Corporate Environmental Liability under the Nigerian Oil and Gas Law: A Critical Appraisal of Environmental Financial Security through the Eye of the Polluter Pays Principle

Kevin Ukeomure Udungeri

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Declaration

I confirm that the work submitted is my own and that appropriate credit has been given where reference has been made to the work of others.

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Kevin Ukeomure Udungeri

May 2024

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Abstract

In Nigeria, liabilities for oil and gas activities are regulated according to the Polluter Pays principle (PPP). However, the PPP has been misunderstood, misapplied and misinterpreted in Nigeria's legal framework as a criminal and civil liability doctrine. Consequently, it is difficult, if not impossible, for the operators responsible for environmental damage to be held liable for the pollution prevention, clean-up and remediation obligations traditionally associated with the PPP in many other legal systems. This inhibits the protection of the environment.

This thesis examines whether the regulatory framework applicable to Nigeria's oil and gas sector is compatible with the 'traditional' understanding of the PPP as seen in other legal jurisdictions, such as the European Union (EU). If so, what is the nature, scope, advantage, and disadvantage of this particular conception of the PPP? In answering this question, the regulatory potential of environmental Financial Security Requirements (FSRs) is considered. By requiring operators or their parent companies to provide evidence of their ability to pay for the environmental obligations that may arise from their activities, FSRs have the potential to prevent and remedy environmental damage arising from oil spills. Such requirements are present within the EU and the United States' legal frameworks. Measures commonly used to satisfy FSRs include liability insurance, self-insurance, bonds, letters of credit and parent-company guarantees.

Without FSRs in the Nigerian oil and gas framework legislation, the efficacy of the National Oil Spill Detection and Response Agency (NOSDRA) Act 2006 is thrown into doubt. First, 'externalised' liabilities deriving from the operator's activities force the state to undertake the works by deploying public funds, as evidenced by launching a billion-dollar Ogoni clean-up. Second, in some cases where the works cannot (or will not) be completed at a public cost, the damage to the environment remains unremediated. Accordingly, while the first scenario has

severe cost implications for public funds, the latter has created significant social and environmental consequences for oil-bearing communities. This study concludes that policy and regulations must be designed to capture FSRs so that operators can internalise (include) the cost of their operations in line with the logic of the PPP.

KEYWORDS: Polluter-Pays Principle, Environmental Liability, Financial Security Requirement, Environmental Damage.

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LIST OF ABBREVIATIONS

A.C.H.P.R	African Charter on Human and Peoples Right
API	American Petroleum Institute
BCF	Billion Cubic Feet
CA	Court of Appeal
CC	Command and Control
CEL	Corporate Environmental Liability
C.F.R.N	Constitution of the Federal Republic of Nigeria
DPR	Department of Petroleum Resources
EC	Environmental Cost
ECJ	European Court of Justice
E.G.A.S.P.I.N	Environmental Guidance and Standards for the Petroleum Industry
EI	Economic Instruments
EL	Environmental Liability
EMS	Environmental Management system
FG	Federal Government
FJ	Food Justice
Harv L Rev	Harvard Law Review
ICCLR	International Company and Commercial Law Review
ICJ	International Court of Justice
ILC	International Law Commission
IMF	International Monetary Fund
Int'l Rev L & Econ	International Review of Law & Economics
IOGP	Association of Oil and Gas Producers
ISO	International Standard Organization

J Corp L	Journal of Corporation Law
J Eur Envtl & Plan L	Journal for European Environmental and Planning Law
J L Bus & Ethics	Journal of Law, Business & Ethics
J Min L & Pol'y	Journal of Mineral Law and Policy
J Transnat'l L & Pol'y	Journal of Transnational Law and Policy
JBL	Journal of Business Law
JCA	Justice of the Court of Appeal
JEEPL	Journal of European Environmental & Planning Law
JEL	Journal of Environmental Law
JPL	Journal of Planning & Environment Law
JVA	Joint Venture Agreement
KJEANRL	Kentucky Journal of Equine, Agriculture, and Natural Resources Law
LQR	Law Quarterly Review
LS	Legal Studies
LUA	Land Use Act
Mich L Rev	Michigan Law Review
MLR	Modern Law Review
MNOC	Multinational Oil Companies
Monash U L Rev	Monash University Law Review
MOSR	Mineral Oil Safety Regulation
Nat Resources & Env't	Natural Resources and Environment
N.D	Niger Delta
N.D.D.C	Niger Delta Development Commission

NESREA	National Environmental Standard Regulation and Enforcement Agency Act
NLNG	Nigeria Liquified Natural Gas
NNPC	Nigerian National Petroleum Corporation
NOSDRA	National Oil Spill Detection and Response Agency
NSIA	Nigeran Sovereign Investment Authority
Nw U L Rev	Northwestern University Law Review
OECD	Organization for Economic Cooperation and Development
OGA	Oil and Gas Authority
Ohio L J	Ohio State Law Journal
Okla L Rev	Oklahoma Law Review
OPA	Oil Pollution Act 1990
OPEC	Organisation of Petroleum Exporting Countries
OSLTF	Oil Spill Liability Trust Fund
OSOWMR	Oil Spill and Oil Waste Management Regulation
OSRCRDA	Oil Spill Recover, Clean up Remediation and Damage Assessment Regulation
PPMC	Pipelines and Products Marketing Company
PPP	Polluter Pays Principle
PPPRA	Petroleum Product Price Regulatory Agency
PSC	Production Sharing Contract
PSNR	Permanent Sovereignty over Natural Resources
RD	Research and Development
RECIEL	Review of European Community and International Environmental Law

Sw LJ	Southwestern Law Journal
Tex Int'l LJ	Texas International Law Journal
U Chi L Rev	University of Chicago Law Review
U Kan L Rev	University of Kansas Law Review
UN	United Nations
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environmental Programme
UNGD	Unconventional Gas Development
USF L Rev	University of San Francisco Law Review
Utah L Rev	Utah Law Review
UTLJ	University of Toronto Law Journal
Va Envtl LJ	Virginia Environmental Law Journal
Wake Forest L Rev	Wake Forest Law Review
Wash & Lee L Rev	Washington and Lee Law Review
Wash ULQ	Washington University Law Quarterly
WB	World Bank
WHO	World Health Organization
Yale LJ	Yale Law Journal

CHAPTER 1

General Introduction

1.1. Introduction

The Niger Delta (ND) region is home to more than 800 oil fields and is estimated to have 1481 operating oil wells.[1] Over 5.5 million barrels of oil are spilt on an average of 550 oil incidents yearly, which affect about 1.94 million hectares and have caused the loss of at least 126,000 hectares of mangrove vegetation since 1958.[2] For 50 years, an estimated 240,000 barrels of crude have been spilt into the Niger Delta annually, and about 7,000 major oil spills of at least 9-13 million barrels were discovered.[3] In 1979, the Forcado Tank 6 terminal spilt 570,000 barrels of oil, polluting aquatic life and the surrounding swamp; the Funiwa no. 5 well was another major 421,000 barrel spilt, lasting January 17-30, 1980, destroying 836 acres of mangrove forest. Chevron Nigeria Limited's operated OML95 in Ilaje, Ondo State, has been burning for the past and has been burning since 2020. To date, Chevron has yet to put off the fire.[4] On Nov 5 2021, a blowout at a well-managed by AITEO went on nonstopped for 56 days in the Santa Barbara field in Bayelsa state, causing extensive pollution of rivers and farmland in the Nembe local government area.[5] Experts confirmed that the scale and duration of the spill are so severe that local communities must be relocated to a safer environment. On January 16, 2012, Chevron North Apoi gas rig in Southern Ijaw Bayelsa state had a blowout that allowed it to go on for 46 days, causing severe damage to the wetlands ecosystem. Owing to the number

[1] PC Nwilo and OT Badejo, ''Oil spill problems and management in the Niger Delta'' [2005] 2005 American Petroleum Institute in International oil spill conference (1) 567-570

[2] NC Duke , 'Oil spill impacts on mangroves: recommendations for operational planning and action based on a global review ' [2016] 109 Marine Pollution Bulletin (2) 700-715

[3] T Bello, ' and L Moses, ' 'Oil Spillage and the Environmental Degradation Shockwaves; Niger Delta Chronicle' ' [2020] 1 Niger Delta Chronicle (1) 1-13

[4] D Terungwa, , ''Fire still burning at OML95 Oilfield 42 Months After Initial Explosion' 21 November 2023' (*Majorwavesenergyreport*, https://www.majorwavesenergyreport.com/fire-still-burning-at-oml95-oilfield-42-months-after-initial-explosion/ accessed 20th May 2024)

[5] D Mongabay, 'An Ongoing Oil Spill Recalls How Common Pollution Is in the Niger Delta' (*Sciencethewirein/external-affairs/world/*, 13/12/2021) <https://science.thewire.in/external-affairs/world/> accessed 12 May 2024

of spills in these indigenous areas, little has been done to clean up. It is regrettable to note that the imminent problem remains the lack of proper and adequate clean-up and remediation of infected areas. The sad reality is that over 70% of these oil spillages have not recovered after five decades of oil exploration and production.[6] There is no gainsaying that Nigeria's ND region is one of the most polluted areas in the world.[7] Despite a rich national and multilateral regulatory architecture purportedly based on the Polluter Pays Principle (PPP), such as the NOSDRA Act and all its regulations, as well as the EGASPIN guidelines[8] first published in 1991, Revised 2002,2016. (issued by The Department of Petroleum Resources Abuja 1991), and Convention on Oil Pollution Preparedness, Response, and Cooperation,[9] oil spillage remains largely unregulated in Nigeria.

This chapter provides a general context on which this study is premised, and it is divided into nine sections; section 1.1 Introduces the chapter, section 1.2 lays the context of the study to the Corporate environmental liability, PPP, the ND region and the extent of environmental damage involving oil spills. Section 1.3 provides justification for the study, while section 1.4 is on the aims and objectives, Section 1.5 is on the research questions, section 1.6 on the scope, section 1.7 is on the contribution to knowledge, section 1.8 is on the methodology of the study while

[6] K Ojuku, 'Managing abandonment issues in Nigerian oil & gas Industry ' [2020] 1875 (OGEL Energy Law Journal 10) 418 , see also Amnesty international, 'Niger Delta Negligence Polluted by the oil industry: Life in Nigeria'sOgoniland' (*Https://wwwamnestyorg/en/latest/news/2018/03/*, 03/2018) <https://www.amnesty.org/en/latest/news/2018/03/niger-delta-oil-spills-decoders/ > accessed 20th January 2022

[7] AA Kadafa,, 'Oil exploration and spillage in the Niger Delta of Nigeria' [2012] 2 Civil and Environmental Research (3) 38-51.

[8] National Oil Spill Detection and Response Agency Establishment Act 2006, the Environmental Guidelines And Standards for the Petroleum Industry in Nigeria (EGASPIN) see also, BO OKORO, "Analysis of Some of the International Environmental Principles and Their Relevance to Nigeria's Quest for Environmental Security." (2019), 86 J.L. Pol'y & Globalisation 138

[9] OECD 'Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies'OECD/LEGAL/0102 Annex A (a)(4) https:// legalinstruments.oecd.org/public/doc/4/4.en.pdf.aceessed 10th July 2023; See also OECD 'Recommendation of the Council on the Implementation of the Polluter-Pays Principle' ECD/LEGAL/0132 https://legalinstruments.oecd.org/public/doc/11/11.en.pdf. See para 5 to the preamble the International Convention on Oil Pollution Preparedness, Response, and Cooperation (OPRC) 1990, see also Principle 16 of the Rio Declaration 1992, Article 3(4) of the Convention on the Protection of the Marine Environment of the Baltic Sea Area 1992, Article 2(5)(b) of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992.

section 1.9 deals with definitions of terms and section 1.10 of this chapter conclude by setting out the thesis structure.

1.2. Context of this Research

The Oil industry in Nigeria: This refers to the industry in Nigeria that is intricate in the exploration, manufacture, refining, and distribution of oil and gas. The Nigerian oil and gas industry is a cornerstone of the nation's economy, accounting for a significant portion of government income and foreign exchange earnings. Since the discovery and eventual commercial drilling of oil in Oloibiri in 1956, the industry has grown exponentially, positioning Nigeria as one of the largest oil producers in Africa and a key player in the global energy market.[10]

Nigeria has maintained Africa's top spot as the largest oil producer, with reserves estimated at over 37.2 billion barrels, mainly around the Niger Delta, which is on the southeastern coast.[11] Ever since the discovery of crude oil in 1956 and the Royal Dutch Shell (RDS) began commercial production in 1958, the operations have not stopped.[12] Oil and gas deposits in Nigeria are located mainly in the Niger Delta (ND), with about 600 functional oil fields. More than 5284 oil wells are found both onshore and offshore, with ten export terminals, 275 flow stations, three semi-functional refineries, a Liquefied Natural Gas (LNG) processing plant, and finally, 5,001km length of oil pipeline that accounts for the movement of petroleum products across Nigeria.[13] However, this growth has come with substantial environmental costs, particularly in the Niger Delta region, where oil exploration and production have led to

[10] S Kabari, and N Zabbey 'Implementing contaminated land remediation in Nigeria: Insights from the Ogoni remediation project'.(2022) 115 *Land Use Policy*, 106051
[11] Nwilo & Badejo, (n1) at p567
[12] Amnesty Int'l, 'Nigeria: Petroleum, Pollution And Poverty In The Niger Delta 9 September (2009) (Hereinafter Amnesty Report), https://www.amnesty.org/en/wp-content/uploads/2021/06/afr440172009en.pdf accessed 20th Dec 2020
[13] B.A Ugbomeh and A.O Atubi, 'The Role of the Oil Industry and the Nigerian State in Defining the future of the Niger Delta Region of Nigeria', (2010) 4, IMDJ, 103-112

widespread ecological degradation, including oil spills and deforestation. Environmental Challenges and Impacts: The environmental impacts of the oil and gas industry in Nigeria are profound and multifaceted. Oil spills, both from operational discharges and pipeline vandalism, have contaminated vast tracts of land and water bodies, leading to loss of biodiversity, destruction of livelihoods, and health issues for local communities. These ecological challenges highlight the urgent need for effective regulatory frameworks to manage and mitigate the adverse effects of oil and gas activities. The Niger Delta is rich in wetlands and marine ecosystems and is globally acclaimed as one of the world's ten most important wetland sites.[14] The wealth of the Niger Delta Region is in its biodiversity that also serves as a habitat for many rare plants and animal species, which include several primates, a vast mangrove ecosystem, agricultural land and vast fish populations on the West African coastline.[15] Oil activities in this region come at a considerable social cost to the state and the over 33 million inhabitants that constitute the 9 States of the Niger Delta. Oil spillages have exposed and threatened the environmental resources to historical environmental damage. A crude oil spill is defined as the release of oil-derived products, such as petrol, diesel, kerosene, oil fluids, etc., into the air, water, or land and causing pollution.

