger Delta crisis can only be resolved when all the stakeholders adopt a common strategic vision and mission that focus on sound community-based economic, environmental, health and political emancipation of the oil-host communities in the Niger Delta.[168] They argued that the Nigerian law on compensation for oil spills contains an effectively poisonous pill that bars oil companies from paying compensation for spills due to "sabotage" and "terrorism." The proportion of oil revenues that filters back to the host communities has dropped from approximately 50 percent in 1960 to 13 percent as stipulated in the 1999 Constitution.[169] Even the 13 percent derivation is a subject of intense political disputes between the Federal and Niger Delta State governments.

Apart from the above, they have raised the following issues that are responsible for the crisis in the Delta as: Oil spillage, gas flaring, environmental degradation, poor health status, poverty, pipeline explosions, limited government/public sector presence, distrust of the government/petro business alliance, lack of basic infrastructure and political marginalization. They picked holes in the National

[165] Ile C and Akukwe C (n 164).
[166] Ile C and Akukwe C (n 164).
[167] Ile C and Akukwe C (n 164).
[168] Ile C and Akukwe C (n 164).
[169] Ile C and Akukwe C (n 164).

Petroleum Policy of Nigeria as announced by the Nigerian National Petroleum Corporation (NNPC), saying that oil-producing communities are glaringly missing in the document.[170] The shortcoming of this work is that it does not review the entire legal framework to identify gaps and challenges in the laws and proffer solutions to the problems identified. This present thesis reviews the entire legal regime to identify what is wrong with the present laws and suggests reforms that are anticipated to bring development into the Niger Delta and also make the laws conform to international best practices.

Ayodele-Akaakar[171] has opined that the reason why Nigeria is going through the crisis in the Niger Delta is partly due to a sharp reaction by the oil producing communities, which suffer grievous hardships resulting from the operations of the laws governing the sector.[172] He traced the history of vesting of ownership and control of oil and gas in Nigeria from colonialism to post-independence. He made copious references to the Mineral Oils Ordinance No.17 of 1914 and the 1946 Minerals Ordinance which stipulated that: -

> The entire property in and control of all minerals, and mineral oil in, under or upon any lands in Nigeria, and of all rivers, streams and watercourses throughout Nigeria is and shall be vested in the Crown.[173]

According to the writer, this system is the same under the common law, where the owner of the soil owned all the minerals below the surface of his land and he may work or lease them. However, this kind of ownership was subject to the right of a state to reserve for herself mineral resources or to statutorily expropriate them. The Petroleum Act 1969 and the Petroleum (Drilling and Production) Regulation 1969 retained the colonial legacy of vesting the oil and gas resources in the state.[174]

This thesis acknowledges the contributions of the various authors to literature on the causes of the crisis in the oil rich Niger Delta region of Nigeria. However, most of them fail to do an in-depth analysis of the laws governing oil and gas exploration and exploitation in Nigeria and how the revision of these laws can help to resolve some of the challenges in the Niger Delta. Most of the authors also failed to offer a

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[170] Ile C and Akukwe C (n 164).
[171] Ayodele-Akaakar FO (n 60).
[172] Ayodele-Akaakar FO (n 60).
[173] Section 3 (1) of the Mineral Ordinance 1946.
[174] It should be noted that this law has under gone various amendments, the latest of which was in 1998 by the Petroleum Amendment Decree No. 22 of 1998.

comparative study of the oil and gas legal regime in other similar jurisdictions in order to draw lessons from them. Some of the authors who did comparative analysis only emphasised other petrol-dollar African countries which equally suffer from the popular resource curse and Dutch disease.[175]

From the literature review, above, there are obvious gaps and flaws which justify further research. Law is the mechanism for social engineering and change. Therefore, this thesis gives an in-depth analysis of the juridical regime governing oil and gas in Nigeria and makes recommendations to the policy makers and the legislature for urgent revision of the laws in line with the laws prevailing in the 21st century oil and gas industry. There is the segmental passage of an aspect of the PIB by the Nigerian Senate on the 25 May 2017. This thesis does a critical analysis of the Petroleum Industry Governance Bill, examining how it anticipates improving the sustainable development of petroleum resources in Nigeria.

The comparative dimension of the study of the legal framework of oil and gas in Nigeria and that of the United States, Canada and Australia generates knowledge on the subject and provides insights for law and policy reforms in Nigeria. This thesis uses questionnaires and interviews to fill in the gaps in the written sources and to unearth the root causes of the crisis in the Niger Delta and makes recommendations for a lasting solution to the problems confronting the oil and gas industry in Nigeria. This study also identifies the issues and challenges in the implementation of laws on the oil and gas industry in Nigeria with the aim of finding lasting solutions to the problems in the oil industry.

1.5 Data Collection and Methodology

This research study is triangulation based. Triangulation is a strategy used in research in order to make its findings robust and reliable. Creswell has defined triangulation as a step taken by researchers employing only the researcher's lens and as a systematic process of sorting through the data to find common themes or categories by eliminating overlapping areas.[176] He opined that this is a popular

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[175] Dutch disease describes the state of over-dependency on one commodity by a country (especially oil).

[176] Creswell JW and Miller DL (2000) "Determining validity in qualitative inquiry" 39 (3) *Theory into practice* 124-130 <www.tandfonline.com/doi/pdf/10.1207/s15430421tip3903_2> accessed on 30 July 2016.

practice for qualitative inquirers to provide corroborating evidence collected through multiple methods, such as observations, interviews, and documents to locate major and minor themes. The narrative account is valid because researchers rely on multiple forms of evidence rather than a single incident or data point in the study.[177] According to Torrance, the justification underpinning mixed method approaches is that no single method is likely to afford a comprehensive account of the phenomenon under investigation, thus two or more methods are employed to bring different intellectual tools to the task at hand.[178]

According to Smith triangulation can be applied to a study in many ways, including: triangulation of data, triangulation of the investigator, triangulation of the theory and triangulation of methods.[179] Triangulation of data may take place in different ways as suggested by Smith:

1. in time which is applicable in a longitudinal study,[180]
2. in space or different geographical areas and
3. by level: e.g. aggregate of persons, interaction of persons or collectivities of persons.

The triangulation of data in time which is applicable in a longitudinal study will not be applied in this study but in terms of space or geographical areas and by level are applicable to this study. This is because this study will cover different oil extraction sites in the Delta, Bayelsa, Rivers and Akwa Ibom States and will deal with different stakeholder groups whose views are therefore triangulated to see whether they share the same opinions about the causes of conflicts in the Niger Delta or not.

Investigator triangulation, on the other hand, involves the use of multiple observers of the same subject to compare their observation results. However, this study involves only a single observer (the researcher) hence this type of triangulation was not deemed applicable in this study.

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[177] Creswell JW and Miller DL (n 176) 4.

[178] Torrance H "Triangulation, respondent validation, and democratic participation in mixed methods research" (2012) XX(X) *Journal of mixed methods research* 1–13 <http://jmmr.sagepub.com> accessed 02 August 2016.

[179] Smith HW (1981) *Strategies of Social Research: The Methodological Imagination*. Prentice-Hall, Inc.: Eaglewood Cliffs. quoted in K'Akumu O *The enabling environment for artisanal dimension stone in Nairobi, Kenya* (PhD-dissertation University of Westminster 2010) 110-111 <www.westminster.ac.uk/research/westminsterresearch>

[180] A longitudinal study is explained in subsequent paragraphs.

Basically, there are two main kinds of research methodology. These are the qualitative and the quantitative methods of data collection. Qualitative research has been defined by Strauss et al, as research that produces findings not arrived at by statistical procedures or other means of quantification. According to him, 'it can refer to research about persons' lives, live experiences, behaviours, emotions, and feelings as well as about organizational functioning, social movements, cultural phenomena, and interactions between Nations.'[181] Strauss has identified three major components of qualitative research which includes interviews and observation, but also might rope in documents, films or videotapes, and even data that have been quantified for other purposes such as census data. Second, the researcher can use qualitative research procedures to interpret and organize the data. Third, the researcher can deliver written and verbal reports.[182] According to Creswell, qualitative researchers use a lens not based on scores, instruments, or research designs, but a lens using the views of people who conduct, participate in, or read and review a study.[183]

Quantitative research, on the other hand, deals with numbers and concentrates on measuring phenomena.[184] Creswell has explained that in quantitative research, most investigators are concerned about the specific inferences made from test scores on psychometric instruments (i.e., the construct, criterion, and content validity of interpretations of scores) and the internal and external validity of experimental and quasi-experimental designs.

Apart from the two main research methods (the qualitative and the quantitative research methods); there is the longitudinal research/survey. Longitudinal research/survey is defined as research emphasizing the study of change and containing at minimum three repeated observations (although more than three is better) on at least one of the substantive constructs of interest.[185] Pike, has also

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[181] Strauss A *et al* "Basics of qualitative research: Techniques and procedures for developing grounded theory" 2nd ed. 2 <www.li.suu.edu/library/circulation/Stein/CommualitativeFall07.pdf> accessed on 30 July 2016.

[182] Strauss A (n 181) 11-12.

[183] Creswell JW and Miller DL (n 176) 3.

[184] Hussey J *Business research: A practical guide for Undergraduate and Postgraduate Students* (Macmillan, London 1997)115.

[185] Ployhart RE et al, "Longitudinal research: The theory, design, and analysis of change" (2010) Journal of Management, Vol. 36 No. 1, 97 <http://jom.sagepub.com/content/36/1/94.full.pdf+html> accessed on 30 July 2016.

described longitudinal study as an observational research method in which data is gathered for the same subjects repeatedly over a period of time and this can extend to cover years or even decades.[186] In a longitudinal cohort study, the same individuals are observed over the study period. Cohort studies are common in medicine, psychology and sociology, where they allow researchers to study changes over time.[187]

Ployhart has observed that there are descriptive and explanatory longitudinal research methods. According to him a descriptive longitudinal research seeks to illustrate how phenomenon changes over time.[188] In descriptive longitudinal research, the researcher attempts only to describe the form of change over time. In contrast, the explanatory longitudinal research seeks to identify the cause of the change process using one or more substantive predictor variables or how the change process in a substantive variable predicts other substantive variables of interest.[189] The longitudinal research methods have challenges, especially whether or not the sample of respondents at later times is representative of respondents at earlier times. In field studies, it is not uncommon to find the response rates drop by half or more between the first and last measurement occasion.[190]

The main research method employed in this study is qualitative, supplemented by questionnaire survey and interview. A research method has been defined by Strauss as a set of procedures and techniques for gathering and analysing data.[191] In order to fill in the gaps in the written sources, interviews will also be used in the thesis. The interview can be structured or semi-structured in nature. Semi-structured interviews are used because they are open, allowing new ideas to be brought up during the interview as a result of what the interviewee says. Interviewing is a common qualitative approach for data collection that allows interviewees the time and scope to relate their opinions about a subject within the framework to be explored. Hence the stakeholders in the oil and gas sector are interviewed to hear their views on what the issues and challenges are in the upstream oil and gas sector in Nigeria.

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[186] Richard P "A longitudinal survey on capital budgeting practices" (1996) 23(79) *Journal of Business Finance and Accounting* accessed July 2017.
[187] Ployhart RE et al (n 185) 99.
[188] Ployhart RE et al (n 185) 99.
[189] Ployhart RE et al (n 185) 99.
[190] Ployhart RE et al (n 185) 103-104.
[191] Strauss A (n 181) 10-11.

This study, apart from employing questionnaire survey and interview also relies on resources that exist in textbooks, journal articles, case law, legislation, international conventions and treaties. The study employs primary sources, including relevant national legislations, the Nigerian constitution, cases and other international legal instruments like various conventions relating to the extraction of oil, corporate social responsibility, human rights and environmental protection. Apart from primary sources, the study also makes use of the secondary sources which consist of relevant books, law reports, encyclopaedias, law dictionaries, journal articles and treatises. In addition to primary and secondary sources, internet resources are utilized to assess reputable local and foreign texts on resource control, federalism and other related topics, reports from governmental organizations, newspaper articles and academic publications.

The study is also a comparative study of the United States, Canada and Australia with Nigerian primary laws regulating oil and gas industries. The comparative analysis focuses on the relevant legal provisions concerning the ownership structures of oil and gas, the licensing models, institutional or regulatory bodies, fiscal systems, local content requirements, human rights and environmental issues. The purpose of the comparison is to produce information and generate knowledge on the juridical regimes of oil and gas of Nigeria with the hope of finding a lasting solution to the incessant crisis in the Niger Delta, resolve various environmental challenges associated with the extraction of oil and ensure sustainable development of the resources.

The United States, Canada and Australia were selected for purposes of the comparative study in this thesis with Nigeria for a variety of reasons. United States, Canada and Australia are federal states and are also rich in oil and gas. The constitution is also the supreme law in the United States, Canada, Australia and Nigeria. The United States, for instance, is known for pioneering developments in human rights, environmental rights and constitutional law. Furthermore, the federal model of government in Nigeria is to a large extent like that of the United States, Canada and Australia.

1.5.1 Data collection methods

The researcher in this study employed the purposive sampling technique. This implies that the individuals selected for data gathering are those with first-hand information, knowledge and experience about the problems of oil and gas exploration and exploitation in Nigeria. Interviews and questionnaire methods are employed in this study.

1.5.1.1 Interview method

The targeted population for the interviews is the National Assembly members; traditional/community heads; staff of Multinational Oil companies (MOCs); staff of Department of Petroleum Resources (DPR), Nigerian National Petroleum Corporation (NNPC) and Niger Delta Development Commission (NDDC); staff of Ministry of Justice and the Judiciary; lawyers; human rights activists, fishermen, farmers and artisans in the Niger Delta.

The population sample for the interviews is 30 and the distribution is as follows:

- Law makers- 3; staff of Multinational Oil Companies- 3; staff of Department of Petroleum Resources, NNPC and NDDC- 5; staff of Ministry of Justice and the Judiciary- 4 traditional/Community heads- 5; lawyers, human rights activists, fishermen, farmers and artisans in the Niger Delta- 10.
- A semi-structured interview is employed. This method permits the collection of more extensive and detailed data from individual participants. It also enables them to express their own views and experiences.
- Interview responses are hand written and audiotape recorded having first sought the consent of the participants.

1.5.1.2 Questionnaire method

Questionnaire is employed to elicit information about the adequacy or otherwise of the legal framework and causes of violence in the Niger Delta. The survey covers oil-producing states in the Niger Delta, namely: Delta, Bayelsa, Rivers and Akwa Ibom States; this is because these four States produce 90% of the total crude oil production in Nigeria.[192] The population sample size of the questionnaire is 400 although the researcher was only able to retrieve 318 out of 400 questionnaires distributed. The questionnaire was distributed to 19 members of the National Assembly; the staff of Multinational Oil companies- 22; the staff of Nigerian National Petroleum Corporation- 17; the staff of the Department of Petroleum Resources- 20;

[192] Ifiokobong R Top 10 oil-producing states in Nigeria 2017 *InfoGuideNigeria* <https://infoguidenigeria.com/oil- producing-states/> accessed 19 October 2017.

staff of Ministry of Justice- 30; staff of Judiciary- 32; Traditional/community heads- 30; lawyers- 36; human rights activists- 22; students- 32; farmers- 45; fishermen- 41; artisans- 27 and traders- 27. The students who were respondents were from the University of Petroleum, Effurun, Delta State, Petroleum Research Institute in Delta State, the University of Port Harcourt in Rivers State, Federal University Otuoke, Bayelsa State, the Niger Delta University in Bayelsa State and the Nigerian Law School, Yenagoa Campus, Bayelsa State. Out of the total number of 400 questionnaire distributed 318 were filled and recovered. Thus, the survey achieved 78.5% response rate. The questionnaires were distributed as indicated above and were administered face to face; personal interviews as well were conducted face to face.

1.5.2 Sampling technique

The researcher employed purposive sampling technique. It implies that the individuals selected for the data gathering were the stakeholders with first-hand information, knowledge and experience on oil and gas exploration and exploitation in Nigeria. The selected people were educated and more informed on effects of extraction of oil and gas in the Niger Delta. They were part and parcel of the communities representing different age-grades, sex and backgrounds in the affected communities.

1.6 Scope and limitations of the Study

In a comparative study of this nature, it is impossible to touch all the areas involved in the petroleum industry. It is likewise impossible to discuss in detail the effects of exploration and exploitation of oil and gas in Nigeria. Hence, this study was limited to examining the legislative and regulatory framework in the upstream sector of oil and gas as it affects the sustainable development of the resources, the ownership structure and the effects of crude oil extraction on the environment and the inhabitants of the Niger Delta.

The Niger Delta has a difficult terrain and the researcher was unable to access some of the creeks, peninsula and coastal communities. Apart from this, the security situation was volatile with outbreaks of violent attacks on oil facilities, the kidnapping of oil companies' workers (both local and foreign nationals), in fact, the researcher

and his assistants were advised against venturing to some parts because of the risk of being kidnapped. The recent attacks by the Niger Delta Avengers in Ibeno communities of Akwa Ibom prevented the researcher and his assistants from entering those communities. Nevertheless, the researcher could visit some sites where exploitation of petroleum is taking place, conducted some interviews and was able to get first-hand information on sites of oil spillages, the causes of the crisis in the Niger Delta and noted suggestions that could bring about a lasting peace in the region.

The researcher was refused access into the Shell Nigeria oil facility located in Amassoma area of Bayelsa State by the military stationed at the entrance. Also the researcher's effort to conduct direct interviews with the officials of Chevron Nigeria in Lagos was thwarted. These oil companies were restricted through their information protection policy. Their policy administrators must peruse and approve any document perceived as related to the companies or the oil and gas industry at large. As such, this study was unable to collect facts directly from the International Oil Companies on their activities concerning extraction of crude oil in the Niger Delta. Therefore, the assessment of the activities of the said companies in this study is based on personal communications with staff of these companies outside their place of work. The study also relies on the existing literature on these Multinational Oil companies and the responses gathered from the questionnaire administered and the interviews conducted with other stakeholders.

The thesis is divided into seven interrelated chapters. Chapter one is the introduction and it presents the background to the study, the statement of the problem, purpose of the study, the significance and justification of the study. The study sets out to achieve some identified research objectives. The chapter also presents the research methodology which is a mixture of qualitative and quantitative research method. On the methods adopted in collecting data, the issues of validity, reliability and ethical consideration are dealt with. It defines the concepts of the upstream petroleum resources and natural resources/resource control. This chapter also reviews the literature on the ownership structure, resource control, the extent of damage caused by unsustainable exploitation of oil and gas in Nigeria, other causes of crisis in the Niger Delta and the proffered solution to the imbroglio.

Chapter two is an overview of the different ownership structures and regulatory models of upstream oil and gas resources generally. It deals with the theories of ownership of oil and gas law, ownership of oil and gas under the common, civil laws, Islamic law and African customary law. It examines state ownership of oil and gas and the exception to the general rule under the common law.

Chapter three reviews the existing legal regime of oil and gas as it is by examining the pre-independence and post-independence legal and regulatory framework of oil and gas in Nigeria. It analyses the influence of international law elements on the ownership structure in Nigeria. It examines federalism, especially fiscal federalism in Nigeria.[193] It discusses the State participation in oil and gas Industry, by considering various contractual agreements and the types of licences in Nigeria.

Chapter four discusses the proposed law reforms in the petroleum industry.

Chapter five discusses various issues and challenges in the implementation of oil and gas law in Nigeria. The study discusses the concepts of sustainable development, resource curse and "Dutch disease". The study identifies major oil spills and discusses the menace of gas flaring. It reviews the effectiveness of institutions to control and regulate the activities of oil companies and examines the legislative provisions on compensation to oil spills victims. It also examines the programmes put in place to assuage the suffering of the people of the Niger Delta. It discusses the inaccessibility to justice experienced by the victims of oil pollution, the legal bottlenecks in terms of rules of locus *standi,* technicality of evidence and the burden of proof required to succeed in oil pollution compensation claims. It also discusses the negative impact of corruption on the petroleum industry of Nigeria.

Chapter six presents the juridical regime governing oil and gas resources in the United States of America (USA), Canada and Australia with the aim of understanding what is obtainable in these countries. The chapter does a comparative analysis of the legal regime of oil and gas with Nigeria; and enumerated lessons that can be learnt by Nigeria.

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[193] Madubuko CC (2015) *Oil Exploration and Youth Unrest in the Niger Delta: A Study in the Rise and Impacts of Socio-Cultural Group Insurgency in Nigeria 1956 – 2014* (PhD-dissertation University of New England 2015) 4 (see table 1.1 Timelines of Nigerian leaders, 1960–2015 in the thesis p.4).

Chapter seven presents the interviews conducted and analyses responses from the questionnaires distributed.

Chapter eight is the conclusion and recommendations. It summarises the findings of the research and gives useful recommendations for the reforms.

1.7 Major Concepts defined

1.7.1 Upstream (Petroleum Industry)

The oil and gas industry (otherwise referred to as Petroleum Industry) is divided into three major sectors: upstream, midstream and downstream.[194] The upstream oil sector is also commonly known as the *exploration and production sector*.[195] The upstream sector includes searching for potential underground or underwater crude oil and natural gas fields, drilling exploratory wells, and subsequent drilling and operating the wells that recover and bring the crude oil and/or raw natural gas to the surface.[196]

The upstream sector of the oil and gas industry involves processes, including the searching for and the recovery of crude oil as well as its production. In the upstream sector, discovery or exploration for crude oil takes place.[197] This involves intensive and extensive efforts towards ascertaining the actual places where crude oil is located. [198]

Upstream is raw material extraction or production. The companies that engage in these activities identify oil and natural gas deposits and engage in the extraction of these resources from underground.[199] It has been observed that the extraction of hydrocarbons is an inherently hazardous activity with potential grave risks to the general environment. Environmental woes occur during all stages of the oil and gas cycle but more notably during the upstream stage of operations.[200] This stage is

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[194] Upstream (petroleum industry) from Wikipedia, the free encyclopedia <https://en.wikipedia.org> accessed on 10 July 2016.

[195] Upstream (petroleum industry) (n 194) 1.

[196] Upstream (petroleum industry) (n 194) 1.

[197] Challenges and Solutions in an Upstream and Downstream Oil and Gas Operation, (2013) Think Oil, HOUSTON, TEXAS, <http://globalenergy.pr.co> accessed 14 July 2016.

[198] Challenges and Solutions in an Upstream (n 197) 1.

[199] What is the difference between upstream and downstream oil and gas operations? | Investopedia <www.investopedia.com/ask/answers/060215/what-difference-between-upstream-and-downstream-oil-and-gas-operations.asp> 13 July 2016.

[200] Arinaitwe PW "Environmental Regulation of Upstream Sector of Oil and Gas Industry" <http://ssm.com/abstract=2486551> accessed on 13 July 2016.

accompanied by a range of environmental issues like accidental spills and blow-outs during the development stage,[201] operational discharge and atmospheric emissions like gas-flaring during the production stage.[202] Major incidents like Ecuador rain forest pollution, Piper alpha offshore disaster (1988), gas flaring in Nigeria, Montara accident (2009) and Macondo blowout (2010) are but a few examples.[203]

The Declaration of the United Nations of Permanent Sovereignty over Natural Resources by its resolution[204] encouraged the third world countries to take over the resources found in their lands, especially the newly independent African countries.[205] The formation of OPEC in 1971 also encouraged members to form their own national oil companies to do the business of oil exploration and production. These developments made the host countries enter into forms of agreements in the upstream sector of petroleum production. In modern times, there are various forms of government participation agreements in the exploration for and production of petroleum resources, namely concessions, or conventional licenses, joint ventures (JVs), pure and risk service contracts, and Production Sharing Agreement (PSAs)/Production Sharing Contracts (PSCs).[206]

1.7.2 Natural resources/resource control

The term "natural resources" is defined by the Black's Law Dictionary as:

> Any materials in its native state which, when extracted has economic value... the term includes not only timber, gas, oil, coals, minerals, lakes and submerged lands, but also, features which supply a human need and contribute to the health, welfare, and benefits of a community, and are essential to the well-being thereof and proper enjoyment of property devoted to park and recreational purposes.

Oil, natural gas, minerals and coal are within this definition. Also the term "control" has been defined by Black's Law Dictionary as restraint, command, regulation, a check or the fact of controlling or of checking and directing action, domination and command.

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[201] Gao Z "Environmental Regulation of the Oil and Gas Industries" <www.dundee.ac.uk/cepmlp/journal/html/vol2/article2-11.html> accessed on 13 July 2016.

[202] Wawryk SA "International Environmental Standards in the Oil Industry: Improving the Operations of Transnational Oil Companies in Emerging Economies" (2002) unknown page <www.dundee.ac.uk/cepmlp/journal/html/Vol13/article 13> accessed 13 July 2016.

[203] Wawryk SA (n 202).

[204] Resolution 1803(XVII) 14 December 1962, Declaration on Permanent Sovereignty over Natural Resources.

[205] Omorogbe Y (n 126) 27.

[206] Omorogbe Y (n 126) 58.

The term "resources" is not defined in the 1999 constitution. They are regarded as a means of supplying some want or deficiency, a stock or reserve upon which one can draw when necessary. They therefore include natural resources and money and other man-made resources capable of being acquired through the exploitation of such natural resources.

1.8 Ethical Considerations

The study of the regulatory framework for oil and gas involves different institutions set up by government to monitor and participate in oil and gas business. The actions and inactions of these regulatory bodies affect various sectors of the society. As such the people of Niger Delta who are directly affected and other stakeholders are interviewed. The researcher conducted the research using interviews and questionnaire methods and this was after considering and applying the principles recommended by McNamara[207] which include: (i) choosing a setting with little distraction; (ii) explaining the purpose of the interview; (iii) addressing terms of confidentiality; (iv) explaining the format of the interview; (v) indicating the usual length of the interview; (vi) telling them how to get in touch afterwards - if they want to; (vii) asking them if they have any questions before the interview commences; and (viii) making sure all instruments are in place so as not to rely on memory in order to recall their answers. Questionnaires were also used to collect information useful for this study. A letter of introduction and the ethical clearance certificate from North-West University were attached to the questionnaire as an assurance of genuineness, confidentiality and importance of the research. The letter of introduction, interview questions, questionnaire and ethical clearance certificate are hereby attached as annexures A, B, C and D respectively.

1.9 Summary

This chapter has provided the foundation upon which the entire structure of this thesis rests. The chapter dealt with the background to the study, statement of problem, aims and objectives of the study. It gave an overview of the rationale and justification of the study and did a literature review of works on the study with a view to identifying the problem under investigation. For clarity, it explains and clarifies

[207] McNamara C "General Guidelines for Conducting Research Interviews" (2009) www.google.com accessed 13 May 2016.

certain concepts/technical terms. It stated the method of data collection and methodology adopted. Finally it stated the scope and the limitations of the study as well as the ethical considerations. Chapter two will discuss different ownership structures, thoeries and regulatory models of upstream oil and gas resources.

CHAPTER TWO

A SYNOPSIS OF THE VARIOUS OWNERSHIP AND REGULATORY STRUCTURES OF OIL AND GAS RESOURCES

2.0 Introduction

This chapter discusses the different ownership structures and regulatory models of upstream oil and gas resources generally. It deals with the theories of ownership of oil and gas law, private ownership, ownership of oil and gas under the common, civil laws, Islamic law and African customary law, followed by an examination of state ownership of oil and gas under the United Nations' doctrine of permanent sovereignty of nations over natural resources.

2.1 Ownership and Control defined

The concept "ownership" refers to an almost complete or absolute right to real property limited only by law.[208] Ownership can also be defined as "the collection of rights allowing one to use and enjoy property, including the right to convey it to others".[209] Ownership connotes the right to use, enjoy and deal with the thing in any manner the owner wishes, including the right to sell, hire, dispose of the thing and the right to exclude others from using or interfering with the property.[210] Ownership has also been defined as "the bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others".[211] The owner's right is, however, subject to the rule of law that the owner of a thing should not use it to disturb or interfere with the use of another persons' property. Here the rights and duties of each individual are determined by existing norms and rules which form the basis of laws.[212] It has been observed by *Lanre Aladeitan* that the concept of property rights was developed within legal systems to regulate and justify the exclusive right given to some individuals, groups, communities or states to use and

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[208] Megarry R et al *the law of real property*, (4th ed. Stevens and sons limited, London, 1975), 13; Olong AMD, *Land Law in Nigeria* (2nd edn. Malthouse Law Books, Nigeria 2012) 1-2; Mailula DT *Protection of petroleum resources in Africa: A comparative analysis of oil and gas laws of selected African states* (PhD-dissertation University of South Africa 2013) 27.

[209] Edu OK (n 69) 17.

[210] Freehold Petroleum and Natural Gas Owners Association, about 'Owning' Petroleum & Natural Gas, 208, 1235 17th Ave SW, Calgary, AB T2T 0C2 <www.cancompany.org> accessed 7 October 2016.

[211] Garner BA *The Black's Law Dictionary* (10th ed. St. Paul Publishing, 2014) 146.

[212] Ojuokaiye OE "Oil and Gas Law I" (2011) Course Code: Law 411, *National Open University of Nigeria* (NOUN), Lagos 68. <www.nou.edu.ng/uploads/NOUN_OCL/pdf/Laws.pdf> accessed 7 December 2016.

dispose of such resources.[213] This explains the importance attached to the property holder and his control, management and use of the property.[214] Sometimes, the property right conferred on the individuals, groups, communities or states is absolute ownership, while at other times, the right conferred is an interest less than ownership.[215]

2.2 Ownership of oil and gas

Ownership of oil and gas has remained a topical issue in jurisdictions with abundant reserves of oil and gas, including the production of the same, throughout the world. It is topical because it defines the extent or plenitude of interests and rights that any person, individual or body has over oil and gas. It has generated a lot of discussion and arguments amongst scholars and governments, the international oil companies and the generality of the people.[216] This is so because oil is a source of wealth and thereby plays a dominant role in the economies of nations. The issue of who owns and controls oil resources has caused major disagreements in some instances while certain theories have evolved in the process to determine who owns and controls oil resources.[217] Oil and gas exploration and exploitation involve intricate relationships between the owner states and multinational oil conglomerates, leading to various licensing and contractual models.

2.3 Theories of ownership

Various kinds of interests are created in contractual agreements between the owners (either the state or the individuals) of land in which oil and gas are situated and Multinational Oil Companies. The nature of the interest created is, in large measure, determined by the theory of ownership recognized in each state.[218] In a practical sense, legal remedies are often moulded by the theory of ownership and by the nature of the interest created in an oil and gas lease.[219] The above reasons underscore the importance of discussing ownership theories. Writers have identified

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[213] Aladeitan L (n 63) 24.
[214] Aladeitan L (n 63) 24.
[215] Smith IO *Practical Approach to Law of Real Property in Nigeria* 2nd ed. (Ecowatch, 2007), 3.
[216] Ojuokaiye OE *op cit* (n 212) 67.
[217] Ojuokaiye OE *op cit* (n 212) 67.
[218] Haranzo JJ *et al* "Oil and Gas - The Effect of Theories of Ownership upon the Remedies of an Oil and Gas Lessee" *Notre Dame Law Review* Volume 27(4) Article 5, 613 <http://scholarship.law.nd.edu/ndlr > accessed 7 November 2016.
[219] Haranzo JJ *et al* (n 218) 613.

different ownership theories of oil and gas. Williams and Meyers, for instance, divide the various states into three categories, "ownership-in-place," "non-ownership" and "qualified ownership," but they are convinced that the latter two are now practically identical. Each of these categories is discussed in turn hereunder.

2.3.1 Absolute Ownership Theory

Absolute ownership or ownership-in-place posits that minerals such as oil and gas are fully owned in place before they are extracted and converted to possession. Title to oil and gas may be lost by legitimate drainage and by the rule of capture.[220] This theory states that the owner of a piece of land is considered also as the owner of the petroleum lying beneath the land. Land in this respect comprises everything down to the crust of the earth and up to the sky. The expression 'everything down to the crust of the earth and up to the sky' has been treated as a hyperbole because there is always the limit to which the landowner can utilize the space above his land. The landowner owns all substances, including oil and gas which are underneath his land. It is important to note that such ownership is qualified, in the case of oil and gas, by the operation of the rule of capture.[221] If the oil and gas are extracted from beneath the owned land, ownership in such substances is lost. This theory is adopted in the State of Texas in the United States of America.[222] It states that petroleum (oil and gas) is capable of being owned in fee simple, meaning that it is capable of absolute ownership.

It has been argued that an examination of what *rights* property owners hold in their property must precede any determination of what legal remedies are available to them.[223] The question therefore is whether trespass law provides landowners with a legal remedy against subsurface intrusion caused by hydraulic fracturing. This question inherently is linked to theories of property ownership. Property law defines and protects interests in physical property; control over surface acreage alone does

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220 US Legal definition Absolute Ownership (Oil and Gas) Law & Legal Definition <http://definitions.uslegal.com/a/absolute-ownership-oil-and-gas/> accessed 5 December 2016.

221 The rule of capture will be fully discussed in the subsequent paragraphs.

222 Smith EE "Oil and gas the Internet Legal Resource Guide ILRG Law School Course Outlines Archive Law Runner: A Legal Research Tool" <www.ilrg.com/terms> accessed 7 December 2016.

223 Slottje H "Cmty. Envtl. Def. Council, Remarks at the Cornell Law School" (2011) *Energy Conference: Gas Drilling, Sustainability & Energy Policy* <www.streams.lawschool.cornell.edu> accessed 28 December 2016.

not delimit ownership.[224] The concept of ownership is said not to consist only of the physical property itself, but of a complex bundle of legally enforceable rights, powers and privileges with respect to that physical property.[225] Thus, theories of property ownership provide a basis for determining landowners' rights and remedies against trespass.

Aladeitan has contended that this theory is absurd, especially when the ownership of airspace is considered as an absolute private possession, because, in fact, the notion of personal property does not go beyond the point where the owner of the superjacent land cannot make real or beneficial use of the airspace.[226] This is a conceptual flaw in the ownership in place theory. A point of departure from this view point is that, in the absence of any other reasonable method to resolve the issue of ownership of airspace or subsoil depth, the theory seems to be the most suitable starting point for nations around the world to exercise ownership rights over their airspace based on their geographical landmass and territorial waters and also resolve the challenges that arise globally.[227] To totally reject this theory of ownership would likely lead to submitting airspace rights and subsoil depth to the realm of common heritage of mankind and its attendant challenges.[228]

One of the leading cases for the ownership in place theory, as applied in Texas, is *Brown v. Humble Oil & Refining Co.*,[229] where the Court at stated:

> Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in connection with the law of capture. This rule gives the right to produce all of the oil and gas that will flow out of the well on one's land; and this is a property right. And it is limited only by the physical possibility of the adjoining landowner's diminishing the oil and gas under one's land by the exercise of the same right of capture.

2.3.2 Non-Ownership Theory

The non-ownership theory applies more to oil and gas than other resources, partly because oil and gas in the ground are considered migratory or "fugacious" in nature and, therefore, incapable of being owned until the resources are produced and

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[224] Lamarre CE "Owning the Centre of the Earth: Hydraulic Fracturing and Subsurface Trespass in the Marcellus Shale Region" *Cornell Journal of Law and Public Policy*, 21(457) 457-487 at 461.
[225] Walker AW Jr. "Nature of the Landowner's Interest in Oil and Gas" (1955–1956) 17 MONT. L. REV. 22, 22.
[226] Aladeitan L (n 63) 162.
[227] Aladeitan L (n 63) 162.
[228] Aladeitan L (n 63) 162.
[229] (1935) Tex. S.C., 83 S.W. (2d) 935, 940.

reduced to possession.[230] In the context of Oil and Gas law, non-ownership theory is a characterization of oil-and-gas rights used in a minority of jurisdictions. This theory holds that the owner of a severed mineral interest does not have a present right to possess the oil and gas in place, but he/she has the right only to search for, develop, and produce it. The interest of such an owner in a non-ownership-theory state is akin to a right to use the land and removal of items of value from it.

The fugacious nature of subsurface oil and gas presented the courts of the late 1800's with difficulties. For instance, for centuries, the legal maxim *cujus est solum, ejus est usque ad coelum et ad inferos,* that is, the owner of the surface owns everything from the skies to the centre of the earth had been applied to ownership disputes.[231] However, the advent of the commercial oil and gas industry in the 1850s led to significant changes to the doctrine. While the doctrine was easily applied to "hard" minerals, the transitory nature of oil and gas made application of the *ad coelum* doctrine impracticable.[232] States in the United States feared that the continued application of the *ad coelum* doctrine (a rule in law that the owner of land owns the air space above it indefinitely upward) would prevent or slow oil and gas development: Mineral owners would have been discouraged from drilling by the fear of liability for drainage from their neighbours' properties.[233] The court in addressing these concerns, adapted the *ad coelum* doctrine and applied the rule of capture by distinguishing oil and gas ownership from ownership of other solid minerals.[234] Due to the fugacious nature of oil and gas, a neighbour could drill a well on his side of the fence and drain away an owner's oil or gas. The pertinent question is how someone could be said to own oil or gas unless he or she could prevent his or her neighbour from interfering with what he owned. Another unresolved problem was how to measure the owner's loss. More so, it is impossible to trace the oil and gas produced

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230 Martin PH *et al* Oil and Gas Law (2012) 203.1. "Fugacious" as a word implies transience or non-permanence. When used from an oil and gas user's perspective, this non-permanence of the resource—or his ability to exploit it—has two connotations. One is that rivals may forestall his efforts, diverting or taking some of the resource and leaving less or nothing for him. The other is that the period of the resource's availability is naturally short, terminating when it flows or migrates away."

231 Freehold Petroleum and Natural Gas Owners Association, (n 237).

232 Lowe JS *Oil and Gas Law in a Nutshell* (4th ed. 2003), 9. "Oil and Gas are fugacious; they move from place to place within sedimentary rock. In addition, oil and gas are fungible; it is difficult to determine whether a given MCF [metric cubic foot] of gas or barrel of oil produced has been drawn from under one tract of land or another."

233 Lowe JS (n 254) 8-9.

234 Ragsdale TD "Hydraulic Fracturing: The Stealthy Subsurface Trespass" (1993) 28 *TULSA L.J* 311, 314–316.

from a well to determine where it came from in the subsurface with any degree of certainty. This problem was especially critical in the United States because section one of the 14th Amendment to the American Constitution specifically protects private property.[235]

In 1900, the United States Supreme Court in the case of *Ohio Oil Company v. Indiana*[236] resolved the problem by pronouncing what has come to be known as the 'non-ownership' or 'qualified ownership' theory of oil and gas law when the Supreme Court held as follows:

> Although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil, until these substances are actually reduced by him to possession, he has no title whatever to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession.[237]

One of the leading authorities for non-ownership[238] is the case of *Strother v. Mangham*[239] where the Supreme Court stated that:

> The doctrine that the owner of the land has no property right in the oil and gas beneath the surface until he has reduced it to possession in no manner denies to such owner the exclusive right to the use of the surface for the purposes of such reduction, or for any other purpose not prohibited by law, but, to the contrary, concedes that right, as inherent in the title to the land, and subject only to the control of the state, in the exercise of its police power; and the right may be sold, as may any other right, and may carry with it the right to the oil and gas that may be found and reduced to possession.

The principle that oil and gas cannot be owned absolutely until found and reduced to possession is recognized in all the oil and gas producing jurisdictions of the United States.[240] This principle was incorporated into Canadian oil and gas law by the 1953 decision of the Judicial Committee of the Privy Council in *Borys v. CPR and Imperial Oil Limited* where Lord Porter, for the Privy Council, stated:

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[235] Section 1 of the American Constitution (14th Amendment) says: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[236] U.S.S.C. (1900) 44 L. Ed. 729, par. 64

[237] *Ohio Oil Company v. Indiana* U.S.S.C. (1900) 44 L. Ed. 729, par. 64

[238] Summers Law of Oil and Gas (1938), section 62.

[239] (1915) 138 La 437.

[240] Aladeitan L (n 63) 163.

> The substances are fugacious and are not stable within the container although they cannot escape from it. If any of the three substances (petroleum, gas or water) is withdrawn from a portion of the property which does not belong to the appellant but lies within the same container and any oil or gas situated in his property thereby filters from it to the surrounding lands, admittedly he has no remedy. So, also, if any substance is withdrawn from his property, thereby causing any fugacious matter to enter his land, the surrounding owners have no remedy against him. The only safeguard is to be the first to get to work, in which case, those who make the recovery become owners of the material which they withdraw from any well which is situated on their property or from which they have authority to draw.[241]

The above principle of law culminated into what is referred to as the rule of capture or law of capture. The rule of capture is a common law principle from England,[242] adopted by a number of U.S. jurisdictions, that institutes a rule of non-liability and ownership of captured natural resources including groundwater, oil, gas, and game animals. The general rule is that the first person to "capture" such a resource owns that resource. For example, a landowner who removes or "captures" groundwater, oil, or gas from a well within the subsurface of his land obtains absolute ownership of the substance, even if it is sapped from the subsurface of another person's land.[243] The landowner that takes the substance owes no duty of care to other landowners.[244] For example, a water well owner may dry up wells owned by adjacent landowners without fear of liability. This rule of law is however qualified; it means the rule will not apply if the groundwater was withdrawn for malicious purposes; the groundwater was not put to a beneficial use without waste.[245] An outcome of this rule is that a person who drills for groundwater, oil, or gas may not extract the substance from a well that is under the subsurface estate of another by drilling on a slant.[246]

In the development of the non-ownership theory, the case of *Frost-Johnson Lumber Co. v Sailings Heirs*,[247] is significant where the court held:

> it is the settled jurisprudence of [Louisiana] that oil and gas in place are not subject to absolute ownership as specific things apart from the soil of which they form part; and a grant or reservation of such oil and gas carries only the right to extract such minerals from the soil.[248]

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[241] *Borys v. CPR and Imperial Oil Limited* J.C.P.C. (1953) 7 W.W.R. (NS) p. 550 -551.
[242] *Acton v. Blundell*, 12 Mees. & W. 324, 354, 152 Eng. Rep. 1223, 1235 (Ex. Ch. 1843).
[243] *Ohio Oil Co. v. Indiana,* (1900) 177 U.S. 190, 203.
[244] *Acton v. Blundell*, 12 Mees. & W. 324, 354, 152 Eng. Rep. 1223, 1235 (Ex. Ch. 1843).
[245] Aladeitan L (n 63) 165-166.
[246] Williams H and Meyers C *Oil and Gas Terms* (5th ed. 1981), 737; See also *Nunez v. Wainoco Oil & Gas Co.*, (La. 1986) 488 So. 2d 955, 958.
[247] (La. 1920) 91 So. 207, 243, 245.
[248] *Frost-Johnson Lumber Co. v Salling's Heirs,* (La. 1920) 91 So. 207, 243, 245.

The court held further that:

> that no matter what the intention of the parties be, the owner of lands cannot convey or reserve the ownership of the oils, gases, and waters therein apart from the land in which they lie . . . because the owner himself has no absolute property in such oils, gases, and waters, but only the right to draw them through the soil and thereby become the owner of them.[249]

It should be noted that when confronted with oil and gas cases, early common law jurists were somewhat reluctant to recognize a corporeal possessory interest in substances they considered to be fugacious or "wild and migratory," and therefore subject to loss by drainage.[250]

The rule of capture was further explained in the case of *Pierson v. Post*.[251] In that case, the Supreme Court of New York gave judgment over a disagreement over a dead fox that serves as an important cornerstone in Common Law legal education. The facts of the case were that Lodowick Post, a fox hunter, was chasing a fox through a vacant lot when Pierson came across the fox and, knowing it was being chased by another, killed the fox and took it away. Post sued Pierson on an action for trespass and for damages against his possession of the fox. Post argued that he had ownership of the fox as giving chase to an animal during hunting was sufficient to establish possession. The trial court found in favour of Post. On appeal, the issue put to the Supreme Court of Judicature of New York was whether one could obtain property rights to a wild animal (*Ferae naturae*), in this case the fox, by pursuit. In its majority opinion, the Court cited ancient precedent in deciding the case and held as follows:

> If we have recourse to the ancient writers upon general principles of law, the judgment below is obviously erroneous. Justinian's Institutes, and Fleta, adopt the principle, that pursuit alone vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be taken.

The principle established by the case was that pursuit alone was not enough to vest property or right in the person who was hunting the animal; accompanied with wounding, was equally not enough for that purpose, unless the animal was captured.

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[249] *Frost-Johnson's case* (supra), ibid n 38.
[250] *Hammonds v Central Kentucky Natural Gas Co.*, (Ky.1934) 75 S.W.2d 204.
[251] 3 Cai. R. 175, 2 Am. Dec. 264.

The court reasoned that given the common-law requirement to have control over one's possessions, merely giving chase of the fox was not sufficient. Something more was needed; otherwise law would create a slippery slope. It was argued by the court that if the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared the animal, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile course of disagreement and litigation. The majority opinion found that though it might have been rude for Pierson to have killed the fox; there was no reason to object as only the person to mortally wound or seize the animal could acquire possession of it.

The dissenting opinion was expressed by Henry Brockholst Livingston of the Supreme Court. He was not satisfied by the authorities used. He argued that the pursuit should be considered sufficient, as it serves a useful purpose of encouraging hunters to rid the countryside of that 'wild and noxious beast' known as the fox. He further acknowledged that possession could be seen in relative terms where the continued chase might merely be a formality of the pre-existing control already exerted by the hunter.[252] The case became the *locus classicus* often cited because it established, for the first time, by the court of last resort in the USA, that to give an individual right in wild animals, the claimant must capture them. This case was often cited to describe the principle of law in the rule of capture of oil and gas.

This analogy has been said to be untrue and has been discredited in North America where it was first propounded as there is no similarity between wild animals and petroleum.[253] There is not much support for this theory as modern practice show that petroleum though may move from one place to the other is still subject to ownership by the person or authority that captures it at any point in time.[254]

The rule of capture creates an opportunity and encourages an owner to drill as many wells as possible on his piece of land to obtain the groundwater, oil, or gas before his

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[252] Establishing the Distinction between Meus and Tuus Section 1. Occupancy, the Source of "Property"? A. The Capture of Wild Animals 4-5. *Pierson v Post Supreme Court of New York* 3 Caines 175 (1805)

[253] Edu OK (n 69) 66.

[254] Edu OK (n 69) 66.

neighbour. One area of dispute involved in the earlier oil and gas cases was that which arose out of the drainage of oil and gas by the owner of a neighbouring land. In *Kelley v. Ohio Oil Co.*[255] the question whether the adjoining owner was entitled to damages or injunctive relief was presented for determination for the first time. In that case, the plaintiff alleged that his neighbour had drilled wells along two of the boundary lines of plaintiff's property, locating them only twenty-five feet from plaintiff's land and unnecessarily close together. It was also alleged that the defendant's act was in violation of the common practice in the industry, which was to drill no closer than two hundred feet from one's property line to avoid draining an undue amount of oil from adjacent lands. Plaintiff sought damages and an injunction to prevent future drainage by these operations.

The court held that plaintiff's only remedy was self-help and that the defendant could as well drill as many wells as he liked on his land.[256] Part of the reasoning of the court was that it was impossible to determine the extent to which the production represented drainage from neighbouring land. In Kelley's case, the court held further that:

> Whatever gets into the well belongs to the owner of the well no matter where it came from. In such cases the well and its contents belong to the owner or lessee of the land and no one can tell to a certainty from whence the oil, gas or water which enters the well came, and no legal right as to the same can be established or enforced by an adjoining landowner.[257]

The danger of this rule is that many drilling operations can result in dissipation of the pressure within an aquifer or oil and gas reservoir, and therefore over drafting of the aquifer or incomplete extraction of the substance.[258] The impact of the rule of capture has been lessened by conservation statutes and regulations adopted under them. The "drill as-you-please" privilege has been restricted, as has the remedy of self-help in drilling offset wells, to protect against drainage.[259] However, it is still applicable to protect against liability when there is no violation of conservation laws,

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[255] (1897) 57 Ohio St. 317, 49 N.E. 399.

[256] Woodward MK "Ownership of Interests in Oil and Gas" (1965) 26(3) *Ohio State Law Journal* 355 <http://hdl.handle.net/1811/6877> accessed 5 December 2016.

[257] *Kelly*'s case (supra), (n 282) 327.

[258] *In re W. Land Servs., Inc. v. Dep't of Envtl. Conservation*, 26 A.D.3d 15, at 17 (N.Y. App. Div. 3d Dep't 2005).

[259] Low CA "The Rule of Capture: Its Current Status and Some Issues to Consider" (2009) 46:3 Alberta Law Review, 800 <*www.albertalawreview.com/index.php/ALR/article/view/226*> accessed 5 December 2016.

and it, therefore, remains as a rule of fundamental importance.[260] The court has evolved the correlative rights doctrine which limits the liability shield created by the rule of capture and addresses concerns of fairness and waste.[261] It has also been argued that the correlative rights doctrine and statutory limitations to the rule of capture may protect those with a property interest in the common gas or oil source.[262]

The common-law rule of capture holds that "(t)he first person to reduce subsurface oil or gas to physical possession (becomes) the owner of (the) same regardless of whether the product was in fact extracted from beneath the surface of that person's property."[263] However, the rule of capture presupposes that oil and gas wander within reservoirs and between land boundaries.[264] The Texas Supreme Court described the rule of capture in *Elliff v. Texon Drilling Co.* as follows:[265]

> (C)ourts generally have come to recognize that oil and gas, as commonly found in underground reservoirs, are securely entrapped in a static condition in the original pool, and, ordinarily, so remain until disturbed by penetrations from the surface. It is further established, nevertheless, that these minerals will migrate across property lines towards any low pressure area created by production from the common pool. This migratory character of oil and gas has given rise to the so-called rule or law of capture. That rule simply is that the owner of a tract of land acquires title to the oil or gas which he produces from wells on his land, though part of the oil or gas may have migrated from adjoining lands. He may thus appropriate the oil and gas that have flowed from adjacent lands without the consent of the owner of those lands, and without incurring liability to him for drainage.[266]

To alleviate this danger, many states in the United States of America have sought to replace the rule of capture with conservation Acts.[267] Such Acts enforce pro-rationing, pooling, and limiting on density of drilling to avoid physical waste and ensure maximum eventual recovery. In the case of actions or remedies based on theories of ownership, States that adopted the ownership in place theory employed actions in adverse possession and trespass to property.

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[260] Shank "Present Status of the Law of Capture" (1955) *Sixth Annual Institute on Oil and Gas Law and Taxation, South western Legal Foundation*, 257.

[261] Lowe JS (n 254) 462.

[262] Williams HR and Meyers CJ "Oil and Gas Law" (2010) § 203, at 60.8–60.11.

[263] *W. Land Servs.*, 26 A.D.3d at 16-17.

[264] *ANR Pipeline Co. v. 60 Acres of Land*, (W.D. Mich. 2006) 418 F. Supp. 2d 933, 939. The assumption that gas migrates between property lines is inherent in the rule of capture. However, in the case of the Marcellus Shale, gas does not migrate prior to the physical trespass. Rather it is the trespass itself which releases the gas from the tight shale pores that enables the gas to migrate.

[265] 210 S.W.2d 558, 561–62 (Tex. 1948).

[266] *Elliff v. Texon Drilling Co.*, (Tex. 1948) 210 S.W.2d 558, 561–62.

[267] Arkansas Code Annotated s 15-72-101 et seq.

The different types of theories of ownership and control of oil and gas discussed above have considerably influenced and formed the basis of the legal system and concept of property rights adopted by different countries across the world in the regulation, use, management, transfer and alienation of their mineral resources. For instance, while some countries have adopted sole ownership theory as the logical basis of their concept of property rights, others have accepted a mixture of the theories.[268] Whether the theory adopted is ownership in place (ownership *in situ*), non-ownership or qualified ownership, ownership of oil and gas is further classified as "Private Ownership" or "State Ownership" and, in some instances, a combination of both "Private and State Ownership." These typologies are discussed hereunder.

2.3.3 Public-Private Ownership of Oil and Gas resources

Private ownership essentially implies that the landowner on whose land the oil is found automatically owns the oil and gas found in it.[269] The ownership structure is said to be entirely private, when individuals are the owners of minerals found in their land. In jurisdictions where private ownership as a concept of property right is recognized, an individual can either raise the capital to exploit the oil or sell his rights to another individual or company with the necessary capital and expertise.[270] It is important to note that the owner of such land can drill wells on his land to recover oil and gas on it, subject, however, to regulatory framework governing the exploration and exploitation of the resources in the industry, for example environmental pollution, health and safety of people, etc. Apart from the restrictions imposed by regulation, the right of a landowner to explore and produce minerals from his land is unrestricted.[271]

Furthermore, under private ownership, the landowner may grant a mineral interest, royalties or leasehold interest.[272] It is therefore possible, through the appropriate contractual agreement, for a landowner to grant to one person the right to drill a well for oil and to another, other interests over the land, e.g. farming, construction, etc.[273]

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[268] Aladeitan L (n 63) 167.
[269] Martin PH and Kramer BM Williams & Meyers *Oil and Gas law* § 202 (2012), cited in Aladeitan L (n 63) 167.
[270] Williams and Meyers *Oil and Gas Law* (abr. 3rd ed. 2007) 1.
[271] Williams and Meyers (n 270) 1.
[272] Williams and Meyers (n 270) 2.
[273] Williams and Meyers (n 270) 2.

For example, the United States recognizes private ownership of oil and gas side by side the state's and Federal Government ownership.

2.3.3.1 The United States Example

In the American legal system, ownership of land brings with it ownership of all substances under the surface. This regime is based on the Latin maxim *cujus est solum, ejus est usque ad coleum et ad inferos.* This was discussed earlier in this chapter under non-ownership theory. The word 'land' in this instance includes not only the face of the earth, but everything under it, or over it. Based on this premise therefore private ownership of oil, gas, and other minerals has long been recognized in the American legal tradition.[274] The United States being a federal system recognizes and allocates power to both the Federal Government and the States. State laws are applicable to onshore oil and gas while the federal law applies to the offshore oil and gas resources.

2.3.3.2 Canadian Example

In Canada, a right of ownership carries along with it the right to develop or to preserve the resources.[275] The basic rule is that the ownership of land carries with it the right to extract non-renewable resources such as coal, minerals and petroleum.[276] The emphasis here shall however be on petroleum resources. The State owns petroleum resources in Canada, although there are some instances of private ownership. For example, in respect of some lands in Ontario, Manitoba, Saskatchewan, Alberta and British Columbia, ownership of petroleum rights lies with private landowners (known as "freehold" lands).[277] Ownership of petroleum resources as stated above belong to the state but it is shared between the Canadian National government (otherwise called the Crown or the Federal Government) and the provincial governments.[278] For instance, the provincial governments in Western

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[274] Duruigbo E "The Global Energy Challenge and Nigeria's Emergence as a Major Gas Power: Promise, Peril or Paradox of Plenty?" (2009) 21 *GEO. INT'L ENVTL. L. REV.* 395, 440 Citing Wieland P "Going beyond panaceas: Escaping mining conflicts in resource-rich countries through middle-ground policies" 20 *N.y.u. Environmental law journal* volume 209.

[275] Historical Canada "Resource Rights" <www.thecanadianencyclopedia.ca/en/article/resource-rights/> accessed 23 June 2017.

[276] Historical Canada "Resource Rights" (n 275).

[277] Torys LLP, Deyholos R and Cuschieri D "Canada – Oil and Gas: A comparative Guide to the Regulation of Oil and Gas Projects" (2013) *European lawyer reference* series 1. <www.torys.com/insights/publications> accessed 23 June 2017.

[278] Torys LLP (n 277) 1.

Canada are owners of petroleum resources, the British Columbia, Prince Edward Island (PEI) and other provinces are also the owners of petroleum resources in their territories[279] whereas in northern Canada and in the offshore regions outside the provinces, the federal government enjoys such ownership.[280]

2.3.3.3 Australian Example

Australia operates a federal system of government of six states and two self-governing territories. Australia was a former colony of Great Britain and thus has a common law system, based on the English system meaning that much of Australian law is taken from case law and precedent.[281] Similar to petroleum industries in other market-capitalist economies such as those in Western Europe and North America, the structure of the Australian petroleum industry is characterised by the involvement of private corporations, with an important regulatory role occupied by the federal and state governments in most aspects of the industry.[282] The power to make laws with respect to mining is determined by reference to the Constitution of Australia. The Constitution sets out all the matters that form the Federal government's exclusive jurisdiction and all other matters are taken to be part of the jurisdiction of the state legislatures.[283]

The Government of Australia's involvement in the industry covers areas such as policy development, safety and environmental regulation, investment facilitation, provision of infrastructure, releases of new exploration areas, and acquisition of regional geological data.[284] The legal framework within which petroleum exploration and development occurs is a result of the division of responsibilities between the Commonwealth and the states/territories under the Constitution and inter-governmental agreements (in particular, the 1978-79 Offshore Constitutional

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279 Torys LLP (n 277) 1.
280 Torys LLP (n 277) 1.
281 Brennan K *et al.* "Mining law in Australia, Practical law" *A Thomson Reuters Legal Solution* <http://uk.practicallaw.com/> accessed 7 December 2016.
282 Australia Energy Statistics and Analysis. *U.S. Energy Information Administration. (2007)* <https://en.wikipedia.org/wiki/Petroleum_industry_in_Western_Australia> *accessed 7 November 2016.*
283 Section 51 of the Commonwealth of Australian Constitution Act, 2003.
284 Brennan K *et al.* (n 281).

Settlement).[285] Each state and territory has its own legislation, which regulates the exploration for and extraction of minerals.[286] In states where mining is particularly important, principally Western Australia and Queensland, there is often a regular review of the legislation to ensure it is up-to-date with industry needs and new technology. It is important to note however that in case a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.[287]

Most other legal systems around the world grant title to minerals to the crown or government, for example Nigeria, Angola, South Africa, Saudi Arabia, Kuwait, Brazil, Russia etc. In today's public ownership system, natural resources are considered distinct from land tenure and vest immediately in the government, while landowners only have a right to compensation for the potential takings of surface lands.[288] Mining activities can be undertaken either by the government itself through state-owned companies or, more likely these days, be awarded to private companies under licenses, concessions, or other arrangements with proprietary characteristics.[289] The public ownership has found justification in the need to discharge government obligations, and the prevention of wasteful exploitation.[290]

The public ownership system sets the stage for two potential conflicts. First, given that open-pit mining is usually incompatible with other land uses on the surface, this regime creates a conflict between the holder of a mining lease granted by the government and the owner of the surface lands.[291] The other extreme is state ownership, which is a situation where the state appropriates all minerals to itself, leaving the owners of the land only the right to compensation for the loss of surface rights in their land. This is a situation whereby the state vests ownership of petroleum resources in the state in terms of statutes. The ownership of natural

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285 "2007 Oil and Gas Review" *(PDF). Department of Mines and Petroleum (2008)* <https://en.wikipedia.org/wiki/Petroleum_industry_in_Western_Australia> *accessed 7 December 2016.*

286 Sections 59-74, Part 1.4, Offshore Petroleum Act, 2006.

287 Section 109 of Commonwealth of Australia Constitution Act, 2003.

288 Omorogbe Y and Oniemola P "Property Rights in Oil and Gas under Domanial Regimes" in *Property and the Law in Energy and Natural Resources* 115, 118 (Aileen McHarg et al. eds., 2010); Duruigbo E (n 301) 395, 440.

289 McHarg A *et al*, "Property and the Law in Energy and Natural Resources" *in Property and the law in energy and natural resources* (Oxford University Press 2010) 3.

290 Duruigbo E (n 274), 440.

291 Wieland P "Going beyond panaceas: Escaping mining conflicts in resource-rich countries through middle-ground policies" 20 *N.y.u. Environmental law journals* 209.

resources by the state is popular among the African states for example, Nigeria, Angola, Equatorial Guinea, Ghana and Algeria.[292]

2.3.3.4 Angolan Example

The Angolan Constitution provides a good example of state ownership of oil and gas resources, Article 16, for instance, provides that: "The solid, liquid and gaseous natural resources existing in the soil and subsoil, in territorial waters, in the exclusive economic zone and in the continental shelf under the jurisdiction of Angola shall be the property of the state..."[293] The principal law that gave effect to the Angolan Constitution was the Amended Petroleum Activities Act of 2004. It established a National Oil Company named *Sonangol*. The National Oil Company has the mandate to exercise its powers to secure, from the oil industry, maximum benefits for the state.

Sonangol is comparable to the Nigerian National Petroleum Corporation (NNPC). It earns for the government more than 90 per cent of its revenue. It performs both the roles of regulator, as concessionaire, and commercial entity as an oil company. It is therefore a player and referee at the same time and this gives rise to a conflict of interests. The conflicting roles of *Sonangol* as both the regulator and as a player in the oil industry, has been identified by Lwanda as one of the shortcomings of *Sonangol*.[294] However, unlike the Nigerian oil resources which are mainly onshore resulting in ethno-social conflicts (for example in the Niger-Delta), oil deposits in Angola are mostly offshore thus minimising the possibility of ethno-social or Community-International Oil Companies conflicts.[295]

2.3.3.5 Nigerian Example

Nigeria provides a classical example of state ownership of oil and gas. In Nigeria Section 44(3) of the 1999 Constitution states that the:

> entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive

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[292] Bribena EK (n 34) 101.

[293] Article 16 of the Angolan Constitution, 2010.

[294] Lwanda GC "Oiling Economic Growth and Development: Sonangol and the Governance of Oil Revenues in Angola" Working Paper (Series No.21) of the *Development Bank of Southern Africa* 14.

[295] Alexander K and Gilbert S "Oil and Governance Report: A Case Study of Chad, Angola, Gabon, and São Tomé É Principe" 11 <www.ethicsworld.org> accessed 8 January 2017.

> Economic Zone of Nigeria shall rest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

The same provision is in the Petroleum Act to the effect that the entire ownership and control of all petroleum in, under or upon any lands including and covered by water which is: (a) is in Nigeria or (b) is under the territorial waters of Nigeria, (c) forms part of the continental shelf; or (d) forms part of the Exclusive Economic Zone of Nigeria vests in the state. A similar provision is made in the Exclusive Economic Zone Act that:

> Sovereignty and exclusive rights with respect to the exploration and exploitation of the natural resources of the seabed, subsoil and super adjacent waters of the Exclusive Economic Zone shall vest in the Federal Republic of Nigeria and such rights shall be exercised by the Federal Government...

2.4 Ownership of mineral resources under Nigerian Customary Law

2.4.1 Pre-independence

Before the coming of the Europeans to present-day Nigeria, the ethnic groups constituted themselves into sovereign entities known as emirates, kingdoms and empires and each of these groups was independent of the other.[296] In these indigenous societies, customary ownership of land was based on the principles of communal land ownership. Land and its natural resources were not individually owned but were owned communally.[297] Although natural resources were owned by the community, the traditional authorities like the native Chiefs, Obas, Emirs and Obis of the various communities in Nigeria were the custodians of these resources on behalf of the community. No individual could therefore exploit natural resources without obtaining permission from the traditional authorities who must only grant such permission after consulting and obtaining consent from the community.[298] Therefore the system of private or individual ownership of land in general and mineral resources is, thus, not known in this legal system.

Whenever the community members or families need a portion of the land to farm or live on, they went to the head of the community to request for a portion of the land and it was not unusual for the community head to make allotments to the individuals

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[296] Ojuokaiye OE (n 212) 120.

[297] Pienaar G "The Inclusivity of Communal Land Tenure: A Redefinition of Ownership in Canada and South Africa?" (2008) 12(1) *Electronic Journal of Comparative Law (EJCL)* 1 at 9 <http://www.ejcl.org> accessed 28 November 2016.

[298] *Richtersveld Community v. Alexkor Ltd* (2003) 6 SA 104 (SCA) para 18.

or families for farming or living purposes. However, consequent upon the British colonial administration in the country, the treaty of cession of Lagos of 1861[299] and other various treaties signed with the native Chiefs, Obas, Emirs and Obis of the various communities in Nigeria are frequently cited as basis of British Crown ownership of land in Nigeria, though they signed without understanding the content of the documents. Article I of the Treaty of Cession of Lagos is reproduced hereunder:

> In order that the Queen of England may be the better enabled to assist, defend, and protect the inhabitants of Lagos, and to put an end to the Slave Trade in this and the neighbouring counties, and to prevent the destructive wars so frequently undertaken by Dahomey and others for the capture of the slaves, I, Docemo, do, with the consent and advice of my Council, give, transfer, and by these presents grant and confirm unto the Queen of Great Britain, her heirs, and successors forever, the port and Island of Lagos with all the rights, profits, territories, and appurtenances whatsoever thereunto belonging, and as well the profits and revenue as the direct, full, and absolute dominion and sovereignty of the said port, island, and premises, with all royalties thereof, freely, fully and entirely and absolutely. I do also covenant and grant that the quiet and peaceable possession thereof shall with all possible speed, be freely and effectually delivered to the Queen of Great Britain, or such person as Her Majesty shall thereunto appoint for her use in the performance of this grant; the inhabitants of said island and territories, as the Queen's subjects, and under her sovereignty, Crown, jurisdiction, and government, being still suffered to live there.[300]

This claim notwithstanding, the ownership of land under the customary law was still given recognition. In the case of *Attorney General of Southern Nigeria v John Holt*,[301] the Privy Council, per Lord Shaw while delivering judgment held that property or ownership in the land of the colony was not excluded from the grant in the Treaty of Cession but that the ownership by the colonial government was subject to the condition that all property existing in the inhabitants under the grant or otherwise from King Dosumu and his predecessors were to be respected.[302] It was argued that in cases of land disputes among the indigenous people of Nigeria, such disputes should be settled according to the principles of customary law. The decision of the Privy Council in *Oyekan* v *Adele*,[303] is apposite here.[304] It was held in that case that a dispute between indigenous people as to the right to occupy a piece of land had to

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[299] The Treaty of Cession, 6 August 1861 or the Lagos Treaty of Cession was a treaty between Great Britain (represented by Norman B. Bedingfield, Commander of HMS Prometheus and William McCoskry, Acting Consul to Lagos) and Oba Dosunmu of Lagos (spelled 'Docemo' in British documents) representing Lagos <www.nairaland.com> accessed 30 April 2017.

[300] Article I of the Treaty of Cession of Lagos <www.revolvy.com> accessed 30 April 2017.

[301] (1910) 2 NLR 1.

[302] Ojuokaiye OE (n 212) 119.

[303] (1957) 2 All ER 785 (PC) at 788G-H.

[304] Mailula DT (n 127), 43.

be determined in accordance with indigenous law "without importing English conceptions of property law."[305]

However, because of the recognition by courts of customary rights to land, various problems arose as to the actual ownership of the lands mostly taken over by the British colonial administration, the colonial masters of Nigeria. The effect of the annexation of the lands within the country at that time is what the reality is today. There have been several legal tussles on the issue of customary ownership of land especially in respect of customary land and government acquisition in Nigeria. The legal status of land held under customary law but acquired by the colonial government came up for determination in the case of *Amodu Tijani* v *Secretary, Southern Nigeria*.[306] In this case, the court, per Viscount Haldane, L.C held that there was a cession to the British crown, along with the sovereignty of the radical or ultimate title to the land in the new colony, but that the rights of the indigenous owners were to be protected.[307]

2.4.2 Post-independence

The land tenure system in Nigeria was in a confused state at the time of independence in 1960. There were essentially four systems: tenure under the received English law,[308] tenure under the State Land Laws,[309] tenure under the Land Tenure Law,[310] and the indigenous tenure under customary law.[311] By virtue of 'the Received English Law' certain interests in land were created nationwide and at independence such interests in land were governed by the provisions of the various

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[305] Pienaar G "The methodology used to interpret customary land tenure" (2012) 15(3) *Potchefstroom Electronic Law Journal* 176.

[306] (1921) 3 NLR 21.

[307] Ojuokaiye OE (n 212), 120.

[308] The introduction of English law into Nigeria dates to 1863 when Ordinance No. 3 of that year received English law into the Colony of Lagos. Obilade AO *The Nigerian Legal System* (Sweet and Maxwell, London 1979) 18.

[309] State Lands Act, ch. 45 (Nig. 1958), and the State Land Laws of each state of the federation for example Western States, ch. 29, Eastern States, ch. 122. These statutes are mentioned in Tobi *Nigerian Land Law* (Ahmadu Bello Univ. Press Ltd. 1987).

[310] Laws of Northern Region of Nigeria, ch. 59, cited in The Laws of Northern Nigeria (1963) [hereinafter Land Tenure Law of 1963].

[311] Oshio PE "The Indigenous Land Tenure and Nationalization of Land in Nigeria" 10(1) *Boston College Third World Law Journal* 44 http://lawdigitalcommons.bc.edu/twlj accessed 30 April 2017. See also Udoekanem NB "Land Ownership in Nigeria: Historical Development, Current Issues and Future Expectations" (2014) 4(21) *Journal of Environment and Earth Science* 183 <www.iiste.org> accessed 1 April 2017.

State Land Laws.[312] Section 2 of the State Lands Act defined state land as all public lands in Nigeria which are, for the time being, vested in the President on behalf of or for the benefit of the nation and government.[313] Equivalent definitions were contained in the state lands legislation of the various states of the federation.[314]

The customary land tenure in southern Nigeria was firmly rooted and regulated in the traditional concept of land ownership as discussed in the preceding paragraphs above. However, the land tenure in northern Nigeria followed the Lands and Native Rights Ordinance of 1916 which was substantially re-enacted in the Land Tenure Law of 1962.[315] This law declared certain lands in northern Nigeria as "native lands" and vested the management and control of these lands in the Minister (later Commissioner) for Lands and Survey to administer such lands for the use and common benefit of the natives. Section 6 of the 1962 Law empowered the minister to grant rights of occupancy to natives.[316] This was the state of land tenure system in Nigeria as of 1977, when the then Military Government set up the Land Use Panel to study the land tenure situation with these terms of reference:

i. to undertake an in-depth study of the various land tenure, land use and conservation practices in the country and recommend steps to be taken to streamline them;
ii. to study and analyse the implications of a uniform land policy for the country;
iii. to examine the feasibility of a uniform land policy for the entire country, make recommendations and propose guidelines for their implementation; and
iv. to examine steps necessary for controlling future land use; and opening and developing new lands for the needs of the government and Nigeria's growing population in both urban and rural areas and make appropriate recommendations.[317]

The Federal Military government based on the report of the Panel promulgated the Land Use Decree of 1978.[318] This Decree introduced a uniform land tenure system in Nigeria. This Decree was however, heavily criticized and there have been conflicting judicial interpretations of its provisions. The criticisms and judicial interpretations are not the focus of the thesis.

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312 Oshio PE (n 311) 45.
313 State Lands Act (n 337).
314 State Lands Act (n 337).
315 Oshio PE (n 311) 45.
316 Land Tenure Law of 1962.
317 Oshio PE (n 311) 51. See also the Report of The Land Use Panel in 1977.
318 Now Land Use Act, Cap. 202 Volume 11 Laws of the Federation, 1990.

2.5 Ownership of mineral resources under Islamic Law

Ownership of property under Islamic Law in general is governed by the *Qur'an*. The state is vested with ownership of mineral resources: "all God's bestowed wealth . . . [as] the property of the state as defined by law."[319] Some *ayat*[320] from the *Qur'an* reflect the above contention. For example, *Allah* said that:

> All that is in the heavens and on the earth, belong to Allah.[321] To him belongs whatever is in the heavens and on earth.[322] His is the Kingdom of the heavens and the earth and all that lies between them.[323]

The basic principle envisaged in Islam relating to land ownership and its mineral resources is the concept that land vests solely in Allah and that is, land, as a free and common gift from Allah, must be utilized to the fullest.[324] The implication of the above *Qur'anic* verses is that man is trustee of the land and its resources and he is therefore answerable to Allah in the way he discharges his duties in relation to the resources.[325] The benefits derived from the use of mineral resources as an owner are therefore burdened with duties, liabilities and disabilities.[326]

Islam also recognizes the right to private ownership of mineral resources. Although the *Qur'an* allows for private ownership of property, this is subject to the rights of others and overriding consideration of public interest. The State therefore reserves the right to take it from him should the need arise or if it is for the benefit of the society.[327] This can only be done with the consent of the owner and adequate

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[319] Basic Law of Governance (No. A/90) Art. 14 (Saudi Arabia). Citing Wallace AG "Natural Resource Ownership and Use Rights Under Civil, Islamic, and Customary Legal Systems" (2016) *William and Mary Law School* 13 <https://law.wm.edu/academics/intellectuallife/researchcenters/postconflictjustice> accessed 4 December 2016.

[320] It means a verse of the *Qur'an*.

[321] Surah An-Nisa (4):126 & 134.

[322] Surah An-Nahl (16): 52.

[323] Surah al-Zukhruf (43): 85; Surah Al-Maidah (5): 120. Surah Al-Maidah stated again that: "For to Allah belongs the dominion of the heavens and the earth and what is between them. He creates what He pleases." (Surah Al-Maidah (5): 18 and 40). In Surah Al-A'raf it is stated to the effect: "The earth belongs to Allah, He gives to His servants as He pleases and the end is (best) for the righteous." (Surah Al-A'raf (7): Part of ayat 128). Op cit Cited in Siti Mariam Malinumbay S. Salasal (1998) 'The Concept of Land Ownership: Islamic Perspective' *Bulletin Geoinformasi, Jld. 2 No.2, ms.* 286.

[324] Salasal SM "The Concept of Land Ownership: Islamic Perspective" (1998) 2(2) *Bulletin Geoinformasi, Jld. ms.* 286 <http://eprints.utm.my/4950/1/concept.pdf> accessed on 4 November 2016.

[325] Ajijola AD *the Islamic Concept of Social Justice* (Islamic Publications Ltd., Lahore 1977) 60.

[326] Salasal SM (n 324).

[327] Salasal SM (n 324).

compensation must be paid.[328] Under the *Shari'ah* law, every individual is entitled to the ownership, possession, enjoyment and transfer of property, a right which must be respected and safeguarded by the citizens of the State.[329]

On the ownership of mineral resources under Islamic law, there is consensus among the Muslim jurists in considering land as *al-Aqar* that is immovable property.[330] However, there is controversy on whether the term *al-Aqar* applies only to the surface of the earth or it proceeds to include all the super-jacent and sub-jacent things such as minerals, buildings and trees.[331] There are two opinions; one says that mineral resources super-jacent and sub-jacent of the land should be treated separately while the other group though in the minority opined that the attachment of land is part of the land.[332]

Ownership of mineral resources under Shari'ah law is based on and is covered by the Islamic law of contracts.[333] The Arabic word *Aqd* in Islam literally means 'tie' or 'bond' which can be taken to mean contract.[334] In the early times of the development of Islamic jurisprudence, four schools emerged namely: the *Hanafi*; the *Maliki*; the *Shafie*; and the *Hanbali*.[335] These schools of thought were developed by groups of Islamic legal scholars. Each had its own method of interpreting the *Qu'ran* and the test to be applied to verify the authenticity of the sayings of the prophet.[336] However, principles of ownership of minerals are not the same among the different schools of thought under Islamic law.[337]

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[328] Hussain SS "Human Rights in Islam: Principles and Precedents" (1983) III (2) *Islamic Comparative Law Quarterly* 105.

[329] Kamali MH "The Limits of Power in an Islamic State" (1989) 28 *Islamic Studies Quarterly Journal*, Islamic Research Institute, IIU-Pakistan 344.

[330] Kamali MH (n 329) 344.

[331] Mohammed GB *Ownership and control of mineral resources under the Shariah and Nigerian statute: a comparative analysis* (LLB-long essay University of Ilorin, 2011) 28.

[332] Mohammed GB (n 331) 28-29.

[333] Al-Jumah KM "Arab State Contract Disputes: Lessons from the Past" (2002) 17(3) *Arab Law Quarterly* 234-238 at 215.

[334] Mailula DT (n 120) 41.

[335] Mailula DT (n 120) 41.

[336] Mailula DT (n 120) 41.

[337] In *Saudi Arabi v Arabian American Oil Co*, the *Aramco* case 27 I.L.R., (1963), p. 116, as quoted by Al- Jumah n 148 *supra* at 233, the arbitration court stated that "the regime of mining concessions, and consequently, also of oil concessions, has remained embryonic in Muslim Law and is not the same in different schools. The principle of one school cannot be introduced into another, unless it is done by an act of authority".

Under the *Hanafi* school of thought,[338] ownership of minerals follows ownership of land.[339] In the *Shafie* school of thought,[340] hidden minerals follow land ownership while unhidden minerals are not owned.[341] Under the *Shafie* school of thought, where a 'mine' is part of the state's domain, the sovereign has *Iqta*, the right of discretion to grant an exclusive concession subject to payment of a Royalty. Although the discretion of the sovereign to grant exclusive concession originally applied to agricultural grants, it is currently applicable to mineral grants. Furthermore, valid agricultural analogies exist for concessions, and Production Sharing Contracts (PSCs).