The term "oil spillage" also refers to the contaminating effect of oil spills that occur from accidents or human mistakes in saltwater. It can happen when drilling and extracting the earth's crust, when pipelines break, when transferring material onto oil vessels, and when oil is transported.[16] The amount of crude oil that leaks into rivers and contaminates the land in states that produce oil has been the subject of numerous reports and publications throughout the years

[14] HO Nwankwoal, DC Okujagu, 'A Review of Wetlands and Coastal Resources of the Niger Delta: Potentials, Challenges and Prospects'. (2021) 5 Environment & Ecosystem Science, (1):37-4

[15] R Steiner, 'Friends Of The Earth Neth., Double Standard: Shell Practices In Nigeria Compared With International Standards To Prevent And Control Pipeline Oil Spills And The Deepwater Horizon Oil Spill' 11 (2010), *available at* http://www.milieudefensie.nl/publicaties/rapporten/double-standard accessed 20th Sept 2019.

[16] Temitayo and Lois (n3) 2

in an effort to increase public awareness for urgent intervention. In an attempt to quell environmental and public criticisms, the oil giants often attributed the oil spills to theft and illicit oil exploitation in a classic instance of no face, no case.[17] The figures by oil majors like Shell and Eni, respectively, claimed that (17.5 million litres in 2011 and 4.1 million litres in 2014) were attributed to interference in their facilities being significantly inflated, according to an undercover study conducted by Amnesty International investigating oil spills in the Delta.[18] More specifically, oil contamination has ruined and turned farmlands into brand fields and poisoned streams against drinking and fishing opportunities.[19] The scale of Environmental damage has adversely impacted the ecosystem, and the biodiversity is at risk of extinction due largely to oil pollution.

In 2011, the Federal Government of Nigeria commissioned the United Nations Environment Programme (UNEP) to conduct an independent Environment Assessment (EA) within the ND. The UNEP examined over 200 oil spill locations, reviewed over 5,000 medical records, surveyed 122 kilometres of pipeline rights of way and engaged over 23,000 people at the host community levels for over a 14-month period.[20] At the end of the exercise, evidence showed the level of devastation due to oil pollution, large-scale impact on farming and aquatic life, and ruined livelihoods.[21] The overall impact resulted in a loss of economic activities and created food scarcity, affect the local people's subsistence. The synopsis of the assessment report of the UNEP report released to the public on 4th August, 2011, revealed the following key points:

- Severe pollution of land and underground water that are basically localised.

[17] Amnesty International, "Niger Delta Negligence" (amnesty.org) March (2018) https://www.amnesty.org/en/latest/news/2018/03/niger-delta-oil-spills-decoders/ accessed 20th
[18] Ibid
[19] Amnesty Report, (n12) , at 14
[20] P. Agbonifo, 'Oil spills injustices in the Niger Delta Region: reflections on oil industry failure in relation to the United Nations Environment Programme (UNEP) report.' (2016). 2 *International Journal of petroleum and gas exploration management*, (1), 26-37; see also U.N. Env't Programme, Environmental Assessment of Ogoniland 8 (2011) [Hereinafter Unep Report], *available at* http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf. Accessed 20th Dec 2019
[21] Agbonifo at p27

- Air pollution associated with oil operations is pervasive and affects the quality of life.
- Pollution of drinking water with high concentrations of benzene, a carcinogenic element, was more than 900 times above World Health Organization (WHO) guidelines.
- Contrary to the operators' claim of oil spill clean-up, the sites remained highly contaminated by hydrocarbons.
- Operators often failed to meet Nigeria's minimum environmental standards, let alone international oil industry standards.
- Water coated with hydrocarbon was more than 1,000 times the level Nigerian drinking water standards allowed.
- The incredible impact of oil spills on mangrove vegetation in the Niger Delta

The UNEP report indicated that Shell does not comply with Nigerian environmental standards or the oil industry standards.[22] The prevailing understanding of pollution liability is that those who cause pollution should bear the cost of clean-up and remediation,[23] which has been incorporated into Nigeria's environmental liability policy. The idea that "the polluter should pay" is based on a simple premise that transcends payment for traditional damages and can be summed up as "those who pollute should be held accountable for the pollution they cause".[24] This means that those who cause pollution should be the ones to pay for the various preventive and corrective measures that are being implemented.[25] What now needs to be considered is how precisely the industry arrived here despite the operating activities being regulated. The PPP is not defined or expressly mentioned in Nigerian law, but it is implicitly ingrained in the country's environmental liability policy, as evidenced by the several sections of the NOSDRA

[22] Amnesty International 'No Progress. An Evaluation of the Implementation of UNEP's Environmental Assessment of Ogoniland, Three Years on. (2014):Available online at http://reliefweb.int/report/nigeria/no-progress-evaluation-implementation-unep-senvironmental-assessment-ogoniland-three (accessed 10/1/2021)
[23] P Schwartz, "The polluter-pays principle." *Elgar Encyclopedia of Environmental Law*. Edward Elgar Publishing, 2018. 260-271.
[24] M.N. Boeve & G.M. van den Broek, 'The Programmatic Approach; a Flexible and Complex Tool to Achieve Environmental Quality Standards', (2012) 8 *Utrecht Law Review*. 3, 80-81.
[25] Ibid

Act and other legislation pertaining to oil and gas liabilities.[26] The liability of polluters in law is intended to serve as an incentive to prevent environmental pollution.[27] However, the existing legal architecture for liability/responsibility fails to provide for such pertinent issues as (a) provision for cost recovery if public authorities incur clean-up/remediation costs, (b) restoration of loss natural resources by those who damaged them, (c) lack of efficient means to implement the polluter pays principle, (d) critical is the issue of the responsible parties in the oil spill cases in Nigeria, since liability is shifting and the range of recoverable damages remains undefined.

Another point to make here is that Nigeria's public authorities (NOSDRA) cannot efficiently monitor and supervise the oil sector environment due largely to the gaps in the law enumerated in the preceding paragraph. These gaps in the law pose a serious challenge to bring responsible operators to account for neglecting to clean up and remediate the oil damage they cause.[28] Above all, the institutional problems range from (1) the lack of appropriate enforcement mechanisms to implement the PPP. (2) Poor funding for environmental management systems in Nigeria, especially as public authorities have no established funding pool to perform clean-up and remediation functions. (3) A restrictive understanding of the PPP in Nigeria.

Corporate Environmental Liability (CEL): Corporate Environmental Liability refers to the legal and financial responsibility of companies for the environmental damage they cause.[29] In Nigeria's context, CEL, in the oil and gas sector, aims to hold companies accountable for

[26] G Elvis-Imo 'An analysis of the polluter pays principle in Nigeria' (2016) 1 *Ajayi Crowther University Law Journal (1)* 1- 3. See also .National Oil Spill Detection and Response Agency. *Establishment) Act, CAP, 157* (2006). National Policy on the Environment https://www.nesrea.gov.ng/wp-content/uploads/2017/09/National-Policy-on-Environment.pdf.. Harmful Waste (Special Criminal Provisions) etc Act, Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN Regulations.

[27] Schwartz, (n23) at p 263

[28] Amnesty International Report (2014) (n22) at2& 5

[29] Environmental liability of companies https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2020)651698 accessed 20th March 2024

pollution and environmental degradation, ensuring they bear the cost of cleanup, remediation, and compensation. Effective CEL frameworks are crucial for promoting environmental stewardship and preventing companies from externalising environmental costs to society and future generations.

The Polluter Pays Principle (PPP): The Polluter Pays Principle (PPP) is a fundamental environmental policy principle that asserts that the party responsible for producing contamination should bear the costs of remedying the damage to the environment.[30] This principle is designed to internalise the environmental costs of economic activities, thereby incentivising companies to adopt cleaner technologies and practices.[31] In Nigeria, the implementation of PPP within the oil and gas sector is critical for ensuring that polluters are held financially accountable for their environmental impact. Environmental Financial Security Environmental financial security mechanisms, such as environmental bonds, insurance, and compensation funds, are essential tools for implementing CEL and PPP.[32] These mechanisms provide the financial resources needed for effective environmental management, ensuring that resources are available for cleanup and remediation in the event of environmental damage. In the Nigerian oil industry, the adequacy and effectiveness of these financial security mechanisms are crucial for safeguarding the environment. Regulatory Framework in Nigeria: Nigeria's regulatory framework for environmental protection in the oil industry includes several key legislations and agencies. The National Oil Spill Detection and Response Agency (NOSDRA) Act establishes NOSDRA to oversee oil spill management. However, the regulatory landscape is characterised by fragmentation and overlaps, leading to challenges in enforcement and compliance.

[30] B Mamyluk, 'Analyzing the Polluter Pays Principle Through Law and Economics,' (2009) 18 SE. ENvTL. LJ. (40) 41-42
[31] Ibid
[32] Ibid

In conclusion, the background sets the stage for a comprehensive analysis of corporate environmental liability and financial security in the Nigerian oil and gas sector. It underscores the critical importance of robust legal and regulatory frameworks, effective enforcement mechanisms, and adequate financial security provisions in achieving environmental sustainability. Through this study, policymakers, industry stakeholders, and environmental advocates can gain valuable insights into improving the management and accountability of environmental impacts in Nigeria's vital oil and gas sector.

1.3. Research Questions

This research explores the dominant question: How can the Nigerian law be reformed to ensure polluters are held liable for Natural Resources Damage? This question is followed by the sub-questions listed below, which will be addressed in successive chapters.

1. To what extent could the polluter be held liable for damage to environmental resources in Nigeria's oil and gas sector?
2. *What are the barriers to the regulation of oil and gas activities in Nigeria?*
3. To what extent is a polluter-pays approach enshrined in Nigeria's law?
4. What is the regulatory potential of financial security requirements in remedying environmental damage caused by oil and gas operations?
5. Would an industry-funded compensation fund provide a viable solution to deal with the historic pollution experienced in Nigeria?

1.4. Justification for the Research

This research is mainly premised on the following justifications. Firstly, for more than 50 years, oil and gas resources have been the dominant source of income and energy production in Nigeria, and enormous environmental liabilities have arisen from their operations. Prominent oil firms, including Shell, AGIP, ENI, Chevron and ExxonMobil, continued their dominance

in extracting resources. They ultimately have unfulfilled accumulated environmental obligations to restore the damaged environment from oil spills. In 2006, the industry encountered a significant shift in the allocation of environmental responsibility with the introduction of the National Oil Spill Detection and Response Agency Establishment Act 2006. The act established the NOSDRA as an agency whose mandate is to monitor and supervise the oil and gas environment and ensure all the environmental responsibilities of industry actors are performed. However, over the years, NOSDRA has been helpless in getting operators who fail to perform their environmental obligations to account. In the meantime, concerns that an upward trajectory of unsettling obligations in the industry may persist. Prominent oil corporations in the Niger Delta are abandoning their environmental liabilities and restiveness towards operations from locals suffering the effects of environmental damage, bankruptcy, or divestment from onshore to offshore without settling their unmet obligations. For example, in January 2024, Shell Petroleum Development Company SPDC announced that it was divesting from Nigeria's onshore operations, prompting concerns about its unmet environmental obligations. Seven Energy International Limited went bankrupt in 2017[33] , and no plans were implemented to settle their unmet obligations. 2012 Afren Petroleum Plc and Allied Energy 2012[34] also went bankrupt, and their environmental obligations remain unmet. According to statistics from the Nigeria Employers Consultative Association, the employer umbrella body disclosed that at least 15 multinationals have divested or closed operations in Nigeria in three years.[35] This study is poised to resolve the unanswered question about whose responsibility it is to meet environmental obligations of this nature.

[33] O Akintayo 'How two firms led Seven Energy into bankruptcy' February, (2020) https://crudemixafrica.com/how-two-firms-led-seven-energy-into-bankruptcy/ accessed 20th June 2021

[34] O Homey, 'The collapse of Afren, part 7 of 7: From rescue to disaster.' (August 2015) https://www.globalcapital.com/article/28mxvuohl8l89e7a92sxs/equity/the-collapse-of-afren-part-7-of-7-inglorious-end accessed 10th May 2020.

[35] G Nwafor ''Nigeria Lost over 15 Multinationals in three year (NECA) https://guardian.ng/news/nigeria-lost-over-15-multinationals-in-three-years/ accessed 22/12/23;

Secondly, while the NOSDRA contains a framework for environmental liability, it uses the term "oil spiller" to denote who is responsible for cleanup and remediation if an oil spill occurs. It does not precisely define traditional damage, environmental liability, polluters, or environmental damage. However, the goal of the NOSDRA framework is to create a new liability system that complements the current administrative, civil, and criminal liability systems rather than just transferring the existing tort laws into administrative liability. None of the existing liability systems can achieve the proactive goal of the PPP that the new regime implicitly aims to implement. Considering that, they all operate under the assumption that 1) liability can only be established after the damage has already taken place. 2) only private persons affected can bring an action for damages. 3) environmental damage is immaterial. Moreover, none of these options offered an acceptable and all-encompassing resolution for the issue of environmental degradation. The absence of private ownership of the impacted natural resources, such as the natural environment, presents a barrier to establishing a strong sense of legitimacy. Moreover, assessing the exact impact and magnitude of environmental damage was onerous because of the ongoing and chronic nature of the contamination, rendering it tough to measure precisely

Thirdly, one of the most efficient strategies for safeguarding the environment is to require the polluter to pay for the costs of cleanup and remediation, which the NOSDRA act implicitly seeks to establish. The prerequisites for granting permits, authorisations, and concessions for operators' activities are the costs that polluters must fully bear. This mandates that the polluter assumes full financial responsibility by complying with all environmental standards and obligations specified by the law. The PPP mandates that the polluter is responsible for covering the expenses associated with pollution, as determined by the existing laws.[36] As

[36] Mamyluk, (n30) 43

shown in section 6 (2)(3) of the NOSDRA Act, it takes the responsibility to carry out the Pollution Prevention and Control Programme on the oil spiller. Polluters bear the financial burden of their environmental costs, which is the foundation of environmental financial security provisions. This economic theory mandates that an operator that sells or provides a good or service that customers demand internalises the costs associated with an activity that harms the environment.[37]

Therefore, environmental costs only arise when consumers demand a service or item. As the consumer demand for a service or good increases, the firm is more motivated to provide that need and the environmental impact also increases. However, a business will not engage in an activity if the environmental costs connected with the activity make it commercially unattractive. What is directly at issue here is the most evident environmental cost under the polluter-pays concept, which is an operator's obligation to restore resources harmed during the course of extracting natural resources. Environmental remediation encompasses the immediate cost of restoring the land to an acceptable condition once damage occurs from the oil activities or it ceases operations and the potential costs associated with future impacts, such as water quality.[38]However, NOSDRA lacks economic mechanisms that incentivise operators to prevent, mitigate or at the very least remedy pollution. These three issues are at the crux of this study.

1.5. Aims and Objectives

This study aims to support Nigerian legislators and policymakers in developing the best possible legal and policy frameworks to efficiently internalise environmental costs. In light of these two clear and presumably persistent trends, this work aims to guide significant changes

[37] Mamyluk (n30) at 43-44

[38] S J. Surber, 'Writing a Check that the State Can't Cash: Water Pollution from Coal Mining and the Imminent and Inevitable Failure of the West Virginia Special Reclamation Water Fund',(2013) 27 TUL. ENVTL. L.J. 1, 2-4

in regulatory patterns. Thus, this work aims to drive significant changes in regulatory patterns based on two unique and presumably long-lasting trends. One problem is the growing and immediate need for measures to protect Nigeria's surroundings from oil spill-related environmental damage. The idea of holding individuals who pollute the environment accountable for compensating for the harm they cause is another problem. This involves determining who is responsible for preventing oil pollution, controlling it, and restoring the environment after it has been harmed. The acronym PPP refers to this concept[39] Therefore, this study aims to critically appraise the extent to which the PPP has been implemented in Nigeria to address issues 1 and 2 above involving the environmental liability of operators relating to oil pollution damage. Accordingly, this study focuses on the following additional objectives: to explore the original conceptual understanding of PPP. At the core of this thesis is the effort to explore the original conceptual understanding of PPP and examine the implementation techniques of PPP in the Nigerian oil and gas industry. In the Nigerian oil and gas industry, the thesis looked at the theoretical misapplication and misinterpretation of applying the PPP in a way that does not foster a chance for the assignment of responsibility. Although this concept has been touted as one whose primary objective was to bring polluters to account, we aim in this study to assess the viability of reliance on the PPP in addressing the environmental degradation caused by oil pollution. This study aims to deconstruct the nonexistence of PPP in the legal framework and policy tools applicable to Nigeria's oil and gas industry.

Furthermore, this study aims to explore the efficacy of Market-oriented instruments such as financial security requirements and encourage cost internalisation by making prospective polluters show that they have the financial means to cover any possible future environmental damage.[40] Accordingly, we aim to examine if financial security can serve as a valuable

[39] SE Gains, 'The Polluter-Pays Principle: From Economic Equity to Environmental Ethos' [1991] 26(1) Tex Int'l LJ 463.

[40] J Boyd, 'Financial Responsibility for Environmental Obligations: Are Bonding and Assurance Rules Fulfilling their Promise?' (2002) 20 Rsch in L & Econ 417

addition to other regulatory compliance needs of restoratory obligations and NOSDRA-related liabilities. Considering the growing prevalence of neglected environmental responsibilities in Nigeria's oil and gas sector, the necessity for providing security has become imminent to improve regulatory efficiency. Ultimately, this thesis explores the most effective way the PPP might accomplish Nigeria's environmental policy objectives, primarily by remedying environmental damage. The economic literature shows that the liability system is not just about providing a remedy but also about creating a system that effectively encourages potential polluters to take preventive actions to eliminate or significantly reduce the chances of oil pollution. This study seeks to formulate arguments and ideas that will result in recommendations and policy suggestions related to the objectives above. The aim is to stimulate the process of establishing the agenda for these new solutions. This thesis aims to critically appraise the current state of corporate environmental liability and financial security mechanisms in the Nigerian oil and gas sector through the lens of the Polluter Pays Principle. The objectives include evaluating the effectiveness of existing regulatory frameworks, identifying gaps and challenges, and proposing recommendations for strengthening CEL and enhancing environmental financial security. The significance of this study lies in its potential to inform policy reforms and regulatory improvements that can lead to better environmental outcomes. By holding companies accountable and ensuring adequate financial provisions for environmental management, Nigeria can mitigate the environmental impacts of its oil and gas sector, promote sustainable progress, and protect the health and well-being of its citizens and ecosystems.

1.6. Scope and Limitations of the Research

The scope of the Study focuses on Corporate Environmental Liability (CEL) within the Nigerian oil and gas sector, critically appraising the concept of environmental financial security through the lens of the Polluter Pays Principle (PPP). The scope includes, firstly, exploring the

conceptual framework, which is the examination of the theoretical foundations of CEL and PPP, including their definitions, principles, and relevance in environmental regulation. Secondly, Legal and Regulatory Analysis: this will involve the detailed analysis of Nigerian laws and regulations pertaining to environmental liability in the oil and gas sector, including the National Oil Spill Detection and Response Agency (NOSDRA) Act, oil pipelines Act (OPA) Petroleum Industry Act and other relevant legislation such as EGASPIN and OSRRDC. Thirdly, Case Studies: Analysis of some specific cases of environmental harm caused by oil and gas operators in Nigeria, assessing how CEL and PPP have been applied in practice. Key case studies will include major oil spill incidents and their subsequent legal and financial outcomes. Fourthly, comparative Analysis: Comparison of Nigeria's approach to CEL and PPP with other jurisdictions, particularly in relation to financial security mechanisms such as environmental bonds, insurance, Parent Company Guarantees, bank guarantees, letters of credit and compensation funds. Fifth, policy and institutional Framework: the evaluation of the role of governmental institutions in enforcing CEL and implementing PPP, including challenges and effectiveness. Six, Recommendation: Proposals for enhancing the legal, regulatory, and institutional frameworks to enforce CEL better and ensure robust financial security mechanisms are in place. Limitations of the Study: Despite its comprehensive approach, the study faces several limitations. Firstly, data availability: Access to reliable and up-to-date data on oil spill incidents, financial compensations, and enforcement actions may be limited. This can affect the depth of analysis and the ability to draw definitive conclusions. Secondly, legal ambiguities: The complexity and evolving nature of environmental laws in Nigeria present challenges in obtaining a clear and consistent interpretation of CEL and PPP. Fourth, geographic focus: While the study aims to provide a thorough analysis of the Nigerian context, the geographic focus may limit the generalisability of findings to other countries or regions with different legal and environmental frameworks. Fifth, the study primarily focuses on

environmental damage involving oil spills, cleanup, and remediation, and it looks at variables that align with the objectives stated above. This thesis is limited to NOSDRA-related costs and financial obligations associated with environmental damage caused by oil spills. Finally, the NOSDRA liability and financial obligation is specifically for oil spills, excluding gas flaring, well closure, and/or decommissioning, which are not the focus of this study.

The current political and institutional dynamics may constrain the study's ability to propose actionable recommendations. Addressing CEL and PPP involves interdisciplinary considerations, including legal, economic, and environmental aspects. Balancing these diverse perspectives within the study's scope might be challenging, potentially leading to an overemphasis on certain aspects at the expense of others. This study aims to provide a critical appraisal that informs policymakers and stakeholders in the oil and gas sector, offering insights into improving environmental liability frameworks and ensuring the effective application of the Polluter Pays Principle in Nigeria.

1.7. Contribution to Knowledge

This thesis offers one standard contribution to knowledge. The examination of legal, social, political, and economic barriers to the regulation of oil and gas activities in Nigeria contributes significantly to our understanding of the complex dynamics that shape environmental governance in resource-rich regions. By identifying and analysing these barriers, this study sheds light on the complex interaction between legal frameworks, societal dynamics, political interests, and economic incentives that influence regulatory outcomes in the oil and gas sector. Firstly, the identification of legal barriers highlights the importance of robust regulatory frameworks and effective enforcement mechanisms in achieving environmental objectives. By uncovering loopholes, inconsistencies, and enforcement gaps within existing laws and regulations, this research underscores the need for legislative reforms and institutional strengthening to enhance regulatory effectiveness and ensure compliance with environmental

standards. Secondly, the exploration of social barriers emphasises the critical role of stakeholder engagement, community participation, and social justice in environmental governance processes. By examining tensions and conflicts between oil and gas companies and local communities, this study underscores the significance of addressing social concerns, respecting Indigenous rights, and promoting inclusive decision-making to build trust, foster cooperation, and achieve sustainable outcomes. Thirdly, the analysis of political barriers exposes the challenges posed by corruption, regulatory capture, and weak governance structures in the regulation of oil and gas activities. By uncovering the influence of vested interests, political patronage, and regulatory capture on regulatory decision-making, this research underscores the need for transparency, accountability, and institutional reforms to safeguard regulatory integrity and ensure impartiality in decision-making processes. Finally, the investigation of economic barriers highlights the impact of economic dependency, profit motives, and vested interests on environmental governance outcomes. By examining the incentives that drive regulatory capture and prioritise short-term economic gains over long-term environmental sustainability, this study underscores the importance of diversifying the economy, promoting sustainable development, and aligning economic incentives with environmental objectives. Generally, the findings of this study provide valuable insights into the challenges and opportunities facing environmental governance in oil and gas-producing regions like Nigeria. By addressing these barriers and adopting a holistic and integrated approach to environmental governance, policymakers, regulators, and stakeholders can work towards achieving more equitable, resilient, and sustainable outcomes that benefit society, the economy, and the environment.

1.8. Methodology

Research primarily focuses on systematically gathering and analysing data to address a particular problem.[41] Babbie and Mouton define research as a systematic framework that outlines how a researcher would investigate, address a research problem, or answer a research question. Meanwhile, methodology describes the approaches, strategies, and processes used in carrying out the study plan or design.[42] Using analysis and legal deductive reasoning from primary sources, prior studies, and secondary sources, this study uses a doctrinal method, commonly called "black letter research," to evaluate the regulatory framework in Nigeria's oil and gas sector. Hence, operators must be mindful of the significant deterioration, ongoing ecological harm, and the government's incapacity to halt this trend.

Regulatory failure is a significant contributor that is coupled with a poor understanding of the polluter's liability, which is inherent in the NOSDRA legal framework. Environmental problems and their legal and socio-economic implications have been acknowledged in this research. As a result, there is an increasing demand for a more robust and interdisciplinary research approach to create a cohesive regulation to balance law and economics since most legal research findings solve problems that are substantially linked to the social environment.[43]

While delving into a different methodology that considers social and legal structures as interwoven disciplines may be imperative to have a deeper understanding of the subject matter. This study may not directly employ the socio-legal methodology that will not be utilised in this research. However, the socio-legal technique, which is an interdisciplinary research approach, suggests studying two connected fields: man (natural and juristic persons) and his social environment on the one hand and law and legal institutions on the other. Harris aptly explained

[41] C Chatterjee, '*Methods of Research in Law'* (2nd edn, Old Barley Press, 2000) 16.
[42] E. Babbie and J. Mouton, 'The Practice of Social Research' (Oxford University Press; Oxford, 2001).
[43] IJ Kroeze, 'Legal Research Methodology and the Dream of Interdisciplinary' Potchefstroom Electronic Law Journal (2013) 16(3) 36

socio-legal methodology as the "*study of the law and legal foundations from the perspectives of the social sciences*".[44] He further explained the socio-legal methodology as the "*study of the realities of the law in action*".[45] It is more concerned with the functionality of law and how it affects man's attitude, relationships, and actions.[46] The socio-legal methodology adopts social sciences' methods to illuminate the workings of the law and legal institutions.[47] It, therefore, affords the researcher a rare prospect of testing the effect of the law on a broader spectrum and helps to properly understand the work of legal institutions and the social consequences of the law.