Under the *Maliki* school of thought,[342] on the other hand, all natural resources are state owned.[343] According to the *Hanbali* school of thought, on the other hand, unhidden minerals, whether in private or state-owned lands, cannot be owned privately.[344] The reason adduced for this argument is due to the fact that private ownership might create hardship for society and that unhidden minerals are not part of the land. In the case of hidden minerals in a dead land, merely digging them out cannot confer exclusive ownership. The investor should first dig out the minerals and should make it compliant to the requirements of society or the state should grant concession to work on the minerals.

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[338] The *Hanafi* school of thought is the most widely accepted school of thought among the Muslims today and is still adopted in many Arab and Muslim States, such as Egypt, Syria, Lebanon, Pakistan and Afghanistan. *Hanafi* is named after Abu Hanifa an-Nu'man ibn Thābit (699 - 767CE /89 - 157AH) who possessed an outstanding potential of reason. See in this regard, Al-Jumah n 103 at 234.

[339] Al-Jumah (n 333) 235.

[340] The *Shāfie* school of fiqh, or religious law, within Sunni Islam is named after Imām ash-Shāfi'ī. This school of thought stipulates authority to four sources of jurisprudence, also known as the Usul al-fiqh. In hierarchical order the *usul al-fiqh* consists of: the *Quran*, the Sunnah of Prophet Muhammad, ijma' 'consensus', and qiyas 'analogy'.

[341] Al-Jumah (n 333) 235.

[342] The *Mālikī* is the third-largest of the four schools, followed by approximately 15 per cent of Muslims, mostly in North Africa, West Africa, United Arab Emirates, and some parts of Saudi Arabia.

[343] Al-Jumah (n 333) 235.

[344] Al-Jumah (n 333) 236.

2.6 Ownership and regulatory structures of Oil and Gas resources under International Law

2.6.1 United Nations Principle of Permanent Sovereignty over Natural Resources

The principle of permanent sovereignty over natural resources (PSNR) was developed by the United Nations and the reason behind this principle is to secure the sustainable exploitation of mineral resources for the benefit of all citizens from generation to generation.[345] PSNR is based on two related international law concepts,[346] namely the principle of state sovereignty and a state's right to self-determination.[347] What then is sovereignty? Sovereignty (in reference to a state) means the supremacy of the will of the state as expressed by its laws over all the individuals and associations within its boundaries and independence against all foreign control and intervention.[348] When sovereignty is defined in terms of state control of natural resources, it means there is no internal or external control over the state concerning its natural resources. Although this idea of sovereignty is not obtainable in the modern-day world, it helps the third world or developing countries to gain control over their resources.

PSNR is pivotal to the survival of a modern state. In international law, a state exercises supreme authority, power or control over natural resources under its jurisdiction.[349] The essence of PSNR is to enable the state to have a comprehensive

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[345] Iweri O "What Effect does the Ownership of Resources by the Government have on its People: A case Study of Nigeria" <www.dundee.ac.uk/cepmlp/gateway/files.php?file=CAR-11_37.pdf 4> accessed 10 December 2016.

[346] For instance, on 19 December 2005, the International Court of Justice (ICJ) in the Case concerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Uganda*) declared that the principle of permanent sovereignty over natural resources is a "principle of customary international law" (§ 244). See Bastos FL "A Southern African Approach to the Permanent Sovereignty over Natural Resources and Common Resource Management Systems" <http://www.wiwi.unisiegen.de/rechtswissenschaften/oerecht/ tagungen/psnr> accessed 16 December 2016.

[347] Thomashausen A "Investment Policy and Protection Aspects of Natural Resources: (Foreign) Investment Strategies in Africa" Paper presented at International Conference on Permanent Sovereignty over Natural Re-sources –Development of a Public International Law Principle and its Limits', Siegen, Germany 29th to 30th of January 2013, <www.wiwi.unisiegen.de...wp2013-03-thomashausen.pdf> accessed 10 October 2016.

[348] Farooq U "what is Sovereignty, Definition, Features and Characteristics" (2013) <http://www.studylecturenotes.com/social-sciences/law/431-what-is-sovereignty-definition-features-a-characteristics> accessed 5 November 2016. See also Island of Palmas Arbitration.

[349] Schrijver N *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 2008) 3.

collection of rights and duties which entail its power to possess, use, freely dispose of, and most importantly, regulate its natural resources.[350]

There is no absolute PSNR; it is limited by several factors. These factors include generally accepted principles of international law, including international agreements, international environmental law and good neighbourliness among the comity of nations.[351]

For instance, the international law principle of *pactum sunt servanda,*[352] which is also embodied in international agreements, provides for sanctity of contracts. In other words, contracts entered freely and in good faith must be fulfilled.[353] It can also be limited by the rights of indigenous peoples residing within a state's territory.

The idea of PSNR became popular after the Second World War and was used as a tool to free African states from colonization and to assist states to regain control over their economic activities, including exploitation of natural resources, which were unjustifiably controlled by their colonial masters before independence. By 1952, the United Nations General Assembly passed a resolution referred to as (UNGAR) No. 626 (VII) of 21 December 1952 using the term 'permanent sovereignty over natural resources (PSNR).[354] The resolution was about the right to exploit freely natural wealth and resources. On 12 December 1958, the UN passed UNGAR 1314 (XIII) which established the Commission on PSNR. And by 1962 the UNGA passed UNGAR No. 1803 (XVII). The resolution however recognized the fact that investment agreements entered by states 'shall be observed in good faith'.[355] It further referred to already existing International law; however, the developing states believed the then international law position favoured developed countries and therefore pushed for a revision of the resolution.

In 1966, the General Assembly adopted UNGAR No. 2158 (XXI) by which the exploitation of natural resources in each country shall always be conducted in

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[350] Hofbauer JA *The Principle of Permanent Sovereignty over Natural Resources and its Modern Implications* (LLM-dissertation University of Iceland 2009) 63.
[351] Viellevile DE and Vasani BS "Sovereignty over Natural Resources versus Rights under Investment Contracts: which one prevails?" 2008 5(2) *Transnational Dispute Management (TDM)* 6.
[352] Viellevile DE and Vasani BS (n 374) 46.
[353] Mailula DT (n 120) 47.
[354] Mailula DT (n 120) 49.
[355] This is contained in paragraph 8 of the resolution.

accordance with its national laws and regulations.[356] This was followed up in 1974 when the UN, passed the UNGAR 3281 (XXIX), which provided for free and full exercise of sovereignty of states over economic activities including possession, use and disposition of their natural resources.[357]

2.7 State Contracts

In most of the countries of the world, oil and gas resources are vested absolutely in the state as a sovereign.[358] The principle of state sovereignty over natural resources was affirmed by the United Nations through its resolutions as indicated above.[359] It is important to note also that some federal systems like United States of America, Canada and Australia allow for ownership of mineral resources by the component units of the federation.[360] In addition, the United States system allows for individual ownership of oil and gas.

To control the use of their resources, states at different times apply various types of contracts in dealing with the oil companies. Governments have three options to develop their natural resources: They can create state companies for the exploration, development, and production, as in Saudi Arabia, Mexico, Venezuela, Iran, and Oman.[361] The states can invite private investors to develop the oil and gas resources, as in the United States, United Kingdom, Russia, and Canada. Or they can use a combination of these two systems, as in Indonesia, Nigeria, Azerbaijan, and Kazakhstan.[362] In most of these contracts, the Governments are parties to the contract and thereby place themselves in the awkward situation of having to regulate

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[356] The Resolution is available at <www.un.org/documents/ga/res/21/ares21.htm> accessed on 10 October 2016.

[357] See para 2 of the Resolution available at <www.un.org/documents/ga/res/29/ares29.htm> accessed 24 December 2016.

[358] Omorogbe Y (n 126) 58.

[359] The PSNR was first used by UN in 1952, It passed a resolution referred to as (UNGAR) No. 626 (VII) of 21 December 1952. On 12 December 1958, the UN passed UNGAR 1314 (XIII) which established the commission on PSNR. And by 1962 the UNGA passed UNGAR No. 1803 (XVII) recognizing the fact that investment agreements entered by states 'shall be observed in good faith'. However, in 1966, UNGAR No. 2158 (XXI), if the exploitation of natural resources in each country shall always be conducted in accordance with its national laws and regulations. And was followed up in 1974 when the UN in December 1974, passed the UNGAR 3281 (XXIX), which provided for free and full exercise of sovereignty of states to economic activities including possession, use and disposition of their natural resources.

[360] These component units could be former independent territories that joined the federation or may be a creation of the federation from the existing population.

[361] Radon J "The ABCs of Petroleum Contracts: License-Concession Agreements, Joint Ventures, and Production-sharing Agreements" *covering oil* 61.

[362] Radon J (n 361) 61.

themselves. Another major challenge faced by the Governments of resource-rich developing countries is negotiating with major oil companies, which have the advantage of employing well-skilled legal representatives.

2.7.1 Types of Contracts

These contracts can take the following forms: Concessions which include: traditional and modern concession; the joint venture (JV), the production sharing contract; service contracts which include: the risk service contract, the pure service and the technical assistance agreement.[363] These different types of contracts mentioned above are discussed in chapter three under section "3.9 Contractual arrangements".

2.9 Summary

This chapter outlined the general framework and laid a theoretical foundation for the subsequent chapters. It has been observed that the right approach to contract to prospect for oil for the host country is the one that it can manage and supervise and should be structured in such a way that the host country objectives are satisfied such that adequate financial benefits should accrue to the host country while at the same time the contracting company is assured of an acceptable level of profit. The next chapter is a discussion of the current legislative frameworks for oil and gas, the strong and weak points of the laws are identified with a view to improving on the laws for sustainable development of oil and gas resources in Nigeria.

[363] Omorogbe Y (n 126) 58.

CHAPTER THREE

THE LEGAL FRAMEWORK FOR OIL AND GAS IN NIGERIA

3.0 Introduction

The previous chapter was a general overview of the various ownership and regulatory structures of oil and gas resources globally. This chapter aims at exploring the legal framework for oil and gas in Nigeria, starting from the colonial era to date. It will discuss the shortcomings in the laws and enforcement mechanisms. The chapter, therefore, starts with a brief discussion of the development of the Niger Delta region and Nigerian oil wealth. The Niger Delta region of Nigeria is strategic to Nigeria's economic development because it produces the oil and gas resources which account for about 90 per cent of Nigerian exports and more than 80 per cent of government revenue.[364] This chapter will also examine the influence of international law on the legal framework for oil and gas in Nigeria. Nigeria adopted a federal system of government at independence in 1960; this chapter will also examine federalism in Nigeria and its implications for the distribution of revenue from oil and gas between the tiers of government.

This chapter discusses the modes of oil rights acquisition, licensing regimes like Oil Exploration Licence (OEL), Oil Prospecting Licence (OPL) and Oil Mining Licence (OML). It examines the different options open to developing the natural resources of a state. For example; the natural resources of a state can be developed through a state-owned company or enterprise which can be created for the exploration and exploitation of oil resources as in Saudi Arabia, Venezuela, Iran, Oman and Mexico; she can invite private investors to develop the natural resources, as in Canada, United States, Australia, United Kingdom and Russia and combinations of these two systems can be employed as in Nigeria, Azerbaijan, Kazakhstan and Indonesia. The chapter appraises the pros and cons of each system as applicable to Nigerian oil and gas industry. One of the policies close to the heart of Nigerian government is the development of Nigerian content in the petroleum sector of the economy; this chapter will examine the Nigeria content law and its implementation.

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[364] Onduku A (n 27).

3.1 The Niger Delta

The Niger Delta is the major oil and gas producing area of Nigeria, described as one of the world's largest wetlands, and is certainly the largest in Africa and third largest in the world.[365] It covers approximately 70,000 square kilometres and this makes the Niger Delta the largest delta in Africa.[366] Its development has been traced to the times of high rainfall, when the Atlantic Ocean exceeded its usual boundaries and encroached on land.[367] It withdrew in successive periods of persistent dryness, leaving deposits of sediments. The Delta came into existence through this process over time.[368] The region has some unique characteristics that tend to make economic development difficult.[369] The Niger Delta comprises distinct ecological zones which are typical of a large river delta in a tropical region; coastal ridge barriers, mangroves and fresh water swamp forests.[370]

The name 'Niger Delta' is identical with the Riverine people of Nigeria.[371] The Niger Delta Mangrove Forest is 6000 square kilometres in area and its fresh water swamplands are 11,700 square kilometres. It has many rivers, streams, brooks and canals as over 60% of the region is traversed by creeks and dotted islands while the rest is a low-land rain-forest.[372] Because of this, the Niger Delta is relatively strategic for development being the economic nerve centre of Nigeria. It is also endowed with enormous water resources, with major rivers connecting the region to the Atlantic

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365 Sagay IE "The Niger Delta and the case for resource control" <www.profitsesagay.com/pdf> accessed 16 April 2017.

366 UNEP, Environmental Assessment of Ogoniland (2011) 20 <www.unep.org/nigeria accessed 10 July 2017> accessed 10 July 2017; Akpabio EM and Akpan NS "governance and Oil Politics in Nigeria's Niger Delta: The Question of Distributive Equity" *30(2) J Hum Ecol,* 111-121 at 111 <http://re.indiaenvironmentportal.org.in/files/Governance.pdf> accessed 10 July 2017; Alamieyeseigha DSP "The environmental challenge of developing the Niger Delta" (2003) *The News* <www.gasandoil.com/news/africa> accessed 10 July 2017.

367 Peek P and Keith N "Lower Niger Bronze Industries and the Archaeology of the Niger" (2002) page unknown.

368 Peek P and Keith N (n 367).

369 Nwilo PC and Badejo OT "Oil Spill Problems and Management in the Niger Delta" (2005) *International Oil Spill Conference* 567 <http://ioscproceedings.org> accessed 18 April 2017.

370 UNEP, Environmental Assessment of Ogoniland (2011) (n 366) 20; Akpabio EM and Akpan NS "governance and Oil Politics in Nigeria's Niger Delta: The Question of Distributive (n 3) 111.

371 Abila SE "Historic Philosophical Foundation of Minority Rights Movements in the Niger Delta" in Emiri F and Deinduomo G (eds) *Law and Petroleum industry in Nigeria: Current Challenges* (Malthouse Lagos 2009) 175-210.

372 Abibe E and Essaugh A, *Environmental Impact Assessment* (Enugu: Immaculate Publication, 1999) 45-50.

Ocean which is a water highway that opens coastal Nigeria to all the parts of the world.

3.2 Oil wealth in Nigeria

The Federal Republic of Nigeria is divided into six geo-political zones of North-West, North-East, North-Central, South-West, South-East and South-South. The South-South comprises the Niger Delta. Nigeria is Africa's largest country with a population of approximately 182 million[373] and it is a complex country with over four hundred ethnic nationalities.[374] Its vast land area spans about 910,770 sq. km situated in the West of Africa region.[375] It shares boundaries with the Republics of Chad and Niger to the North, the Republic of Benin to the West, the Republic of Cameroon to the East, and by Atlantic Ocean to the South.[376] It has a coastline approximately 853 km along the Atlantic Ocean; the continental portion of this zone is about 28,000 square km in area, while the surface area of the continental shelf is 46,300 square km.[377]

Nigeria is a federation with 36 states, nine of which are crude oil-producing states spreading across three geo-political zones of South-South, the South East and South-West.[378] The nine oil producing states are Delta, Bayelsa, Rivers, Akwa Ibom, Cross River, Edo, Abia, Imo and Ondo.[379] The South-South geo-political zone is the largest producer of crude oil with 91.5 per cent of the national gross oil production.[380] The proportion of oil production from these states is uneven with four of them – Bayelsa, Rivers, Delta and Akwa Ibom – accounting for about 90% of the entire production in the country and about 50% of Government revenue.[381]

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[373] See the remarks of the Director-General of National Population Commission, Nigeria <www.population.gov.ng> accessed 18 April 2017.

[374] Achimugu H, *et al* "Ethnicity, Ethnic Crisis, and Good governance in Nigeria: Implications for Sustainable National Development" (2013) *3(12) Public Policy and Administration Research* <www.iiste.org/Journals/index.php> accessed 18 April 2017.

[375] The World Bank, Nigeria Land Sq. Km (2015) <http://data.worldbank.org> accessed 18 April 2017.

[376] Nwilo PC and Badejo OT (n 369) 567.

[377] Nwilo PC and Badejo OT (n 369) 567.

[378] Osuigwe NE *Crude Oil, Conflict and Christian Witness in Nigeria: Baptist and Pentecostal Perspectives* (PhD-dissertation University of Edinburgh 2010)14.

[379] Osuigwe NE (n 378) 14.

[380] Osuigwe NE (n 378) 14.

[381] African Network for Environment and Economic Justice (ANNEJ), *Oil of Poverty in Niger Delta* (Benin City: ANEEJ, 2004) 3 <http://www.aneej.org> accessed 18 May 2017. These four states were selected for field study in this thesis.

The country's economic growth primarily stems from the oil sector. It has large reserves of crude oil and natural gas.[382] Out of Africa's 'proven' reserves which were estimated to be 129.2 billion barrels in 2016 (7.6 per cent of the world total proven reserves), Nigeria's oil reserves were estimated to be at least 37.2 billion barrels, with an average production level of 2.2 million barrels a day.[383] This makes Nigeria the largest oil 'proven' reserves on the African continent and the 10th in the world.[384] The natural gas was estimated at 180.5 trillion cubic feet of gas reserves.[385]

Nigeria was once the seventh oil-producing state in the world but in 2010, it ranked ninth in the world's production of crude oil.[386] Nigeria used to be Africa's leading oil producer but is now trailing behind Angola because of the incessant crisis over ownership of oil and gas and attacks on oil infrastructure in the Niger Delta.[387] Crude oil production in Nigeria decreased to 1269 barrels of oil a day in March 2017 from 1426 barrels in February of 2017.[388] Crude oil production in Nigeria averaged 1894.51 barrels a day from 1973 until 2017, reaching an all-time high of 2475 barrels of oil a day in November of 2005 and a record low of 675 barrels a day in February of 1983.[389]

Despite this present situation, Nigeria is still an oil giant in sub-Saharan Africa in terms of its oil reserves and potentials of increasing its oil production.[390] Busch has

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382 Mailula DT (n 120) 201-202.

383 Central Intelligence Agency, the World Factbook Country "Comparison: Crude Oil – Proved Reserves"https://www.cia.gov/library/publications/the-world-factbook/rankorder/2244rank.html accessed 22 September 2017. See also BP Statistical Review of World Energy June 2016, 65th edition www.bp.com/content/dam/bp/pdf/energy-economics/statistical-review-2016/bp-statistical-review-of-world-energy-2016-full-report.pdf accessed 22 September 2017.

384 Central Intelligence Agency (n 470).

385 BP Statistical Review of World Energy June 2016, 65th edition www.bp.com/content/dam/bp/pdf/energy-economics/statistical-review-2016/bp-statistical-review-of-world-energy-2016-full-report.pdf accessed 22 September 2017.

386 Inokoba PK and Imbua DL "Vexation and Militancy in the Niger Delta: The Way Forward" (2010) *29(2) Journal of Human Ecology* 101 at 104.

387 US Energy Information Administration, Independent Statistics and Analysis (2017) <www.eia.gov> accessed13 May 2017.

388 Nigeria Crude Oil Production 1973-2017 Data, Trading Economics <www.tradingeconomics.com/nigeria/crude-oil-production> accessed 13 May 2017.

389 Nigeria Crude Oil Production 1973-2017 Data, Trading Economics <www.tradingeconomics.com/nigeria/crude-oil-production> accessed 13 May 2017.

390 See Young DJ "Energy Development and Maritime Boundary Dispute: Two African Examples" 19 (1984) *Texas Law Journal* 437 at 443.

indicated that there are many new reserves of oil found in, amongst others, offshore Nigeria, which are yet to be exploited.[391]

Nigeria is a significant global player in the petroleum industry. It is a member of important bodies such as the World Petroleum Congress, Organization of Petroleum Exporting Countries (OPEC) and African Petroleum Producers Association (APPA).[392] It was once ranked sixth largest producer in OPEC.[393] As noted earlier, oil accounts for about 80% of government revenue and about 90% of export earnings.[394]

3.3 The colonial legal and regulatory framework

Mailula has argued that the legal and regulatory frameworks are decisive factors in the success or failure of oil and gas industry in Nigeria, especially in relation to the Niger Delta developmental challenges.[395] Thus, it is necessary to trace the history of the legal and regulatory frameworks in Nigeria.

Before 1914, the territory now known as Nigeria was not in existence. By the 19th century, some British companies had established trading ports around the Niger River and subsequently extended their operations from the middle of the Niger valley into what is now known as Northern Nigeria. The companies later merged and formed a company known as the Royal Niger Company, which was granted a Charter by the British Monarch not only to trade but also to administer the area from the middle of the Niger valley to present day Northern Nigeria.[396] The Royal Niger Company was crucial in securing most of Nigeria's major ports and monopolized coastal trade.[397]

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391 Busch GK "Black Gold" available <www.nigeriavillagesquare.com/articles> accessed 13 May 2017.

392 This association was formed in 1987 and initially comprised of Algeria, Angola, Benin, Cameroon, Congo, Egypt, the Ivory Coast, Gabon, Libya, Nigeria, and Zaire.

393 See Crude Oil Exports by Country, Nigeria was 6th position with 38 billion barrels as at 2015 <www.worldstopexports.com/worlds-top-oil-exports-country> accessed 13 May 2017.

394 Onduku A (n 27); Osuigwe NE (n 378) 14.

395 Mailula DT (n 120) 204.

396 The Royal Niger Company Chartered and Limited, 1886 – 1900. See also Pearson SR "The Economic Imperialism of the Royal Niger Company" <http://ageconsearch.umn.edu/bitstream.pdf> accessed 31 July 2017. The Royal Niger Company became chartered in 1886.

397 Achimugu H, *et al* "Ethnicity, Ethnic Crisis, and Good governance in Nigeria: Implications for Sustainable National Development" (2013) 3(12) *Public Policy and Administration Research* <www.iiste.org/Journals/index.php> accessed 18 April 2017.

By the latter part of the 19th century, the Royal Niger Company, with a detachment of the British royal army, had conquered the areas situated in the northern part of the Niger (now known as northern Nigeria) under the British army commander, Sir Frederick Lugard. The British colonial expansionist policy was boosted by the Berlin Conference of 1884.[398] On the revocation of the Charter of the Royal Niger Company on 31st of December 1899, the area under its sphere of administration was renamed the Protectorate of Northern Nigeria with effect from 1 January 1900. The remaining part of the present-day Nigeria that did not form part of the Protectorate of Northern Nigeria was added to the Niger Coast Protectorate which had earlier been established for the communities of the Niger Delta, to form the Protectorate of Southern Nigeria with effect from 1906. The colony of Lagos was not part of the two protectorates as it was administered separately.[399]

The political history of Lagos was slightly different from the rest of Northern and Southern protectorates. By the Treaty of Cession entered into on 6 August 1861, King Dosumu of Lagos and his chiefs ceded to the British Crown the Port and Island of Lagos under the Great Seal dated 13th March 1862. The yielded territories formed a separate Government with a Legislative and Executive Council under the title of the Settlement of Lagos.[400] Thereafter, various arrangements were put in place for example, on the 19 February 1866 Lagos became part of the Government of the West African Settlements, with a separate Legislative Council but subject to the Governor-General-in-Chief in Sierra Leone. By 24 July 1874, the Gold Coast (now Ghana) and Lagos were separated from the other settlements and constituted into one Colony known as the Gold Coast Colony. On 13 January 1886, by Letters Patent, Lagos became a separate Colony. Twenty years later, by Letters Patent dated 28 February 1906, the Colony of Lagos, on 1 May 1906, was merged with the Protectorate of Southern Nigeria to form the Colony and Protectorate of Southern

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398 The Berlin Conference balkanized African territories among the Europeans. It encouraged the Europeans to establish their government in any territory they have strong hold to avoid conflicts among the European powers.

399 Berlin Conference (n 398).

400 Per Ogundare J.S.C in *Attorney general of the Federation v. Attorney general of Abia State and Ors No. 2 (2002) 6 NWLR Pt 764 at 542.* The history of Lagos colony was also explained in the case of *The Attorney General v. W.B. McIver & Co. & Ors. (2002) 2NLR at 4-5.*

Nigeria.[401] It can therefore be concluded that Nigeria, like many states in the African continent, is a creation of British colonial masters.[402]

In 1914 the British colonial administration decided to merge the Northern Protectorate and Southern Protectorate for reasons best described as economic, trade and administrative convenience.[403] After the amalgamation of Northern and Southern Protectorates, the name Nigeria was suggested by one Miss Flora Shaw,[404] quoted to have written:

> [i]t may be permissible to coin a shorter title for the agglomeration of pagan and Mahomedan states which have been brought by the extensions of the Royal Niger Company within the confines of the British protectorate and thus for the first time in their history be described as an entity... The name 'Nigeria' applying to no other portion of Africa may, without offence to any neighbours, be accepted as a co-extensive within the territories over which the Royal Niger Company has extended British influence, and may serve to differentiate them from the British colony of Lagos and the Niger protectorate on the coast and from the French territories of the Upper Niger.[405]

3.3.1 History of legal and regulatory framework of oil and gas during the colonial regime in Nigeria

Ogri has maintained that the oil industry in Nigeria was relatively undeveloped before the 1950s.[406] The Nigerian Bitumen Company, a German-owned company, was the pioneer company that started oil exploration activities in Nigeria in 1908, but its activities were cut short following the outbreak of the First World War.[407] This company operated under the Mining Regulation (Oil) Ordinance of 1907.[408] However, in 1914, the Mineral Oil Act was enacted "to regulate the right to search for, win and work mineral oils".[409] The 1914 Ordinance arrogated any oil and

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401 Per Ogundare J.S.C (n 400) 543.
402 Ebeku KSA *Oil and the Niger Delta People in International Law: Resources Rights, Environmental and Equity Issues* (Rüdiger Köpper Verlag 2006) 14.
403 Ebeku KSA (n 402) 14.
404 Flora Shaw was a British newspaper correspondent; she later became the wife of Lord Lugard, Lord Lugard later became the first Governor-General of Nigeria in 1914.
405 Ebeku KSA (n 402) 16.
406 Ogri OR "A Review of the Nigerian Petroleum Industry and the Associated Environmental Problems" (2001) *21 The Environmentalist* 11 at 15.
407 Ebeku KSA (n 402) 68.
408 Sasegbon F *Energy Law Seminar held at the Banff Centre, Alberta, Canada* (vol. 1 Sweet & Maxwell, 1981) 365
409 Etikerentse G (n 16) 6.

minerals under Nigerian soil legal property of the Crown.[410] This provision of the Ordinance was repeated in the 1946 Minerals Ordinance which stated as follows:

> The entire property in and control of all minerals, and mineral oil in, under or upon any lands in Nigeria, and of all rivers, streams and water courses throughout Nigeria is and shall be vested in the Crown.[411]

The Nigerian Bitumen Company, however, did not resume operation but instead, a consortium of Royal Dutch and Shell[412] known as Shell D'Arcy Company emerged and began oil exploration activities in 1937.[413] By 1938, the colonial government had granted the company a monopoly over the exploration for all minerals and petroleum resources in the entire colony of Nigeria which comprised 357,000 square miles.[414] This type of concession is typical of the concession system through which developing countries were exploited by multinational oil companies in exchange for small amounts of money.[415] Shell D'Arcy Company was a British state-sponsored company. However, the activities of Shell D'Arcy were disrupted by the outbreak of the Second World War in 1939 but the company resumed operations after the war in 1945.[416] Shell D'Arcy maintained its leading position in the Nigerian petroleum industry as from this period due to the privileged position the colonial government granted to the Company. Such a privilege was facilitated by the Minerals Act, for instance, section 6(1)(a) stated:

> No lease or license shall be granted except to a British subject or to a British company registered in Great Britain or in a British colony having its principal place of business within Her Majesty's dominion, the Chairman and the Managing Director (if any) and the majority of the other directors of which are British subjects.[417]

Thus, Shell D'Arcy was granted the exclusive right to search for and win oil because the law forbade non-British subjects and companies that did not have their principal places of business in Britain or in its dominion or whose majority shareholders and

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[410] Achimugu H, *et al* (n 397) 4.

[411] Section 3(1) of the Act. The legacy of this law appeared in subsequent legislations in Nigeria like the Section 1 of the Petroleum Act of 1969 (CAP) 350, 1990 Laws of the Federation of Nigeria LFN), also 40 (3) of the 1979 Constitution, Section 44 (3) of the Constitution of the Federal Republic of Nigeria 1999.

[412] Dutch and English interests.

[413] The forerunner of Shell Petroleum Development Company of Nigeria [SPDC).

[414] Nlerum FE "Reflections on Participation Regimes in Nigeria's Oil Sector" (2007-2010) *Nigerian Current Law Review* 145 at 147.

[415] Omorogbe Y "Contractual Forms in the Oil Industry: The Nigerian Experience with Production Sharing Contracts" (1986) *20 Journal of World Trade Law* 342; Atsegbua L "Acquisition of Oil Rights under Contractual Joint Ventures in Nigeria" (1993) *Journal of African Law* 10 at 19 - 20.

[416] Etikerentse G (n 16) 6.

[417] The Mineral Oils Act as contained in Cap. 135 of the 1948 Edition of the Laws of Nigeria.

directors were not British subjects to explore and win oil in Nigeria.[418] This legislation had adverse effects on the development of the oil sector as it discouraged competition and frustrated companies from outside Britain though it was manifestly clear that British companies lacked the necessary capital and human resources for exploration of the vast reserves of oil in Nigeria.[419] However, because of the increased activities of Shell D'Arcy after the Second World War, the Mineral Oils (Safety) Regulations 1952 were promulgated to regulate the activities of the company in terms of safety and good oil-field practices.[420]

Although Shell D'Arcy undertook several exploratory activities[421] its first commercial discovery was made in 1956 in a location near Oloibiri village in what is now Bayelsa state[422] with 5,100 barrels per day in 1958 when the first consignment of crude oil was exported to Europe.[423] In 1958 the monopoly granted to Shell D'Arcy was reviewed and other companies were also granted licence to explore for oil in Nigeria.[424] Shell D'Arcy erected pipelines to transport crude oil from well-heads to the point of exportation or refining. Thus, the Oil Pipelines Act of 1956[425] was passed with provisions designed to meet the requirements of this development in Shell D'Arcy's operations.[426] It was amended in 1965 by the Oil Pipelines Act of 1965. It is important to also mention the enactment of the Petroleum Profits Tax Act, 1959 which separately taxed the profits of oil companies from the companies which engaged in other enterprises.

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[418] The Law was repealed in 1958 by Section 2 of the Mineral Oils (Amendment) Act of 1958; Section 3 (1) of the Minerals Act 1946 – the colonial government arrogated the entire property in and control of all mineral oils to itself.

[419] Ayodele-Akaakar FO (n 60).

[420] Etikerentse G (n 16) 7.

[421] For example, it drills its first well in 1951 at a location near Ihuo village, some sixteen kilometres north-west of Owerri town. It also drilled another well at Akata-1 well.

[422] Bayelsa state is one of the 36 states of Nigeria and remain today one of the largest oil producing states in Nigeria.

[423] Inokoba PK & Imbua DL (n 386) 101 at 104; Okonmah PD "Right to Clean Environment: The Case for the People of Oil-Producing Communities in the Niger Delta" (1997) *Journal of African Law* 43.

[424] Companies of different nationalities such as Mobil, Gulf, Agip, Safrap (Elf), Tenneco, and Amoseas (Texaco/Chevron). Other Multi-National Oil companies in operation in Nigeria are: Korean oil company, Addax Petroleum Development (Nigeria) Limited, China National Oil Company, Express Petroleum, Cavendish, AENR, Consolidated Oil Limited (Conoil), and AMNI International; Ariweriokuma S *The Political Economy of Oil and Gas in Africa: The Case of Nigeria* (New York: Routledge 2008) 6. See also Omorogbe Y (n 507) 274.

[425] Cap 145 of the 1958 Edition of the Laws of Nigeria.

[426] Etikerentse G (n 16) 8.

Consequent upon the lifting of the ban on other nationalities' participation in the oil industry in Nigeria in 1958[427] companies like Mobil, Gulf, Agip, Safrap (Elf), Tenneco, and Amoseas (Texaco/Chevron) were licensed under the Mineral Oils Act.[428] The profits realised were taxed under the Petroleum Profits Tax Act 1959. Apart from available legislations, a few non-legislative provisions were also made by relevant administrative bodies/government ministries and made applicable to oil companies. For example, the percentage of the companies' profits that would be subject to taxation under the Petroleum Profits Tax Act, the variation in the royalty amounts due and payable at a given period, revision upward in the posted price to be applied to crude oil produced for taxation purposes and the levy on ships carrying crude oil from the chosen oil stations in the country were addressed.[429]

3.4 The Influence of International law on the legal framework of oil and gas in Nigeria

The development of the law of the sea has been influenced largely by two notions, namely, freedom of navigation on the one hand, and restricted access on the other. And interaction between these two opposing notions has resulted in the acceptance of two concepts as a compromise, namely, the territorial sea and the right of innocent passage.[430] For a long time, maritime states have usually asserted their sovereign jurisdiction over waters that are contiguous to their coasts up to certain limit recognizing the right of innocent passage of the vessels of foreign states.[431] The *Cannon-shot* rule was accepted internationally as one league or three (3) miles from the shore line and that was the width of the portion of the sea that then became generally accepted as the area over which a coastal nation could exercise sovereign control.[432]

However, in 1958 the territorial seas or waters limit was controlled by the Convention on the Territorial Sea and the Contiguous Zone that was signed in Geneva in 1958. It was agreed under the Convention that the sovereignty of a State extended beyond

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[427] See Section 6(1) (a) of the Mineral Oils Act, Cap 135 of the 1948 Edition of the Laws of Nigeria.
[428] Cap 120 of the 1958 Edition of the Laws of Nigeria.
[429] Etikerentse G (n 16) 9.
[430] Agyebeng K, "Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea" (2005), Cornell Law School Graduate Student Papers. Paper 9 <http://scholarship.law.cornell.edu> accessed 21 April 2017.
[431] Etikerentse G (n 16) 11. See also the right of innocent passage in Section III of Part I of the 1958 Convention.
[432] Etikerentse G (n 16) 11.

its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea and extended to the air space over the territorial sea as well as to its bed and subsoil.[433] However, this sovereignty was qualified by Article 1(2) which provided that the sovereignty must be exercised subject to the provisions of the Convention's Articles and to other rules of international law. The Convention provided for the normal baseline for measuring the breadth of the territorial sea as the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state.[434]

The Convention provided that the contiguous zone could not extend beyond twelve miles from the baseline from which the breadth of the territorial sea was measured over which a coastal state could exercise jurisdiction.[435] However, a coastal state could exercise control in furtherance of the enforcement of its territorial sea rights and compliance with its municipal laws and regulations.[436] To avoid conflict of interest among states, the Convention also provided that where the coasts of two states were opposite or adjacent to each other, neither of the two states was entitled to extend its contiguous zone beyond the median line every point of which was equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two states was measured unless there was an agreement between them to the contrary.[437]

The law of the sea of 1958 had a tremendous influence on the off-shore area covered under Nigerian oil and gas law. In 1958, an international conference was held in Geneva on the Territorial Sea, the Contiguous Zone and the Continental Shelf. This conference had direct influence on the 1959 amendment to the Mineral Oils Act of 1914. The 1959 amendment was to enable Nigeria take advantage of the provisions of the Geneva Convention. For example, Article 2 of the Geneva Convention on the Continental Shelf 1958 gave a sovereign coastal state the right to exercise control over the exploration and exploitation of the natural resources of its

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[433] Part 1, Section I, Articles 1(1) and 2 of Convention on the Territorial Sea and the Contiguous Zone 1958.
[434] See Article 3 of the 1958 Convention.
[435] Article 24 (1) and (2).
[436] See Part II Article 24(1) (a) and (b) of the 1958 Convention.
[437] Article 24 (3).

continental shelf.[438] The concepts of Territorial Waters and Continental Shelf will be discussed here under.

3.4.1 Territorial Waters

Nigeria's territorial waters before 1967 covered a three-nautical miles' area, but due to the influence of international law of the sea, it was increased to twelve-nautical miles off the coast of Nigeria.[439] Nigeria in the exercise of her sovereignty and ownership of oil and gas over territorial water resources enacted some Acts. For example, section 5 (1) of the Territorial Waters Act[440] preserved and maintained the grants earlier made in oil exploration of areas covered by Nigerian territorial waters. Likewise, sections 2 (3) of the Oil in Navigable Waters Act,[441] section 7 of Oil Terminal Dues Act,[442] section 1 (1) of the Petroleum Act, section 2 of the Exclusive Economic Zone Act,[443] section 1 (3) of the Offshore Oil Revenues (Registration of Grants) Act,[444] section 18 (1) of the Interpretation Act[445] and the provisions of section 44(3) of the 1999 Constitution affirmed the ownership and control of oil and gas by the Federal Government of Nigeria.

There was, however, controversy between the Federal Government and the eight littoral states of Akwa Ibom, Bayelsa, Rivers, Cross-River, Ondo, Delta, Ogun, and Lagos on the ownership, control and management of petroleum located in the off-shore areas of Nigeria, in the case of *Attorney General of the Federation v. Attorney General of Abia State and Ors.*[446] In that case, the plaintiff[447] contended that the southern (or seaward) boundary of each of the eight littoral States was the low-water mark of the land surface of such State or, the seaward limit of inland waters within the State, as the case so required. The Federal Government maintained that natural

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[438] Etikerentse G (n 16) 10.

[439] Going by section 2 of Article 3 of 1982 UNCLOS the breadth of the territorial sea is measured from low-water mark or these award limits of the inland waters up to 12 nautical miles. See Section 1(1) of the Territorial Waters Act Cap 428 Laws of Federation of Nigeria 1990 and available at Cap T5 LFN 2004.

[440] Cap 428 Laws of Federation of Nigeria 1990 and available at Cap T5 LFN 2004.

[441] Cap 337 Laws of Federation of Nigeria 1990 and available at Cap O6 LFN 2004.

[442] Cap 339 Laws of Federation of Nigeria 1990 and available at Cap O8 LFN 2004.

[443] Cap 116 Laws of Federation of Nigeria 1990 and available at Cap E17 LFN 2004.

[444] Cap 336 Laws of Federation of Nigeria 1990 and available at Cap O4 LFN 2004.

[445] Cap 192 Laws of Federation of Nigeria 1990 and available at Cap 123 LFN 2004.

[446] *Attorney General of the Federation v Attorney General of Abia State and Ors., No. 2 (2002) 6 NWLR Pt 764* at 542.

[447] That was the Attorney-General of the Federation (AGF) representing the Federal Government of Nigeria.

resources located within Nigeria's Territorial Waters, Exclusive Economic Zone and the Continental Shelf of Nigeria were not derivable from any State of the Federation while each littoral state claimed that its territory extended beyond the low-water mark onto the Territorial Waters and even onto the Continental Shelf and the Exclusive Economic Zone. They maintained that natural resources derived from both onshore and offshore were derivable from their respective territories and in respect thereof, each was entitled to the "not less than 13 per cent"[448] allocation as provided in the proviso to subsection (2) of section 162 of the 1999 Constitution.

The plaintiff prayed the Apex Court to determine the seaward boundary of a littoral state within the Federal Republic of Nigeria for the purposes of calculating the amount of revenue accruing to the Federation Account directly from any natural resources derived from that state pursuant to section 162 (2) of the Constitution of the Federal Republic of Nigeria 1999.[449]

The Supreme Court of Nigeria affirmed that the Federal government had exclusive right of ownership, control and management of petroleum located in the offshore areas of Nigeria. This decision of the Supreme Court generated controversy between the Federal and the State Governments. However, in 2004, a 'political solution' was found to the problem. The solution was the abolition of offshore/onshore dichotomy in calculating the revenue derivable from the natural resources available for sharing under section 162 (2) of the 1999 Constitution.

3.4.2 The Continental Shelf

The continental shelf refers to the land masses that project from the continental land mass into the ocean.[450] It is that portion of the sea bed or ocean floor which lies beyond the territorial sea of a littoral state and it is usually up to a depth of 200 metres and forms a geographical and geological prolongation of the continental land

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[448] Per Ogundare J.S.C (n 400) 542. By this principle *"not less than thirteen per cent"* of the revenue accruing to the Federation Account directly from any natural resource shall be payable to a State of the Federation from which such natural resources are derived. For a State to qualify for this allocation of funds from the Federation Account, the natural resources must have come from within the boundaries of the State, that is, the resources must be located within that State.

[449] See a similar US case of *United States v. State of California, 332 US 19, 24-25; US Reporter 1658, 1661,* the US Supreme Court, per Black J.

[450] Sourish S "Principle of Delimitation of Continental Shelf Areas between States" (2013) *The International Law Annual* <http://spilmumbai.com/uploads/article/pdf> accessed 22 April 2017.

mass.[451] Before the 1958 Geneva Convention, the terminology became popular among maritime states at the end of the Second World War. At that time, maritime states unilaterally reserved to themselves the ownership and control of the oil and natural resources that lay in the geological formations and faults of the submarine continental extensions of their states.[452] The United States President Truman's Proclamation in 1945 of his country's sovereign jurisdiction and control over the natural resources of the sub-soil and seabed of the continental shelf beneath the 'high sea' contiguous to the US coast gave a boost to the claim of maritime states to their continental shelves as it was known before the 1958 Geneva Convention.[453] The claim of these states was eventually incorporated into the Articles of the Geneva Convention. Article 1 of the Geneva Convention 1958 defined the Continental Shelf as:

> (a) seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas;
> (b) the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.[454]

The definition in Article 1 of 1958 was based on exploitability of the natural resources of the said areas instead of depending upon the conventional geological definition, which referred to the seabed and subsoil of the submarine zones next to the coast but not within the territorial sea that extends to a depth of 200 metres or beyond that limit, to where the depth of the superjacent waters admitted of the exploitation of the natural resources in those areas.[455] The phrase 'beyond that limit to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas'[456] is said to be ambiguous because there is a mechanism which can be used to mine resources from the ocean bed which could be from a depth exceeding

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[451] Etikerentse G (n 16) 12; Article 76 of the Convention. See also the definition of Continental Self-offered by the Commission on the limits of the Continental Self (CLCS) <www.un.org/depts/los/clcs_new/continental_shelf_description.htm> accessed 22April 2017.

[452] See the Treaty relating to the Submarine Areas of the Gulf of Piras between the U.K. and Venezuela (1942) UKTS10.Cmd 6400.

[453] See Department of State Bulletin, No. 327, 30 September 1945, pp. 485 and America Journal of International Law (Supp. 45).

[454] See Article 1 of the Convention on Continental Shelf of 1958 held also in Geneva.

[455] Article 1 of the 1958 Convention. It is now measured at 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance; see Article 76 of Part VI of 1982 UNCLOS.

[456] Article 1 of the 1958 Convention.

200 metres. It is important to state that the Convention included the islands in its paragraph (b) which hitherto had not been contemplated.

In the North Sea Continental Shelf case between the German Federal Republic, the Netherlands and Denmark in 1969, the ICJ was called upon to determine the rules that would be applied in delimiting continental shelf boundaries.[457] The Court held that the rights and privileges of the littoral state with respect to the area of the continental shelf that formed a natural continuation of its territory merged into the sea which existed *ab initio*. This was because of the littoral state's autonomy over the land and as an addition to it, in an exercise of sovereign rights for exploring the seabed and exploiting its natural resources. With respect to the delimitation of the continental shelf between states with opposite or adjacent coast, Article 83 provided that 'delimitation shall be effected by agreement based on international law, as referred to in Article 38 of the Statute of the International Court of Justice, to achieve an equitable solution.[458]

The 1982 UNCLOS now provides that the continental shelf of a coastal State shall comprise the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory. This is said to extend to the outer edge of the continental margin or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[459]

In summary, the Convention in its Article 77 recognized the sovereign rights of the coastal state over the continental shelf for exploring it and exploiting its natural resources.[460] These rights are said to be exclusive in that if the coastal state does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal state. And these rights do not depend on occupation, effective or notional, or on any express proclamation of the coastal states.

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[457] ICJ Reports, 1969 3, 39; 41 ILR 29, 68.
[458] United Nations Convention on the Law of the Sea, 1982 <www.un.org/ Depts./los/convention agreements> accessed 23 April 2017.
[459] See Article 76 of the 1982 UNCLOS.
[460] UNCLOS Article 77 of the 1958 Convention. This is also provided for in the same Article 77 of 1982 UNCLOS.

Pursuant to the United Nations' Law of the Sea provisions expressed above, section 1 (2) (c) of the Petroleum Act 1969 and later the Offshore Oil Revenues Act of 1971 No. 9 made copious references to the fact that ownership of and title to petroleum beneath the territorial waters and in the continental shelf areas was vested in the Federal Government of Nigeria. The Nigerian Continental Shelf was defined by the Petroleum Act as:

> the sea bed and subsoil of those submarine areas adjacent to the coast of Nigeria the surface of which lies at a depth no greater than 200 metres (or, where its natural resources are capable of exploitation, at any depth) below the surface of the sea, excluding so much of those areas as lies below the territorial waters of Nigeria.[461]

Section 1 (2) of the Petroleum Act empowers the Federal government of Nigeria to exercise ownership and control by which she could grant exploration and exploitation licences and oil mining leases as well as enter into production sharing, joint venture and other beneficial contracts with oil companies in Nigeria.

3.4.3 The Exclusive Economic Zone

Under the United Nations Convention on Law of the Sea 1982,[462] the Exclusive Economic Zone (EEZ) is an area beyond and adjacent to the territorial sea. This is however subject to the specific legal regime established in Part V of the Convention, under which the rights and jurisdiction of the coastal state and the rights and freedoms of other states are governed by the relevant provisions of the Convention. It stated further that the EEZ should not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. According to Article 56 (1) (a), the coastal state has sovereign rights for exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters suprajacent to the seabed and of the seabed and its subsoil, and regarding other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.[463]

In Nigeria, the concept was legislated upon in 1978 by the Exclusive Economic Zone Act;[464] an area of 370.65 kilometres seawards from Nigerian coasts was designated a zone over which it could exercise certain sovereign rights in relation to the

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[461] The Interpretation Section – Section 15(1) of the Petroleum Act Cap. P10 LFN 2004.
[462] UNCLOS 1982 Part V Article 55.
[463] Article 56(1)(a) of the convention.
[464] Now contained in Cap 116 Laws of Federation of Nigeria 1990 and available at Cap E17 LFN 2004.

conservation or exploitation of the minerals and living species of the seabed, subsoil and the superjacent waters. Nigeria reserves the right to regulate in the zone by the establishment of artificial structures, installations and marine scientific research.[465] The 1999 Constitution (as amended) gave ownership and control of the resources found in that zone to the Federal Government in Section 44 (3) of the Constitution (as amended) which states as follows:

> Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

3.5 Federalism and revenue allocation in Nigeria

Wheare has defined federalism as a system of government in which sovereignty is divided between the central and state governments.[466] He went further to explain that federalism allows the Federal and constituent units to exist side by side, each with stated spheres of powers and jurisdiction. The governments are coordinate in that one level of government is not subordinate to the other in legal authority.[467] Usually, the constitutions of federal states are clearly written, stating the powers and functions of each level of government.[468] Subject matters like aviation, defence, currency, international affairs and federal public service are usually on the Central/Federal Government's exclusive legislative list[469] while other matters are under the concurrent legislative list upon which Central Government and the federating units can legislate.[470]

The first attempt at federalism by Nigeria was in 1946 when the then Governor-General imposed on Nigeria the Richard Constitution, which divided Nigeria into three different regions, namely the Northern, Western and Eastern Regions but the attempt failed due to inherent weaknesses in the Constitution. Firstly, because the

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[465] Etikerentse G (n 16) 15.
[466] Wheare KC, *Federal Government* 4th ed. (Oxford University Press London 1963) 11.
[467] Uhunmwuangho SO and Ekpu CE "Federalism: Problems and Prospects of Power Distribution in Nigeria" (2011) *13(5) Journal of Sustainable Development in Africa* 172 <www.jsd-africa.com> accessed 21 May 2017.
[468] Oluyede PAO *Constitutional Law in Nigeria* (1st edn. Evans Brothers (Nigeria Publishers) Limited, Ibadan, Nigeria 1992 Reprinted 2001) 12.
[469] Section 4, Part I of the Second Schedule of the 1999 Constitution of Federal Republic of Nigeria.
[470] Section 4, Part II of the Second Schedule of the 1999 Constitution of Federal Republic of Nigeria.

stakeholders were not consulted and secondly, the regions that were created were not given any constitutional responsibilities and powers to operate as autonomous regions. More importantly, the division of the Southern Protectorate into Western and Eastern regions, leaving the Northern Protectorate undivided with 50% of the seats in the central legislature made the Northern Region a decider of joint deliberations.[471] This arrangement offended the principle of federalism characterized by the representation of constituent units in the federation and this shortcoming has been the bane of the Nigerian federation till date.[472]

In 1951, the Macpherson Constitution was introduced; it was quasi-federal in nature. It introduced elective principles in the central and at the regional levels, but did not set up an autonomous government at the regional level. The people's representatives were democratically elected into the central and regional legislatures, but the cabinet was not formed by the elected representatives, but was handpicked by the Governor-General and were directly responsible to him. The 1954 Constitution was an improvement over the 1951 Constitution.[473] Autonomous Regional Governments were set up for each of the regions, by 1955 the Western region gained self-rule under a democratically elected representative of the people and a cabinet was formed with the Premier as the head of government selected to lead the region being the leader of the party that won the majority in the region's House of Assembly. The Eastern and Northern regions followed suit in 1956 and 1957 respectively.[474] Each region had its constitutions with its own symbol of authority.

Nigeria in its subsequent constitutions retained the federal structure. The powers and functions of each level of government were clearly spelt out in the Schedule to the 1960 and 1963 independence and the Republican Constitutions respectively. The Second Schedule of both the 1979 and 1999 Constitutions also state that the Exclusive Legislative List belongs to the Federal Government alone over which it can

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[471] Hassan D and Issa AS "Federalism and ethnic violence in Nigeria: Past and Present Issues" (2011) *9 JORIND* www.transcampus.org/journals accessed 22 May 2017.

[472] Hassan D and Issa AS (n 471).

[473] Each of the constitutions was named after the Governor-General that was in government when the constitution was made. The 1954 constitution was named after Sir Lyttleton.

[474] Ebegbulem JC "Federalism and the Politics of Resource Control in Nigeria: A critical Analysis of the Niger Delta Crisis" (2011) *1(12) International Journal of Humanities and Social Sciences* 219 <www.ijhssnet.com> accessed 22 May 2017.

make and administer laws and the Concurrent Legislative List deals with matters over which the Federal and State Governments have legislative powers. However, in cases of conflict between the laws made by the Federal Government and the State Governments, the federal laws shall prevail.[475] Unfortunately, the military intervention in Nigerian politics in 1966 obstructed the federal arrangement. The Nigerian federal arrangement was run as a unitary system by the Military Governments between 1966 and 1999.[476]

3.5.1 Revenue allocation under Nigerian Federalism

Fiscal federalism can be defined as the relationship among the various levels of government with respect to the allocation of national revenue and the assignment of functions and tax powers to the federating units in a federation.[477] The creation of the three regions in Nigeria in 1946 and subsequent creation of more states marked the beginning of the recognition of sub-national governments with financial responsibilities.[478] Since then, there has been agitation by the state governments for increases in revenue allocation and many commissions have been set up to look into the revenue allocation formula.[479] In furtherance of the principle of fiscal federalism adopted by Nigeria at independence, the region where oil was exploited was paid fifty percent (50%) of the revenue derived therefrom. Section 134 (1) (a) and (b) of the 1960 Constitution provided thus:

> There shall be paid by the Federation to each Region a sum equal to fifty percent of:

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[475] Section 4 (5) of the 1999 Constitution – Legislative powers of the Federal Republic of Nigeria.
[476] There was a civilian administration between 1979 and 1983.
[477] Ebegbulem JC (n 474) 223.
[478] Ebegbulem JC (n 474) 224.
[479] Lukpata VI "Revenue Allocation Formulae in Nigeria: A Continuous Search" (2013) *2 (1) International Journal of Public Administration and Management Research (IJPAMR)* 32-33 <www.rcmss.com> accessed 22 May 2017. On the issue of revenue allocation, the following commissions among others were setup: the Phillipson Commission (1946), the Hicks-Phillipson Commission (1951), Louis Chick Commission (1953), Jeremy Raisman Commission (1958), the Binns Commission (1964), the Dina Commission (1968), the Aboyade Commission (1977), the Okigbo Commission (1980), and the Danjuma Fiscal Commission (1988). The Revenue Mobilization Allocation and Fiscal Commission (1989) was established as a legal and permanent entity to deal with fiscal matters on a more regular basis as the need arises. It is a statutory body provided for in Part I of the 3rd Schedule to the 1999 Constitution. The criteria used are as follows: Basic needs; Minimum Material Standards; Balanced Development; Equality of Access to Development Opportunities; Derivation; Independent Revenue/Tax effort; Absorptive Capacity; Fiscal Efficiency; Minimum responsibility of Government; Population; Social Development Factor; Equality of States; Landmass and Terrain and Internal Revenue Generation Effort.

(a) the proceeds of any royalty received by the Federation in respect of any minerals extracted in that Region; and
(b) any mining rents derived by the Federation during that year from within that Region.

The same provision as quoted above was repeated in section 140 (1) (a) and (b) of the 1963 Republican Constitution. In addition to this, sections 134 (6) and 140 (6) of the 1960 and 1963 Constitutions respectively provided that in the calculation of the fifty percent (50%) derivation, the continental shelf of a region shall be deemed to be part of that region. Sections 134 (5) and 140 (5) of the 1960 and 1963 Constitutions interpreted minerals to include oil and at that time Nigeria could boast of other sources of revenue ranging from solid minerals to agricultural products. The Federal Government was to pay to regions as stated above the sum equal to fifty percent (50%) of the natural resources (including agricultural produce) derived from that region. The principle of derivation in revenue allocation has been progressively reduced by successive regimes from 50 percent in 1960-1969 to 45 percent in 1970, 20 percent in 1975, 2 percent in 1982, 3 percent in 1992 and presently rose to 13 percent after much agitation from the people of the Niger Delta.[480] However, the storm is far from being over yet because restiveness and the destruction of oil facilities continue unabated in the region.[481]

Presently, Nigeria's former three regions have evolved into 36 states with a Federal Capital Territory (FCT) and 774 local governments.[482] Fiscal responsibilities are vested in these levels of government. The emphasis is on a revenue allocation formula, the sharing of national revenue (otherwise called "the national cake") among the various tiers of government.[483] The over-dependence on revenue from oil (coupled with the downturn of oil price in the international market) and the proliferation of states in Nigeria have rendered the state governments ineffective. They go cap in hand, soliciting for financial assistance from the federal government even after the release of their monthly revenue allocations. The present revenue allocation formula (after the statutory deductions of 13 percent derivation on revenue

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[480] Akinola SR and Adesopo A "Derivation Principle Dilemma and National (Dis)Unity in Nigeria: A Polycentric Planning Perspective on the Niger Delta" (2011) 2, 4 (5) Journal of Sustainable Development www.ccsenet.org/jsd accessed 21 September 2017.

[481] Ojo EO "The Politics of Revenue Allocation and Resource Control in Nigeria: Implications for Federal Stability" (2010) *7(1) Federal Governance* 15-38 at 31 <https://queens.scholarsportal.info> accessed 23 May 2017.

[482] The 1999 Constitution of Nigeria.

[483] Ebegbulem JC (n 474) 223.

from petroleum to be distributed among the oil producing states based on the quantum of production)[484] is as follows: the Federal Government – 52.68 percent, states – 26.72 percent and Local Government – 20.60 percent.[485]

3.6 The Post-colonial legal and regulatory framework for oil and gas

As mentioned earlier on,[486] because of the abrogation of section 6(1)(a) of the Minerals Act which prevented competitive exploration and exploitation of crude oil, many oil companies secured licences to explore for oil. The oil companies' activities necessitated a change in Nigeria's existing Petroleum (Oil and Gas) Laws. The weak structure of the Mineral Oils Ordinance of 1914 with its amendments could not sustain the ever-increasing pressures and trends in the industry. There was the need for a detailed and comprehensive law for the grant of rights to search for and win oil in Nigeria, hence the promulgation of the Petroleum Act 1969 and the Petroleum (Drilling and Production) Regulation 1969.[487] Post-colonial Nigeria's oil and gas legal framework is therefore regulated through a legislative framework consisting of the Constitution,[488] and a principal petroleum law, which is, the Petroleum Act of 1969,[489] supported by other laws.[490]

The developments of 1960s, which led to the independence of most African states from colonial rule, necessitated renegotiation or restructuring of the concession contracts as a legitimate part of the decolonisation process, arguing that their sovereignty over natural resources was at risk if these agreements were to last.

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[484] It should be noted that the 13% derivation is applicable to all natural resources derived from the states; the emphasis here is because oil accounts for about 90% of revenue accruing to the Federal Government.

[485] Onuigbo RA State Governors and Revenue Allocation Formula in Nigeria: A Case Study of the Fourth Republic (2015) *2(7) International Journal of Accounting Research* 14 <www.arabianjbmr.com/pdfs> accessed 22 May 2017; Lukpata VI (n 114) 32-33; National Bureau of Statistics, Federation Account Allocation Committee (FAAC), February 2017 Disbursement <www.nigerianstat.gov.ng/download/532> accessed 22 May 2017.

[486] See section 3.4.1 on *History of legal and regulatory framework of oil and gas during the colonial regime in Nigeria at page 11.*

[487] Ayodele-akaakar FO (n 68) 2.

[488] Beginning from the Independence Constitution, Republican Constitution, the 1979 Constitution and the 1999 Constitution.

[489] Now the Petroleum Act, Cap P10 LFN 2004.

[490] The Petroleum Profits Act of 1959 PPTA Cap 354 LFN 1990 Now at Cap P13, LFN 2004 which controls the applicable tax rates on the chargeable or net profits of companies engaged in petroleum operations; the Oil Terminal Dues Act No. 9 of 1969; the Land Use Act of 1978, which controls land use and transfer; the Oil Pipelines Act of 1978; the Oil Navigable Waters Act of 1979, the Nigerian National Petroleum Corporation Act of 1990; the Petroleum Liquefied Natural Gas (LNG Act of 1993), and the Associated Gas Re-injection Decrees.

Hence these countries amended existing legislations relating to their natural resources.[491] Most of these newly independent states took the fight to the international arena and the conflict that ensued led to the United Nations' Resolution on Permanent Sovereignty over Natural Resources,[492] which shifted the balance of power from the International Oil Companies (IOCs) to the developing countries.[493] This Resolution[494] rejected investor ownership and control of a state's natural resources. No doubt, Nigeria benefited from the Resolution and this was reflected in the changes to its laws and contractual agreements with the IOCs.[495] The Organization of the Petroleum Exporting Countries (OPEC) also bears direct influence on Nigeria.[496] Nigeria joined OPEC and formed the Nigerian National Oil Corporation (NNOC) in 1971.[497] The Nigerian National Petroleum Corporation (NNPC) was established to replace the Nigerian National Oil Corporation in 1977.[498] It was empowered to carry out exploratory activities and to produce petroleum. It has operational interests in refining, petrochemicals and products transportation as well as marketing.[499] In 1988, the Nigerian National Petroleum Corporation was commercialised into 12 strategic business units, covering the entire spectrum of oil industry operations: exploration and production, gas development, refining, distribution, petrochemicals, engineering, and commercial investments.[500] The Department of Petroleum Resources (DPR) was also established to ensure compliance with industry regulations; process applications for licenses, leases and permits, establishes and enforces environmental regulations. It is a department in

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491 Kemper K "The concept of permanent sovereignty and its impact on mineral contracts in legal and institutional arrangements", *in Legal and Institutional Arrangements in Mineral Development (London: Mining Journal Books, 1982)* 32.

492 *G.A. Res, 1803, 17 United Nations, GAOR, Supp. (No. 17) 15, UN Doc. A/5217 (1962).* See also equity participation and contractual joint ventures discussed extensively in Atsegbua L *Nigerian Petroleum Law (New Era Publishers, 1993, Benin), 38–88.*

493 El-Kosheri AS and Riad TF "The law governing a new generation of petroleum agreements: changes in the arbitration process" (1986) *1 ICSID Rev.* 257, at 257.

494 See Resolution 1803 (XVII) of the United Nations General Assembly.

495 This gesture reflected in the Petroleum Act of 1969 and the various contractual agreements between the NNPC and the IOCs.

496 *OPEC Resolution XVI.90, "Declaratory Statement of Petroleum Policy in Member Countries", 24–25 June 1968. See OPEC Official Resolutions and Press Releases 1960–90, at 62. This resolution called on all Member Countries to acquire participation in the exploration of their natural resources.*

497 The formation was backed up with *Decree No. 18 of 1971.* It was renamed Nigeria National Petroleum Corporation (NNPC) in 1977.

498 The Nigerian National Petroleum Corporation (NNPC) <http://nnpcgroup.com/AboutNNPC/Corporateinfo.aspx accessed 22 May 2017.

499 The Nigerian National Petroleum Corporation (n 498).

500 The Nigerian National Petroleum Corporation (n 498).

the Federal Ministry of Petroleum Resources. The Department of Petroleum Resources' regulatory function is discussed in the segment that follows.

3.6.1 Department of Petroleum Resources

Department of Petroleum Resources (DPR) is the regulatory arm of the oil and gas industry in Nigeria but it has a chequered history. DPR has the statutory responsibility of ensuring compliance with petroleum laws, regulations and guidelines in the Oil and Gas Industry. The discharge of these responsibilities for all the chains in petroleum production[501] involves monitoring of operations at drilling sites, producing wells, production platforms and flow stations, crude oil export terminals, refineries, storage depots, pump stations, retail outlets, any other locations where petroleum is either stored or sold, and all pipelines carrying crude oil, natural gas and petroleum products. Its mandate includes supervising all petroleum industry operations in the country; enforcing environmental and safety regulations; keeping accurate records on operations (reserves, production, and exports of products); processing applications for licenses, ensuring timely and adequate payments of all rents and royalties; and monitoring the local content policy.[502]

Before the establishment of NNPC in 1977 the supervisory and regulatory role of oil and gas in Nigeria was under the Federal Ministry of Petroleum Resources. On its establishment, the NNPC inherited the commercial activities of the Nigerian National Oil Corporation (NNOC) and the supervisory-regulatory role of the Federal Ministry of Petroleum Resources. In 1984 however, the commercial activities and regulatory function which was hitherto combined by the NNPC was separated. The regulatory function reverted to the Federal Ministry of Petroleum Resources acting through the Department of Petroleum Resources (DPR).

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501 All chains or sectors of petroleum development involves the upstream, midstream and downstream. For the upstream only (which is the concern of this study) the functions of DPR are: to regulate oil and gas activities, conserve Nigeria's Hydrocarbon Resources, optimise government take in oil and gas activities, ensure compliance with Health Safety and Environmental (HSE) Standards, maintain and administer the National Data Repository (NDR), administer oil and gas acreages and concessions and implement government policies on Upstream Oil and Gas matters.

502 Department of Petroleum Resources- The Petroleum Regulatory Agency of Nigeria dprnigeria.org.ng/aboutdpr/function of dpr accessed 4 November 2017; Gboyega A *et al* "Political Economy of the Petroleum Sector in Nigeria" (2011) World Bank Policy Research, Working Paper 5779 p 28.

In 1990, a department in NNPC known as the Petroleum Inspectorate was established to regulate the oil and gas industry. It was to *inter alia* regulate the:

> (a) Issuing of permits and licences for all activities connected with petroleum exploration and exploitation and the refining, storage, marketing, transportation and distribution thereof;
>
> (b) Acting as the agency for the enforcement of the provisions of the said Acts and any relevant regulations made there under by the Minister; and
>
> (c) Carrying out such other functions as the Minister may direct from time to time, and notwithstanding the foregoing, any regulatory function conferred on the Minister pursuant to the said Acts or any other enactment shall, as from the appointed day, be deemed to have been conferred upon and may be discharged by the chief executive of the Inspectorate.[503]

The DPR was relegated to the background between 1993 and 1998; in fact, DPR was scrapped in 1998 and its functions were taken over by the Minister in charge of Petroleum. However, from 1999, DPR's regulatory function was restored.[504]

The Department of Petroleum Resources (DPR) under the Federal Ministry of Petroleum Resources plays a key role in regulating and enforcing environmental law in Nigeria. The DPR's regulation- Environmental Guidelines and Standards for Petroleum Industry in Nigeria (EGASPIN), first issued in 1992 and reissued in 2002, forms the basis for most environmental regulation of the oil industry. In 1999, the Federal Ministry of Environment was formed, followed in 2006 by the establishment of the National Oil Spill Detection and Response Agency (NOSDRA). These institutions based their operations on the DPR Environmental Guidelines and Standards.

However, in the history of oil and gas, regulation appears to be relegated to the background in favour of NNPC and Multinational Oil companies.[505] DPR's activities are also hampered by human and financial incapacities.[506] The staff of DPR moved to the NNPC; due to relatively poor civil service compensation, the DPR could not attract to it the right calibre of personnel. So, DPR is dependent on the NNPC for

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[503] Section 10 Nigeria National Petroleum Corporation Chapter 320 LFN 1990

[504] Nwokeji GU "The Nigerian National Petroleum Corporation and the Development of the Nigerian oil and gas Industry: History, Strategies and Current Directions" (2007) *The James A Baker II Institute for Public Policy and Japan Petro0leum Energy Centre* 17 – 30.

[505] Subai P *Towards a Functional Petroleum Industry in Nigeria: A Critical Analysis of Nigeria's Petroleum Industry Reform* (PhD-dissertation Newcastle University 2014) 75.

[506] Gboyega A *et al* "Political Economy of the Petroleum Sector in Nigeria" (2011) World Bank Policy Research, Working Paper 5779 p 28.

staffing. The arrangement in place allows DPR to tap into the human resources available in the NNPC and to allow for fluid movement of personnel and for ease of sharing experience.[507]

DPR has been treated just like another arm of the NNPC subject to its directives, those of the Ministry, and the presidency.[508] In 2006 the government admitted failure to enforce the rule that production companies must relinquish 50% ownership of oil blocs not developed over ten years under the Deep Offshore and Inland Basin Production Sharing Contract Decree 1999.[509] This is an indication of DPR's low capacity to regulate.[510]

Because of the inadequacies of the DPR the new PIGB seeks to establish a regulatory Commission to be known as the Nigeria Petroleum Regulatory Commission. The Commission is expected to assume all the rights, interests, obligations and liabilities of the Petroleum Inspectorate, the DPR, and the Petroleum Products Pricing Regulatory Agency "PPPRA") when the PIGB is passed into law. The next section discusses the acquisition of oil rights under the Petroleum Act.

3.7 Acquisition of Oil rights under the Petroleum Decree of 1969[511]

The military government of Nigeria in 1969 promulgated the Petroleum Decree in 1969 repealing the Mineral Oils Ordinance of 1914.[512] It also repealed the Mineral Oils Act of 1958 in its entirety. By that Decree, the entire property and control of oil resources were vested in the Federal Government and as such to start exploration; development or production activity in Nigeria, oil companies needed the authorisation of the government of the Federation of Nigeria.[513] Before the Decree was promulgated, the Colonial Government in 1959 had issued notices which standardized the acquisition of oil rights and also distinguished between exploration, prospecting and mining rights, according to the stage of development in the concession areas. In 1969 however, the Petroleum Decree incorporated all salient

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[507] Nwokeji GU (n 504) 26.
[508] Usman AK *Nigerian Oil and Gas Law* (Malthouse Press Ltd 2017) 6.
[509] Nwokeji GU (n 504) 118.
[510] Nwokeji GU (n 504) 119.
[511] Cap P10 Laws of the Federation of Nigeria (LFN) 2004.
[512] Lawan MA *The Paradox of Underdevelopment amidst Oil in Nigeria: A Socio-Legal Explanation* (PhD-dissertation University of Warwick 2008) 66.
[513] Schatzl LH *Petroleum in Nigeria* (Ibadan: Oxford University Press, 1969) 77.

provisions of the government notices on the acquisition of oil rights. For instance, the provisions relating to the assignment, revocation, rights and powers of the holders of Oil Prospecting Licences (OPLs) and Oil Mining Licences (OMLs), which were contained under the Decree, were also dealt with in the pre-1969 grants of oil rights.

Under the pre-1969 arrangements, a distinction existed between OMLs for the land and territorial waters and those issued in respect of continental shelf areas. Under the pre-1969, OMLs were issued for 40 years, with the option for the lessee to renew for a further period of 40 years while, with the 1969 Decree, the OML was granted for 30 years, with the lessee having the option to renew for another 30-year period.[514] It is pertinent to say that the 1969 Decree did not make a distinction between OMLs covering land and territorial waters and those in respect of the continental shelf areas. Instead, Paragraph 10 of Schedule 1 of the Decree provided that the term of an OML would not exceed 20 years, but could be renewed in accordance with the Decree. The Decree, under Paragraph 12 (1) of the First Schedule provides that ten years after the grant of an OML, one-half of the area of the lease had to be relinquished which was not present in the pre-1969 grants of oil rights. Although it can be argued that relinquishment under the Decree would not affect the oil rights acquired under the pre-1969 notice, the 1969 provision encouraged the rapid exploration and development of the oil industry by the oil companies.[515] The oil companies, knowing that one-half of the area of the lease would be relinquished after ten years, would be inclined to speed up their exploration activities.[516]

The Petroleum Decree has now become an Act of the National Assembly through the provision of section 315 (1) (a) of the Constitution which states as follows:

> (1) Subject to the provisions of this Constitution, an existing law shall have effect with such modification as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be-
>
> (a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws; ...

The Petroleum Decree[517] remains the most important legislation in Nigeria subject to a segment of the Petroleum Industry Bill called Petroleum Industry Governance Bill

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[514] Etikerentse G (n 16) 12.
[515] Atsegbua L "The Development and Acquisition of Oil Licences and Leases in Nigeria" (1999) 23(1) *OPEC Review* 67 <http://onlinelibrary.wiley.com> accessed 25 April 2017.
[516] Atsegbua L (n 515) 68.
[517] Cap P10 LFN 2004.

(PIGB)[518] that was passed into law by the Senate on the 25 May 2017. The PIGB must still pass through the House of Representatives in like manner and be passed into law; if the President gives his assent, then it overrides the governance regime of the Petroleum Act. The Petroleum Act incorporated the laws relating to the petroleum industry before 1969 and included provisions that were in line with international developments in the petroleum sector. It vested ownership and control of petroleum resources in the Federal Government of Nigeria. Section 1(1 and 2) provided that:

> (1) The entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State.
> (2) This section applies to all land (including land covered by water) which-
> *(a)* is in Nigeria; or
> *(b)* is under the territorial waters of Nigeria; or
> *(c)* forms part of the continental shelf; or
> *(d)* forms part of the Exclusive Economic Zone of Nigeria.[519]

Going by the provisions of Section 1 of the Petroleum Act 1969, the Federal Government has an exclusive right to petroleum resources and interested companies are granted licences or leases to explore, prospect or mine oil and gas by the Minister of Petroleum Resources. Based on the provision of section 2 (2) of the Petroleum Act that states that a license or lease for exploration and exploitation of oil rights can only be granted to companies incorporated in Nigeria, Nigeria has put in place certain statutes that regulate foreign investment generally, and the activities of IOCs. Section 54 (1) of the Companies and Allied Matters Act (CAMA) 1990[520] stipulates that "every foreign company... having the intention of carrying on business in Nigeria shall take the steps necessary to obtain incorporation as a separate entity in Nigeria." A similar provision is therein contained under the Nigerian Investment Promotion Commission (NIPC) Decree No 16 of 1995[521] which states that any foreign enterprise (i.e. Company with foreign participation, including IOCs) having been incorporated under the CAMA needs to be registered with the NIPC.[522]

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[518] The Petroleum Industry Bill and the Petroleum Industry Governance Bill are discussed in detail in the course of this chapter.
[519] Section 1 of the Petroleum Act, 1969.
[520] Cap C20 LFN 2004.
[521] Amended by Decree No 32, 1998.
[522] See sections 19(I) and 20(1) of the NIPC Amendment Decree No 32, 1998.

3.8 Licensing regime in Nigeria

Three types of licences are granted in Nigeria: exploration, prospecting and production licences.[523] To explore for oil in Nigeria the company must be granted an Oil Exploration Licence (OEL). On application for an Oil Prospecting Licence (OPL), the Minister of Petroleum Resources grants it to the holder of OEL if satisfied with the activities of the licensee. Where oil is discovered in commercial quantity by the holder of an OPL the Minster grants an Oil Mining Lease to the licence holder.[524] For instance, Section 2 (1) of the 1969 Petroleum Act states that the Minister may grant—

> (a) a licence, to be known as an oil exploration licence, to explore for petroleum;
> (b) a licence, to be known as an oil prospecting licence, to prospect for petroleum; and
> (c) a lease, to be known as an oil mining lease, to search for, win, work, carry away and dispose of petroleum.

3.8.1 Acquisition of Oil Exploration Licence (OEL)

By the provision of section 2(1) of the Petroleum Act, an Oil Exploration Licence (OEL) was necessary to conduct preliminary exploration surveys.[525] An oil company, seeking a grant for an OEL, had to file with the Minister a completed form 'A', together with the payment of 100 naira in application fees.

The main characteristic of an Oil Exploration Licence (OEL) was that the registered oil companies had the right to carry out geological and geophysical exploration for oil over the land and territorial waters of Nigeria.[526] This excluded land approved for grant or already granted to oil companies and did not include the right to drill for petroleum in the concessionary area.[527] Exploration rights could be granted to cover up to 12,950 sq. km.[528] It did not confer on the licensee any exclusive right over the area covered by the licence, and the grant of an OEL could not preclude the grant of another OEL or an OPL or OML over the same area or any part thereof.[529]

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[523] See Section 2(1) of the 1969 Act.
[524] These types of licences shall be discussed in the subsequent paragraphs.
[525] Section 2(1)(a) of the Act.
[526] Atsegbua L (n 515) 59.
[527] Paragraph 1 to the First Schedule of Section 2(3) of the Act.
[528] Notice No. 2675.
[529] Paragraph 2 to the First Schedule of Section 2(3) of the Act.

An OEL was granted in the first instance for one year but the licensee had the option to renew the licence for one further year on prescribed conditions. The grant of an OEL did not confer any right to the grant of any OPL or OML.[530]

3.8.2 Oil Prospecting Licence (OPL)

Section 2(1) (b) of the Petroleum Act empowered the Minister to grant an Oil Prospecting Licence (OPL) to an applicant. An application for this licence was made to the Minister of Petroleum Resources by the completion of form 'A', together with an application fee of 200 naira. An OPL entitles the holder to an exclusive right to explore and prospect for petroleum within a specified area.[531] The holder of an OPL could carry away and dispose of petroleum won during prospecting operations, subject to the fulfilment of the obligations imposed by or under the Act.[532] Paragraph 6 of the First Schedule to the Act provided that the duration of an OPL was determinable by the Minister; however, a licensee could hold the licence for not more than a renewable maximum period of five years.

3.8.3 Oil Mining Licence (OML)

A holder of an OPL is entitled to the grant of an OML upon application if the Minister is satisfied that the licensee has fulfilled all the conditions imposed on the licence or otherwise imposed on him by the Act and that he has discovered oil in commercial quantities.[533] According to section 9 of the Act, oil is deemed to have been discovered in commercial quantities by the holder of an oil prospecting licence if the Minister, upon evidence provided by the licensee, is satisfied that the licensee is capable of producing at least 10,000 barrels per day of crude oil from the licensed area.

A licensee of OML has an exclusive right to conduct exploration and prospecting operations and to win, get, work, store, carry away, transport, export or otherwise treat petroleum discovered in or under the leased area.[534] He holds the mining lease

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[530] Paragraph 4 of the Act.
[531] Paragraph 5 of the Act.
[532] Paragraph 7 of the Petroleum Act. The right of an OPL is to subject to the fulfilment of obligations imposed upon him by or under the Act (including any special terms or conditions imposed under paragraph 34 of this Schedule) or by the Petroleum Profits Tax Act or any other law imposing taxation in respect of petroleum.
[533] Paragraph 8 to the First Schedule of the Act.
[534] Paragraph 11 of the Petroleum Act.

for a term not exceeding twenty years. He is however obliged to relinquish one half of the area of the lease after a period of ten years of the grant.[535] The Minister has the power to impose on a licensee or lessee special terms and conditions not inconsistent with the Act if he considers it to be in the public interest. For instance, the Federal Government can participate in the venture to which the licence or lease relates, on terms to be negotiated between the Minister and the applicant for the licence or lease.[536]

The Act also made special provisions applying to any natural gas discovered. Here the Federal Government retains the right to take natural gas produced with crude oil by the licensee or lessee free of cost or at an agreed cost and without payment of royalty; the licensee or lessee has an obligation to obtain the approval of the Federal Government as to the price at which natural gas produced by the licensee or lessee (not taken by the Federal Government) is sold; and the licensee or lessee is required to pay royalty on natural gas produced and sold.[537] It is important to note that under the Petroleum Act unlike what obtains in some other jurisdictions, there is no special prospecting licence or mining lease for gas. The rights granted to the holder of an OPL or OML apply both to oil and gas.