Nevertheless, it is essential to reflect on the words of Morris and Murphy, who submitted that there is no one right or perfect methodology in research writing.[48] This statement supports the possibility of using more than one methodology in research. More often than not, methodologies occasionally overlap, depending on the research needs. Consequently, this research topic has more to do with the possible legal and social impact of FSR and the PPP, which is the subject matter of this study. An attempt at institutionalising FSR would invariably create a legal consequence when considered against the backdrop of the seemingly poorly regulatory regime of Nigeria's oil and gas environment due to the mandatory nature of FSR. This makes it imperative to mix both the socio-legal and the doctrinal methodologies, bearing in mind that it will be beneficial in evaluating the legal and social effects of the subject on society through an examination of relevant statutes, case laws, legal principles and journal articles.[49] Remarkably, the legal foundation of this study is principally covered by more than one background. These include the principal enactment (the NOSDRA Act) and the subsidiary

[44] D Harris, 'The Development of Socio-Legal Studies in the United Kingdom' Legal Studies (1983) 3 315
[45] Ibid
[46] Ibid
[47] M Adler, 'Recognising the Problem: Socio-Legal Research Training in the UK' (University of Edinburgh, 2007) 1,
[48]C Morris and C Murphy, '*Getting a PhD in Law'* (Hart Publishing 2011) 29
[49] M Salter and J Mason, Writing Law Dissertations: 'An Introduction and Guide to the Conduct of Legal Research' (7th edn, Pearson Longman 2007) 49

legislation vis-à-vis FSR and PPP. The international and regional human rights environmental concerns[50] and other international legal instruments advocate operator responsibility and set out best practices concerning the environment, natural resources, and human rights.[51]

Other statutory provisions on the human right to safe environments, like Article 24 of the African Charter of Human and Peoples' Rights, have a binding effect in Nigeria because of its ratification by Nigeria (it is now part of Nigerian Law).[52] Bearing in mind the above legal provisions, one can readily agree that the issue of oil and gas pollution in the Niger Delta region of Nigeria raises the issue of ineffective laws. This makes the doctrinal methodology significant because it helps the researcher appraise the principal law and evaluates the legal, social and economic significance of the FSR proposal vis-à-vis operators externalising their cost. Furthermore, the doctrinal methodology is the only means to achieve the judicial interpretation of relevant and applicable case laws on the right to a safe environment. Accordingly, whilst the doctrinal methodology will allow this researcher to assess the legal doctrine and its significant denotations, the socio-legal methodology would help in the practical application of principles of law beyond the wording contained in the statutes.

Settling for the doctrinal approaches as the primary methodology for this study implies that the methods adopted must reflect the methodology. First, this research shall review, analyse, and critically appraise a wide range of primary sources, such as statutes, case laws, and international treaties, as methods of the doctrinal approach. Second, it will consider government policies, secondary literature such as textbooks, peer-reviewed journal articles, newspapers, reports of

[50] International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of December 1996

[51] UN Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (August 2003); Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, B&B Doc, 107 (entered into force 30 May 1996)

[52] African Charter on Human and Peoples' Rights (Ratification and Enforcement Act) Cap A9 Laws of Federation of Nigeria 2004.

United Nations specialised bodies, international non-governmental organisations (NGOs) reports like Amnesty International, encyclopaedias, and trusted journals.[53]

It is important to note that while this study will, as far as possible, consider and prioritise relevant primary sources in Nigeria, they are hardly ever comprehensive and reflect the original meaning of PPP or cover the FSR. The primary legal framework of NOSDRA lacks any comprehensive means of enforcing the PPP. This explains why this study seeks to make essential recommendations to enhance the existing legal framework using the PPP and FSR mechanisms. The utilitarian value of secondary literature will be added to aid the researcher in critically evaluating the extant views and opinions of others either on the subject matter directly or in any related areas.[54] However, caution is required when using such secondary sources to determine what materials or information should be relied upon. To this end, this research shall primarily depend on verified sources from the University of Leeds e-library for peer-reviewed journals, textbooks, and other academic documents. Nevertheless, other valuable and verifiable websites, databases, and blogs may also be considered, albeit with circumspection.

1.9. Definitions

Some terms considered significant to this thesis are defined, and this is done to remove any form of ambiguity and provide clarity and precision of meaning and thought. The terms that will be defined in this thesis include the following:

1. Environmental damage: This is defined as any "measurable adverse change" or "measurable impairment" to protected species and natural habitats, water and land.[55] Environmental damage in the ELD refers to harm caused to three specific natural resources: (a) protected species and habitats as outlined in the Habitat-Wild Birds Directive, (b) water

[53] M Salter and J Mason, (n49) at 50, 44
[54] Chatterjee (n41) 17
[55] Article 2 of the ELD.

as outlined in the Water Framework Directive, and (c) land contamination that poses a significant risk to health.[56] This definition has drawn criticism for being overly restrictive and limited in scope as it does not include traditional damage, which includes personal injury, property damage or economic loss. In the US, the term represents a broader perspective of environmental damage in the two most notable pieces of environmental legislation: (a) The US Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). And (b) The Oil Pollution Act (OPA) 1990. Environmental damage is generally comprised of damage to "*wildlife, biota, air, land, fish, water, groundwater, drinking water supplies, and other such resources belonging to, and managed by, held in trust by, belonging to, or otherwise controlled by the United States, any State or local government, or any foreign government*".[57]

2. NOSDRA-Related Cost: In Nigeria, the term 'NOSDRA-related costs' means the costs of preventive and remedial measures, an obligation imposed on operators.
3. Cost Internalisation: This means the costs involved in preventing and remedying environmental pollution are paid directly by the operators responsible for the damage, not the taxpayer.[58]
4. Environmental Liability: This means making the polluter who causes environmental damage pay to remedy the damage they have caused.[59] Or simply the liability for environmental damage, as defined in paragraph 1 of this section.

[56] V Fogleman, 'Enforcing the Environmental Liability Directive: Duties, Powers and Self-Executing Provisions' (2006).14 Environmental Liability. 2006; (4):127.
[57] 42 U.S.C.A. & 9601(16) (West 2012); 33 U.S.C.A. & 2701(20) (West 2012).
[58] JL Osorio-Tejada, E Rebrov, V Hessel 'Internalisation of environmental costs of decentralised nitrogen fertilisers production'. (2023) 28 The International Journal of Life Cycle Assessment., (11):1590-603.
[59] Ibid

1.10. Structure of the Thesis

This thesis is organised and structured into six chapters. Chapter One explains the general concept and framework for this thesis. The nature, scope and limitations of the thesis, contribution to the knowledge, the methodology adopted and definitions. Chapter two examines the concept of environmental damage, which focuses on two levels of differentiation. First, it distinguishes between traditional damage and environmental damage or damage to the environment. The chapter evaluates a subtext of the limits of Nigeria's environmental liability regime and the problem of Nigeria's environmental law. Chapter three also examines how the legal, economic, social, cultural, and political factors have shaped the environmental regulations of Nigeria's oil and gas activities. This chapter will further show why the current regulatory framework and the regulatory agencies' challenges have historical antecedents that are partly responsible for continuous oil pollution in the Niger Delta.

Moreover, there is a need to provide victims of environmental damage with a new and better mechanism to pursue their claims in court, rather than reliance on the common law remedies that failed to yield appropriate results. Chapter four examines to what extent a PPP approach is enshrined in law in Nigeria. This chapter discusses the NOSDRA framework and other subsidiary legislation in the sector while appraising the extent to which the PPP is contained therein and the effect(s) on the operators. Chapter five looks at the regulatory potential of financial assurance to prevent and remedy environmental damage caused by oil and gas operations. As a solution to the research problem, this chapter critically evaluates specific financial security measures to determine which, if any, are most effective at ensuring that environmental damage is prevented or, where this is not possible, remediated by the polluter. It will also examine possible features of a financial assurance regime that can ensure the internalisation of NOSDRA-related costs. It is proposed here that a framework of operator

liability could complement a mandatory financial assurance regime to assist regulatory authorities in ensuring that operators internalise their NOSDRA-related costs.

Finally, chapter six this chapter ends with a summary and appropriate recommendations that may help improve the ugly situation of environmental damage caused by oil leak in Nigeria's Niger Delta region.

Chapter 2

Available Legal Response to Environmental Damage in Nigeria and Liability in Nigeria

2. Introduction

Nigeria has Africa's largest reserves of oil and gas within its borders.[1] Most of these oil resources exist in the Niger Delta and on the country's continental shelf.[2] The Niger Delta region comprises wetlands, which is a prosperous ecosystem that supports a diverse range of freshwater, flora, and fauna.[3] The previously pristine environment, in which wetlands are integral to the subsistence livelihoods of the communities, now holds the record of the most polluted ecosystem in the world.[4] Oil spills are a significant environmental issue within the Niger Delta Region.[5] Oil companies operate in highly delicate ecosystems in rural areas.[6] For five decades, the Niger Delta Region has experienced environmental pollution due primarily to oil-related activities of oil corporations (operators).[7]

This chapter aims to answer this thesis's first sub-research question: to what extent can polluters be held liable for damage to environmental resources arising from oil spillage in Nigeria? Under Nigerian law, it is the operator's responsibility to initiate the necessary clean-up under the extant environmental regulations in the event of any oil spill.[8] Spillage in Nigeria?

This chapter will also review the fundamental law applicable to oil spills in Nigeria, which is the Nigeria Oil Spill Detection and Response Agency Act (NOSDRA) and some instructive

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[1] PB Eregha, & EP Mesagan, 'Oil resource abundance, institutions and growth: Evidence from oil producing African countries.' (2006) 38 *Journal of Policy Modeling*, (3), 603-619. See also US Energy Information https://www.eia.gov/international/data/world/petroleum-and-other-liquids/annual-petroleum accessed 20th May 2023

[2] O Lindén, & J Pålsson, 'Oil contamination in *ogoniland*, Niger Delta'. (2013) 42 *Ambio*, 685-701.

[3] Ibid

[4] PC Nwilo, OT Badejo 'Oil spill problems and management in the Niger Delta' (2005), 1 IOSC pp. 567-570).

[5] Linden & Palson (n2) at 686.

[6] Ibid

[7] V Alves de Carvalho, 'The Clash between the Public Interest in Environmental Protection and the Self-Interest of International Investors: Evidence from the Nigerian Oil Spills' (2017) 8 QMLJ 27 28-34

[8] Oil Spill Recovery, Clean-up, Remediation And Damage Assessment Regulations, 2011, Part VII (65), p76... Department of Petroleum Resources, Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN), revised edition 2002,

environmental policies and guidelines that have to do with environmental liability from oil spillages in Nigeria.[9]

This chapter is divided into five sections: Section 2.1 The problem of oil and gas pollution in Nigeria, Section 2.2 Laws applicable to the oil and gas sector in Nigeria, infringement of which may result in *liability* for causing damage to the environment. Section 2.3 Critique of the laws and the conceptualisation of (i) what it means to be a 'polluter', that is, how to define the polluter - is it too broad, too narrow, for instance; is there any case law that helps us understand the interpretation of the terms that relate to what it means to be a polluter, for example, someone that operates or controls the activity; can the government be a polluter, for instance; why is it important that the definition of polluter is clearly and fairly defined, (ii) what does it mean to be held 'liable', that is; is it administrative, civil, criminal etc?; (iii) how do these laws define 'damage' (this is where you can draw the distinction between environmental damage and traditional damage), (iv) how do they define 'natural resources' (are there any 'gaps' in their coverage, that is do they, perhaps, not cover water damage or damage to soil, or the atmosphere etc. ?). Section 2.4 discusses the gaps in the legal framework for regulating liability for pollution damage under Nigerian Law, and Section 2.5 concludes.

2.1. The Problem of Oil and Gas Pollution in Nigeria

This section considers the problem of regulating the oil industry as it concerns environmental pollution from oil spills. Nigeria has maintained its dependence on crude oil as the primary revenue source of the economy for more than fifty years despite the ongoing and accumulating effects of oil exploration and production. Hence, Kadafa argued that the oil industry has significantly contributed to the nation's economic progress and advancement, even though

[9] Particularly the National Oil Spill Detection and Response Agency Establishment Act 2006, which establishes the regulatory agency (NOSDRA) and the Petroleum Industry Act (PIA) 2021. Oil Pipelines Act Chapter 338, Laws of the Federation of Nigeria 1990

unsustainable oil exploration practices have adversely affected the ecosystem.[10] Over the past fifty years, the extraction of petroleum products substantially affects the environment.[11] Extensive mangrove mortality, associated with oil exploitation, is a prevalent issue in the Niger Delta Region.[12]

While the time and area dimensions of oil accidents in Nigeria have been recorded,[13] many oil spills have not been officially reported.[14] An analysis of the data on oil spills in Nigeria indicates significant inconsistencies in the stated numbers. In Nigeria, the formal reporting procedure mandated for oil industry operators, particularly the joint investigation Visit, is characterised by a number of conflicts of interest and instances of technical and socio-political inaccuracies.[15] While approximately 86% of oil spill occurrences in Nigeria from 2006 to the present are directly associated with oil facilities controlled by five international oil companies (IOCs): AGIP, Shell, Mobil, Total, and Chevron.[16] 2 Of the 47 operators that operate in the Niger delta, NAOC (Agip) and SPDC (Shell) are responsible for about 75 per cent of spill events. While From 2006 to March 2020, Agip was responsible for a total of 5797 oil spills, releasing 172,997 barrels of oil, with an average of 30 barrels per spill. Meanwhile, SPDC has 3421 spills with a total of 306,708 spill releases, averaging at least 90 barrels per spill.[17] Even though neither DPR, NOSDRA, nor NNPC data were readily available before 2006, published research reports that the Department of Petroleum Resources estimated that 1.89 million

[10] AA Kadafa, Z Mohamad and F Othman. 'Oil Spillage and Pollution in Nigeria: Organizational Management and Institutional Framework' (2012.) 2 JE&ES. (4): 22-30
[11] T Bodo, LK David 'The petroleum exploitation and pollution in Ogoni, Rivers State, Nigeria. The community perspective. (2018) 14 European Scientific Journal.; (32): 197-212.
[12]Nwilo, Badejo (n4) p586
[13] N Zabbey, S Kabari, T O Adaugo 'Remediation of contaminated lands in the Niger Delta, Nigeria: Prospects and challenges' (2017) 586 Science of Total Environment 1 952–965
[14] AN Dibofori-Orji et al., 'Spatial and temporal distribution and contamination assessment of heavy metal in Woji Creek'. (2019) 111003 *Environ. Res. Commun.* . (11),.1-10
[15] M Watts, A, Zalik. 'Consistently unreliable: Oil spill data and transparency discourse. (2020) 7 Extr Ind Soc. (3):790-795.
[16] Ibid
[17] Watt & Zalik (n15) at 791

petroleum barrels were spilt in the Niger Delta between 1976 and 1996 a portion of the 2.4 million barrels of a contaminant in 4835 incidents that occurred during that time.