3.9 Contractual arrangements

There are two major categories of the legal regimes for the regulation of exploration and exploitation activities for oil and gas namely the concession system[538] and the contractual system.[539] Some legal regimes have adopted a mixture of the two otherwise described as the 'hybrid system'. Nigeria has adopted the 'hybrid system' as explained in the subsequent segment. The system adopted by Nigeria during the colonial period was purely concessionaire which was a feature of colonialism.[540] The International Oil Companies (herein after referred to as IOCs) paid royalty in consideration of the lease granted to them under the concessionaire system. Even

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[535] Paragraph 12.
[536] Paragraph 35(a).
[537] Paragraph 35 (b) (i - iii) of the Petroleum Act.
[538] The concession system is discussed subsequently under section 3.9.1 of this chapter.
[539] The contractual system comprises of joint ventures, production sharing formula and service contracts, these are discussed in sections 3.9.2, 3.9.3 and 3.9.4 respectively.
[540] For instance, before 1958, Shell Petroleum Company was granted whole of Nigeria as a concession to explore and exploit for oil. See Section 6(1)(a) of the Mineral Oils Act - Cap. 135 of the 1948 Edition of the Laws of Nigeria.

though the Petroleum Act contained a provision that allowed the Nigerian Government to participate in oil exploration and exploitation in partnership with the IOCs,[541] the IOCs continued to operate the lease solely until the early 1970s, when Nigeria chose to participate in the exploration and exploitation of its oil jointly with the IOCs, in accordance with OPEC policy.

3.9.1 Options for developing the natural resources of a state

One of the first decisions that governments must make is to select the type of contractual system to develop its natural resources. There are three options for developing the natural resources of a state. A state-owned company or enterprise can be created for the exploration and exploitation of oil resources as in Saudi Arabia, Venezuela, Iran, Oman and Mexico. She can invite private investors to develop the natural resources, as in the Canada, United States, United Kingdom and Russia. Combinations of these two systems have been employed in Nigeria, Azerbaijan, Kazakhstan and Indonesia.

Whatever system is adopted by the state, the interest of a natural resource-rich country is to exploit such resources for social and economic development.[542] While the interest of the state is to raise funds for its developmental programmes, it must also on the other hand use its regulatory power to protect the public interest so as to ensure, for example, that oil spills do not damage farmland, fish ponds and public drinking water, etc.[543] The host government needs to learn how to balance these competing interests. When the host government places more emphasis on investment of funds to the detriment of the people and the environment, it usually leads to agitation as is the case in the Niger Delta of Nigeria. The situation in Nigeria is further complicated because the government participates in the exploration and production of oil and gas in joint-ventures with the IOCs. This places the government in the difficult situation of having to regulate itself.

The government can choose between the following: a concession or license agreement, a joint venture (JV), or a production-sharing agreement (PSA) or even Service Contracts. These are discussed seriatim below.

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[541] Paragraph 35 (a) to the First Schedule of the Petroleum Act.
[542] Radon J (n 361) 61.
[543] Amnesty International "Nigeria: Petroleum Pollution and Poverty in the Niger Delta (2009) <www.amnesty.org> accessed 30 July 2017.

3.9.1.1 Concession or licence agreements

The traditional concession or license agreement has been discussed in this chapter under the colonial legal and regulatory frameworks. However, the modern form of concession or license agreement often grants an oil company exclusive rights to explore, develop, sell, and export oil or minerals extracted from a specified area for a fixed period in exchange for its payments of all costs and specified taxes.[544] The duration is now an initial period of twenty years and the maximum area for oil licences under the Nigerian Petroleum (Drilling and Production) Regulations 1969 is in the case of an oil exploration licence, 5,000 square miles; in the case of an oil prospecting licence, 1,000 square miles and in the case of an oil mining lease, 500 square miles.[545]

The oil companies pay rents, royalties and a higher tax rate which captures between 55 and 90 percent of the economic rent on the average for the state and the petroleum *in situ* at all times is that of the host country.[546] Oil companies compete by offering bids, often coupled with signing bonuses, for the license to such rights. This type of agreement is quite common throughout the world and is used in nations as diverse as Kuwait, Sudan, Angola, and Ecuador.[547] It is advantageous to developing countries in that they are more straightforward than other types of agreements, it requires less degree of professional support and expertise unlike complex joint ventures or production-sharing agreements. The successful bidder pays the bidding price, usually the license fee and/or signing bonus - and these fees are kept by the host government regardless of whether or not oil is found and commercial production takes place.[548] If oil is discovered in commercial quantity, then the host government also receives royalties based on gross revenue and/or a profit tax based on net income, both of which are based on the quantity of production and the price at which the product is sold. One of the disadvantages is that there is usually a lack of *passable* knowledge about the potential of a concession area because seismic

[544] Omorogbe Y (n 126) 59.
[545] Regulation 2 (2) (a-c).
[546] Omorogbe Y (n 126) 60.
[547] Radon J (n 361) 63.
[548] Radon J (n 361) 65.

exploration has not been fully undertaken. The result is that the bidding system is often simply an auction.[549]

3.9.1.2 Joint venture contracts

A joint venture (herein after referred to as JV) contract implies that two or more parties wish to pursue a joint undertaking in a form that is yet to be clarified.[550] It is a partnership arrangement, wherein the state, either directly or through its NOC, receives an equity or ownership interest in the rights and obligations of a contractor or a concession.[551] In this type of arrangement ownership, funding and production sharing are all based on each partner's equity share. For instance, in Nigeria each partner in the JV contributes to the operating costs and shares the benefits or losses of the operations in accordance with its proportionate equity interest in the venture.[552] Thus, in a bid to participate in the exploration and exploitation of crude oil within its territory, Nigeria established its National Oil Company named the Nigerian National Oil Corporation (NNOC). The name NNOC was changed to NNPC in 1977.

In the Nigerian JV arrangement, the NNPC entered into agreements with oil companies on behalf of the Federal Government. The JV can either be incorporated or unincorporated. An un-incorporated JV is one in which each partner has an undivided interest in the lease as well as all oil produced and the assets employed in oil production. Thus, all rights and obligations accruing to the lessee under an oil mining lease (OML) would automatically accrue to all the joint venture partners including the NNPC.[553]

Under the JV arrangements, there are three separate agreements that define the relationship between the Nigerian Federal Government, through the NNPC, and the oil producing companies. These are: the participation agreement; the Joint Operating Agreement (herein after referred to as JOA); and the heads of agreement.[554] The

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[549] Radon J (n 361) 65.
[550] Radon J (n 361) 65.
[551] Barrows GH *Worldwide Concession contracts and petroleum legislation* (Pennwell Books, Tulsa 1993) 28 <www.sciepub.com/reference/53697> accessed 18 May 2017.
[552] Mailula DT (n 120) 213.
[553] Ifesinachi K and Aniche ET "Oil Joint Venture Partnerships and Nigerian Economy" 7 (1 and 2) *University of Nigeria Journal of Political Economy*, 2 <www.researchgate.net> accessed 27 April 2017.
[554] Atsegbua L "Acquisition of Oil Rights under Contractual Joint Ventures in Nigeria" (1993) *Journal of African Law* 10 at 19 to 20.

participation agreement sets out the respective interests of the oil companies and the state in the concession and provides for an operating agreement, while a JOA governs the parties' administrative and operational relations.[555] The JOA defines relationships between the partners in terms of:

(a) operatorship and obligations;
(b) work programme, plans and expenditure;
(c) authority of operating (management) committee and its sub-committees (exploration, technical, finance, services, engineering, production, and public affairs);
(d) right of assignment by either party;
(e) off take, scheduling and lifting procedures;
(f) accounting procedures;
(g) project, contract procedures; and
(h) communication procedures.

The third leg of the agreement, which is the heads of agreement, provides, among other things, that there shall be undivided interests in the rights granted by the applicable OMLs with respect to petroleum under the contract area, and that each interest owner will share therein to the extent of its equity participation.

Companies engaged in the joint venture arrangement are assessed for taxation under the Petroleum Profits Tax Act (PPTA) at the rate of 65.75% of chargeable profits for the first five years of operation (when the company is yet to fully recover its capitalized pre-production cost), and 85% thereafter.[556] The commercial terms of the joint ventures are governed by a Memorandum of Understanding (MOU) which adjusts the fiscal regime by providing fiscal incentives to guarantee that the oil company gets a minimum profit margin and a bonus when there are additions to oil reserves. The tax payable is revised by the provisions of the Memorandum of Understanding (MOU) between the parties. The MOU seeks to ensure certain profit margins to the IOC when crude oil market price falls below certain levels. Whenever the price of crude oil exceeds the reference price of $30 per barrel, the parties suspend the application of the MOU provisions because it is ordinarily meant to ensure certain profit margins to the IOC.[557] The MOU thus provides an overall

[555] Etikerentse G (n 16) 26.
[556] KPMG Nigeria, Nigeria's Oil and Gas Industry Brief (2014) KPMG Professional Services, 6 www.blog.kpmgafrica.com/wp-content accessed 01 May 2017.
[557] KPMG Nigeria (n 556) 6.

structure for allocating oil income among the joint venture partners, including payment of taxes and royalties as well as industry profit margin.[558]

There were six major joint ventures involving foreign-owned oil companies and NNPC as of 2016. They were: Shell Petroleum Development Company of Nigeria Limited (SPDC), Chevron Nigeria Limited (CNL), Mobil Producing Nigeria Unlimited (MPNU), Nigerian Agip Oil Company Limited (NAOC), Elf Petroleum Nigeria Limited

(EPNL) and Texaco Overseas Petroleum Company of Nigeria Unlimited (TOPCON).[559]

A joint venture operated by Shell accounts for more than forty percent of Nigeria's total oil production from more than eighty oil fields. The joint venture is composed of NNPC with 55 percent of the Capital, Shell (30 percent), Elf (10 percent) and Agip (5 percent).[560] The Joint Venture operates principally onshore on dry land or in the mangrove swamps. With respect to the one operated between NNPC and Chevron, the NNPC has 60 percent and Chevron 40 percent. It was the second largest producer with fields located in the Warri region west of the Niger River and offshore in shallow waters.[561] Another joint venture between NNPC (60 percent) and Mobil (40 percent) operates in shallow waters off Akwa Ibom state in the south-eastern Delta.[562] The joint venture operated by Agip but owned by NNPC, (60 percent), Agip (20 percent) and Phillips Petroleum (20 percent) produces 150,000 bpd mostly from small onshore fields.[563] A joint venture between NNPC (60 percent) and Elf (40 percent) produces oil both on and offshore. Lastly the joint venture operated by Texaco and owned by NNPC (60 percent), Texaco (20 percent) and Chevron 20 percent produces about 60,000 bpd from five offshore fields.[564]

The table below is a summary of the equity holdings in the various JV partnerships in Nigeria between the years 2009 – 2011.

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[558] Mailula DT (n 120) 214.
[559] Nigerian National Petroleum Corporation NNPC, Joint Venture operations (2016) unknown page <www.nnpcgroup.com/nnpcbusiness/upstreamventures.aspx> accessed 01 May 2017.
[560] NNPC JV (n 559).
[561] NNPC JV (n 559).
[562] NNPC JV (n 559).
[563] NNPC JV (n 559).
[564] NNPC JV (n 559).

Table 1: List of Joint Venture Operators, 2016

Joint Ventures (JVs)	Equity Holding
NNPC/SPDC/EPNL/NAOC	NNPC = 55% SPDC = 30% EPNL = 10% NAOC = 5%
NNPC/CNL	NNPC = 60% CNL = 40%
NNPC/EPNL	NNPC = 60% EPNL = 40%
NNPC/MPNU	NNPC = 60% MPNU = 40%
NNPC/NAOC/POCN	NNPC = 60% NAOC = 20% POCN = 20%
NNPC/TOPCON/CNL	NNDC = 60% TOPCON = 20% CNL = 20%

Source: Nigerian National Petroleum Corporation, 2016.[565]

Presently the NNPC on behalf of the Federal Government holds 60 per cent equity in joint venture operations with ExxonMobil, Chevron, Total, Agip and Pan Ocean. The NNPC holds 55 per cent stake in the Shell Joint Venture.[566] By implication, the Corporation is expected to contribute the equivalent of its equity in each of the joint ventures to the approved annual budget to fund the joint venture operations.

[565] NNPC Business: Upstream Venture <www.nnpcgroup.com/nnpcbusiness/upstreamventures.aspx> accessed 23 September 2017.

[566] Operators in the Petroleum Industry, "Nigeria to begin new funding arrangement for oil, gas joint ventures" 1 <www.nnpcgroup.com/NNPCBusiness/BusinessInformation> accessed 01 May 2017.

Nigeria's major challenge in the joint venture arrangement is the inability of the NNPC to discharge its cash call obligations as and when due. The situation is made worse by the pronouncement of the Supreme Court in the case of *Attorney General of the Federation v Attorney General of Abia State*[567] where the Court declared as unconstitutional the Federal Government funding of the NNPC's joint venture business as a first line charge on the Federation Account.[568] It is becoming increasingly difficult for the Nigerian government to cope with the funding of NNPC cash call obligations under the JV agreement, bearing in mind that the government also needs funds for social and economic development of the country.[569] This difficulty is also partly due to the drop in global crude oil prices from over US $ 120 in 2014 to US $ 50 or less in 2016. As a result, the Federal Government continues to raise funds from international investors and the private sector for the JV cash calls.[570] This is unsustainable in the long run.

The failure of NNPC to meet its obligations has had negative effects because most often the private operator in the JV has recourse to funding from international financial institutions and money markets to make up for the NNPC's defaults to carry on the joint operations. Interest due on such facilities adds to NNPC's liabilities, further diminishing its share of the profits under the joint venture. This problem has adverse multiplier effects on the production and the quantum of the government's revenue from its share of crude oil as well as petroleum profits tax and royalties.[571]

Government's inability to meet its cash call obligations to the JV over the years has been identified as one of the challenges responsible for the lack of growth in the country's oil and gas industry.[572] Therefore developing a new funding system for the JV operations has been at the heart of the reforms undertaken by government to do

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[567] (no. 2) (2002) 6 NWLR (Pt 7841) 542.

[568] See Section 162 of the 1999 Constitution of the Federal Republic of Nigeria.

[569] Etikerentse G (n 16) 40.

[570] Bassey U "Nigeria opts for private investors for 2016 joint venture funding" (2015) Premium Times, 01 May 2017, Abuja <www.premiumtimesng.com/business/business-interviews> accessed 01 May 2017. Cash call is the financial contributions by the Nigerian National Petroleum Corporation, NNPC, and its six Multinational joint venture partners to their oil and gas annual operations. This statement is credited to the Minister of State for Petroleum Resources, who doubles as the Group Managing Director of the NNPC, Ibe Kachikwu, in Vienna, Austria during the Organisation of Petroleum Exporting Countries, OPEC, conference that high level discussions were already on with local and international investors to bridge the perennial JV cash call funding gap.

[571] Etikerentse G (n 16) 40.

[572] Operators in the Petroleum Industry, (n 566) 1.

away with the often difficult cash call regime, while at the same time enhancing the efficient running of oil and gas resources and ensuring growth.[573]

Government therefore has announced its resolve that all JV operations will in future be subjected to a new funding regime, which will allow for cost recovery.[574] Until now, the upstream JV agreements have been unincorporated JV with oil companies but the Executive Council of the Federation and the National Economic Council has approved a new funding system for the JV oil and gas operations in the country.[575] Under the new dispensation, the JV would become incorporated and source their own financing as an incorporated company.[576] The Federal Government is to implement an incorporated joint venture as recommended in the Petroleum Industry Bill (PIB)[577] and as a follow-up to government policy towards solving cash calls problem of the NNPC from the present unincorporated JV.[578] This new funding system is expected to increase exploration and exploitation operations, thereby affording the government the opportunity to allocate funds timeously and proportionately to infrastructure, agriculture, solid minerals, education, manufacturing sectors and health.[579]

3.9.1.3 The Production Sharing Contracts/Agreements (PSCs/PSAs)

In 1967, Indonesia adopted the concept of Production Sharing Contract (hereinafter referred to as PSC). Indonesia was said to be the first petroleum producing country to use the concept as a legal tool for allowing foreign oil enterprises to carry out oil extraction in its territory.[580] It was referred to as "Indonesian formula" in which the state would retain ownership of the resources (but permit foreign corporations to manage and operate the development of the oil field) and negotiate a profit-sharing system.[581]

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[573] Operators in the Petroleum Industry, (n 566) 1.
[574] Operators in the Petroleum Industry, (n 566) 1.
[575] Operators in the Petroleum Industry, (n 566) 2.
[576] Operators in the Petroleum Industry, (n 566) 2.
[577] The PIB shall be discussed later in the chapter.
[578] Oladunjoye OM "Incorporated Joint Ventures in the Nigerian Petroleum Industry: Examining the Legal Implications & Regulatory Risks" (2013) *11(2) Oil, Gas & Energy Law Intelligence (OGEL)* 1-13 <www.ogel.org.> accessed 02 May 2017.
[579] Operators in the Petroleum Industry, (n 566) 2.
[580] Taverne B *Petroleum, Industry and Government: An Introduction to Petroleum Regulation, Economies and Government Policies* (London, Kluwer Law International 1999)
[581] Radon J (n 361) 68.

A PSC is a contract between an International Oil Company (IOC) and National Oil Company (NOC) (representing the Host Country), permitting the IOC to extract petroleum within a certain area subject to the rules of the agreement.[582] The first PSC in Nigeria was the one between NNPC and Ashland Oil (Nigeria) Company – the Nigerian subsidiary of an American company in 1973 covering the exploitation of NNPC's concessions of Oil Prospecting Licences Numbers 118 and 98 situate respectively in Imo State and off-shore the Cross River State.[583] The contract was to last for twenty years with a renewable term of five years.[584] This PSC remained the only one in operation for over a decade until, pursuant to the Federal Government's petroleum sector policy, the PSC became the preferred means of Government participation in the upstream petroleum industry.[585]

As discussed earlier,[586] the NNPC had a lot of challenges under the JV arrangement because it could not meet its cash call obligations. The PSC was thus considered suitable as it would not bring about any financial burden on the government. Nigeria also sought to increase its petroleum production through the development of the offshore and inland basin, hence adopted PSC as the appropriate upstream petroleum model that would be appropriate for the award of the acreages in the early 1990s.[587] In 1993, the NNPC signed new PSCs with eight oil companies. The companies included: Shell Nigeria Exploration and Production Company, Mobil Producing Nigeria Unlimited, Nigerian Agip Oil Company, British Petroleum in alliance with Norwegian Statoil, Elf Petroleum, and Chevron Nigeria Limited. Other new entrants were also Esso, Du Pont and Abacan Resources Corporation.[588]

Thus, in a typical PSC, the IOC furnishes the entire funds for the expenses or cost involved in exploration, drilling and production including day to day running of the

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582 Taverne B "Production Sharing Agreements in Principle and in Practice" in David MR (ed) *Upstream Oil and Gas Agreement,* (London, Sweet & Maxwell, 1996).
583 Etikerentse G (n 16) 88.
584 Etikerentse G (n 16) 88.
585 Etikerentse G (n 16) 88.
586 See page 116 of this thesis.
587 Ogunleye TA "A Legal Analysis of Production Sharing Contract Arrangements in the Nigerian Petroleum Industry" (2015) 5(8), *Journal of Energy Technologies and Policy,* 1 <www.iiste.org/Journals> accessed 18 May 2017.
588 Atsegbua L "The development and acquisition of oil licences and leases in Nigeria (1999)" 69 *1999 Organization of the Petroleum Exporting Countries* <http://onlinelibrary.wiley.com> accessed 18 May 2017.

JV.[589] When oil is discovered in commercial quantities, the company is entitled to recoup its investment from the crude oil produced.[590] This portion of the oil is usually called 'cost recovery oil.' The remainder is then shared between the National Oil Company (NOC) and the IOC in predetermined proportions.[591] The amounts of crude oil involved in the production spilt are subject to income tax, with the contractor's share being paid by itself, or on its behalf by the NOC.[592] The percentages of production set aside for cost recovery vary worldwide between 20 per cent and 40 per cent. A greater disparity exists worldwide between the ratios of production splits. These range from 81 to 90 percent going to the NOC, with a corresponding 19 to 10 per cent accruing to the IOCs in Egypt and Libya, to 15 per cent NOC and 85 per cent IOC in Chile.[593] It should be noted that the disparities are not as striking as they seem because of the income tax rates which affect the production retained by the parties.[594]

The applicable funding regime and tax rates of PSC are significantly different from that of a JV. This was why the NNPC requested Chevron and Shell Petroleum to incorporate new companies during the negotiations leading to the PSC grants because Chevron and Shell Petroleum were in a joint venture with NNPC already.[595] Chevron and Shell incorporated Chevron Petroleum Nigeria Limited and Shell Nigeria Exploratory and Production Company (SNEPCO) respectively to operate their PSC. In a typical PSC arrangement in Nigeria, the concession remained that of the NNPC, the legal ownership and interest of the concession remained in NNPC. The IOC provided JV funds and the reimbursement of IOC's was dependent on production.[596] The IOC has the obligation to meet the requirements of fiscal

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[589] Etikerentse G (n 16) 89.
[590] Omorogbe Y (n 126) 60.
[591] Blinn KW *et al International Petroleum Exploration and Exploitation Agreements —Legal, Economic and Political Aspects* (New York: Barrows Co, 1986) 69.
[592] Blinn KW *et al* (n 591) 69.
[593] Blinn KW *et al* (n 591) 69.
[594] Blinn KW *et al* (n 591) 69.
[595] Etikerentse G (n 16) 88.
[596] Etikerentse G (n 16) 88.

legislation, especially the Petroleum Profits Tax Act[597] and the Petroleum (Drilling and Production) Regulations.[598]

Under PSC arrangements in Nigeria, the following commonly used terminologies: Royalty Oil, Cost Oil, Tax Oil and Profit Oil are explained below.

3.9.1.3.1 Royalty Oil[599]

Royalty oil rates are fixed in accordance with the location of the field such that generally the further or deeper the concession is from onshore, the lower the royalty rate that is applicable. This is contained in section 5 of the Deep Offshore and Inland Basin Production Sharing Contracts Act 1999 No. 9 and those of the Petroleum (Drilling and Production) (Amendment) Regulations 2003 for onshore and shallow offshore areas.[600] The royalty oil is allotted in such quantum as generating an amount of the proceeds equal to the actual royalty payable during each month and the concession rental annually in accordance with the PSC terms.[601]

3.9.1.3.2 Cost Oil[602]

This is the amount of crude oil allotted to the IOC or contractor in such a quantum as generating an amount of proceeds sufficient for the recovery of operating costs in the OPL and any OMLs, which is recoverable in the year of expenditure, and capital costs, which are recoverable in equal instalments over a five-year period or over the remaining duration of the contract.[603] The operating costs are recoverable in U.S dollars.[604]

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[597] Section 8 of the Petroleum Profits Tax Act and the Act's Interpretation section (Section 2) for the definition of 'petroleum operations'. IOC was required to pay petroleum profits tax at 85 per cent rather than the lower company tax rate under the companies Income Tax Act (Cap. 60 LFN 1990).

[598] See the Statutory Instrument no. 3 of 2001 and Section 6 of Statutory Instrument of 2003.

[599] Section 7 of the Deep Offshore and Inland Basin Production Sharing Contracts Act, 1999 No. 9 and Section 6 of Statutory Instrument of 2003.

[600] Etikerentse G (n 16) 91.

[601] Section 7 of the Act. See also Etikerentse G (n 16) 91.

[602] Section 8 of the Deep Offshore and Inland Basin Production Sharing Contracts Act, 1999 No. 9 and Section 6 of Statutory Instrument of 2003.

[603] Section 8(1) of the Deep Offshore and Inland Basin Production Sharing Contracts Act, 1999. See also Y Omorogbe, (n 126) 51.

[604] Section 8(2) of the Deep Offshore and Inland Basin Production Sharing Contracts Act, 1999. See also Etikerentse G (n 16) 91.

3.9.1.3.3 Tax Oil[605]

This is the portion allocated to the NNPC (or the holder of the OPL) in such quantum as would generate an amount of money equal to the petroleum profits tax liability payable during each month.[606] The petroleum profits tax rate applicable to PSCs is a flat rate of 50% of the chargeable profits for the duration of the PSC.[607] Though the PSCs are substantially the same, with some modifications, the tax oil could be negotiated and therefore vary according to the particular PSC.[608]

3.9.1.3.4 Profit Oil[609]

The profit oil or production split is the balance of available crude oil after the deduction there from of the royalty oil, tax oil, and cost oil portions and is allocated to each party in accordance with the terms of the PSC.[610] By its very nature, PSC is very flexible: the profit split could be used with many variations, in accordance with the partners' wishes.[611]

3.9.1.4 Service Contract

Under this model, the Contractor usually the IOC, undertakes exploration, development and production activities for, and on behalf of, NNPC, provides the entire risk capital for exploration and exploitation. The concession ownership remains entirely with the NNPC/ holder, and the contractor has no title to the oil produced.[612] The contractor is reimbursed costs incurred only from the proceeds of oil sold and the contractor is paid periodical remuneration in accordance with the formulae stipulated in the contract.[613] The IOC/Contractor has the first option to buy

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605 Section 9 of the Deep Offshore and Inland Basin Production Sharing Contracts Act, 1999 No. 9 and Section 6 of Statutory Instrument of 2003.

606 Section 9 of the Deep Offshore and Inland Basin Production Sharing Contracts Act, 1999. See also Etikerentse G (n 16) 91.

607 Section 4 of the Deep Offshore and Inland Basin Production Sharing Contracts Act, 1999. This rate, which is lower than the rate provided for in the Petroleum Profit Tax Act (Cap 340 Laws of the Federation of Nigeria 2004 hereinafter called the PPTA), was recently given legal validity by section 3(1) of the Deep Offshore and Inland Basin Production Sharing Contracts Decree 1999, which amended the PPTA.

608 Y Omorogbe, (n 126) 51.

609 Section 10 of the 1999 Production Sharing Contract Act.

610 Section 10. See also Etikerentse G (n 16) 92.

611 Omorogbe Y (n 126) 62. See also Clause 9 of the 1993 and 2000 PSCs.

612 Under this model, the Contractor undertakes exploration, development and production activities for, and on behalf of, NNPC or the concession holder, at its own risk. The concession ownership remains entirely with the NNPC/ holder, and the Contractor has no title to the oil produced

613 Omorogbe Y (n 126) 62.

back the crude oil produced from the concession. The Contractor is assessed for taxation purposes on its service fees under the Companies Income Tax Act as amended (CITA) at 30%; while the concession holder (or the NNPC) is assessed for tax under the PPTA.[614]

The Service Contract could be Risk-Service, Pure-Service or Technical Assistance Agreement. These types of service contracts are discussed below.

3.9.1.4.1 The risk service contract

These are arrangements whereby the contractor provides the entire risk capital for exploration and exploitation.[615] In case of discovery, the contract ceases to exist; however, the contractor is entitled to payment, which may be in cash or option for payment in crude oil if such is included in the contract.[616] This method of payment constitutes the major difference between the risk service contract and the production sharing contract.[617] This system is employed in Brazil, Argentina and Columbia.

3.9.1.4.2 The pure service contract

This is simply a contract of work. In this arrangement, the host country bears the whole risk; the contractor only performs its stipulated services and is paid for services rendered. This system is largely practiced in Qatar, Saudi Arabia, Kuwait and Bahrain.

3.9.1.4.3 The technical assistance contract

A Technical Assistance Contract has a narrow scope compared with the other service contracts; the company is brought in to perform a defined task for which it receives a fixed compensation. Unlike the other service contracts, however, the company has no possibility of acquiring an interest in the resource.[618] This contract is usually entered into by a country which is interested in developing a viable indigenous petroleum industry. Though it is similar to a pure service contract, the main difference is that the concerned company is engaged to provide technical

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[614] Omorogbe Y (n 126) 62.
[615] Omorogbe Y (n 126) 63.
[616] Omorogbe Y (n 126) 63.
[617] Omorogbe Y (n 126) 63.
[618] Likosky M "Contracting and regulatory issues in the oil and gas and metallic minerals industries" (2009) 18(1) *Transnational Corporations* 15.

service only without any interest in the oil produced at any time. The company in question is only entitled to a specified fee as remuneration.[619]

3.10 Legal Framework for Gas Production

The Nigerian gas sector can be divided into three segments namely: the upstream sector comprising exploration, drilling and production of natural gas, the midstream sector comprising transportation, and refining of gas, and downstream sector comprising the importation, storage and distribution of gas products.

In November 2016, the Ministry of Petroleum Resources issued the draft National Gas Policy. This policy aims to:

1. Set out the policy of the federal government in respect of Nigeria's natural gas endowment.
2. Set the medium- to long-term targets for gas reserves growth.
3. Deal with utilisation.
4. Ensure successful implementation of the policy by adhering to Nigeria's national social and economic development priorities.

Ownership of Natural Gas is vested in the Federal Government of Nigeria and this is contained in sections 40(3) and 44(3) of the Constitutions of the Federal Republic of Nigeria 1979 and 1999 respectively.[620] This is also contained in section 1 of the Petroleum Act[621] as well as the Exclusive Legislative powers in respect of matters listed in Part 1, Second Schedule of the 1999 Constitution which vested in the National Assembly the power to legislate on Natural Gas. Natural Gas was expressly listed in item 39. No gas-specific concessions were granted for gas production under the Production Sharing Contracts - Oil Mining Leases.[622] Nigeria is naturally endowed with enormous proven reserves of associated and non-associated gas.[623] Nigeria has abundant natural gas reserves estimated to be over 184 trillion standard cubic feet with the country ranked the largest holder of gas reserves in Africa and the 7th in terms of global gas reserves.[624] It is estimated that the natural

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[619] Omorogbe Y (n 126) 64.

[620] Gas is not treated separately under the Constitution of Nigeria.

[621] Petroleum Act, Cap 350, LFN 1990.

[622] Section 2 (1) (a-c) Petroleum Act (Chapter 350 LFN 1990; Chapter P10 Laws of the Federation of Nigeria. Oil and gas was instead mentioned in the provision of the Act. See also Regulation 39 Petroleum (Drilling & Production) Regulations on production of crude oil and natural gas.

[623] Nigeria: Oil & Gas Regulation (2017) Africa Law and Business <www.africanlawbusiness.com> accessed 1 May 2017.

[624] Gidado MM "Fiscal provisions for gas development and commercialisation under the Petroleum Industry Bill (PIB)" (2009) *NIALS Journal of Business Law* 27.

gas reserves/production will last for 109 years.[625] Gas production in Nigeria is closely linked to the production of crude oil. This is referred to as "associated gas." This gas is separable from oil at flow stations.[626] It is estimated that Nigeria produces an average of 34 billion cubic metres of gas yearly, but regrettably, large quantities of the gas are flared on a daily basis in the process of crude oil production, even though the Federal Government is taking steps to reduce gas flaring.[627] The SERAC case[628] is apposite here. In that case, the Nigerian Government was sued by SERAC on behalf the people of the Niger Delta for violating the socio-economic and environmental rights of the inhabitants. SERAC took up this case against Nigeria before the African Commission in 1996. In year 2000, the government admitted the allegations and took steps to remediate the environment and increase infrastructural facilities to improve the standard of living of the people. The government set up the NDDC as an interventionist agency to develop the Niger Delta region. However, the body has recorded little success and environmental degradation of the region continues.[629]

The Nigerian Liquefied National Gas (NLNG) was established to cater for the export of gas while domestic gas development remains at its lowest level.[630] The West African Gas Pipeline Projects (WAGPP) were signed between Nigeria and the Republics of Benin, Togo and Ghana. The pipeline was completed on 1 November 2011; it supplies gas through pipelines to neighbouring West African countries of Benin Republic, Togo and Ghana.[631] There is also the Escravos Gas Project executed by NNPC/Chevron JV. The plant is in the South-western part of the country and it produces mainly Liquefied Natural Gas (LNG) for export.[632] The Escravos-

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625 Nigeria: Oil & Gas Regulation (n 342).

626 Abila S "Law and Petroleum Industry in Nigeria, the Current Legal Issues for Gas Production and Utilization in Nigeria" <www.linkedin.com/pulse/law-petroleum-industry-nigeria...> accessed 10 May 2017.

627 Gidado MM (n 624) 27; Abila has claimed that 75 per cent out of the quantity of gas produced on daily basis were flared – Abila S (n 626).

628 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR)/Nigeriawww.achpr.org/files/sessions/30th/comunications/155.96> accessed on 13 July 2016.

629 As above. See the full discussion of the case in chapter one of this thesis, on pages 8 – 9.

630 Gidado MM (n 624) 27.

631 Gidado MM (n 624) 34.

632 National Petroleum Investment Management Services (NAPIMS) (2016) <www.napims.com> accessed 13 May 2017.

Lagos pipeline feeds the commercial nerve-centre of the nation, as well as fuelling the main power station at Egbin, near Lagos.[633]

There is also the OSO Natural Gas Liquids (NGL) Project, which is to convert associated wet gas into natural gas liquids.[634] The Oso NGL Project is run by the NNPC/Mobil JV and its NGL plant is located at its OSO field in the South-Eastern part of Nigeria.[635] All these gas projects are geared towards increasing export but do not concentrate on developing environmentally friendly programme along the line thereby causing further degradation of the environment.[636] Less emphasis is placed on producing gas for local consumption; the PIB is silent on this issue.[637]

The Federal Government has, however, developed a master plan aimed at addressing the underutilization of the gas sector-with emphasis on domestic gas consumption, to diversify the nation's economy and in the process reducing over-dependence on crude oil which has recently affected the nation's economy negatively because of the decline in the price of crude oil on the international market.[638] Despite the efforts made by the government, little significant changes have been noticed in the development of the gas sector. The reasons for this is not far-fetched; they range from low local commercial demand coupled with the fact that it is more expensive to exploit associated gas and weak or absence of necessary legal, policies and fiscal incentives to encourage the development of the industry.[639] The legal framework for the gas sector is discussed below.

3.10.1 The Constitution

To date, Nigeria has experimented with three different constitutions[640] and the fourth being the 1999 Constitution of the Federal Republic of Nigeria is still extant. The Independence Constitution of Nigeria 1960 and the Republican Constitution of 1963

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633 NNPC, 2017 <www.nnpcgroup.com> accessed 13 May 2017.
634 Gidado MM (n 624) 34.
635 NAPIMS (n 632).
636 Gidado MM (n 624) 34. See also SERAC's case against the Nigerian Government – chapter one of this thesis, footnote 57, pages 11 – 12.
637 Gidado MM (n 624) 35.
638 See the 'Nigeria Strategic Gas Plan' Joint UNDP/World Bank Energy Sector Management Assistance Programme (ESMAP) ESM 279, Report 279/04 February 2004. The prices have declined further in 2016-2017 to less than 50 US dollars.
639 Abila S (n 626).
640 The Independence Constitution of Nigeria 1960, the Republican Constitution of 1963 and the 1979 Constitution.

empowered the Federal Legislature to legislate on 'Mines and minerals, including oilfields, oil mining, geological surveys and natural gas' exclusively.[641] The 1979 and 1999 Constitutions empowered the Federal Legislature to legislate on 'Mines and minerals, including oilfields, oil mining, geological surveys and natural gas' under the Exclusive Legislative List.[642] The 1979 and 1999 Constitutions also vested in the Federal Government the ownership of all mineral resources onshore and offshore of Nigerian territory. Sections 40(3) and 44(3) of the 1979 and 1999 Constitutions using the same language provide as follows:

> Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

The Petroleum Act 2004 and the Nigerian Minerals and Mining Act 2007 gave effect to this provision of the constitution in their section one respectively.

3.10.2 Associated Gas Re-Injection Act 2004[643]

Section 1 of the Act mandates every company producing oil and gas in Nigeria to submit to the Minister a preliminary programme for the viable utilization of all associated gas produced from a field or groups of fields and project or projects to re-inject all gas produced in association with oil but not utilized in an industrial project.[644] In addition to that, companies are required to submit detailed plans for the implementation of gas re-injection; schemes for the viable utilization of all produced associated gas.[645]

Also, Regulation 43 of the Petroleum (Drilling & Production) Regulations provides for the mandatory utilisation of Associated Gas not later than five years after the commencement of production.[646] The reason for the grace period of five years to flare gas is not given. Flare-out Policy is contained in Section 3 (1) while the Flare Penalty is contained in Section 3 (2) of the Act, which states that in the event of

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[641] The Constitution of the Federation of Nigeria 1960 and the Republican Constitution of 1963 in Part I of The Exclusive Legislative List, Item 25.

[642] Second Schedule (Legislative Powers), Part I (Exclusive Legislative List), Item 36 of 1979 Constitution and 1999 Constitution Second Schedule (Legislative Powers), Part I (Exclusive Legislative List), Item 39.

[643] Cap A25 Laws Federation of Nigeria 2004.

[644] Section 1(a) and (b).

[645] Section 2(a) and (b).

[646] Regulation 43 of the Petroleum (Drilling & Production) Regulations, Decree No. 51 of 1969.

violation of the provisions of the Act, the licensee or lessee forfeits the acreage concerned.[647]

The Act made copious provisions to stop gas flaring by 1984; this provision was, however, weakened by the provision of Section 3 (1) which provided that the Minister may issue a certificate allowing the continuation of gas flaring where the utilization or re-injection of the produced gas is not appropriate or feasible in a particular field or fields. Later in 1985 Regulation 1 tagged Associated Gas Re-Injection (Continued Flaring of Gas) Regulations[648] gave few reasons why flaring might be permitted. For the gas flared, the erring company was required to pay penalty fees depending on the volume of gas flared.

Proceeds from gas flare penalties have proved to be a source of substantial income, and this seems to be of more interest to the Federal Government than the pressing demands by the people to stop gas flaring given its proven hazardous effects on human health.[649] Suffice to state that the amount levied as a penalty for flaring should be related to the damage caused thereby. This Act and the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations, made thereunder, were apparently not enacted to accomplish the policy to stop gas flaring because the gas could be flared on the permission of the Minister and upon payment of a required penalty.[650]

3.10.3 The Petroleum Act – provision for Gas

There has not been any separate/specific licensing procedure or organizational framework for the exploitation and production of natural/associated gas reserves in the country.[651] The exploration and exploitation of gas were conducted under an Oil Prospecting Licence (OPL) and an Oil Mining Lease (OML) under the Petroleum Act and its subsidiary legislations (as amended).[652]

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[647] That is Associated Gas Re-Injection Act.
[648] Associated Gas Re-Injection (Continued Flaring of Gas) Regulations, 1985.
[649] Ayodele-akaakar FO (n 60) 3.
[650] Ayodele-akaakar FO (n 60) 3.
[651] Gidado MM and Shishi JM "Statutory Framework for Refining Biofuels in Nigeria" in Azinge E. and Aduba N. (eds) *Law and Development in Nigeria: 50 years of Nationhood* 969 - 991 (NIALS Lagos 2010).
[652] Section 2 of the Petroleum Act Cap. 35 Laws of the Federation of Nigeria (LFN) 2004.

3.10.4 The Oil Pipeline Act, 2004– provision for Gas[653]

The OPA regulates the grant of licences for the establishment of oil pipelines which was defined to include gas and gas derivatives pipelines.[654] With the development of the local gas market, there was a growth of an increasingly expanded gas pipeline transportation system. In a bid to ensure that a comprehensive, safe and efficient system is developed, the statutory protection presently given on burial grounds and other venerated land by the OPA[655] should be extended to empower the Minister to declare certain areas as Special Protection Areas and Special Areas of Conservation. These areas should be granted such status to protect the ecology, listed plant and animal species and to promote the maintenance of bio-diversity.[656] Under the OPA, provisions relating to oil also apply to gas in respect of the pipelines.[657] The Licensing Regime for the Construction and Operation of Gas Pipelines, Permit to Survey Pipeline Route is contained in the Oil and Gas Pipelines Regulations of 1995. The Regulations give detailed guidelines for the design, construction and maintenance of Gas Pipelines.

3.11 Other laws governing oil and gas in Nigeria

3.11.1 The Land Use Act of 1978

The Act vests all land within the territory of each State (except land vested in the Federal Government or its agencies) solely in the Governor of the State.[658] It is important to note that petroleum resources are the exclusive preserve of the Federal Government notwithstanding that the resources is found within the jurisdiction of a state.[659] The Governor holds such land in trust for the people and is responsible for the allocation of land in urban areas to an individual resident in the State and to organisations for residential, agriculture, commercial and other purposes while similar powers with respect to non-urban areas are conferred on Local Governments.[660]

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653 Oil Pipelines Act, Cap O7, Laws of the Federation 2004.
654 Section 11(2) Oil Pipelines Act, Cap 338, Laws of the Federation 1990.
655 Section 15(1) (a and b) Oil Pipelines Act.
656 A clue can be taken of Section 14 of the Act by increasing the protected areas as provided for in this Section.
657 Section 11(2) of the Act.
658 Section 1 of the Land Use Act, Cap. 202 Laws of Federation of Nigeria 1990.
659 Section 44 (3) of the 1999 Constitution of Federal Republic of Nigeria.
660 See the preamble to the Land Use Act, 1978.

3.11.1.1 The issue of compensation

The Land Use Act in section 35(1) provides for the payment of compensation on land where such is compulsorily acquired by the Governor.[661] The Governor is required to pay to that person, group or family compensation to be computed as specified in section 29 of the Act in respect of the improvements based on the value at the date of revocation.[662]

The First Schedule to the Petroleum Act (as amended) also provides that the holder of an oil exploration licence, oil prospecting licence or oil mining lease is, in addition to any liability for compensation to which he may be subject under any other provision of the Act, liable to pay fair and adequate compensation for the disturbance of surface or other rights to any person who owns or is in lawful occupation of the licensed or leased lands.[663] In case any dispute arises as to the quantum of compensation payable for such unexhausted improvements, the dispute is referred to the Land Use and Allocation Committee for determination.[664] Compensation is usually calculated with reference to the provision of the Land Use Act cited above. The position of the law is that the owner is only entitled to compensation for improvements found upon the land and where nothing is found the landowner is not entitled to any compensation.[665]

Amokaye has argued that compensation payable under the Land Use Act is inadequate, meagre and usually falls short of the market value of the property in question.[666] He has, therefore, suggested that an amount that is commensurate to the value of crude oil and gas being extracted be paid to the land owners either on monthly, quarterly or yearly basis to compensate for environmental degradation in the Niger Delta.[667]

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[661] Land held under a leasehold, whether customary or otherwise, and formed part of an estate laid out by any person, group or family in whom the leasehold interest or reversion in respect of the land was vested immediately before the commencement of this Act.

[662] See section 29 of the Act.

[663] The First Schedule to the Petroleum Act (as amended), paragraph 37.

[664] See section 30 of the Land Use Act.

[665] Section 29 (4) (a), (b) and (c) of the Land Use Act. Para. C talks about paying for crops found on the land – the question is how much would payment on crop gives to the land owners compared with the quantum of oil and gas being exploited in those areas.

[666] Amokaye OG, "The impact of the Land Use Act upon land rights in Nigeria" in Home R (ed) *Local case studies in African land law* (Pretoria University Law Press (PULP) 2011) 75 <www.academia.edu> accessed 17 May 2017.

[667] Amokaye OG (n 666) 75.

Opafunso *et al* have opined that to find lasting solution to the crisis, gangsters' activities and kidnapping of oil and gas workers in the Niger Delta, the government should allow land owners to determine the value of the land through negotiations with the government and oil companies.[668] They have further advised that the government should design a suitable mechanism in the Land Use Act and other relevant laws to address this issue of compensation, and further that there is need for the enactment of legislation(s) that would provide fair and adequate compensation for environmental damage in the Niger Delta.[669]

Nuhu and Aliyu have also argued that it is erroneous to say that the Land Use Act has totally taken away the rights of families and communities over their lands if Section 34 of the Act is anything to go by.[670] That section provides as follows:

> Where the land is developed, the land shall continue to be held by the person in whom it was vested immediately before the commencement of this Act as if the holder of the land was the holder of a statutory right of occupancy issued by the Governor under this Act.[671]

This is otherwise referred to as a deemed right of occupancy. In this case, the individual or family owner is entitled to a certificate of occupancy.[672]

The provisions of the law about payment of compensation are applicable to the oil and gas sector of the petroleum industry. For example, section 6 (3) and (4) of the Oil Pipelines Act[673] imposes an obligation on the licence holder to pay compensation to persons whose interests in land are adversely affected and to persons who have suffered damage through the negligence of the licence holder or pipe leakage. Compensation must be fair and reasonable.[674] The Oil Pipelines Act provides in section 20 (4) that no compensation is payable in respect of unoccupied land as

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668 Opafunso ZO *et al* "Effects of the 1978 Land Use Act on Sustainable Mining and Petroleum Industries in Nigeria" (2015) 6(2) *Art and Social Sciences Journal* 5 <www.omicsonline.com/open-access/effects-of-the-1978-land-use-act-on-sustainable-mining-and-petroleum-industries-in-nigeria> accessed 18 May 2017.

669 Opafunso ZO *et al* (n 668) 5.

670 Nuhu MB and Aliyu AU "Compulsory Acquisition of Communal Land and Compensation Issues: The Case of Minna Metropolis" (2009) *TS 7E – Compulsory Purchase and Compensation and Valuation in Real Estate Development* 5<www.fig.net/pub/fig2009/papers/ts07e/ts07e_nuhu_aliyu> accessed 18 May 2017. This paper was written to assess the situation in Minna, Niger State of Nigeria but the same thing is applicable to the people of the Niger Delta *mutatis mutandis*.

671 Section 34(2) of the Act.

672 Section 34(3) of the Act.

673 Enacted in 1956 and adapted as Oil Pipeline Act Cap 338 Laws of the Federation of Nigeria 1990.

674 Section 6(4) of the Act.

defined in the Land Use Act, except to the extent and in the circumstances specified in that Act. It goes further to say in sub-section 5 that compensation must be in accordance with the provisions of section 20 which provides that the court shall apply the provisions of the Land Use Act so far as they are applicable and not in conflict with anything in the Act. In the event of a dispute as to the amount to be paid as compensation, the courts are the final statutory adjudicating authorities.[675]

The issue of compensation remains a volatile issue in the exploration and exploitation of oil and gas in Nigeria. The compensation paid is usually neither fair nor adequate in comparison with the volume of oil extracted on a daily basis from the communities of the Niger Delta region. To make the matter worse, the compensation paid is calculated based on the provisions of the Land Use Act in terms of the number of economic trees and other physical developments found on the land.[676]

Apart from statutory provisions, the common law causes of action, such as negligence, nuisance, trespass and the doctrine in *Rylands* v *Fletcher*[677] are also available to an injured party in cases involving trespass to land and environmental pollution.[678] In the case of *Rylands* v *Fletcher*, Fletcher hired a skilled engineer and contractor to construct a reservoir, playing no active role in its construction. The contractors discovered several coal shafts improperly filled with debris, but they chose to continue work rather than properly blocking them. They filled the reservoir constructed with water but due to the pressure of the water, it broke through the filled-in shaft of an abandoned coal mine and flooded connecting passageways in the plaintiff's active mine nearby.

Two points were canvassed. First, whether the defendants were liable irrespective of the proof of negligence on their own part, or on the part of any one engaged by them to erect the reservoir. Second, whether they, though personally guiltless of any negligence, were liable for the negligence of the contractor employed by them to construct the reservoir. On the second point, the Court of Exchequer found in favour of the defendants, and was not discussed in the subsequent appeals, because it was

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[675] Part IV Sections 19-23 of the Act.
[676] Sections 29 and 35 of the Land Use Act 1978, Cap 202 Laws of Federation of Nigeria 1990.
[677] (1868) LR 3 HL 330 <http://scholarship.law.upenn.edu> accessed 11 May 2017. The case established the doctrine of strict liability for abnormal dangerous activities under the English Law.
[678] Caused either by oil spillage or gas flaring.

held immaterial in view of the decision that the defendants were liable upon the first point. On the first point argued in the Court of Exchequer, Pollock, C. B., Martin and Channell, B. B., held that the defendants, not being guilty of negligence, were not liable for the harm done by the bursting of the reservoir. However, Bramwell, B., held a dissenting opinion because he was of view that the plaintiff had the right to enjoy his land free from the flood.

On appeal, Mr. Justice Blackburn, who delivered the opinion of the court, found in favour of the Plaintiff thereby reversing the decision of the lower court. He laid down the broad principle now commonly called the rule in *Rylands v. Fletcher* that:

> the person who for his own purpose brings on his lands and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major,* or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten clean by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he known to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches.

The case was further appealed to the Privy Council. The Council affirmed the decision of the appellate court and adopted the principle laid down by Mr. Justice Blackburn. Likewise, the laying of oil and gas pipelines are unnatural use of the land by the licensee or lessee concerned and in the event of oil spillage leading to fire incidence the licensee or lessee should be held responsible for the damage caused as a result of the spillage. Despite the laws that are meant to regulate environmental hazards caused by the extraction of oil, oil spillage and flaring of gas has continued unabated in the Niger Delta region.[679]

[679] Raji AOY and Abejide TS "Compliance with oil & gas regulations in the Niger Delta Region, Nigeria C. 1960s-2000: An assessment" (2014) *3(8) Arabian Journal of Business and Management Review (OMAN Chapter)* 40 <www.arabianjbmr.com> accessed 11 May 2017.

In Nigeria, the SERAC, a civil right organisation alleged that the government has neither monitored operations of the oil companies nor required safety measures that are standard procedure within the industry. They further alleged among others things that the Nigerian security forces have attacked, burned and destroyed several Ogoni villages and homes under the pretext of dislodging officials and supporters of the Movement for the Survival of Ogoni People (MOSOP).[680]

The case was an eye opener, although the environmental abuse of the Niger Delta has continued unabated. Organisations and individuals have continued to challenge the Nigerian Government's insensitivity to the plight of the oil producing communities by demanding remediation of the environment and the payment of adequate compensation.

3.11.2 Environmental Impact Assessment Act

The Federal Government in response to environmental degradation caused by oil spillage and gas flaring enacted the Environmental Impact Assessment Act (EIA Act)[681] to curb the menace of oil spillage and gas flaring in the country. It is important to mention here that the essence of an environmental impact assessment is to assess what the impacts oil and gas exploration and exploitation could have on the environment.[682] Thus, the assessment ought to be done before the commencement of the project. The objectives of the Act are:

> (a) to establish before a decision taken by any person, authority corporate body or unincorporated body including the Government of the Federation, State or Local Government intending to undertake or authorise the undertaking of any activity that may likely or to a significant extent affect the environment or have environmental effects on those activities shall first be taken into account;
> (b) to promote the implementation of appropriate policy in all Federal Lands (however acquired) States and Local Government Areas consistent with all laws and decision-making processes through which the goal and objective in paragraph (a) of this section may be realised;
> (c) to encourage the development of procedures for information exchange, notification and consultation between organs and persons when proposed activities are likely to have significant environmental effects on boundary or trans-state or on the environment of bordering towns and villages.[683]

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[680] SERAC's case (n 47) 1 (para 7).
[681] Environmental Impact Assessment Act, E12 Laws Federation of Nigeria 2004.
[682] Usman AK *Environmental Protection Law and Practice* (1st edn. Ababa Press Ltd, Ibadan, Nigeria 2012) 5.
[683] Section 1 (a), (b) and (c) of EIA Act.

Before an application to the Minister for a licence under the Oil Pipelines Act for development consent can be approved, an environmental impact assessment must be undertaken and the project authorised by the National Environmental Standards and Regulations Enforcement Agency (NESREA).[684] Construction of gas facilities is listed in the Schedule of Mandatory Study Activities.[685] This is a welcome and environmentally friendly development in the law.

The EIA Act makes conducting an EIA study mandatory before an oil and gas project can be commenced.[686] Environmental Impact Assessment is to be carried out with a view to determining the nature of the project and to what extent the project will affect the environment.[687] EIA studies apply not only to private projects, but also to projects being carried out by public institutions.[688] The EIA Act does not stipulate whether an assessment is to be conducted in house or through an external body.[689] To address this gap in the law, it is imperative that an independent body (an external body) should be established and entrusted with the responsibility for EIA study of projects in the petroleum industry.

The Environmental Guidelines and Standards for the Petroleum Industry (hereinafter referred to as 'EGASPIN') also make EIA studies mandatory. However, there is a closed category of projects that do not require EIA studies:

(i) Projects that the President or the Federal Environmental Protection Council feels are likely to have minimal environmental effect.
(ii) Projects carried out during national emergencies.
(iii) Projects carried out in circumstances that, in the opinion of the National Environmental Standards & Regulations Enforcement Agency are in the interest of public health or safety.

EGASPIN prescribes that the EIA study must be prepared by the project proponent or initiator, together with consultants certified by the Department of Petroleum Resources (DPR) (where necessary) and in conjunction with the DPR.[690]

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[684] Section 2(4) of EIA Act. The National Environmental Standards and Regulations Enforcement Agency (NESREA) replaced the Federal Environmental Protection Agency (FEPA).
[685] The Schedule of Mandatory Study Activities, Item 12 (c) and (e) of EIA Act.
[686] Section 22 (a) of the Act.
[687] Section 2 of the Act
[688] Section 2 (1) of the Act
[689] Section 58 only stipulates that the Agency can facilitate environmental assessment.
[690] Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN), 1991. It was revised in 2002, The Guidelines were issued by the Department of Petroleum Resources (DPR).

3.11.3 National Environmental Standards and Regulations Enforcement Agency (NESREA) Act 2007

The fore runner to NESREA Act was the Federal Environmental Protection Agency Act. It was the statutory threshold of a national policy on environmental protection in Nigeria.[691] The NESREA Act repealed and replaced both the Nigerian Environmental Protection Agency established by the Federal Environmental Protection Act.[692] It is an Act that provides for the establishment of the National Environmental Standards and Regulations Enforcement Agency charged with responsibility for the protection and development of the environment in the Country and for related matters.[693] It is also responsible for biodiversity conservation and sustainable development of natural resources in general and environmental technology, including coordination and liaison with relevant stakeholders within and outside the country on matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines.[694] The Act also prescribes the establishment of an Agency[695] with a Governing Council to be headed by a Chairperson appointed by the President on the recommendation of the Minster of Petroleum Resources. Other members are to be representatives of relevant ministries and other relevant stakeholders.[696]

The NESREA Act in section 7 outlines the functions of the Agency as follows:

(a) enforce compliance with laws, guidelines, policies and standards on environmental matters;
(b) coordinate and liaise with stakeholders, within and outside Nigeria, on matters of environmental standards, regulations and enforcement;
(c) enforce compliance with the provisions of international agreements, protocols, conventions and treaties on the environment, including climate change, biodiversity, conservation, desertification, forestry, oil and gas, chemicals, hazardous wastes, ozone depletion, marine and wild life, pollution, sanitation and such other environmental agreements as may from time to time come into force;
(d) enforce compliance with policies, standards, legislation and guidelines on water quality, environmental health and sanitation, including pollution abatement;
(e) enforce compliance with guidelines and legislations on sustainable management of the ecosystem, biodiversity conservation and the development of Nigeria's natural resources;
(f) enforce compliance with any legislation on sound chemical management, safe use of pesticides and disposal of spent packages thereof;

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[691] Okorodudu-Fubara MT *Law of Environmental Protection: Materials and Texts* (1st edn. Caltop Publication (Nigeria) Limited, Ibadan, Nigeria 1998) 168.
[692] Section 63(1) of EIA Act, (Decree No. 48 of 1992). See also Ogbodo SG "National Environmental Standards and Regulations Enforcement Agency (NESREA) Act – A Review" <http://nigerianlawguru.com> accessed on 12 May 2017.
[693] See the preamble to the Act.
[694] Section 2 of the Act.
[695] Section 1(2) (b) of the Act.
[696] Section 3 of the Act.

(g) enforce compliance with regulations on the importation, exportation, production, distribution, storage, sale, use, handling and disposal of hazardous chemicals and waste other than in the oil and gas sector;
(h) enforce through compliance monitoring, the environmental regulations and standards on noise, air, land, seas, oceans and other water bodies other than in the oil and gas sector;
(i) ensure that environmental projects funded by donor organizations and external support agencies adhered to regulations in environmental safety and protection;
(j) enforce environmental control measures through registration, licensing and permitting systems other than in the oil and gas sector;
(k) conduct environmental audit and establish data bank on regulatory and enforcement mechanisms of environmental standards other than in the oil and gas sector;
(l) create public awareness and provide environmental education on sustainable environmental management, promote private sector compliance with environmental regulations other than in the oil and gas sector and publish general scientific or other data resulting from the performance of its functions and
(m) carry out such activities as are necessary or expedient for the performance of it.

Section 8 of the Act empowers the Agency to use law enforcers to enable it to discharge its responsibilities/functions. The law enforcer of the Agency is referred to as an 'Authorised authority or officer' and this can as well be interpreted to mean that any Police officer not below the rank of Inspector of Police or any Customs officer can enforce the Act.[697] The law states that anyone that obstructs an officer of the agency has contravened the law and upon conviction can be sentenced to a minimum fine of two hundred thousand naira only (N200,000:00) or to a maximum imprisonment of one year or to both fine and imprisonment. In addition, the Act prescribes a further fine of twenty thousand naira only (N20,000:00) for each day the offence continues.[698] In case of obstruction by a body corporate, the corporation is liable, upon conviction, to two million naira only (N2, 000,000:00) and an additional fine of two hundred thousand naira only (N200,000:00) for each day the offence continues.[699]

The NESREA Council is heavily dominated by government appointees and representatives from the relevant ministries, thus defeating the purpose for its establishment which is to protect and develop the environment, because the appointing bodies are either the Minister on behalf of the President or government ministries representing the Federal Government. Since the Federal Government is involved in oil and gas exploration and production; the implication is that the Federal

[697] Section 37 of the interpretation section of the Act.
[698] Section 31 on offences and penalties.
[699] Section 31 on offences and penalties.

Government is being invited to regulate itself. For an organization of this nature to be effective, it must be independent of the government both in appointment and funding.

3.12 Summary

From the foregoing, Nigeria has an impressive array of legal instruments which are at times self-contradictory and ambiguous. Nigeria has good policies and laws but it has not succeeded in weaving the laws and policies into a corporate culture due to lack of thorough enforcement.[700] Furthermore, most of the laws (especially the Petroleum Act) are outdated and could not cope with the demands of the modern-day petroleum industry. Presently, more oil and gas extraction takes place in the deep sea offshore, which means Nigeria needs to update her laws to effectively cope with the new developments in the industry. In the light of the inadequacy of the laws coping with modern-day developments in the oil and gas sector, the Nigerian government in the year 2000 set up the Law Reform Commission. The Commission submitted its report in the year 2004. The government in 2007 set up the Law Report Implementation Committee to consider the Report. The Committee's work has culminated in the present Petroleum Industry Bill (PIB) and a sub-set of the PIB called the Petroleum Industry Governance Bill. The next chapter therefore discusses the gravamen of the proposed law reforms in the petroleum sector.

[700] Fagbohun O *The Law of Oil Pollution and Environmental Restoration: A Comparative Review* (1st edn. Odade Publishers Lagos Nigeria 2010) 464.

CHAPTER FOUR

THE PROPOSED REFORM OF THE OIL AND GAS SECTOR IN NIGERIA

4.0 Introduction

Having discussed the regulatory framework for oil and gas and its shortcomings in chapter three, this chapter is devoted to how the Federal Government intends to deal with the shortcomings in the law and institutions. As pointed out in the last chapter, since 1969, the Petroleum Act[701] has been the major law regulating the petroleum industry in Nigeria; though before that time the Petroleum Profits Tax Act 1959 had been enacted to ensure that the profits made by oil companies from oil production were taxed appropriately.[702] Pursuant to the Petroleum Act, the Petroleum (Drilling and Production) Regulations 1969 were promulgated. The Act has been subjected to some amendments, but it remains the main regulation in the industry. The Nigerian National Petroleum Corporation (NNPC) Act was also enacted in 1977 to establish the National Oil Company.[703] Apart from the fact that these laws are inadequate and outdated, policy statements and regulations are contained in various documents making it difficult to locate.[704] More importantly, the petroleum regime was not in line with international best practice; it could not ensure transparency, as well as ensuring good governance of the petroleum sector generally.[705]

Apart from the NNPC, the Ministry of Petroleum Resources was also established to oversee the industry, but the Ministry remains basically a civil service outfit that is ill-equipped to consider and formulate the essential policies for such a complex and sophisticated industry.[706] The Department of Petroleum Resources (DPR) was established as a regulatory body but was likewise constrained being a body located within the Ministry encumbered with bureaucratic bottle necks.[707] The most problematic issue, however, remains the Nigerian National Petroleum Corporation

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[701] Though it was amended in many instances it remains the main law for the regulation of the petroleum industry in Nigeria. CAP P10 Laws of the Federation of Nigeria 2004.
[702] The Petroleum Profits Tax Act of 1959, Cap. P13, Laws of the Federation of Nigeria, 2004.
[703] This repealed the Nigerian National Oil Corporation Act 1971. NNPC Act is in Cap. N123, Law of the Federation of Nigeria, 2004.
[704] Egbogah EO "Oil and Gas sector reforms in Nigeria: what you should know" <www.nigeria.com> page unknown Accessed 12 May 2016.
[705] Mailula DT (n 120) 238.
[706] Egbogah EO (n 704).
[707] Egbogah EO (n 704).

(NNPC) which cannot stand on its own.[708] It cannot honour its obligations for 'cash calls' in the joint venture agreements between it and the multinational oil companies.[709]

The present tax regime is inadequate; hence there is a need for a comprehensive tax policy for the oil and gas sector. The new oil and gas tax policy will be to improve on the tax system so that the Federal Government can earn more revenue from that sector for the development of other sectors of the economy. Nigeria's new Hydrocarbon Tax regime is to be established and when passed into law, it will override all other tax regimes.[710] It was because of the shortcomings of the present regulatory regime that the Federal Government put together a Bill known as Petroleum Industry Bill (PIB) which seeks to transform the oil and gas industry in Nigeria. The proposed reform is to be discussed in the subsequent paragraphs.

4.1 The proposed reform under the Petroleum Industry Bill (PIB)

By the year 2000, it became obvious that there was an urgent need for the revision of petroleum laws in Nigeria; therefore, the Federal Government initiated the reform process by setting up the Oil and Gas Sector Reform Implementation Committee (OGIC). This process led to the approval of the National Oil and Gas Policy in 2004.[711] The main objective of the policy was to make far-reaching changes and ensure the transformation of Nigeria's Oil and Gas industry, to bring it in line with 21st century petroleum industry.[712]

The National Oil and Gas Policy basically provides general guidelines for the development of the new oil and gas industry. These guidelines must be transformed into a more practical and concrete legal and institutional framework to effectively transform the oil and gas industry as envisaged by the policy. It was in this regard that the Federal Government set up the second version of the Oil and Gas Sector

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[708] Egbogah EO (n 704).
[709] Etikerentse G (n 16) 40.
[710] See Section 299 of Part VIII on the provisions on Taxation in the Petroleum Industry of the PIB.
[711] Oladunjoye OM "Incorporated Joint Ventures in the Nigerian Petroleum Industry: Examining the Legal Implications & Regulatory Risks" (2013) *11(2) Oil, Gas & Energy Law Intelligence (OGEL)* 3 <www.ogel.org.> accessed 02 May 2017.
[712] Oladunjoye OM (n 711). 3.

Reform Implementation Committee (OGIC).[713] The terms of reference of the Committee were as follows:

i. Assume the full mandate for the implementation of the OGIC report, especially as enshrined in the Road Map approved by government.
ii. Advise on the take-off, of the new bodies, institutions, organisations and agencies that would constitute the institutional framework for the restructured Oil industry.
iii. Identify and put in motion all required amendments and changes in all legislations governing the country's Oil and Gas industry as a result of the implementation of the OGIC report.
iv. Seek the approval of the President on all major amendments to the report that may arise in the course of implementation.
v. Engage, as much as possible, all industry stakeholders in the course of the implementation programme, as well as resource persons, facilitators and consultants where necessary.[714]

Therefore, the proposed reform was the result of a painstaking effort of the second version of the Oil and Gas Sector Reform Implementation Committee (OGIC) set up by the Federal Government in 2007. The report of this committee was submitted to government in 2009. From the Committee's report, the Petroleum Industry Bill (PIB) was put together and presented as a Bill to the National Assembly for enactment in 2012.[715]

The PIB is a comprehensive document covering most of the relevant issues pertaining to oil and gas exploration and exploitation in Nigeria. It emphasises the principles laid down in section 44 (3) of the Nigerian Constitution, which vests ownership and control of all petroleum in Nigeria including its Continental Shelf and Exclusive Economic Zone in the Federal Government. The Bill consolidated various pieces of legislation that were at various stages of the legislative process in the National Assembly. Among these were the Downstream Gas Bill, the Petroleum Profit Tax Amendment Bill, the Petroleum Equalisation Fund and Petroleum Trusts Development Fund Bills. The objectives of the PIB are to create a conducive business environment for petroleum operations, establish a progressive fiscal framework that encourages further investment in the petroleum industry while optimising revenue accruing to the government, create an efficient and effective

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[713] Egbogah EO (n 704).
[714] Egbogah EO (n 704).
[715] It is important to say that a segment of the Bill otherwise referred to as Petroleum Industry Governance Bill (PIGB) was passed by the Nigerian Senate (that is the Upper Chambers of the National Assembly) on the 25th day of May 2017. The same bill must also be passed into law by the House of Representatives (that is the lower Chambers of the National Assembly) and the President must assent to it before it becomes law.

regulatory agency and promote transparency and openness in administration of petroleum resources. However, National Assembly has not been able to pass the Bill due to controversies surrounding it. For instance, the multi-national oil companies have argued that the tax regime is too harsh and may discourage investment in oil and gas; they argued that it will no longer be profitable to invest in the sector because there will be low turn-over on the investment. Another controversy that stemmed from the provisions of the Bill is on the Petroleum Host Community Fund (PHCF). The Fund will be utilized for the development of the economic and social infrastructure of the communities within the petroleum producing area.[716]

The law makers from the other parts of the country especially those of them from Northern Nigeria believed PCHF is a way of increasing the 13% derivation already granted to the oil-producing states by the Constitution. According to them, the grant of such request will lead to unequal development of the States within the Federation. Because of this, the law makers broke the Bill into segments in order to pass the less controversial segment first and subsequently pass the remaining in piece-meal fashion as matters involved are resolved. The first segment of the PIB which is the Petroleum Industry Governance Bill (PIGB) was presented to the Senate. On the 25 May 2017, the Senate passed the Petroleum Industry Governance Bill (PIGB). The same Bill must also be passed by the House of Representatives (that is the lower Chamber of the National Assembly) and the President must assent to it before it becomes law.

As noted above,[717] the PIB is a comprehensive document covering most of the relevant issues pertaining to oil and gas exploration and exploitation in Nigeria. Some of the matters covered include: issues of state participation – ownership and control, fiscal matters, institutions and regulatory bodies, safety, health, environmental concerns and one of the knottiest issues – the issue of community relations.[718] These issues are here under discussed.

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[716] The law makers who are from Northern Nigeria were against the proposal saying it will bring unequal development in the country, the Niger Region having 13% derived under the 1999 constitution.

[717] See the last paragraph of page 158 above.

[718] Egbogah EO (n 704).

4.1.1 Ownership and Control

The PIB maintains the status quo in terms of retaining the ownership and control of oil and gas in the Federal Government. Section 2 of the PIB vesting the ownership and control in the Federal Government states as follows:

> The entire property and control of all petroleum in, under or upon any lands within Nigeria, its territorial waters, or which forms part of its Continental Shelf and the Exclusive Economic Zone, is vested in the Government of the Federation.

The issue of ownership has been a contentious issue in the petroleum industry in Nigeria. The PIB makes no progress in this direction, leaving the issue of ownership the way it has been since the colonial era. The failure of the PIB to touch this area means leaving Nigeria to contend with restiveness in the Niger Delta. This study argues that unless this burning issue is addressed in one way or the other, Nigeria's petroleum industry will continue to experience setbacks in terms of exploration and exploitation of the resources.

The Minister of Petroleum Resources is to manage and allocate petroleum resources and their derivatives on behalf of the Federal Government and in accordance with the principles of good governance, transparency and sustainable development. He is to grant, amend, renew, extend or revoke upstream petroleum licences and leases upon the advice of the Inspectorate pursuant to the provisions of this Act.[719]

Where oil is found in a community or individual's land, the compensation payable by the concerned oil company has been generating controversies over the years. Hence, the issue of compensation has been recurring in every segment of the law on oil and gas extraction in Nigeria but none has been realistic as the one in the PIB because it provided that the rates shall be arrived at through a consultative process and that the Agency involved shall update the guidelines annually to reflect rates of inflation and any other relevant factors.[720] Though so much still needed to be done, it is more than paying compensation to the community or individual because the effect of oil extraction on the people and the environment is devastating. The Federal government needs to take proactive steps to ensure that the infrastructure facilities

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[719] Section 6(1)(g) of PIB. Note that is contained in Section 2 (1)(g) of the Petroleum Industry Governance Bill. The Upstream Petroleum Inspectorate is to be known under the PIGB as Nigerian Petroleum Regulatory Commission.

[720] Section 296 (1) of the PIB.

are developed and the outdated ones are upgraded. The PIB provides for compensation in section 296(1) as follows:

> The holder of a petroleum exploration licence, petroleum prospecting licence or petroleum mining lease shall, in addition to any liability for compensation to which the holder may be subject under any other provision of this Act, be liable to pay fair and adequate compensation for the disturbance of the surface of the land or any other rights to any person who owns or is in lawful occupation of the licensed or leased lands, in accordance with written guidelines issued by the Agency. (2) The rates of compensation contained in the guidelines referred to in subsection (1) of this section shall be arrived at through a consultative process and the Agency shall update the guidelines issued annually to reflect rates of inflation and any other relevant factors.[721]

4.1.2 Licensing Regime for Upstream Operations

The PIB in order to improve the exploration and exploitation of oil and gas introduces a new licensing regime to replace the existing regime. Thus, the Oil Exploration Licence which is presently granted for the exploration of petroleum will be substituted by the Petroleum Exploration Licence which will be granted to carry out exploration on a non-exclusive basis.[722] The licence will bestow on the licensee the right to carry out geological, geophysical and geochemical exploration for petroleum within the licence area and to drill borehole not deeper than 150 meters using only percussion drilling techniques unless otherwise allowed by the Inspectorate.[723] This includes any right or option to win, get, work, store, carry away, transport, export or otherwise treat petroleum discovered in or under the said licence area. The duration is not more than three years. Likewise, the Oil Prospecting Licence which is presently granted to prospect for petroleum will be replaced by the Petroleum Prospecting Licence.[724] This is the exclusive right to carry out petroleum operations within the area of its licence, which is the right to carry away and dispose of crude oil, natural gas or bitumen won during prospecting operations because of production tests.

For onshore and shallow water areas, the duration is five years including the initial exploration period of three and is renewable for two years.[725] To explore the deep-water areas and the frontier acreage the licensee is given five years. In the case of prospecting licences, the duration is eight years including the initial five years of

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[721] Section 296 (1) of the PIB.
[722] Section 175 (1) of the PIB.
[723] Section 175 (2) and (3) of the PIB.
[724] Section 176 of the PIB.
[725] Section 177 (a) of the PIB.

exploration. The licence can be renewed for another three years.[726] Where certain conditions specified in the PIB are met, there is the possibility of a further extension of the duration.

The Oil Mining Lease which is presently granted to search for, win, work, carry away and dispose of petroleum will be replaced by the Petroleum Mining Lease.[727] It will be granted to the holder of a Petroleum Prospecting Licence who has fulfilled all the terms and conditions of the licence and the Inspectorate has approved the licensee's field development plan. The holder of a Petroleum Mining Lease will have the exclusive right to conduct petroleum operations over the lease area. Lessees will be subject to the domestic gas supply obligation as may be determined by the Inspectorate, where they produce natural gas. The maximum term for the lease will be twenty years, excluding the initial seven years for related petroleum prospecting licence for onshore and shallow water areas.[728] The duration for deep water areas and frontier acreages for petroleum mining lease will be thirty years from the date of the grant of the related petroleum prospecting licence. It is important to note that the PIB abolishes the grant of discretionary awards[729] of licences and leases, but creates an exception in the case of the President who is permitted under the Bill to grant licences or leases in special circumstances.[730] Section 190 (1) on the abolition of discretionary grant of licences states as follows:

> The grant of a petroleum prospecting licence or a petroleum mining lease not derived from a petroleum prospecting licence in respect of any territory in, under or upon the territory of Nigeria shall be by open, transparent and competitive bidding process conducted by the Inspectorate pursuant to the provision of subsection (2) of this section.

4.1.3 The Fiscal Regime under the PIB

The PIB puts forward a new fiscal regime for the oil and gas industry, which hopes to improve the economic benefits derived from petroleum exploration and production. One of the fiscal policy objectives is to balance Government's increased revenue

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[726] Section 177 (b) of the PIB.
[727] Section 181 of the PIB.
[728] Section 184 (1) of the PIB.
[729] Section 190 (3) of the PIB.
[730] Section 19 of the PIB.

through tax-take with incentives to invest in the oil industry.[731] The fiscal regime is about the tax introduced by the Federal Government and its cost implications for the oil industry. This fiscal regime includes: Hydrocarbon Tax, Companies Income Tax and Royalties.[732] For instance, the PIB proposes Hydrocarbon Tax as a replacement for the Petroleum Profits Tax (PPT).[733] The PIB states that the assessable tax for any accounting period of a company shall be a percentage of the chargeable profits for that period and shall be totalled6 as follows: '50% for onshore and shallow water areas and 25% for bitumen, frontier acreages and deep-water areas.'[734]

4.1.3.1 Nigerian Hydrocarbon Tax (NHT)[735]

The Petroleum Profit Tax (PPT) for deep-water offshore and frontier operations in Nigeria is currently put at 50% of profit for PSC contracts.[736] However, the PIB proposes the NHT and Company Income Tax (CIT) to replace the PPT. The proposed NHT rate for deep-water/frontier operations is 30% of total revenue less expenses. Section 305 of the PIB[737] accommodates the deductions of all outgoings and expenses wholly, exclusively, necessarily and reasonably incurred by a company, during that period for those operations. However, some costs are non-deductible for NHT purposes (for instance, initial capital employed in PSCs will not be deductible) and only 80% of foreign expenses are deductible.[738]

Meanwhile, 20% of expenses that are incurred outside Nigeria are not deductible except where such expenditure relates to the procurement of goods or services which are not available domestically in the required quantity and quality. And that will be subject to the approval of the Nigerian Content Development and Monitoring Board.[739] Interest and financing expenses; production and signature bonuses;[740] any amount incurred in respect of any income tax, profit tax, or similar tax whether charged within Nigeria or elsewhere except tax imposed in accordance with the

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731 A Closer Look at the Petroleum Industry Bill (PIB) (2015) 7 <http://stakeholderdemocracy.org> accessed 09 May 2017.
732 A Closer Look at PIB (n 731) 8.
733 Section 299, Part VIII on the Provisions on Taxation in the Petroleum Industry - Imposition of the Nigerian Hydrocarbon Tax.
734 Section 313 (1) (a) and (b) - Assessable Tax.
735 Section 299 of PIB.
736 Section 22 (2) PPTA as amended (1999 No. 30).
737 Proposed Bill for an Act.
738 Section 306 of the PIB.
739 Section 306 (n) of the PIB.
740 Section 306 (l) of the PIB

Education Tax Act;[741] and gas flaring penalties[742] among other costs will not be deductible for purposes of NHT.[743] Thus, the tax base for the NHT will not be fully profit-based since it excludes some qualifying expenditure. Therefore, despite being a profit-based tax, the NHT will not be a completely neutral tax either.[744] These measures will be a disincentive for the oil companies in respect of deep-water investment and will have serious implications for the petroleum industry in Nigeria because most production-sharing contracts are in deep-water areas and have high capital costs.[745]

4.1.3.2 Company Income Tax (CIT) and Withholding Tax on Dividends

The main change from the former Companies Income Tax (CIT) is that CIT is now payable on upstream (exploration and production) operations. Companies involved in both upstream and downstream (refining and distributing) must compute CIT separately in respect of each operation. To improve Nigeria's refining capacity, various tax incentives are offered for greater involvement in downstream oil investment.[746] There is no specific provision in the PIB for royalty, however, but it gave the Minister the power to change the system.[747]

In addition to the NHT, the PIB proposes a Company Income Tax (CIT) of 30% on net profit. Withholding Tax (WHT) of 10% is also proposed on dividends. Unlike in the case of the NHT, 100% of the relevant costs incurred are deductible for CIT purposes except for costs designated non-recoverable. However, the tax expense in respect of the NHT earlier charged is not an allowable deduction for CIT purposes. Furthermore, signature bonuses and production bonuses are not cost recoverable or tax deductible.[748] Thus, like the NHT, the CIT also is not completely a profit-based tax since some relevant costs are non-allowable and non-recoverable.[749]

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[741] Section 306 (f) of the PIB.
[742] Section 306 (k) of the PIB.
[743] See Section 306 generally.
[744] Sani S and Mohammed A "The Nigerian Petroleum Industry Bill: An Evaluation of the Effect of the Proposed Fiscal Terms on Investment in the Upstream Sector" (2014) 2(2) *Journal of Business and Management Sciences* 45-57 <http://pubs.sciepub.com> accessed 09 May 2017.
[745] A Closer Look at PIB (n 731) 7.
[746] A Closer Look at PIB (n 731) 7.
[747] A Closer Look at PIB (n 731) 7.
[748] Section (306) (l) of the PIB.
[749] Sani S and Mohammed A (n 744).