According to the Department of Petroleum Resources, now Nigeria Upstream Petroleum Regulatory Commission (NUPRC) (DPR) data, there were 16,476 spills between 1976 and 2015.[18] Another frequently cited source from a 2011 research by the Woodrow Wilson Centre showed roughly 546 million gallons of oil were spilled in Nigeria between 1958 and 2010.[19] This roughly translates to an average annual oil spillage of 10.8 million gallons from around 300 separate incidents. The average ratio of 42 gallons per barrel corresponds to an estimated total of around 257,142 barrels per year or more than 13,370,000 barrels over a span of 52 years.[20] Based on data from the NOSDRA oil spill monitor website, there have been a total of 13,091 oil spill incidents and a total discharge of 692,761 barrels of oil in Nigeria from 2006 to March 2020.[21] Out of these spill incidents, 71.5% of the incidents were related to crude oil, which accounted for 95.7% of the total spill pollutants.[22]

Nearly 3 million barrels of crude oil were spilt into the environment due to all these incidents, which occurred at different sites.[23] However, less than 30% of the spilled oil was successfully recovered.[24] The Niger Delta is frequently affected by oil spill-contaminated sites, which are the results of almost fifty years of oil exploitation, several events, and a poor oil spill response system.[25] Nigeria has about 2000 legacy sites that have been contaminated with oil spills.[26] A

[18] S Kabari, N Zabbey, & AP Onyena 'Implementing contaminated land remediation in Nigeria: Insights from the Ogoni remediation project' (2022) 115 Land Use Policy 106051, 1-12
[19] P Francis, D Lapin, P Rossiasco, 'Securing Development and Peace in the Niger Delta'. (2011). Woodrow Wilson International Center for Scholars Africa Program. https://www.wilsoncenter.org/sites/default/files/media/documents/publication/AFR_110929_Niger%20Delta_0113 accessed 20th May 2023.
[20] Ibid Francis *et al*. (p. 11),
[21] NOSDRA Oil Spill Monitor https://oilspillmonitor.ng/ accessed 2/04/2023
[22] Watt & Zalik (n15) at 791
[23] Ibid
[24] Ibid
[25] Watt & Zalik (n15) at 792
[26] AE Ite *et al,* 'Petroleum exploration and production: past and present environmental issues in the Nigeria's Niger Delta' (2013) 1 Nature 78–90.

report by Amnesty International in 2009 reveals that oil spills in the ND region can only be of a magnitude akin to that of the Exxon Valdez incident annually for the past five decades.[27] The Niger Delta is adversely impacted by oil pollution, which has wide-ranging effects on the environment, which include air, water, and land pollution. It also threatens biodiversity and public health in the region. Environmental experts' reports on the environmental condition of the Niger Delta have established that the region has transmuted into an ecologically barren ecosystem.[28] The effects of habitat destruction, biodiversity loss, and water pollution have far-reaching implications for the livelihoods of the people.[29] The bulk of oil spills result from human activities, such as drilling operations, pipeline explosions, loading at terminals, and illegal pipeline tapping.[30] Wunmi argued that operational standards variations are the primary causes of spills; hence, there is an inconsistency in the level at which operators bury oil pipelines in other countries, which is different from the standard in Nigeria.[31]

Despite these effects, several crude oil exploration and production operations in the Niger Delta are still being conducted without proper adherence to the necessary principles and practices of sustainable environmental management, which is mostly due to the absence of systematic and robust regulatory arrangements.

[27] Laden & Palson (n2) at 686
[28] ET Bristol-Alagbariya, 'Costs and Benefits of Energy and Major Natural Resources Extractive Industrial Operations on Communities: Spotlight on Host Communities Development Regime in Nigeria's Petroleum Industry Act, 2021'. (2023).11 IJDES, (1), 1-36.
[29] N. Zabbey *et al*. 'Remediation of contaminated lands in the Niger Delta, Nigeria: Prospects and challenges' (2017) 586 Science of the Total Environment (1) 952–965 At 954
[30] Laden & Palson (n2) at 686
[31] W William 'Citizenship Questions and Environmental Crisis in the Niger Delta: A Critical Reflection'. (2002); 11 Nordic Journal of African Studies'(3): 377-389.

Figure 2.1 shows pipelines on the surface.

Many young people in the affected villages and their surroundings are unemployed due to the destruction of their primary sources of income, namely farming and fishing.[32] As a response to these degradations, communities have devised untenable means of deriving livelihood, including bunkering (stealing oil), increased youth unrest, the emergence of violent factions, and a decline in government revenue.[33] Contrary to the Exxon Valdez and Deepwater Horizon incidents, oil spills in Nigeria do not result from a single significant disaster but from several sources. Primary contamination sources in Nigeria include accidental spills during the loading process, equipment malfunction, and oil theft.[34]

A) Technical or operational errors typically arise from equipment deterioration, inadequate risk assessment, deficient planning and insufficient safety training, and the influence of

[32] Laden & Palson (n2) at 686
[33] Ibid
[34] C.C Obeagu & K.E.I Oraegbunam, 'Shell Exploration and Production Company Limited vs National Oil Detection and Response Agency (NOSDRA) (2020) :Case Comment' 2 IRLJ 169

organisational culture on employee conduct.[35] B) Operational errors have resulted in multiple oil spills. For instance, in 2008, a Shell pipeline experienced two significant oil leaks, releasing at least 560,000 barrels of oil onto Bodo community land. The oil spills posed a substantial threat to the Bodo population and its coastal ecosystem and destroyed about 1000 hectares of mangroves. They caused the complete loss of marine species that the Bodo people rely on for existence.[36] Oil infrastructures are linked by pipelines, even to export terminals and offshore oil platforms. Insufficient data exists regarding the extent of unserviced oil pipelines, wells, flow stations, and pipelines with inadequate structural strength. However, it is common for these infrastructural elements to experience leaks or explosions, resulting in the release of crude or refined products into the environment.[37] C) The alleged surge in oil theft in Nigeria is deeply problematic.

According to reports, oil thieves pilfer approximately 400,000 to 600,000 barrels of crude oil daily.[38] Oil theft substantially impacts production capacity, affects the performance of the national budget, and encourages both external and internal borrowings, which has raised the country's debt profile.[39] However, our focus is on the environmental impacts here. Oil theft commonly involves tampering with oil pipelines (crude oil tapping) and deliberate damage (vandalism).[40] This process leads to oil spills, which in turn cause the degradation of the ecosystems, the loss of biodiversity, and contamination of the land. The social consequences are that operators often blame every oil spill on vandalism to create latitude for them not to compensate for the damage caused by oil pollution.[41]

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[35] G Babagana *etal* "Environmental impact of natural resources exploitation in Nigeria and the way forward.*"(2012) 2 JATEES* , .(2): 95-102.
[36] Babagana *etal*,(n29) at 96
[37] Ibid
[38] E Akpomera 'International crude oil theft: elite predatory tendencies in Nigeria..'(2015) 42; Review of African Political Economy (143):156-65
[39]O, Olubayo. "Oil exploration and ecological damage: the compensation policy in Nigeria." (2012): 33 *CJDS* (2) 164-179
[40] Ibid Oludayo at p165
[41] Ibid

Managing environmental problems efficiently requires well-designed public policies and harmonisation of the policies among stakeholders.[42] Environmental policies are launched to mitigate market failure due to negative externalities.[43] Yet public intervention impacts not only the social welfare of the economy as a whole but also shields vulnerable resources from extinction. Although the economics scholarship on the choice of environmental regulations tends to focus on efficiency, how instruments affect polluters and the environment can be far-reaching.[44] It determines the success or failure of a particular regulation, as operators might be more cautious with laws that hurt them.

2.2. Applicable Laws to the Oil and Gas Sector in Nigeria Whose Infringement May Result in Liability for Causing Damage to the Environment.

The starting point for this discussion is the provision of the Constitution of the Federal Republic of Nigeria 1999 as amended (CFRN). This is because every other law on environmental liability derives its validity from the Constitution.[45] This section outlines the primary framework law, the National Oil Spills Detection and Response Agency Establishment Act NOSDRA,[46] The Oil Pipeline Act[47] and the Petroleum Industry Act 2021. Below is a detailed discussion of these specific laws. This section will also discuss secondary legislations such as the Environmental Guidelines and Standards of the Petroleum Industry in Nigeria's EGASPIN regulations.

[42] S Ambec, L, Ehlers. Regulation via the Polluter-pays Principle. (2016). 126 EJ (593), 884-906.
[43] Ibid
[44] Ambec, & Ehlers (n42) at 889
[45] Constitution of the Federal Republic of Nigeria (CFRN) 1999 at Section 1 (3)
[46] The National Oil Spill Detection and Response Agency Establishment Act (2006) Section 6(3)
[47] Oil Pipeline Act CAP. 07 L.F.N. 2004

2.2.1. The Constitution of the Federal Republic of Nigeria (CFRN) 1999

The correlation between established human rights and the preservation of the environment has been characterised by many perspectives.[48] One perspective relates to environmental protection objectives that are necessary for exercising fundamental human rights.[49] An alternative perspective relates to environmental protection not as a prerequisite for human rights but as an essential component of their fulfilment, a breach of which will warrant liability. Put differently, "environmental rights" means redefining and broadening the scope of liability to human rights and responsibilities to ensure the environment is safeguarded.[50] Thus, this explains the extent of state responsibility for environmental harm.

The Constitution of the Federal Republic of Nigeria (CFRN or Constitution) 1999 is the fundamental basis for all environmental legal frameworks in Nigeria.[51] It is incontestable that the Constitution is the ultimate source of existence and legitimacy for all laws in Nigeria.[52] Section 1 (3) of the Nigerian constitution is unambiguous in the supremacy of the Constitution as established.[53] The Supreme Court in *Abacha v. Fawehinmi* held *inter-alia*[54] that it is necessary to get our bearings right. The Constitution is the supreme law of the land, and it is the *grundnorm*. Its supremacy has never been called into question in ordinary circumstances.[55] Given this provision, the Constitution establishes the ground for the state to prevent environmental damage through environmental protection.

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[48] D Shelton (*Human rights, environmental rights, and the right to environment* and *Environmental rights.* (2nd Routledge,) (2017) 509-544.
[49] Ibid
[50] Shelton (n48) at 510
[51]Section 37 of the National Environmental Standards and Regulations Enforcement Agency (NESREA) Act, 'pollution' is defined as "man-made or man-aided alteration of the chemical, physical or biological quality of the environment to the extent that is detrimental to that environment or beyond acceptable limits."
[52] AO. Enabulele, 'The Right To Life Or The Right To Compensation Upon Death: Perspectives On An Inclusive Understanding Of The Constitutional Right To Life In Nigeria' (2014) 3 *JSDLP*:(1) 99-117
[53] TF Yerima, FO Ekpa. 'Environmental Degradation as a Human Right Violation in Nigeria: A Re-Analysis.'(2016) 8 *KSULJ*; (1) 79-112.
[54]*Abacha v. Fawehinmi*, (2000) 6 NWLR 228
[55] A Oba. 'The African Charter on Human and Peoples' Rights and ouster clauses under the military regimes in Nigeria: before and after September 11'.(2004) 4 *AHRLJ* (2):275-302.

The concept of environmental protection in Nigeria can be drawn from Section 20 of the Constitution. It is the responsibility of the state to safeguard and enhance the environment and protect Nigeria's water, air, land, forest, and wildlife.[56] The Supreme Court, in giving impetus to this section, stated in *Attorney General of Lagos State v. Attorney General of the Federation and* Ors[57] *per Uwaifo JSC* that section 20 was introduced in Nigeria's constitutional history for the first time in the 1999 Constitution. This section did not attempt to define the extent of protection; therefore, it is not exhaustive. It is for the judiciary to give life and flesh to the bare letters of the law in a manner that advances the intent of the lawmakers and best effectuates the law.

Besides the constitutional provisions, courts globally are acceding to regulating environmental liability enforcement as a human right issue that has to do with life, which is a right recognised under national constitutions and international instruments.[58] Globally, the tendency to protect the right to a healthy environment is linked to the right to life. Hence, protecting the environment from pollution had better be incorporated under the fundamental rights as a component of the rights to life under the constitution.[59] In the last decades, courts worldwide have relied on the right to life to protect a pollution-free environment and halt environmental activities that are harmful to human life.[60] For example, in the case of Minor *Oposa v Factoran,*[61] children from a local village in the Philippines filed a lawsuit against the Secretary of the Department for Environment and Natural Resources of the Philippines. In the suit, the children demanded that the government cancel all existing timber licence agreements and stop

[56] Constitution of Federal Republic of Nigeria s.20
[57] *Attorney General of Lagos State v. Attorney General of the Federation and* Ors (2003) SWLR (PT. 168) 909
[58] The United Nations Charter on Human Rights (10th Dec 1948) and African Charter on Human and Peoples' Rights: Came Into Force, 21st October, 1986.
[59] European Parliamentary Assembly Environment and Human Rights Report, Draft Recommendations 7 and 9(a) and (b) (April 16, 2003), https://perma.cc/D8FD9MML. Accessed 20th August 2020
[60] MJ. Kane, 'Promoting Political Rights to protect the Environment' (1993) 18. *Yale J. Int'l L.*, (1)389 -411
[61] *Oposa v. Factoran* (296 Phil. 694, G.R. No. 101083, July 30, 1993

further issuance because the authorised deforestation around the village harmed their future. The Court allowed the application for an order of *certiorari* and overturned the lower court's decision, which dismissed the initial action. The revocation of wood licence agreements serves as a subtle reminder that Nigerian courts have the authority to mandate operators or licence holders of oil mining lease agreements to take appropriate measures to halt operations that are causing environmental damage.

Nigerian case law, on this point, is yet to grasp the progress made by other jurisdictions in the practical application of the right to protect the environment as if it is the right to life. Similar to the *Oposa* case, the Inter-American Court of Human Rights (IACHR) Commission in *Velásquez-Rodíguez v. Honduras*[62] affirmed that the right to life suggests that State Parties have a duty to take reasonable measures to avert circumstances that might lead to the violation of a person's right to life.[63] The IACHR has variously emphasised this point. In the Yakye Axa Indigenous Community v. Paraguay case,[64] the court affirmed that the right to life encompasses not only the protection against arbitrary deprivation of life but also the guarantee that circumstances preventing or hindering a dignified existence should not be created. One of the obligations that the state must inescapably undertake as a guarantor to protect and ensure the right to life is to develop minimum living conditions compatible with people's dignity and not create situations that hinder or impede it.[65] In this regard, the state must take positive, concrete measures to fulfil the right to a decent life, especially for vulnerable and at-risk persons close to the degraded environment whose care becomes a high priority.

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[62] *Velásquez-Rodríguez v. Honduras Judgment of July 29, 1988* https://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf accessed 29 May 2023

[63] Ibid Inter America's case n35 at Para 188

[64] **VU Thalia. "Addressing Health Crises through Courts? Climate Litigation in Latin America, the Right to Health and Vulnerable Populations." (2023),** https://core.ac.uk/download/588016829.pdf. Accessed 29th Mya 2023; Case of the Yakye Axa Indigenous Community v. Paraguay https://www.corteidh.or.cr/docs/casos/articulos/seriec_125_ing.pdf accessed 29 May 2023

[65] Ibid

The narrow-minded understanding of the right to life still controls the conception and reasoning of the Supreme Court and policymakers in Nigeria. This partly explains why the constitutionally guaranteed right to a healthy environment is hardly litigated before Nigerian courts. It is on the strength of this that scholars argue that the right to a healthy environment is yet to be taken beyond and into the traditional understanding of the right to life.[66] There is a dearth of legal precedents that specifically address whether the rights to life and dignity, as outlined in sections 33 (1) and 34 (1) of the Constitution, encompass the right to a clean, uncontaminated, unpolluted, and healthful environment.[67] Substantive rights, like the right to life, were tested in *Jonah Gbemre v Shell Petroleum Development Company of Nigeria*.[68] There, the Federal High Court held that the 1st and 2nd Respondents' activities in an unending gas flaring during their oil exploration and production activities in the applicant's community grossly violated their rights to life, including a healthy environment.[69] Reinterpreting extant rights depends on a progressive understanding of the judiciary, as the court must connect the alleged human rights violation and the environmental problem.[70]

The Nigerian Constitution does not contain substantive enforceable provisions that acknowledge the right to a healthy environment.[71] However, the African Charter on Human and Peoples' Rights explicitly recognises such rights and has been incorporated into Nigerian Law through the African Charter on Human and Peoples' Rights Act 2004.[72] As a result, this

[66] Enabulele (n52) at 110
[67] H.O.Ijaiya, 'Environmental Rights in Nigeria and India'. (2012), 9 IJED, (2),.153-160
[68] *Jonah Gbemre v Shell Petroleum Development Company of Nigeria and 2 Others*, Unreported Suit No. FHC/B/CS/53/05, Delivered on 14 November 2005.
[69] Ibid at paras 3-4
[70] DS Douglas-Scott, 'Environmental Rights in the European Union— Participatory Democracy or Democratic Deficit', in Alan E Boyle and Michael Anderson eds., Human Rights Approaches to Environmental Protection 210 (Oxford: Clarendon Press, 1996) 111
[71] See chap 2 of the CFRN 1999 as amended
[72] Yerima, & Ekpa (n53) 84; see also The African Charter on Human and Peoples' JUNE 27, 1981, OAU CAB/LEG/67/3/Rev. 5 (1981) reprinted in I.L.M 59 (1982) (hereinafter Africa Charter or the Charter). The African Charter is also called the 'Banjul Charter' because it was adopted in 1981 by the 19th Assembly of Heads of the State and Government of Organization of African Unity (OAU), the official body of African States in Banjul, the Capital of the Gambia.

Charter holds legal authority over all Nigerian authorities.[73] The utilisation of constitutional procedural rights for environmental protection can be regarded as enabling rights since they facilitate the active participation of individuals in safeguarding their environmental rights. The significance of these rights lies in their ability to facilitate a transparent and participatory decision-making process while ensuring that the government body is held accountable for its actions.[74] This is because environmental rights are not included in Chapter IV of the Constitution. However, there is a possibility that these rights may still be enacted through the extension of these procedural rights and powers. This argument is anchored on the premise that Nigerian courts and other jurisdictions have consistently and widely acknowledged that the right to life includes the right to have access to a clean and healthy environment.[75] Section 20 of CFRN is within Chapter 2 of the Constitution, denominated as Fundamental Objectives and Directive Principles of State Policy.[76] The effect of the provisions under Chapter 2 of the CFRN is that these provisions are impeded by Section 6 (6) (c) of the Constitution, which stipulates that the inherent judicial powers that the court possesses shall not enforce the provisions of Section 20, unless otherwise specified by the Constitution, regarding the conformity of any act or omission by any individual or authority, or any laws or judicial decisions.

Consequently, the implication is that Chapter 2, which incorporates the core goals and guiding principles of State Policy, is non-justiciable within Nigeria's legal setting.[77] Section 6 (6) (c) of the Constitution of Nigeria applies to Chapter 2 non-justiciable, precluding citizens from

[73] Yerima, & Ekpa (n53) 84;
[74] PE Amechi, "Litigating Right to Healhty Environment in Nigeria: An Examination of the Impacts of the Fundamental RIGHTS (Enforcement Procedure) Rules 2009, in Ensuring Access of Justice for Victims of Environmental Degradation,' (2010) 6 *Law Env't & Dev. J.* 320-334
[75] *Ransome Kuti v. A.G. Fe*d FWLR (pt 80) 1637(2001), it was held that allowing a person to live in an unprotected or downgraded environment could put their life at great risk
[76] A cursory look at the chapter containing the provisions pertaining to the fundamental objectives and directive principles of state policy reveals that they encompass a wide range of areas, including but not limited to political (Section.15), economic (Section.16), social (Section.17), educational (Section.18), foreign policy (Section.19), environmental (Section.20), cultural (Section.21), mass media (Section.22), and ethical (Section.23) objectives and responsibilities to citizens. The enforceability of these rights is impeded by the provisions outlined in Section 6 (6) (c) of the Constitution of 1999.
[77] Yerima, & Ekpa (n53) at p80

seeking legal remedies in court if their socioeconomic and developmental rights are violated.[78] The provisions outlined in Chapter 2 are intended solely as a guide for the Federal/State Governments in their efforts towards national development and in executing their routine governance responsibilities.[79]

In *Morebishe v. Lagos State House of Assembly*,[80] the court held that while Chapter 2 serves as a guide and focus of attention for all tiers of government, its provisions are not subject to legal enforcement. Thus, it is unarguable that Section 20 of the Nigerian Constitution does not explicitly grant Nigerian citizens the right to be protected from environmental damage or seek redress in court to enforce the right to live in a clean and healthy environment under the Constitution. Although Chapter 4 does not directly relate to environmental rights and concerns, provisions that may have implications for environmental protection do exist. Victims of environmental damage in Nigeria have attempted to rely on section 33 (1) to argue that their lives were in danger.[81] This section stipulates that all persons possess an inherent right to life and that no individual shall be deliberately deprived of their life, except in cases where a court has issued a sentence for a criminal offence for which the individual has been convicted in Nigeria.

Conversely, recognising that everyone enjoying the right to life can function independently and maintain a legal basis before environmental damage yields a capricious denial of life.[82] This shows that while human rights and environmental protection are distinct social values, the state can address their interrelated nature in a way that promotes both goals. The objective of

[78] O, A Ebanehita. "Improving the Human Rights Accountability of Multinational Corporations in the Oil and Gas Industry: A Case Study of Nigeria." A Thesis Is Submitted In Partial Fulfilmento of the Requirements of The Robert Gordon University for the Degree of Doctor In Philosophy 2021, https://core.ac.uk/download/478586619.pdf. Accessed 20th March 2023

[79] O. Awolowo 'Environmental Rights and Sustainable Development in Nigeria' *OIDA* 1923-6662 (online) www.oidaijsd.com Also available at http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev acceessed 10th May 2023.

[80] *Morebishe v. Lagos State House of Assembly* (2000) 3 WRN 134

[81] Enabulele (n52) at 101

[82] Ibid

environmental law, as articulated in the environmental liability goals, is to achieve remediation responsibility. However, the ultimate objective of environmental liability is challenging to delineate precisely because environmental issues such as soil and water pollution are subject to private law (tortious actions) and public law actions (remediation orders).[83] Both states and individuals in Nigeria can be responsible for environmental harm or initiate civil action for traditional damages and administrative courts, respectively. Globally, governments worldwide have adopted policies and laws to reduce the environmental impact of oil activities to appropriate levels and prevent environmental damage.[84] Civil liability for environmental harms is based on national law; civil litigation public law provisions are used to establish negligence or other tortious behaviour.[85] Nigeria's environmental law is predominantly public law. Numerous environmental protection laws have been enacted.[86] Although the obligations they impose are not always clearly defined, and effective enforcement mechanisms are often missing. Maybe because of the lack of real teeth, political pressure is vital for ensuring future compliance in Nigeria if exerted.

Environmental legislation in Nigeria can be classified into three distinct categories: (a) framework environmental legislation, (b) sectoral legislation, and (c) incidental legislation.[87] A framework of environmental legislation refers to a unified legal instrument encompassing a broad range of laws regulating environmental management.[88] Sectoral legislation pertains to particular facets of the environment and human actions. Incidental legislation has to do with

[83] L Bergkamp 'Liability and Environment Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context' (2002) 11 Rev. Eur. Comp. & Int'l Envtl. L. (2) 251 -256
[84] In Nigeria, the Constitution sets out a right to a healthy environment under section 20 CFRN 1999 as amended. This right, however, is often phrased as a duty of care of the government, which serves as a political statement, rather than an enforceable individual right.
[85] Bergkamp (n83) at 251
[86] Ibid
[87] O.C. Eneh and V.C. Agbazue, "Protection of Nigeria's Environment: A Critical Policy Review") (2011) 4 *JEST* (5) 490, 493
[88] This includes the PIA 2021 which repealed the Petroleum Act 1969, and all its subsidiary regulations repealed Federal Environmental Protection Act now repealed by the National Environmental Standards and Regulations Enforcement Agency Act Cap N36 Laws of the Federation of Nigeria 2010 and National Oil Spill Detection and Response Agency Act Cap N63 Laws of the Federation of Nigeria 2010.

laws that both the Federal/State Governments enact that affect the environment. This can be seen in certain legislations that have to do with environmental sanitation in some states in Nigeria.

2.2.2. The Petroleum Industry Act 2021

The primary regulatory framework governing Nigeria's petroleum sector comprises the recently enacted *Petroleum Industry Act (*PIA 2021),[89] as well as existing regulations and guidelines for liability for environmental damage.[90] Before coming into force, Nigeria was subjected to governance and regulation by the long-standing Petroleum Act of 1969, which is now considered oldfashioned, and other contaminat ion control rules govern oil and gas operations, which have all been repealed by the PIA 2021.[91] The PIA 2021 annulled roughly ten pre-existing statutes that regulated the petroleum sector before its implementation.[92] The PIA potentially has a range of outcomes, such as introducing new regulatory and governance frameworks, creating new licence categories, monetising Nigerian National Petroleum Company Ltd (NNPCL) and adopting a revised fiscal structure.[93] The PIA maintained a similar section to the previous Petroleum Act 1969. Of particular interest is the retention of the Minister's power to withdraw a petroleum prospecting

[89] *Petroleum Industry Act* Signed into law on 16 August 2021, the PIA 2021 replaced the old Petroleum Act 1969, Cap P10, LFN 2004

[90] Mineral Oils (Safety) Regulations (1997), Petroleum Regulations 1967, Petroleum (Drilling and Production) Regulations (1969) etc.; Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) (2002).

[91] Signed into law on 16 August 2021, the PIA 2021 replaced the old Petroleum Act 1969, Cap P10, LFN 2004Made pursuant to Section 8 (i) b (iii) of the Petroleum Act 1969, which empowers the Minister of Petroleum Resources to make regulations to prevent pollution of water courses and the atmosphere. Some specific regulations include The Petroleum (Drilling and Production) Regulations 1969, the Oil in Navigable Waters Decree No. 34, now Oil in Navigable Waters Act, Regulations 1968. The Oil Pipeline Ordinance Cap 145 of 1956 was amended by the Oil Pipeline Act 1965 and the Petroleum Refining Regulations 1974 and Associated Gas Re-injection Act.[91] The National Policy on Environment 1998, which survives the PIA 2021 has repealed these laws; hence we cannot discuss them in detail.

[92] Some of the laws which have been repealed by the PIA 2021 are the Petroleum Act 2004, Associated Gas Reinjection Act 1979 and its amendments, Hydrocarbon Oil Refineries Act No. 17 of 1965, Nigerian National Petroleum Corporation (Projects) Act No. 94 of 1993, Nigerian National Petroleum Corporation (NNPC) Act 1977 (as amended), Petroleum Profit Tax Act (PPTA) 2004, and Deep Offshore and Inland Basin Production Sharing Contract Act (DOIBPSCA) 1993 and its 2019 amendment

[93] M Kassim-Momodu 'Exercise of ministerial powers under Nigeria's petroleum industry Act' (2023) 41 J Energy & Natural Resources Law. (1), 105–115

licence or petroleum mining lease for non-compliance by the operator (licensee/lessee) with the prescribed good oilfield practices (international petroleum industry practices) or environmental obligations as mandated by the relevant law.[94] Good oil field practice was not defined in the 1969 Petroleum Act. However, the defunct Mineral Oils (Safety) Regulations 1962, updated in 1997, stipulated compliance with any internationally recognised and accepted system or codes of industry practice. Such as the American Petroleum Institute (API) codes or the Energy Institute, London codes would satisfy the requirement of the phrase good oil field practice, which has been integrated into the PIA 2021.[95] These institutions are responsible for disseminating globally acknowledged guidelines for optimal oil field conduct. However, it is important to note that these guidelines primarily focus on the technical requirements of oilfield equipment and do not encompass environmental regulations.