4.1.4 Environmental Protection under PIB

The PIB also makes provision for the regulation of the environment and air quality emissions. The PIB in clause 6 expressly provided for the functions and powers of the Minister of Petroleum Resources and enjoins him/her, among other things to attend international organization meetings concerned with the petroleum industry, "... introduce and enforce integrated health, safety and environmental quality management systems."

One of the main objectives of PIB is to reduce gas flaring to the barest minimum. Environmental pollution has been one of the major negative impact of oil extraction in Nigeria. Nigeria was brought before the African Commission by SERAC for violation of socio-economic and environmental rights of the people of Ogoniland in particular and the Niger Delta in general.[750]

Ologunorisa has also pointed out that gas flaring is responsible for a decrease in agricultural yields, depression in flowering and fruiting in Okro and palm trees, deformities in children, liver damage and skin problems, increasing concentrations of airborne pollutants, acidification of soils and rain water, corrosion of metal roofs and significant increases in concentrations of sulphates, nitrates and dissolved solids, with associated socio-economic problems.[751]

Section 200(1) of PIB states that:

> Every licensee or lessee engaged in upstream petroleum operations shall, within one year of the commencement of this Act, or within three months after having been granted the license or lease, submit an environmental management plan to the Inspectorate for approval.

The environmental management plan will:

> (a) establish an initial baseline information and a programme for collecting further baseline information concerning the affected environment to determine protection and remedial measures and environmental management objectives;
> (b) investigate, assess and evaluate the impact of the licensee's or lessee's proposed exploration and production activities on:
> (i) the environment; and

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[750] SERAC's case (n 47) 1 (para 7).

[751] Ologunorisa E "A Review on the effects of Gas flaring on the Niger Delta Environment" (2001) 8(3) *International Journal of Sustainable Development & World Ecology* 249 <www.tandfonline.com/loi/tsdw20> accessed 09 May 2017.

(ii) the socio-economic conditions of any person who might be directly affected by the upstream petroleum operations.[752]

To deter the oil companies from gas flaring, section 201 provides for gas flaring penalties as follows:

(1) The lessee shall pay such gas flaring penalties as the Minister may determine from time to time.
(2) The lessee shall install all such measurement equipment as ordered by the Inspectorate to properly measure the amount of gas being flared.

4.1.5 Regulatory and Institutional Framework under the PIB

Before the new National Oil and Gas Policy was adopted, there has not been clear cut regulatory framework governing the industry. At some time, a department in the NNPC was the regulator; at some other time, it was the DPR, an arm of the Ministry of Petroleum Resources that was the regulator. Thus, there were no clear-cut roles for these institutions.[753] The Committee (OGIC) recommended that the NNPC should take responsibility for oil exploration and production. To bring to fruition the recommendation of the Committee to commercialize the NNPC, clause 148 of the PIB provides as follows:

> The Minister shall, not later than three months after the effective date, take such steps as are necessary under the Companies and Allied Matters Act to incorporate the National Oil Company as a public company limited by shares, which shall be vested with certain assets and liabilities of the NNPC.

4.1.5.1 The NNPC PLC

The NNPC is to be incorporated as a limited liability company under the Companies and Allied Matters Act (CAMA 1990). The aim is to make the NNPC a self-financing national oil corporation capable of competing both locally and internationally in the relevant segments of the oil and gas industry.[754]

Concerning the joint venture operations, the NNPC hitherto operated unincorporated joint ventures, but it is recommended that the existing NNPC joint ventures be incorporated into autonomous commercial entities under the Companies and Allied Matters Act (CAMA).[755] It is proposed that all assets currently held in the joint ventures should be transferred into the new Incorporated Joint Venture (IJV)

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[752] Section 200 (3) (a) and (b) of PIB.
[753] Egbogah EO (n 704).
[754] Egbogah EO (n 704).
[755] Egbogah EO (n 704).

companies. It is important to note that regardless of incorporation under CAMA, the IJV remained governed by the Petroleum Profits Tax Act. The present Joint Operating Agreements (JOAs) between NNPC and its JV Partners will form the basis of the new Shareholders' agreement. The concept of appointing one of the partners to be the operator of the Joint Venture in the present JOAs will be substituted by Joint Operatorship led by the majority shareholder. The concept of 'cash call' which has been the bane of the current joint venture will be replaced by equity, debt and third-party financing.[756]

4.1.5.2 The role of the Minister

Under Part II of PIB, the Minister of Petroleum Resources will be responsible for the co-ordination of the activities of the petroleum industry and will exercise general supervision over all operations and all institutions in the industry. His/her functions and powers will include amongst others:

(a) be responsible for the formulation, determination and monitoring of Government policy for the petroleum industry in Nigeria;
(b) exercise general supervisory functions over the affairs and operations of the petroleum industry;
(c) report developments in the petroleum industry to the Federal Executive Council;
(d) advise the Government on all matters pertaining to the petroleum industry;
(e) represent Nigeria at meetings of international organisations that are primarily concerned with the petroleum industry.

Furthermore, the Minister will have a role to play in negotiating and executing international petroleum treaties and agreements with other sovereign countries, international organizations and other similar bodies on behalf of the Government. The Minister will grant, amend, renew, extend or revoke upstream petroleum licences and leases pursuant to the provisions of the Act upon the advice of the Inspectorate. He/she will advise the President on the appointments of the chief executives of the Upstream Petroleum Inspectorate, Downstream Petroleum Regulatory Agency, the National Oil Company, the Asset Management Corporation and any other Government agency or corporate entity established or to be established pursuant to the Act. For the purpose of inspecting operations conducted and accessing information available therein, and enforcing the provisions of the Act and any regulations made under the Act, the Minister will have access at all times to areas or rights of way covered by existing licences, leases, permits and

[756] Egbogah EO (n 704).

authorisations or any related offices or buildings, and all installations to which the Act will apply. The Minister will be empowered to do all such other things as are incidental and necessary for the performance of his functions.[757]

The Minister will be able to exercise his/her power to delegate to any other person or institution any power or function exercisable by him/her under the Bill except the power to make orders and regulations.[758] The Minister will have the power to make regulations necessary to give proper effect to the provisions of the PIB if advised by any of the agencies established under the PIB but subject to the provisions of subsections (2) and (3) of section 8. The Minister will be enjoined to conduct inquiries in the manner specified in section 8 (4). However, he/she can make any regulation without conducting an inquiry, if there is an emergency.[759] But such regulation can only stand after twelve months if confirmed by a public inquiry thereafter.[760]

In case of non-compliance or disobedience to the provision of the Bill, the culprit will be liable on conviction to a fine not exceeding N2,500,000.00.[761] If any person obstructs or interferes with the Minister, his servants or agents in the exercise of the powers conferred on him, the erring individual is liable on conviction to a fine not exceeding N5,000,000.00 or to imprisonment for a period not exceeding two years, or to both.[762]

4.1.5.3 Petroleum Technical Bureau

The PIB under clause 9 provides for the establishment of the Petroleum Technical Bureau, which shall consist of professionals with expertise in the upstream and downstream sectors of the petroleum industry. The Bureau shall carry out the functions of the former Frontier Exploration Services of NNPC. It will provide technical and professional support to the Minister on matters relating to the petroleum industry and it shall also assist the Minister in all activities relating to the petroleum industry.[763]

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[757] The roles of the Minister as contained in Paragraphs (f) – (k) of the PIB.
[758] Section 6(2) of the PIB.
[759] Section 8(6) of the PIB.
[760] Section 8(7) of the PIB.
[761] Section 7(3) of the PIB.
[762] Section 7(4) of the PIB.
[763] Section 10 (a) of the PIB and section 10 (b-h) of the PIB.

4.1.5.4 Upstream Petroleum Inspectorate (NPI)

The Department of Petroleum Resources (DPR) will be restructured into an autonomous regulatory agency to be known as the Nigerian Petroleum Inspectorate (NPI) with responsibility for the upstream sector regulations. The NPI will assume the functions of the former DPR like setting standards and regulations for the industry and for ensuring adherence to environmental guidelines from time to time. Generally, the body is to administer and enforce policies, laws and regulations relating to all aspects of upstream petroleum operations and to issue and manage licenses in the upstream sector. The NPI's establishment is provided for in Section 13 (1) of the PIB which states as follows:

> There is established under this Act the Upstream Petroleum Inspectorate ("the Inspectorate") as a body corporate with perpetual succession and a common seal and which may sue or be sued in its corporate name.

4.1.5.5 Petroleum Technology Development Fund

The Bill provides that there will be established a Petroleum Technology Development Fund.[764] It will be a body corporate with perpetual succession and a common seal, which means it will be able to enter into contracts, incur obligations and to do all things incidental to the carrying out of its functions and duties under the Act. The PTDF was established in 1973 but as a desk in the Department of Petroleum Resources, it became a government agency in 2000. Thus, the provision for PTDF in the PIB is to give legislative backing to the existing PTDF.[765] The Fund will provide scholarships, bursaries and endowments for the training of Nigerians who will qualify as graduates, professionals, technicians and craftsmen in the fields of engineering, geology, science and management and other relevant fields in the petroleum industry.[766]

4.1.5.6 The National Petroleum Assets Management Corporation

The PIB in clause 120 (1) provides for the establishment of the National Petroleum Assets Management Corporation (hereinafter referred to as NPAMC) and it will be a body corporate with perpetual succession, a common seal and will be able to sue or be sued in its corporate name. It is to be established as a holding company operating

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[764] This is provided for in Section 73 (1) of the PIB.
[765] It was established by a Decree under the Military Administration.
[766] Section 76 (1) (a-n) of the Bill.

fully on commercial principles.[767] The functions of the corporation will include acquiring and managing investments of the Government of Nigeria in the upstream petroleum industry; and, undertake such other activities as are necessary or expedient for the performance of its functions.[768]

4.1.5.7 The Petroleum Host Community Fund

The PIB also provides for a fund known as the Petroleum Host Community Fund (hereinafter referred to as 'the PHC Fund').[769] It is noteworthy that this is one of the giant strides to be taken in trying to solve the problems in the Niger Delta. The crisis in this part of the country has assumed alarming proportions in recent times.[770] The people are agitating for improved conditions of living. They decried the lack and sometimes decayed infrastructure facilities despite billions of Naira realised from the region.[771] One of the indigenes of the communities in Bayelsa State while responding to a question from the researcher on the reason for the unrest in the Niger Delta responded as follows:

> The Niger Delta crisis is quite unfortunate, but it is expected. In a situation where people by divine providence reside in a particular location, unknown to any person that God has endowed the soil where they locate the wealth that is enough to manage the environment. But in a situation where the government has come with laws that did not favour the development of those areas of course you should expect reactions. These are spontaneous reactions because of negligence of the Federal Government, as a result of not doing what government was supposed to do.

The Federal Government, in a deliberate effort to develop the oil producing communities, proposes the establishment of the PHC Fund. According to clause 117 of the PIB, the Fund will be utilized for the development of the economic and social infrastructure of the communities within the petroleum producing areas. Clause 118 (1) mandates every upstream petroleum producing Company to remit monthly ten percent of its net profit as follows:

> (a) for profit derived from upstream petroleum operations in onshore areas and in the offshore and shallow water areas, all of such remittance shall be made directly into the PHC Fund; and
> (b) for profit derived from upstream petroleum operations in deep-water areas, all of the remittance directly into the Fund for the benefit of the petroleum producing littoral States.

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[767] Section 120 (2).
[768] Section 120 (4) (a and b).
[769] Section 116.
[770] Ojameruaye E "A Review of the Petroleum Host Community Fund in the Revised Petroleum Industry Bill" (2012) page unknown <http://chatafrik.com/articles/nigerian-affairs/item/1188-a-review-of-the-petroleum-host-community-fund-in-the-revised-petroleum-industry-bill.html#.WX5i-mfRbIU> accessed 31 July 2017.
[771] Ojameruaye E (n 770).

The clause 118 (2) defines 'net profit' as the adjusted profit, less royalty, allowable deductions and allowances, less Nigerian Hydrocarbon Tax and less Companies Income Tax.

Clause 118 (5) however, limits the application of the Fund by providing that in the case of acts of vandalism, sabotage or civil disturbance that causes damage to any petroleum facilities within a host community, then the cost of the repairs will be paid from the fund earmarked for that community unless it is established that no member of the community is culpable. This provision for paying for the repairs caused by vandalism from the fund of the community which is responsible for it is like giving something with the right hand and using the left hand to collect it back. Because without a proper investigative process by which to determine the extent of the damage, this clause in the Bill and the identity of the perpetrator will easily render the PHCF vulnerable to corruption and misuse.[772]

The Minister will be empowered to make regulations on entitlement, governance and management structure with respect to the PHC Fund, subject to the provision of section 8 of the proposed Act.[773] Going by this provision of the PIB, the communities that are entitled to the Fund, governance and management structure are left entirely in the hands of the Minister of Petroleum Resources. In contrast to the Petroleum Development Fund and the other institutions set up under the Bill, there is no provision for a board of directors, or staff. This is a serious shortcoming in the Bill because the administration of the Fund is subject to the arbitrary power of the Minister of Petroleum Resources.[774] It should be noted that the Bill is yet to be passed as it is by the National Assembly because of controversies surrounding some of the provisions. However, a segment of the Bill known as Petroleum Industry Governance Bill (PIGB) has been passed by the Senate.[775]

4.1.6 The Nigerian Oil and Gas Local Content Policy under the PIB

The local content policy is also reflected in the Petroleum Industry Bill for example, one of the objectives of the PIB is to promote the development of Nigerian content in

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[772] A Closer Look at PIB (n 731) 7.
[773] Section 18(6) the PIB.
[774] A Closer Look at PIB (n 731) 11.
[775] This is discussed further under the section on Petroleum Industry Governance Bill (PIGB).

the petroleum industry.[776] Clauses 284-288 of Part VI make provisions for the participation of Indigenous Petroleum Companies. The provisions in clause 284-288 apply to oil prospecting licences and mining leases held by indigenous petroleum companies; and to petroleum operations undertaken pursuant to such licences and leases.[777] The PIB imposes an obligation on the Federal Government to promote the use of indigenous companies in the petroleum industry.

The PIB empowers the Petroleum Inspectorate to revoke a license, permit, etc. if the Nigerian local content law is not complied with. It repeats employment provisions of the Nigerian Content Development Board (NCDB) and requires licensees to submit a detailed programme for recruitment and training of Nigerians. It is important to note the provision of the PIB concerning retainership of legal services by the operators, contractors and subcontractors. The will provide opportunities for lawyers to also participate in the oil and gas sector of the economy by offering their professional services. Clause 51 (1) provides as follows:

> All operators, contractors and other entities engaged in any operation, business or transaction in the Nigerian oil and gas industry requiring legal services shall retain only the services of a Nigerian legal practitioner or a firm of Nigerian legal practitioners whose office is located in any part of Nigeria.

4.1.7 The National Gas Company under the PIB

The Bill proposes to establish a National Gas Company Limited by shares.[778] It provides that the Minister will, not later than three months after the coming into effect of the Bill; take such steps as will be necessary under the Companies and Allied Matters Act to incorporate the National Gas Company PLC as a company, limited by shares, which will be vested with certain assets and liabilities of NNPC. It is proposed that 49% of its shares will be divested to the public by listing on the Nigerian Stock Exchange (NSE) within 6 years of its incorporation.[779] Adeniji has argued that the provisions are internally inconsistent with its stated policy objectives because government having the total of 51% share in the NGC will be in control of the company, which is contrary to the stated objectives of the PIB which *inter alia* are

[776] See the "objective section" of the PIB (Section 1(l)).
[777] Section 284(1) (a) and (b).
[778] See Section 159 of the PIB.
[779] Section 162 of PIB.

to establish commercially oriented and profit driven oil and gas entities and deregulate and liberalise the downstream petroleum sector.[780]

The Bill further provides that the NGC will not be subject to the provisions of the Fiscal Responsibility Act 2007 and the Public Procurement Act 2007. This is to make it a commercial enterprise and make a clear distinction between it and a statutory corporation. It will be equally exempted from certain rates, for example gas pipelines and other installations belonging to the National Gas Company will not be regarded as hereditaments or tenements to be valued for rating purposes. For the purposes of subsection 1 of Section 168, the expression "Gas pipelines and other installations" will include gas rigs, refineries, power generating plants, pumping stations, tank farms and similar installations but do not include office or residential buildings.

Section 6 (1) (g) and (h) retains the old model of regulation where the Minister will continue to grant, amend, renew, extend or revoke licences upon the advice of the Inspectorate for the upstream petroleum licences and leases. He will also regulate downstream petroleum licences for gas transportation pipeline, gas distribution networks, refineries, LNG plants, petrochemical plants and gas exports upon the advice of the Agency. Appointment of the board members of the Agency will be at the pleasure of the President through the Minister of Petroleum Resources. Because of this and the fact that members of the board will not have security of tenure, this will undermine their independence. In such circumstances, politicians will regularly interfere with the regulation of the gas sector, which will ultimately result in inconsistent regulation.[781]

4.1.8 Fiscal regime for Gas under the PIB

As discussed earlier,[782] the Petroleum Profits Tax Act (PPTA) rates were seen as a disincentive to gas utilisation, hence the introduction of the Associated Gas Framework Agreement 1994 (AGFA). It granted incentives to the gas industry as follows: tax rate of 40%, the same as Company Income Tax Act (CITA);[783] Capital

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[780] Adeniji G "Boom or Bust – The PIB and Gas Sector Liberalisation in Nigeria" (2013) *A paper presented at: the 2nd Esq Oil and Gas Summit,* 5 <http://cpparesearch.org/wp-content/uploads> accessed 12 May 2017.

[781] Adeniji G (n 780) 5.

[782] See page 145 under Nigerian Hydrocarbon Tax (NHT) section.

[783] The principal law governing the taxation of Companies is the Companies Income Tax Act 1961, Cap C21 Vol.3 LFN 2004.

Allowance of 20% per annum from first to four years, 19% on the fifth year and 1% in the books; Investment Tax Credit (ITC) of 5% at current Petroleum Profits Tax and Royalty of 7% on-shore and 5% off-shore.[784]

In furtherance of the government's policy of promoting the exploration and exploitation of gas, a comprehensive tax regime will be introduced under the PIB. The PIB objectives for the gas sector are to optimize domestic gas supply for the power and industrial sectors, deregulate and liberalise the downstream petroleum sector,[785] create efficient and effective regulatory agencies"[786] and put in place a fiscal framework to encourage further investment in the gas sector.[787] For the first time in the Nigerian history of oil and gas extraction a distinction was made between the exploration and exploitation of crude oil and gas.[788] Because of these separate provisions, a separate licence/authorisation will be required to conduct gas exploitation activities under the PIB.[789]

Where gas is discovered in commercial quantity under a Petroleum Prospecting Licence, the licensee will be allowed to retain the area for a period of ten years pending the invitation of the Inspectorate for the licensee to declare a commercial discovery. Where the licensee fails to make a declaration of a commercial discovery prior to the expiration of the retention period, then the area shall be relinquished.[790] If the licensee is interested in exploiting the gas resources, he must submit a Nigerian content plan which must be approved before the commencement of work.[791]

The PIB will incorporate the provisions of the Company Income Tax Act including the incentives provided to companies engaged in midstream domestic gas, downstream domestic gas distribution, utilization operation and companies engaged in midstream export gas operation in respect of liquefied natural gas.[792]

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[784] As above.
[785] Section 1 (f) of the PIB.
[786] Section 1 (g) of the PIB.
[787] Section 1(d) of the PIB.
[788] Sections 159-169, 178 (12-18)0 of PIB. This thesis however, will concern itself with the upstream sector that is the exploration for and exploitation of the associated or natural gas?
[789] Exploration of gas is still tied with that of crude oil, see Section 178 of the bill.
[790] Section 178 (16) of the PIB.
[791] Section 178 (18) of the PIB.
[792] Section 416 of the PIB.

All capital costs of upstream gas investments up to the custody transfer points are treated as oil investments and the resulting capital allowances are deducted from PPT (at a marginal rate of 85%). Furthermore, the upstream producer is exempted from payment of royalty and PPT on any gas that is transferred to a downstream project. The Liquefied Natural Gas (LNG) projects receive a 10-year tax holiday/break.[793] The LNG project is also exempted from withholding tax[794] on interest and dividends paid to non-residents and from income tax on work or services provided by non-residents. There is also an additional investment allowance of 20% for upstream projects and 35% for LNG extraction.

4.2 The Petroleum Industry Governance Bill

As noted earlier,[795] the new Petroleum Industry Governance Bill (PIGB) was passed by the Senate of the National Assembly on the 25 May 2017.[796] The PIGB is a segment of the Petroleum Industry Bill (PIB), which was set to transform the operations in the Nigerian petroleum industry. The PIB is being held up in the National Assembly due to the inability of stakeholders to agree on some of its provisions. Following this unresolved disagreement, some of the concerned stakeholders requested for a piecemeal approach to enacting the Bill.[797] The Chairman, House of Representatives Committee on Petroleum Resources Downstream Sector while responding to the question put to him concerning the delay in the passage of the PIB responded as follows:

> No doubt, there are contending interests and issues like ownership and control, tax regime, institutions, power structures, etc. Even the oil companies are coming to express their reservations about some aspects of the proposed PIB. To ensure that all interests are balanced, for instance the interest of the International Oil Companies, the interest of the National Oil Company, interest of the Host Communities, the interest of the Government, the regulator and that of the inspectorate we must hear all the stakeholders out before the PIB can be passed.

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[793] Section 20 (4) (b) of the PIB.

[794] Withholding taxes are deducted at source from certain specified payments including interests, rents, dividends, management and consultancy fees. However, recognition is given for any amount of withholding tax deducted at source in the final computation of the tax liability <http://rockvilleandco.com> 15 May 2017.

[795] See page 162 of this chapter before the section on ownership and control.

[796] The same bill must also be passed into law by the House of Representatives (that is the lower Chambers of the National Assembly) and the President must assent to it before it becomes law.

[797] Perchstone and Graeys "Nigeria: The Introduction of The Petroleum Industry Governance and Institutional Framework Bill 2015" page unknown <www.mondaq.com/Nigeria> accessed 05 May 2017; Templars, "The Petroleum Industry Governance Bill, June 2017" <www.linkedin.com/company/templars> accessed 12 July 2017; Ayodele O "The Petroleum Industry Governance Bill Changing the Regulatory Landscape June 2017 <www.lexology.com/library/detail.aspx> accessed 12 July 2017.

The Chairman of the Senate Committee on Petroleum Upstream Sector in his own response to the same question on what is responsible for the delay in the passage of PIB had this to say:

> PIB as it was would have been very difficult to pass for some reasons, for example, the Host Community interest, when you talk about South-South, I could remember the Mid-Belt people were saying if you are going to do this for the South-South what about the Kanji and Siroro Dams that are used to supply electricity for Nigeria. So, because of all these interests, we said let us slow down on the passage of the Bill. Instead, let us treat the issue of regulatory authorities first because they are not performing satisfactorily. So, we say let us start by breaking down the old PIB to segments, for instance, we are dealing with Petroleum Industry Governance Bill and we hope to deal with that in the next few months. When we finish with that we want to go to the fiscal – what should be the responsibilities of the International Oil Companies (the IOCs) and so on and so forth.[798]

The PIGB sets-out to achieve the following amongst others: to create efficient and effective governing institutions with clear and separate roles for the petroleum industry; establish a framework for the creation of commercially-oriented and profit-driven petroleum bodies that ensure value addition and based on international best practice; promote transparency and accountability in the petroleum industry; and to foster a conducive business environment for petroleum industry operations.[799]

The PIGB can be classified into the following categories: Policy and General Strategy, Formulator, Regulator, Commercial Institutions and Ancillary Institutions.

4.2.1 The Role of Minister under the PIGB

The policy and general strategies are left in the hands of the Minister of Petroleum Resources. He/she will be responsible for the determination, formulation and monitoring of Government policy for the petroleum industry.[800] He/she is to supervise the affairs and operations of the petroleum industry subject to the provisions of this Act.[801] The Minister among other things will be empowered to promote the local content in the Nigerian petroleum industry, to represent and execute treaties and agreements on petroleum Nigeria entered into with other countries.[802] The Minister

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[798] This interview was conducted on 2 March 2017. It is interesting to note that the Senate passed the Petroleum Industry Governance Bill on the 25 May 2017, few weeks after conducting the interview relieved above.

[799] Perchstone and Graeys (n 885); KPMG "The Petroleum Industry Governance Bill" 1 <www.kpmg.com/ng> accessed 9 July 2017.

[800] Section 2 (1) (a) of Part 2 of the PIGB 2017.

[801] Section 2 (1) (b) of Part 2 of the PIGB 2017.

[802] Section 2 (1) (e) - (g)of Part 2 of the PIGB 2017.

will not be able to grant, amend, renew, extend or revoke any licence or lease required for petroleum exploration or production except on the recommendation of the Nigeria Petroleum Regulatory Commission.[803] This is to ensure separation of duties and provide for checks and balances.[804] However, the Minister still retains pre-emptive rights to all petroleum products in the country in the event of a national emergency.[805] The PIGB prescribes 10 years imprisonment without option of a fine for contravention of the Bill; it regards such act as economic sabotage.[806]

4.2.2 National Petroleum Regulatory Commission (NPRC)

The PIGB provides for the establishment of the National Petroleum Regulatory Commission (NPRC) which will be a body corporate with perpetual succession and a common seal and which may sue or be sued in its corporate name.[807] It replaces the current Department of Petroleum Resources (DPR), the Petroleum Inspectorate and the Petroleum Products Pricing Regulatory Agency (PPPRA)) and as such will take over all assets, funds, resources and other movable and immovable properties currently held by the Petroleum Inspectorate, Department of Petroleum Resources and the Petroleum Products and Pricing Regulatory Agency.[808] It shall be responsible for regulating the entire industry.[809]

The Commission, which shall be independent from the Minister of Petroleum, shall be run by a Governing Board[810] whose members, other than those representing the Ministries of Petroleum, Finance and Environment, shall be appointed by the President subject to the approval of the Senate. The Governing Board shall comprise eleven (11) Directors, five (5) of whom shall be Executive Directors.[811] The regulator (the Commission) is to perform the following functions:

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[803] This is contrary to the position under the Petroleum Act which gave the Minister discretion to grant, amend, renew, extend or revoke upstream petroleum licences and leases pursuant to the provisions of the Act; this power was also retained under the Old PIB however, upon the advice of the Inspectorate.
[804] Section 2 (1) (h) of Part 2 of the PIGB 2017.
[805] Section 3 of Part 2 of the PIGB 2017.
[806] Section 3 (4) of PIGB.
[807] Section 4 (1) of Part 3 of PIGB.
[808] Section 4 (3) of Part 3 of PIGB.
[809] It means that its regulatory cut across the upstream, midstream and downstream sectors.
[810] Section 13 of PIGB.
[811] Section 20 of PIGB.

i. Administer and enforce policies, laws and regulations relating to all aspects of the petroleum operations assigned to it under the provisions of this Act or any regulations made in pursuance of this Act or any other enactment.
ii. Monitor and enforce compliance with the terms and conditions of all leases, licences, permits and authorisations issued in respect of any petroleum operation.
iii. Advise the Minister on fiscal and other issues pertaining to the petroleum industry.
iv. Conduct bid rounds or other processes for the award of any licence or lease required for petroleum exploration or production.
iv. Establish the methodology for determining appropriate tariffs for gas processing, gas transportation, transmission and transportation of crude oil and bulk storage of oil and gas.
v. Establish the framework for calculating the fair market value of petroleum products.
vi. Regulate the supply, distribution, marketing and retail of petroleum products.

The Minister will oversee the work of the Commission's Board and issue general policy directions to the Commission, such directives must not be in conflict with the Act if the directives are not in conflict with the Act.[812] The provision is not good enough because it can easily be abused, rather a neutral body should be appointed to perform this function. The PIGB empowers the President to remove a member of the regulatory Commission without recourse to the Senate. It is obvious that this is not good enough for a supposedly independent entity. It is suggested that such removal should be subject to ratification by the Senate to secure the independence of the Commission. The PIGB also allows a person who has interests in the oil and gas industry to become a member of the Board in so far, he/she declares his/her interest and in the opinion of the President there shall not be a conflict of interest.[813] In this circumstance, the President is to determine whether there will be a conflict of interest or not and the criteria for this decision is not stated which means the decision is discretionary. This kind of provision can easily be abused; it is therefore advised that someone with an interest should not be appointed as a member of the Commission.

The objectives of the Commission among others are promoting the healthy, safe and efficient conduct of all petroleum operations in an environmentally friendly and sustainable manner;[814] and ensure compliance with all applicable laws and regulations governing the petroleum industry.[815] This provision seems promising in

[812] See generally section 2 of PIGB.
[813] See section 13 (11) and the third schedule to this Act.
[814] Section 5 (a) of Part 3 of PIGB.
[815] Section 5 (c) of Part 3 of PIGB.

terms of reducing the effects of oil extraction on the environment. However, the performance of the function is already compromised because the Commission is saddled with conflicting functions. For instance, the Commission is mandated to "promote an enabling environment for investments in the petroleum industry"[816] and in doing so "ensure that regulations are fair and balanced for all classes of lessees, licensees, permit holders, consumers and other stakeholders."[817] Now the question is, how will a commission charged with the task of promoting conditions for maximum profitability of investments on one hand, turn round on the other to scrupulously enforce environmental regulations against the same commercial entities?[818]

Under the provisions of the old PIB, the Ministry of Environment had overriding power over environmental matters.[819] However, the PIGB jettisoned this provision and arrogates the power to the Commission and the Commission does not need to consult with the Ministry of Environment on the issue of environmental protection.[820] The reason for this is not given and one wonders why. It is therefore advised that the provision that saddled the Commission with the authority to undertake the promotion of a healthy environment is revised to ensure checks and balances and the Commission should consult regularly with the Ministry of Environment on the issue of environmental protection.

The exploration and exploitation of oil and gas brings along with it unavoidable consequences of environmental pollution, so a host country is to ensure that proper laws and regulations are put in place to compensate the victims and to remediate the environment.[821] In case of oil spillage or air pollution the host is enjoined to put in place of legal mechanisms to make the polluter pay compensation and remediate the environment. Ordinarily, the Nigerian legal system is not favourable to poor litigants but it is more worrisome that the PIGB which seeks to create a new governance structure for the petroleum industry fails to afford the people the opportunity of

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816 Section 5(f) of PIGB.
817 Section 5(g) of PIGB.
818 Onumahon C "Shortchanged: How the Senate's Petroleum Industry Governance Bill fails the environment and local communities" *Text of a Press Conference by the Social Development Integrated Centre (Social Action), 21June 2017, Abuja, Nigeria.*
819 See section 5 (a) of PIGB.
820 See section 5 (c) of PIGB.
821 The unavoidable consequences of oil and gas extraction is fully discussed in chapter five of this thesis.

making companies, government institutions and agencies accountable for environmental pollution by placing a limitation on the people's right of action.

The PIGB provides a maximum 12-month period for the exercise of the enforcement of civil rights against polluters especially for suits against the institutions and agencies created under the PIGB, a member of the governing boards or an employee in respect of their functions and powers under the Act.[822] The limitation of action is shorter than the time provided for civil action under the Statute of Limitation. It is a known fact that Plaintiffs in oil and gas pollution have difficulties with collating evidence, raising money to fund their case and other legal issues.[823] Therefore, the 12 months limitation of cause of action in this respect is not in the interest of the poor people who are most times the victims of the oil politics in Nigeria.[824] In the meantime the limitation for civil action should apply while considering giving special concession of an expanded time to litigants in oil and gas actions because of the peculiar circumstances of the industry.

Another important omission is the lack of due regard to the interest of the host communities in the issuance of petroleum licences.[825] This is one of the reasons for the incessant crisis in the oil rich Niger Delta of Nigeria and any law that fails to address this problem like the PIGB did fail to do, cannot solve the crisis in the region. One wonders why the same provisions applicable to a sister sector[826] are not made applicable to oil and gas sector. For example, section 102 of the Mining Act provides for proper consultation with and consent of landowners even before the grant of mining title to a mining company. This can be seen in section 102 which provides that:

> The Minister shall, before granting a mining lease on any private or any state land–
>
> (a) cause the owner or occupier of the land to be informed of the intention of the Minister to grant the lease; and
> (b) require the owner or occupier of the land to state in writing within the period specified by the Regulations made under this Act, the rate of annual surface rent which the owner desires should be paid to him by the lessee for the land occupied or used by it for or in connection with its mining operations.

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[822] Section 61 (2) (a) of the PIGB.
[823] The other problems faced by the litigants are: the jurisdiction of court (which of the courts to approach), *locus standi* etc.
[824] Onumahon C (n 818).
[825] Section 6 (1) of PIGB.
[826] The solid minerals.

4.2.3 The Commercial Entities

It is expected of the Minister of Petroleum Resources within six months of the signing into law of the PIGB to incorporate two companies to be known as Nigeria Petroleum Assets Management Company (NPAMC),[827] National Petroleum Company (NPC)[828] and Ministry of Petroleum Resources Incorporated (MOPI).[829]

4.2.3.1 Ministry of Petroleum Resources Incorporated (MOPI)

MOPI is an institution created to hold on behalf of the Government, shares in the successor commercial entities to be incorporated. Ayodele has argued that the power granted to the Minister to transfer assets of the MOPI is too wide and can lead to misuse and abuse of such powers.[830]

4.2.3.2 Nigeria Petroleum Assets Management Company (NPAMC)

The NPAMC will manage the Production Sharing Contracts while NPC shall be responsible for all other assets such as Joint Ventures.[831] NPAMC has an obligation to comply with the Codes of Corporate Governance issued by the Securities and Exchange Commission, and publish its annual reports and accounts on its website and public media.[832] This is a good development because it will enhance accountability and transparency in the activities of the body.

4.2.3.3 National Petroleum Company (NPC)

To ensure accountability and transparency, the NPC is to comply with the general rules of accountability applicable to companies under the Companies and Allied Matters Act and the Investment and Securities Act. It is however exempted from complying with the provisions of the Fiscal Responsibility Act, 2007 and the Public Procurement Act, 2007.[833] This means in effect that the NPC will not be required to file reports on its operations and budgets to the Ministry of Finance or any other authorities concerned; hence, making it run more like a private company than a

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[827] See section 37 of PIGB.
[828] See section 61 of PIGB.
[829] See section 36 of PIGB.
[830] Ayodele O "The Petroleum Industry Governance Bill Changing the Regulatory Landscape *Bloomfield Law Practice, Nigeria* June 2017 <www.lexology.com/library/detail.aspx> accessed 12 July 2017.
[831] See section 39 of PIGB.
[832] See section 59 of PIGB.
[833] See section 62 of PIGB.

statutory corporation.[834] This is a welcome development because the former NNPC was bedevilled with bureaucratic bottlenecks and it was heavily politicised; the new NPC will function better as private company rather than a statutory corporation.

To ensure that NPAMC and NPC are not financially encumbered with the liabilities of NNPC, the Governance Bill proposes the incorporation of a liability management company to which certain liabilities of the NNPC will be transferred for resolution purposes. Upon the conclusion of the settlement of such liabilities, the liability management company shall be wound up.[835]

The PIGB will curtail the power of the Minster in that he/she will not be allowed to create new institutions as against the initial provision of the old PIB that granted the Minister the discretion to create new institutions.[836] This is an improvement over the old PIB thereby reducing the over bearing influence of the Minister.

4.2.3.4 Petroleum Equalisation Fund

The fund is meant to be given to the petroleum marketers for any loss they might have suffered as a result of maintaining uniform prices for petroleum products across Nigeria.[837] As such 5% levy on all petroleum products shall be paid into the Petroleum Equalisation Fund.[838] One of the shortcomings of the law is that the Minister can use the Petroleum Equalisation Fund for infrastructural purposes or approve the use of the fund for other financial purposes.[839] This provision needs to be reviewed otherwise the fund will be miss-applied. Perhaps the influence of the Minister explains why the President combines the office of the Minister of Petroleum with his duty as head of state and government because of lack of trust.[840] This practice is even more dangerous because it can lead to abuse of power on the part of the President. The PIGB ought to address this point to prevent over concentration of power in the president.

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[834] Perchstone and Graeys (n 799); KPMG "The Petroleum Industry Governance Bill" 1 <www.kpmg.com/ng > accessed 9 July 2017.
[835] Templar, "The Petroleum Industry Governance Bill, 2017" <www.templars-law.com> accessed 12 July 2017.
[836] See section 2 of PIGB.
[837] See section 37 (a) of PIGB.
[838] See section 36 (1) (a) of PIGB.
[839] Section 37 (b) of PIGB.
[840] Ayodele O (n 830).

The main problem in Nigeria is corruption which pervades every sector of the economy. The petroleum subsidy scandal was widely reported in the news and up till now none of the key personalities involved have been brought to book. Thus, a provision for the Petroleum Equalisation Fund without providing a mechanism for dealing with the massive corruption that has attended the management of such funds in the past is just a way of providing fertile ground for corruption.[841]

By necessary implication all provisions under the PIB not provided for under the PIGB will not stand because Section 84 of Part 6 of the PIGB provides that:

> the provisions of all existing enactments or laws, including but not limited to the Petroleum Act, Pipeline Act, Petroleum Profits Tax Act and the Companies and Allied Matters Act, shall be read with such modifications as to bring them into conformity with the provisions of this Act.

Also by the provision of section 84 (2), the PIGB shall prevail in the case of any inconsistency between the provisions of the PIB and the PIGB.[842] It is worrisome that some salient provisions of the PIB were left out of the PIGB like the Petroleum Host Community Fund (PHCF). It should be noted, however, that the PIGB, is a fragment of the PIB, which caters for the governance and institutional framework of the operations in the Petroleum Industry only. Hence, the PIGB cannot be said to cater for all other important subject matters in the PIB.[843] It is therefore hoped that the legislature will consider the passage of the other aspects of the PIB in the nearest future.

4.3 Summary

It can be observed that the present laws, the proposed PIB and the PIGB accorded the Federal Government the ownership of oil and gas in Nigeria; this has been the source of the agitation in the oil rich Niger Delta. It is like Nigeria is not ready to pull the bull by the horn in terms of amending the law to restructure the ownership of oil and gas to accommodate the yearnings of the deprived. In the meantime, to assuage the people of the Niger Delta, the National assembly should not delay further in passing into law the lofty proposed Petroleum Host Community Fund as contained in the PIB so as to take care of the communities that are directly affected by oil and gas

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[841] Onumahon C (n 818).
[842] Perchstone and Graeys (n 799).
[843] As above.

exploitation. It is pertinent to mention that the delay in the passage of the entire PIB is slowing down investments in the industry because an investor would like to be sure of the laws that will govern the industry before investing his/her fund because investment in the exploration and exploitation of petroleum is huge. Having considered the laws as they are and discussed the proposed reforms, the next chapter will consider the issues in and challenges facing the extraction of oil and gas resources in Nigeria to further stress the need for urgent intervention to ameliorate the situation.

CHAPTER FIVE

ISSUES AND CHALLENGES IN THE EXPLORATION AND EXPLOITATION OF OIL AND GAS RESOURCES IN NIGERIA

5.0 Introduction

Oil and gas are indispensable commodities internationally and more importantly for the development of oil-rich states around the world. This is because oil and gas serve as important sources of revenue for the oil producing states. For example, Nigeria relies almost entirely on the revenue from oil and gas for its socio-economic development. Crude oil is the highest revenue yielding commodity exported from Nigeria.[844] However, the exploration and exploitation of oil and gas have some negative consequences on the inhabitants of the Niger Delta and the environment. This has been a source of concern for indigenes of the Niger Delta, pressure groups and other stakeholders within the Nigerian society and internationally. The case of *SERAC v Nigeria*[845] is apposite here.

The negative impacts of oil extraction have led to incessant crisis in the Niger Delta region where all sorts of criminality are going on under the guise of genuine agitations for the socio-economic development of the region. It is trite that the extraction of oil and gas must come with some unavoidable consequences which can only be ameliorated or remediated by the oil companies and the government where the government is directly involved in the business of oil exploration and development as in the case of Nigeria.[846] But even if the government is not directly involved, it has responsibilities relating to the environment.

Where environmental pollution is inevitable, the government and oil companies ought to take proactive steps to provide adequate compensation and ameliorate or remediate the environment when it occurs. Even though the Nigerian government

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[844] Nigeria's most important non-renewable energy source, currently contributing over 90% of country's foreign exchange earnings and about 80% of recurrent and capital expenditure. See Onduku A "Environmental conflicts: the case of the Niger Delta" (2001) a presentation at the One World Fortnight Programme Organised by the Department of Peace Studies, University of Bradford, United Kingdom <www.waado.org/nigerdelta/essays/resourcecontrol/Onduku.html> accessed on 16 May 2017.

[845] *SERAC* case (n 47).

[846] NNPC on behalf of the Federal Government is into joint ventures with major oil companies in Nigeria.

earns the revenue for the socio-economic development of the country from the Niger Delta, it has failed to show enough commitment to the development of the region.[847] Nigeria is more interested in meeting its crude oil quota for exportation and the government usually reacts to the agitations in the Niger Delta when this expectation is not met or is threatened.

Apart from the fact that the Nigerian government is lackadaisical to the plight of the people of the Niger Delta; the entire citizenry suffers from inept leadership and economic under development resulting from corruption in governmental circles.[848] For example, Chinua Achebe in his book "No Longer at Ease" wrote about the problem of official corruption in Nigerian society.The monies realised from the exploitation of oil and gas end up in private bank accounts of the politicians and their cronies in and outside the government. For example, the former Minister of Petroleum Resources, Diezani Allison-Madueke was accused of stuffing billions of US dollars in various foreign bank accounts.[849] She was implicated in bribery, fraud, misuse of public funds, and money laundering cases in Nigeria, Britain, Italy, and the United States.[850]

This chapter discusses the challenges encountered in the exploration and exploitation of oil and gas resources in Nigeria and the issue of inter-generational sustainability, social, economic and environmental aspects of sustainable development in Nigeria. It will discuss other issues such as "Dutch disease,"[851] corruption and mismanagement of the revenue from crude oil, environmental degradation caused by oil spillages and gas flaring, challenges associated with access to justice and the controversies surrounding ownership of oil and gas. It will also discuss reactions of the inhabitants of the Niger Delta to the under-development of the area and methods adopted by the Nigerian government and its international oil companies' partners in dealing with the problems.

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[847] *SERAC* case (n 47).

[848] Achebe C *No Longer at Ease* (Heinemann Publishers Nigeria 1960).

[849] Kazeem Y "The most fascinating details in United States" 54-page case against Nigeria's corrupt ex-oil minister" (2017) Quartz Africa <https://qz.com/1032997/nigeria-oil-corruption-diezani-alison-madueke-and-kola-alukos-one57-manhattan-condo-luxury-yachts-and-ferrari-racing> accessed 18 September 2017.

[850] SABC News of Sunday 23 July 2017 "Nigeria's ex-oil minister battles slew of graft cases <http://www.sabc.co.za/news/a/8835850041f9786ab9b0bddc4bf1bc75/Nigerias-ex-oil-minister-battles-slew-of-graft-cases-20172307> accessed 18 September 2017.

[851] Over dependence Nigeria one commodity for export to detriment of other commodities.

5.1 Sustainable development issues in the Niger Delta

Oil and gas have been exploited indiscriminately in the Niger Delta since 1956 when crude oil was discovered in commercial quantity. This is more worrisome because oil and gas are non-renewable resources; once exploited cannot be regained. Even though, the exploitation of the resources is important for the enhancement of socioeconomic development of the state, it is also important that these resources are exploited in a sustainable way. The question then is how much of the resources should be exploited in a life time? This question has been a source of international discourse and serious concerns to environmental activists and organisations under the auspices of the United Nations. However, there has been a consensus that mineral resources ought to be exploited in such a way as to guarantee development and at the same time not jeopardising the needs of future generations.[852]

5.1.1 Sustainable development as a development concept

Various attempts have been made to define sustainable development at different fora, for instance the World Commission on Environment and Development has described sustainable development as "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[853] Therefore, sustainable development offers a framework for managing economic growth and human development while preserving the life support systems of the planet.[854] The concept of sustainable development is perhaps more easily understood in the case of renewable resources such as forests, fisheries or some forms of energy such as wind, solar and hydro power than in the case of mineral resources including oil and gas.[855] This idea of making use of the gain without spending the capital is more difficult to apply in the instance of non-renewable resources like oil and gas, coal and other minerals.[856] Concerns are often expressed about the rate of consumption of non-renewable resources and their long-term availability for future generations.[857] In line with the views expressed above,

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[852] See Stockholm Declaration by the United Nations Conference on the Human Environment of June 1972 and Rio Declaration on Environment and Development of June 1992.

[853] The World Commission on Environment and Development (the Brundtland Commission) in its 1987 report, "Our Common Future" <www.un-documents.net/our-common-future.pdf> accessed 28 May 2017.

[854] Sustainable Development Strategy, 1997-2001 *Safeguarding our Assets, Securing our Future* <www.nrcan.gc.ca/plans-performance-reports/sustainable-development> *accessed 28 May 2017.*

[855] Sustainable Development Strategy (n 854).

[856] Sustainable Development Strategy (n 854).

[857] Report of the World Commission on Environment and Development: Our Common Future, 5 <http://www.un-documents.net/our-common-future.pdf> accessed 10 October 2017.

Okorodudu-Fubara has pointed out the Nigeria's National policy on the Environment adopts the notion of "sustainable development" which "refers to the judicious and planned use of natural resources for equitable development to meet the needs of the present generation without jeopardising that of the future generations."[858]

When considering non-renewable resources, the notion of sustainable development takes on another dimension. Sustainable development is considered based on the importance of protecting the natural resource and the environment, thus economic and social well-being cannot be improved with measures that destroy the environment.[859]

In 1992, UN member countries called for further development of international law on sustainable development. They advocated that special attention should be given to the delicate balance between environmental and developmental concerns. They also identified a "need to clarify and strengthen the relationship between existing international instruments or agreements in the field of environment and relevant social and economic agreements or instruments, taking into account the special needs of developing countries".[860]

In 2002, the World Summit on Sustainable Development reaffirmed these priorities of sustainable use of the environment and decided to have a collective responsibility to advance and strengthen the inter-dependent and mutually-reinforcing pillars of sustainable development: – economic development, social development and environmental protection – at the local, national, regional and global levels.[861] The United Nations General Assembly has recommended sustainable development as a guiding principle to member countries and private businesses, urging all countries to embrace policies aimed at sustainable and environmentally sound development.[862]

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[858] Okorodudu-Fubara MT *Law of Environmental Protection: Materials and Texts* (1st edn. Caltop Publication (Nigeria) Limited, Ibadan, Nigeria 1998) 62.

[859] Bärlund K "Sustainable development - concept and action" *United Nations Economic Commission for Europe* <www.unece.org/oes/nutshell/2004-2005/focus_sustainable_develop> accessed 28 May 2017.

[860] The Rio de Janeiro Earth Summit, in Agenda 21 (the United Nations Programme of Action from Rio 1992), <www.sustainable-environment.org.uk/Action/Agenda_21.php> accessed 28 May 2017.

[861] As above.

[862] Report of the World Commission on Environment and Development UN GAOR 96th Plen mtg UN Doc A/Res/42/187(1987) <www.un.org/documents/ga/res/42/ares42-187.htm> accessed 28 May 2017.

African countries have been called upon to embrace sustainable development.[863] This call was stressed by the African Development Bank and the African Union in the report tagged "Supplement to the African Development Report" as follows:

> A key purpose is to ensure that mineral-hosting nations in Africa benefit from their mineral resource endowments in the short and long terms, for example, by using the revenues accrued from mineral resource development for socio-economic development.[864]

In the report, it was said that if the oil boom in Africa was well-handled it could have been a significant catalyst for development in the oil-producing nations of Africa. However, in many African countries, natural resource booms have contributed to economic growth processes only to a limited extent. This failure has been ascribed to several factors, including: "Dutch disease"—the syndrome of rising real exchange rates and wages driving out pre-existing export- and import-competing industries; rent seeking by elites and others who could otherwise put their energies into profit-making activities; price volatility and the "asymmetry of adjustment" (it is easier to ramp up public expenditure than to wind it down again); and inflexibility in labour, product, and asset markets; and tensions between oil-producing and non-oil producing regions within countries.[865]

On inter-generational sustainability or equity, there are divergent opinions on how much of the resources should the present generation consume and how much should be left for future generations. However, the fact remains that the present generation should use the common heritage responsibly.[866] It is expected of the present generation to manage the resources prudently so that the benefits derived from their utilisation are used to enhance economic development for the benefit of future generations.[867]

From the foregoing, it is clear that the decision on the quantity to use and the sustainability of the use depend on the interaction between the stakeholders which

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[863] African Development Bank and the African Union, "Oil and Gas in Africa" *Supplement to the African Development Report* (2009) 89 <www.afdb.org/fileadmin/uploads...> accessed 30 May 2017.

[864] African Development Bank and the African Union (n 863) 89.

[865] African Development Bank and the African Union (n 863) 78 -79.

[866] Solow R "On the Intergovernmental allocation of Natural Resources" (1986) 88(1) *Scandinavian Journal of Economics* 141.

[867] Dasgupta S and Mitra T "Intergenerational equity and efficient allocation of exhaustible Resource" (1983) 24 (1) *International Economic Review* 133-134.

includes: the state, the society and the oil companies. The outcome of such interactions ordinarily should result in the formulation of oil and gas extraction policy in the country.

The fact that oil and gas resources are non-renewable underscores the fact that they should be exploited in a sustainable manner. There is the need to exploit the resources to develop socio-economic infrastructure like hospitals, schools, roads, housing, potable water, electricity etc. in the country. It is also expected that the revenue from the resources would be used to develop other aspects of the economy. However, the reverse is the case in Nigeria as an average Nigerian lives below the poverty line due to corruption and misappropriation of funds meant for development.[868] Unfortunately, the resources are being depleted without much to show for the exploitation of these resources. For example, as pointed out before, petroleum was first discovered in commercial quantities in Oloibiri (in the present Bayelsa State of Nigeria) in 1956 and was exported in 1958, but Oloibiri today is abandoned because the crude oil has dried up.[869] It has been asserted by Donwa that the Nigerian oil reserve was approximately 33 billion barrels as of 2011 and it is expected to last for about 49 years if no additional reserve is added.[870] The socio-economic deplorable state of Oloibiri town has been described by Emmanuel thus:

> Oloibiri is referred to as a fossil town because there is nothing to show that the town opened the door to the international oil market in Nigeria. The only historical relics there is an old signboard marked 'Oloibiri Oil Well 1' with over-grown bush. Oloibiri has no roads, no hospital, no electricity and no water supply.[871]

The researcher was at Oloibiri to see things for himself and an extract of the interview conducted with an indigene is reproduced hereunder:

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[868] Ovat OO and Bassey EE "Corruption, Governance and Public Spending in Nigeria: Implications for Economic Growth" (2014) 4(11) *British Journal of Economics, Management & Trade* 1679-1699 at 1685.

[869] Vanguard Newspaper 60 years after Nigeria's first crude: Oloibiri oil dries up, natives wallow in abject poverty <https://www.vanguardngr.com/2016/03/60-years-after-nigerias-first-crude-oloibiri-oil-dries-up-natives-wallow-in-abject-poverty> accessed 10 October 2017.

[870] Donwa PA "Corruption in the Nigerian Oil and Gas Industry and Implication for Economic Growth" (2015) *14 International Journal of African and Asian Studies* 29 <http://iiste.org/Journals/index.php/JAAS/article/viewFile/26422/27065> accessed 29 May 2017.

[871] Emmanuel OE, "Gauging Progress on Oil in Nigeria: Community Relations, Development Impact and Revenue Transparency," paper presented at a Panel Discussion on "The Crude Reality: Africa's Oil Boom and the Poor," Fordham University School of Law, New York, September 27, 2004, 1.

> This place was founded in 1956, but the place as you can see now is abandoned because the oil has dried up. The SPDC owed us a lot of money in this community because they were the ones who exploited oil in this location. Oloibiri is worse than it was before the discovery of oil in this place. The community lacks the infrastructure and social amenities that will make life more tolerable for us. We are appealing to the Federal Government to provide us with hospitals, schools, potable water, roads etc.[872]

In a related interview conducted in Ogoniland, a community leader expressed his fear about the future of the communities where oil was extracted as follows:

> Apart from the physical harm of oil pollution in the water and in the air, there is also the danger of earthquake in the distant future. Space or vacuum is left underground after the exploitation of oil. The question is what happens in that space or vacuum that is left. I believe this is what our government should be interested in monitoring if they are interested in our future and not just in the oil. The fear was initially raised by the late environmentalist Ken Saro Wiwa, but now that he is no more, nobody is addressing this vital issue that can exterminate a whole community in the near future.[873]

5.2 Corruption, "Resource Curse" and "Dutch Disease"

Oil and gas exploration and exploitation are bedevilled with corruption in most third world countries. The countries have very minimal levels of economic development to show for the huge revenues they get from oil and gas exploration; citizens still wallow in abject poverty.[874] Nigeria raises a lot of revenue from oil and gas through oil taxation, levies, royalties, signatory bonuses, production-sharing agreements and/or joint venture partnerships (otherwise referred to as rentier system) and yet most Nigerians earn income of less than two dollars per day.[875] For example, Nigeria realised the sum of N36 trillion from crude oil between 1999 and 2010 and the sum of N51 trillion between 2010 and 2015. The present administration earned about N6 trillion since 29 May 2015 up till August 2016 due to the down-turn in the price of crude oil in the world market.[876] Despite these huge revenues the minimum wage of either Federal, State or Local Government workers in Nigeria was fixed at N18,000:00 (Eighteen Thousand Naira) since 2011 which is less than sixty dollars

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[872] Personal communication by way of an interview conducted at Oloibiri on 7 February 2017.

[873] Personal communication by way of an interview conducted at Ken Saro Wiwa Polytechnic, Ogoniland on 8 February 2017.

[874] *SERAC* case (n 47).

[875] Enweremadu DU "The Vicious Circle: Oil, Corruption and Armed Conflicts in the Niger Delta" (2008) *Conference Paper on the Nigerian State Oil industry and the Niger Delta,* NDU, 445-457.

[876] Vanguard News "Under Jonathan, Nigeria earned N51trillion from crude oil" https://www.vanguardngr.com/2016/08/jonathan-nigeria-earned-n51trillion-crude-oil accessed 11 October 2017.

per month.[877] This pathetic situation of Nigerian workers makes writers to refer to the oil boom in Nigeria as a curse.[878] The Nigerian oil boom for instance started in 1970s, but before then Nigeria exported agricultural products and solid minerals.[879] The proceeds from agricultural products were used to develop most of the infrastructural facilities still in place to date. The terms corruption, resource curse and Dutch disease are discussed hereunder.

5.2.1 Corruption

Corruption is a global phenomenon. The United Nations Convention against corruption has defined it is a dangerous plague that has a wide range of destructive effects on societies. It weakens democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human comfort.[880] The Convention is the only legally binding universal anti-corruption instrument. It develops a comprehensive response to the global problem and its provisions are mandatory. The Convention covers five main areas: preventive measures, criminalization and law enforcement, international cooperation, asset recovery, and technical assistance and information exchange.[881]

Corruption and economic sabotage have been the bane of the Nigerian polity, and this menace has frustrated economic development of the country, despite abundant petroleum resources and the revenue that accrues to the nation through it. Corruption pervades the Nigerian socio-political milieu and Omorogbe has rightly observed that corruption, more than any other related vices, is the root cause of Nigeria's socio-political and economic problems.[882] Achebe has also opined in his book titled "the trouble with Nigeria" that one of the problems Nigeria has is

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[877] As 15th day of July 2017, one dollar was exchanged for the average of N350. Vanguard News "Senate approves N18,000 national minimum wage" 23 February 2011 https://www.vanguardngr.com/2011/02/senate-approves-n18000-national-minimum-wage accessed 11 October 2017. See also Ovat OO and Bassey EE (n 24) 1685.

[878] Peterson J "The Resource Curse in Nigeria: A Story of Oil and Corruption" (2012) *The Geopolitics and Economics of Oil,* 8-9 <www.researchgate.net/publication> accessed 11 October 2017; Vanessa KO "Nigeria's 'Resources Curse': Oil as Impediment to True Federalism" (2014) *E-International Relations Students* unknown page http://www.e-ir.info/2014/07/20/nigerias-resource-curse-oil-as-impediment-to-true-federalism/ accessed 11 October 2017.

[879] Enweremadu DU (n 875) 445-457. .

[880] United Nations Office on Drugs and Crime (UNODC) "United Nations Convention against Corruption" (2004) iii <www.unodc.org> accessed 11 October 2017.

[881] United Nations Office on Drugs and Crime (n 967).

[882] Omorogbe JI *Ethics for Every Nigerian* (Joja Educational Research and Publishers Ltd, Lagos 1991) vii; Fawehimi G *State of the Nation and the Damages Ahead* (Book Industries Ltd, Lagos 1999) 4.

corruption.[883] Lip service is being paid to the fight against corruption. In fact, all military coups in Nigeria cited corruption as the major reason for toppling democratically-elected civilian regimes.[884] Yet, Nigeria has had the worst military regimes in terms of corrupt practices.[885]

Many laws and institutions established by the government to fight corruption have made no significant in-roads in the fight against corruption;[886] the proceeds from oil are laundered away in Swiss banks and other western countries' bank accounts of the political elite and their cronies to the extent that individual Nigerians are richer than most states of the federation.[887] In fact, monies discovered in private accounts both home and broad are enough to sponsor Nigeria's yearly budget.[888]

The Federal Government set up the Independent Corrupt Practices and Other Related Offences Commission (ICPC) in 2000 and the Economic and Financial Crimes Commission (EFCC) in 2003. The Statute establishing the Economic and Financial Crimes Commission in Section 46 of the Act describes corrupt offences as:

> non-violent, criminal and illicit activities committed with the objectives of earning wealth illegally either individually or in a group or organized manner thereby violating existing legislation governing the economic activities of government and its administration and includes any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, looting and any form of corrupt malpractices, illegal arms deal, smuggling, human trafficking and child labour, *illegal oil bunkering and illegal mining* [emphasis mine], tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic waste and prohibited goods, etc.[889]

Apart from these two agencies, Nigeria has also put in place other enactments with a view to curbing corruption within the polity, the enactments are:

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[883] Achebe C *The Trouble with Nigeria* 1st ed (Heinemann Educational Books 1984) 37.

[884] Alemika EE "Recession and Regression in Nigeria" (Afrigov, Jos, 1998) 19.

[885] As above. See also Okechukwu E "A Critique of the Activities of EFCC vis -a –vis the 1999 Constitution" (2006) 3(1) *Ife Juris Review a Journal of Contemporary Legal and Allied Issues* 104.

[886] Laws to curb corruption: The Public Officer Investigation of Assets Decree No 5 of 1966, the Corrupt Practices Decree No 39 of 1975, the Recovery of Public Property (Special Military Tribunal) Decree 1984 (as amended), Institutions: Asset Investigation Panel to investigate the assets of state governors, federal commissioners and high-ranking officials 1975, Economic and Financial Crime Commission (EFCC) and Independent Corrupt Practices and Other Related Offences Commission (ICPC).

[887] "Money Laundering in Nigeria: Implications on National Development" (2013) paper presented by the Faculty of Law, Bayero University, Kano at the 46th Annual Conference of the Nigerian Association of Law Teachers at the University of Ilorin, held between 22 and 26 April 2013, 31-32.

[888] Money Laundering in Nigeria (n 887) 31-32.

[889] Section 46 of EFCC (Establishment) Act of 2004.

1. the Fiscal Responsibility Act, 2007;
2. the Money Laundering Act 1995;
3. the Nigeria Extractive Industry Transparency Initiative (NEITI) Act 2007;
4. the Freedom of Information Act, 2011 and
5. the Advance Fee Fraud and other Related Offences Act, 1995.

The Constitution of Federal Republic of Nigeria 1999 (as amended) establishes the Code of Conduct for public officers, which provides for certain rules and regulations which a public officer during his official duties must adhere to.[890] It also establishes a Code of Conduct Tribunal to enforce the provisions of the code of conduct.[891] Despite the existence of these laws, it is worrisome that the prevalence of corruption is still very high; Nigeria ranked 136 out of 176 countries having scored 28% on the list of corruption perception index in 2016.[892]

The method of award of exploration and production licenses in Nigeria is prone to abuses because the procedures are not well regulated. For instance, the Petroleum Act gives the Minister of Petroleum authority over the allocation of licenses for the exploration, prospecting, and mining of oil.[893] The Minister has discretion in the award of licences; this is prone to mis-use of the discretionary power.[894] During the military rule, most licenses were awarded on a discretionary basis by the head of state. Oil blocks were awarded to individuals who later sold them at a huge profit to oil companies.[895] In 2014, former Central Bank Governor of Nigeria said that the sum of $20 billion was stolen from oil revenue claiming that the said amount was not remitted into the coffers of the Federal Government.[896] Also, some of the Nigerian politicians and their cronies were indicted in the Halliburton Scandal when a USA oil service company, pleaded guilty to paying around US $180 million in bribes to top Nigerian Government officials, to secure four contracts, worth over US $6 billion, to build Liquefied Natural Gas (LNG) facilities in Nigeria.[897]

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[890] See section 15 (5), (5) - The State shall abolish all corrupt practices and abuse of power; section 172 and 209 of the 1999 Constitution of Nigeria for the federal and the state public office holders respectively which enjoins them to observe and conform with Code of Conduct.
[891] See 5th Schedule, Part II of the Constitution of Federal Republic of Nigeria 1999.
[892] Transparency International, Corruption Perception Index in 2016 <www.transparency.org/country/NGA> accessed 29 May 2017.
[893] Section 2 of the Petroleum Act.
[894] As above.
[895] Donwa PA (n 870).
[896] The Economist "The $20 billion hole in Africa's largest economy" <www.economist.com/news> accessed 29 May 2017.
[897] Donwa PA (n 870) 36.

Corruption has been a great impediment to the growth of the Nigerian economy. It has been observed by Donwa *et al* that although there were foreign direct investments in the oil and gas sector, they have had little or no effect on the economic development of Nigeria because of lack of accountability, transparency and wide spread corruption in all sectors of the Nigerian economy.[898] He further argues that corruption impairs economic growth by diverting investment funds meant for public goods and services into private gains by few individuals.[899] Nigeria, the largest oil producer in Africa, paradoxically not only ranks among the poorest countries in the world, but also one of the most heavily indebted countries of the world.[900]

Table 1: Nigeria's ranking in the Corruption Perception Index from 2006- 2016.

Year	Ranking	No. of countries surveyed
2006	142nd	163
2007	147th	180
2008	121st	180
2009	130th	180
2010	134th	178
2011	143rd	183
2012	139th	176
2013	144th	177
2014	136th	175
2015	136th	168
2016	136th	176

Source: Compiled from the Transparency International Corruption Perception Index Report 2006-2016.

[898] Donwa PA (n 870) 36.
[899] Donwa PA (n 870) 36.
[900] Donwa PA (n 870) 36.

Since Nigeria's economy depends on the oil and gas industry, it is incumbent on the government to ensure sound legal and regulatory frameworks that will reduce corruption so that the country can develop. This was why the government enacted into law the Nigeria Extractive Industries Transparency Initiative (NEITI) in 2007.[901] The NEITI is a national subset of the global movement, known as the Extractive Industries Transparency Initiative (EITI).[902] The EITI was established in June 2003 to achieve sustainable development and poverty reduction in resource-rich countries plagued by the phenomenon of 'resource curse'. The following are the objectives of NEITI:[903]

i. To ensure due process and transparency in the payments made by all extractive industry companies to the Federal Government and statutory recipients;
ii. To monitor and ensure accountability in the revenue receipts of the Federal Government from extractive industry companies;
iii. To eliminate all forms of corrupt practices in the determination, payments, receipts and posting of revenue accruing to the Federal Government from extractive industry companies;
iv. To ensure transparency and accountability in the application of resources from payments received from extractive industry companies; and
v. To ensure conformity with the principles of the Extractive Industries Transparency Initiative.[904]

If well implemented this legislation could be a useful tool for government and citizens in the quest for greater transparency and responsibility in the management of revenues from mining, oil and gas.[905] According to the Act, the NEITI is charged with the following objectives: to ensure due process, transparency and accountability and eliminate all forms of corrupt practices in the extractive industry:[906]

In 2003, the Federal Government declared Nigeria's acceptance of the principles and criteria of the global Initiative and made public its decision to implement the EITI. However, the fortune of NEITI is not different from other governmental efforts to curb corruption. In 2004, when the implementation of the EITI process started, the percentage of Nigerians living below the poverty line was 54.4 percent but by 2010

[901] The NEITI Act 2007 in Nigeria.
[902] Donwa (n 870) 38.
[903] Mailula DT (n 120) 275.
[904] Section 2 of the NEITI Act 2007.
[905] Mailula DT (n 120) 275.
[906] Section 2 of the NEITI Act 2007.

the percentage of people living below the poverty line had increased to 65.1 percent.[907]

5.2.2 "Resource Curse"

Basically, the resource curse refers to the inverse relationship between development and natural resource wealth.[908] It describes a situation whereby an export oriented natural resources sector (oil and gas resources in the case of Nigeria) in a country generates large revenues for government but ironically leads to underdevelopment and political instability.[909] It is generally used to explain the negative development outcomes related to oil and gas and other minerals.[910] It has often been asserted that petroleum brings trouble - waste, corruption, consumption, debt overhang, deterioration, falling apart of public services, wars, and other forms of conflicts, among others.[911] Bribena has stated that revenue from natural resources is often wasted on "prestige projects", stolen by corrupt officials or used by the Nigerian government to repress political opponents.[912]

The people of Niger Delta bear the direct consequences of bad governance as money meant to improve their socio-economic conditions are misappropriated. Consequent upon these the socio-economic and environmental rights of the people of the Niger Delta are violated with impunity. *SERAC v Nigeria*'s case summarises the issues of socio-economic injustice and environmental degradation in Nigeria.[913]

Corruption and 'resource curse' are inter-related because a good use of revenue from petroleum for the development of the society is a blessing rather than a curse. So, the natural resources on their own are not curses but blessings to a nation but when the natural resources such as petroleum are exploited leaving the environment devastated and the people impoverished, then they become a curse.[914] Furthermore, when the resources are not exploited in a sustainable manner, the revenue from the resources are diverted to private pockets by corrupt government officials and the

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[907] National Bureau of Statistics (2012) Nigeria Poverty Profile 2009/2010.
[908] African Development Bank and the African Union (n 863) 79.
[909] African Development Bank and the African Union (n 863) 79.
[910] African Development Bank and the African Union (n 863) 79.
[911] African Development Bank and the African Union (n 863) 79.
[912] Bribena EK (n 34) 121.
[913] *SERAC* case (n 47).
[914] Ikelegbe A "Economy of Conflict in the Oil Rich Niger Delta Region of Nigeria" (2006) *5(1) African and Asian Studies* 23. See also the SERAC's case.

earnings from the resources are not ploughed back to the region where these resources are exploited. In the instant case of Nigeria, the Niger Delta and the Nigerian society in general, it is a curse.[915]

Oil blessing becomes a curse in Nigeria with the violent agitations by the affected inhabitants of the Niger Delta resulting in abductions of oil workers (both local and expatriates), destruction of oil facilities, oil bunkering, proliferation of arms because of constant armed conflicts and eventual instability in the polity.[916] Commenting on the deplorable situation of the Niger Delta and its inhabitants Raji has observed:

> Paradoxically the same [oil] resource representing the power-house of national life (in Nigeria) also serves as a big agency of dislocation and disorientation for the several million-people inhabiting the areas where it is produced. Directly, the dislocation and disorientation derive from two complementary and interrelated factors: the first being the devastating impact of the exploration of the resources on the environment, and the second that of the cruel neglect of the people of the area by successive Nigerian administrations.[917]

The Nigerian problem is not limited to the Niger Delta alone, but the economic hardship bites hard on all Nigerians. The huge revenues from our gas exploitation that accrue to the nation do not reflect in the lives of ordinary Nigerians. Mahler has opined that Nigeria is a good example of a nation where petroleum exploitation has turned into a curse instead of blessings for its citizens.[918] She observed as follows:

> ...indeed, 50 years of substantial oil production has not resulted in sustainable socioeconomic development in the country. The poverty rate today is extremely high, with 50 percent of the population living on less than US$1 per day; in fact, the current poverty rate exceeded that of the period before the first oil boom in the 1970s, which was 35 percent. The national social and transport infrastructures are in a desolate condition, and the country is marked by chronic internal instability and periodic flare-ups of violent conflicts.[919]

One of the indigenes of Niger Delta in Yenagoa while reacting to the question put to him on whether the oil extraction is a curse or blessing said:

> Since 1950s, when oil was discovered in the Niger Delta, it has been a curse and not a blessing; people live in squalor, no water, no light, no good road and other infrastructural facilities. We demand that the Nigerian Government and the oil

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[915] Ifeka C "Conflict, Complicity and Confusion: Unravelling Empowerment Struggles in Nigeria after the Return of Democracy" (2000) *Review of African Political Economy* 83.

[916] Reno W "Foreign Firms and Financing of Charles Taylor's NPFL" (2003) *18 Liberia Studies Journal* 92.

[917] Raji W "Oil Resources, Hegemonic Politics and the Struggle for Re-inventing Post-colonial Nigeria" in Na'Allah n 29 at 109.

[918] Mähler n 902 *supra* at 5. For a more general discussion of the 'resource curse' see Stevens n 257 *supra;* Karl n 251 *supra,* and Karl n 252 *supra.*

[919] As above.

> companies follow the international standards in their operations and provide infrastructural facilities for the well-being of the oil producing communities.[920]

In another interview, a traditional ruler in Delta State claimed that his community/local government is one of the major areas where crude oil is being produced and yet they have factually nothing to show for it. He commented on the issue of whether crude oil is a blessing or a curse as follows:

> My local government is a major stakeholder in oil production because right from the onset, they have been extracting crude oil in that area and you discover that it has not added anything to the community, because we are so marginalized, no potable water to drink, no electricity, etc. There are no good roads, and unfortunately, the roads we manage, big trucks that take the crude oil used to spoil the roads and people are left to suffer. They use a bigger vehicle; they can manoeuvre, but you with small vehicle you cannot pass and this make life difficult for the people. In the riverine areas, you cannot even go for fishing due to oil spillages that happens here and there. Because of these, I cannot say it has been a blessing; there is nothing to show for it. Anyway, to the federal government and for those people who are exploiting the oil, it is a blessing to them. To the immediate communities, it is not a blessing. At the level of Traditional Rulers of Oil Producing Communities (TROPCOM) in Delta State (of which I was once the chairman) we made several representations to the government to tell those people in authority that our people are the ones that bear the brunt of exploitation, that there should be recognition or make the people to feel that this is what they are getting from the crude oil exploitation. They used to promise, but at the end of the day those benefits are not forthcoming, so you cannot say it is a blessing.[921]

5.2.3 "Dutch Disease" or non-diversification of the economy

As of 2004, oil and gas exports accounted for more than 95% of export earnings and about 80% of Federal Government revenue, as well as generating more than 40% of its GDP.[922] It is important to put on record that up to the 1960s, agriculture was the mainstay of the Nigerian economy before crude oil production took the leading position beginning from the 1970s, following the first series of oil bonanza or oil boom in 1973-1974. This wave of the oil boom drove into the background the exploitation of solid minerals; and agricultural and manufacturing activities nearly came to a halt subsequently. Thus, Nigeria became a monolithic economy, depending on a single commodity for export. Jensen, while commenting on Nigeria's over dependence on crude oil, posits:

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[920] Personal communication by way of an interview in Yenagoa, the capital of Bayelsa State of Nigeria on 7 February 2017.

[921] Personal communication by of an interview in Yenagoa, the capital of Bayelsa State of Nigeria on 7 February 2017.

[922] Omiyi MD SPDC, Nigeria, "Location Reports: Nigeria" in *The Shell Report 2004*; Ugochukwu CNC and Ertel J Negative impacts of oil exploration on biodiversity management in the Niger Delta area of Nigeria" (2008) *26(2) Impact Assessment and Project Appraisal* 139 <www.tandfonline.com/doi/pdf> accessed 01 June 2017.

> [t]he oil boom of the 1970s led Nigeria to neglect its strong agricultural and light manufacturing bases in favour of a dependence on crude oil. New oil wealth, the concurrent decline of other economic sectors, and a lurch toward a non-dynamic economic model, generated massive migration to the cities and led to increasingly widespread poverty, especially in rural areas. Along with the ubiquitous malaise of Nigeria's non-oil sectors, the economy continues to witness massive growth of "informal sector" economic activities, estimated by some to be as high as 75 percent of the total economy. While oil dominates the Nigerian economy, and generates the vast majority of government revenues...[923]

Aturu was making a forecast when he pointed out that the way the Nigerian economy is structured leaves more to be desired and that if oil production ceases for any reason the nation will grind to a halt. Presently, Nigeria is in economic recession due to the fall in price of crude on the international market. Most states of the Federation are unable to meet their financial obligations, especially the payment of workers' salaries.[924]

5.3 Environmental Degradation

The Niger Delta is the worst hit in terms of environmental degradation due to constant oil spills and continuous gas flaring daily. The eco-system has been changed; the natural habitats of fishes and other aquatic lives are destroyed because of the pollution of the streams and other water sources. The weather condition has changed- people experience more heat, more than ever before. When it rains the rain water is acidic and this is dangerous for human consumption. The natural vegetation is affected by oil spillages; when such spills are mismanaged, they result into fire consuming acres of farmlands. The environmental degradation in the Niger Delta was well documented in the *SERAC* case.[925]

The world through the agencies of the United Nations has come to the realisation that socio-economic development of states and environmental protection must go on hand in hand in order to sustain the universe. This concept was affirmed by Article 15 of the Rio Declaration on Environment and Development which states:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

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[923] Jessen L "Corruption as a Political Risk Factor for Investors in the Oil and Gas Industry, with Specific Emphasis on Nigeria: Identification Analysis and Measurement" (2012) *a thesis presented in partial fulfilment of the requirements for the degree of Master of Arts (International Studies)* at Stellenbosch University, March, at 57.

[924] Mailula DT (n 120) 248.

[925] *SERAC* case (n 47).

It is trite that, all states have the right to manage their own natural resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause significant damage to the environment of other States or of areas beyond the limits of national jurisdiction. However, the states are under obligation to manage natural resources, including natural resources solely within their own territory or jurisdiction, in a rational, sustainable and safe way to conserve and sustain the use of such natural resources and protect the environment, including ecosystems.