Given that Nigeria's environmental pollution arises from operators' abuse of these practices, it is imperative to reconsider and interpret the phrase 'good oil field practice' to include protection to prevent ecological damage.[96] Notably, the PIA 2021 has effectively attempted to address this deficiency.[97] By defining the phrase, good oilfield practices are the practices widely adjudged globally as safe, cost-effective, environmentally sustainable, and efficient in petroleum operations.[98] The technology must be either state-of-the-art or suitable for the specific operations. Also, these practices had better be implemented with no less stringent standards than those employed by petroleum companies in global operations.

The API, for instance, recommends using pipelines of higher specifications in areas deemed high risk or high consequence. There are areas where the possibility of pipeline sabotage and

[94] PIA (89), s. 96(1)(a)
[95] M.AG Bunter , 'World-wide Standards of Good Oilfield Practice… the Impact of the Blow-out, Deaths and Spills at the BP Macondo Well, the MC 252/1 01, US Gulf of Mexico' (2013) 11 OGEL (2) 3
[96] M Ele. 'Oil Spills in the Niger Delta-Does the Petroleum Industry Act 2022 Offer Guidance for Solving this Problem? (2022) 13 The Journal of Sustainable Development, Law and Policy,(1) 130-161
[97] Ibid
[98] PIA (n89) at Section 318

vandalism is expected or reasonably foreseeable.[99] Also, in the event of oil spills, the API has established industry standards to detect pipeline leaks—an emergency flow reduction device to execute automatic shutdown procedures to minimise or halt oil flow.[100] The Niger Delta is considered a high-consequence area, and the pipeline must meet API standards. However, as shown in Figure 2.1 above, it is in contrast to the API standards. The case of *Four Nigerian Farmers and Stichting Milieudefensie v Shell*[101] in the Dutch Court of Appeals factually and legally reaffirms these standards. In this case, Nigerian nationals sued SPDC for damages due to oil pipeline leaks. The court recently found SPDC liable for failing to set up a leak detection system (LDS) in its pipelines as a critical component of the API codes.[102] In the suit, the court ordered SPDC to pay damages the farmers for the damage suffered from the leakage.[103] In Nigeria, the NOSDRA's insistence on operators' implementation and enforcement of these leak detection devices is not always consistent. As observed, oil spills remain persistent for extended periods without being detected in ND.[104] On the extent of oil leaks, a leak reported at the Oil Mining Lease (OML) 29 in *Nembe* lasted 56 days before the incident was curtailed.[105] This again reiterates the failure to adhere to the best practices demonstrated in the API codes of conduct for operators.

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[99] R Steiner, 'Double standard: Shell practices in Nigeria compared with international standards to prevent and control pipeline oil spills and the Deepwater Horizon oil spill' (Milieudefensie, November 2010) 28. <https://www.foei.org/wpcontent/uploads/2014/01/20101109-rapport-Double-Standard.pdf; (accessed 23May 2023): Amnesty International, Negligence in the Niger Delta: Decoding Shell and Eni's poor records on oil spills' (Amnesty International, 2018) 5, 19 <https://www.amnesty. org/en/documents/afr44/7970/2018/en/ (accessed 31 May 2023)

[100] Computational Pipeline Monitoring, API 1130, 2nd Ed. 2002, codified under the US Code of Federal Regulation, 49 CFR s.195.444 https://law.resource.org/pub/ us/cfr/ibr/002/api.1130.2002.pdf accessed 31 May 2023

[101] *Four Nigerian Farmers and Stichting Milieudefensie v Royal Dutch Shell plc and another* [2021] ECLI:NL:GHDHA:2021:132 (*Oruma*), ECLI:NL:GHDHA:2021:133 (Goi) and ECLI:NL:GHDHA:2021:134 (*Ikot Ada Udo*).

[102] *Milieudefensie et al. v. Royal Dutch Shell plc*. ECLI:NL:RBDHA:2021:5339, 5.3

[103] Ibid

[104] Oguru, Efanga and Milieudefensie v RDS & SPDC, ECLI: NL: GHDHA: 2015: 3588, para. 1.1. https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI: NL: GHDHA:2015:3588accessed 2 May 2022

[105] Aiteo Finally Stops Bayelsa Wellhead Oil Spill After Over 30 Days **https://saharareporters.com/2021/12/08/aiteo-finally-stops-bayelsa-wellhead-oil-spill-after-over-30-days** accessed 20th January 2023.

2.2.3. The Environmental Guidelines for Petroleum Industry in Nigeria 2002, 2016 and 2018.

The Environmental Guidelines for the Petroleum Industry in Nigeria were formerly implemented by the Department of Petroleum Resources (DPR) until 2021, when the PIA was enacted. The PIA has transferred the EGASPIN mandate to a new Commission, which is The Nigerian Upstream Petroleum Regulatory Commission (NUPRC). Thus, the NUPRC, which manages the issuance of licences for oil industry operations, now implements the EGASPIN guidelines.[106] The NUPRC rules are environmental guidelines for the oil industry's operations, and they seek to mitigate the ecological effects of oil spills. The rules were first published in 1992 and revised in 2002, 2016 and 2018, with the latter being the most recent iteration.[107] The Environmental Guidelines for the Petroleum Industry in Nigeria create liability for oil pollution damage under Section 5.1, which imposes a responsibility on the operator to clean up oil spills and remedy the environment to an acceptable level. EGASPIN's mandate is to reduce oil pollution to the lowest possible level to preserve the environment. According to the EGASPIN rules, oil companies must initiate the clean-up process of any oil spill within twenty-four hours.[108] The target set by EGASPIN for clean-up appears strict; however, in real-world scenarios, the operators have shown a lack of desire and competence to clean up spills within the designated twenty-four timeframe.[109] As a result, the petroleum industry remains a significant contributor, both directly and indirectly, to the environmental degradation in Nigeria.[110]

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[106]The Environmental Guidelines for Petroleum Industry in Nigeria EGASPIN Published guidelines for the regulation of the oil industry in Nigeria in 1992

[107] NA Oshienemen *et al*. 'Environmental Policies within the Context of Compensation for Oil Spill Disaster Impacts: A Literature Synthesis' (2018) 212 Procedia Engineering' 1179–1186

[108] Oshienemen *et al.* (n102) at 1182

[109] E Adde and U Orizu Finally, Aiteo Halts Bayelsa Wellhead Blowout, Begins Remediation Process https://www.thisdaylive.com/index.php/2021/12/09/finally-aiteo-halts-bayelsa-wellhead-blowout-begins-remediation-process/ accessed 15th May 2022

[110] DS Olawuyi, Z Tubodenyefa.' Review of the environmental Guidelines and standards for the petroleum industry in Nigeria (EGASPIN)'.(2018) OGEES Institute.

The oil spill management prescribed by EGASPIN aligns with the global best practices and standards, such as international environmental law concepts, including the polluter pays principle.[111] This suggests that EGASPIN guidelines aim to implement optimal approaches by adhering to methods and protocols that align with global benchmarks.[112] Notwithstanding the determination to avert environmental damage through EGASPIN rules, implementation remains a crucial concern. While EGASPIN aligns with global best practices and standards, the inherent deficiencies prevent these international best practices from being achieved in Nigeria. The EGASPIN rules can be likened to target setting and intervention values to achieve environmental protection. According to Oluwayi, the target values specified in EGASPIN exhibit considerable leniency, thereby failing to effectively disincentivise environmental damage involving oil pollution.[113] EGASPIN target values mean the necessary soil quality level for sustainability and a complete restoration of soil functionality for human, animal, and plant life. Despite failing to meet the target over the years, it has never generated penalties such as licence withdrawal or fines.

On the other hand, intervention value pertains to soil quality, which seriously threatens soil functionality for human, animal, and plant life or has already caused significant impairment.[114] Crude oil concentrations exceeding the intervention values indicate severe environmental damage involving oil contamination. Nigeria has not established stringent benchmarks for target and intervention values to deter pollution, whereas the values specified in EGASPIN are considerably higher than normal. For instance, the maximum acceptable levels of benzene in water and soil are significantly higher and exceed the recommended thresholds established by

[111] Section 65 states that "such licencee/lessee shall bear all the costs associated with the investigation, remediation and monitoring, even when same are conducted at the discretion of the Director, Petroleum Resources".
[112] Oluwayi & Tubodenyefa (n110) at p 10
[113] Ibid
[114] Oluwayi & Tubodenyefa (n110) at p 10

global bodies such as the World Health Organization (WHO) by approximately threefold.[115] It is a sorry state of affairs where water, soil, and air are at risk to the people living in the Niger Delta region. These communities whose groundwater system is contaminated with benzene at over 900 times against the WHO guidelines evaluated self-reported health conditions and predicted cancer risks and hazards from inhalation exposure. While the legal basis of EGASPIN is clear, it is not an Act of parliament, nor has it passed through an extensive legislative debate process. This situation suggests that EGASPIN remains only a document guidance rather than having the force of law.[116]

2.2.4. Oil Pipelines Act 2004

Under this Act,[117] Section 11 confers the authority to build, upkeep, and run an oil pipeline, which encompasses the authority to construct, upkeep, and operate any other facilities along the path of said pipeline. that are ancillary to the pipeline's construction, maintenance and operation. Section 11(5) establishes the responsibility of a licence holder to provide compensation to individuals whose land or property rights are negatively impacted by the exercise of the rights allowed by the licence for any such negative effects that are not otherwise rectified. Section 11 5(c) provides compensation to individuals who experience harm due to pipeline breakdown or leakage, excluding cases where the harm is caused by their own actions or the intentional acts of others. The compensation covers any damage that is not already covered by other means.

The exemption clause under section 11 (5) (c) appears to release operators from liability arising from oil spillage. According to section 11(5)(c), individuals who make claims are not

[115] Benzene in Drinking-water Background document for development of WHO Guidelines for Drinking-water Quality Originally published in Guidelines for drinking-water quality, 2nd ed. Vol.2. Health criteria and other supporting information. World Health Organization, Geneva, 1996. https://cdn.who.int/media/docs/default-source/chemical-safety/benzene-in-drinking-water.pdf?sfvrsn=f4e4aca7_1&ua=1 (accessed 20/05/2023)
[116] Oluwayi (n110) at p9
[117] Oil Pipelines Act, Cap. O7 LFN 2004

eligible to receive compensation for any harm caused by oil spills resulting from criminal activities such as theft, sabotage, or illegal oil bunkering.[118] With this section, operators now proclaim that most of the oil spills in the ND region result from oil bunkering and vandalism, even without concrete evidence to support such claims.[119] In a research conducted by Amnesty International in 2018, the study revealed that a minimum of 89 spills were potentially misattributed to acts of sabotage or theft by Shell and Eni.[120] This has become the practice because where there is a third-party interference with an oil pipeline, compensation cannot be lawfully obtained under section 11(5) (c) of the OPA.[121]

In the context of environmental damage, violating a statutory or regulatory provision is the most essential criterion for a liability claim to succeed. Section 20 (4) OPA excludes liability for resources in unowned lands. Section 20 provides that when determining the decline in value of the land or interests in land owned by a claimant, th e court must evaluate the value of the land or the relevant interests as of the date right before t he licence was granted. According to Section 20(4) of the Land Use Act, compensation cannot be granted for empty land unless it falls under the specific parameters and circumstances outlined in the Act. Under this legislation, the licensee/operator must implement all feasible measures to prevent oil spillage.[122] In light of this, the operator's liability may be limited to 1) damage to owned land and 2) where an oil spill is not a result of third-party interference.[123] Thus, OPA's general duty of care to the licence holder may be reduced with these apparent

[118]OPA (n117), s.11(5)(c)
[119] Nwilo & Badejo (n1) at 568; see also *SPDC Nig Ltd v Chief T Edamkue*(2009) 14 NWLR (Pt. 1160) 1; SPDC v Ohaka(2008) 8 C.L.R.N. 94.
[120]Amnesty International, 2018) 5 https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR4479702018ENGLISH.pdf accessed 29 May 2023
[121] Oguru, Efanga and Milieudefensie v RDS and SPDC, ECLI: NL: GHDHA: 2021:132, para. 6.43, on 29 January 2021 https://uitspraken.rechtspraak.nl/inzien docu ment? Id=ECLI: NL: GHDHA: 2021:132 Given the predictability of harm resulting from a sabotage spill, a universal obligation to prevent or mitigate such harm through supplementary and preemptive actions can be inferred. Failure to do so would result in the operator being deemed responsible.
[122] EGASPIN (n106) Part VIII B 1.1.1
[123] OPA (117) section 20 (4)

exceptions. The duty imposed by this Act makes the likelihood of enhanced monitoring and surveillance a measure to mitigate any potential damage to pipelines. To do this, operators must install suitable leak detection systems (LDS) and automatic shutdown systems as a proactive step to tackle accidents that may result in environmental damage.