The precautionary approach is vital to sustainable development in that it enjoins states, international organizations and civil society, particularly the scientific and business communities, to avoid human activities which may cause substantial harm to human health, natural resources or ecosystems. The approach includes accountability (or what is referred to as "polluter must pay" principle) for harm caused. Nigeria bought into the idea of a precautionary approach to environmental protection and that was why she enacted the Environmental Impact Assessment (EIA) Act.[926] An environmental impact assessment is an assessment of the potential impacts of a proposed project on the environment. Section 20 of the Constitution of 1999, empowers the state to protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria. The construction of oil and gas facilities is listed in the schedule of Mandatory Study Activities under item 12 (c) and (e) of EIA Act and this provision reinforces section 20 of the 1999 Constitution.[927]

This law like many other Nigerian laws has suffered from poor implementation due to weak regulatory framework; governments at all levels violate the principles of EIA.[928] They approve projects within the mandatory list even before any impact assessment is carried out, which runs contrary to Section 12 of the Act.[929] For example, the Niger Delta Development Commission decided in a press release to

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[926] The EIA Act was discussed in Chapter three of this thesis.

[927] Usman AK *Environmental protection Law and Practice* (1st edn. Ababa Press Ltd, Ibadan, Nigeria 2010) 6.

[928] Nwoko CO "Evaluation of Environmental Impact Assessment System in Nigeria" *2(1) Greener Journal of Environmental Management and Public Safety* 27 <www.gjournals.org> accessed 1 June 2017.

[929] Nwoko (n 928) 27.

dredge Ayetoro canal prior to carrying out any EIA.[930] In most cases, projects involving government agencies are carried out without resort to EIA; where the EIA is done it is after the project has taken off to forestall resistance from any quarters. Where the EIA is done, it is usually with insufficient or lack of consultations with the communities likely to be affected directly by the project.[931]

It is because of the need to access information, enable public participation in decision-making and access to justice in environmental matters that the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was signed in Aarhus, Denmark on 25 June 1998.[932] The European Union has expressed its satisfaction with the present Convention as an essential step forward in further encouraging and supporting public awareness in the field of environment and better implementation of environmental legislation in the UN/EU region, in accordance with the principle of sustainable development.[933] It is important to note that this Convention incorporates the language of Principle 1 of the Declaration of the United Nations Conference on the Human Environment ("Stockholm Declaration").[934] The implication of this Convention for Nigeria is that it imposes governmental accountability, as it grants the public rights of access to information and imposes obligations on public authorities to provide this information. This is expected to lead to more accountable environmental decision-making and greater potential for environmental justice.[935] Nigeria is a signatory to Stockholm Declaration; it is therefore expected of it to implement its principles.[936]

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[930] Anago I "Environmental Impact Assessment as a Tool for Sustainable Development: The Nigerian Experience" (2002) *FIG XXII International Congress Washington, D.C. USA,* 11 https://www.fig.net/resources/proceedings/fig_proceedings/fig_2002/Ts10-3/TS10_3_anago.pdf accessed 11 October 2017.

[931] Nwoko (n 928) 28.

[932] United Nations Treaty Collection Chapter XXVII Environment titled Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters <https://treaties.un.org/Pages/ViewDetails.aspx?> accessed 11 October 2017.

[933] United Nations Treaty Collection (n 1032).

[934] American Society of International Environmental Law https://www.asil.org/eisil/convention-access-information-public-participation-decision-making-and-access-justice accessed 11 October 2017.

[935] Jeffery MI "Environmental governance: a comparative analysis of public participation and access to justice" *Journal of South Pacific Law* http://www.paclii.org/journals/fJSPL/vol09no2/2.shtml accessed 11 October 2017.

[936] Ishaya, DA *et al* "Challenges in the delivery of environmental sustainability in housing development in Abuja, Nigeria" in *Emerging trends in construction organizational practices and project management knowledge area*, the 9th cidb Postgraduate Conference February 2-4, 2016, Capa Town, South Africa.

In Nigeria however, when access to information and accountability in environmental decision-making concerns multinational companies especially the oil companies, the government waives the provisions of the law to accommodate investment in the oil and gas sector to the detriment of the people and the environment. To aggravate the sufferings of the victims, the government most of the time refuses to commence litigation on behalf of the victims of violations of environmental statutes and there is no provision of private law remedies for victims of the environmental harm in the form of common law remedies of damages and injunction.[937] The Bodo spill is a typical example of how the people of Niger Delta have been denied access to information about how oil exploration and production will affect them, and are repeatedly denied access to justice.[938] The *SERAC*'s case is also instructive here.[939]

The repealed FEPA was replaced with the National Environmental Standards and Regulations Enforcement Agency (NESREA), 2007.[940] However, the power to regulate the oil and gas industry was taken away from it and given to the National Oil Spill Detection and Response Agency (NOSDRA) which was saddled with the responsibility for enforcing environmental regulations in the oil and gas sector.[941] This step further weakened any independent oversight of the oil and gas industry by considerably limiting the authority of the Ministry of Environment in regulating the environmental impacts of the industry.

The main objectives of NESREA are the sustainable development of Nigeria's natural resources, biodiversity conservation, environmental protection, and sustainable management of ecosystems and enforcement of the provisions of international treaties on the environment, climate change, biodiversity conservation,

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[937] Yusuf RO et al "Environmental Impact Assessment Challenge in Nigeria" (2007) *2(2) Journal of Environmental Research and Policy* 78 <www.academia.edu/912970/Environmental_impact_assessment_challenge_in_Nigeria> accessed 1 June 2017.

[938] Responding to the question of lack of information on the impacts of oil extraction, some companies referred to Environmental Impact Assessments (EIAs), which are required by law, and which are supposed to give communities the opportunity to know about projects. Some companies also make announcements through media such as radio and newspapers about projects. However, Amnesty International found EIAs to be difficult to access and few communities were aware of the actual or potential impacts of projects (as opposed to the fact that the project might exist). These issues are taken up later in this report.

[939] *SERAC*'s case (n 20).

[940] Act No. 25 of 2007.

[941] National Oil Spill Detection and Response Agency (Establishment) Act 2006, section 6 (1) (a).

desertification, forestry, oil and gas, chemicals, hazardous wastes, ozone depletion, marine and wildlife, among others.[942]

Apart from NESREA at the federal level, there are State Environmental Protection Agencies. Because of this, there is overlapping of functions between bodies set up to implement EIA and by attempting to satisfy these bodies, permit seekers met with the attendant problems, especially costs and time of executing reports for two or more of the controlling authorities.[943] At times permit seekers simply ignore one of the agencies.[944] Despite the elegant provisions of the law to protect the environment, the Nigerian environment still suffers degradation because the regulatory authorities are seriously constrained by lack of capacity and resources.[945]

5.4 Oil spillage

As pointed out earlier, oil and gas exploration and exploitation carry along with it some unavoidable consequences like oil spillage, pipeline explosions, flaring of gas leading to air pollution; they have long term effects on the people and the ecosystem.[946] There are oil pollution problems where ever oil has been exploited, but the control measures vary between countries and with the availability of economic means and technology, as well as with environmental concerns and government policies.[947]

In developing countries, the emphasis is usually on increasing the crude oil production levels at the expense of the people and the environment.[948] Nigeria is not an exception to this; in fact Nigeria has been planning to increase her daily production from an average 2.2 million barrels to 2.8 million barrels per day despite

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[942] Section 2 of the NESREA Act 2007.

[943] Ogunba OA "EIA systems in Nigeria: evolution, current practice and shortcomings" (2004) *24(6) Environmental Impact Assessment Review* 643-660 <www.sciencedirect.com/science/article> accessed 02 June 2017.

[944] Ogunba OA (n 943) 643-660.

[945] World Bank, Defining an Environmental Development Strategy for the Niger Delta, 25 May 25 1995, Vol II, Industry and Energy Operations Division West Central Africa Department 45-53; The World Bank, Nigeria Rapid Country Environmental Assessment, Final Report 11/30/2006, 39, which states: "Environmental inspectors belonging to the FMEV often have to rely on private companies for providing cars to undertake monitoring activities, in addition to hotel bills, per diems and other expenses, compromising legitimacy and effectiveness in the environmental monitoring process."

[946] Etikerense (n 16) 144.

[947] Ogri OR "A review of the Nigerian petroleum industry and the associated environmental problems (2001) *The Environmentalist* 11-21 at 11 Kluwer Academic Publishers <http://link.springer.com/content/pdf> accessed 31 May 2017.

[948] Ogri (n 947) 15.

the outcry from the Niger Delta inhabitants for neglect and environmental degradation. The devastating effects of oil extraction are glaring in the Niger Delta despite claims by oil companies that they adhere to the "highest environmental standards and that the impact of oil on the environment of the Delta is minimal".[949] Since 1956, when oil and gas was first discovered in commercial quantity in Nigeria, the Niger Delta has been suffering from the devastating effects of oil and gas production.[950] Ogri has rightly observed that:

> Nigeria has abundant deposits of oil and natural gas and their exploitation has improved the economy substantially, but with serious environmental costs. Severe ecological damage has occurred in the Niger-Delta area where most of the oil industries are based. Statutory rules and regulations for environmental protection applicable to the oil industry in Nigeria appear to be generally inadequate and ineffective. So far, air pollution has not been properly addressed. Natural gas is still being flared from many oil wells, with serious air pollution problems and a waste of this resource. The legal control of air pollution in the light of the ongoing operations of liquefied natural gas (LNG) and compressed natural gas (CNG) projects is advised along with other measures for environmental quality, control and the conservation of resources.[951]

While describing the negative effects of oil and gas exploration and exploitation on the environment in the Niger Delta region, Inokoba and Imbua have had this to say:

> oil related environmental multi-dimensional problems that have made life unbearable for the people of the Niger-Delta includes water pollution as a result of oil spills and drilling activities; destruction of vegetation, deforestation, destruction of farmlands and human settlement as a result of the installation and location of exploring facilities such as crude oil and gas carrying pipelines that criss-cross most communities in the Niger-Delta; loss of biodiversity such as fauna and flora habitat; destruction of mangrove swamps and salt marsh; air pollution and acid rain from gas and oil processing evaporation and flaring; industrial solid waste disposal; and several others.[952]

Amnesty International in its report titled "Nigeria: Petroleum Pollution and Poverty in the Niger Delta" describes the deplorable standard of living of the people of Niger Delta because of oil pollution as follows:

> People living in the Niger Delta have to drink, cook with, and wash in polluted water; they eat fish contaminated with oil and other toxins - if they are lucky enough to still be able to find fish; the land they use for farming is being destroyed because of the lack of respect for the ecosystem necessary for their survival; after oil spills the air they breathe reeks of oil and gas and other pollutants; they complain of breathing

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[949] Orubu CO *et al* "The Nigerian Oil industry: Environmental Diseconomies, Management Strategies and the Need for Community Involvement" 16(3) (2004) *Journal of Human Ecology* 203.

[950] Nwilo C and Badejo OT "Impacts and Management of Oil Spill Pollution Along the Nigerian Coastal Areas" (2007) <www.fig.net/pub/figpub/ pub36/chapters/chapter_8.pdf> accessed 01 June 2017.

[951] Ogri OR (n 947) 11. See also *SERAC* case (n 47).

[952] Inokoba PK and Imbua DL (n 386) 101-120 at 104.

> problems, skin lesions and other health problems, but their concerns are not taken seriously and they have almost no information on the impacts of pollution.[953]

The causes of oil spillage are multifarious and multi-dimensional, ranging from equipment failure, human error, sabotage to acts of God.[954] Oyekunle has identified the following causes of oil spillage:

1. drilling activity at new site,
2. an accidental bursting of pipeline when work is taking place around the pipeline,
3. an old pipeline that has not been checked for maintenance, and
4. vandalism by angry youth and members of the host communities.

Oyekunle has further asserted that the Federal Government and its collaborators in joint ventures always blame oil spillage on the people of Niger Delta which, according to him, is misconstrued. For instance, Shell Petroleum Development Company (SPDC) admitted that its infrastructure needed repair work and that corrosion was responsible for 50 per cent of oil spills.[955] A case in point was the Jesse, Delta State, pipeline explosion in October 1998 in which over 1000 people reportedly lost their lives.[956] It was alleged that the Government did not respond immediately to assist those affected, as would have been done in Western and industrialised countries.[957]

In one of the interviews conducted, a lawyer based in Yenagoa, while answering questions pertaining to the causes of oil spillage had this to say:

> Major spills are caused by corrosion and equipment failure due to long age and lifespan, even the sulphur content of the oil also causes problem for the pipelines. Sabotage too occurred, but the major causes are corrosion and equipment failure. Whereas, the same companies in advanced countries take care and update their equipment and replace the ageing ones to prevent oil spillage because of the heavy fines and the cost they may suffer if spillage occurs because of their own negligence. There, regulations are implemented to ensure best practices and standards are followed. I suggest that the Nigerian law should criminalise the pollution of the

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[953] Amnesty International "Nigeria: Petroleum, Pollution and Poverty in the Niger Delta" *Amnesty International* 21 <www.es.amnesty.org/uploads/media> accessed 02 June 2017.

[954] Ogri OR (n 947) 11.

[955] Amnesty International (n 953) 15.

[956] Sahhed ZS and Egwaikhide CI "Impact of Social Crises on Economic Development: Theoretical Evidence from Nigeria" (2012) 2 (6) *American International Journal of Contemporary Research,* 179 http://www.aijcrnet.com/journals/Vol_2_No_6_June_2012/21.pdf accessed 11 October 2017; AllAfrica "Nigeria: Pipeline Vandalism and Culpability of Security Agents" (2014) unknown page http://allafrica.com/stories/201410140258.html accessed 11 October 2017.

[957] Oyekunle S "Effect of petroleum on agricultural development in Nigeria" <www.academia.edu/1226374/effect_of_petroleum_on_agricultural_development_in_nigeria accessed 31 May 2017.

environment, and whenever pollution occurs in addition to civil litigation, the erring companies should be prosecuted.[958]

5.4.1 Effects of oil spillage

Water is a source of life; especially fresh or unpolluted water. Therefore, water is a public good that ought to be provided for by the government. Nigerians have the right of access to portable water and streams and other water bodies and the sources of water should remain unpolluted for their uses. The international human rights instruments like the Convention on the Elimination of all forms of Discrimination against Women (CEDAW),[959] the United Nations Convention on the Rights of the Child[960] and the African Charter on the Rights and Welfare of Children provide for right to clean water.[961] Nigeria is also a signatory to the International Covenant on Economic, Social and Cultural Rights (the Covenant) which, among other things enjoined member states to ensure the availability of sufficient, safe, and acceptable water for personal and domestic uses.[962] With the domestication of these international engagements, they are applicable as part Nigerian law.[963]

The right to an adequate standard of living is guaranteed under Article 11 of the Covenant, which is closely linked to the rights to health[964] and food.[965] Water is declared as indispensable to human survival and to achieving an adequate standard of living.[966] The inhabitants of Niger Delta depend on water systems for drinking, fishing, harvesting and fermenting cassava. However, the water body is polluted by the activities of oil companies and by the incessant spills into the water streams and rivers.[967] An Ogoni man that was interviewed at Ken Saro-Wiwa Polytechnic, in the

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[958] Personal communication by way of an interview on the 8 February 2017 at the Bayelsa State High Court in Yenagoa.

[959] Article 14(2). CEDA W entered force on 3/9/81 and was ratified by Nigeria on 13/7/85.

[960] Article 24, The Convention entered force on 2/9/90 and the Bill of Rights, which it established for children, has been incorporated into Nigeria's Child's Right Act No.26 of 2003.

[961] Article 14, the Charter entered force on 29/ 1/99.

[962] Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. I S: The Right to Water (Arts. II and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc E./C. I2/2002/ 1I, 20 January 2003. Nigeria has domesticated the agreement and as such, it has the force of law like any other Nigerian law?

[963] See Section 12 (1) of the 1999 Constitution of Federal Republic of Nigeria.

[964] Article 12.

[965] Article 11(1).

[966] See the General Comment 15 (2002) and the United Nations Economic and Social Council, "Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights" E/C. 12/2002/ 11 of 26/ JI /2002.

[967] Yusuf RO (n 937) 78.

heart of Ogoniland of River State, lamented the deplorable state of things when he said:

> In those days, we used to peel cassava and pour the peel into the river and when you go there the following day you will catch plenty fish, but in recent the story has changed; there is no more fish in the river, fish is now a scarce commodity in our communities. This scarcity is due to pollution of our rivers by continuous oil spills into these rivers.[968]

Also, a community leader in Port Harcourt, the Rivers State capital expressed his opinion on the state of the economy of the inhabitants of the Niger Delta generally because of the unsustainable exploration and exploitation of oil and gas in their area as follows:

> In those days when I was in the primary school, if you throw bate into the river you catch a lot of fish but nothing again. If you toiled day and night for fish, hardly do you catch what will sustain you and your family not to talk about selling to make money, so, there should be another way/method of providing means of livelihood like skill acquisitions. I am not in support of the demand for big money, but an alternative means of how people will survive, minimum comfort, provide them with good health facilities, schools, and potable water where necessary. Provide people with scholarship so that those of them that want to further their education will be able to do so and those who want to go for vocations will be trained. This is important because as Oloibiri oil, dried up, a time will come when other wells will also dry up. So, if there are no benefits now that the well is producing several million barrels of oil, then, what will happen when the oil dries up? More so, Nigeria does not save for raining days. Just imagine the shortfall in price of petroleum the country is in a financial crisis, what if the wells dry up. The realization of this is one of the reasons why our people are agitating for a better condition now.[969]

Apart from the harm to fisheries, oil pollution has damaged farms and natural resources (both living and non-living things in the eco-system). Oil pipelines run close by or sometimes right through farmland, and other oil infrastructure, such as well heads and flow stations, is often close to agricultural land.[970] It has been discovered that the location of these pipelines on farmlands makes farming extremely difficult and when there is an outburst of oil, the spill destroys the crops and renders the site useless for farming purposes. At times, oil spills result in large scale fire outbreaks leading not only to the destruction of plants, but valuable properties and lives are lost in the process. The following examples will hopefully put the problem into proper perspective.

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[968] Personal communication by way of an interview conducted in Ogoniland, River State of Nigeria on the 9 February 2017.

[969] Personal communication by way of an interview conducted on 9 February 2017 in Port Harcourt, River State of Nigeria

[970] Bribena EK (n 34) 230.

5.4.1.1 The Oil Spill at Bodo 2008

In 2008, a fault was reported in the Trans-Niger pipeline which resulted in a considerable oil spill into Bodo Creek in Ogoniland.[971] The oil poured into the swamp and creek for weeks, unchecked either by the regulatory authorities or the Shell Petroleum Development Company (SPDC) even though the spill was reported to them.[972] The oil spill covered the area, killing several species of fish and destroyed the mangroves which are an important fish breeding ground.[973] The killing of fish resources resulted in protein deficiency in the community of Bodo.[974] The destruction caused by the spill led to food shortages in the community without any relief from either the Federal Government or SPDC. The spill started on 28 August 2008 and was only stopped by the 7 November 2008.[975]

In an interview conducted by a local NGO, the Centre for Environment, Human Rights and Development (CEHRD), a local fisherman had this to say:

> If you want to go fishing, you have to paddle for about four hours through several rivers before you can get to where you can catch fish and the spill is lesser ... some of the fishes we catch, when you open the stomach, it smells of crude oil.[976]

The Nigerian oil industry regulations require clean-up of oil spills immediately but this is not done until the spill has destroyed the aquatic life in the area.[977] The state of affairs was confirmed by UNEP Environmental Assessment of Ogoniland.[978] This is an example of non-implementation of the regulation or a typical weak regulator.[979] What happened in Bodo is also an example of how multinational oil companies take advantage of the weak regulatory systems that characterize many poor countries, which frequently results in the poor people being the most vulnerable to exploitation

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[971] Amnesty International (n 953) 7.

[972] The pipeline that busted was that of the Shell Petroleum Development Company.

[973] United Nations Environment Programme (UNEP), Environmental Assessment of Ogoniland, Executive Summary (2011) 3 www.unep.org accessed 22 June 2017.

[974] Amnesty International (n 953) 7.

[975] Amnesty International (n 953) 7.

[976] Interview with local fisherman reported in CEHRD's, *Report on the state of human rights abuses and violence in the Niger Delta region of Nigeria*, (2009) 157 <www.cehrd.org> accessed 02 June 2017.

[977] Amnesty International (n 953) 8.

[978] United Nations Environment Programme (UNEP), Environmental Assessment of Ogoniland, Executive Summary (2011) 3 www.unep.org accessed 22 June 2017.

[979] No progress, an Evaluation of the Implementation of UNEP's Environmental Assessment of Ogoniland, Three Years On <www.amnesty.org.uk/files/unep_briefing_2014_niger_delta.pdf> accessed 22 June 2017.

by corporate actors.[980] The mishap in Bodo raised fundamental human rights abuses like:

1. violations of the right to an adequate standard of living, including the right to food as a consequence of the impact of oil-related pollution and environmental damage on agriculture and fisheries, which are the main sources of food for many people in the Niger Delta.
2. violations of the right to gain a living through work – also as a consequence of widespread damage to agriculture and fisheries, because these are also the main sources of livelihood for many people in the Niger Delta.
3. violations of the right to water – which occur when oil spills and waste materials pollute water used for drinking and other domestic purposes.
4. violations of the right to health – which arise from failure to secure the underlying determinants of health, including a healthy environment, and failure to enforce laws to protect the environment and prevent pollution.
5. the absence of any adequate monitoring of the human impacts of oil-related pollution – despite the fact that the oil industry in the Niger Delta is operating in a relatively densely populated area characterized by high levels of poverty and vulnerability.
6. failure to provide affected communities with adequate information or ensure consultation on the impacts of oil operations on their human rights.
7. failure to ensure access to effective remedy for people whose human rights have been violated.[981]

The Bodo oil spills were later to be taken up against Shell in the UK court, but Shell decided to settle before the case began. Shell agreed to compensate 15,600 farmers and fishermen who are to receive about £2,000 each as part of the Shell £55m pay-out for pollution caused by two oil spills in 2008 and 2009. The settlement is to be split as £35m for individuals and £20m for the Bodo community. While this is a significant sum in the context of the impoverishment of the Niger Delta, it will not reverse the degradation of the environment which the community relies on for their water, food and livelihood.[982]

It is important to note that Nigeria on 2 June 2016 set in motion a $1 billion clean-up and restoration programme of the Ogoniland region in the Niger Delta and in July 2016 flagged off the implementation of the UNEP Environmental Assessment of

[980] Amnesty International (n 953) 10.
[981] Amnesty International (n 953) 10.
[982] Shell announces £55m pay-out for Nigeria oil spills, the guardian news www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills accessed 8 June 2017.

Ogoniland Report.[983] The Federal Government inaugurated a 13-person Governing Council and a 10-person Board of Trustees for the implementation of the UNEP Report on Ogoniland.[984] If Nigerian government follows the recommendations of UNEP the clean-up may not take more thirty years to complete.[985] This is a step in the right direction, however, the Federal Government still needs to establish a clean-up fund; coordinate multi-stakeholders efforts; carry out emergency measures to reduce community exposure and initiate institutional and regulatory reforms as recommended by UNEP.[986]

5.4.1.2 Ibeno shoreline oil spill 2016

There was a massive oil spill in some communities situated on the Ibeno shoreline in Akwa Ibom state.[987] The spill has been traced to Exxon Mobil installations located at Okposo, Atia, Western end and Eastern end of Ibeno communities. It was allegedly caused by the Niger Delta Avengers and it has impacted the ecosystem of the communities negatively. The recent attacks by Niger Delta Avengers made it extremely difficult to reach the affected communities but the researcher conducted some interviews in Uyo, the capital of Akwa Ibom State. In one of the series of interviews conducted an indigene of the affected communities assessed the damage done by the oil spill as follows:

> This present spill is the sixth this year and it happened when the oil company was trying to fix Edoho pipelines destroyed by Niger Delta Avengers. The development has caused a great hardship to the fishermen, farmers and people in the affected communities.

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983 UN environment, UN Environment's Ogoniland Assessment Back in Spotlight <http://www.unep.org/newscentre/un-environments-ogoniland-assessment-back-spotlight> accessed 22 June 2017. The federal government had in 2006 commissioned UNEP to conduct an independent assessment of the environment and public health impacts of oil contamination in Ogoniland and make recommendations for remediation. The UNEP released its report in August 2011, the Report revealed that crude oil contamination in Ogoniland was widespread and severely impacting many components of the environment.

984 Shell Nigeria, The UNEP Environmental Assessment of Ogoniland.

985 Oil watch http://oilwatchafrica.org/content/ogoni-clean-up-set-to-commence-after-years-of-popular-campaigns/ accessed 22 June 2017.

986 This Day newspaper of Thursday, 22 June 2017 <www.thisdaylive.com/index.php/2016/06/07/implementing-cleanup-of-ogoniland/ accessed 22 June 2017.

987 Vanguard News 21 December 2061 "Fresh oil spill hits Ibeno communities in Akwa Ibom" <www.vanguardngr.com/2016/12/fresh-oil-spill-hits-ibeno-communities-akwa-ibom> accessed 21 June 2017.

5.4.1.3 Other Examples

On 25 June 2001 a major oil spill was reported in Ogbodo in Rivers State which continued for several days before the spill was contained.[988] Rukpokwu in Rivers State experienced an oil pipeline spill on the 3 December 2003.[989] On the 27 March 2007, Amnesty International also reported an oil spill in Kira Tai in Ogoniland.[990]

On the 2 September 2016, there was an oil spillage in Ologama, in Bayelsa State and as at 8 February 2017 when the researcher conducted an interview with a former member of the State House of Assembly, the oil spills were yet to be cleared and no relief materials had been supplied. The researcher asked him what the response of the oil companies was in terms of evacuating properties and people from the spillage site to avoid loss of lives and properties. He responded as follows:

> The major problem we have here is that even when an oil spillage occurs due to act of God (I mean due to no human error) or corrosion of old pipeline or equipment failure the oil companies takes up to a month or more before clearing the site whereas it is expected of them to respond immediately to clear the spillage and provide relief materials to the victims. As I am talking to you, my community Ologama have a case in court against the Nigeria Agip Company for the spill that occurred on the 2nd of September 2016. As I am speaking to you, no relief materials have been provided and people are in pains.[991]

The researcher was curious to know the efforts they made to inform the appropriate authorities about the occurrence in Ologama. He responded as follows:

> You know we have agencies, when the spill occurred, we reported at the station, even before we made our report the incidence has been communicated to the station at Brass, and then communicated to the government through the Ministry of Environment of Bayelsa State. Ordinarily, all the government agencies ought to spring to action within 24 hours and make necessary arrangements in order to prevent a major disaster. This, however, was not done and the spill spread to the farmlands, the swamps, and to the creeks. The effect is so devastating; the aquatic life is gone. Generally, in my place the kind of emission from the oil facility located there is bad; when it rains, it is acid rain, if you collect rain water into white bucket, the following day it turns black. And you are not allowed to take laws into your own hands and that was why we decided to approach the court for a remedy.[992]

Responding to the question on how to solve the problem of oil spillage in the Niger Delta and deal with the lackadaisical attitude of the oil companies to clear the

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[988] Amnesty International (n 953) 21.
[989] Amnesty International (n 953) 32.
[990] Amnesty International (n 953) 31.
[991] Personal communication by way of an interview on the 7 February 2017 at Ologama in Bayelsa State.
[992] Personal communication by way of an interview on the 7 February 2017 at Ologama in Bayelsa State.

spillage and pay compensation to assuage the suffering of the victims and restore the environment back to the state it was before the spill, a Senator in the National Assembly observed as follows:

> The laws are there to regulate the activities of the oil companies and the regulators are there to ensure compliance with best practices in the industry but the problem is one lack of competent personnel and equipment to work with. Again, another problem is the Nigerian factor of not doing things professionally. I think one area we need to look at seriously is this because in overseas when there is a spill, the company responsible for the spill does clean up and pay compensation; I do not think this is happening in Nigeria. So, I believe this is an area the National Assembly should look at and amend the law and let oil producers pay for their negligence. This is called "polluters must pay principle" widely adopted in petroleum industry globally.[993]

The peoples of Bodo, Ogbodo, Rukpokwu and Kira Tai and most recently Ologama in Bayelsa State saw their human rights undermined by oil companies and their government cannot or will not hold the companies to account.[994]

Three oil spills were reported in the press in August and September 2016. These spills have had devastating impacts on the agriculture, environments and general well-being of the local communities.[995] The first one was in Delta State affecting ten Ijaw communities along the Escravos River in Warri South West Local Government Area of Delta State, namely: Tebujor/Okpele-Ama, Ikpokpo, Okerenkoko-Gbene, Opuedebubor, Opuede, Opuendezion, Atanba, Oto-Gbene and Meke-Ama Communities in Gbaramatu Kingdom, along the Escravos. The crude oil spill was said to be from a Nigerian National Petroleum Corporation (NNPC) facility that is a crude oil trunk line from the Pipelines and Products Marketing Company (PPMC), the products marketing and distribution subsidiary of the NNPC.[996] The communities accused the PPMC of not carrying out a proper joint investigation of the incident by a properly constituted team comprising representatives of the community, NNPC, Department of Petroleum Resources and the National Oil Spill Detection and Response Agency, NOSDRA. They also accused the PPMC of bringing in military men to chase away the villagers.

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[993] Personal communication by way of an interview conducted for the Chairman Senate Committee on upstream sector of petroleum in the Nigeria's National Assembly on the 2 March 2017.

[994] The spill in Ologama was related to the researcher in one of the interviews he conducted on 7 day February 2017.

[995] Recent oil spills in Delta and Bayelsa States, Nigeria unknown page <www.stakeholdersdemocracay.org> accessed 19 June 2017.

[996] Recent oil spills in Delta and Bayelsa States (n 1079).

The second oil spill took place in the Kalaba community of Bayelsa State which has been in recent times plagued by gas leaks. A spill was discovered in August 2016, which continues to spill crude oil into the forests and swamps, threatening local ecosystems and agriculture capacity.[997] The oil field from which the reported spill came is operated by Nigerian Agip Oil Company.

Thirdly, in reference to a third oil spill in Ahoada East, Rivers State in August 2016, indigenes of Odiemerenyi community in Ahoada East, Rivers State in August reported a clash between military officers attached to the management staff of Total and local community youths.[998] The former had previously been denied access to the spill site while attempting to carry out an inspection tour, and reportedly returned with reinforcements, and shot at the youths in order to gain access, and burned six houses to the ground.[999]

The Niger Delta provides a plain case study of the lack of accountability of a government to its people and of multinational companies' lack of accountability when it comes to the impact of their operations on human rights. It is important to reiterate the provisions of the 1999 Constitution regarding the protection of the environment and responsive governance in the exploration and exploitation of natural resources. For example, Section 20 of the 1999 Constitution provides that "the state shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria". And Section 16 (2) provides that the State shall direct its policy towards ensuring:

> that the material resources of the nation are harnessed and distributed as best as possible to serve the common good; ... and that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens. [1000]

According to Section 17 (2) (d) "exploitation of human or natural resources in any form whatsoever for reasons, other than the good of the community, shall be prevented."

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[997] Recent oil spills in Delta and Bayelsa States (n 1079).
[998] Recent oil spills in Delta and Bayelsa States (n 1079).
[999] Recent oil spills in Delta and Bayelsa States (n 1079).
[1000] Amnesty International (n 953) 12.

Apart from this municipal law, the African Charter in Article 24 recognizes the right of all peoples to a "general satisfactory environment favourable to their development". Also, the UN Committee on Economic, Social and Cultural Rights has also explained that the right to health under Article 12 of the International Covenant on Economic, Social and Cultural Rights covers the underlying determinants of health, including "a healthy environment". As stated earlier, Nigeria is a signatory and has domesticated these agreements and thus she is obliged to implement them.

Nevertheless, government's failure to take the necessary measures to prevent third parties from polluting or contaminating food, water supplies and air, including the failure to enact or enforce laws, constitute violations of the rights to health.[1001] In a way, the Nigerian government supports and provides security using its military to shield oil companies against attacks from the aggrieved local communities. Most of the local people believed that there is hardly any distinction between the oil industry and the state.[1002] The two are perceived as one and the same entity. This view was expressed in the statement of one of the Frontline Niger Delta civil society activists as follows:

> Government and oil companies are in alliance and I can prove it. Government signs the issues concerning oil extraction with oil companies and the local people are not involved. This is unlike the situation in developed countries where agreements are between the people and oil companies. We are not even arguing for a bilateral agreement with oil companies, but, at least, let there be a tripartite agreement. Again, it is well known that any time things go wrong in the oil producing area, soldiers are sent in and they are never on the side of the people, but to protect oil.[1003]

SERAC case is apposite here.[1004]

5.5. An evaluation of the performance of the NDDC

There had been some other interventionist agencies before the establishment of the NDDC. For instance, the Niger Delta Development Board (NDDB) was established after the recommendations of the Willink Commission of 1958 to allay the fears of the minority in the Niger Delta. The main goal for establishing the NDDC is to improve the living standards of the people of Niger Delta. To assess the performance

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[1001] Section 17 (3) (d) of the 1999 Constitution of Nigeria.

[1002] This an example of a rentier state which is only interested in collecting rents in terms of royalties and taxes from the oil companies.

[1003] Interview with ex-Executive Officer of the IYC retrieved from Omeje K Oil conflict in Nigeria: Contending issues and perspectives of the local Niger Delta people (2005) *10 (3) Journal New Political Economy* <www.tandfonline.com> accessed 20 June 2017.

[1004] *SERAC* case (n 47)

of the NDDC at improving the living standards of the people of Niger Delta, the researcher conducted some interviews to sample the opinions of the people in the oil rich states of Delta, Bayelsa and Rivers and that of other stakeholders in the industry. The researcher interviewed one of the law makers in the House of Representatives; he expressed his opinion as follows:

> Nigeria established the NDDC to improve the lots of the Niger Delta people but unfortunately the body has not performed to expectation. When government put good policy in place in Nigeria the usual problem is its implementation. Government at times is to blame for haphazard implementation of budgetary allocation to the NDDC; the full budgetary allocation meant for the NDDC is not released. This resulted in many abandoned projects found here and there in the oil producing states of Nigeria.[1005]

A Senator in the Upper Chamber of Nigerian legislature has a slightly different view on the reason for the poor performances of the NDDC when he asserted:

> The Federal Government tried to put legislation and institutions in place to assuage the sufferings of the people in the oil producing states. A lot of agencies were created which were doing the job which the present NDDC is doing. This is what I called interventionist agencies and their job is strictly for the development of the Niger Delta but you find out that over the years, the funds for these interventionist agencies were misapplied by those in charge. If you look at what they were using the money for in the past, the majority of the projects upon which this fund was spent were things you cannot find on ground. The money was spent on consultancy services; this consultancy that, public community relations and so on and so forth, things you cannot lay your fingers on. There was a very little infrastructural development.[1006]

In another interview conducted at the Nigerian Law School based in Yenagoa, Bayelsa State of Nigeria, a community leader and politician who is also a law graduate shared his opinion on the reasons for the poor performance of the NDDC as follows:

> First, what is NDDC; NDDC is not for the Niger Delta. Though it is called the Niger Delta Development Commission, everybody knows the Niger Delta; it is the tributaries of the River Niger into the Atlantic Ocean. So, a situation whereby Imo State is part of the Niger Delta, Imo State is not one of the tributaries of the Niger, you see that the inclusion of Imo state has negated the real meaning of the Niger Delta. The real reason for the creation of the Niger Delta Commission is because oil is being produced in the Niger Delta and this Commission is formed to take care of the Niger Delta issues, but instead, it is taking care of oil producing states, not the Niger Delta issues as it ought to be. If the body is for the Niger Delta, then the managers of this body should then come from this locality. It is not somebody known to you as a Senator, or as Governor or Deputy Governor that parleys with you at the Federal level you appoint, someone who does not even have a building in his locality, how will he have a feeling or a thought of the locality, he won't even know the pains these people go through. These people that are appointed, if you see when they come to

[1005] Personal communication by way of an interview conducted for the Chairman House Committee on downstream sector of petroleum in the Nigeria's National Assembly on the 2 March 2017.

[1006] Personal communication by way of an interview conducted for a member of Senate in the Nigeria's National Assembly on the 2 March 2017.

> this area, they come with convoy, security personnel that will not even allow access to them. The real thing is that they will never listen to you, it is only when a Minister, a Senator recommends or put a call through to them that they listen, but if a local man, a fisherman or somebody in the locality puts a call through to such people, they will not even pick the calls, because they will not know the number. My own community is an oil producing community. The NDDC awarded a job in my community since 2007 and the job is to protect or reclaim the land from erosion, but from 2007 to date is about 10 years nothing is done; the erosion has gone into the shores over a kilometre. The NDDC is not proactive; they are not interested in the Niger Delta, it is politicised and it is aimed at sharing the contracts among the people in positions of authority, it is not intended to develop the people.[1007]

A traditional ruler in Rivers State has a different opinion on the reason responsible for the poor performances of the NDDC. According to him:

> The Federal Government has not released enough funds to them. If they are releasing the money to the NDDC, and they do not perform people will now say they are not performing. In a situation where you do not release the funds how do you expect them to perform?[1008]

From the foregoing, it can be observed that the NDDC as an interventionist agency has not lived up to expectations and there is need for total overhauling of the agency to place it in a strategic way to be able to achieve the goal for its establishment. It was also observed that the budgetary allocations due to the NDDC were not released to them, thereby resulting in abandoned projects spreading over the Niger Delta. The National Assembly has the statutory oversight function to monitor the disbursement of budgetary allocations to parastatals, agencies and institutions; they have the right to question the executive on the non-release of budgeted funds to the NDDC. The National Assembly cannot be said to have fared well in its oversight functions over agencies and institutions of government especially the NDDC.

Apart from the Federal Government interventionist agencies, 13 percent derivation from oil is also allocated to the State Governments in the Niger Delta region, namely: Imo, Abia, Ondo, Rivers, Cross River, Bayelsa, Edo, Akwa Ibom and Delta. Unfortunately, however, the 13 percent derivation given to oil producing states in Nigeria has not solved the problem of agitation in the Niger Delta. The 13 percent derivation[1009] which amounts to billions of Naira every month given to the oil-producing states are diverted to private pockets leaving the common man poorer. In

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[1007] An excerpt of the interview conducted for a community leader and politician in Yenagoa, Bayelsa State on the 6 February 2017.

[1008] An excerpt of the interview conducted for a traditional ruler in Warri, Delta State on the 6 February 2017.

[1009] See Section 162(2)(4) of the 1999 Constitution of the Federal republic of Nigeria.

an interview with a worker in the Judiciary, Yenagoa, Bayelsa State, the person responded to the question as to whether the 13 per cent given to Bayelsa State has a positive impact on the lives of the people as follows:

> Things are so tough with us now than ever; we only hear and see the figures of billions of Naira allocated to the state, but as you can see yourself there is nothing to show for it. Will it not surprise you if I tell you that civil servants are being owed up to four months' salaries in the state? There has been no difference between us and the non-oil producing states.

5.6 The Issue of Compensation under International Law

As observed earlier, oil and gas being global commodities have attracted international attention. It is also globally acknowledged that the extraction of oil brings along with it unavoidable consequences of environmental damage, hence, provisions for compensation to the victims of the exploration and exploitation of the commodity are contained in the international legal instruments. There are international instruments on pollution due to oil, such as the Convention on Civil Liabilities for Oil Pollution Damage (CLC), 1969[1010] and the Convention on the Establishment of International Fund for Oil Pollution Damage (FUND Convention) 1971.[1011] These Conventions cover compensation for all sea-going vessels carrying oil in bulk as cargo and they apply to pollution damage within the waters of countries that are party to them; they are applicable to oil spillage caused by ships while on the high seas.[1012]

The occurrence of oil spillage under the international regime is a strict liability offence and therefore, there is no need to prove that the ship-owner is negligent or not. More importantly, the plaintiff has the opportunity of claiming from ship-owners whose ships caused the oil pollution harm where the sum from the ship owner is limited or is insufficient to compensate the victims because of the enormity of the damage; the victims can also recover from the FUND. The FUND is raised by levies from all persons who have received in the calendar year, more than 150,000 tons of

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[1010] The Convention on Civil Liability for Oil Pollution Damage (CLC),1969 <https://cil.nus.edu.sg/rp/il/pdf/1969%20International%20Convention> accessed 5 June 2017.

[1011] The Establishment of International Fund for Oil Pollution Damage (FUND Convention) 1971. It is also important to note that both conventions were amended by two additional protocols in 1972 which came into force in 1996. So, the 1992 protocol has replaced the 1971 convention. See < www.admiraltylawguide.com> accessed 5 June 2017.

[1012] It is important to note that in 1996, a new international convention was adopted to cover liability and compensation for damage about the carriage of hazardous and noxious substances (HNS) by sea.

crude oil and heavy fuel oil from a state party to the FUND and from the contributions received from state contributors. Although there are no uniform compensation schemes under international law, there are few principles they have in common, which are:

1. damage to property tends to be calculated by reference to the actual cost of repairing or replacing the property, or the difference between the value before and after the spill;
2. compensation for damage to natural resources (where this is provided for) tends to be calculated by reference to the cost of remediating or replacing the lost or damaged natural resources. The compensation schemes do not generally provide for additional, independent compensation for damage to natural resources;
3. damages for loss of subsistence use of natural resources can be included;
4. compensation for consequential losses and pure economic losses (such as loss of income) are generally provided;
5. it can include the cost of bringing a claim, including the use of advisers where appropriate;
6. the heads of loss identified in the compensation schemes are generally not exhaustive or exclusive: for example, the French court awarded damages for non-pecuniary losses in addition to those provided for by the International Convention on Civil Liability for Oil Pollution Damage 1992 similarly, the American Oil Pollution Act does not contain damages for personal injury but these can be claimed under state or admiralty law;
7. non-pecuniary losses (save to the extent that these might be recoverable as damage to natural resources or loss of subsistence use) and punitive damages are generally not expressly recoverable under the compensation schemes.[1013]

It should be noted, however, that the Conventions do not apply to inland waters, but it is expected that member nations should take care of such similar occurrences in their domains. These are clearly adaptable to the Nigerian context relating to offshore oil production, but not so easy to apply to the frequent spills from onshore pipelines, affecting Nigerian farms and villages in the Niger Delta and other parts of Nigeria. It seems that Nigeria has a peculiar context which international systems take no account of like the losses that arise from pollution of communal water supplies since these have no calculated monetary value. The same applies to natural resources like mangrove swamps, which are not even communally-owned, but are of great importance to communities.

5.6.1 Compensation for oil spillages

Compensation for oil spillage under present Nigerian law is inadequate, and this is the major reason for unrest in the Niger Delta. Under the existing legislation, compensation relates primarily to the economic value of the damaged land rather

[1013] NOSDRA "Towards a new Oil Spill Compensation System in Nigeria" (2004) 6 <www.stakeholderdemocracy.org/stockholm/wp-content/uploads> accessed 05 June 2017.

than specific environmental damage done to the ecosystem. Secondly, the level of the compensation offered is effectively decided based on a valuation through the Land Use Act, which is designed to pay for compulsory purchase, rather than on-going damage.[1014] The Land Use Act was not designed for the oil industry at all, although its provisions run through all subsequent compensation assessments.[1015]

The Petroleum Act, 2004 specifies compensation based on the "commercial value" of trees and crops. It does lay down a statutory duty to avoid damage to trees, crops and buildings, but it does not say what happens when this duty is violated. In fact, it makes no provision at all for how the compensation is calculated beyond saying that it should be "fair and adequate".[1016]

The Oil Pipelines Act demands 'just compensation' for a wider range of potential problems, including pipeline leakages. However, it refers to the Land Use Act to calculate this compensation in "so far as they are applicable'. The result is that the compensation system under the Oil Pipelines Act refers once more to an inadequate enabling Act.[1017]

Meanwhile the Nigerian National Petroleum Corporation Act of 2004 also requires compensation for any loss or damage, but in place of any definition of the level of the necessary compensation, it once again refers to the flawed Land Use Act.[1018]

The Nigerian Minerals and Mining Act of 2007, does at least have an element of best practice in that it specifically requires that compensation be calculated by the Mining Cadastre Office after consultation with the State Minerals Resource, the Environment Management Committee and a Government licensed valuation expert.[1019] This at least allows for specific sites to be examined and valued.[1020] This however is not applicable to oil and gas.

There have been several attempts to harmonise compensation rates. In 2008, the Conference of Directors of Lands in Nigeria (CDLN) adopted a new harmonised

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[1014] NOSDRA (n 1013) 3.
[1015] NOSDRA (n 1013) 4.
[1016] NOSDRA (n 1013) 4.
[1017] NOSDRA (n 1013) 4.
[1018] NOSDRA (n 1013) 4.
[1019] Section 108 of the Nigerian Minerals and Mining Act of 2007.
[1020] Section 108 of the Nigerian Minerals and Mining Act of 2007.

compensation rate system for the country. The problem is that these rates appear to compete with two other rating systems. These are the Department of Petroleum Resources Compensation Rates of 1998 and the Oil Producers Trade Section (OPTS) rates of 1997. These two rates were effectively set by the oil industry, after a national outcry that the then existing rate of compensation had not been revised for almost two decades.

Because of the conflicting positions in the methods of calculations stated above which have no legal basis, resort is made to the nearly 40 year old Land Use Act which is grossly inadequate.[1021] For instance, section 29 of the Act states that where land is compulsorily acquired by the government for public purposes, it is to pay compensation for the improvements and in case of agricultural land compensation for the economic crops.[1022] It should be noted also that compensation for pollution and its environmental damage is more than compensation for compulsory purchase of land.[1023] Nigeria can learn from the international regime on the site assessment of the extent of damage caused by the pollution rather than basing compensation on the crops and other improvements on the land as provided by the Land Use Act.

The fines or penalties for pollution and environmental damage are small compared to the impact of oil spills on human lives and the environment. For instance, the fine for failing to report an oil spill to NOSDRA is 500,000 Naira.[1024] The fine for failure to clean up the impacted site to all practical extents, including remediation incurs a fine of one million Naira. These fines are inadequate to ensure compliance with the law and to prevent damaging practices. The fine for failure to clean up and ameliorate oil impacted sites is a cause for concern, given that such failure prolongs serious human rights violations. The amount paid by oil companies in fines is unknown, but many civil society organizations in the Niger Delta are concerned that low fines reflect the fact that the government is the major partner in the joint venture operations, and so liable for the bulk of any fines imposed.[1025]

[1021] NOSDRA (n 1013) 5.
[1022] See section 29 of the Land Use Act, Cap 202 Laws of Federation of Nigeria 2004.
[1023] See section 29 of the Land Use Act, Cap 202 Laws of Federation of Nigeria 2004.
[1024] National Oil Spill Detection and Response Agency (Establishment Act) 2006.
[1025] Amnesty international (n 953) 52.

Apart from the fines imposed, the government in collaboration with the oil companies concerned should assuage the environmental devastation by building suitable infrastructural facilities such as schools, water supply, power supply, create employment opportunities, scholarships, vocational skills programmes, agricultural support programmes and other examples of corporate social responsibilities.

The *case of Shell v Farah*[1026] underlines the difficulties faced by individuals and communities in the Niger Delta in securing fair and adequate compensation. In this case, several families were unable to use their farmland for years but received no compensation for the loss of income and could not secure an adequate rehabilitation until they went to court. In 1970 a blow-out at Shell's Bomu Well II in Ogoniland resulted in severe and widespread damage to surrounding lands, which were used by the community for farming and hunting. Shell compensated the affected families for the losses of the crops and economic trees. They did not give compensation for damage to the land, but promised to rehabilitate the land on which the affected families could no longer farm. When the land had not been remediated almost two decades later, residents of the area initiated a lawsuit in 1989.

In 1991 the Bori High Court in Rivers State awarded them 4.6 million Naira (US$210,000 at the official exchange rate) in damages. The court found that the compensation originally paid by Shell was not fair and adequate. While Shell had paid for damage to crops and trees, the court found that the victims should also be compensated for the loss of income in the long term since, for the two decades after the incident the victims had not been able to use the land for farming. The court also found that the victims should be compensated for the shock, fear and general inconvenience they had experienced.

Shell appealed the judgment. In December 1994, the Appeal Court dismissed the appeal and affirmed the judgment of the lower court. The Court stated that payment for only the crops and economic trees damaged at the time of the incident "certainly could not amount to a fair and adequate compensation as the damage went well beyond mere damages to crops and economic trees [and] the arable land was heavily polluted and rendered unproductive for many years." The case of *Farrah* is

[1026] (1995) 3 WLR (Pt. 382) 148.

an example of how justice could be delayed in Nigeria. The matter was only resolved after twenty-five years.

5.7 Gas Flaring

The moment oil is pumped out of the well, the gas produced is referred to as "associated gas" and this is separated by being burnt as waste in massive flares. This practice has been going on for almost six decades. The burning of this "associated gas" has long been acknowledged as extremely wasteful and environmentally damaging.[1027] Nigeria has declared as unlawful gas flaring since 1984, unless a ministerial consent has been issued.[1028] Although the government has announced various deadlines for the cessation of flaring, each deadline has passed, but flaring continues with impunity or unimpeded.

Gas flaring continues for twenty-four (24) hours a day in many areas and this is injurious to human and animals' health.[1029] The court has also made pronouncements to stop flaring of gas, but the judgements have not been enforced either by the police or the regulatory authorities.[1030]

In the case of *Jonah Gbemre v Shell Petroleum Development Company and Others*[1031] (Jonah Gbemre was supported by Environmental Rights Action, Friends of the Earth Nigeria and the Climate Justice Programme), Gbemre filed a case in the Federal High Court of Nigeria to stop gas flaring in the Iwerekan community in Delta State. On 14 November 2005, the Federal High Court of Nigeria ruled that gas flaring was a violation of the constitutionally guaranteed rights to life and dignity, and ordered that flaring should be brought to an end in Iwerekan.

[1027] Environmental Rights Action and The Climate Justice Programme, "Gas Flaring in Nigeria: A human rights, environmental and economic monstrosity", June 2005.

[1028] The Associated Gas Reinjection Act 1979, required every company to submit a plan on how they would implement the reinjection of associated gas, including a scheme for the utilization of all produced gas (section 2). Under section 3 of the Associated Gas Reinjection Act 1979, a consent to continue flaring can only be issued if the Minister is satisfied that utilization or reinjection is not appropriate or feasible in a field or fields. The Associated Gas Reinjection (Continued Flaring of Gas) Regulations 1984, include a range of conditions for continued gas flaring but also allows the Minister to authorize the production of oil from a field that does not satisfy any of the conditions specified in these Regulations. Despite requests by Environmental Rights Action/Friends of the Earth Nigeria, no consents or conditions have been disclosed by any of the companies.

[1029] Amnesty international (n 953) 35.

[1030] *Jonah Gbemre v Shell Petroleum Development Company and Others (2005) Suit No. FHC/8 /CS/53/05.*

[1031] (2005) Suit No. FHC/8 /CS/53/05.

On the 10 April 2006, the Federal High Court granted a conditional stay of Execution of the court order. Three conditions were attached, including that Shell and NNPC stop gas-flaring activities in Nigeria by 30 April 2007. The court also told SPDC to produce a detailed plan of action, showing how they would stop gas flaring in Iwerekan. Jonah Gbemre's legal representative attended the court on 30 April 2007. He discovered that, not only had no detailed scheme for stopping the flaring been submitted, but that the judge had been transferred to another court district and the case file was not available. No representatives of the company or government turned up. SPDC subsequently obtained a further stay of the court order, with no known conditions attached. As of May 2009, two years after the expiry of the original deadline, gas flaring continues in Iwerekan.[1032]

As noted earlier, the Land Use Act was not designed for the oil industry at all, although its provisions run through all subsequent compensation assessments.[1033] However, the courts are enjoined to follow the example laid down in the cases of *Jonah Gbemre* and *Farrah* to award damages beyond mere damage to economic crops and improvement on the land to rehabilitating the polluted land.

In the *Exxon Valdez case,*[1034] the issue of rehabilitation of the environment was uppermost in the minds of both the court and the polluter. The Exxon Valdez oil spill has been the worst in American history.[1035] It damaged 1,300 miles of shoreline, disrupting the lives and livelihoods of people in the region and killing hundreds of thousands of birds and marine animals. It occurred after the ship's captain, who was drunk left the bridge at a crucial moment. The Court held that Exxon Mobil was vicariously liable for damage caused by the recklessness of the ship captain and awarded US$5 billion punitive damages. On appeal to the Supreme Court, the polluter having spent a large sum of money in cleaning-up the water and voluntarily paid the sum of US$507 as compensation to the victims the court reduced considerably the fine it awarded against the company.[1036]

[1032] Amnesty international (n 953) 77.
[1033] NOSDRA (n 1013) 4.
[1034] Exxon Shipping Co. v Baker 490 F.3d 1066 (9th Cir. 2007).
[1035] Exxon Valdez super tanker spilled 11 million of gallons of crude oil in Alaska water in 1989.
[1036] Liptak A "Damages Cut against Exxon in Valdez Case" <www.nytimes.com/2008/06/26> accessed 12 October 2017.

The court in the above case applied the "polluter must pay principle." The principle requires that the company that pollutes the environment should be made to pay compensation to victims and be responsible for the cost of remediating the environment.[1037] It imposes liability on the polluter whether or not the polluter is at fault especially in matters of oil pollution and gas flaring. The polluter is strictly liable for its harmful act even if all reasonable care is taken. Sometimes the damage caused by the polluter is beyond its capacity and that is why trust funds are usually set up to mitigate large-scale environmental degradation. Although this principle has been incorporated into the statute books, Nigeria is yet to join other advanced economies where such trust funds are established to compensate and remediate the environment.[1038]

5.8 Access to Justice

The cost of litigation in Nigeria is very high for the poor people to afford. As such, most of the cases of oil spillages and other environmental damage claims are not pursued through the legal system. The delay experienced by litigants in getting justice is one of the major problems in the administration of civil and criminal justice system in Nigeria. This is contrary to the popular maxim that justice delayed is justice denied. The justice system itself is fraught with legal technicalities which rob the litigants of justice especially in environmental matters. Among these challenges are: locus *standi,* burden and standard of proof, limitation time/period and jurisdictional controversy on environmental pollution cases. These challenges are discussed here under.

5.8.1 Locus Standi Rule

The word locus *standi* denotes "standing to sue", "legal standing" or "title to sue".[1039] It means that a person who does not have sufficient interest in a case will not be allowed to sustain an action in court.[1040] Generally under the existing rule of locus

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[1037] Osondu AC *Our Common Environment: Understanding the Environment, Law and Policy* (1st edn. University of Lagos Press, Lagos, Nigeria 2012) 94.

[1038] Section 12 of the Harmful Wastes (Special Criminal Provisions) Act.

[1039] Oluyede PAO *Constitutional Law in Nigeria* (1st edn. Evans Brothers (Nigeria Publishers) Limited, Ibadan, Nigeria 1992 Reprinted 2001) 369.

[1040] Derri DK "Litigation problems in compensation claims for oil gas operations in Nigeria" in Emiri F and Deinduomo G (eds) *Law and Petroleum Industry in Nigeria: Current Challenges* (Malthouse law books Lagos 2009) 10.

standi in Nigeria, to maintain an action the persons bringing public law actions including those relating to the protection of the environment against the State must show that they are 'person aggrieved', that is an individual, persons or group of persons whose legal rights are infringed or is about to be infringed by the State's act, neglect or default in the execution of any environmental law, duties or authority.[1041] Such individuals, persons or group of persons must show some pecuniary interest or physical damage, either sustained or about to be sustained and must not be remote, speculative and insubstantial.[1042]

The case of *Adesanya v President, Federal Republic of Nigeria*[1043] is the *locus classicus* for the in courts' approach to the issue in Nigeria. In that case, Abraham Adesanya, then a serving Senator in the National Assembly, instituted an action against the President of the Federal Republic of Nigeria challenging the appointment of Justice Ovie-Whiskey as the Chairperson of the Federal Electoral Commission (FEDECO). The appointment was tabled in the National Assembly, where the views of Abraham Adesanya were over-ruled by the majority views of members who supported the appointment of Justice Ovie-Whiskey. Upon confirmation, Abraham Adesanya approached a High Court in Lagos State seeking a declaration and injunction to stop the appointment. The Lagos High Court in its judgment, declared the appointment unconstitutional and held that Justice Ovie-Whiskey was not competent under the Constitution to be appointed a member and Chairperson of FEDECO at the time the appointment was made.

The decision was appealed and the Court of Appeal allowing the appeal declared that Abraham Adesanya had no locus *standi* to challenge the appointment being a member of the Senate where his objection to the appointment had been over-ruled. Dissatisfied with the outcome of the appeal, he appealed further to the Supreme Court. The Apex Court in its ruling affirmed the decision of the Court of Appeal that Senator Adesanya, having participated in the deliberations of the Senate about the

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[1041] See Oronto-Douglas case, note 10 above; *Adesanya v President of Nigeria* (1981) All NLR 1 at 39; *Inyangukwo v Akpan* (1985) 6 NCLR 770; *Attorney-General of Kaduna State v Hassan* (1985) 2 NWLR 483; *Irene Thomas and others v Reverend Olufosoye* (1986) 1 NWLR 669, and *Adediran and another v Interland Transport Limited* (1992) 9 NWLR (Part 214) 155. For a criticism of this position, see Ogowewo TI, "Wrecking the Law: How Article III of the Constitution of the United States Led to the Discovery of a Law of Standing to Sue in Nigeria", 26 Brooklyn JIL 527 (2000).

[1042] The standard was laid down by Breman J in the case of *Baker v Carr* 369 US 186, 204 (1962).

[1043] (1981) 5 SC 112. See also the case of *Fawehinmi v. Akilu* [1987] 4 NWLR (PT.67) 797

subject matter before instituting the suit, had no locus *standi* to challenge the constitutionality of the appointment in the court. The court laid down the following rules in determining whether a litigant has locus *standi* or not:

1. If he has a special legal right or alternatively, if he has sufficient or special interest in the performance of the duty sought to be enforced, or where his interest is adversely affected.
2. What constitutes a legal right, sufficient or special interest, or interest adversely affected, will, of course, depend on the facts of each case.
3. Whether an interest is worthy of protection is a matter of judicial discretion which may vary according to the remedy asked for.[1044]

Satisfying the procedural requirement in environmental law litigation has proved onerous to persons, including Non-Governmental Organisations (NGOs) that are interested in the protection of the environment or in defending the rights of persons affected by environmental degradation.[1045] Their failure to satisfy this requirement had led to the loss of many worthy environmental cases in Nigerian Courts. This is manifest in *Oronto-Douglas v Shell Petroleum Development Company Ltd and 5 others*,[1046] where the plaintiff, an environmental activist sought to compel the respondents to comply with the provisions of the Environmental Impact Assessment (EIA) Act before commissioning their project (production of liquefied natural gas) as required by law in the Niger Delta region of Nigeria. The Federal High Court (per Belgore, CJ, (as he then was) dismissed the suit on the grounds, *inter alia*, that the plaintiff has shown no legal standing to prosecute the action. It should be noted that a fall-out of the Oronto-Douglas case was the practice of environmental NGOs sponsoring victims of environmental degradation to litigate against those responsible.[1047]

This is evident in the case of *Jonah Gbemre v Shell Petroleum Development Company and others*[1048] referred to above which was sponsored by Environmental Rights Action (Friends of the Earth Nigeria) and the Climate Justice Programme; the

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[1044] The lead judgment was read by Fatayi-Williams CJN

[1045] Amechi EP, 'Poverty, Socio-Political Factors and Degradation of the Environment in Sub-Saharan Africa: The Need for a Holistic Approach to the Protection of the Environment and Realisation of the Right to Environment', 5/2 Law, Environment and Development Journal 107, 110 (2009).

[1046] For an equivalent Ugandan decision, see *Byabazaire Grace Thaddeus v Mukwano Industries*, Misc. Application No. 909 OF 2000, High Court of Uganda (Kampala Division).

[1047] For example, Gbemre case was sponsored by Environmental Rights Action/Friends of the Earth Nigeria, with scientific and legal support from E-LAW U.S. See Yusuf, note 73 above at 93 and Anonymous, 'Nigerian Judge Rules Gas Flaring Violates Constitutional Rights', ENS, 15 November 2005, available at http://www.ens-newswire.com/ens/nov2005/ 2005-11-15-04.asp

[1048] (2005) Suit No. FHC/8 /CS/53/05.

case was pursued to its logical conclusion but the judgment was not implemented. It is expected that the case will be followed up to ensure compliance with the court order that flaring should be stopped at a fixed date and that Shell should also submit a plan to stop gas flaring. However, this practice is dependent on the determination of the victims to prosecute such suits to their logical conclusion because most of the time the oil company uses financial inducement to force the litigants to discontinue their suits.[1049]

The Court of Justice of the Economic Community of West African States (ECOWAS) sitting at Ibadan, Nigeria in 2012 considered the issue of locus *standi*, justiciability of socio-economic rights and the right to healthy environment in the case of *SERAP v Federal Republic of Nigeria.*[1050] In that case, the plaintiffs alleged violation by the Defendants of the rights to health, adequate standard of living and rights to economic and social development of the people of Niger Delta and the failure of the Defendants to enforce laws and regulations to protect the environment and prevent pollution. It cited the examples of oil spills in Bodo Creek in Ogoniland on 28 August 2008 and Ogbodo in Rivers State. The defendants raised preliminary objections that the plaintiffs lacked locus *standi* and argued that the said rights complained of were not justiciable in Nigeria and that the court lacked jurisdiction to entertain the alleged violations of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[1051]

On the issue of justiciability of socio-economic rights; the court held that a distinction had to be drawn between the rights that were not justiciable because the enjoyment of the rights depends on the availability of state resources and those ones that were denied due to a failure to use the state's authority, in compliance with international obligations, to prevent the oil extraction industry from doing harm to the environment, livelihood and quality of life of the people of that region. More importantly, the sources of law the court relied on were not the Constitutions of Member States, but

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[1049] For example, in the Tiomin mining incident which resulted in *Rodger Muema Nzioka and 2 others v Tiomin Kenya limited,* Civil case No.97 of 2001, High Court of Kenya, Mombasa, available at http://www.elaw.org/node/1996, there was the allegation that some of the parties were bought off thereby facilitating easy extra-judicial settlement of the dispute. See Kameri-Mbote P, Towards Greater access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention (Geneva: International Environmental Law Research Centre, Working Paper 2005-1, 2005), < www.ielrc.org/about_kameri-mbote.php.> accessed 9 June 2017.

[1050] Case file no: ECW/CCJ/JUD/18/2012.

[1051] Para 20, page 7 of the judgment.

rather the international instruments to which these States voluntarily bound themselves at the international level, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights.[1052]

Paragraph 2, Article 5 of the International Covenant on Economic, Social and Cultural Rights which Nigeria is a state party to by adhesion since 29 July 1993 provides:

> No restriction upon or derogation from any of the fundamental human rights recognised or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent.[1053]

The defendants raised the issue of locus *standi*, because there was no proof that the plaintiff was acting on behalf of and in the interest of the People of Niger Delta. However, the court ruled in support of the plaintiffs maintaining that the plaintiffs had sufficient locus *standi* in the matter.[1054] The court held that there was agreement in International Law that when the issue at stake was the violation of rights of entire communities, as in the case of the damage to the environment, access to justice should not be easily denied. For instance, Articles 2 (5) of the Convention of "Access to Information, Public Participation in Decision- Making and Access to Justice in Environmental Matters" [1055] defines the "public concerned" with environmental protection as:

> the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.[1056]

The court observed that although the Convention was not binding on African States, but it had a strong persuasive effect which the court could not ignore. The court went

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[1052] See the case of *Socio- Economic Rights and accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission*, 2009 ECW/CCJ/JUD/18/2012, 11<www.courtecowas.org> accessed 14 June 2017.

[1053] *SERAP* case (1052) 11.

[1054] *SERAP* case (1052) 12.

[1055] Convention on Access to Information, Public Participation in Decision- Making and Access to Justice in Environmental Matters. The Convention was adopted in Aarhus, Denmark, 25 June 1998. See also *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v President of the Federal Republic of Nigeria & Ors* Suit No: ECW/CCJ/APP/08/09; Rul. No: ECW/CCJ/APP/07/10 para 57.

[1056] Convention on Access to Information (n 1055) para 57.

on to say that this right was also recognised by the American Convention on Human Rights which provides in its Article 44 as follows:

> that any person or group of persons, or any non-governmental entity legally recognized in one or more member states of the organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a state party.

It is important to note that Article 33 of the Rules of Procedure of the African Court of Justice and Human Rights also allows non-governmental organisations to sue on behalf of victims of environmental degradation.[1057] This more liberal view on locus *standi* has been recommended by Magnus Killander for the African Continent.[1058]

The court among other things, held that it had jurisdiction to adjudicate on the alleged violations of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, that SERAP had locus *standi* in the instant case and that the Federal Republic of Nigeria had violated Articles 1 and 24 of the African Charter on Human and Peoples' Rights.[1059] The court ordered the Nigerian Government to:

1. Take all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta;
2. Take all measures that are necessary to prevent the occurrence of damage to the environment;
3. Take all measures to hold the perpetrators of the environmental damage accountable.

To enhance access to justice, the 2009 Fundamental Rights Enforcement Procedure (FREP) Rules in Nigeria have dispensed with the burdensome requirement of locus *standi*. The Courts are required to encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus *standi*.[1060] The new Rules expressly mandate the Court to 'proactively pursue enhanced access to justice to all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated, and the unrepresented'.[1061]

[1057] Convention on Access to Information (n 1055) para 60.

[1058] Killander M, "The African Regional Human Rights system and Other Regional Systems: A Comparative Analysis" in judiciary Watch Report, Publication from the Kenyan section of the International Commission of Jurist, 182

[1059] The African Charter has been domesticated, it is referred to as: African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Chapter A9 (Chapter 10 LFN 1990).

[1060] FREP Rules, 2009, Para 3(e).

[1061] FREP Rules, 2009, Para 3 (d).

This is a very important objective as the poor are not only adversely affected in instances of environmental degradation,[1062] but also, lack the financial wherewithal to offset the cost (including the opportunity cost) involved in diligently prosecuting lawsuits against those responsible for the degradation or threatened degradation.[1063] Achieving this objective invariably will include granting access to courts to NGOs and other persons representing these classes of people.

Furthermore, the Rules expanded the class of persons that can bring action in instances of human rights violation. These include anyone acting in his own interest; anyone acting on behalf of another person; anyone acting as a member of, or in the interest of a group or class of persons; anyone acting in the public interest, and association acting in the interest of its members or other individuals or groups.[1064] Hence, by virtue of these provisions, NGOs and other public spirited individuals can now validly bring action to enforce the fundamental rights of persons affected or threatened either by environmental degradation or by any act, neglect or default of the Nigerian government in the execution of any environmental law, duties or authority. It is usually associated with enforcement of the right to freedom of movement and prevention of unlawful arrest by the police and is not yet popular with the enforcement of environment-related rights.

5.8.2 Burden and standard of proof

Another major challenge for the victims of oil pollution is the onerous task to discharge the burden of proof in the environment-related pollution. It has been the practice of Nigerian courts to insist on a high standard of proof by the plaintiff before their claims are upheld.[1065] The common remedies available to oil pollution victims are based on nuisance and negligence. In an action for negligence however, the

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[1062] See Bakary K, "The Environment, the Wealth of the Poor?" *Poverty & Environment Times No. 2*, March 2004; Peter Hazlewood, Geeta Kulshrestha and Charles McNeill, "Linking Biodiversity Conservation and Poverty Reduction to Achieve the Millennium Development Goals", in Dilys Roe ed., *Millennium Development Goals and Conservation: Managing Nature's Wealth for Society's Health* (London: IIED, 2004) 144.

[1063] Amechi EP "Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, in Ensuring Access to Justice for Victims of Environmental Degradation" *6(3) Law Environment and Development Journal (LEAD)* 112-113. <www.lead-journal.org/content/10320.pdf> accessed 09 June 2017.

[1064] FREP Rules, 2009 Para 3(e).

[1065] Derri DK "Litigation problems in compensation claims for oil gas operations in Nigeria" in Emiri F and Deinduomo G (eds) *Law and Petroleum Industry in Nigeria: Current Challenges* (Malthouse law books Lagos 2009) 14.

plaintiff is expected to discharge the burden of proof as required in the case of negligence according to the rules in sections 135 and 136 of the Evidence Act which provide that whoever asserts must prove though on balance of probabilities.[1066] This restrictive rule of evidence has in no small measure undermined the claims of the oil pollution victims because the activities in the oil industry are sophisticated and require technical knowledge to detect and present facts regarding pollution as evidence before the court.

The plaintiffs in oil related litigation usually do not have this technical know-how, neither do they have the financial wherewithal to prosecute their cases, thus losing the cases even though they have sustained losses arising from the action of the defendant oil companies.[1067] For example, in the case of *Seismograph Services v Mark,*[1068] the plaintiff claimed compensation from the defendant for damages done to his fishing nets by a seismic boat. At the trial, the poor fisherman failed to show that the company was negligent even though his net was destroyed; the court concluded that he failed to provide technical details of the breach hence his case was dismissed.

Nuisance is another form of tort relied on by the plaintiffs in the oil and gas operations. It is defined as substantial interference with the enjoyment of the land.[1069] To sustain an action for nuisance, damages must be proved. It could be private or public. In the case of *Seismograph Services* v *Akporuovo,*[1070] *the* plaintiff claimed that the defendant's operation caused damages to his building and household goods. The trial court awarded damages in favour of the plaintiff, but was reversed by the Supreme Court because there was a conflict of evidence as to whether the building was damaged or not and since damage must be proved, the trial judge ought to have visited the scene and since he did not, then the judgment could not stand. It should be noted that it is not too difficult to bring action for private nuisance but it is cumbersome and difficult to bring action in public nuisance.

[1066] Derri DK (n 1065) 15.
[1067] Derri DK (n 1065) 15.
[1068] (1993) 7 NWLR 203.
[1069] See *Rylands v Fletcher* (1868) LR 3 HL 330.
[1070] (1974) 6 SC 119.

Before the 1990s, when the cases of *Farrah* and that of *Gbemre* were decided, access to justice was virtually blocked against the victims of oil pollution in Nigeria. The position of the law was that individuals could not sue for compensation or whatever remedies in the Nigerian courts because oil spillage was considered a public nuisance.[1071] It was only the Attorney-General of the Federation alone that could sue the erring companies on behalf of the victims.[1072] The only exception to this rule was that the victim should be able to prove that he suffered some direct and substantial harm to his person or property over and above that sustained by the community at large.[1073] Further, the person suing must have applied and secured the permission of the Attorney General of the Federation before he could sue otherwise his suit could be incompetent and struck out. To apply for permission of the Attorney General was cumbersome due to bureaucratic delays in the Ministry of Justice. At times, the permission was not even granted after processing of the application.[1074]

The case of *Jimoh Lawani and Ors (for themselves and on behalf of other inhabitants and farmers of Ewekoro, Ibagun, Egbado Alaguntan and Otun Villages near Itori via Abeokuta)* v *The West African Portland Cement Company Limited*[1075] is instructive. In that case, the whole of the inhabitants of five villages who lived within the neighbourhood of the operations of the defendant company took the defendant company to court. The plaintiffs claimed N1,100,000.00 (One million, one hundred thousand Naira) for damages done to their crops, buildings and other properties because of the nuisance from the defendants' factory from 1971 until the nuisance was abated; and an injunction restraining the defendants from continuing the nuisance. In their defence, the defendants argued that the suit was incompetent and should be struck out because the acts complained of amounted to public nuisance and as such only the Attorney General could sue; and that the plaintiffs had no right to bring the action. The court held that the nuisance upon which this action was

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[1071] Ayodele OA "Civil Liability for Oil Pollution under Nigerian Law" (2011) *NIALS Journal of Law and Public Policy* 302.

[1072] As above.

[1073] Per Nnaemeka – Agu, J. C. A. (1986) 2 NWLR (Part 20) pg. 85, (1986) 2 C.A. (Part 1) a pp. 25-26.

[1074] *Jimoh Lawani and Ors (for themselves and on behalf of other inhabitants and farmers of Ewekoro, Ibagun, Egbado alaguntan and Otun Villages near Itori via Abeokuta) v. The West African Portland Cement Company Limited* (1973) 3 U.I.L.R (Part iv) 459. See also the case of Fawehinmi v. Akilu [1987] 4 NWLR (PT.67) 797

[1075] (1973) 3 U.I.L.R (Part iv) 459; see other cases: *Chief A. S. Amos and Ors (for themselves as individual and on behalf of Ogbia Community Brass Division) v. Shell-BP Petroleum Development Company of Nigeria Limited and Anor.* (1977) 6 SC 109 affirming (1974) L.R.S.C. 21.

founded was a public nuisance, and therefore the plaintiffs had no right to bring it; and that the only way it could be brought was by an action ex-relation of the Attorney General.

However, the court has shifted ground and it is more willing to listen to litigants without first obtaining the helping hand of the Attorney-General of the Federation. In the case of *Interland Transport Limited* v *J. A. Adediran and Anor (as representatives for and on behalf of all members of Ire-Akari Housing Estate Association, Isolo),*[1076] the court relied on the provision of Section 6(6)(b) of the 1979 Constitution which is in *pari-materia* with Section 6 (6) (b) of the 1999 Constitution of Federal Republic of Nigeria and held that there was no more need to sue in public nuisance through the Attorney-General.

5.8.3 Limitation time

In civil matters, the litigant must bring the case within the statute of limitation; he/she must also establish the causation between the harm and the defendant's conduct.[1077] Where the plaintiff fails to comply with the limitation period, the defendant can raise an objection at the trial that the action is statute-barred thereby removing the right of enforcement or right of relief and therefore leaves the plaintiffs grievance not remedied.[1078] When an action is in tort, the limitation period is six (6) years and time begins to count from when the cause of action arises. However, time will not continue to run when the parties to the dispute engage themselves in negotiations for settling the dispute. For example, in the case of *Gulf Oil (Nig) Ltd* v *Oluba,*[1079]the respondents (plaintiffs at the trial court) brought an action against the appellant (defendant at the trial court) in 1986 to recover damages for pollution of their farms, fish ponds, swamps, channels and lakes as a result of seismic and other oil exploration activities within the community in 1973. The Court of Appeal held that the cause of action was statute-barred and that once the cause of action accrued, time continues to run.[1080]

[1076] (1986) 2 NWLR (Part 20 78, (1986) 2 C. A. (Part 1) 18.
[1077] Derri DK (n 1065) 17.
[1078] As above.
[1079] (2002) 12 NWLR (pt 780) 92.
[1080] See also the cases of *Egbe v Adefarasin* (1986) 1NWLR (pt 47) 1; *Adimora v Ajufor* (1988) 3 NWLR (pt 80) 1 at 17 per Oputa JSC.

The court had, however, held that time could not be said to be running in the case of *SPDC* v *Councillor Farrah and ors.*[1081] The counsel for *SPDC* argued that the action was statute-barred because the said pollution occurred in 1970 and the action was brought in 1989. He argued further that since rehabilitation process was concluded in 1973 then the action ought to commence in 1974. The opposing counsel contended that the action was not statute-barred because the respondents got to know the state of the land in 1989 when the land was formally handed over to them.

The Court of Justice of the Economic Community of West African States (ECOWAS) sitting at Ibadan, Nigeria in 2012[1082] observed that: "it is trite law that in situations of continued illicit behaviour, the statute of limitation shall only begin to run from the time when such unlawful conduct or omission ceases." The court in that case therefore held that: "the acts which occurred after the 2005 Protocol came into force, in relation to which the Federal Republic of Nigeria had a conduct considered as omissive, are not statute barred."[1083]

Another major challenge to justice is that cases are delayed for too long in Nigerian courts, and 'justice delayed is justice denied'. Many people have lost hope in the judiciary because of the delays in the administration of justice.[1084] For example, the case of *Farrah* referred to earlier took twenty-five years before judgment was entered.

In the case of *SPDC* v *Ambah,*[1085] the plaintiff claimed the sum of N30,000:00 (when Naira was 0.6466 to one dollar)[1086] as special and general damages suffered by the plaintiff when the defendant through their agents destroyed fish ponds, creeks, lakes and channels belonging to the plaintiffs in 1977. The case went on until 1987 when judgment was reserved. The counsel to the plaintiff filed a motion to further amend their pleadings in the suit and amended the initial N30,000:00 to read N300,000:00 The trial court granted the amendment and gave judgment in favour of the plaintiff.

[1081] (1995) 2 NWLR (pt 382) 148.
[1082] *SERAP* case (n 1052).
[1083] Para 62 page 17 of the judgment in the case of *SERAP v Federal Republic of Nigeria.*
[1084] Akeredolu OO "Access to Justice Problems and Solutions" (2003) *2(1) Ibadan Bar Journal* 14.
[1085] (1996) 66 LRCN 390.
[1086] Aluko ME "Exchange Rates 1970-1999" <http://ngex.com/personalities/voices/balukonaira.htm> accessed 10 June 2017.

The defendant appealed to the Court of Appeal and the court confirmed the judgment of the lower court.

The defendant further appealed to the Supreme Court, which in 1999 (in 1999, Naira value had reduced substantially to 105.0 to one dollar)[1087] set aside the judgment of the lower court and reversed the initial amendment granted by the trial court. The Supreme Court opined that the leave to amend the pleadings should not have been granted and as such the sum of N300,000:00 was not pleaded. Considering this judgment, one can say that the Supreme Court is right but it is the judiciary that was responsible for the delay in doing justice in the matter. The sum granted could not even pay the transportation costs of the plaintiff from Warri to Abuja. This type of occurrence discourages people from seeking justice in the Nigerian Courts; people in the alternative take laws into their hands doing jungle justice. This and some other injustices contribute in no small measure to the unending crisis in the Niger Delta.

5.8.4 Jurisdictional Controversy in Environmental Pollution cases

Section 251(1) (n) of the 1999 Constitution expressly states that:

> 251. (1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters relating to
> (n) mines and minerals (including oil fields, oil mining, geological surveys and natural gas) ...

Going by the above provisions, it is only the Federal High Court that has jurisdiction in matters that have to do with oil and gas. It means that the oil companies and their activities are under the exclusive jurisdiction of the Federal Government and are therefore subject to the jurisdiction of the Federal High Court. But when it comes to the enforcement of fundamental human rights including the rights to health and environment free from oil and gas pollution, the same Constitution gives jurisdiction to the State High Courts. About the enforcement of human rights, Section 46 (1) provides as follows:

> 46. (1) Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court for redress.
> (2) Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of the provisions of this section and may make such orders, issue such writs and give such

[1087] Aluko ME (n 1086).

> directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that State of any right to which the person who makes the application may be entitled under this Chapter.

Although, the Constitution does not directly provide for the protection of environmental rights, they are indirectly provided for under sections 33 and 34 of the Constitution which provides for right to life and right to dignity of every person. Moreover, environmental objective is one of the fundamental objectives and directive principles of state policy in Nigeria which are not justiciable. However, Nigerian courts have taken different positions on matters that have to do with compensation for oil and gas pollution in the Niger Delta; some have held it was the Federal High Court while others have held it was the State High Court that has jurisdiction.

This jurisdictional controversy remains one of the major problems encountered by the victims of oil and gas extraction in their quest for compensation. For example, in the case of *C.G.C (Nig) Ltd* v *Asagbara,*[1088] the respondent (plaintiff in the trial court) brought an action before the Rivers State High Court wherein he claimed N10million for personal injuries he sustained due to the defendant's (appellant) negligent failure to provide a safe workplace. The defendant objected to the jurisdiction of the High Court and argued that the Federal High Court was exclusively vested with jurisdiction. The trial court dismissed the application. The defendant appealed to the Court of Appeal and the Court of Appeal by a majority decision upheld the appeal and the case was accordingly struck out.

However, the same court in the case of *N.A.O.C Ltd* v *Chief Dr. William Kemmer*[1089] held that though an oil company was involved, the matter was a mere landlord and tenant agreement and as such the State High Court and not the Federal High Court had jurisdiction to try the case. The Supreme Court has also held in the case of *Nkuma and Ors* v *Odili*[1090] that when the action was on who among the litigants was entitled to compensation for land used for oil exploration, the State High Court had jurisdiction. It has been held by the Supreme Court in the case of *SPDC* v *Isaiah and Ors*[1091] that when a matter was not ancillary but had to

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[1088] (2000) FWLR (pt 17) 110.
[1089] (2001) FWLR (pt 48) 1247.
[1090] (2006) 6 NWLR (pt 977) 587.
[1091] (2001) FWLR (pt 56) 608.

do directly with oil and gas exploration and exploitation, it was the Federal High Court that had jurisdiction.[1092]

The reason for wrestling jurisdiction from the State High Courts remains unclear when they are the ones that are nearer to the victims of oil pollution. Apart from that, they are many and are widely spread within the states of the Niger Delta, whereas you have only one Federal High Court in each of the state of the Niger Delta. No wonder the cause list of the Federal High Courts in the states of the Niger Delta region is always full. As such the court is usually overburdened with cases implicating exploration and exploitation of oil and gas; this leads to frequent adjournments of cases and subsequent long delays in the dispensation of justice. The Federal High Court is usually located in the state capital far away from where oil and gas are being exploited. This is highly disadvantageous to the victims who must travel long distances on each adjourned date and sometimes will be told of the inability of the court to sit which leads to further adjournments.

Another problem encountered in the judiciary is the lack of technical capacity of the judicial officers in relation to the ever-advancing frontiers of petroleum exploration and exploitation. This is coupled with the lack of trained personnel and equipment to carry out the necessary inspections of the sites of the spills from the regulatory section of the industry.

Most of the times, it is difficult for poor farmers and fishermen to retain the services of lawyers. And where they gathered money for that purpose they lose to the superior arguments of lawyers hired by the oil companies because the oil companies have the means to employ the best hands in the legal profession. Expert witnesses and technical evidence are extremely costly and few communities have the capacity to secure such support for their cases unaided. In some cases, multiple experts are needed to give specialist evidence of negligence and the impact of pollution on different issues such as fisheries and agriculture.[1093] Victims also complained that most of the time courts are unwilling to give judgments against the oil companies with the Nigerian government being in joint ventures with major oil companies. For

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[1092] See the case of *SPDC v Isaiah and ors* (2001) 11 NWLR (pt 723) 168 at 178-179 per Mohammed JSC. See also Fagbohun O "Jurisdiction of Nigerian Courts in Environmental Matters: A Note on Shell v Abel Isiah" 24(2) *Journal of Energy & Natural Resources Law* 209-220.

[1093] Amnesty international (n 953) 77.

example, the court is always reluctant to granting injunction to stop continuing or further pollution of the land, creeks and fish ponds based on public policy.[1094] The court had earlier denied a similar request for an injunction in the case of *Allar Iron* v *Shell BP*[1095] with the court reasoning as follows:

> Firstly, negligence or carelessness by the defendant's employees cannot be controlled by the defendants. To grant the order ... would amount to asking the defendant to stop operating in the area...The interests of the third persons must be in some cases considered e.g. where the injunction would cause stoppage of trade or throwing out a large number of people... mineral oil is the main source of this country's revenue... the defendant having been granted an oil exploration licence. It will not be just and convenient to grant an injunction in this case.

5.9 Summary

This chapter has discussed some challenges associated with the exploration and exploitation of oil and gas in Nigeria. It defined sustainable development generally and examined whether petroleum resources are exploited in a sustainable manner. The chapter underscores the need for sustainable use of the resources bearing in mind the non-renewable nature of the resources. Nigeria, unfortunately, has been wasting the revenue earned from exploiting the resources through corrupt practices and enrichment of individual government officials and their cronies. Oil blocks are awarded to influential Nigerians in the guise of pursuing local content development. Government officials collaborated with oil conglomerates to siphon the funds realized from the sale of petroleum resources and bank the money in their foreign accounts. Therefore, the extraction of oil instead of being a blessing has turned into a curse and the more the exploitation, the poorer the inhabitants of the Niger Delta and entire citizenry.

Another problem is that of non-diversification of the economy; which is popularly referred to as "Dutch disease". The recent downturn in the price of crude oil in the international market caught Nigeria napping. It has been noted earlier that the exploitation of oil is usually accompanied by environmental degradation and that of Nigeria is not an exception. But the Nigerian situation is worse because of the weak

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[1094] *Chief J O Ibini v Shell BP* Suit No: SCK/21/81 Warri High Court, July 1985.
[1095] Suit No: W/81/71, Warri High Court, November 1973.

regulatory frameworks and the inability of the regulatory agencies to enforce the regulations. The lackadaisical attitude of the oil companies to stopping spillage when it occurs is appalling. Such spills are left to continue for days; worse still is the unwillingness of these oil companies to clear the spills. The regulation prohibiting gas flaring is not implemented; instead Nigeria makes money from the payment of fines imposed on gas flaring to the detriment of the environment and the health of the people.

Nigeria in reaction to criticism of lack of development to match the large proceeds from oil realized from the Niger Delta region set up various interventionist agencies and the recent one being the Niger Delta Development Commission (NDDC). It has been observed that this agency has failed woefully in the performance of its mandate to develop the Niger Delta due to inadequate release of budgeted funds to it and the misappropriation of those funds released to it. The Nigeria National Petroleum Company (NNPC) that ought to develop the petroleum sector has been found to be weak and incapable of performing to the optimum when compared to the other NOCs in other oil rich states of Canada, Australia and the United States. The NNPC is found to be heavily politicized and it is being used as a conduit pipe to siphon funds from Nigeria; for instance, there has been accusation of non-remittance of funds running into billions of dollars to the Central Bank of Nigeria (CBN).

Another major challenge is the issue of ownership of oil and gas. Ownership of petroleum resources remains vested in the Federal Government of Nigeria, which leads to the agitations by the people of the region to participate in the decision making concerning the resources being exploited in their region. These agitations take different forms, namely the fight for an increase in derivation rate from 13% to 25% and gradually to be increased up to 50% as obtained in the 1960s. On the other hand, the people of the region wanted the resources to be tapped by them and subsequently pay taxes to the Federal Government in a kind of mixed ownership as is obtainable in the United States of America. The neglect of the region by the Federal Government and lackadaisical attitude of the oil companies to the plight of the people led to frustrations and this has been identified as the major reason why the youths took up arms under various names to press home their demands.

Other challenges discussed are lack of access to justice experienced by the victims of oil pollution, the legal bottlenecks in terms of rules of locus *standi*, technicality of evidence and the burden of proof required to succeed in oil pollution compensation claims. Because of these problems, justice is either delayed for too long or entirely denied on legal technicalities.

CHAPTER SIX

COMPARATIVE PERSPECTIVES OF THE LEGAL REGIMES FOR OIL AND GAS IN OTHER SELECTED JURISDICTIONS

6.0 Introduction

The previous chapters have identified the inadequacies in the Nigerian legal regime governing the exploration and exploitation of oil and gas. This chapter compares the successful legal regimes in Australia, Canada and the United States of America with those obtaining in Nigeria to draw important lessons for that country. It is hoped that if Nigeria adopts best practices obtainable in these countries, it would help to resolve some of the teething issues and challenges in the petroleum sector.

A deliberate choice of countries with federal systems of government is made to minimize the differences that legal and political systems might have on the regulation of the petroleum industry *stricto sensu*. The comparable countries are oil producing federal states with clear division of powers between their respective national and sub-national levels of government. They are federal democracies with constitutional regimes. Similarly, Nigeria has a federal system of government with emphasis on constitutional division of powers between the levels of government. These same comparable countries have advanced economies with well-developed legal regimes which ensure peaceful and sustainable extraction of the resources compared to Nigeria with the incessant crisis because of the indiscriminate and unsustainable exploitation of petroleum resources.

This chapter is divided into four sections. Sections one to three discuss the comparable countries' legal regimes for oil and gas with emphasis on ownership, state participation in exploration and development and environment related issues. Section four discusses the similarities and differences between the comparable countries and Nigeria and highlights the lessons Nigeria can learn from these jurisdictions. The comparable countries are perceived as having strong institutions which assist them in the implementation of the laws and policies of government on oil and gas.

Apart from the inadequate legal and institutional frameworks and the fact that the oil pollution victims do not have adequate access to justice, Nigeria is also bedeviled by corruption in its public and private sectors.[1096] The scourge of corruption is eating away at the fabric of the society. The situation in Nigeria has been described by that popular playwright, the late Chinua Achebe, that when "things fall apart; the centre cannot hold."[1097] There is no system that can succeed in an environment riddled with corrupt practices. Therefore, this chapter concludes by discussing how corruption has negatively impacted upon the development of oil and gas sectors compared to relatively corruption-free systems of the comparable countries.

6.1 Oil and Gas situation in Australia

Australia is not a major player in the petroleum sector when compared to the United States and Canada. It has proven reserves of 1.2 billion barrels (bbl.) as at 1 January 2016.[1098] It has about 0.3 per cent of the world's oil reserves.[1099] Australia's primary areas of petroleum production are in offshore Victoria, and along the North-West Shelf in the Northern Carnarvon and Bonaparte basins. The Cooper Basin in South Australia and Queensland is the main oil and gas producing province onshore. The production of condensate and natural gas began in the Browse Basin in 2016. For more than 50 years now, in offshore Victoria nearly 4 billion barrels of oil as well as over 7.5 trillion cubic feet of natural gas, LPG and ethane have been produced from the Gippsland Basin.[1100] The latest project to deliver natural gas is the $4.5 billion Kipper Tuna Turrum Project, the largest gas development on the eastern seaboard.[1101] The Otway Basin has been producing gas since the late 1980s with small onshore fields being developed. Since the early 2000s offshore fields such as

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[1096] Ovat OO and Bassey EE "Corruption, Governance and Public Spending in Nigeria: Implications for Economic Growth" (2014) 4(11) *British Journal of Economics, Management & Trade* 1679-1699 at 1685.

[1097] Achebe C *Things Fall Apart* 1st ed (Heinemann Publisher UK 1958).

[1098] Crude oil - proved reserves is the stock of proved reserves of crude oil, in barrels (bbl). Proved reserves are those quantities of petroleum which, by analysis of geological and engineering data, can be estimated with a high degree of confidence to be commercially recoverable from a given date forward, from known reservoirs and under current economic conditions. The Central Intelligence Agencies, the World Factbook www.cia.gov/library/publications/the-world-factbook/rankorder/2244rank.html accessed 15 June 2017.

[1099] Australia Government Geoscience *Minerals and Petroleum in Australia, A guide for Investors* 14 date unknown https://industry.gov.au/resource/Enhancing/Documents/Minerals-and-Petroleum-in-Australia-Investors-Guide-2015.pdf accessed 16 June 2017.

[1100] Australia Government Geoscience (n 1099).

[1101] Australia Government Geoscience (n 1099).

Thylacine, Casino, Minerva and Henry provide natural gas to Australia's south-eastern market via a network of interconnected pipelines.[1102]

6.1.2 The Australian - oil and gas legal regime

Australia is a federal state with three levels of government and each level has law-making powers.[1103] The three levels of government are the Federal, State/Territory and the Local Governments.[1104] The federal parliament makes laws for the entire Australia; the State/Territory which comprises six states and two mainland territories make laws for their states or territories.[1105] The local councils or governments with 560 local councils make local laws called bye-laws for their local areas.[1106] The states and territories are: Western Australia, Queensland, New South Wales, Victoria, South Australia, Tasmania, Northern Territory and Australian Capital Territory.[1107]

In Australia, most of the Commonwealth powers are on the concurrent legislative list, hence exercisable by the commonwealth or the constituent states which makes it difficult to impose policy proposals on the states.[1108] By necessary implication, the states are equally unable to legislate, regulate or administer areas which are on the exclusive legislative list of the Commonwealth. This constitutional division of powers necessitates inter-governmental interactions, which are meant to resolve grey areas in governmental relations. More so, that the Commonwealth cannot unilaterally change the Constitution, nor abolish any of the original states.[1109] However, the Commonwealth has the power to legislate to overturn state legislation seen as inconsistent with its obligations under international conventions or treaties.[1110]

[1102] Australia Government Geoscience, (n 1099).
[1103] Parliament Education Office, "Governing Australia: their levels of law-making" http://www.peo.gov.au/learning/closer-look/governing-australia.html accessed 17 June 2017.
[1104] Parliament Education Office (n 1103).
[1105] Parliament Education Office (n 1103); Section 51 of the Australian Constitution.
[1106] Parliament Education Office (n 1103).
[1107] Parliament Education Office (n 1103).
[1108] Saunders C "Constitutional and Legal Aspects" in Galligan B, Hughes O and Walsh C (eds.) *Intergovernmental Relations and Public Policy* (Sydney: Allen and Unwin1991) 39.
[1109] Haward MG *Federalism and the Australian Offshore Constitutional Settlement* (PhD-dissertation University of Tasmania 1992) 26.
[1110] Haward MG (n 1109) 31.

Australia being a member of the United Nations must abide by the United Nations Conventions on the Continental Shelf, the Territorial Sea and Contiguous Zone.[1111]

Sections 51 and 52 of the Australian Constitution describe the law-making functions of the federal parliament; other law-making functions are left to the state/territory.[1112] The combination of sections 109 and 122 of the Constitution allows the federal parliament to override the laws of the state/territory in cases of conflict.[1113]

Similarly, Part I of the Second Schedule to the 1999 Constitution of Nigeria describes the legislative powers of the federal legislature, but unlike Australia, mineral resources including oil and gas are under the exclusive legislative list of the federal legislature.

Australia, like Canada and the United States of America, has experienced significant political crisis arising from the question of jurisdiction over the offshore.[1114] This might be due to limited or ambiguous constitutional provisions governing offshore resources.[1115] The federating components or units have contended that they have sovereignty and jurisdiction over their offshore resources. Cullen has observed that:

> In the case of a coastal state with a unitary system of government, the issue has been largely one of adapting municipal law to international law concepts . . . Special problems; however, occur when a coastal state is in a federation. A question then arises as to which entity in the federation should enjoy control or sovereignty or even ownership of the territorial sea and the continental shelf.[1116]

This controversy has been resolved in Australia by adopting the political and administrative solutions used in other federations, especially the United States and Canada.[1117] For example, after a series of intergovernmental interactions, a settlement was reached which is popularly referred to as Offshore Constitutional Settlement (OCS).[1118]

[1111] It is an obligation for the Commonwealth to enforce the international law of the sea in Australia and thus these conventions were annexed to *the Seas and Submerged Lands Act* 1973.
[1112] Parliament Education Office Ibid (n 1103) 3.
[1113] Parliament Education Office Ibid (n 1103) 5.
[1114] Haward MG (n 1109) 1.
[1115] Haward MG (n 1109) 1.
[1116] Cullen R *Australian Federalism Offshore* (2nd ed Melbourne: Intergovernmental Relations in Victoria Programme, Law School University of Melbourne, 1988) 2.
[1117] Cullen R (n 1116) 2.
[1118] Patience A and Head B (eds.) *From Whitlam to Fraser: Reform and Reaction in Australian Politics,* (Melbourne: Oxford, 1979).

6.1.3 Petroleum policy and its influence on petroleum extraction in Australia

The Australian Commonwealth Parliament has power to legislate on trade and commerce, postal and communications services, foreign policy, taxation, census and statistics, weights and measures, bankruptcy and insolvency, quarantine, fisheries, currency, copyright, immigration, defence etc.[1119] The Australian Government sets national policy which includes fiscal, monetary and taxation policy, foreign investment guidelines, immigration, competition policy, trade and customs, company law, international agreements, native title, and regulates operations in offshore waters. It is important to note that, the Australian objective in the exploitation of the petroleum resources, and the benefits it wishes to reap are summed up in the state policy formulated on petroleum.

For the state to effectively regulate its petroleum industry there is a strong link between the policy and legal regulation.[1120] For example, the state must develop regulations and legal institutions that will allow development in line with the policy of the state.[1121] In Australia, offshore petroleum production started in the 1960s with the discovery of petroleum in the Bass Strait in 1965.[1122] There were two main areas of Australian policy in the 1960s namely: exploration for further deposits and the establishment of petroleum price parity as a policy for the development of its petroleum resources and this continued until 1983.[1123] In 1983, the Hawke government undertook an assessment of Australia's offshore petroleum resources policies and gave recognition to maintaining a programme of exploration and development of the petroleum industry.[1124] In 1990, the government announced a new policy objective of maximising the benefit to all Australians through an efficient

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[1119] See Section 51 of the *Australian Constitution* which gives a list of 40 items over which the federal parliament can legislate.

[1120] Hunter T *Legal Regulatory Framework for the Sustainable Extraction of Australian Offshore Petroleum Resources: A Critical Functional Analysis* (PhD-dissertation University of Bergen 2010) 138; Taverne B *Petroleum Industry and Governments: An introduction to Petroleum Regulation, Economics and Government Policies* (Kluwer Law International 1999) 87.

[1121] Hunter T (n 1120) 138.

[1122] Esso/BHP Bass Strait Oil and Gas (2002) page unknown www.exxonmobil.com/Australia - English/PA/Files/publication 2002 BassStriat.pdf accessed 7 October 2017.

[1123] Keating P "The Labour Approach to Petroleum Exploration Development and Pricing" (1980) 20 *APPEA Journal* 16, 16.

[1124] Evans G "The Petroleum Industry: Building Our Achievements" (1985) 25 *APPEA Journal* 22, 23.

and competitive exploration industry that could access Australia's petroleum resources and develop them for the benefit of all Australians.[1125]

The policy goals were addressed by an offshore petroleum strategy aimed at applying a comprehensive programme for the granting of offshore acreage areas for exploration, the provision of geological data from the government's agencies, and the provision of attractive offshore petroleum title and taxation arrangements[1126].

There was a change of government in 1996, and the new government developed a policy that sought to create certainty for the investors and the stakeholders. To achieve this goal, government created a highly competitive operating environment, allowing the industry to respond confidently to international challenges and to seize international trade and investment opportunities.[1127] In 2007, the government of Australia improved on the previous administration's policy by stressing the need to exploit the resources in an environmentally responsible and sustainable way, not just focussing on commercial interests alone.

6.1.4 Ownership of petroleum resources of the state

As a rule, all mineral deposits, including petroleum, within each of the Australian States are regulated by state legislation.[1128] It should be noted from the onset that there is no specific constitutional provision for ownership and control of oil and gas in Australia. However, there are other legal provisions from which inference can be drawn in favour of a devolved model of control despite the fact that the constitutional text makes no mention of ownership or control of mineral resources. It is important to state here that mineral and petroleum resources in Australia are owned by the state rather than private individuals.[1129] It is therefore the duty of the state to exercise its authority over the resources to maximise the economic and social benefits for the State and its populace at the same time ensuring the least possible damage to the

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[1125] Department of Primary Industries, *Offshore Strategy: Promoting Petroleum Exploration Offshore Australia* (1990) 1.

[1126] As above.

[1127] Parer W "Delivering National Prosperity" (1998) Address to the 1998 APPEA Conference 9 March 1998, Canberra 38 *APPEA Journal Part 2*, 11; also, outlined in the *Mineral and Petroleum Resources Policy Statement* released in 1998.

[1128] Carney G "Constitutional Framework for Regulation of the Australia Uranium Industry" (2007) 26 *ARELJ*, 236.

[1129] Australia Government Geoscience (n 1099).

environment.[1130] It is, however, pertinent to note that none of the tiers of government themselves engage in commercial exploration and exploitation of petroleum resources but instead give licences to oil companies.[1131]

The Commonwealth and State/Territory governments have separate roles and responsibilities regarding the exploration and development of petroleum resources.[1132] For instance, the Commonwealth Government's jurisdictional involvement is mainly limited to resources in the offshore area, which starts three nautical miles from the territorial sea baseline and extends seawards to the outer limits of the continental shelf. This is referred to as 'offshore' petroleum resources.[1133] The jurisdiction of the States and Territories is limited to resources found on their lands or inside the first three nautical miles of the territorial sea ('designated territorial waters').[1134]

6.1.5 The legislative framework for Australian petroleum

The Australian Constitution and the International Law of the Sea have a great influence on the policy and legislation on the offshore petroleum sector because the policy and legislation rely on the extant provisions of both.[1135] Consequently, the Constitution and the International Law of the Sea set the limits for legislative activity while the policy contained therein is the product of the political idea dominating at certain critical times.[1136]

6.1.5.1 The Australian Constitution

The strength of Australian States/federating units is the Constitution, where some specific legislative powers were granted to the states by the Constitution. Apart from the few national subject matters like land set aside for aviation, defence and communication purposes and the federal public service, all other matters are under

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[1130] Arnesen F *et al* "Energy law in Europe" in Roggenkamp MM *et al* (eds) *Energy Law in Europe: National, EU and International Regulation* 2nd ed (Oxford University Press 2007) 895- 896.
[1131] Australia Government Geoscience (n 1099).
[1132] As above.
[1133] Australia Government Geoscience (n 1099).
[1134] As above.
[1135] Evans N, *Jurisdictional Disputes and the Development of Offshore Petroleum Legislation in Australia* (PhD - dissertation University of Tasmania 1998) 10.
[1136] As above.

the concurrent legislative list upon which each level of government can legislate.[1137] Offshore matters are placed under the concurrent legislative list.

6.1.5.2 Australia and the Law of the Sea

The United Nations Conventions on the Law of the Sea (UNCLOS I-III) provide the basis for the national enactment on the offshore jurisdiction of the Commonwealth of Australia. Australia played a prominent role in UNCLOS III.[1138] Evans has observed that International law of the Sea is applicable to Australian offshore resources policy for two reasons. First, it provides the universally-agreed framework within which national exploitation occurs. Secondly, under the Law of the Sea Convention 1982 the development of regulatory regimes is mainly devolved to individual nations, unlike the situation regarding fishing and navigation where the international community is deeply involved in specifying rules of conduct.[1139] According to Ijistra, the International Laws of the Sea, no doubt have a positive effect on the national law about the exploitation of oil and gas especially offshore petroleum resources.
The Australian offshore petroleum regulatory structure for oil and gas will be discussed here under.

6.1.5.3 Offshore Petroleum Regulatory Regime

As noted earlier, the Commonwealth and States/Territories have been engaged in controversies on who controls the offshore petroleum resources. Thus, the Offshore Petroleum and Greenhouse Gas Storage Act (OPGGSA) 2006 was enacted to resolve these controversies.

6.1.5.3.1 Offshore Petroleum and Greenhouse Gas Storage Act 2006 (OPGGSA)[1140]

The offshore petroleum operations beyond designated state and territorial coastal waters are governed by the Commonwealth and related Acts and Regulations.[1141] The Australian government administers the regulatory regime together with state and Northern Territory government in Joint Authority arrangements.[1142] It is the

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[1137] See Section 52 of the *Australian Constitution*.
[1138] Ryan K (ed.) *International Law in Australia,* (2nd ed Sydney: The Australian Institute of International Affairs & The Law Book Company, 1984).
[1139] Evans N (n 1135) 15.
[1140] It however entered force in 2008.
[1141] Australian Government Department of Industry, Innovation and science, Offshore Petroleum Regulatory Regime page unknown <https://industry.gov.au/resource> accessed 19 May 2017.
[1142] Australian Government Department of Industry (n 1141).

responsibility of the Joint Authority to make major decisions under the OPGGSA concerning the granting of petroleum titles, the imposition of title conditions and the withdrawing of titles, as well as make decisions on resource management and resource security.[1143] The Joint Authorities for the offshore area of each state and the Northern Territory comprise the Commonwealth Minister in charge of petroleum resources and the relevant state and Northern Territory Resources Minister.[1144]

6.1.5.3.2 The Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Act 2011.

The Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Act 2011 was tagged the National Regulator Amendment Act. It amended the Offshore Petroleum and Greenhouse Gas Storage Act 2006.[1145] It retains the National Offshore Petroleum Titles Administrator (NOPTA) but expanded the former National Offshore Petroleum Safety Authority to become the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA).[1146] NOPTA and NOPSEMA assumed regulatory functions and powers under the Offshore Petroleum and Greenhouse Gas Storage Amendment (National Regulator) Act which came into force from 1 January 2011.[1147] NOPTA and NOPSEMA were established to promote transparent, accountable, and efficient management of offshore petroleum resources and to fully recover the cost incurred as regulators and ultimately reduce the overall costs for the industry.[1148] The establishment of NOPSEMA and NOPTA was also intended to remove duplication of functions that characterised the former Joint Authority/Designated Authority processes and thus reduce approval timelines.[1149]

The National Legislative Compliance Framework (NLCF) was also put in place because of the government's response to the Report of the Montara Commission of Inquiry.[1150] The intention is to assist the development of a reliable best practice

[1143] Australian Government Department of Industry (n 1141).
[1144] Australian Government Department of Industry (n 1141).
[1145] Australian Government Department of Industry (n 1141)
[1146] Australian Government Department of Industry (n 1141).
[1147] Australian Government Department of Industry (n 1141).
[1148] Australian Government Department of Industry (n 1141).
[1149] Australian Government Department of Industry (n 1141).
[1150] Australian Government Department of Industry (n 1141).

approach by regulators of Australia's offshore petroleum industry through its recognition of best regulatory practice.[1151]

6.1.6 Environmental regulation in Australia

Australia, being a federal state, has its environmental matters regulated at the federal, state and territory levels and the oil companies must follow the regulations for environmental protection. Environmental regulation at the Commonwealth level is limited to areas of national importance and those involving the Commonwealth or Commonwealth bodies. The Offshore Petroleum and Greenhouse Gas Storage Act (Cth) (OPGGSA) does not regulate the environment, but the National Offshore Petroleum Titles Administrator (NOPTA) and the National Offshore Petroleum Safety and Environment Management Authority (NOPSEMA) were set up to perform regulatory functions under the OPGGSA. Also, the Environmental Protection and Biodiversity Conservation Act 1999 was enacted to regulate offshore petroleum activities.[1152]

It is compulsory that each project be assessed on its merits, nature and location to determine what environmental permits are required and if state and/or Commonwealth permits are needed. Every project with a considerable environmental impact in Australia, like the United States and Canada, requires that EIAs be carried out and submitted to the relevant regulator before work begins. Breach of environmental law is a serious offence with significant consequences, including criminal sanctions in some circumstances. Like in Canada, serious offences attract a fine of A$ one million for a corporation or A$ five hundred thousand and/or up to five years imprisonment for individuals.

6.2 Canadian legal regime for oil and gas

Canada, a federation of 10 provinces and three territories, is a common law jurisdiction (with the exception of Quebec).[1153] The Constitution of Canada divides legislative authority between the Federal Parliament (the Federal Crown) – which has jurisdiction over matters of inter-provincial, national and international scope and

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[1151] As above.
[1152] Hunter T (n 1120) 11.
[1153] Torys LLP, Deyholos R and Cuschieri D "Canada – Oil and Gas: A comparative Guide to the Regulation of Oil and Gas Projects" (2013) *European lawyer reference* series 1. <www.torys.com/insights/publications>_accessed 17 June 2017.

the provincial legislatures. Each province has a provincial government which has jurisdiction over matters of a more local nature.[1154] Its Constitution grants jurisdiction over onshore natural resources to the provincial governments, known in each province as the "crown".[1155]

Canada is rich in oil and natural gas and currently is the world's fifth largest crude oil producer and has the third largest proven reserves of crude oil in the world (behind Saudi Arabia and Venezuela), with 171 billion barrels of estimated oil reserves, and of that number, 166.3 billion barrels are in the Alberta oil sands.[1156] The extraction of crude oil in Canada started in 1858 in Ontario.[1157] On a regional basis, Alberta, British Columbia, Saskatchewan and the Maritime Provinces all produce substantial quantities of oil and gas. However, the clear majority of Canada's proven oil and gas reserves and production facilities are located within the province of Alberta.[1158]

Discoveries of oil and gas in Alberta (in the Athabasca oil sands) have made Alberta the largest oil and gas producing region in North America. For example, in 2011, Alberta produced 1.7 million barrels of oil per day, and it is estimated that this figure could rise to over 3 million barrels per day by 2020.[1159] Approximately 5% of oil sands in Canada can be surface-mined with the rest available *in situ* drilling methods. A further 4.7 billion barrels of Canadian oil are held in conventional, offshore, and unconventional tight oil formations.[1160]

6.2.1 Canadian policy framework on mineral resources

The establishment of the National Energy Board has significant effect in shaping Canada's inter-provincial energy strategy in terms of oversight. Nevertheless, the

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[1154] Torys LLP, Deyholos R and Cuschieri D (n 1153).

[1155] Hoskin O and Harcourt LLP "Canada - law and Practice," page unknown <www.chambersandpartners.com/guide/practice-guides/location/271/8001/2354-200> accessed 17 June 2017.

[1156] Manning L, O'Connor T and Lawson LLP "Oil and gas regulation in Canada: overview" (2016) *Thomson Reuters* unknown page https://ca.practicallaw.thomsonreuters.com accessed 23 June 2017.

[1157] World Bank Global Gas Flaring Reduction- Private Public Partnership Implementation Plan for Canadian Regulatory Authorities "GGFR Implementation Plan for Canadian Regulatory Authorities (2008)" 3 http://www.worldbank.org/en/programs/gasflaringreduction accessed 23 June 2017.

[1158] Fagbohun O *The Law of Oil Pollution and Environmental Restoration: A Comparative Review* (1st edn. Odade Publishers Lagos Nigeria 2010) 407.

[1159] Manning L, O'Connor T and Lawson LLP (n 1156).

[1160] Manning L, O'Connor T and Lawson LLP (n 1156).

bulk of regulation remains provincial. Each province has different regulatory policies that affect the oil and gas industry. As noted above, Alberta is the largest oil and gas producing province in Canada, hence the oil and gas policy in Alberta is used as a reference point for the development of the resources petroleum in Canada. The basic principle behind the exploitation of natural resources (inclusive of petroleum resources) is the realisation of revenue to develop the country's economy. On the other hand, the main reason for investing in a business venture for a corporation is to maximise profit. These two aims are most of the time opposing and competing. Government policy, therefore, must maintain a delicate balance between these two competing aims. The policy must ensure that the exploitation of resources provides good revenue for the owners as well as encourage sustainable development.[1161] If the royalty collected is on the high side, it will discourage further investment in the industry.[1162] When investment is discouraged, development is hindered thus having negative effects on the economy and consequently on the people.[1163] As such, government designs its policy to achieve some levels of development in a sector of the economy. For example, Alberta introduced a new royalty regime in 1997 to accelerate the development of the oil sands in a period of low crude oil prices.[1164]

The Alberta royalty system is used to fulfil several development objectives, including the following:

> (i) To extend the life of mature oil and natural gas pools to maximize recovery;
> (ii) To promote the development of new and more efficient technologies; and,
> (iii)To promote the exploration and development of new reserves.[1165]

[1161] Alberta Energy "Alberta's Royalty System – Jurisdictional Comparison" <www.energy.alberta.ca/Org/pdfs/Royalty_Jurisdiction.pdf> accessed 13 June 2017.

[1162] Using data on natural gas well activity, prices and net revenue between 2001 and 2007, the DOE concludes that a 1% increase in royalties is associated with a 0.73% decline in well activity. Assuming drilling activity of about 20,000 wells per year, a 1% royalty increase would result in 150 fewer wells drilled. Source: Alberta Department of Energy, Technical Report #3: Alberta's Conventional Oil and Gas Industry – Impact of Potential Royalty Change on Industry Activity.

[1163] Alberta Energy "Alberta's Royalty System – Jurisdictional Comparison" (n 1161).

[1164] Alberta Energy "Alberta's Royalty System – Jurisdictional Comparison" (n 1161). For instance, the USA concerns over dependency on foreign sources of non-renewable energy have led to a system that strongly favoured domestic production by targeting royalty and tax incentives to encourage the development of federally-owned offshore oil and natural gas reserves.

[1165] Alberta Energy "Alberta's Royalty System – Jurisdictional Comparison" (n 1161).

6.2.2 Ownership of oil and gas

The provisions of sections 92A (1) (a) – (b) and 109 of the Canadian Constitution of 1867 left no one in doubt on the type of ownership model adopted by Canada which is dual ownership between the Federal and other levels of government. Section 92A states:

> (1) In each province, the legislature may exclusively make laws in relation to:
> (a) Exploration for non-renewable natural resources in the province;
> (b) Development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom...

6.2.2.1 Influence of United Nations Convention on the Law of the Sea on Canadian ownership structure

The United Nations Conventions on the Law of the Sea (UNCLOS I-III) provided the basis for the national enactment on the offshore jurisdiction of the Canadian National Government. UNCLOS granted the Coastal States a Territorial Sea, a Contiguous Zone and an Exclusive Economic Zone (EEZ) of 200 nautical miles measured from the same baselines as the Territorial Sea. In the EEZ, the Coastal State has "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources" as well as "jurisdiction... with regard to ... the protection and preservation of the marine environment".

It is important to note that the UNCLOS only addresses each State as if it were a single entity. It says nothing about a nation's internal political organization, especially in countries like Canada, where jurisdiction is shared among the national and other levels of governments like the provinces and territories. The provinces and territories have different legal regimes and they include counties and municipalities, with various types of governance structures. Therefore, there are various claims to ownership of offshore petroleum resources in Canada. The Federal Government laid claim to the petroleum resources in northern Canada and in the offshore regions outside the provinces while the provinces own onshore petroleum resources and the coastal petroleum resources up to 12 nautical miles into the sea. There is also some collaboration between the Federal Government and some provinces on offshore petroleum resources.[1166] Because of the nature of Canadian ownership and control

[1166] Alberta Energy "Alberta's Royalty System – Jurisdictional Comparison" (n 1161).

of petroleum resources, participants in the oil and gas industry are often subject to both federal and provincial regulators because these levels of government have over-lapping or shared legislative competences in the areas of natural resource development, transportation, marketing and the environment. This is in stark contrast to the situation in Nigeria where the Federal Government is the absolute owner of both the onshore and offshore petroleum resources.[1167] The oil-producing states are only entitled to 13% of the revenue from the petroleum resources.

The Supreme Court of Canada has, however, recognised that the Federal Government exercises jurisdiction over offshore natural resources located in the continental shelf.[1168] Because of this, each of the provinces of Nova Scotia and Newfoundland and Labrador entered an accord with the Federal Government to provide for the joint management and administration of petroleum resources offshore from those provinces.[1169] There has been a moratorium on west coast offshore petroleum development since 1970; however, no such accords have been entered into between the Federal Government and the province of British Columbia.[1170]

The Federal Government of Canada also retains ownership of petroleum rights in some federally administered onshore lands, for example the northern territories of Nunavut and Yukon on behalf of Canada's Aboriginal peoples with unsettled land claims.[1171] For those few settled land claims, ownership of petroleum rights lies with the Aboriginal governments holding tenure over them.

For some lands in Ontario, Manitoba, Saskatchewan, Alberta and British Columbia, ownership of petroleum rights lies with private landowners (known as "freehold" lands).[1172] This however, depends on the time that the land was settled because from 1887, the government's usual practice has been to reserve mineral rights.[1173] In Alberta, the Province owns approximately 81% of the mineral rights; the Federal

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[1167] See section 44(3) of the 1999 Constitution of Federal republic of Nigeria.

[1168] Harrison RJ, "Jurisdiction over the Canadian Offshore: A Sea of Confusion" (1979) *17 (3) Osgoode Hall Law Journal* 469-505 at 472 <http://digitalcommons.osgoode.yorku.ca> accessed 14 June 2017.

[1169] The governments of Newfoundland and Labrador entered an agreement with Federal Government called Atlantic Accord over development of offshore oil and gas. This Agreement was backed up by Accord Implementation Act of 1987.

[1170] Harrison RJ (n 1168) 472.

[1171] Harrison RJ (n 1168) 472.

[1172] Torys LLP, Deyholos R and Cuschieri D (n 1153) 1.

[1173] Manning L, O'Connor T and Lawson LLP (n 1156).

Government owns 9% of the mineral rights, which includes most Indian reserves and national parks,[1174] while the final 10% is held privately under freehold ownership. In areas of Canada which were settled earlier, such as southern Manitoba, about 80% of mining and mineral rights are privately owned.[1175] The proportion of oil and gas interests which are held privately or by the government varies by province. To prevent waste of petroleum resources, provinces enacted legislation to encourage efficient extraction. In Alberta for instance, the Oil and Gas Conservation Act, 2000[1176] creates a licensing regime for oil and gas wells that imposes certain spacing requirements between oil wells.[1177]

In general, petroleum resource extraction is subject to the rule of capture. This was fully discussed in Chapter Two of the thesis under ownership of oil and gas *in situ.*[1178] It means that the first person to "capture" or dig a well and extract the resource owns the resource. To ensure that the extraction of oil and gas is done in a sustainable and responsible manner, each province controls the ability of producers to extract hydrocarbons, thereby ensuring the conservation of oil and gas resources.

The Canadian government does not partake in the exploration and exploitation of oil and gas. The oil and gas regimes are concession-based.[1179] The owner of the mineral rights, whether the Crown or the owners of freehold estates, will usually grant a company a lease that gives the lessee the right to explore, drill for, remove and dispose of minerals for a determined term in exchange for a certain amount of consideration, rental fees and royalty interest on recovered minerals.[1180] The grant of lease or the issuance of licence depends on who the owner is. If the owner is a private individual, the owner grants freehold and if it is a government it grants a Crown lease agreement.[1181] In the case of freehold leases, they are privately negotiated contracts between the lessee and the lessor.

[1174] As above.
[1175] As above.
[1176] Oil and Gas Conservation Act, 2000, current as of 7 June 2017.
[1177] Sections 81 and 84 of Part 12 of Oil and Gas Conservation Act, 2000.
[1178] See chapter two section 2.3.1 titled Absolute Ownership Theory of this thesis.
[1179] Torys LLP, Deyholos R and Cuschieri D (n 1153) 4.
[1180] Torys LLP, Deyholos R and Cuschieri D (n 1153) 4.
[1181] Manning L, O'Connor T and Lawson LLP (n 1156).

6.2.2.2 Private land access

Under the common law, the property rights to the surface of the land and the property rights to the minerals under the land are separate and distinct.[1182] Thus, one party can hold title to the surface rights while another party holds title to the oil and gas beneath the surface. This results in a split title over the lands in question. When a company holds only the mineral rights over a parcel of land, it must negotiate with the surface rights holder to gain access to the land to work and recover its minerals. In Canada, access to land is usually obtained by negotiation between the landowner and the company.[1183]

6.2.2.3 Provincial Government/Crown land access

To explore for and exploit oil and gas on provincial Crown lands, a company requires approval from the Environment and Sustainable Resource Development (ESRD) for access to the surface of such lands. This takes the form of a mineral surface lease, licence of occupation, pipeline agreement or pipeline installation lease.[1184] There are two processes of obtaining approval from the ESRD, depending on the activities that will be taking place on the Crown lands. For instance, for the conventional upstream oil and gas activities, the Enhanced Approval Process (EAP) applies. However, the EAP does not cover unconventional gas developments (tight gas, shale gas, and liquid rich gas), thermal *in situ* oil sands operations and oil sands mines.[1185] These activities must be applied for and approved separately by submitting an Environmental Field Report to the ESRD. Under this process, applicants must ensure that their land uses conform with Integrated Land Management, which is the strategic planned approach used by the ESRD to manage environmental effects of oil and gas activities on public lands.

6.2.2.4 Federal Crown land access

Under the National Energy Board Act, 2010 (NEB Act) and the Canada Oil and Gas Operations Act,[1186] access to Federal Crown lands is administered by the provincial authorities. As in the case of the process administered by provincial authorities, no

[1182] Torys LLP, Deyholos R and Cuschieri D (n 1153) 9.
[1183] Torys LLP, Deyholos R and Cuschieri D (n 1153) 9.
[1184] Torys LLP, Deyholos R and Cuschieri D (n 1153) 10.
[1185] Torys LLP, Deyholos R and Cuschieri D (n 1153) 10.
[1186] R.S.C. 1984, c. O-7.

operations can commence on Federal Crown lands until the NEB has granted proper authorisation.[1187]

6.2.3 The legislative regime

6.2.3.1 Canada Petroleum Resources Act, 1985[1188]

Canada Petroleum Resources Act was enacted in 1985 and this authorizes the issuance by the Crown of title rights to explore for, develop and produce petroleum in areas under federal jurisdiction that are not covered by other legislation.[1189] It governs the allocation of rights to explore and exploit petroleum resources on frontier lands, the administration of these rights and the setting of royalties on production.

The Act is based on certain principles that can be summarised as follows: rights can be awarded only as the result of a transparent, competitive bidding process;[1190] generally, rights once issued should be secure; to support the recirculation of potential exploration areas[1191] and help implement the concept of unitary development.[1192]

The ministerial responsibility is shared between two ministers, that is the Minister of Indigenous and Northern Affairs who is responsible for the administration of the Act where it applies in the North and the Minister of Natural Resources who is responsible for the administration of the Act in other areas and is also the Minister responsible for the administration of legislation implementing the Atlantic Accord and the Canada-Nova Scotia Petroleum Resources Accord.[1193] In comparison, Nigeria has only one minister in charge of petroleum resources and he/she grants licences to explore, prospect and mine petroleum.

[1187] Torys LLP, Deyholos R and Cuschieri D (n 1153) 10.
[1188] The *Petroleum Resources Act* 1985 was last revised in 2014.
[1189] Sections 12 and 21 of Canada Petroleum Resources Act 2014.
[1190] Sections 13 and 14 *Petroleum Resources Act* 2014.
[1191] Section 25 (3) *Petroleum Resources Act* 2014. This means that at the end of the term of an exploration licence, all areas that are not carried forward into either a significant discovery licence or production licence revert to crown reserve land and are potentially available, through the call for bids process, for exploration by others
[1192] Review of the Canada Petroleum Resources Act, 2016 https://www.aadnc aandc.gc.ca/eng accessed 6 October 2017. This means that petroleum reservoirs are best developed as a single unit from the perspectives of resource conservation, engineering efficiency and protection of the environment.
[1193] As above.

6.2.3.2 Canada Oil and Gas Operations Act 2016

The Canada Oil and Gas Operations Act empowers the National Energy Board (NEB) to regulate "frontier areas" which includes: The Northwest Territories, Nunavut and Sable Island, Submarine areas not within a province in the internal waters of Canada and the territorial sea or continental shelf of Canada.[1194] It also sets up the Canadian Environmental Assessment Agency (CEAA), which provides environmental assessments in support of sustainable development for specific projects that prompt federal environmental assessments. The CEAA is not particularly set up for petroleum resources, but does environmental impact assessment of the operations of the petroleum industry on the environment.[1195]

It is important to note that the regulatory authority over oil and gas production and environmental protection within provincial boundaries lies primarily with provincial governments, and each province has its own environmental laws. The Federal Government also has a separate regulatory regime for health and safety, which includes, *inter alia,* the following legislations: Radiation Emitting Devices Act, 1985, Hazardous Products Act, 2015 and the Controlled Products Regulations. It is important to note that the provinces and territories have separate regulatory regimes governing health and safety.[1196]

Apart from the Canada Petroleum Resources Act 1985 and the Canada Oil and Gas Operations Act, 2016, the legislature has enacted some other laws to regulate the exploitation of offshore petroleum resources in Canada namely: the National Energy Board (NEB) Act 1985; the Energy Safety and Security Act, 2016; Canada-Newfoundland Atlantic Accord Implementation Act, 1987 and Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act 1987.[1197] In summary, the laws addressed the following:

(1) The lease of federally owned oil and gas rights on defined "frontier lands" to oil and gas companies,
(2) Development of oil and gas in marine areas controlled by the federal government and

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[1194] Manning L, O'Connor T and Lawson LLP (n 1156).
[1195] As above.
[1196] As above.
[1197] Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act 1987 (as amended).

(3) Implementation of agreements between the federal and provincial governments relating to offshore petroleum resources.

The National Energy Board (NEB) is a regulatory agency and it is here under discussed.

6.2.4. National Energy Board (NEB)

The regulation of the exploration and exploitation of petroleum resources depends on the jurisdiction and the nature of the development.[1198] The Federal Government established the NEB to regulate inter-provincial and international trade and commerce, including the import, export and transport of natural resources. The NEB also makes decisions and recommendations, which include environmental assessments, on applications to construct, operate, decommission, and abandon pipelines and international and designated inter-provincial power lines.[1199]

The NEB makes decisions on applications for pipeline tolls and tariffs so that they are just and reasonable on applications related to oil and gas exploration and drilling activities and infrastructure in certain northern and offshore areas of Canada. It also decides on applications for the export of oil, natural gas liquids, electricity and the export and import of natural gas.[1200]

6.2.5 Environmental regulation in Canada

Environmental impact assessment is required in the exploitation of oil and gas and this depends on the jurisdiction and nature of the oil and gas project. Environmental impact assessment can be done in the province, federal, or both at province and federal levels if the project is one that requires environmental impact assessment. Under federal legislation, an environmental impact assessment may be required under the Canadian Environmental Assessment Act 2012 (CEAA).[1201] An assessment under this law is obligatory only for certain designated projects and is otherwise at the Minister's discretion. Some of the designated projects include: exploratory wells, drilling programmes and offshore projects. Environmental Canada, as it is called, is responsible for the control of pollution in the air, on land and water

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[1198] Manning L, O'Connor T and Lawson LLP (n 1156).

[1199] Canada National Energy Board 2017 – 2018, Departmental Plan <www.neb- one.gc.ca/bts/pblctn/plnprrt/2017-2018/dp-pm05-2017-2018-eng.html accessed 27 June 2017.

[1200] Canada National Energy Board 2017 – 2018 (n 1199).

[1201] Manning L, O'Connor T and Lawson LLP (n 1156).

and sets environmental national standards in Canada. It, among other things, sets a national standard, the National Ambient Objective (NAO) for the different air pollutants. It also administers Canada's National Pollutant Release Inventory (NPRI) to which companies who wish to flare and vent large volumes of gas, must report.[1202]

Environmental regulation in Canada is very extensive and this has necessitated the enactment of numerous pieces of legislation especially for activities of oil and gas companies. The legislation deals with such issues as air pollution, water pollution, waste and contaminated property. It is worthy to note that in the case of: (a) an environmental or social problem of a serious nature, or (b) dangerous or extreme weather conditions affecting the health or safety of people or the safety of equipment; the Commissioner in Executive Council may, by order, prohibit any interested owner specified in the order from commencing or continuing any work or activity on the petroleum lands or any portion of those lands that are subject to the interest of that owner.

It is important to state that government orders may be issued against a broad range of persons, including those who are deemed to be, or who have been in control of a source of contamination or contaminated property. In the province of Alberta, for instance, the government will perform the remedial work and charge the costs of this work to the person responsible for remediation. Liability can potentially be joint and several, as well as retrospective. The legislation also covers offences for discharging contaminants into the natural environment, failing to comply with orders and engaging in certain activities (for example waste management) without first obtaining approval.

At the planning stage, environmental regulations are prompted and can, in a large-scale oil and gas project, require both federal and provincial approvals. At times, these otherwise separate processes are combined under a single Joint-Review Panel (JRP).[1203] The duration of the assessment is usually twenty-four months and can be extended by three months depending on the circumstances.[1204] Water

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[1202] World Bank Global Gas Flaring Reduction- Private Public Partnership Implementation Plan for Canadian Regulatory Authorities "GGFR Implementation Plan for Canadian Regulatory Authorities (2008)" 3 http://www.worldbank.org/en/programs/gasflaringreduction accessed 23 June 2017.

[1203] Torys LLP, Deyholos R and Cuschieri D (n 1153) 13.

[1204] Torys LLP, Deyholos R and Cuschieri D (n 1153) 13.

sources are protected in that Provincial licences and approvals will also have to be obtained under the Water Act before a project can proceed. Approval is required for any activity that could have adverse impacts on the province's water resources.[1205]

After a project has started, at the federal level, Environmental Canada and the Department of Fisheries and Oceans (DFO) monitor, manage and control toxic substances, pollution and waste, under the Canadian Environmental Protection Act, 1999 (CEPA) and the Fisheries Act, 1985.[1206] At the provincial level, especially in Alberta, the Environment and Sustainable Resource Development (ESRD) is responsible for the protection of Alberta's environment and the management of Alberta's water resources by:

> (1) Providing rules and requirements that are applicable to the release, storage and handling of harmful substances;
> (2) Outlining the procedures for waste management; and
> (3) Outlining the enforcement provisions and penalties for violating environmental regulations.

It is also obligatory for the oil and gas companies to report whenever environmental accidents and spills occur.[1207]

Section 4 of CEAA 2012, section 2 of Petroleum Resources Act, 1985 and section 35 of the Constitution Act, 1982 recognise the rights of the aborigines and promote communication and co-operation between responsible authorities and Aboriginal peoples with respect to environmental assessment. This is a plus for Canadian environmental promotion efforts unlike Nigeria where the indigenes of the Niger Delta are completely left out of the scheme of things on projects that directly affect them and their environment.

In Canada, Section 79 of CEAA 2012 provides for an internet site in the EIA process which gives opportunities for the public to be constantly aware of the EIA process. It also provides for a description of the factors to be considered in the Environmental Impact Assessment (EIA) process, the report with respect to the EIA that is considered by the responsible authority and any other information that the responsible authority considers appropriate. The internet site also provides for the

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[1205] Torys LLP, Deyholos R and Cuschieri D (n 1153) 14.
[1206] Fagbohun O *The Law of Oil Pollution and Environmental Restoration: A Comparative Review* (1st edn. Odade Publishers Lagos, Nigeria 2010) 410-411.
[1207] Torys LLP, Deyholos R and Cuschieri D (n 1153) 14.

application process and the criteria for eligibility for participant funding in the EIA process. In contrast, there is no provision of any internet site to report the EIA process in Nigeria.[1208]

6.2.5.1 The Canadian Environmental Protection Act, 1999 (CEPA 1999)

The CEPA 1999 is an important part of Canada's federal environmental legislation aimed at preventing pollution and protecting the environment and human health.[1209] It has many compliance and penalty provisions. For example, it is an offence for regulated entities to refuse, fail or neglect to meet any of the requirements set out by the CEPA 1999 or regulations made there under.[1210] It is the duty of enforcement officers to ensure compliance with the Act and its regulations. When there is a violation, the enforcement officer acts by using one or more of the enforcement tools available under CEPA 1999, such as warnings, directions, and tickets, orders of various types (including environmental protection compliance orders), injunction, or prosecution depending on the seriousness of the breach.

The Environmental Enforcement Act established a range of heavy fines for individuals, corporations, ships and "other persons" that are convicted of any of many designated offences in CEPA 1999 or the regulations made under that Act. Section 272 of CEPA 1999 was amended with effect from 22 June 2012 and it sets minimum and maximum fines for the most serious statutory and regulatory offences, ranging from $5,000 for a first offence by an individual to $6 million for a large corporation. The fines are doubled for second and subsequent offenders.

6.3 The United States of America oil and gas regulatory framework

The provisions of the United Nations Convention on the Law of the Sea (UNCLOS) have a considerable impact on offshore ownership structures in the United States. The offshore and onshore ownership structures for oil and gas in the United States and the relevant provisions of UNCLOS are here under discussed.

[1208] This is further discussed here under in section 7.4.2.3 on environmental related issues.

[1209] Environment and Climate Change Canada "An overview of CEPA 1999" <www.ec.gc.ca/lcpe-cepa/default.asp?> accessed June 2017. This was later amended by the Bill C-33 (26 June 2008) to include period and comprehensive reviews of the environmental and economic impacts of biofuel production in Canada.

[1210] See CEPA 1999 S.C. 1999, c.33.

6.3.1 Ownership of oil and gas in the United States

The United States is a federal state. Its Constitution was negotiated by the thirteen colonies that had united in 1776 to declare their independence from the British Crown.[1211] However, it was soon discovered that the Articles of Confederation binding them together were too loose and inadequate to bring about effective national government; they therefore adopted a federal system of government.[1212] The federal system they adopted allows for levels of authority between the federal and state governments. The relationship between the levels of government was defined by the United States Constitution in 1787 and relevant case law.[1213]

Oil was first discovered in the east coast state of Pennsylvania in 1859. By 2015 the United States had become the third largest oil producer in the world with 9,415,000 barrels per day behind Russia and Saudi Arabia.[1214] Although, oil's contribution to the United States National Gross Domestic Product is less compared to other sectors of the economy, it forms a significant part of the economic life of the various individual states where production takes place. In the states of Alaska, Wyoming, New Mexico, Louisiana and Texas, oil accounts for 24.7 percent, 16.2 percent, 10.4 percent, 10.1 percent and 7.5 percent respectively of the GDP of these states.[1215]

It is important to mention at this juncture that the 1787 Constitution of the United States does not make express provisions about the ownership of mineral resources in the United States nor does it explicitly assign legislative competence over such matters to either the Congress of the United States or the legislatures of the states.[1216] However, some governmental arrangements, practices and legislative enactments have defined the ownership structure for petroleum resources in the United States. For instance, the control of petroleum resources found in the territory

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[1211] Acholonu KKC *Constitutional Approaches to Resource Control in Oil Producing Federations* (LLM-dissertation University of Toronto 2011) 18.

[1212] Thomas KR "Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power" *Congressional Research Service* REPORT FOR CONGRESS, The Congressional Research Service, Washington, February 2008, 4 <www.fas.org/sgp/crs.pdf> accessed 5 July 2017.

[1213] Thomas KR (n 1212) 1.

[1214] Central Intelligence Agency, The World Factbook https://www.cia.gov/library/publications/the-world-factbook/rankorder/2241rank.html accessed 2 October 2017.

[1215] Mieszkowski P and Soligo R "The Governance of Oil and Gas in the United States" (2010) 3, (Washington: World Bank Conference on Oil and Gas in Federal Systems, 2010) accessed 2 October 2017.

[1216] Acholonu KKC (n 1211) 18.

of a state is inherent in the attribute of the states' territorial sovereignty, the antecedents of which can be traced to the time of the confederation or federation- (as applicable) and the adoption and ratification of the Constitution.[1217]

The onshore and offshore oil and gas resources' legal framework in the United States is impacted by a few interconnected legal regimes, including international, federal, and state laws.[1218] International law provides a framework for establishing Federal Government ownership or control of offshore areas, and United States domestic law has, in substance, adopted these internationally established principles.[1219] Based on these internationally recognised principles, the US has in its domestic law defined ownership and control of offshore minerals between the States and the Federal Governments based on the proximity of the resource to the coast.[1220]

6.3.2 United Nations Convention on the Law of the Sea (UNCLOS)[1221]

The United Nations Convention on the Law of the Sea has a great influence on the offshore legal framework of the United States. The US has control over its territorial sea, the contiguous zone, the exclusive economic zone (EEZ) and the continental shelf as applicable to comparable states and other coastal states.[1222]

Generally, UNCLOS III provides that in the contiguous zone, the exclusive economic zone (EEZ), coastal states have sovereign rights to explore, exploit, conserve, and manage marine resources; and state jurisdiction is provided over:

1. The establishment and use of artificial islands, installations and structures;
2. Marine scientific research; and
3. The protection and preservation of the marine environment.[1223]

[1217] Thomas KR (n 1212) 4.

[1218] Vann A "Offshore Oil and Gas Development: Legal Framework" (2013) *Congressional Research Service Report for Congress* 1 www.crs.gov accessed 30 June 2017.

[1219] As above.

[1220] As above.

[1221] United Nations Convention on the Law of the Sea III (hereinafter referred to as "UNCLOS") which entered force on the 16 November 1994.

[1222] Article 3 of section 2, part II of UNCLOS III, Article 33 of section 4 (2), part II of UNCLOS III, Article 21 of section 3 (A), part II of UNCLOS III.

[1223] Article 56 (1) part V under Exclusive Economic Zone of UNCLOS III.

The EEZ is 200 nautical miles from the baseline of the state's territorial sea.[1224] The EEZ practically overlaps another offshore area called the continental shelf. The continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[1225]

6.3.3 Federal Government oil and gas jurisdiction

The United States' claim to offshore zones has followed the provisions of UNCLOS III. The Supreme Court in various landmark cases has also affirmed federal control of these offshore areas.[1226] The Outer Continental Shelf Lands Act, 1953 has also defined the "Outer Continental Shelf" as "all submerged lands lying seaward and outside of the areas ... [under state control] and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control..."[1227] Therefore, the US Outer Continental Shelf (OCS) comprises an area extending at least 200 nautical miles from the official US coastline and possibly farther where the geological continental shelf extends beyond that point. Hence, the federal government's authority to regulate offshore oil and gas exploitation applies to all areas under U.S. control except where U.S. waters have been placed under the primary jurisdiction of the states.[1228] The Federal Government possesses over 700 million acres of land which constitutes about 30 percent of the land in the United States.[1229] The Federal Government owns land in some western states such as New Mexico, Wyoming and Alaska. It has no land in Texas apart from lands acquired for the post office, interstate highways, etc. Texas' case is different because it joined the

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[1224] Article 57 part V under Exclusive Economic Zone of UNCLOS III.

[1225] Article 76 part VI under Continental Shelf of UNCLOS III.

[1226] *United States v. Texas*, 339 U.S. 707 (1950); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. California*, 332 U.S. 19 (1947). In accordance with the *Submerged Lands Act*, states generally own an offshore area extending three geographical miles from the shore. Florida (Gulf coast) and Texas, by their offshore boundaries prior to admission to the Union, have an extended, three-marine-league offshore boundary. See *United States v. Louisiana*, 363 U.S. 1, 36-64 (1960); *United States v. Florida*, 363 U.S. 121, 121-129 (1960).

[1227] 43 U.S.C. s.1331(a).

[1228] Vann A (n 1218) 2.

[1229] Elumelu O *Licenses, leases and other contractual arrangements for the exploration and production of petroleum: a comparative study between Nigeria and the United States* (LLM-dissertation University of Georgia 2007) 41.

Union as a sovereign nation and the State of Texas retained title to all of its public domain.[1230]

6.3.4 State jurisdiction

The Federal Submerged Lands Act of 1953 (SLA) provides that coastal states are normally entitled to an area extending three nautical miles[1231] from their officially recognized coast (or baseline).[1232] However, to accommodate the claims of certain states, the SLA provides for an extended three-marine-league 12 nautical miles seaward boundary in the Gulf of Mexico if a state can show that such a boundary was provided for by the state's "constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."[1233]

Oil and gas exploration and production began on land several decades ago, but with the discovery of oil and gas, and the advancement of technology allowing its exploration and development, arose what has been rightly described as "the greatest land case in history."[1234] Up till 1937, coastal states exercised control over the seabed, collected taxes on fishing rights and exercised police powers in the area without disturbance from the federal government.[1235]

The conflict of ownership came to the fore in the 1940s, when the oil and gas industries began to expand into offshore regions. There was a controversy between the United States and Texas on title to submerged lands located off the coast of Texas up to 3 leagues (10.35 miles) from shore into the Gulf of Mexico, also referred to as the tidelands.[1236] In the case of *US* v *Texas,* Texas first acquired title to submerged lands located off the coast of Texas up to 3 leagues (10.35 miles) from

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[1230] The reason for Texas ownership of its lands is discussed below under the section on State jurisdiction.

[1231] A geographical or nautical mile is equal to 6,080.20 feet, as opposed to a statute mile, which is equal to 5,280 feet.

[1232] 43 U.S.C. s.1301(b).

[1233] 43 U.S.C. ss1312, 1301(b).

[1234] James WC Jr., "The Federal-State Offshore Oil Dispute" 11 *William and Mary Law Review* 755 (1970) http://scholarship.law.wm.edu/wmlr/vol11/iss3/13 accessed 03 July 2017.

[1235] H.R. REP. No. 1778, 80th Congress. 2d Session. 17 (1948); 99 CONG. REC. 2499 and 2501 (1953) (remarks of Congressmen Nicholson and Reed).

[1236] Overview of U.S. Legislation and Regulations Affecting Offshore Natural Gas and Oil Activity, Energy Information Administration, Office of Oil and Gas, (2005) 5 www.eia.gov/pub/oil_gas/natural_gas/feature_articles/2005/offshore/offshore.pdf accessed 02 July 2017.

shore into the Gulf of Mexico when it established itself as an independent nation in 1836, and the United States recognized this maritime boundary when Texas entered the Union in 1845. This position was recognised by the officials of the United States for over a century.

The problem started when applicants for cheaper federal leases and federal officials began to assert federal ownership in the same manner as they had done against California and other coastal states. The controversy was not limited to Texas, but other coastal states. All coastal states became agitated over their long-recognised titles to lands beneath their navigable waters. It became a national issue, resulting in three Supreme Court decisions against the states and three Acts of Congress in favour of the states,[1237] two presidential vetoes against the states,[1238] and a major issue in a presidential campaign, before the states finally won the victory.[1239] It was the most serious conflict of the century between the states and the federal government.

The Supreme Court in the case of *United States v. Louisiana*[1240] supported this arrangement where the Court held that the Gulf coast boundaries of Florida and Texas extended to the three-marine-league limit.[1241] The court held that the coastal states have power within their offshore boundaries and are entitled to the lands beneath navigable waters within the boundaries of the respective states, and the right and power to manage, administer, lease, develop and use the said lands and natural resources.[1242] To this end, some states do not differentiate between onshore and offshore oil and gas and other types of minerals.[1243]

In the United States, case law and the Submerged Lands Act, however, have not completely resolved the dispute because of the problem of establishing a fixed line to

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[1237] The congress enacted Submerged Lands Act in 1953 recognising three nautical miles for the coastal states and 3 leagues for the State of Texas.

[1238] Congress twice (1946 and 1952) passed bills restoring to the States the title to all submerged lands within their respective boundaries, but President Truman vetoed the bills.

[1239] President Dwight Eisenhower declared in favour of State ownership, and said he would sign a bill enacted by Congress, which he then did on May 22, 1953.

[1240] 363 U.S. 1, 66 (1960).

[1241] See also *United States v. Florida*, 363 U.S. 121, 129 (1960) "We hold that the Submerged Lands Act grants Florida a three-marine-league belt of land under the Gulf, seaward from its coastline, as described in Florida's 1868 Constitution."

[1242] 43 U.S.C. §1311.

[1243] Vann A (n 1218) 3.

begin the measurement of the three miles from the coast; it has been difficult because of the geological conditions.[1244] In many areas, the coastline is constantly changing so that the line would have to be continually re-drawn.[1245] James has argued that a compromise should be struck between the federal government and the states.[1246] He suggested that the Australian example be adopted. In Australia, the seabed was given by statute to the federal government because of its responsibilities for international affairs and defence, but the revenue from leases and the exploitation of the area is divided with forty percent going to the Commonwealth and sixty percent to the states.[1247]

As discussed in the preceding paragraphs, the regulatory framework for oil and gas varies from state to state, since each state has a measure of autonomy to regulate its own activities within the federation. The states determine which offshore areas under their jurisdiction will be opened up for exploration and exploitation. They make laws to regulate and establish state agencies to manage the development of oil and gas resources within their jurisdiction.[1248] It is also important to note that a variety of other state laws could impact both onshore and offshore development, such as environmental and wildlife protection laws and coastal zone management regulations.[1249]

6.3.5 Legislative framework

The principal legislative framework like Outer Continental Shelf Lands Act, 1953 (OCSLA), the Federal Oil and Gas Royalty Management Act and Outer Continental Shelf Deep Water Royalty Relief Act of 1995 are discussed here under.

6.3.5.1 The Outer Continental Shelf Lands Act (OCSLA)

The principal federal law governing the exploration and exploitation of oil and gas in federal waters is the Outer Continental Shelf Lands Act (OCSLA).[1250] The OCSLA

[1244] James WC Jr., *The Federal-State Offshore Oil Dispute*, *11 William and Mary Law Review.* 755 (1970) 768 http://scholarship.law.wm.edu/wmlr/vol11/iss3/13 accessed 3 July 2017.
[1245] James WC Jr. (n 1244) 770.
[1246] James WC Jr. (n 1244) 770.
[1247] James WC Jr. (n 1244) 770.
[1248] Vann A (n 1218) 3.
[1249] Vann A (n 1218) 3.
[1250] 43 U.S.C. ss.1331-1356; Overview of U.S. Legislation and Regulations Affecting Offshore Natural Gas and Oil Activity, Energy Information Administration, Office of Oil and Gas, (2005) 8 www.eia.gov/pub/oil_gas/natural_gas/feature_articles/2005/offshore/offshore.pdf accessed 02 July 2017.

asserts federal control of the OCS, declaring that the sub-merged lands seaward of the states' offshore boundaries belongs to the Federal Government. Apart from the fact that it codifies federal control of the OCS, it has as its primary purpose the "expeditious and orderly development [of OCS resources], subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs..."[1251] To ensure the fulfilment of this purpose, the OCSLA makes federal laws applicable to certain structures and devices located on the OCS.[1252] The OCSLA provides that the law of adjacent states will apply to the OCS when it does not conflict with federal law;[1253] and, considerably, provides a comprehensive leasing process for certain OCS mineral resources and a system for collecting and distributing royalties from the sale of these federal mineral resources.[1254] The OCSLA thus provides for comprehensive regulation of the development of OCS oil and gas resources.[1255]

6.3.5.2 The Federal Oil and Gas Royalty Management Act

To make sure that all Federal lands in the offshore have good accounting and implementation mechanisms, the Congress enacted the Federal Oil and Gas Royalty Management Act.[1256] To ensure transparency and proper accounting, the Act put in place a comprehensive system for determining, collecting and auditing all fees and payments for offshore leases.[1257] Furthermore, the implementation mechanisms put in place included conducting inspections and enforcing penalties.[1258] Civil penalties range between $500 and $25,000 per violation for each day such violation continues; the amount depends on the severity of the violation.[1259]

Criminal penalties are provided for in section 110 of the Act. Any person convicted of an offence under this head is liable to pay a fine of $50,000, or to serve a prison term

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[1251] 43 U.S.C. s.1332(3).

[1252] 43 U.S.C. s.1333. The provision also expressly makes the Longshore and Harbour Workers' Compensation Act, the National Labour Relations Act, and the Rivers and Harbours Act applicable on the OCS, although application is limited in some instances.

[1253] As above.

[1254] 43 U.S.C. ss.1331(a), 1332, 1333(a)(1).

[1255] Vann A (n 1218) 4.

[1256] Section 2 of the *Federal Oil and Gas Royalty Management Act*, 1982.

[1257] Sections 103 and 104; Overview of U.S. Legislation and Regulations Affecting Offshore Natural Gas and Oil Activity, Energy Information Administration, Office of Oil and Gas, (2005) 9 www.eia.gov/pub/oil_gas/natural_gas/feature_articles/2005/offshore/offshore.pdf accessed 02 July 2017.

[1258] Sections 107 and 108 of the Federal Oil and Gas Royalty Management Act, 1982.

[1259] Section 109 of the Federal Oil and Gas Royalty Management Act, 1982.

of not more than 2 years or both imprisonment and fine.[1260] The Act increased the responsibilities of the Secretary of the Interior.[1261] It empowered the Secretary of the Interior to create the Mineral Management Service (MMS)[1262] within the Department to administer all responsibilities relating to oil and gas extraction on the OCS. The responsibilities range from the scheduling of sales and the leasing of OCS tracts to the approval and oversight of offshore operations and the conduct of environmental impact studies.[1263]

6.3.5.3 Outer Continental Shelf Deep Water Royalty Relief Act of 1995

The idea behind the Act was to offer incentives for the exploration and exploitation of oil and gas in the Gulf of Mexico, in waters at least 200 meters (656 feet) deep. This is necessary because without the royalty incentive, technologies necessary for pursuing deep-water oil and gas exploration and exploitation would be economically unattractive. The Mineral Management Service (MMS) determines which leases qualify for relief based on location[1264] and economic viability of the resource field associated with the lease - the field would not be explored or drilled without the relief.[1265]

In 2000, the Mineral Management Service (MMS) adopted a programme which determines royalty relief on a lease-specific basis, for example, if one natural gas field is more expensive to access, then it may possibly receive more royalty relief than a field in the same water depth with lower costs to access.[1266] In January 2004, the Department of Interior (DOI) issued a rule to offer similar incentives for existing leases, and on 8 August 2005, President Bush signed into law the Energy Policy Act of 2005 which includes a provision to increase further incentives on production of deep natural gas in the shallow waters of the Gulf of Mexico.[1267]

[1260] Section 110 of the Federal Oil and Gas Royalty Management Act, 1982.
[1261] Section 101 of the Federal Oil and Gas Royalty Management Act, 1982.
[1262] Now referred to as the Bureau of Ocean Energy Management, Regulation and Enforcement.
[1263] Overview of U.S. Legislation and Regulations (n 1257) 8-9.
[1264] The lease must be in the Gulf of Mexico, west of the Florida/Alabama boundary.
[1265] Overview of U.S. Legislation and Regulations (n 1257) 14.
[1266] Overview of U.S. Legislation and Regulations (n 1257) 14.
[1267] Overview of U.S. Legislation and Regulations (n 1257) 15.

6.3.6 Regulations related to environmental issues

In order to ensure a healthy environment, it is mandatory that an environmental impact statement (EIS) of major federal actions that significantly affect the environment be prepared and a document offering detailed analysis of the project as proposed as well as other options, including taking no action at all must be made available to members of the public.[1268] Therefore, the United States provided for internet access to US Energy Information Administration (EIA) which serves as the agency's worldwide energy information point of contact for Federal, state, and local governments, the academic and research communities, businesses and industry, foreign governments and international organizations, the news media, financial institutions and the public. This website EIA.gov was launched on 1 July 1995.[1269] The aim is to serve as a preliminary guide to information that may prove helpful in dealing with environmental impact assessments (EIA).[1270]

In addition to the provisions ensuring a healthy environment contained in the laws and regulations dealing with the exploration and exploitation of oil and gas resources as discussed above, there are other specific laws on the regulation of environmental risks that relate to offshore natural gas and oil exploration and exploitation. They are: the National Environmental Policy Act of 1969; Clean Air Act 1970;[1271] the Coastal Zone Management Act of 1972; the Endangered Species Act of 1973; the Clean Water Act of 1977, the National Fishing Enhancement Act of 1984, the Oil pollution Act (OPA) 1990 and the Gulf of Mexico Energy Security Act (GOMESA). It is important to note that the operators are required to satisfy the Secretary of Interior, and the affected states that adequate planning has been made in relation to the mandatory five-year plan before exploration and exploitation leases or licences are granted.[1272] The Oil Pollution Act of 1990 is discussed here under.

[1268] Alexander K, "Overview of National Environmental Policy Act (NEPA) Requirements" *CRS Report RS20621* in Vann A (n 184).

[1269] U.S. Energy Information Administration, EIA celebrates 20 years on the Internet in 2015 https://www.eia.gov/todayinenergy/detail.php?id=21872 accessed 6 October 2017.

[1270] International Association for Impact Assessment, Environmental Impact Assessment Index of Web sites http://www.iaia.org/eia-index-of-websites.php accessed 6 October 2017.

[1271] Amended in 1977 and 1990.

[1272] Overview of U.S. Legislation and Regulations (n 1257) 9.

6.3.6.1 The Oil Pollution Act 1990

An oil spill occurred on 24 March 1989 and the spill was the second largest in the history of oil spills in the US, spilling approximately 40,900 to 120,000m3 or 257,000 to 750,000 barrels.[1273] The Oil Pollution Act (OPA), 1990 was passed as a result by the 101st US Congress and assented to by President George W Bush to mitigate and prevent civil liability from the future oil spills off the coast of the USA. It formed part of oil governance in the USA. The law prescribes that oil companies must have a plan to prevent spills that may occur and have a comprehensive plan to contain and clean up the oil spills.[1274]

The OPA states that the party responsible for an oil spill is liable for any loss of natural resources, for example, fish and other aquatic life, animals, plants, and their habitats and the ancillary services provided by the affected resource- for example portable water and recreation. For this purpose, Jonathan L Ramseur has opined that natural resource damage may include both losses of direct use and passive uses. Direct use value may derive from recreational (e.g., boating), commercial (e.g., fishing), or cultural or historical uses of the resource while a passive-use worth may stem from preserving the resource for its own sake (ecological balancing) or preserved for future generations.[1275]

The OPA widened the scope of liability for the oil spill; the oil companies are responsible for all clean-up costs incurred, either by a government agency or by a private party.[1276] Apart from this, the OPA considerably increased the range of liability to include the following:

1. Injury to natural resources,
2. Loss of personal property (and resultant economic losses), loss of subsistence use of natural resources,
3. Lost revenues resulting from destruction of property or natural resource injury,
4. Lost profits and earning capacity resulting from property, injury or natural resource injury, and
5. Costs of providing extra public services during or after spill response.[1277]

[1273] Field B, *Environmental Economics* 5th ed (Cram 101 Textbook Reviews 2016) unknown page. Oil Company responsible was Exxon Vadez BP.

[1274] Field B, *Environmental Economics* (n 1273).

[1275] See 15 CFR Section 990.30, definition of "value"; Ramseur JL "Oil Spills in U.S. Coastal waters: Background and Governance" (2012) *CRS Report for Congress* 9 www.crs.gov accessed 4 July 2017.

[1276] Oil Pollution Act section 1002(b) (1).

[1277] Oil Pollution Act section 1002(b) (2).

For these losses, damages are collected but damages collected are compensatory and when collected, they are not placed in general Treasury revenues of the federal or state government, but must be used to return or replace lost resources.[1278]

In response to oil spills, the President of the United States has three options that is: perform clean-up, immediately monitor the response efforts of the spiller, or direct the spiller's clean-up activities.[1279] The OPA, *inter alia,* directed the President to establish procedures and standards (as part of the National Contingency Plan (NCP)) for responding to worst-case oil spill situations.[1280] The Act mandated the Federal Government to determine the level of clean-up required. The Federal Government is requested to consult with designated trustees of natural resources and the Governor of the State affected by the spill to determine when the clean-up is complete. If, however the State requires further work, it can go ahead but without the support of Federal funding.[1281] The Gulf of Mexico Energy Security Act (GOMESA) of 2006[1282] was enacted to lift the ban placed on offshore oil extraction because of the Exxon Valdez oil spill in Alaska.

Spills in the USA, however, "are responded to in minutes.[1283] On the oil spill which occurred in 2010, estimates suggest that BP could face up to $80 billion (updated to $100 billion) in costs, including penalties, damages and clean-up costs. Apart from the financial costs the company also faced tougher scrutiny from regulators and reduced opportunities to drill wells.[1284]

The provisions of the OPA in respect of compensation for oil spill and remediation of the environment are comprehensive and Nigeria has a lesson to learn here. Nigeria should include these provisions in its laws, in order to solve the problem of oil spills,

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[1278] 33 U.S.C. Section 2706(f); William D. Brighton, *Natural Resource Damages under the Comprehensive Environmental Response, Compensation, and Liability Act* (2006), U.S. Department of Justice, Environment and Natural Resources Division.

[1279] U.S. Congress, House Committee on Merchant Marine and Fisheries, Report accompanying H.R. 1465, Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989, 1989, H.Rept. 101-242, Part 2, 101st Cong., 1st sess., p. 84.

[1280] Oil Pollution Act section 4201(b), amending Section 311(d)(2)(J) of the CWA.

[1281] Oil Pollution Act section 1011.

[1282] Pub Law 109-432.

[1283] Carolyn W and McNicholas P "The BP Gulf Oil Spill: Public and Corporate Governance Failures" (2012) 3 http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1036&context=acsear2012 accessed 3 July 2017.

[1284] Carolyn W and McNicholas P (n 1283) 4.

improve on compensation payable to victims of oil spills and thereby bring peace to the Niger Delta.

6.3.7 Oil Spill Liability Trust Fund[1285]

At times, the loss involved in an oil spill is more than what the spiller can solely bear. In fact, federal funding for oil spills was generally inadequate and as such damage recovery was difficult for private parties.[1286] For this reason, Congress established by law the Oil Spill Liability Trust Fund (OSLTF). A body known as the National Pollution Funds Centre (NPFC) was established by Executive Order (EO) 12777 to administer the fund. The Fund among other things is to achieve the following:

1. Prompt payment of costs for responding to and removing oil spills;
2. Payment of the costs incurred by the federal and state trustees of natural resources for assessing the injuries to natural resources caused by an oil spill, and developing and implementing plans to restore or replace the injured natural resources;
3. Payment of parties' claims for uncompensated removal costs, and for uncompensated damages (e.g., financial losses of fishermen, hotels, and beachfront businesses);
4. Payment for the net loss of government revenue, and for increased public services by a state or its political subdivisions; and
5. Payment of federal administrative and operational costs, including research and development, and $25 million per year for the Coast Guard's operating expenses.

For the Fund's take off, Congress transferred balances from other federal liability funds into the OSLTF and imposed a 5-cent-per-barrel tax on the oil industry to support the Fund.[1287] As of 2017, the rate has been increased by 9 cents. To preserve the Trust Fund and ensure that spillers are held accountable for oil spill clean-up and damages, the OPA requires that vessels and offshore facilities maintain evidence of financial responsibility (insurance). The Coast Guard's National Pollution Funds Centre (NPFC) implements the financial responsibility provisions for vessels; the Bureau of Ocean Energy Management, Regulation, and Enforcement

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[1285] Though the fund was created in 1986, the Congress only provides its funding after the Exxon Valdez incident of 1989.

[1286] Wilkinson, C et al., "Slick Work: An Analysis of the Oil Pollution Act of 1990," *Journal of Energy, Natural Resources, and Environmental Law*, 12 (1992), 188; U.S. Congress, House Committee on Merchant Marine and Fisheries, Report accompanying H.R. 1465, Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989, 1989, H.Rept. 101-242, Part 2, 101st Cong., 1st sess., 35.

[1287] The CWA Section 311(k) revolving fund; the Deep-water Port Liability Fund; the Trans-Alaska Pipeline Liability Fund; and the Offshore Oil Pollution Compensation Fund; Omnibus Budget Reconciliation Act of 1989 (P.L. 101-239). Other revenue sources for the fund include interest on the fund, cost recovery from the parties responsible for the spills, and any fines or civil penalties collected.

(formerly the Minerals Management Service, MMS) implements this requirement for offshore facilities.[1288] The responsible party is subjected to certain liability limits under the OPA.[1289]

6.4 Similarities and differences of comparable jurisdictions and the lessons for Nigeria

The preceding sections have discussed the legislative and regulatory frameworks for oil and gas in comparable jurisdictions; it is thus important to examine the similarities and differences between comparable jurisdictions and Nigeria in order to bring out the lessons Nigeria could learn from these jurisdictions. The similarities and differences between the comparable jurisdictions and Nigeria are presented in tabular form. However, the major difference between comparative jurisdictions and Nigeria is in the implementation of the legislative and regulatory frameworks and this shall be discussed subsequently in emphasising the lessons Nigeria could learn from these successful jurisdictions.

[1288] Ramseur JL "Oil Spills in U.S. Coastal waters: Background and Governance" (2012) *CRS Report for Congress* 17 www.crs.gov accessed 4 July 2017.

[1289] For the maximum amount, the responsible party can be subjected to see the liability limits in OPA Section 1004; 33 U.S.C. 2704. This has been increased and the increase was effective from 21 December 2015. Single-hull tank ship greater than 3,000 gross tons GT = USD 3,500 per GT or USD 25, 845, 600; tank ship greater than 3,000 GT, other than single – hull ship = USD2,200 per GT or USD 18, 796, 800; single – hull tank ship less than or equal to 3,000 GT = USD 3,500 per GT or USD 7,048,800; tank ship less than or equal to 3,000 GT, other than single – hull ship = USD2,200 per GT or USD 4,699,200 and other ships, including any edible oil tank ship and any oil spill response ship = USD 1,100 per GT or USD 939,800.

TABLE 2: SIMILARITIES AND DIFFERENCES

Countries	USA	Canada	Australia	Nigeria
Ownership of oil and gas	1. State ownership of petroleum resources.	1. State ownership of petroleum resources.	1. State ownership of petroleum resources.	1. State ownership of petrole resources.
	2. Mixed ownership, for example, the Federal and State Governments and individuals own and control petroleum resources found in their lands.	2. Mixed ownership, for example, the Federal and Provincial Governments and individuals own and control petroleum resources found in their lands.	2. Mixed ownership, for example the Commonwealth and State Governments own and control petroleum resources. No individual ownership.	2. Sole ownership, the Feder Government owns and contr and gas. No State Governme individual ownership.
	3. The Federal and State Governments have separate legislation governing oil and gas.	3. The Federal and Provincial Governments have separate legislation governing oil and gas.	3. The Federal and State Governments have separate legislation governing oil and gas.	3. Only Federal legislation ar single regulatory agency for gas.
	4. Separate regulatory agencies for each level of governments.	4. Separate regulatory agencies for each level of governments.	4. Separate regulatory agencies for each level of governments.	4. Only the Federal governm regulates.
	5. Non-State participation in the extraction of oil and gas. State issues licences to private oil companies.	5. Non-State participation in the extraction of oil and gas. Province issues	5. Non-State participation in the extraction of oil and gas. State issues licences to private oil	5. State participation through National Oil Company the NN issues licences to private oil companies as well as plays t

	The role of the state is limited to regulation of the industry.	licences to private oil companies. The role of the state is limited to regulation of the industry.	companies. The role of the state is limited to regulation of the industry.	role of a regulator through the Department of Petroleum Resources (DPR).
	6. Experience political crisis arising from the question of jurisdiction over the offshore oil and gas resources due to different claims between the Federal and State Governments.[1290]	6. Experience political crisis between the Federal and Provincial Government over control of oil and gas resources due to different claims between the Federal and State Governments.	6. Experience political crisis arising from the question of jurisdiction over the offshore oil and gas resources due to different claims between the Federal and State Governments.	6. Experienced political crises the interpretation of section 1 of the 1999 Constitution concerning the offshore seaw boundaries of the State and Federal Governments.
	7. The United States Supreme Court awarded offshore oil and gas resources to the Federal Government.[1291] The case laws could not resolve this crisis; the Congress waded in and was resolved when President Dwight Eisenhower signed	7. The Supreme Court of Canada intervened by awarding the offshore resources to the Federal Government.[1293] This did not finally resolve the problem but the provinces concerned entered accord with the Federal Government to provide for	7. The crisis was resolved through political and administrative methods after a series of intergovernmental interactions.	7. The Supreme Court award the offshore zones to the Fed Government.[1295] This decisio could not resolve the crisis, b was resolved through enactm Allocation of Revenue (Abolit Dichotomy in the Application Principle of Derivation) Act, 2 which abolished the onshore/offshore dichotomy i

[1290] Haward MG (n 1109) 1.

[1291] *United States v. Texas*, 339 U.S. 707 (1950); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. California*, 332 U.S. 19 (1947). In accordance with the Submerged Lands Act, states generally own an offshore area extending three geographical miles from the shore. Florida (Gulf coast) and Texas, by their offshore boundaries prior to admission to the Union, have an extended, three-marine-league offshore boundary. See *United States v. Louisiana*, 363 U.S. 1, 36-64 (1960); *United States v. Florida*, 363 U.S. 121, 121-129 (1960).

	into law a bill enacted by Congress on May 22, 1953.[1292]	joint management and administration of the resources.[1294]		calculating the 13 percent derivation formula.
Environmental matters	1. Environmental impact assessment is mandatory for projects that impact on the environment like oil and gas under Outer Continental Shelf Lands Act (OCSLA). 2. Environmental Impact Assessment can be done at the state, federal, or both at state and federal levels if the project is the	1. Environmental impact assessment is mandatory for projects on oil and gas under Canadian Environmental Assessment Act 2012 (CEAA). 2. Environmental Impact Assessment can be done at the province, federal, or both at province and federal levels if the project	1. Environmental impact assessment is mandatory for projects on oil and gas.[1300] 2. Environmental Impact Assessment can be done at the state, federal, or both at state and federal levels if the	1. Environmental impact assessment is mandatory for projects on oil and gas under environmental Impact Assess Act (EIA Act).[1301] 2. Environmental Impact Assessment can only be don the Federal Government age

[1293] Haward MG (n 1109) 1.

[1295] See the case of *Attorney General of the Federation v. Attorney General of Abia State & 35 Ors.* (2002) 6 N.W.L.R. (part 764), 542.

[1292] See the *Outer Continental Shelf Lands Act* (OCSLA) was enacted in 1953.

[1294] The governments of Newfoundland and Labrador entered an agreement with Federal Government called Atlantic Accord over development of offshore oil and gas. This Agreement was backed up by Accord Implementation Act of 1987.

[1300] For example, e.g. serious offences attract a fine of A$ one million for a corporation or A$ five hundred thousand and/or up to five years imprisonment for individuals.

[1301] Environmental Impact Assessment Act, E12 Laws Federation of Nigeria 2004.

	one that requires environmental assessment.	is the one that requires environmental assessment.	project is on mandatory list.	
	3. The EIA report is to be published and submitted to the Governors of potentially affected states. For easy access, USA provides internet access to EIA information.	3. The EIA process is transparent, with opportunities for public and stakeholders' comment.	3. The EIA process is transparent and there are opportunities for public and stakeholders' participation.	3. The EIA process is not transparent; the public is deni the opportunities of participati EIA. There is poor implement of the provisions of the EIA A
	4. There are overlap of issues because of the existence of the Federal legal regime on the one hand and the State's legal regime on the other hand.[1296] These overlapping issues have resulted in rivalry and delayed EIA process.	4. There are overlap of issues because of the existence of the National legal regime on the one hand and the Provinces legal regime on the other hand. These overlapping issues have resulted in rivalry and delayed EIA process.	4. There are overlap of issues because of the existence of the Commonwealth legal regime on the one hand and the state legal regime on the other hand. These overlapping issues have resulted in rivalry and delayed EIA process.	4. There is one EIA legislation existence which governs EIA process (the EIA Act of 1992)
	5. National Environmental Policy Act (NEPA) and Oil Pollution Act mandate the	5. The National Energy Board and Canadian Environmental	5. The regulatory agencies are National Offshore Petroleum	5. The National Environmenta Standards and Regulations Enforcement Agency (NESRE

[1296] Fasina OA *Environmental Impact Assessment for Oil and Gas Projects: A Comparative Evaluation of Canadian and Nigerian Laws* (LLM Thesis University of West Ontario 2016) 126.

	United States Environmental protection agency and other state agencies to manage the environment. 6. NEPA is in collaboration with the States and local jurisdictions in environmental review process[1297] and the US provided for internet access to US Energy Information Administration (EIA) which serves as the agency's worldwide energy information point of contact for Federal, state, and local governments, the academic and research	Assessment Agencies are regulatory authorities.[1298] 6. The law recognises the right of the aborigines and promotes communication and co-operation between responsible authorities and Aboriginal peoples with respect to environmental assessment.[1299] It provides for internet access to EIA information.	Titles Administrator and the National Offshore Petroleum Safety and Environment Management Authority (NOPSEMA). 6. The Commonwealth, all states and territories entered into bilateral agreements regarding the assessment process for major projects that are likely to have a considerable impact on environment.	enforces compliance with law guidelines, policies and stand on environmental matters, bu unfortunately oil and gas were excluded from the list.[1302] 6. The Department of Petrole Resources is the regulator for and gas industry. It made rule guidelines for the conduct of E for oil and gas referred to as Environmental Guidelines and Standards for the Petroleum Industry (EGASPIN).

[1297] NEPA.GOV, States and Local Jurisdictions with NEPA-like Environmental Planning Requirements https://ceq.doe.gov/laws-regulations/states.html accessed 17 July 2017.

[1298] See section 272 of CEPA 1999. It sets minimum and maximum fines for the most serious statutory and regulatory offences, ranging from $5,000 for a first offence by an individual to $6 million for a large corporation. The fines are doubled for second and subsequent offenders.

[1299] Section 4 of CEAA 2012, section 2 of Petroleum Resources Act and section 35 of the Constitution Act, 1982.

[1302] Section 2(4) of EIA Act. The National Environmental Standards and Regulations Enforcement Agency (NESREA) replaced the Federal Environmental Protection Agency (FEPA).

	communities, businesses and industry, foreign governments, international organisations, the news media, financial institutions and the public. 7. The Oil Pollution Act (OPA) prescribes that oil companies must have a plan to prevent spills that may occur and have a comprehensive plan to contain and clean up the oil spills. There is the Oil Spill Liability Trust Fund (OSLTF) which, *inter alia*, ensures prompt payment of costs incurred while removing oil spills. The Fund also remediates the environment.			

6.4.1 The lessons Nigeria can learn from these successful jurisdictions

This section discusses the lessons Nigeria could learn from the successful jurisdictions of the United States of America, Canada and Australia to ensure a sustainable development of Nigeria's petroleum resources. This is discussed under the following sub-heads: Ownership and Control of oil and gas, and Environmental Regulation and management.

6.4.1.1 Ownership and Control of oil and gas

As noted in the table, Nigeria belongs to a jurisdiction that utilises the licensing and concession system to allocate rights to develop its petroleum resources. Nigeria also participates in the business of oil exploration and exploitation. Ordinarily, this is supposed to be an advantage for the Nigerian petroleum industry because state participation allows for a principle-based regulatory framework which contributes to sustainable development of petroleum resources.[1303] However, the Nigerian regulatory framework has failed to bring the necessary development to the petroleum sector. Nigeria has not used its direct involvement to influence the diversification of its economy resulting in the popular "Dutch disease." It depends on petroleum resources to the detriment of other sectors of the economy. The government's participation in the extraction of petroleum has made it rather difficult for it to implement policies that ensure the protection of the environment. Most of the time, the government and its regulatory agencies collaborate and collude with oil companies to trample on the socio-economic and environmental rights of the host communities in the Niger Delta,[1304] thus raising the spectre of a rentier state. The comparable jurisdictions are not dependent on revenue from oil alone, so Nigeria should learn to diversify its economy, placing more attention on agriculture where it has a comparative advantage.

6.4.1.2 Environmental regulation and management

Nigeria, like other comparable countries, requires environmental impact assessments (EIA) as mandatory before oil and gas projects can be commenced.[1305] This is to be carried out to determine the nature of the project and to what extent the project will affect the environment.[1306] However, unlike other comparable

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[1303] Hunter T (n 1120) 419.
[1304] *SERAC* case Communication No 155/96 (n 47)
[1305] Section 22 (a) of the Petroleum Act.
[1306] Section 2 of the *Petroleum Act.*

jurisdictions, in Nigeria the EIAA does not stipulate whether an assessment is to be completed in house or through an external body.[1307] This is an obvious gap in the law and it is suggested that an independent body (an external body) should be established and entrusted with the responsibility of EIA reports for the projects in the petroleum industry in Nigeria.

Also, unlike what obtains in the comparable countries, the people of the Niger Delta are denied access to information concerning the effects of oil and gas projects on the environment. In Canada, for instance, section 4 of the CEAA recognises the right of the Aborigines to participate in the environmental impact assessment of projects that might have a negative impact on their health and that of the environment. It is unfortunate that neither the Nigerian Constitution, nor the Petroleum Act, recognises community or group rights to participate in environmental impact assessment surveys of oil and gas projects. The position in Nigeria is contrary to Article 24 of The African Charter which recognizes the right of all people to a healthy environment. Article 24 of The African Charter provides:

> All people shall have the right to a general satisfactory environment favourable to their development and the State shall have the duty individually or collectively to ensure the exercise of the right to development.

Additionally, the National Environmental Standards and Regulations Enforcement Agency (NESREA) has the statutory mandate to enforce all environmental laws, guidelines, policies, standards and regulations in the country and for other related matters.[1308] The Agency was established by the National Environmental Standards and Regulations Enforcement Agency Act of 2007. Unfortunately, its scope of regulation does not include the oil and gas industry. This is a serious gap in the law which could be identified as one of the critical factors responsible for environmental pollution in Nigeria. The responsibility for monitoring compliance and enforcement for emissions and other environment related issues such as gas flaring in the oil and gas industry was left with the Department of Petroleum Resources. Although, the Department of Petroleum Resources (DPR) set up Environmental Guidelines and Standards for the petroleum industry (EGASPIN), 1991 which was revised in 2002, this cannot be equated with a statutory agency like the NESREA in Nigeria.

[1307] Section 58 only stipulates that the Agency can facilitate environmental assessment.

[1308] See the preamble to the *National Environmental Standards and Regulations Enforcement Agency Act.*

In the comparative countries, there are overlaps of issues because of the existence of the Federal/National/Commonwealth legal regime on the one hand and the States/Provinces legal regime on the other.[1309] These overlapping issues have resulted in rivalry and delayed EIA processes. In Nigeria, the reverse is the case as there is just one EIA legislation which governs the federal and state EIA process (the EIA Act of 1992). This position ought to be an advantage but the reverse is the case because the problem of different regulatory institutions plagues the EIA process. For example, the Federal Ministry of Environment, the Federal and State Ministry of Lands, the Nigerian Environmental Protection Agency, the National Emergency Management Agency, the Nigerian Maritime Administration and Safety Agency and Department of Petroleum Resources (DPR) are empowered to administer EIA. The Department of Petroleum Resources is, however, given a dual role as a law enforcer while at the same time promoting private sector investment in oil and gas activities. The role of promoting private sector investment compromises its effectiveness as a law enforcer. Therefore, these roles should be separated with distinct bodies administering each of them. Also, to achieve an efficient administration of EIA Act, Nigeria needs to ensure that these regulatory bodies are well-coordinated in the execution of their functions.

The comparable countries stressed their commitment further by establishing internet sites for the publication of the EIA reports for easy access to the members of the public. For example, the United States information service provides for internet access to the US Energy Information Administration (EIA) and serves as the agency's worldwide energy information point of contact for: federal, state, and local governments, the academic and research communities, businesses and industry, foreign governments and international organizations, the news media, financial institutions and the public. Canada also provides for an internet site in the EIA process which gives opportunities for the public to be constantly aware of the EIA process.

Unlike the comparable countries, Nigeria does not provide internet facilities, even though section 38 of the EIA Act provides that:

[1309] Fasina OA *Environmental Impact Assessment for Oil and Gas Projects: A Comparative Evaluation of Canadian and Nigerian Laws* (LLM-dissertation University of West Ontario 2016) 126.

> On receiving a report submitted by a mediator or a review panel, the Agency shall make the report available to the public in any manner the Council considers appropriate and shall advise the public that the report is available.

This provision appears vague if compared to the express provisions of section 79 of the Canadian Environmental Assessment Act (CEAA) 2012 on publicity through the internet that states as follows: "The Agency must establish and maintain an Internet site that is available to the public." It is therefore suggested that an internet site for this purpose should be created to enhance easy accessibility to the public on information regarding the EIA processes in Nigeria.

6.4.1.2.1 Cleaning and Compensation for oil spillages

Unlike what obtains in the comparable countries, compensation for oil spillage in Nigeria is still based on the economic value of the damaged land rather than specific environmental damage done to the ecosystem. The Nigerian Petroleum Act, 2004[1310] did not help matters. The law still refers to the obsolete Land Use Act in calculating the quantum of damages for oil pollution. By contrast, the Oil Pollution Act in the United States of America states that the party responsible for an oil spill is liable for any loss of natural resources, for example, fish and other aquatic life, animals, plants, and their habitats and the ancillary services provided by the affected resource, for example, portable water and recreation.[1311] The compensation for oil spills under the Nigerian legal regime is inadequate compared to the comparative countries. The injustice in the Niger Delta has been identified by different writers[1312] and this thesis argues that the failure to provide adequate compensation is the main cause of the crisis in the region.[1313] Nigeria could learn from the United States of America by amending the related laws to include compensation for environmental damage done to the ecosystem, lost revenues resulting from destruction of property or natural resource injury, lost profits and earning capacity resulting from injury to property or natural resource, and costs of providing extra public services during or after oil spillages.

[1310] The Petroleum Act (as amended) P10 Laws of Federation of Nigeria 2004.

[1311] *Oil Pollution Act* Section 1002 (b) (2).

[1312] Dafinone DO "Resource Control: The Economic & Political Dimension" (2001)UrhoboHistory@waado.org accessed 9 October 2017; Inokoba K and Imbua DL "Vexation and Militancy in the Niger Delta: The Way Forward" (2010) J Hum Ecol, 29(2): 101-120; Ile C and Akukwe C "Niger Delta, Nigeria: Issues, Challenges and Opportunities for Equitable Development" (2001).

[1313] See Table 3: Respondents' views on oil spillage, violent attack and government effort at helping people of Niger Delta in chapter six of this thesis.

In comparable countries, oil spills are responded to timeously.[1314] For example, in response to oil spillage, the President of the United States has three options that is: perform clean-up, immediately monitor the response efforts of the spiller, or direct the spiller's clean-up activities.[1315] The Oil Pollution Act mandated the Federal Government to determine the level of clean-up required. The Federal Government is requested to consult with designated trustees of natural resources and the Governor of the state affected by the spill to determine when the clean-up is complete.[1316] This is unlike Nigeria where oil spillages are not promptly attended to. Instead, the spiller company usually points accusing fingers at the community. For example, the Obodo oil spillage of 2008 in Ogoniland is yet to be cleared.[1317] This is evident in the United Nations Environment Programme's Environmental Assessment of Ogoniland.[1318] There was a recent oil spill at Ologama, in Bayelsa State. The spill occurred on 2 September 2016 and at the time of the interview conducted in that region on 8 February 2017 the spill was yet to be cleared.[1319] Nigeria could learn from the quick response that usually attends oil spills in comparable countries by setting up a Presidential Committee that would include both the State and the Local Governments to immediately respond to oil spillage in the Niger Delta.

The United States has established the Oil Spill Liability Trust Fund (OSLTF) to assist in the clearing of oil spillages and remediate the environment in addition to the liability of the spiller. This is very important because often the damage done exceeds what the spiller can bear.[1320] There is an urgent need for Nigeria to set up this kind of fund to assist in clearing of oil spillage and remediate the environment in the Niger Delta.

[1314] Carolyn W and McNicholas P (n 1283) 3.

[1315] U.S. Congress, House Committee on Merchant Marine and Fisheries, Report accompanying H.R. 1465, Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989, 1989, H.Rept. 101-242, Part 2, 101st Cong., 1st sess., p. 84.

[1316] *Oil Pollution Act* Section 4201(b),

[1317] United Nations Environment Programme (UNEP), Environmental Assessment of Ogoniland, Executive Summary (2011) 3 www.unep.org accessed 22 June 2017.

[1318] United Nations Environment Programme (UNEP) Ibid (n 224).

[1319] This information was given in the recorded interview I conducted on the 8 February 2017 at Ologama in Bayelsa State of Nigeria.

[1320] The Oil Spill Liability Trust Fund (OSLTF) is a trust fund meant to, among other things ensure prompt payment of costs for responding to and removing oil spills. As of this year (2017) the rate imposed on the oil industry has been increased 9 cents per-barrel tax to support the fund.[1320] To preserve the trust fund and ensure that spoilers are held accountable for oil spill clean-up and damages a body known as the National Pollution Funds Centre (NPFC) was established by Executive Order (EO) 12777 to administer the fund.

Apart from the inadequacies in the implementation of the regulatory framework, Nigeria is confronted with lack access to justice for oil pollution victims and the petroleum industry is also adversely affected by corrupt practices.[1321]

6.4.2 Access to Justice

Unlike the countries in the comparable study, the placement of environmental issues under the fundamental objective and the directive principles of state policy in the Nigerian Constitution[1322] is counter-productive as it means that environmental matters, as a form of right, cannot be litigated upon.[1323] This is expressly provided for in section 6 (6) (c) of the1999 Constitution as follows:

> The judicial powers vested in accordance with the foregoing provisions of this section shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

This provision is an impediment to the enforcement of environmental right of victims against the Federal Government and its collaborators - the oil companies. Thus, again reinforcing the law of a rentier state.

Apart from this, the victim of oil and gas pollution also faced the challenge of overcoming the technicality of legal standing or *locus standi*.[1324] The existing rule on *locus standi* in Nigeria states that to maintain an action the persons bringing public law actions, including those relating to the protection of the environment, against the State must show that they are 'person aggrieved', that is an individual, persons or group of persons whose legal rights are infringed upon or is about to be infringed upon by the State's act, neglect or default in the execution of any environmental law

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[1321] Enweremadu DU "The Vicious Circle: Oil, Corruption and Armed Conflicts in the Niger Delta" (2008) *Conference Paper on the Nigerian State Oil industry and the Niger Delta,* NDU, 445-457.

[1322] Section 20 of the 1999 Constitution of Nigeria.

[1323] In view of the provisions of section 6(6) (c) of the1999 Constitution (as amended), environmental issues as a socio-economic right is not justiciable.

[1324] Derri DK "Litigation problems in compensation claims for oil gas operations in Nigeria" in Emiri F and Deinduomo G (eds) *Law and Petroleum Industry in Nigeria: Current Challenges* (Malthouse Press Ltd Lagos 2009) 10.

duties or authority.[1325] However, what appears to be the current and more liberal position on *locus standi* in environment related issues was taken by the Supreme Court of Nigeria in the case of *Adediran v Interland*.[1326] In that case the Supreme Court upheld the right of a private person to institute an action in public nuisance. Before this judgment, it was only possible upon a fiat by the Federal or State Attorney-general in view of the provision of section 174 or 211 of the Constitution. The position of the Supreme Court in the above case is a welcome shift from the conservative common law approach in favour of a progressive view of the rule of locus *standi*.

The issue of locus *standi* was also raised in the case of *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria*.[1327] In that case, the defendant objected to the right of appearance of SERAP arguing that SERAP lacked locus *standi*. The Court of justice of the Economic Community of West African ruled in favour of the plaintiff that it had locus *standi*.

Even with this liberal position of the courts on locus *standi*, the poor litigants still cannot afford the cost of litigation against the rich MNCs and influential oil companies. Most of the time the victims of oil pollution are poor peasant farmers and must depend on human rights organizations to represent them in court and also fund the litigation on their behalf.[1328] The principle of locus *standi* as stated above still requires that it is the person whose right is infringed or about to be infringed that has standing to sue for redress. However, the introduction of a new Fundamental Rights Enforcement Procedures Rules (2009) has opened a window of opportunity to overcome the onerous barrier of locus *standi* in environment-based public interest actions that have human rights implications in Nigeria. In human rights litigation, the applicant may include any of the following:

(a) Anyone acting in his own interest,
(b) Anyone acting on behalf of another person,

[1325] See Oronto-Douglas case, note 10 above; *Adesanya v President of Nigeria* (1981) All NLR 1 at 39; *Inyangukwo v Akpan* (1985) 6 NCLR 770; *Attorney-General of Kaduna State v Hassan* (1985) 2 NWLR 483; *Irene Thomas and others v Reverend Olufosoye* (1986) 1 NWLR 669, and *Adediran and another v Interland Transport Limited* (1992) 9 NWLR (Part 214) 155. For a criticism of this position, see Ogowewo TI, "Wrecking the Law: How Article III of the Constitution of the United States Led to the Discovery of a Law of Standing to Sue in Nigeria", 26 Brooklyn JIL 527 (2000).

[1326] (1991) 9 NWLR (pt 214) 155

[1327] ECW/CCJ/JUD/18/12.

[1328] See *SERAC* case (n 47).

(c) Anyone acting as a member of, or in the interest of a group or class of persons,
(d) Anyone acting in the public interest, and
(e) An association acting in the interest of its members or other individuals or groups.

Also, unlike the comparable countries, lack of political will on the part of the government to implement governmental policy aimed at ensuring a healthy environment and the reluctance to subject the oil and gas sector to rigorous regulation can be inferred from government's refusal or reluctance to subject the environmental aspect of the oil industry to an independent regulatory body.[1329] Despite persistent environmental pollution, Nigeria has found it difficult to enforce its regulations. This was alluded to by the African Commission in the case of *SERAC v Nigeria*[1330] before the African Commission Court in Addis Abba, Ethiopia, in 2000 where Nigeria was found guilty of violating the socio-economic and environmental rights of the people of the Niger Delta. The same abuse of socio-economic and environmental rights of the people of the Niger Delta formed the fulcrum of the SERAP case against the Nigerian Government at the ECOWAS' Court Holden in Ibadan Nigeria in the year 2009.[1331]

In the above case, the Registered Trustees of the Socio-economic Rights and Accountability Project (SERAP), pursuant to Article 10 of the Supplementary Protocol A/SP.1/01/05, brought a case against the President of the Federal Republic of Nigeria, the Attorney General of the Federation, Nigerian National Petroleum Company, Shell Petroleum Development Company, ELF Petroleum Nigeria Ltd, AGIP Nigeria PLC, Chevron Oil Nigeria PLC, Total Nigeria PLC and Exxon Mobil. The Plaintiff alleged violations by the Defendants of the rights to health, adequate standard of living and rights to economic and social development of the people of Niger Delta and the failure of the Defendants to enforce laws and regulations to protect the environment and prevent pollution. The court found for the plaintiff and ordered the Federal Republic of Nigeria to:

i. Take all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta;
ii. Take all measures that are necessary to prevent the occurrence of damage to the environment; and
iii. Take all measures to hold the perpetrators of the environmental damage accountable

[1329] For instance, the exclusion of oil and gas from the sector NESREA can monitor.
[1330] SERAC case (n 47).
[1331] *Socio-Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria* ECW/CCJ/JUD/18/12.

Despite this landmark pronouncement of the court, Nigeria has not taken significant steps to remediate the Niger Delta environment or improve the living standards of the people.

One of the major challenges in Nigeria is the weak institutions or agencies of government. The institutions are poorly staffed; the few staff employed are inexperienced in most cases. The logistics are usually very poor and the agencies are underfunded. They lack modern day technology to detect the oil company that is responsible for spills and the quantity of oil spilled into the environment. The figure of oil spillages is the one reported by the oil companies themselves, which is usually inaccurate and ubiquitously under-estimated by the MNCs.

Unlike the comparable countries, in Nigeria oil pollution cases are seriously compromised by the government. In a bid to encourage uninterrupted production of crude oil and get more revenue, the Nigerian Government has been shielding oil companies against prosecution. The over-dependence of Nigeria's economy on revenue from oil has made the government to over-protect the oil companies. This reinforces the fact that Nigeria is a rentier state, interested in rent seeking to the detriment of its people and the environment. Every agitation by the aggrieved residents is tagged terrorism and is crushed by the state military might. Litigating against oil corporations is always a difficult undertaking because it is seen as a threat to the economy of the nation and most of the time government does everything within its power to frustrate cases against oil companies. More so that Nigeria is into joint ventures with the major international oil companies. This is responsible for the lukewarm attitude of the government to the enforcement of judgments against the oil companies.[1332] The case of *Jonah Gbemre v Shell Petroleum Development Company Nigeria Ltd, Nigerian National Petroleum Corporation and Attorney General of the Federation*[1333] is apposite here. The plaintiff suing in representative capacity alleged that his rights and that of his community- the Iwherekan community - was infringed by the defendants. The court found for the plaintiff as follows:

[1332] See the case of *Mr. Jonah Gbemre v Shell Petroleum Development Company Nigeria Ltd, Nigerian National Petroleum Corporation, Attorney General of the Federation* FHC/B/Cs/53/05.

[1333] FHC/B/Cs/53/05.

> That the actions of the 1st and 2nd Respondents in continuing to flare gas in the course of their oil exploration and production activities in the Applicant's Community is a gross violation of their fundamental right to life (including healthy environment) and the dignity of the human person as enshrined in the Constitution.

However, this ground-breaking judgment was frustrated by the government and nothing came out of it as Shell Petroleum Company continued to flare gas in that community and the Niger Delta in general. This perhaps explains why victims of oil pollution take their cases to the home countries of the oil conglomerates where the judiciary is independent and the government is neutral. For example, following the oil spills in Ogoniland in 2008 and 2009, an estimated 15,600 Ogoni farmers and fishermen whose lives were devastated by these two large Shell oil spills took the matter up against Shell Company in a United Kingdom court.[1334] The case went on for some time until 2015 Shell decided to end the case by offering to pay a sum of £55m as compensation and to clean up the environment. Apart from the challenges discussed above, corruption has also constituted a major impediment to development of petroleum resources in Nigeria.[1335] The negative impact of corruption on the development of petroleum resources is here under discussed.

6.4.3 Corruption

Unlike the comparable countries, corruption has been the bane of Nigeria's economic development. Once the regulators "are settled" they look the other way when laws are breached.[1336] Multinationals lobby the legislature and influence law making to their own advantage. The judiciary is not immune against corruption either. Recently, a Supreme Court Justice was accused of money laundering and illegal possession of passports and two High Court Judges were alleged to have received bribes during and after the General Election of 2015.[1337]

[1334] In London High Court on 23 March 2012.

[1335] Peterson J "The Resource Curse in Nigeria: A Story of Oil and Corruption" (2012) *The Geopolitics and Economics of Oil,* 8-9 <www.researchgate.net> accessed 11 October 2017; Vanessa KO "Nigeria's 'Resources Curse': Oil as Impediment to True Federalism" (2014) *E-International Relations Students* unknown page http://www.e-ir.info/2014/07/20/nigerias-resource-curse-oil-as-impediment-to-true-federalism/ accessed 11 October 2017.

[1336] Peterson J (n 1335) 8-9.

[1337] Ademuwagun A and Agyeman-Togobo K Nigeria: Top Nigerian Judges on Trial for Corruption" mondaq Ltd <www.mondaq.com/Nigeria> accessed 3 October 2017; Sahara Reporters "Names of Nigerian Judges Under Investigation Revealed" http://saharareporters.com/2016/10/16/names-nigerian-judges-under-investigation-revealed accessed 3 October 2017; Vanguard Newspaper Arrest of judges for corruption long overdue – Nigerians www.vanguardngr.com/2016/10/arrest-judges-corruption-long-overdue-nigerians accessed 3 October 2017.

In Nigeria, there are reported cases of multinational corporations or chief executives of oil corporations openly or secretly donating funds for campaigns of the ruling parties. These practices have negative effects on the enforcement and administration of environmental legislation, particularly in the Niger Delta region and Nigeria in general. For example, in the Malabu oil deal, Oil Prospecting Licence (OPL) 245, an oil block was sold to Shell and Eni oil companies, but more than half of the N171.32 billion ($1.1 billion) of the price was paid to Malabu Oil and Gas company.[1338] It was alleged that the payment was used to bribe Nigerian politicians and intermediaries who helped secure the controversial deal.[1339]

Instead of performing their corporate responsibility, International Oil Companies prefer to settle the Niger Delta militant groups and also set them against one another. Some of the militants are on the payroll of these companies without having any designated function they perform.[1340]

6.5 Summary

This chapter has discussed each of the legal frameworks for oil and gas in comparable jurisdictions of the United States of America, Canada and Australia and the lessons Nigeria can learn from these jurisdictions. These three cases are success stories and Nigeria will do well to emulate their laws and regulatory practices for sustainable development of the oil and gas sector. To effect law reform it is envisaged and law being a means of social engineering can be used to improve the oil and gas sector to ensure sustainable development of the resources in Nigeria. Other challenges facing the legal system were also discussed with a view to finding lasting solution to them. The next chapter discusses the findings of the study and proffers recommendations to ensure sustainable development of oil and gas in Nigeria and concludes the research.

[1338] Nicholas I "Malabu Oil Deal: Corrupt Nigerian officials bought private jets, armoured cars with N83 billion bribe" Premium Times https://www.premiumtimesng.com/news/headlines/168992-malabu-oil-deal-corrupt-nigerian-officials-bought-private-jets-armoured-cars-with-n83-billion-bribe.html accessed 3 October 2017.

[1339] Nicholas I (n 1338).

[1340] Personal communication by way of interview with a community leader in Yeangoa, Bayelsa State.

CHAPTER SEVEN

DISCUSSION OF THE INTERVIEWS AND QUESTIONNAIRE RESPONSES

7.0 Introduction

This chapter analyses the field work of this study by referring to supportive literature triangulated by the interviews conducted and the respondents' responses from the questionnaires administered.

7.1 Discussion of the interviews and questionnaire responses

The main purpose of the qualitative review and empirical research in the study was to investigate why the regulatory regime for oil and gas in Nigeria has failed to ensure sustainable development of petroleum resources. The study employed in-depth semi-structured interviews to elicit responses on the consequences of extracting oil and gas in Nigeria. The study also employed questionnaires to collate empirical evidence upon which a view can be formed regarding the causes of crises in the Nigerian oil sector and to capture suggestions for enduring peace in the Niger Delta.

In-depth interviews were conducted with National Assembly members, traditional/community heads, staff of Multinational Oil companies (MOCs), staff of Department of Petroleum Resources (DPR), staff of Nigerian National Petroleum Corporation (NNPC) and the Niger Delta Development Commission NDDC, staff of Ministry of Justice and the Judiciary, lawyers, human rights activists, fishermen, farmers and artisans in the Niger Delta. The interviews were conducted with 3 law makers, staff of Multinational Oil Companies - 3, staff of Department of Petroleum Resources - 1, NNPC - 2, NDDC - 2, staff of Ministry of Justice and the Judiciary - 4 traditional/Community heads - 5, lawyers, human rights activists, fishermen, farmers and artisans in the Niger Delta - 10. The questionnaires were distributed as indicated below in section "7.2.2 The rate of response to questionnaires". It was administered face to face. The personal interviews as well were conducted face to face. Purposive sampling technique was used in identifying the interviewees because these are the stakeholders in matters of exploration and exploitation of oil and gas.

This section of the study is divided into two broad sub-sections which are the responses to in-depth semi-structured interviews and an analysis of questionnaire-based survey.

7.1.1 Responses to in-depth semi-structured interviews on the exploration and exploitation oil and gas in Nigeria

The interviews were quite revealing, the people of the Niger Delta opened up on what they tagged the violation of their socio-economic and environmental rights by the Nigerian Government and Multinational Oil companies. The case of *SERAC v Nigeria*[1341] is instructive here.

Most of the interviewees revealed their names, but due to ethical considerations, this thesis maintains anonymity. Most of them argued that the Federal Government, in collaboration with the oil companies, causes the crises in the Niger Delta and that they know what to do to abate the crises.[1342] They outlined the cases of oil spills, unending gas flaring in their communities and maintained that peace would continue to elude the region unless the polluters pay adequate compensation to the farmers and fishermen who have lost their means of livelihood as a result of the unsustainable exploitation of the petroleum resources.

During the interviews, closed and open-ended questions were asked and the major themes that emerged from the descriptive analysis of the responses were: the legal regime of ownership and the thorny issue of resource control; poor implementation of the existing laws; causes of people's violent reactions and suggestions for peaceful resolution of the crises and development issues in oil and gas sectors. Some of the excerpts of the interviews are related hereunder.

7.1.1.1 The legal regime governing ownership and the issue of resource control

On ownership of petroleum resources, the Chairperson, House of Representatives Committee on Petroleum Resources observed that there is no controversy on who owns petroleum resources in Nigeria. According to him, both sections 44 (3) of the 1999 Constitution and section 1 of the Petroleum Act are clear on the fact that the Federal Government owns the resources. He stated as follows:

[1341] *SERAC* case (n 47); *SERAP v Federal Republic of Nigeria* ECW/CCJ/JUD/18/2012.

[1342] Personal communications by way of interviews conducted in various parts of Delta, Bayelsa, Rivers and Akwa Ibom states.

> All mineral resources (including petroleum resources) under the soil, whether onshore or offshore areas of geographical area called Nigeria belong to the Federal Government. That is how the law has structured it and it is contained in section 44(3) of the 1999 Constitution, section 1 of the Petroleum Act and Clause 1 of the proposed Petroleum Industry Bill.[1343]

This position of the law notwithstanding, the people of the Niger Delta have been clamouring for resource control. They have been advocating for a change in the ownership structure to reflect what obtains in the United States of America and other federal systems which operate a similar system of government as Nigeria. On this issue, the Chairperson of the Senate Committee on Petroleum Resources stated thus:

> The problem with Nigeria is not solely about the ownership structure of petroleum resources. Changing ownership structure will not solve the problem because Nigeria is a nation where some people on account of their access to revenue from petroleum resources are strikingly rich and others are so poor that they hardly able to feed themselves. That is why there is restiveness all over the country, though more in the Niger Delta. So, it is better to make sure that everybody is guaranteed a certain level of comfort through sustainable development and the use of revenue from petroleum resources.[1344]

The Chairperson of the Senate Committee on Petroleum Resources however, maintained that the Federal Government should retain absolute ownership of petroleum resources according to section 44 (3) of the 1999 Constitution and section 1 of the Petroleum Act. On the Niger Delta crises, the lawmaker stated:

> The Niger Delta crises for me is the problem of people who have been neglected for a long period of time and I have always told people it is easy to destroy, but it is not easy to build, it is also easier to build than to rebuild because to rebuild you have to work harder and put more efforts to start rebuilding, you have to remove the rubbles and everything before you can start all over again. So over the years the Niger Delta region has really been neglected. But the entire blame should not be laid at the doorstep of the Federal Government alone; the oil-producing State Governments are also to blame. What are the State Governments doing with the monthly 13% oil revenue derivation that amounts to billions of Naira? For example, my state, Ondo State was able to utilize the money for road construction, bridges, fishing and farming tools were bought for fishermen and farmers, and other infrastructural facilities were put in place and that is why you cannot hear of restiveness in Ondo State. So, if the oil-producing states really used the money that they got from this derivation for the development of their states I am sure this agitation will not be as bitter as it is today.[1345]

[1343] Personal communication by way of an interview with the Chairman House Committee on petroleum resources on 2 March 2017.

[1344] Personal communication by way of an interview with the Chairman Senate Committee on petroleum resources on 2 March 2017.

[1345] Personal communication by way of an interview with the Chairman House Committee on petroleum resources on 2 March 2017.

A lawyer in Uyo, the capital of Akwa Ibom State criticised this position of the law on ownership of petroleum resources. He argued that it was an imposition of the majority over the minority people of the Niger Delta who originally owned the resources. He submitted that:

> Although sections 44 (3) of the 1999 Constitution and section 1 of the Petroleum Act arrogated ownership of petroleum resources to the Federal Government naturally the Niger Delta region owns the oil. It is their God given resources. The claim of the Federal Government based on the draconian laws passed by its legislature is against the common law position of *quid quid plantatur solo, solo cedit* meaning that whosoever owns the land owns the resources found underneath and the space upon the land up to the sky subject of course to state regulation of the use of space. In the United States of America and some parts of Canada individual ownership of natural resources is allowed under their legal regimes. Coincidentally the two countries are federal and constitutional democracies like Nigeria. I therefore suggest that there should be an urgent review of the Constitution and other relevant laws to reverse the skewed and lopsidedness of the present legal regime against the people of Niger Delta if Nigeria is interested in finding a lasting solution to the crises in the petroleum sector.[1346]

A staff of the NDDC in Warri, Delta State contended that the states where resources were located should also control the resources. He stated as follows:

> The present legal regime should be changed to give the state where the resources are found the ownership of such resources. The Multinational Oil Companies should pay the royalties and taxes to the State Governments where they are operating. The National Assembly as a matter of urgency should review the laws governing oil and gas in Nigeria which are the 1999 Constitution and the Petroleum Act. More funds should be released to the NDDC to effectively develop the Niger Delta.[1347]

A community leader from Amassoma in Bayelsa State has a slightly different view on what the ownership structure of petroleum resources should be, saying:

> The Federal Government should control the petroleum resources, but the revenue should be shared on 50-50 basis between it and the State Government to ensure the development of infrastructural facilities for an improved socio-economic condition of the people of the areas affected by the unavoidable consequences of crude oil exploitation. The revenue sharing formula under the 1960 Independence and 1963 Republican Constitutions was 50% to the regions when cocoa beans, groundnuts and coal were exported from the Western, Northern and Eastern Regions respectively. I am not in support of individual or community ownership of petroleum resources because it will cause divisions within our communities.[1348]

Another community leader in the Ikot Afanga area of Akwa Ibom State on the issue of 13% revenue derivation formula stated:

> I think the present 13% revenue derivation formula is not enough because in 1960s revenue derivation formula was 50% for the regions when agricultural products and

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[1346] Personal communication by way of an interview in Akwa Ibom State on 10 February 2017.
[1347] Personal communication by way of an interview in Warri on 6 February 2017.
[1348] Personal communication by way of an interview in Amassoma area of Bayelsa State on 7 February 2017.

> solid minerals were the major exports for the Northern, Western and Eastern Regions respectively. At that time nobody talked about reducing the percentage, why is now (when it comes to our turn) that the Federal Government takes over everything leaving us with just 13%? This is unfair to the Niger Delta. We should be given 50% and there should be periodic upward review of the 50% so that we can develop like other parts of the country so that our people could have a sense of belonging.[1349]

A traditional ruler in one of the Ikot communities of Akwa Ibom State supported the fact that the community where oil is found should control its exploration and exploitation. He stated:

> If I have petroleum resources within my own domain and I am controlling their exploration and exploitation, it will be easy for me to take care of my place. If I fail to do that my people will accuse me since am the one in control. People can easily match against me and demand explanations, but the same thing cannot be said of the Federal Government whose seat of power is in Abuja several kilometres from the exploration and production sites. Even where the people organize to carry their protest to Abuja, the Federal Government would have heard and will block them before they leave their states. It is easy if I control my petroleum resources, I only have to contribute a percentage of the revenue I realised to the national purse.[1350]

7.1.1.2 Inadequacy of the existing law and its poor implementation

The Petroleum Act[1351] has been the major law regulating the petroleum industry in Nigeria since 1969. Pursuant to this Act, the Petroleum (Drilling and Production) Regulations 1969 were promulgated. Apart from the fact that these laws are inadequate and outdated, policy statements and regulations are contained in various documents making it difficult to locate.[1352] Commenting on the inadequacy of the Nigerian law in meeting international standards that would ensure transparency, increase revenue from the petroleum sector as well as to ensure good governance in the sector, a legal practitioner in Uyo, the capital of Akwa Ibom State observed as follows:

> The Nigerian law on oil and gas is outdated and is therefore unable to cope with the modern-day developments in the oil and gas sectors. For example, the present tax regime is inadequate and this has necessitated the need for a comprehensive review of the tax policy for oil and gas sector. For these reasons, the Federal Government initiated the reform process by setting up the Oil and Gas Sector Reform Implementation Committee (OGIC) in the year 2000. This process led to the approval of the National Oil and Gas Policy in 2004. To actualise these objectives, the government set up the second version of the Oil and Gas Sector Reforms Implementation Committee (OGIC), in 2007 which culminated in the comprehensive petroleum industry reform - Petroleum Industry Bill 2012. However, this Bill has suffered an undue delay in the National assembly until recently when a segment of the Bill titled Petroleum Industry Governance Bill was introduced and passed by the

[1349] Personal communication by way of an interview in Akwa Ibom State on 10 February 2017.
[1350] Personal communication by way of an interview with a traditional ruler on 10 February 2017.
[1351] Though it was amended in many instances it remains the main law for the regulation of the petroleum industry in Nigeria. CAP P10 Laws of the Federation of Nigeria 2004.
[1352] Egbogah EO (n 13).

> Senate, which will only become law if passed by the House of Representatives and assented to by the President. So, as it is presently Nigeria sadly still relies on the old laws to regulate its petroleum industry. I therefore seize this opportunity to appeal to the National Assembly to pass into law the comprehensive Bill on Petroleum industry without any further delay.[1353]

In another related view on whether the oil and gas law is adequate or not, a lecturer at the Federal University of Petroleum Resources, Effurun, Delta State, identified the revision of the petroleum law as an important way of solving the crises in the Niger Delta region. He stated thus:

> Government has many options at its disposal to solving the Niger Delta crises. Apart from the interventionist agencies like the NDDC and the Ministry of Niger Delta, the Petroleum Industry Bill is a powerful weapon, but it is perceived that the original version of the Bill that would have benefited the people of the region has been watered down. For example, there is an important provision for community development which states that the Federal Government shall, in co-operation with the state and local governments and communities, encourage and ensure the peace and development of the petroleum producing areas of the Federation through the implementation of specific projects aimed at ameliorating the negative impacts of petroleum activities. Another lofty provision in the Bill is the establishment of the Petroleum Host Community Fund that will take care of the community where there is oil spillage in terms compensating the victims and remedying the environment. However, since, 2012 the Bill has not been passed by the National Assembly. It looks as if the Federal Government is not interested in the welfare of its people because such a well-researched and comprehensive Bill would have benefited not only the people of Niger Delta but the entire nation.[1354]

Another lawyer and a social critic interviewed in Abuja, the Federal Capital of Nigeria on the state of the legal regime for the exploration and exploitation of oil and gas in Nigeria had this to say:

> The problem with Nigeria is not dearth of laws, but the implementation of those laws. The mind-set is what matters. The pertinent questions to ask are: is our government committed to implementing the existing laws no matter whose horse is gored? Is the government not carrying out selective justice? Is the government not backing the oil companies with whom it is in joint ventures (through its National Oil Company - the NNPC)? If the answers to these questions are in the affirmative, then we are going nowhere, we will continue to take one step forward but two steps backwards. My sincere advice to the Nigerian government is to retrace its steps and remain committed to the implementation of its laws.[1355]

[1353] Personal communication by way of an interview with a traditional ruler on 10 February 2017.
[1354] Personal communication by way of an interview at the Federal University of Petroleum Resources, Effurun, Delta State on 5 February 2017.
[1355] Personal communication by way of an interview at Abuja 1 March 2017.

7.1.1.3 Causes of people's violent reactions and suggestions for peaceful resolution of the crises

A traditional ruler who was a former Chairperson of the Traditional Rulers of Oil Producing Communities (TROPCOM) in Delta State related his experiences and that of his community over the exploitation of crude oil. In his words:

> My local government area is Nduka East, it is a major stakeholder in crude oil production because right from the onset the oil companies have been exploring for and exploiting oil in the area but unfortunately no development come to us as a result. My community is so marginalized; there are no good roads, no good drinking water. My community is a riverine community and we depend essentially on fishing as a source of livelihood. However, the continuous oil spillages have destroyed the aquatic lives leaving my people poorer than before the discovery of crude oil. Now, to answer the question whether oil is a blessing or not from foregoing, I can say oil is a curse to us in the Niger Delta because it makes us poorer, that it made us and our environment devastated. At the level of TROCOM we have carried our protests to the government several times, but our protests did not yield any good fruits, because the government officials are also beneficiaries of the unsustainable exploitation of the petroleum resources.[1356]

Responding to the question on what the Federal Government and the oil companies could do to resolve the crises in the Niger Delta the former TROPCOM chairperson stated:

> Some weeks ago,[1357] we interfaced with the Vice-President of Nigeria on this issue when town hall meetings with the stakeholders within the Niger Delta region were organized. It started with Delta State; the issue we raised with him was to see to how the Federal Government will develop this region because this is where the bulk of the money all of us are using comes from. We told him that it was only a meaningful development which people can see that will calm the frail nerves. That if the Federal Government can use the money from Niger Delta to develop Abuja, the Nigeria's Federal Capital what stops the government from developing where it is getting the resources from. We suggested to the Federal Government to bargain with the oil companies to trade crude oil for the construction of roads if the Federal Government claims there is no money. They can trade crude oil for money to construct bridges like those ones in Lagos State (the former Federal Capital territory of Nigeria) to connect communities in the Niger Delta.[1358]

On the provision of infrastructural facilities to ameliorate the hardship caused by the unsustainable exploitation of petroleum resources, a civil servant working with the Bayelsa State Ministry of Justice, who is from the Sagbama area of Bayelsa State, stated:

> The oil-producing communities and their peoples should be adequately compensated and provided for in terms of infrastructure and social amenities because of the level of destruction to the ecosystem. The exploration and exploitation of crude oil in these

[1356] Personal communication by way of an interview Delta State on 5 February 2017.
[1357] Few weeks before this interview was conducted.
[1358] Personal communication by way of interview was conducted for the traditional ruler on 6 February 2017.

> communities have caused oil pollution and gas flaring, which has resulted in the loss of farm-lands and the destruction of the aquatic animals.[1359]

Another major problem the indigenes of the Niger Delta are battling with is the incessant oil spills. This is a serious environmental menace in the Niger Delta. Whenever there is an oil spill there is usually no quick action to stop the spill either by the oil companies or the government. Oil spills have had devastating effects on the people and the environment. The communities and oil companies usually trade words on who is responsible for the spill. The oil companies usually blame it on vandalism while the communities point to corrosion of old pipelines and equipment failure.[1360]

In case of vandalism of oil pipelines, a staff of the Bayelsa State High Court suggested:

> The host communities should be actively involved in the aspect of securing of pipelines and oil installations and they should be well remunerated for this service. The oil company should also see to the well-being of the host community through the provision of basic amenities and other infrastructural facilities.[1361]

A human rights activist who simply identified himself as an indigene of the Niger Delta passionately appealed to the Federal Government to develop the Niger Delta, stating:

> This country is blessed beyond measure, but the question is what the Federal Government is doing with the revenue from these resources? So, I plead with the Federal Government of Nigeria to empower the youths and develop the states of the Niger Delta. I think doing this will stop the bombings of oil facilities. Am from the Delta region, and I know what the people are passing through. The Niger Delta militants are doing what they are doing not because they want to bring this great nation down, but because they are the ones who suffer the devastating effects of oil spills which destroy their means of livelihood. It is sad to see the people whom God has blessed with abundant natural resources suffering the way my people are suffering. The Federal Government should empower the youths, develop our schools and provide the necessary social amenities for the people.[1362]

Speaking on the vandalism of oil infrastructure, a farmer from the Okioama Community in Bayelsa State said it was a form of protest against the insensitivities of the government and the oil companies to the plight of the people of the Niger Delta; he further stated:

> The vandalism of oil resource assets, though not justifiable, the militant youth's actions have become imperative considering the type of country we find ourselves in

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[1359] Personal communication by way of an interview Bayelsa State on 7 February 2017.
[1360] Amnesty International (n 953) 15.
[1361] Personal communication by way of an interview Bayelsa State on 7 February 2017.
[1362] Personal communication by way of an interview Bayelsa State on 7 February 2017.

> and the national structure which makes use of the resources of the Niger Delta to develop the other part of the country leaving the geese that laid the golden eggs unattended to. It is the neglect of the region that the youths are protesting. To end the crises, the government needs to increase employment opportunities, educational opportunities and improve socio-economic well-being of the people. Nigeria used to be an agrarian country before the discovery of oil, government should focus more on agriculture.[1363]

On corporate social responsibility of the oil companies in terms of provision of social amenities and infrastructural facilities for the host communities, oil companies are scored very low. It was alleged that even when the Memorandum of Understanding is signed between the host communities and the oil companies, companies always reneged on their promises claiming that they have paid their dues to the Federal Government and it is the Federal Government that is supposed to develop the Niger Delta. A staff in the Bayelsa State Judiciary commented on the MoUs between host communities and the oil companies, submitting:

> The Multinational Oil Companies should honour their Memorandum of Understanding wherein they state what they will be doing for the host communities, such as the granting of scholarships and providing basic amenities. Most often they do not honour the MoU because it is not a legal document, you cannot go to court and enforce it because it does not have the ingredients of a contract. This is the reason why the boys usually resort to shutting down the oil well or do anything knowing that if they go to court, the court would tell them that the document is not a binding one. If the resources are controlled by the states they are closer to the people they will be able to monitor the implementation of the MoU between the Communities and the Oil Companies.[1364]

A human rights activist from Sangana, a community in the Southern Ijaw Local Government Area of Bayelsa State has berated the oil companies for not performing their corporate social responsibilities. In her words:

> We have approached oil companies to help our community to construct a bridge to link us with Yenagoa, the capital of Bayelsa State but the companies have not yielded to our request. Sangana is not far from Yenagoa but we spend up to six hours on the water to get to Yenagoa. Yet three oil companies that are the Nigeria Agip Oil Company, Consolidated Oil and Gas (Conoil Nigeria Limited) and Chevron Nigeria Limited (former Texaco) have facilities there. The community is located on the peninsular of the country; it is one of the coastal communities.[1365]

As part of the effort to develop the Niger Delta, the Federal Government in year 2000 sets up the Niger Delta Development Commission (NDDC) with the objective of developing the Niger Delta. The case of *SERAC v Nigeria*[1366] is instructive here.

[1363] Personal communication by way of an interview Bayelsa State on 7 February 2017.
[1364] Personal communication by way of an interview in Yenagoa, Bayelsa State on 7 February 2017.
[1365] Personal communication by way of an interview Bayelsa State on 7 February 2017.
[1366] SERAC case (n 47).

The impact of the NDDC is discussed hereunder. The existing literature has proved that NNDC has failed to register substantial progress in its developmental programmes. Its failure has been attributed to political interference, corruption and inadequate funding of its developmental projects. A staff of the Commission who is from Rivers State attributed the failure of the body to non-release of adequate funding, saying:

> The failure of the NDDC is due to inadequate funding, enough money is not appropriated for the body by the National Assembly. To have a better performance, the National Assembly must appropriate more funds to the body and should set up a committee to monitor the NDDC's activities in order to ensure compliance with its mandate. I do not subscribe to the scraping of the body, instead the same body should be set up at the state level to compliment the efforts of the NDDC.[1367]

An artisan from the Effurun area of Delta State also believed that the National Assembly should set up a committee to monitor how the funds provided for NDDC is being spent.[1368] Apart from inadequate funding, corruption also has a toll on the operations of the Commission; hence the Commission could not develop the Niger Delta.[1369]

Generally, corruption has been identified as one of the greatest problems in the Nigerian oil industries.[1370] Billions of Naira could not be accounted for in 2014.[1371] Despite the huge revenue realised from the sale of crude oil Nigerians still wallow in abject poverty.[1372] A human rights activist has described Nigeria as a failed state which, despite its abundant resources, could not provide adequately for its citizens.[1373] He stated as follows:

[1367] Personal communication by way of an interview in Port Harcourt, Rivers State on 9 February 2017.

[1368] Personal communication by way of an interview at Effurun, Delta State on 5 February 2017.

[1369] Personal communication by way of an interview at Effurun, Delta State on 5 February 2017.

[1370] Donwa PA (n 957) 212; Alphonsus OI and Mohammad SBS "Challenges facing Niger Delta Development Commission (NDDC) Projects in Imo State and Niger Delta Region in Nigeria" (2015) 5(6) *International Journal of Humanities and Social Science* 37.

[1371] Cocks T and Brock J "Special Report: Anatomy of Nigeria's US$20 billion "leak"" (2015) *Thomson Reuters* www.reuters.com/article/us-nigeria-election-banker-specialreport/special-report-anatomy-of-nigerias-20-billion-leak accessed 28 October 2017.

[1372] Mohammed I "Democracy and the Failed Nation of Nigeria" http://www.gamji.com/article8000/news8647.htm accessed 28 October 2017.

[1373] Olorunfemi L "Is Nigeria a failing State? Premium Times 30 May 2017 https://www.premiumtimesng.com/news/headlines/232534-is-nigeria-a-failing-state.html accessed 28 October 2017. This year, for the second time in a row, Nigeria is ranked the thirteenth least stable country in the world. The 2017 Fragile States Index (FSI), launched May 15, gave Nigeria a total score of 101.6 out of a possible 120. Failed State Index: Nigeria ranked 15 out of 177 Nations (2009) https://www.proshareng.com/news/Nigeria%20Economy/Failed-States-Index--Nigeria-Ranked-15-out-of-177-Nations/7135 accessed 28 October 2017.

> It is a huge shame that despite six decades of crude oil exploitation in Nigeria, Nigeria has little or nothing to show in terms of economic development. It over-relied on the petroleum resources to the detriment of other sectors of the economy.[1374]

7.1.1.4 The developmental challenges associated with oil and gas industry

The NNPC is into joint ventures with the SPDC, which is the major oil operating company onshore. As the majority shareholder and a state-owned company, NNPC has a clear role to play in ensuring that the joint venture does not cause violations of human and environmental rights. However, the SPDC, the main oil operator on land, has stated that work on pipeline maintenance and repairs and efforts to end gas flaring are behind schedule because its partners (NNPC is the main partner) have not put up their share of the funding.[1375] Thus, the failure of the government to allocate sufficient funding, via NNPC, to ensure safety and prevent pollution related to oil operations has contributed to violations of the human rights of the people of the Niger Delta.[1376]

The information gathered from the interviewees confirms the fact that NNPC has not fared well in terms of sustainable development of petroleum resources in Nigeria. Some of the responses from the interviews are related here under.

A staff of Chevron Nigeria Limited in Bayelsa State decried the rate of gas flaring in the region. He stated that:

> The rate of gas flaring in the Niger Delta region is so much that it causes so much harm to the environment and the residents. The law should be revised to impose heavy penalties for gas flaring to discourage this harmful practice. There has been complaints from the joint venture partners with the NNPC that the NNPC has been defaulting in the payment of its counterpart funding that would have enabled the joint ventures to develop gas utilisation plants. And because of this there has been a continuous flaring of gas in the joint ventures' flow stations. This is unacceptable; the government should find means of ending gas flaring in the Niger Delta region.[1377]

[1374] Personal communication by way of an interview at Abuja 1 March 2017.

[1375] See, for example, interviews with Shell's country chair in Nigeria, Basil Omiyi <www.shell.com/home/content/aboutshell/swol/2008/nigeria> accessed 10 June 2017. See also: Double standards? International Best Practice Standards to Prevent and Control Pipeline Oil Spills, Compared with Shell Practices in Nigeria, Professor Richard Steiner, University of Alaska, USA, November 2008.

[1376] SERAC case (n 47); Amnesty International "Nigeria: Petroleum, Pollution and Poverty in the Niger Delta" *Amnesty International* 54 <www.es.amnesty.org/uploads/media/REPORT> accessed 02 June 2017>

[1377] Personal communication by way of an interview in Yenagoa, Bayelsa State on 6 February 2017.

A staff of the Shell Petroleum Development Company of Nigeria who granted an interview to the researcher berated the NNPC over failure to meet its cash calls thereby defeating the efforts aimed at stopping gas flaring. He stated as follows:

> NNPC is not doing enough regarding environmental issues and gas flaring. NNPC did not release funds to the joint ventures and as such the joint ventures could not invest in gas utilization equipment that would have turned the gas being flared into wealth. There is no transparency in the operation and management of the NNPC. It has become a conduit pipe through which billions of Naira of oil money is siphoned by the unscrupulous politicians.[1378]

The devastating effects of gas flaring cannot be over-emphasised. Some of the health hazards include lung and heart related diseases. The researcher, in an interview with a management staff of the SPDC, asked him what the SPDC's plan is to end gas flaring in its flow stations. In his response he asserted that:

> Before now associated gas flaring at our flow stations were high, but there has been an improvement. Between 2010 and 2012 gas gathering equipment was installed by SPDC and a result flaring has gone down by almost 60% per barrel of oil produced in some of our oil fields and efforts are on-going to further reduce the quantity of gas flaring in all our oil fields.[1379]

Responding to a question on the causes of oil spills in Ogoniland, another shell official claimed that: "Oil pipelines passing through Ogoniland are being subjected to some of the highest rates of oil theft and sabotage in recent years".

A community leader based in Port Harcourt however, believes that NNPC can achieve the desired result if properly monitored. He stated as follows:

> The standard set for competence should be seriously monitored by the appropriate regulatory bodies or authorities to ensure that the desired objectives of establishing the NNPC are strictly adhered to so as to ensure steady success. The NNPC must also observe and obey all relevant laws.[1380]

The government used to appoint politicians on to the board of the NNPC who were not necessarily knowledgeable in the field of oil and gas unlike Petrobras and Statoil who are reputed for their professionalism.[1381] Sometimes, it was only the Group

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[1378] Personal communication by way of an interview in Yenagoa, Bayelsa State on 6 February 2017.

[1379] Personal communication by way of interview with a management staff of SPDC in Yenagoa, Bayelsa State.

[1380] Personal communication by way of an interview in Port Harcourt, Rivers State on 9 February 2017.

[1381] Adam IS *An empirical investigation of the efficiency, effectiveness and economy of the Nigerian National Petroleum Corporation's management of Nigeria's upstream petroleum sector* (PhD-dissertation Robert Gordon University 2014) 263.

Managing Director (GMD) that was a technocrat on the entire board.[1382] Another major problem of the NNPC is lack of transparency and accountability. Hardly can you say that this is the accurate figure for its volume of production, revenue and expenditure.[1383] This secretive nature of the activities of the NNPC has led the people to perceive it as corrupt and inefficient.[1384]

The researcher's interaction with key stakeholders confirms that appointments to the managerial level of the NNPC are politicised.[1385] A staff of the NNPC has attributed low productivity of NNPC to lack of commitment of workers and corruption.[1386] He further identified the lack of qualified personnel as a major problem facing the corporation; advising therefore that the corporation should always employ competent personnel to man its operations. He advised the government to desist from politicising appointments at the managerial level so as to allow for efficient management of the business of the corporation.[1387]

It is important to note that there is a proposed reform in the oil and gas industry which plans to incorporate the joint ventures between NNPC and Multinational Oil companies so that the joint ventures can stand on their own as commercial entities. Efforts to reform the petroleum industry and of course the NNPC are on-going. The National Assembly passed the first tranche of the Petroleum Industry Bill (PIB) on 25 May 2017 tagged the Petroleum Industry Governance Bill (PIGB). The PIB is a comprehensive Bill aimed at the total reform of the oil and gas sector in Nigeria. The PIGB, if it is also passed by the House of Representatives and assented to by the President, will unbundle the Nigeria National Petroleum Corporation (NNPC) into two companies: Nigeria Petroleum Assets Management Company and the National Petroleum Company.[1388]

[1382] Adam IS (n 1381) 263.
[1383] This fact was revealed during personal communication by way interview with a human right activist based in Uyo, Akwa Ibom State.
[1384] Adam IS (n 1381) 259.
[1385] Adam IS (n 1381) 259.
[1386] Extracted from personal communication by way of an interview with a staff of NNPC in Port Harcourt, Rivers State on 9 February 2017.
[1387] As above.
[1388] Petroleum Industry Governance Bill passed into law by the Nigerian National Assembly <http://www.vanguardngr.com/2017/05/pigb-senate-approves-unbundling-nnpc/> accessed 05 June 2017.

With regards to the NNPC being a public-funded corporation and at the same time participating in business, a member of the House of Representatives had this to say:

> The NNPC is a business venture, they own petrol stations, they have the National Petroleum Development Company, which carries on business and at the same time NNPC is a public corporation being funded by the government. This is wrong; the new Petroleum Industry Governance Bill is set to correct this anomaly. NNPC shall be constituted into a limited liability company as a purely business outfit.[1389]

7.2 Analysis of Questionnaire-Based Survey

7.2.1 Introduction

This section analyses the data collected based on the questionnaire designed and administered in the study. The questionnaire was designed in such a way that the questions were asked in line with the objectives of the study, that is to collate empirical evidence upon which a view can be formed regarding the causes of the crises and to capture suggestions for an enduring peace in the Niger Delta. For this reason and to encourage the respondents to answer the questions and increase the response rate, an accompanying covering letter and ethics approval certificate of the research project from the North-West University were attached. The accompanying letter explained the purpose and importance of the survey; an assurance of confidentiality regarding the information being sought and an offer to provide the respondents the results of the survey if they so wished. The input of an expert in statistical analysis for the design and administration of the questionnaire was also sought. The certificate from an independent expert in statistical analysis is attached to the thesis as Appendix "E".

A purposive sampling technique also known as judgmental sampling was employed in this study.[1390] The individuals selected for data gathering are those with information, knowledge and experience about the challenges of oil and gas exploration and exploitation in Nigeria.

[1389] Personal communication by way of an interview with a law maker in the House of Representatives on 2 March 2017.

[1390] See section 1.5.1 Data collection methods under chapter one of this thesis.

7.2.2 The rate of response to questionnaires

A total number of 400 copies of the questionnaire were distributed to respondents in the National Assembly 19; Nigerian National Petroleum Corporation 17; Multinational Oil Companies 22; Department of Petroleum Resources 20; workers in Ministries of Justice 30; Judiciary 32; Traditional/Community leaders 30; Lawyers 36; Human rights activists 22; farmers 45; fishermen 41; Artisans 26; Traders 28; students 32 (from Federal University of Petroleum, Effurun, Delta State, Petroleum Research Institute in Delta State, the University of Port Harcourt, Rivers State, Federal University Otuoke, Bayelsa State and the Niger Delta University in Bayelsa State and the Nigerian Law School, Yenagoa Campus, Bayelsa State). Out of the 400 questionnaires distributed, 318 were completed and returned. Thus, the survey achieved 78.5% response rate. The above average response rate might be due to the choice of respondents through purposive sampling techniques and their understanding of the importance of the research.

For ease of interpretation, this section is structured into two segments involving the analysis of personal information of the respondents and the statistical analysis of the responses to the major issues addressed by the questionnaire.

7.2.3 Analysis of personal information of the respondents

Table 4: Socio-demographic distribution of the study participants

Socio-demographic Characteristics	Frequency	Percent (%)
Sex		
Male	213	67.0
Female	105	33.0
Total	318	100.0
Age groups		
≤ 24 years	36	11.3
25 – 44 years	183	57.6
45 – 66 years	99	31.1
Total	318	100.0
Highest level of education		
Primary	63	19.8
Secondary	94	29.6
NCE/Polytechnic	79	24.8
University	82	25.8
Total	318	100.0

Stakeholder Group	No administered	No recovered	Percent Recovered
1. National Assembly	19	10	3.1
2. Nigerian National Petroleum Corp.	17	10	3.1
3. Multinational Oil Companies	22	15	4.7
4. Dept. Petroleum Resources	20	15	4.7
5. Ministry of Justice	30	25	7.9
6. Judiciary	32	25	7.9
7. Traditional/community heads	30	20	6.3
8. Lawyers	36	28	8.8
9. Human rights activists	22	20	6.3
10. Students	32	30	9.4
11. Farmers	45	35	11.0
12. Fishermen	41	35	11.0
13. Artisans	27	25	7.9
14. Traders	27	25	7.9
Total	400	318	100.0

Respondents' Stakeholder Groups

As illustrated above, the highest number of respondents were farmers and fishermen, 35 (11%) in each group. The student respondents follow with 30 (9.4%). 28 (8.8%) of the respondents were lawyers. 25 (7.9%) of the respondents were workers in each of the Ministry of Justice and Judiciary respectively. 25 (7.9%) of the respondents were Artisans and traders respectively. 20 (6.3%) were traditional/community heads while another 20 (6.3%) were human rights activists. 10 (3.1%) of the respondents were members of National Assembly; another 10 (3.1%)

were workers in NNPC, while 15 (4.7%) each were workers of Multinational Oil Companies and Department of petroleum Resources respectively.

About the sex of the respondents, 213 (67.0%) were male, while 105 (33.0%) were female. The ages of the respondents vary between ≤ 24 and 66 years. The respondents whose ages were ≤ 24 years were 36 (11.3%), followed by respondents of the ages 25-44 years who were 183 (57.6%) while the respondents between the ages 45-66 years were 99 (31.1%).

The respondents' levels of education were between primary school and university. 19.8% had primary education, 29.6% had secondary education while 24.8% and 25.8% had NCE/Polytechnic and university education respectively.

7.2.4 Analysis of the respondents' responses to various questions in the questionnaire

The analysis is presented in tabular forms and graphic representations. It deals with the findings relating to ownership structure and 13% derivation revenue formula, what is responsible for oil spillage, adverse effects of oil spillage, efforts made to clear oil spillages by the oil companies, respondents' support for agitation or violent attacks on oil facilities and staff, response of the government to clearing of oil spillage and remediating the environment, what the oil companies and the government should do to bring lasting peace to the Niger Delta ranging from infrastructural development, vocational training of youths, result-oriented dialogue and payment of compensation, NNPC's performance rating and the performance of government interventionist agency – the Niger Delta Development Commission (NDDC).

Table 5 Ownership structure

Are you in support of private or community ownership of mineral resources in Nigeria	Frequency	Percentage
Yes	146	45.9 %
No	172	54.1 %
Total	318	100.0
Do you support state's ownership (e.g. Delta or Bayelsa State) of oil and gas resources		
Yes	177	55.7 %
No	141	44.3 %
Total	318	100.0

On the ownership structure, most of the respondents – 172 (54.1%) did not support private or community ownership of mineral resources in Nigeria, closely followed by 146 (45.9%) respondents who supported the idea of private or community ownership of oil resources.

Most respondents supported state's ownership (e.g. Delta State or Bayelsa State or River State or Akwa Ibom State) of oil and gas resources, 177 (55.7%) supported the state's ownership and 141 (44.3%) were against state ownership of petroleum resources. This finding supports the argument of Ojakurotu[1391] who is from Delta State, while reacting to the question whether private/community owners of land in which petroleum resources are located should control the exploration and exploitation of the resources, argued that such an arrangement would fuel more crises in the region.[1392]

[1391] This is an opinion expressed during an interview with the Professor in the Department of Politics and International Relations, Mafikeng campus of North-West University, South Africa on 11 April 2017.

[1392] Personal communication by way of an interview with Professor Victor Ojakurotu in the Department of Politics and International Relations, Mafikeng Campus of North West University, South Africa on 11 April 2017.

Another prominent indigene of Bayelsa State was also against the idea of individual/community ownership of petroleum resources in an interview he granted to the researcher. In these words:

> I believe the petroleum resources should be controlled by the State Governments as it was between 1960 and 1969 because this issue of ownership of petroleum resources is causing crisis already between the communities especially where the resource is discovered at the boundaries of two communities. Apart from that, when you say the community where the oil is found is the owner or should control it, I do not think it is fair, you know in the oil business, oil could be found in a community but you cannot fly the oil in the air, you must pass other communities' land. I believe that the communities where the oil wells are located and where pipelines passed are all oil-producing communities because these pipelines passed through the farmlands and at times the backyards of the neighbouring communities. When there is oil spillage it affects not only the community where the oil is but also the communities where the pipelines cross to link up with the stations. I believe compensation ought to be passable to all the affected communities because crude oil pipelines passed their land to Abuja or other places of the refinery. The pipelines link the various oil wells with the refineries in Port Harcourt and Kaduna in the far north.[1393]

This finding supports the position of the Governors' Forum of 17 southern states of Nigeria in their communiqué at the end of the summit organized by them in Benin City, Edo State Capital where they defined resource control as "the practice of true federalism and natural law in which the federating units express their rights to primarily control of the natural resources within their borders and make agreed contribution towards the maintenance of common services of the government at the centre".[1394]

The views expressed by the respondents and that of the southern states Governors' Forum is also like the views of Sagay that "resource control" is about the power and right of a community or state to raise funds by way of tax on persons, matters, services and materials within its territory.[1395] Similarly Etikerentse advocated for state participation in the control of petroleum resources. He criticised the present legal framework that does not accommodate any iota of control or semblance of participation in management by the natives of oil-and gas-producing areas, not even a Commissioner of Petroleum Resources at the state level who could exercise the

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[1393] Personal communication by way of interview in the Nigerian Law School, Yenagoa Campus, Bayelsa State of Nigeria on the 7 February 2017.

[1394] The communiqué issued at the end of its third summit in Benin City, the Edo State Capital, March 27, 2001, Governors of the 17 southern states proclaimed its preference for fiscal Federalism based on the principles of national interest, need and derivation.

[1395] Sagay I (n 27) 10. See section 1.4 - literature review on at page 24 of the thesis.

power granted in Section 8 (1) (f) of the Petroleum Act to order the suspension of operations to prevent danger to life or property.[1396]

Mailula has also argued that the present legal regime is responsible for the crisis in the oil-rich region and the struggle for resource control in the Niger Delta. He therefore recommended the United States of America and Canadian models which provide for both private and state ownership of oil and gas.

This thesis, however argues that if the issue of ownership of petroleum resources is resolved between individuals/communities, there is nothing stopping individual/community's ownership of petroleum resources in Nigeria, as it obtains in the United States of America and Canada. The important element is to put in place adequate laws and empower the regulatory agencies to regulate the industry to achieve international best practices. This view is supported by Dibua who posits that many of the mass-based ethnic and communal movements and some of the youth groups are largely motivated by the marginalisation of the rights of their people in terms of the use and control of the resources located in or on their land.[1397]

However, the same cannot be said of the state-led agitation (for example Delta State). Given the activities and orientation of the State Governors since they assumed office in the Fourth Republic,[1398] it can be argued that they are more interested in resource control for the sake of patronage activities and primitive accumulation rather than the rights of their people.[1399] Billions of naira that accrued to the oil-rich states have been misappropriated.[1400] This view was corroborated by a worker in the Ministry of Justice, Uyo in Akwa Ibom State, that the people of the state did not see the dividends of 13% derivation that the State received every month, the State owed four months' salary to its workers including unpaid pension and non-payment of promotion arrears to its workers.[1401]

[1396] Etikerentse G (n 16) 12.
[1397] Dibua JI (n 33) 28.
[1398] Dibua JI (n 33) 6. The Nigerian fourth Republic began in 1999.
[1399] Dibua JI (n 33) 6.
[1400] Dibua JI (n 33) 6.
[1401] Personal communication by way of an interview in the Ministry of Justice, Uyo, Akwa ibom on the 10 February 2017.

Table 6: Are you satisfied with the present 13% derivation revenue formula in Nigeria?

Respondents' views	Frequency	Percent
Satisfied	92	28.9
Not satisfied	226	71.1
Total	318	100.0

Revenue allocation has been a contentious issue in Nigeria's Federation. At independence in 1960, oil derivation was 50% to the regions that produced the mineral resources while 50% was for the Federal Government. This arrangement was on, until 1970, when the percentage meant for the Regions/States continued to reduce until it got to a ridiculous low level of 1.0%. It was increased to 13% under section 162 (2) of the 1999 Constitution after a protracted struggle by the people of the Niger Delta.[1402] The struggle for periodic increases in the percentage of derivation is still on, hence the question raised here was whether the people were satisfied with the present 13% derivation revenue formula in Nigeria. 226 (71.1%) out of 318 respondents were not satisfied with the present 13% derivation revenue formula while 92 (28.9%) were satisfied. The table below explains the percentages suggested by the respondents that were not satisfied with the present 13% derivation revenue formula.

[1402] Akinola SR and Adesopo A "Derivation Principle Dilemma and National (Dis)Unity in Nigeria: A Polycentric Planning Perspective on the Niger Delta" (2011) 4(5) *Journal of Sustainable Development* 2 www.ccsenet.org/jsd accessed 21 September 2017. In 1953, it was 100% to the regions but the arrangement witnessed a sharp decline from 100 percent in 1953 to 50 percent in 1960, 45 percent in 1969, 20 percent in 1975, 1.5 percent in 1982, 1.0 percent in 1990, 3.0 percent in 1992 and the current 13 percent which was fixed by section 162 (2) of the 1999 Constitution.

Table 7: If you are not satisfied what percentage will you suggest?

Respondents' views	Frequency	Percent
15	4	1.3
20	20	6.3
23	7	2.2
25	11	3.5
30	26	8.2
35	1	.3
40	11	3.5
50	54	17.0
60	9	2.8
65	3	.9
68	1	.3
70	1	.3
75	2	.6
80	4	1.3
100	9	2.8
Total	163	51.3
Missing System	155	48.7
Total	318	100.0

Out of the total number of respondents (318), 163 (51.3%) suggested an increase in the derivation formula. 155 (48.7%) did not offer any suggestion. 9 of respondents wanted the regions/states to appropriate the resources to themselves, suggesting 100% state ownership. 20 respondents suggested increases of between 60%-80%, while 54 respondents suggested 50%. 38 respondents suggested between 30%-40%, while 42 respondents suggested increase of between 15%-25%. This section of the survey supports the argument of an increased oil derivation for the oil-producing States. This finding is in conformity with the submission of Akaninyene in his thesis entitled "The Right of the Niger Delta People

of Nigeria to Resource Control" that Nigeria should fashion out an acceptable revenue allocation formula which takes care of the people of the Niger Delta.[1403] The need for an increase of derivation formula in favour of the states of the Niger Delta was also stressed by Inokoba and Imbua in their article titled "Vexation and Militancy in the Niger Delta: The Way Forward".[1404] Iwere in his article titled "What effect does the ownership of resources by the government have on its people: a case study of Nigeria?" also recommended that the Federal Government should increase the oil revenue allocated to the states in whose land petroleum resources are found. According to him this will afford the oil-producing states the capacity to take appropriate actions to reclaim and remedy the environment from the devastating effects of oil production.[1405]

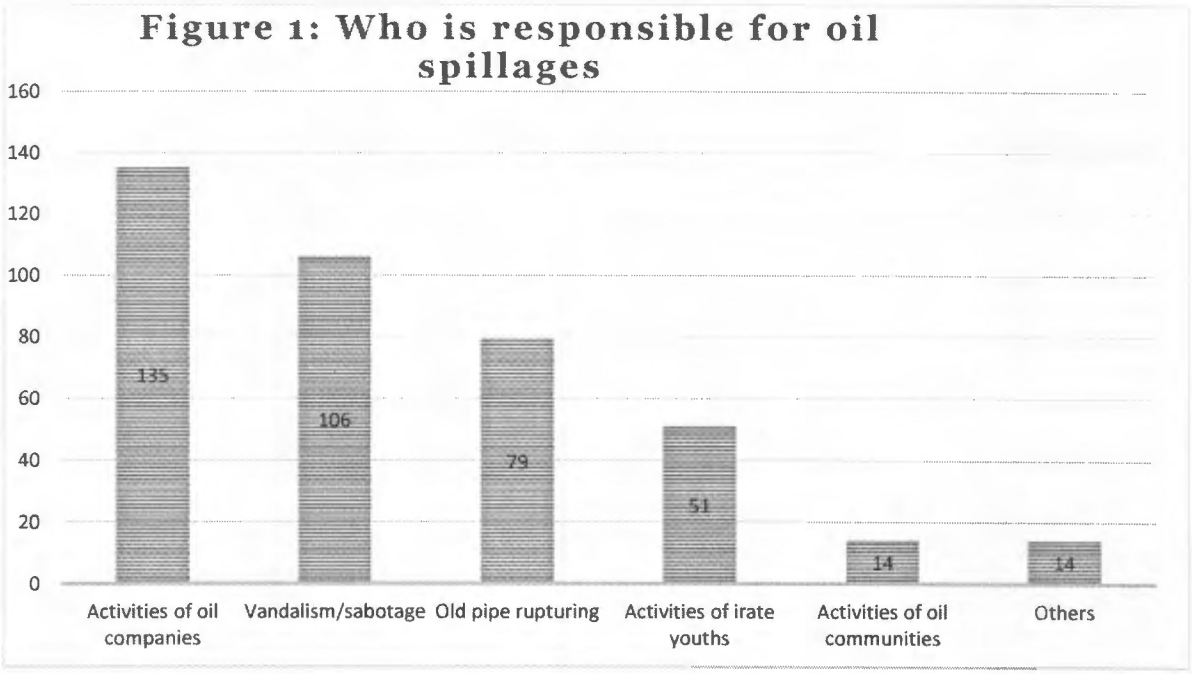


Figure 1:

The opinion of respondents regarding who is responsible for oil spillage is as follows; 135 (42.6%), 106 (33.3%), 79 (24.4%), 51 (16.0%) and 14 (4.4%) respectively

[1403] Akaninyene TS *The Right of the Niger Delta People of Nigeria to Resource Control* (LLM dissertation Malmo University, Sweden 2010) accessed 10 November 2017.

[1404] Inokoba K and Imbua DL (n 145) 101, 120.

[1405] Iwere O "What effect does the ownership of resources by the government have on its people: a case study of Nigeria?" <https://billkamcha.tn/media/uploads...pdf> accessed 11 November 2017.

indicated activities of oil companies, vandalism or sabotage, old pipe rupturing, activities of irate youths and activities of oil communities. From this figure 1, 135 of the respondents (which is 42.6%) indicated that the major cause of oil spillages was because of the activities of the oil companies, though closely followed by 106 respondents (33.3%) who believed vandalism and sabotage were responsible for oil spillages. This result confirms the report of Amnesty International that the major cause of oil spillage was due to the activities of the oil companies.[1406] One of the stakeholders interviewed observed that the major oil spillages were caused by the activities of the oil companies. He said:

> Although sabotage cannot be ruled out, but most of the oil spillages were due to corrosion and equipment failure on the part of the Multinational Oil companies. These same companies in advanced countries take care and update their equipment; they replace the aging ones to prevent oil spillage because of the heavy fines and the cost they may suffer if spillage occurs due to their own negligence. In developed countries regulations are implemented to ensure best environmental practices. In these countries, standard practice in the oil industry is followed, but the same thing cannot be said of Nigeria.[1407]

It is also important to note that vandalism and sabotage engineered by the irate youths were some of the causes of oil spillages in the Niger Delta. 51 respondents (16%) of the total responses support this view. The recent attacks by a militia group named Niger Delta Avengers (NDA) support the respondents' view that vandalism and sabotage by the irate youths were some of the causes of oil spillages in the Niger Delta. This group blew up trunk lines belonging to the Nigerian Agip Oil Company (NAOC) and Shell Petroleum Development Company (SPDC) situated on the Ibeno shoreline of Akwa Ibom State.[1408] They claimed that they were demanding a sovereign state and not pipeline contracts.[1409]

[1406] Amnesty International (n 953) 14. Some of the activities of the oil companies the report mentioned were corrosion of oil pipes, poor maintenance of infrastructure, spills or leaks during processing at refineries.

[1407] Personal communication by way of interview at Eleme in Rivers State of Nigeria.

[1408] Breaking News: Niger Delta Avengers strike again, www.naij.com news, (30 May 2016) PM News accessed 31 May 2016. Vanguard News 21 December 2061 "Fresh oil spill hits Ibeno communities in Akwa Ibom" https://www.vanguardngr.com/2016/12/fresh-oil-spill-hits-ibeno-communities-akwa-ibom accessed 21 June 2017.

[1409] Breaking News: Niger Delta Avengers strike again, (n 1408).

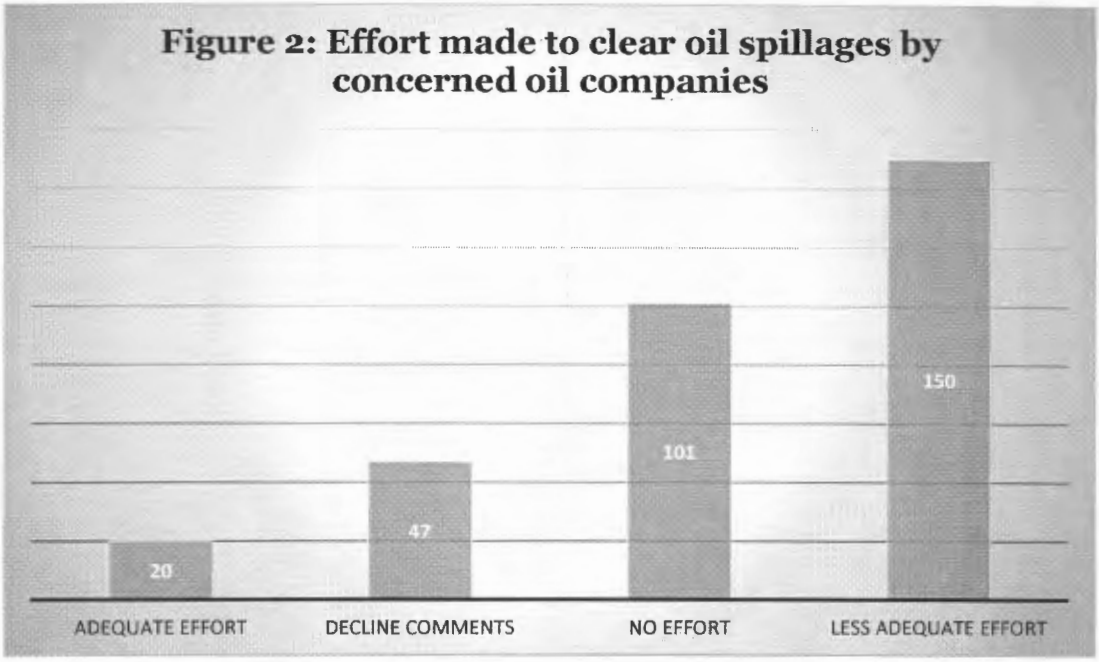


Figure 2:

On the question of efforts made to clear oil spillages by oil companies responsible for oil spillage, 150 (47.2%) respondents believed that efforts made to clear oil spillages by concerned oil companies were totally inadequate, 101 (31.8%) reckoned no effort was made at all, whereas 47 (14.8%) declined comment on the issue and only 20 (6.3%) said the effort was adequate. This result supports the claims that adequate efforts were not made to clear oil spillages in the Niger Delta.[1410] The position is contrary to the law which requires that action is taken to clean up and rehabilitate the land and water sources affected by oil pollution.[1411] This is certainly a case of failure of the regulatory framework to ensure the implementation of oil regulations in the country. Worse still, some oil spillages are not even cleared at all.[1412] One of the community leaders the researcher interviewed alluded to the inability of the regulator to monitor and evaluate the activities of the oil companies as follows:

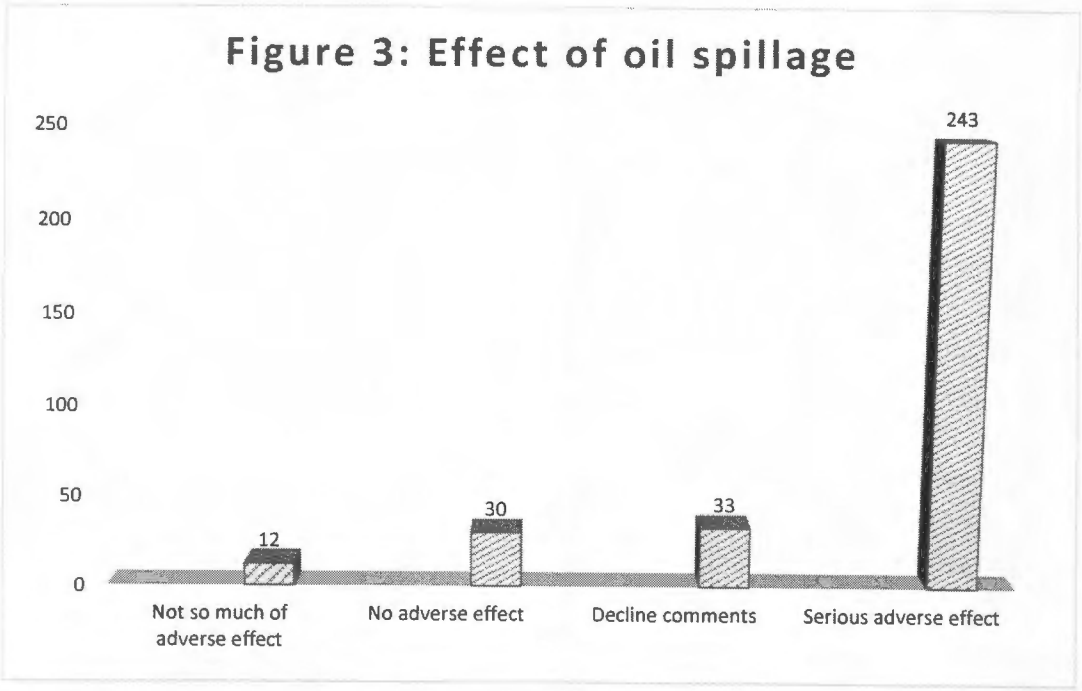
[1410] Amnesty International (n 953) 64.

[1411] Department of Petroleum Resources, Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN), revised edition 2002. Under section 9(i)b (iii) of the Petroleum Act 1969 the Minister is empowered to make regulations. Several regulatory instruments have been promulgated and EGASPIN is a collection of standards and practices, and is the main environmental document used by the oil industry.

[1412] Oil watch <http://oilwatchafrica.org/content/ogoni-clean-up-set-to-commence-after-years-of-popular-campaigns> accessed 22 June 2017.

> The laws are there, but the institutions are not powerful enough to implement the laws. The institutions are not adequately funded, the staffing is poor, they lack the technological know-how to detect and determine who is responsible for oil spillage. Nigerian institutions are weak and are heavily politicised. The politicians interfere in the affairs of the institutions every now and then. The institutions at times may have good intentions and people appointed to lead may have good intention to implement the laws, but the powers that be will always direct and redirect them and they will have no option than to dance to their tune.[1413]

The case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*[1414], which came before the African Commission on Human and Peoples Rights, is illustrative of the inadequate clean-up of the oil pollution sites.



The majority 243 (76.4%) of the respondents believed, that oil spillage has had serious adverse effects on the affected communities and the people of the Niger Delta region, 33 (10.4%) declined comment and only 12 (3.8%) reckoned spillage has had not so much of an adverse effect on peoples' lives. This over-whelming claim of the respondents that oil spillage had an adverse effect on the environment and people of Niger Delta support a report by Amnesty International, finding that the sources of water were polluted by oil spillages and because the people do not have access to portable water they continued to make use of the polluted water. There

[1413] Personal communication by way of an interview with a community leader at Amassoma town in Bayelsa State of Nigeria. Shell Petroleum Development Company's refinery is located there.
[1414] *SERAC* (n 47).

have been reports of skin and eye problems after diving in the oil-contaminated river.[1415] The incessant oil spillages have damaged the fisheries and other aquatic lives. Oil spills and other oil-related pollution have also damaged the Niger Delta's mangrove swamps, which are important fish-breeding areas and are very hard to clean up once they are polluted.[1416]

Furthermore, Onduku[1417] has observed that the unsustainable exploitation of oil and gas in the Niger Delta has led to environmental degradation of unprecedented scales. According to him, the mangrove swamps are threatened by oil pollution; they are the largest in Africa and sixty per cent of which is in the Niger Delta.[1418] The fresh water swamps and forests of the Delta are also facing extinction, which, at 11700 square kilometres, are the most extensive in West and Central Africa and the local people depend on this for sustenance.[1419]

Ogoniland is polluted due to several oil spills that go unattended.[1420] The United Nations Environment Programme (UNEP) Environmental Assessment of Ogoniland Report, confirms that the environment is thoroughly devastated.[1421] It is however important to mention that the Federal Government has inaugurated a 13-person Governing Council and a 10-person Board of Trustees for the implementation of the UNEP Report on Ogoniland.[1422] If the Nigerian government follows through with the

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[1415] Yusuf RO *et al* "Environmental Impact Assessment Challenge in Nigeria" (2007) *2(2) Journal of Environmental Research and Policy* 78 <www.academia.edu/912970/Environmental_impact_assessment_challenge_in_Nigeria>accessed 01 June 2017. See also SERAC's case.

[1416] Amnesty International (n 953) 26.

[1417] Onduku A (n 27) 4.

[1418] Onduku A (n 27) 4.

[1419] Onduku A (n 27) 4.

[1420] For example Bodo oil spills; Ludovica L Shell oil spill: Nigeria's Ogoniland cleanup could take 30 years to restore ecosystem *International Business Times* http://www.ibtimes.co.uk/shell-oil-spill-nigerias-ogoniland-clean-restore-ecosystem-could-take-30-years-says-un-1563336 accessed 19 October 2017.

[1421] UN environment, UN Environment's Ogoniland Assessment Back in Spotlight <http://www.unep.org/newscentre/un-environments-ogoniland-assessment-back-spotlight> accessed 22 June 2017. The federal government had in 2006 commissioned UNEP to conduct an independent assessment of the environment and public health impacts of oil contamination in Ogoniland and make recommendations for remediation. The UNEP released its report in August 2011, the Report revealed that crude oil contamination in Ogoniland was widespread and severely impacting many components of the environment.

[1422] Shell Nigeria, The UNEP Environmental Assessment of Ogoniland.

recommendations of UNEP, the clean-up may not take more than thirty years to complete.[1423]

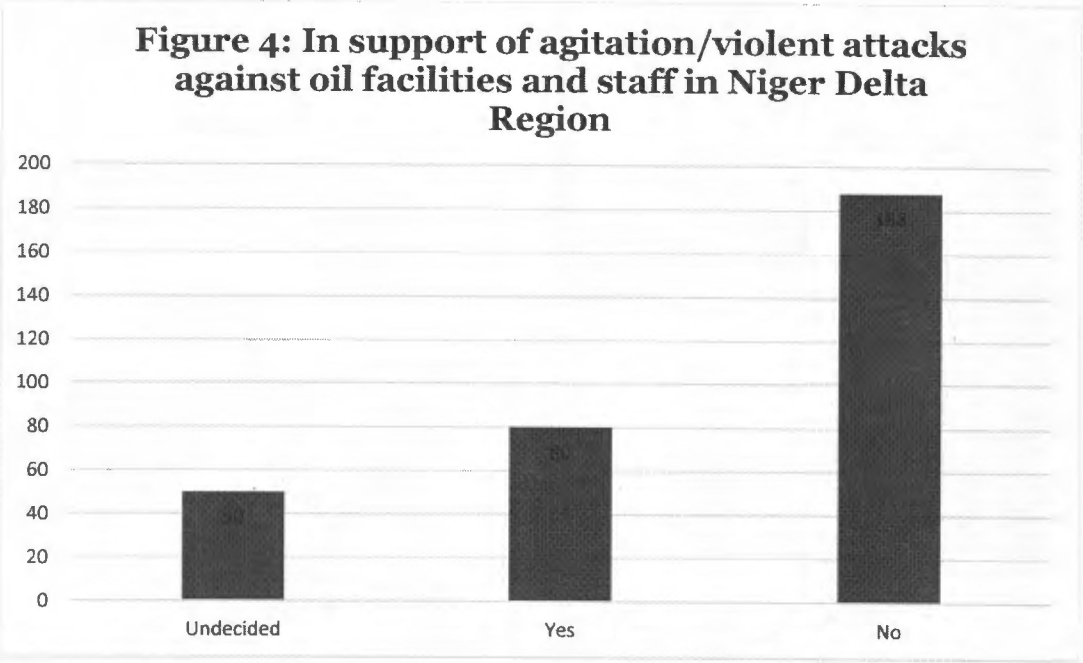


Figure 4 represents the respondents' support for agitation or violent attacks on oil facilities and staff in the Niger Delta region. 80 (25.2%) of the respondents expressed their support for violent attacks and 188 (59.1%) did not support such action while the remaining 50 respondents were undecided. The result of the survey reveals lack of support for violent agitation or attacks on oil facilities and staff of oil companies. This is probably because, violence does no good for anybody and nobody wants to live in a state of lawlessness. It is also possible that family members of some of the respondents are workers in the oil companies and that violence paints a bad image of the people. This is to say that violence is the last resort, especially when there are incessant oil spillages without clean-up and without relief materials to cushion the negative effects on the people.

Moreover, militancy in the Niger Delta has different phases nowadays. Some of the groups of youth are sponsored by political elites to rig elections and fight against opposing political parties. It has also been alleged that some hide under the mask of genuine demands for the development of the Niger Delta to perpetrate criminal and

[1423] Oil watch <http://oilwatchafrica.org/content/ogoni-clean-up-set-to-commence-after-years-of-popular-campaigns> accessed 22 June 2017.

selfish acts. The researcher was shown the mansions built by some of the leaders of the militant groups and one wonders whether they are fighting for their pockets or the people of the Niger Delta. Militancy has suddenly become a lucrative business. One of the residents the researcher interviewed expressed this view on militancy in the Niger Delta as follows:

> The question is those people agitating, are they agitating for the general good or for their selfish interest. I believe what the oil companies need to do is not to give billions of Naira to some people, but provide minimal comfort, provide people with adequate water, alternative means of livelihood since their sources of livelihood have been destroyed by the activities of the oil companies – people could not farm or fish again. The so-called militants are just making money at the expense of the poor people who are directly affected by the activities of the oil companies.[1424]

Table 8: Respondents' view on oil spillage, violent attacks and government effort in helping the people of the Niger Delta

Respondents' views		Frequency	Percent
Oil spillages contribute to the violent attacks by the youths in the region			
Yes		213	67.0
No		105	33.0
Total		318	100

Whereas most of the respondents, 213 (67%) believed oil spillages contribute principally to the violent attacks by the youths in the region, only 92 (28.9) confirmed recent oil spillages in their area. The finding of this survey supports the claim that oil spillages contribute in large measure to the violent attacks on the oil facilities by the youths. It further supports the claim of Ile and Akukwe that the betrayal of the Local, State, and Federal Governments at finding a lasting solution to the oil spillage and the environmental pollution is one of the major reasons for the crisis in the Nigerian oil-rich region.[1425] By implication, the respondents seem to see the oil industry more as a curse than a blessing. It is therefore easy to see why there are incessant conflicts that often disrupt oil production. Because of the spills that were unattended

[1424] Personal communication by way of an interview in Port Harcourt, River State on the 9 February 2017.

[1425] Ile C and Akukwe C (n 164).

to, the youth perceived the oil companies as enemies of their communities and it is this negative perception that leads to attacks on oil facilities in the region.[1426] For example, the recent disruptions have a visible impact on the Nigerian oil industry; Nigeria is unable to meet its quota of 2 million barrels of oil per day.[1427] Nigeria has moved from being the number one producer of crude oil in Africa to number two trailing behind Angola.[1428]

Furthermore, Ile and Akukwe have argued that the Nigerian law on compensation for oil spills contains an effective poison pill that bars oil companies from paying compensation for spills due to "sabotage" and "terrorism." Apart from this the present law on payment of compensation is inadequate. Under the present legislation, compensation relates primarily to the economic value of the damaged land rather than specific environmental damage done to the ecosystem. Secondly, the level of the compensation offered is effectively decided based on a valuation through the Land Use Act, which is designed to pay for compulsory purchase, rather than on-going damage.[1429] They suggest that all the stakeholders adopt a common strategic vision and mission that focuses on sound community-based economic, environmental, health and political emancipation of the oil-host communities in the Niger Delta.[1430]

[1426] Personal communication by way of an interview with a community leader in Yenagoa, Bayelsa State.

[1427] Vanguard News 21 December 2016 "Fresh oil spill hits Ibeno communities in Akwa Ibom" <www.vanguardngr.com/2016/12/fresh-oil-spill-hits-ibeno-communities-akwa-ibom> accessed 21 June 2017.

[1428] Uwafiokun Idemudia, "Community Perceptions and Expectations: Reinventing the Wheels of Corporate Social Responsibility Practices in the Nigerian Oil Industry" (2007) *112 (3) Business and Society Review* 369–405.

[1429] NOSDRA "Towards a new Oil Spill Compensation System in Nigeria" (2004) 3 <www.stakeholderdemocracy.org/stockholm/wp-content/uploads> accessed 05 June 2017.

[1430] Ile C and Akukwe C (n 164).

Table 9: On the question whether there is a recent oil spillage in the respondents' area

Respondents' views	Frequency	Percent
Has there been any oil spillage in your area of recent?		
Yes	92	28.9
No	191	60.1
Decline Comments	35	11.0
Total	318	100.0

This section of the questionnaire sought to find out if there are recent oil spillages in the Niger Delta region. 92 (28.9%) of the respondents confirmed that there were recent oil spillages in their area while 191 (60.1%) said there were no recent oil spillage in their area. 35 (11.0%) declined comment. Although, only 92 (28.9%) of the respondents confirmed that there were recent oil spills in their area, this is still a substantial figure considering the several oil spills that are yet to be cleared.[1431] This result confirms that there are continuous oil spillages in the Niger Delta, for example, one occurred recently on the Ibeno shoreline in Akwa Ibom state.[1432] One of the interviewees the researcher spoke with also reported an oil spill at Ologama area of Bayelsa State in 2016.[1433]

[1431] The United Nations Environment Programme (UNEP) Environmental Assessment Report of Ogoniland confirms that the environment is thoroughly devastated.

[1432] Vanguard News 21 December 2016 "Fresh oil spill hits Ibeno communities in Akwa Ibom" <https://www.vanguardngr.com/2016/12/fresh-oil-spill-hits-ibeno-communities-akwa-ibom> accessed 21 June 2017.

[1433] Personal communication by way of an interview with one of the interviewees on 7 February 2017 in Yenagoa.

Table 10: Respondents' view on government's effort in protecting people of Niger Delta

Respondents' views Government effort in protecting the people of the Niger Delta	Frequency	Percent
Less than or equal to average	154	48.4
Above average	95	29.9
None Responses	69	21.7
Total	318	100.0

Most of the respondents 154 (48.4%) believe that government efforts in protecting life and properties of the people of the Niger Delta are inadequate. The respondents' belief is confirmed by the claim of Amnesty International that the regulatory institutions in Nigeria are weak and that they have failed to control the activities of the oil companies. This finding has confirmed one of the principal points of this study that the regulatory institutions in Nigeria are weak and that they have failed to control the activities of the oil companies. The reason for this is not far-fetched; the National Oil Company that is the NNPC is into joint ventures with the major international oil companies (especially Shell). Mailula traced the ineptitude of the Federal Government (through the NNPC) in not ensuring the sustainable exploitation of petroleum to its participation in both the commercial and regulatory functions; and this survey supports the claim.[1434] This triangulation strengthens the

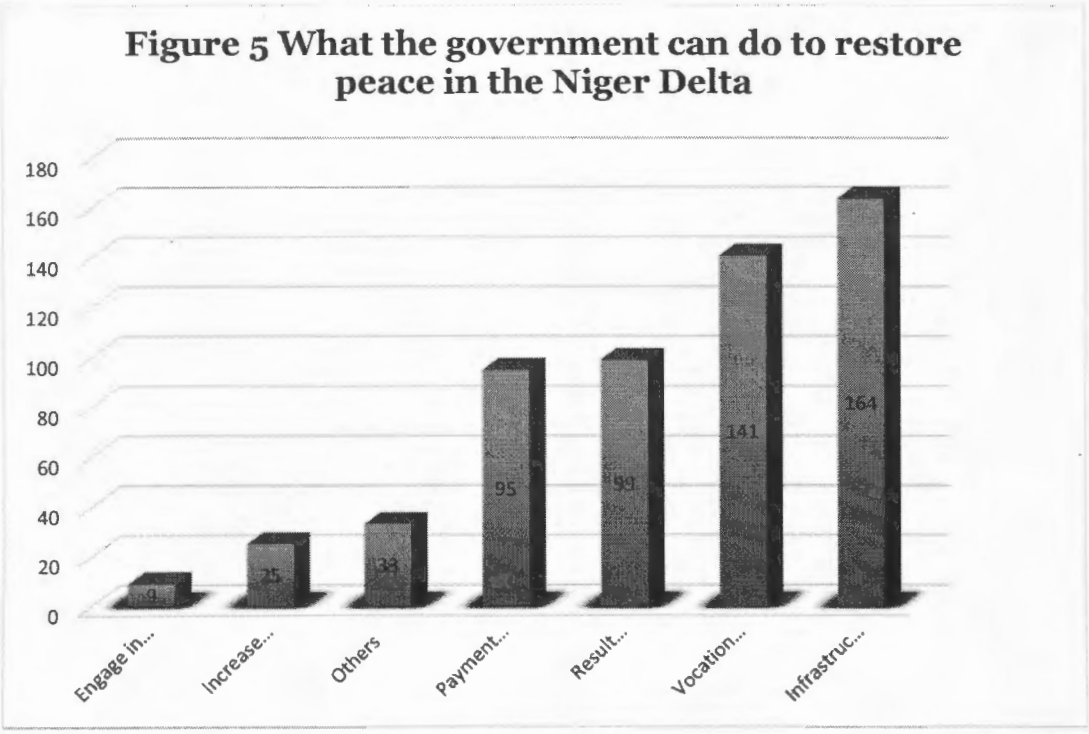
The *Gbemre* case is a typical example of the unwillingness of the Nigerian government to enforce regulation to stop gas flaring in the oil and gas industry.[1435]

[1434] See page 30 of chapter one of the thesis.
[1435] Gbemre case (n 53).

Table 11: Does kidnapping of expatriates, oil workers and hostage-taking of Legislators' children and parents by militant youths and the demand for ransom really take place in the Niger Delta region?

Respondents' views	Frequency	Percent
Yes	212	66.7
No	57	17.9
Decline comments	49	15.4
Total	318	100.0

There were reports of kidnapping of expatriates, oil workers and hostage-taking of Legislators' children and parents by militant youths and demands for ransom. This survey confirmed that the reports were true because 212 (66.7%) respondents confirmed there were spates of kidnapping of expatriates, oil workers and hostage-taking in the oil-rich Niger Delta. 57 (17.9%) denied it and 49 (15.4%) did not make any comment.



It is important to note that the questions here are multiple response questions, respondents indicated more than one option.

Figure 5: Whereas 164 (51.6%), 141 (44.3%), 99 (31.1%) and 95 (29.9%) specified infrastructural development, vocational training of youths, result oriented dialogue and payment of compensation respectively as the way to go for government to restore peace in the Niger Delta region, only 9 (2.8%) of the respondents would support government engaging in military actions. The finding of this study supports the arguments of Inokoba and Imbua. In their contribution to what government must do to bring lasting peace to Niger Delta region they posited that the government has an important role to play and recommended that the government should repeal all undemocratic, exploitative and repressive laws governing the oil industry - the Petroleum Act and Land Use Decree and replace them with people-oriented laws that would ensure sustainable development.

The finding of this study also corroborated the findings of Idowu in his article entitled "Niger Delta Crises: Implications for Society and Organizational Effectiveness" that the government must engage in a results-oriented dialogue with the people of Niger Delta to know what their needs are and address these needs accordingly.[1436] He argued that Federal government responses through institutional framework like Oil Minerals Producing and Development Commission (OMPADEC), Niger Delta Development Commission (NDDC), Amnesty and empowerment of selected ex-militants have failed because they did not meet the aspirations of the Niger Delta people for dialogue, resource control, autonomy and justice.[1437]

[1436] Idowu OF (n 151).
[1437] Idowu OF (n 151).

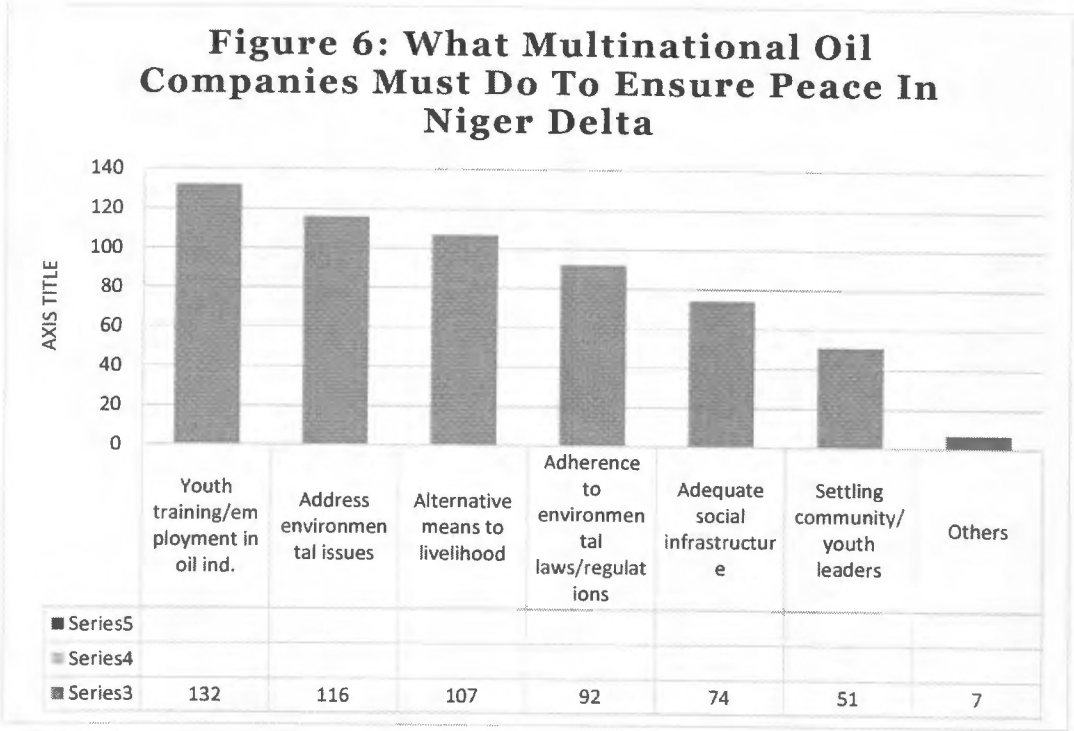


Figure 6

When asked what multinational oil companies must do to ensure peace in the Niger Delta region, 132 (41.5%), 116 (36.5%), 107 (33.6%) and 92 (28.9) of the respondents suggested youth training and employment in oil industries, addressing environmental issues, provision of alternative means of livelihood and adherence to environmental laws and regulations respectively and only 51 (16.0%) wanted "settling community and youth leaders". This survey supports the road map to peace in the Niger Delta written by Dafinone.[1438] He advised that the international oil companies should rehabilitate and ameliorate the hazards arising from oil exploration and exploitation in accordance with generally accepted international standards. The payment of paltry compensation for deleterious economic and environmental disasters cannot suffice, but restoring the already damaged environment to what it was before the extraction of oil is the recommended remediation globally. The oil companies should, therefore clean-up the farmlands, creeks and wetlands, surface

[1438] Dafinone DO 'Resource Control: The Economic & Political Dimension' (2001) UrhoboHistory@waado.org accessed 07 September 2015.

and underground waters and the entire polluted environment as part of their strategy.[1439]

Table 12: NNPC performance rating

NNPC performance rating:	Frequency	Percent
Poor performance	175	55.0
Good performance	96	30.2
None responses	47	14.8
Total	318	100.0

On the performance rating of the NNPC, 175 (55.0%) of the respondents believed that NNPC's performance is poor. 96 (30.2%) of the respondents believed NNPC had good performance, while 47 (14.8%) respondents offered no response.

This finding of this study supports the existing literature that the NNPC has performed very low; that is why most of the authors have recommended the re-structuring of the NNPC.[1440] Instead of making gains NNPC has been recording losses when all operations it is involved in are considered.[1441] In fact, the recently passed Petroleum Industry Governance Bill has unbundled the NNPC and set up the Nigeria Petroleum Assets Management Company, the Ministry of Petroleum Resources Incorporated and National Petroleum Company as commercial entities

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[1439] Dafinone DO "Road Map to Peace in Niger Delta" *Urhobo Historical Society* <http://www.waado.org/NigerDelta/nigerdelta_federalgovt/dafinone_road_map_to_peace.htm> accessed 20 June 2017.

[1440] Ijewereme OB Goal Setting and Performance Appraisal in Nigerian Public Enterprises: An Empirical Study of Nigeria National Petroleum Corporation (NNPC) (2016) 4(9) *Public Policy and Administration Research* 49; Izeze I "Who Should Be Blamed for NNPC's Inefficieny?" <www.gamji.com/article6000/NEWS7863.htm> accessed 20 June 2017. The then President of Nigeria Umar Yar'Adua publicly express misgivings over the level of compliance of the Nigerian National Petroleum Corporation (NNPC), the Department of Petroleum Resources (DPR), the Nigerian Customs Service (NCS) and the Federal Inland Revenue Services (FIRS) with the rules on revenue remittance to the Federation Account.

[1441] Joseph T NNPC records N197.49bn loss in 2016, says report <www.thebusinesspost.ng/business/nnpc-records-n19749bn-loss-2016-says-report> accessed 6 November 2017.

while another body independent of the commercial entities - the Nigeria Petroleum Regulatory Commission will be the regulatory body.[1442] This is an effort in promoting effective good governance in the petroleum industry.

Table 13 Questions about the performance of the Department of Petroleum Resources (DPR)

Respondents' views	Frequency	Percent
Do you know about the existence of DPR?		
Yes	276	86.8
No	42	13.2
Total	318	100.0
What has been the performance of the DPR on its statutory responsibility of ensuring compliance with petroleum laws, regulations and guidelines?		
No performance	20	6.3
Below average	216	67.9
Average	71	22.3
Above average	11	3.5
Total	318	100.0

276 (86.8%) of the respondents were aware of the existence of the Department of Petroleum Resources (DPR), 42 (13.2%) were not aware. The respondents, while assessing the performance of the DPR as regards its statutory responsibility of ensuring compliance with petroleum laws, regulations and guidelines scored the body low. For instance, 216 (67.9%) scored it below average, 20 (6.3%) even claimed that it has not performed at all while 71 (22.3%) claimed that DPR has performed averagely. Only 11 (3.5%) scored the body above average.

[1442] The Senate, Federal Republic of Nigeria "The report of the Senate Joint Committee on the Petroleum Industry Governance Bill 2017 SB 237 <www.petroleumindustrybill.com> accessed 20 June 2017.

This finding confirms the fact gathered from the existing literature that regulation of the oil and gas industry is inadequate; enforcement tools which included compliance monitoring and the issuing of permits/licences are lacking. Studies already carried out indicated the extent of devastation the oil industry has caused to aquatic and terrestrial ecosystems and cultural and historical resources.[1443] This is also expressed by the communities' dissatisfaction and agitation in the Niger Delta. The restiveness in the Delta reinforces the need for the petroleum sector to plan, protect and enhance the environment and ensure the sustainable development of the resources.[1444] This finding is also corroborated by an Amnesty International report titled "Nigeria: Petroleum, Pollution and Poverty in the Niger Delta."[1445] The report described how the multinational Oil Companies flared gas at their flow stations and the care-free attitude towards stopping and clearing oil spills and the consequent suffering of the host communities because of oil spills that are unattended to.

[1443] Ejiba IV *et al* "Impact of Oil Pollution on Livelihood: Evidence from the Niger Delta Region of Nigeria" (2016) 12(5) *Journal of Scientific Research & Reports* 1; Ologunorisa TE "A review of the effects of gas flaring on the Niger Delta environment" (2001) 8(3) *International Journal of Sustainable Development & World Ecology* 1; Inokoba K and Imbua DL "Vexation and Militancy in the Niger Delta: The Way Forward" (2010) 29(2) *J Hum Ecol* 101-120.

[1444] Echefu N and Akpofure E "Environmental impact assessment in Nigeria: regulatory background and Procedural framework" *UNEP EIA Training Resource Manual Law, policy and institutional arrangements* 65.

[1445] Amnesty International (n 953) 21.

Table 14: Respondents' views on creation and operations of Niger Delta Development Commission (NDDC)

Respondents' views	Frequency	Percent
Do you know about the existence of the NDDC?		
Yes	284	89.3
No	34	10.7
Total	318	100.0
Are you satisfied with the creation of (NDDC)?		
Yes	259	81.4
No	59	18.6
Total	318	100.0
What has been the impact of the NDDC on the development of the Niger Delta and your area in particular?		
No positive impact	56	17.6
Below average	145	45.6
Average	112	35.2
Above average	5	1.6
Total	318	100.0
What has been the impact of the NDDC on the development of the Niger Delta?		
No positive impact	83	26.1
Below average	162	50.9
Average	69	21.7
Above average	4	1.3
Total	318	100.0
Would you advocate that this body be Scrapped?		
Yes	251	78.9
No	67	21.1
Total	318	100.0

Although 284 (89.3%) of the respondents were aware of the existence of the NDDC, 259 (81.4%) were satisfied with the creation of the Commission. The respondents, while assessing the impact of the NNDC in their respective areas, scored the performance of this body low. For instance, 145 (45.6%) scored it below average, 56 (17.6%) even claimed that it has had no positive impact in their area while 112 (35.2%) claimed that NNDC has performed averagely. Only 5 (1.6%) scored NNDC above average. It is important to note that the NDDC was established to develop the Niger Delta in response to the judgment of the African Court in the case filed before by SERAC against Nigeria. However, the performance of this body, like other bodies before it, has been a story of abysmal failure because the peoples' lives have not improved.

The rating of the performance of the body in the Niger Delta in general was also very low. 83 (26.1%) of the respondents said NDDC has no positive influence, 162 (50.9%) said the body has performed below average. 69 respondents (21.7%) attributed to the body an average performance. Only 4 (1.3%) scored the body above average. However, the majority of the respondents did not want the body scrapped. 251 (78.9%) supported the retention of NDDC while only 67 (21.1) wanted the body to be scrapped. The reason for this may be that of retaining it in the meantime hoping that it is going to perform better in the future since, they say, "Half a loaf of bread is better than none."

The result of this survey confirms the claims that the NDDC has performed below average. This further reinforces the opinions of those people interviewed by the researcher on the performance of the body contained in chapter five of this thesis.[1446] Based on these findings, this study, therefore, gives some recommendations and it is hoped that if the recommendations are implemented it will ensure sustainable development of petroleum resources in Nigeria. Inokoba and Imbua have also argued that the interventionist agencies that existed before the NDDC[1447] and the NDDC have all failed to address the developmental needs or

[1446] See chapter five of pages 197-200.

[1447] That is the Niger Delta Development Board (NDDB) of 1961 which later metamorphosed in 1976 into Niger Delta Basin Development Authority (NDBDA), the Oil Minerals Producing Areas Development Commission (OMPADEC), the Petroleum Trust Fund (PTF).

challenges of the people because they are based on dubious and faulty premises.[1448]

[1448] Inokoba K and Imbua DL (n 145) 101-120.

CHAPTER EIGHT

CONCLUSION AND RECOMMENDATIONS

8.0 Introduction

The previous chapter discussed and analysed the responses from the questionnaires and personal interviews. This chapter summarises the results of findings from the existing literature and the empirical study carried out in the Niger Delta. It concludes, gives some recommendations and offers suggestions for further research.

8.1 Summary of findings

This study made some assumptions which were that the laws governing the exploration and exploitation of petroleum resources are inadequate to address the challenges facing the sector and that the Federal Government's poor control of petroleum resources in Nigeria has led to ineptitude and wastages in the sector. The Federal Government stands too far away from the sites of petroleum extraction and is only interested in rents, royalty and other tax collection which discourage sustainable development of petroleum resources in the country. The summary of findings is here under stated:

1. To test the assumption that the laws governing the exploration and exploitation of petroleum resources are inadequate to address the challenges facing the petroleum sector, this thesis discusses the present legal framework in Nigeria to see whether they are adequate or not. From the discussion several inadequacies were identified, and it was discovered that the present legal framework could not ensure sustainable development of the resources.
2. It was also established that the Federal Government could not adequately implement the laws and regulate the activities in the sector. This has encouraged impunity in the oil sector; the oil companies flagrantly violate the rules concerning gas flaring and displayed carefree attitude to clearing of oil spills that have devastated the Niger Delta environment.

3. Apart from the fact that the laws are outdated, the study has also highlighted that there has not been a sound petroleum policy.[1449] This was why the Federal Government set up a committee to consider the laws governing the petroleum industry in order to bring it in line with international standards. The efforts of the Federal Government at reforming the sector culminated in the Petroleum Industry Bill. The study, therefore examined the proposed Petroleum Industry Bill and its subset the Petroleum Industry Governance Bill passed by the Senate.[1450]
4. The study identified challenges in the legal system which prevents the victims of oil and gas pollution from getting justice, such as locus *standi*,[1451] the onerous task to discharge the burden of proof in the environmental pollution cases. In civil matters, a litigant must bring the case within the statute of limitation otherwise the defendant can raise an objection at the trial that the action is statute-barred thereby removing the right of enforcement, right of relief and therefore leaves the plaintiff's grievance not remedied. It also discussed the jurisdictional controversy that is which of the courts the litigant will approach for redress: it is the Federal High Court or the State High Court. The provision of the Constitution has given jurisdiction to the Federal High Court, but this notwithstanding this controversy rages on more so that there is only one Federal High court in a State which is usually located in the State Capital far away from the extraction sites.
5. The study identified corruption as one of the major problems facing the industry as huge revenues realized from the sector are siphoned into private accounts by unscrupulous politicians. The revenues realised are not ploughed back to develop the economy; the Niger Delta environment remains devastated and the generality of Nigerians impoverished.

[1449] There was no sound petroleum policy until 2004 when the Federal Government came up with a policy in 2004. Before then petroleum resources development had been ad hoc.

[1450] The segment of the Bill otherwise referred to as Petroleum Industry Governance Bill (PIGB) was passed by the Nigerian Senate (that is the Upper Chambers of the National Assembly) on the 25th day of May 2017. The same bill must also be passed by the House of Representatives (that is the lower Chambers of the National Assembly) but the President must assent to it before it becomes law.

[1451] There has been tremendous improvement on the issue of locus *standi* by the introduction of the 2009 Fundamental Rights Enforcement Procedure (FREP) Rules in Nigeria.

6. The study further inferred that corruption has eroded transparency in the allocation of petroleum licences and the oil blocs.[1452] The regulatory authorities are compromised through bribery and corruption leading to relaxed regulation in the industry.
7. The study identified an inverse relationship between development and petroleum resources wealth in Nigeria, describing what is popularly referred to as "resource curse".
8. It also identified problem of overdependence on petroleum resources, thereby creating a false impression of a prosperous nation with overflowing cash within the economy whereas the production sector is neglected.
9. The study also established that there are incessant oil spills and gas flaring in the Niger Delta. The study further identified that oil pollution has devastating effects on the environment and people of the Niger Delta. This finding supports the holding of an African court in the case of *SERAC v Nigeria*[1453] that the Nigerian government violated the socio-economic and environmental rights of the people of Niger Delta.
10. As a fallout of the *SERAC* case, Nigeria established the Niger Delta Development Commission (NDDC) to fix the infrastructure in the Niger Delta and to ameliorate the unavoidable negative consequences of oil and gas exploitation. This study, therefore evaluated the performance of the NDDC at delivering infrastructural facilities and other steps taken to ameliorate the harsh conditions in the Niger Delta and found that the agency has failed to develop the Niger Delta.
11. The study also examined the Environmental Impact Assessment Act and the level of compliance with the provisions of the law. It discussed the issues of compensation for oil spills and gas flaring under international law as it is applicable under Nigerian law. The study discovered that compensation for oil spills and gas flaring was grossly inadequate and identified this factor as one of the major causes of restiveness in the Niger Delta region.
12. The study also submits that the legal framework governing exploration and exploitation of oil and gas in Nigeria is inadequate; the study therefore examined the legal regimes in comparative federal systems of the United

[1452] The scandal that trailed the allocation of Malabu OPL 245 oil bloc is a typical example.
[1453] *SERAC* case(n 47).

States of America, Australia and Canada. It was discovered that those countries practiced federalism beyond mere administrative demarcation between the federal or national governments and the component states and territories to allowing each level of government ownership and control of petroleum resources found in their respective jurisdictions. The study concludes there are lessons Nigeria can learn from these jurisdictions.

13. The study through empirical/field study confirmed the deplorable state of the environment and the poor standard of living of the inhabitants of the Niger Delta region. The study submits that if the Federal Government improves the standard of living of the people and remediates the environment in conjunction with the oil companies peace will return to the Niger Delta.

8.2 Recommendations

As a result of the above findings this study in the subsequent paragraphs proffers some recommendations.

One of the major findings of the study is that the laws governing the exploration and development of oil and gas in Nigeria are outdated. This study therefore recommends that the laws should be reviewed to achieve transparency and efficiency in the industry.

Another major finding of the study is that the ownership structure has not helped sustainable development of the petroleum resources in Nigeria. This study recommends mixed ownership and control of petroleum resources in Nigeria and a return to the tenets of true federalism as practiced before the 1966 military intervention in politics in Nigeria. It further recommends that the Federal Government should control the offshore petroleum resources beyond 12 nautical miles into the sea and the States should be allowed to control the coastal petroleum resources up to 12 nautical miles into the sea. This study in the interim recommends an increase in revenue derivation formula from the present 13% to 50% and advocates periodic review until Nigeria accedes to mixed resource control between the Federal Government, State Governments and the Communities.

In relation to the above recommendation, this thesis recommends an amendment to section 44 (3) the 1999 Constitution, section one of Petroleum Act, 2004, clause two of the Petroleum Industry Bill (PIB), 2012 and that of the Petroleum Industry

Governance Bill (PIGB), 2018 to allow for mixed ownership of oil and gas as obtainable in the United States of America, Canada and Australia.

This study recommends that the traditional rulers be involved in the sharing of the 13 percent oil derivation and the Host Community Fund when passed into law. The traditional rulers are closer to the grassroots and understand the people better. The people can easily hold them responsible for mismanagement of funds meant to be used for the development of the community. The position was strongly canvassed by traditional leaders of the communities visited by the researcher.

This study further recommends the inclusion of host communities in the scheme of things concerning the exploitation and exploration of oil and gas especially in decision-making processes prior to and during project development so that the oil companies can be monitored and be held responsible for damages that might occur as a result of their activities.

The NNPC was established to develop the country's petroleum resources for the benefit of Nigerians but from the findings of this study the NNPC has not fared well in ensuring sustainable development of the resources. This study, therefore, recommends the unbundling of NNPC (in line with the reform agenda of the present administration and the Petroleum Industry Governance Bill) into the independent commercial entity that will be incorporated as a company to carry on oil and gas related businesses.

This study further recommends that government should not involve itself in oil and gas business with oil companies because such alliance compromises the implementation of regulations. For instance, the involvement of the government in oil and gas extractions does not allow it to take decisive action on ending gas flaring in the Niger Delta.

This study recommends attitudinal change as well because NNPC seems to have an array of qualified staff who are well remunerated yet perform below expectations.

It is recommended that regulatory agencies should ensure transparency when impact assessment surveys are being conducted and should be carried out in consultation with the local stakeholders. Multinational Corporations and regulatory agencies of government should respond to legitimate demands for information

concerning impact assessment reports to know the extent of negative impacts oil extractions on the environment and the lives of the inhabitants.

This study has established that the regulatory agency is weak and inefficient; a total overhaul of the regulatory system to ensure strong, viable and robust regulation in the industry is an obligation. A good regulatory agency must have the expertise to recognise dangerous practices and understand the technology of the industry it controls. However, inadequate funding has prevented the DPR from training its staff to be professionally competent in order to regulate the industry effectively. This study thus recommends the recruitment of staff who are highly knowledgeable about the oil and gas industry and have appropriate experience.

This study further recommends that the staff of the regulatory agency should be well remunerated to minimise the potential for corruption. It is worthy to note that the current reform effort at streamlining regulatory framework under the Nigeria Petroleum Regulatory Commission is a step in the right direction.

The Bill for an Act on the proposed reform of the governance regime of oil and gas has been passed by the legislature; this study therefore recommends that the President assents to the Bill without further delay to bring to fruition the proposed reforms. However, the study recommends that the unlimited powers given to the Nigeria Petroleum Regulatory Commission by section 6 (1) (s) to issue petroleum licenses at will and with no regard for lives and property of landowners and communities in the oil-bearing areas be reversed. The above provision should be revised to provide for prior and informed consent and adequate compensation for local/community landowners. This recommendation is in line with global best practices in the extractive industries.

This study has found out that the Niger Delta Development Commission (NDDC) as an interventionist agency has not lived up to expectations and there is a need for a transformation of the Commission to place it in a strategic position to be able to achieve the goals for its establishment. It was also observed that the budgetary allocations due to the NDDC were not released to them, thereby resulting in abandoned projects spreading over the Niger Delta. This study therefore recommends that the National Assembly should improve on its statutory oversight function of monitoring the disbursement of budgetary allocations to parastatals,

agencies and institutions. This study further recommends that the National Assembly should set up an investigating panel to probe the alleged non-release of budgeted funds to the NDDC by the executive. It is therefore recommended that the lawmakers should go beyond complaining of non-implementation of budgetary allocation to NDDC to monitoring that funds are allocated and disbursed to the body and punish erring government officials.

Extraction of oil and gas brings with it some unavoidable consequences of environmental degradation, therefore this study recommends that government should ensure a mandatory EIA before embarking on oil and gas projects and in the on-going projects, to disclose information on the impact of the operations on the environment and human rights in plain language, including all oil spills, volumes and locations, information on waste disposal into land, air or water, etc. In cases of oil spills "the polluter must pay principle" should be adhered to.

From the findings of this study, responses by government and oil companies show that the cleaning of oil spills is inadequate, therefore this study recommends that the government and the oil companies should clean-up the farmlands, creeks and wetlands, surface and underground waters and the entire polluted environment as part of their strategy to bringing about a lasting peace to the region. The study further recommends that the Federal Government should establish an Oil Spill Liability Trust Fund; coordinate multi-stakeholder efforts and carry out emergency measures to reduce the effects of oil pollution on the communities. The study found out that despite the establishment of National Oil Spill Detection and Response Agency (NOSDRA) most of the creeks are yet to be cleared of oil pollution. This study therefore recommends that the agency should be adequately staffed and funded and equipped to carry out its functions properly and independently of the oil companies.

Another major finding of this study is that the payment of compensation is inadequate. The study, therefore, recommends that the payment of compensation should go beyond calculating for loss to the crops and economic trees at the time of the incident for this certainly could not amount to a fair and adequate compensation. Damage done to the eco-system goes beyond mere damage to crops and economic trees. Arable lands are heavily polluted which renders the land unproductive for many years. This study therefore recommends that apart from ensuring that the

victims of oil spillage are adequately compensated the government in collaboration with the oil companies concerned should assuage the environmental devastation by building suitable infrastructural facilities such as schools, water supply, power supply, create employment opportunities, scholarships, vocational skills programmes, agricultural support programmes and other examples of corporate social responsibility. Hence, this study recommends amendments to the laws on compensation to ensure that the quantum of compensation is fair and adequate, and cover long-term impacts, health issues and all other reasonable damages.

Finally, the judiciary needs to be strengthened by training the judicial officers to increase their knowledge base on environment related matters. This is because it has been shown that with appropriate training, reforms and good leadership, checks and balances can be restored between the three arms of government. This can help to check the excesses of the Multinational Oil Companies (MOCs) by imposing heavy fines on them and directing that damage to the environment be remedied.

The government should ensure that court pronouncements to stop gas flaring are implemented; it should impose heavy fines on erring oil companies to discourage gas flaring. Furthermore, the government should, as a matter of urgency, encourage the use of gas for cooking and other domestic purposes. It should also encourage exports of liquefied natural gas as an alternative to exports of crude oil.

Most of the cases against Multinational Oil companies MOCs are compromised by the Nigerian government because petroleum is seen as the backbone of the economy. The government is not ready to tolerate any disturbance of crude oil production in the form of injunctions restraining the activities of the oil companies. This study, therefore, recommends that the home states of MOCs should be approached for compensation for damages caused by the production of oil and gas. The study further recommends that representations should be made to the Multinational Oil Companies' Annual General Meetings (AGM) to address their boards and their shareholders about the activities of these companies in the Niger Delta.

The study also recommends that an international court be established to try cases of oil and gas pollution in developing countries like Nigeria. A mechanism should be put

in place at the headquarters of these MOCs for easy access to an effective remedy in the home state, including access to the courts, in cases where victims cannot access effective remedy in the host states.

It has been observed that Nigeria's challenges are not limited to inadequate legal framework for oil and gas but includes corruption and bad governance. This study, therefore, recommends that Nigeria should seek to promote good governance, credible elections, a democratic culture and respect for the rule of law. Without developing these virtues, the instrument of law and legal reform in the petroleum sector will have limited impact.

It is hoped that the Nigerian government, MOCs and the indigenes of the Niger Delta will implement these recommendations to bring about sustainable development of oil and gas, thereby ensuring lasting peace in the Niger Delta through improved environmental and socio-economic conditions of the people.

8.3 Suggestions for further research

Due to an increasing spate of violence in the oil-rich Niger Delta of Nigeria and the seeming insensitivity of the Federal Government to the plight of the people, researchers should be attracted to study why and how this intractable problem could be solved. Many interventionist agencies have been established to develop the Niger Delta, but the region is still very much underdeveloped lacking basic infrastructural facilities and socio-economic development despite the huge revenue that accrues to the Federal government from the region. There has been no respite in the Nigerian State, South Eastern states are clamouring for secession while some are gunning for the restructuring of the country because of the unsettled issues of ownership and control of petroleum resources. The fact that these challenges have not yet been resolved calls for further research in the area of the legislative and regulatory regime for oil and gas to see how the law as a mechanism for social change could resolve these problems.

Since the focus of this study is on the upstream petroleum sector, to have a holistic approach to solving the challenges of the oil and gas industry in Nigeria there is the need to carry out further research on the midstream and downstream sectors.

Another area that requires further research is in the offshore petroleum exploration and exploitation. There is an increasing focus on offshore exploration and development of petroleum resources because of technological invention which enables States to explore far into the ocean. The research interest will be to find out how State's petroleum policy can help to transfer skills, expertise and technology from MOCs through contractual conditions and obligations and promote cooperation between international and national oil companies in Nigeria. It has also been noted that some of Nigeria's biggest oil spills have occurred offshore[1454] hence there is a need for research efforts in that direction to protect the Nigerian marine environment.

[1454] Amnesty International (n 953) 29.

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Annexure "A"

NORTH-WEST UNIVERSITY
YUNIBESITI YA BOKONE-BOPHIRIMA
NOORDWES-UNIVERSITEIT
MAFIKENG CAMPUS

Private Bag X2046, Mmabatho
South Africa 2735

Web http://www.nwu.ac.za.

Faculty of Law

Date: 2 February 2017.

Covering letter,

Re: A comparative study of the legal framework governing oil and gas exploration and exploitation in Nigeria.

Dear Participant,

I am a researcher based in North West University, South Africa. I am presently studying towards a Doctoral Degree in the School of Postgraduate Studies and Research, Faculty of Law. My research interest and specialty is in the area of oil and gas (petroleum). I am particularly interested in studying the regulatory framework governing oil and gas exploration and exploitation in Nigeria with a view to ensuring best practices in the field.

I attach a questionnaire relating to the causes of the crisis and what government and oil companies must do to ensure there is peace in the Niger Delta. Also relating the performance of the NDDC as an interventionist agency, NNPC as a National Oil Company (NOC) and the Department of Petroleum Resources' regulation of activities in the petroleum industry.

I would be very grateful if you can complete the questionnaire so that we can have the benefit of your expertise. Please, be assured that your responses will be treated in strict confidence and that your identity will not be revealed at any time. I am happy to let you have a summary of my findings in due course, should you request one. Information on completing the questionnaire can be found at the beginning of each segment.

I would be glad to be contacted any time about the survey or procedures on: +27(0)603833661. Alternatively by email at: peteakinsola@gmail.com.
Thank you for your time and cooperation.
Yours sincerely,
Oladiran Akinsola AYODELE.

Annexure "B"

INTERVIEW QUESTIONS

Stakeholders/ Law/policy makers

1. Would you say the present condition of the Niger Delta is a reflection or associated with the government not having a firm grip on her oil and gas resources?
2. Various allegations against the oil companies in respect of not rendering their dues to the host communities. Would you say this is a reflection of the Federal Government not having sufficient grip over our oil and gas resources?
3. What about the petroleum reform bill PIB, how far so far? Why as the bill not been passed into law since?
4. Are there certain influences committed to hindering the smooth passage of the PIB?
5. If yes, how has this been dealt with by the legislature?
6. If no, why the perceived reluctance on the path of the lawmakers, especially given the importance and the promise the Bill holds to address major issues in the oil and gas industries of the economy?
7. Can you as the honourable member shed light on the various efforts of the Senate/House Committee on oil and gas as it relates to finding solutions to the agitations, aggressions and incessant violence in the Niger Delta?
8. A section of the Constitution of the Federal Republic of Nigeria gives power of ownership of oil field to the government and not to an individual or community where such oil is found, what is your take on this?
9. In your own opinion, what is the best way of resolving the ownership crisis of oil between the government (by constitution) and the natural owner (community) there appears to be conflict of ownership
10. In a bid to resolve the on rest or restfulness or agitation in the Niger Delta, do you think a review is necessary in respect of the aspect of the constitution that gives primary ownership of oil field to the government?
11. If yes, what is your model of the ownership structure you want to suggest as a solution to the oil related crisis in the Niger Delta
12. If no, why not? Does it mean you are satisfied with the present arrangement which may be associated with the present crisis being experienced in that region?
13. What is your suggestion of the solution to the incessant crisis in the Niger Delta area?
14. Are you satisfied with the environmental Impact Assessment done before and during the production of petroleum? If you are not, what reform will you suggest?
15. 9. What did you see as the challenges posed by the extraction of oil and gas in the Niger Delta in terms of the implementation of laws and regulations to ensure socio-economic rights and environmental sustainability?

16. 10. What reforms and implementation strategies can be proffered regarding the legal framework to guarantee sustainable development in line with the international oil and gas best practices?
17. 11. Do you think that the regulatory framework on oil and gas in Nigeria is adequate?
18. 12. What is your evaluation of the performance of the DPR, an institution established by the government to regulate the activities in the petroleum sector?
19. 13. If in your estimation, it has performed below expectation, can you suggest how DPR can be made to perform better?
20. 13. What is your evaluation of the performance of the NNPC, a corporation established to participate in the business of extraction of crude oil in Nigeria?
21. 13. If in your estimation, it has performed below expectation, can you suggest how NNPC can be made to perform better?
22. 14. What is your evaluation of the performance of the NDDC, an interventionist agency established by the Federal Government with the aim of developing the Niger Delta?
23. 15. If in your estimation, it has performed below expectation, can you suggest how NDDC can be made to perform better?
24. 16. As a law/policy maker, what changes would you propose to the government to correct the horrors of environmental degradation and human rights abuses the Niger Delta people have suffered thus far?

Oil company

1. The so called oil related crisis and agitation in the Niger Delta. In your own opinion, is it real?
2. In your own opinion, what would you say are responsible for the violent acts targeting oil facilities by irate youths?
3. Do you believe that the more the exploitation of the crude oil the more the depletion of renewable energy upon which the livelihood of the communities depends on?
4. If yes, would you say a commensurate developmental project are being carried out in the affected communities from time to time over years of oil exploration and exploitation by your company?
5. Is it really true that oil exploration and exploitation in Niger Delta areas have led to the degradation/destruction of farmland, air and water pollution?
6. Are you able to describe the extent of the suffering caused by these oil drilling related activities including oil spillage. For example: destruction of farmland, fishing ponds and rivers, pollution of drinking water sources etc.
7. Any short and long term intervention or provision by your company to ameliorate people's suffering in relation to the activities of your establishments.
8. Would you say such provisions are adequate?

9. Is there any more thing you think your company can still do to curtail future violence against oil workers and facilities in the Niger Delta?
10. In relation to finding a lasting solution to the crisis in the Niger Delta, do you have any advice for the communities where oil is being drilled and the government of the Federal Republic of Nigeria?
11. The Niger Delta as an oil producing region is expected to be rich like other regions of the world where oil is explored, but the people are still very poor, how will you explain this irony? In your own opinion, what solution can you proffer?
12. Would you say your company is up-to-date in her responsibility regarding the preservation of the environment where oil exploration activities are being done?
13. If yes, how will you explain huge environmental pollution in different forms that is evidenced in the host communities?
14. If no, what are the reasons for non-responsiveness by your company to the environmental issues in the host communities?

Questions for traditional rulers/community leaders

1. Your Majesty, what is your name and what is the name of your kingdom or clan?
2. Your Majesty, if I may ask, how long have you ruled your people?
3. What is your experience about the exploration and exploitation of crude oil in your area?
4. Do you have anything to say about the environment and the activities of the oil companies in your domain?
5. Are there any social-economic deprivation suffered by you and your people?
6. Are you satisfied with the oil prospecting and property acquisition laws of Nigeria?
7. As a traditional ruler, what means have you employed to address this issue of kidnapping and hostage taking of expatriates and others?
8. Your Majesty, how do you expect the Federal Government and oil corporations to go about resolving the crisis in the Niger Delta?

General questions

1. What do you think the Federal Government can do to restore peace in the Niger Delta?
2. What do think the Multinational Oil Companies must do to ensure there is peace in the Niger Delta?
3. Are you satisfied with the present 13% derivation revenue formula in Nigeria?
4. If you are not satisfied what percentage will you suggest?
5. Are you in support of private or community ownership or what alternative revenue sharing formula will you suggest?
6. Do you support state ownership (e.g. Delta or Bayelsa states) of oil and gas resources?
7. Why did you think the militants concentrate their attacks on oil installations?

8. What is actually the purpose of these attacks on oil facilities?
9. Does kidnapping of expatriates, oil workers and hostage taking of honourable members' children and parents by militant youths and the demand for a ransom really take place in the Niger Delta region?
10. In your own opinion, what do you think can be done to resolve the issue of hostage taking and kidnapping in the Niger Delta?

Questions on environmental related challenges

11. What is the state of gas flaring at the oil production sites?
12. Has there been an oil spillage in your area?
13. In your opinion who is responsible for oil spillages in your area? Is it as a result of old pipeline ruptures or sabotage?
14. What effort has been made to clear the oil spillage by the company responsible for the spillage?
15. What is the effect of oil spills on means of livelihood of the inhabitants of the Niger Delta communities?
16. Do you think the main reason why the militant youths resort to violence is the loss of means of livelihood through oil exploration and pollution by oil corporations?
17. In your opinion, what has been the impact of the activities of the Multinational Companies and government on sustainable livelihood in your area?

Questions on the performance of the Niger Delta Development Commission (NDDC)

18. Do you know about the existence of NDDC?
19. Are you satisfied with the creation of Niger Delta Development Commission (NDDC)?
20. What has been the impact of the NDDC on the development of the Niger Delta?
21. Do you support the view that this body be scrapped and why?
22. What alternative body do you suggest should be set up to ensure the development of the Niger Delta?

Annexure "C"

Questionnaire

Section 1: Respondent's socio-demographic profile

To be filled by all respondents by ticks of the appropriate box

1. Mode of administration

   Face to face ☐ Self-Administered ☐

2. Date of interview _____/_____/_____

3. Sex Male ☐ ☐ Female

4. Age _____

5. Highest level of education - Primary School ☐ Secondary / High School ☐

College of Education/Polytechnic ☐ University ☐ No Formal Education ☐

6. State of origin .....

7. State (residency).....

   Your community .....

8. Present occupation

Law/policy makers & stakeholders	
Salary Employment and name of the Employer	
Peasant (crop farming)	
Peasant (fish farming)	
Peasant (livestock)	
Business (trading)	
Business (Artisan)	
Self-employment	

Unemployed	
Student	
Other, specify	

Section 2 - General questions (Please note that multiple responses are allowed)

9. Are you in support of the youth restfulness, agitation and violence attack on oil and gas facilities and staff in the Niger Delta region?

i. Yes ii. No

10. What do you think the Federal Government can do to restore peace in the Niger Delta?

i. Engage in military actions against the youths
ii. Result oriented dialogue with the youths
iii. Increase 13% derivation revenue formula
iv. Infrastructural development of the affected areas and communities
v. Vocational/professional training of youths
vi. Provision of compensation/damages to affected families and communities
vii. Others (please mention)……

11. What do you think the Multinational Oil Companies must do to ensure there is peace in the Niger Delta?

i. Address environmental issue related to oil exploration and exploitation in the area
ii. Provision of adequate social infrastructural facilities
iii. Provision of alternative means of earning livelihood for communities affected by oil exploration activities - Compensation
iv. Youth training and employment in oil and gas industry
v. Regular settlement of community and youth leaders
vi. Strict adherence to national and international environmental laws and regulations, especially as it relates to oil exploration and exploitation.
vii. Others (please mention)……

12. Are you satisfied with the present 13% derivation revenue formula in Nigeria?

i. Satisfied
ii. Not satisfied

13. If you are not satisfied what percentage will you suggest?

i. Upward of 13%, (please mention) ……..
ii. Below 13%, (please mention) ……

14. Are you in support of private or community ownership of Mineral resources in Nigeria?

i. Yes ii. No

15. Do you support state's ownership (e.g. Delta or Bayelsa states) of oil and gas resources?

i. Yes ii. No

16. Why did you think the militants concentrate their attacks on oil installations?

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17. What is actually the purpose of these attacks on oil facilities?

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18. Does kidnapping of expatriates, oil workers and hostage taking of honourable members' children and parents by militant youths and the demand for a ransom really take place in the Niger Delta region?

i. Yes ii. No

19. In your own opinion, what do you think can be done to resolve the issue of hostage taken and kidnapping in the Niger Delta?

i. Engage in military actions against the youths
ii. Result oriented dialogue with the youths
iii. Increase 13% derivation revenue formula
iv. Infrastructural development of the affected areas and communities
v. Vocational/professional training of youths
vi. Provision of compensation/damages to affected families and communities
vii. Others (please mention).....

Section 3: Questions on environmental related challenges

20. What is the state of gas flaring at the oil production sites? .....

23. Has there been an oil spillage in your area of recent?

i. Yes ii No

21. In your opinion who is responsible for oil spillages in your area.

i. As a result of old-pipe line rupturing
ii. Activities of irate youths
iii. Oil exploration and exploitations by the oil companies
iv. Community activities
v. Vandalism/sabotages
vi. Others (please mention).....

22. What effort has been made to clear the oil spillage by the company responsible for the spillage?

i. No effort ii. Less adequate effort iii Adequate effort

23. What is the effect of oil spillage on means of livelihood of the inhabitants of the Niger Delta communities?

i. No adverse effect ii. Not so much of adverse effect iii. Serious adverse effects

24. Do you think 23 above contribute majorly to the militant youths resorting to violent attacks in the region?
    i. Yes ii. No
25. Do you think the federal government of Nigeria (represented by the Nigerian National Petroleum Corporation) and oil corporations deliberately impoverished the Niger Delta populace?
    i. Yes ii. No
26. Do you think the government of the Federal Republic of Nigeria is doing enough to protect the right and privileges of her citizens in the Niger Delta viz a viz oil exploration and their environment?
    i. Yes ii. No
27. Can you rate the Government effort in protecting the interest of the people of Niger Delta in relation to their plight as a result of oil exploration and exploitation going on in their region? Please score Government effort over 100%.

    0% ⟶ 100%

Section 4: Questions about the performance of the Niger Delta Development Commission (NDDC) and the Ministry of Niger Delta

28. Do you know about the existence of the NDDC and the Ministry of Niger Delta?
    i. Yes ii. No
29. Are you satisfied with the creation of Niger Delta Ministry?
    i. Yes ii. No
30. Are you satisfied with the creation of Niger Delta Development Commission (NDDC)?
    i. Yes ii. No
31. What has been the impact of the NDDC on the development of the Niger Delta and your area in particular?
    i. No positive impact ii. Below average iii Average
    iv. Above average
32. What has been the impact of the Ministry of Niger Delta on the development of the Niger Delta?
    i. No positive impact ii. Below average iii Average
    iv. Above average
33. Would you advocate that these bodies be scrapped and why?
    i. Yes ii. No

.....

34. What alternative body (ies) do you suggest should be set up to ensure the development of the Niger Delta?.....

Section 5 Questions about the performance of the Department of Petroleum Resources (DPR)

35. Do you know about the existence of DPR?
    i. Yes ii. No

36. What has been the performance of the DPR on its statutory responsibility of ensuring compliance with petroleum laws, regulations and guidelines in the Oil and Gas Industry?

i. No performance ii. Below average iii Average iv. Above average

Section 6: An assessment of the performance of Nigerian National Petroleum Corporation (NNPC)

Please tick the box that best indicates your opinion on whether the following factors have assisted NNPC to develop Nigeria's petroleum industry:

(1 = strongly agree, 2 = agree, 3 = neutral, 4 = disagree, 5 = strongly disagree)

Statement	1	2	3	4	5
Limited political interference in decision making.					
Provisions of existing petroleum contractual arrangements used in Nigeria.					
Taxation and fiscal systems which are favourable to oil companies.					
Stability of petroleum operations.					
Membership of OPEC.					
NNPC's commercial expertise.					
NNPC's disclosure and transparency relating to production and revenue.					
Existing laws governing oil and gas exploration and production in Nigeria.					

Please use the space below to relate any further comments relevant to this research:

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