Recently, The Hague Appeal Court ruling of January 2021 aligns with this viewpoint. The Court of Appeal discounted SPDC's claim that the spills resulted from criminal actions such as sabotage, a burden the court determined the defendants were unable to meet.[124] Moreover, the court determined that SPDC's actions in response to the spills were negligent according to the legal standards established by common law. The court ruled that if SPDC had installed a 'Leak Detection System' (LDS), they would have been able to promptly shut off the pipelines and prevent the spills from continuing. Finally, the court determined that after 2011, RDS had a legal responsibility to take care of the plaintiffs by actively intervening with its subsidiary and ensuring the installation of an LDS in the Oruma pipeline. Similarly, in the case of *Bodo v Shell*, the court posited that the onus lies on the licensee (Shell) to ensure that appropriate measures are taken to sufficiently safeguard their facilities, installations, and pipelines against sabotage, vandalism, and theft. Failure to do so may result in the licensee being held accountable for any damages arising from such avoidable acts.[125]

2.2.5. National Oil Spill Detection and Response Agency Establishment Act 2006

Established in 2006, the National Oil Spill Detection and Response Agency Establishment Act (NOSDRA)[126] is the primary agency tasked with identifying and managing all oil spill incidents

[124] Four Nigerian Farmers, ECLI: NL: GHDHA: 2021:132 (Oruma) and ECLI: NL: GHDHA: 2021:133 (Goi). Jurisdiction and applicable law had already been determined in an interlocutory decision, see Four Nigerian Farmers and Stichting Milieudefensie v Royal Dutch Shell plc and another [2015] ECLI:NL:GHDHA:2015:3588. Four Nigerian Farmers, ECLI: NL: GHDHA: 2021:134 (Ikot Ada Udo). The court agreed in this case with the District Court's finding that the cause of this particular spill was sabotage, and ordered the parties to produce further evidence on the extent of the defendants' precautionary measures, and the consequences of this particular spill

[125] Bodo v Shell [2014] EWHC 1973 (TCC), para. 93

[126] The National Oil Spill Detection and Response Agency Establishment Act20006

in Nigeria.[127] The agency is responsible for the coordination and execution of the National Oil Spill Contingency Plan (NOSCP) in Nigeria under the International Convention on Oil Pollution Preparedness and Response Cooperation (OPRC).[128] The responsibility to ensure that detected spills are promptly responded to by operators, which was previously under the jurisdiction of the DPR, has been transferred to NOSDRA. The pervasive environmental pollution may have influenced this decision in the Niger Delta region. The management and regulation of diverse forms of oil and gas pollution, including but not limited to gas flaring, drill cuttings, seismic surveys, and effluent discharges from oil refineries, are currently overseen by the agency.

NOSDRA, like the defunct Petroleum Act 1969, exhibits a lack of responsiveness to contemporary technologies, ideas, effective administration, and transparency within the petroleum industry.[129] For example, the failure of the NOSDRA act to empower the agency to establish competencies for quick response to contain, clean up and remediate spills and recover costs has hindered the agency's capacity and efficiency. Notwithstanding that, the objectives of NOSDRA include ensuring a safe, well-timed and effective response to significant oil spills. The agency has had to rely on polluters to respond to spills despite establishing the mechanism to monitor and assist operators and contractors to direct the response and clean-up of the impacted sites to the best practical extent.[130] Above all, the agency is responsible for surveillance discovery of oil spills in the petroleum sector and enforcement of existing environmental legislation relating to oil spills in the Niger Delta. The penalty provisions within the Act and many laws governing the petroleum sector environment typically result in minor

[127] NOSDRA Act (n 126) ss. 1 & 5
[128] E O Ekhator, 'Environmental Protection in the Oil and Gas Industry in Nigeria: The Roles of Governmental Agencies'(2013) 5 *International Energy Law Review*, pp.196-203.
[129] M.N. Umenweke & W.A. Chukwuma, 'An Examination of the Petroleum Industry Act 2021 and the Quest for a New Nigeria' (2021) 2 LASJURE (2) 65-68
[130] NOSDRA Act (n126) s.5

fines instead of more severe sanctions.[131] For instance, Section 6 of the NOSDRA Act prescribes a punishment of N500,000 for refusal to report and clean up spills.

In contrast, Section 3 of the Oil in Navigable Waters Act prescribes N2,000 for the release of crude oil and other oily waste from fuel, lubricants, or heavy diesel oil into the marine environment. Section 5 of the Associated Gas Re-Injection Act prescribes minimal fees and penalties. Consequently, it is rare for a conviction to be recorded, leading to a prison sentence for violating these laws. The primary reason is that most of the punitive provisions within Nigeria's environmental regulatory statutes solely entail financial penalties, which are too lenient to deter operators.[132]

2.3. An Appraisal of the Conceptual Underpinnings of the Framework Laws

This section critiques the laws discussed above and their conceptualisation of (i) what it means to be a 'polluter', that is, how do they define the polluter, whether it is too broad or too narrow, to help understand the interpretation of these key terms that relate to what it means to be a polluter, the section answers the questions, for example, who is a polluter, is it operators who control the activity; or can the government be a polluter?, and also why is it important that the definition of polluter is clearly and fairly defined? (ii) What does it mean to be held ‘liable’? That is, is it administrative, civil, criminal, etc.? (iii) How do these laws define 'damage? (iv) How does the law define 'natural resources' (are there any 'gaps' in their coverage, that is, do they, perhaps, not cover water damage or damage to soil or the atmosphere?

[131] The Oil in Navigable Waters Act, Section 6 prescribes a punishment of N2, 000 for the discharge of crude oil, fuel, lubricating oil, or heavy diesel oil into restricted marine regions (Section 1), the discharge of oil into Nigerian seas (Section 3), and the lack of equipment in ships to avoid pollution (Section 5). According to the provisions of the Associated Gas Re-Injection Act, 2020.
[132] NOSDRA Act (n126) S 6 (2) and (3)

2.3.1. What does it mean to be a Polluter under Nigerian Law?

Who is a polluter remains unanswered when ascertaining to what extent the polluters' liability could be under Nigerian law. Under Nigerian law, a polluter is not expressly defined. However, by inference to the responsibility, sections 6 (2) & (3) of the NOSDRA Act place on the person responsible for oil spills and refer to him/her as an oil spiller. It may be said that a polluter is an oil spiller.[133] Section 6 suggests that an oil spiller by law shall report an oil spill incident to the relevant authority in writing within 24 hours after an oil spill incident; however, if the operator defaults to report the oil spill, it shall attract a penalty of five Hundred Thousand Naira (N500, 000) for each day of the failure to report the occurrence continued.[134] It goes further to state that Section 6 (3) provides that if an operator fails to clean up the impacted site to a practical degree, including remediation, he shall be liable to a further fine of N1,000.000, an equivalent of £518.80.[135] Going by the section above, it may be determined that the oil spiller is the operator liable for cleaning up an impacted site, and failure to clean up the area will attract a fine of one million Naira.[136] To put this in context, it is more expensive for polluters to comply with the law than to observe the law in breach. The Oil and Environmental Commission in Bayelsa state said in a report that after an investigation in 2019 on the impact sites of spills, it found that Nigeria will need US$12 billion as cleanup cost over 12 years in Bayelsa alone.[137] It is instructive to note that the commission used a United Nations model adopted to calculate the cost of clean-up of spills in Ogoniland also in Niger Delta more than

[133] NOSDRA Act (n126) S 6 (2) and (3)
[134] Ibid
[135] Ibid
[136] This is inferred because the interpretative section of the Act did not even define the oil spiller and who can fail into this category
[137] Macdonald Dzirutwe Bayelsa needs $12bn to cleanup Shell, Eni oil spills - Report. https://www.reuters.com/business/environment/nigeria-needs-12-billion-clean-up-bayelsa-oil-spills-report-2023-05-16/#:~:text=LAGOS%2C%20May%2016%20(Reuters),for%20most%20of%20the%20pollution. accessed 20th March 2024

a decade ago. This argument sheds light on the efficacy of the law and why there are no attempts at prevention.

Furthermore, assuming an individual is held accountable for any significant oil damage, it remains uncertain if this is justified, considering that determining the appropriate person(s) to be regarded as the polluter is complicated. For instance, who is the actual polluter? Is it the operator whose operations directly caused the oil spill or the Nigerian federal government who issued the oil licences and retained 60% of the equity shares in a joint venture or production sharing agreements with the operators? Or are the oil bunkers breaking unprotected surface-lied pipelines to steal crude oil and cause eventual spills? It is important to determine who the polluter is to ascertain the extent of their liability for oil spill damage under Nigerian Law, which remained contested and debatable.[138] Under Nigerian law, the oil spiller (operator), if responsible, is the polluter. However, suppose a spill occurs despite not being the spiller and the person liable. In that case, the operator is still expected to effect clean-up, maybe as a measure of goodwill; despite the fact that this is unsustainable, it remains the standard practice in the industry.

The expression of an oil spiller as a polluter looks simple on the surface, but the logic that oil spillers should clean up and remediate the environment after oil spills is challenging in Nigeria.[139] This is because the oil spiller appears restrictive; it limits the liability for oil spills to identified oil spillers, often operators. In addition to this limiting factor, section 11 of the Oil Pollution Act created a defence for operators over oil spills from their facility caused by third-party interference.[140] The problem is, if an oil facility operator is absolved because the oil spill emanating from his facility was an act of third-party interference, then who becomes

[138]J O. Ezeanokwasa, "Polluter-Pays Principle and the Regulation of Environmental Pollution in Nigeria: Major Challenges." (2018) *JL Pol'y & Globalization* 70: 45.
[139] NOSDRA (n126) Section 6(1) NOSDRA
[140] OPA (117) at section 11 (5) (c) OPA

responsible, particularly as third parties are alleged criminal elements and vandals?[141] This situation has become an albatross for liability for oil pollution damage in a reasonable percentage of oil spill incidents in the recent past.[142] Evidence shows Nigeria has over 2000 estimated legacy oil pollution sites unattended.[143] Large-scale oil pollution sites have become a depressingly familiar feature in the Niger Delta, with oil spillers often traced to third parties who are not captured in the definition of an oil spiller as polluters and how liability lies as in the case of not operators. Unlike the NOSDRA, which has a more restrictive approach to who is a polluter, The Environmental Liability Directive (ELD) has an expansive approach. For instance, ELD defines a 'polluter' as "somebody who directly or indirectly caused damage to the environment or creates conditions leading to such damage.[144] The mention of someone must be understood in generic terms, signifying that a polluter can be a natural or legal, such as corporations that cause damage.[145]

2.3.2. What it Means to be Held 'Liable'

When an oil spill occurs in Nigeria, the first reaction is that someone ought to be punished and the victims properly compensated for the damage arising from the spill. This reaction is reinforced by the fact that government and operators are often centrally involved in such incidents. Thus, seeking to lay blame on them is a way for society to express their helplessness/ weakness in the face of their wealth and power. But even if someone ought to be punished for oil spills, it is undoubtedly clear that this should be done using the available legal framework. What it means to be held 'liable', therefore, depends on the liability standard for environmental

[141] O.C. Eneh, Managing Nigeria's environment: The unresolved issues. (2011) J. Environ. Sci. Technol. 4, 250–263.
[142] Ibid
[143] Ibid
[144] The Environmental Liability Directive 2004/35/EC (ELD)
[145] A Bleeker, "Does the polluter pay? The polluter-pays principle in the case law of the European Court of Justice." (2009) 18 *European Energy and environmental law review* (6) 289-306

damage entrenched in the legal framework. In Nigeria, different liability standards are present, which include civil, criminal, and administrative liability standards.

According to Section 17 (4) of The Oil Pipelines Act, the granting of licences for oil pipelines is contingent upon adherence to laws on public safety and the avoidance of land and water pollution. The Act establishes a legal responsibility for a licensee or person who controls an oil pipeline to compensate anyone who experiences bodily or financial harm due to a rupture or leakage. In the case of *Shell Petroleum Development Company of Nigeria Ltd. vs. Abel Isaiah and Ors,*[146] the court determined that Shell pay compensation for damage to the claimant. The court found that installing pipelines, processing, and transporting crude oil to storage tanks are components of petroleum mining activities. Thus, if an accident occurs while transporting petroleum to storage tanks, it might be attributed to or associated with or related to mines, minerals, oil fields, and oil extraction.

Similarly, in the case of Nigerian *Agip Oil Co. Ltd. v. Akpati & Others,*[147] a pipeline carrying the appellant's crude oil leaked, causing oil to pour over the respondent's fish pond and canals, upholding the lower court's ruling the Court of Appeal, found the appellant liable for the oil leak and resulting losses and ordering the appellant to pay N35,000,000 as general damages. While compensation is provided for the traditional damage experienced by individuals, primarily concerning their agricultural lands, ponds, crops, structures, and economic trees, through civil liability claims.[148] There is no form of compensation for environmental damage to recover the loss of natural resources; at best, the law mandates the clean-up and remediation of the impacted sites to the state they were in before the incident. Section 6 (4) OPA expressly prohibits compensation from being awarded with respect to unoccupied land, except to the

[146] The Shell Petroleum Development Company Of Nigeria Limited V. Abel Isaiah & Ors LLJ-SC (2001)
[147] *Nigerian Agip Oil Co Ltd v Akpati & Others* (2018) LPELR 45145 (CA).
[148] OPA (117) at Section 6

extent and in the circumstances specified and defined in the Land Use Act. Any damage arising from unoccupied land that no person can claim against the operators will go unremediated and uncompensated.

In addition to the civil liability, the NOSDRA created a two-level administrative liability: 1) Section 6 (2) of the NOSDRA mandates the operator to report a spill to the appropriate authority, a written notification must be sent not later than 24 hours following the incident of an oil spill.[149] The failure to report shall attract a penalty of five Hundred Thousand Naira (N500 000.00) (equivalent to approximately £258) for each day of failure to report the occurrence. 2) Section 6 (3) prescribed the action to be taken on the affected location, including the necessary actions to fix the problem; if it does not comply, it will result in an additional penalty of one million Naira. (equivalent to approximately £700). The imposition of the duty to clean up and remediate the impacted sites is one of the principles guiding the oil and gas environment.[150] The NOSDRA Act does not contain provisions regarding natural resource damages or causes of action for liability for harm to public resources. The two-level liability for failure to report an oil spill and refusal to clean up shows a limited focus on the operator's liability for environmental damage.[151] The two categories of liability the NOSDRA acknowledges following an oil spill incident are fault-based liability (based on refusal or negligence to report a spill) and strict liability (prima facie responsibility to clean up spills with defences).[152] The NOSDRA and all other liabilities laws do not cover environmental damage from oil spills, to which liability or compensation under specific civil liability provisions depends.

[149] NOSDRA (n126) section 6 of NOSDRA
[150] EGASPIN (n84) Part VIII B 1.1.1
[151] OPA (117) section 11
[152]NOSDRA (n126) section 6 of NOSDRA

However, the discretion to exempt an operator from liability lies with the regulatory agency, where the operator shows that he was not at fault or negligent and that the environmental damage caused resulted from an oil spill, which is an event expressly authorised by the regulatory authority. Apart from the so-called regulatory compliance defence, regulatory bodies may also decide to exempt an operator from liability where he can demonstrate no liability by showing that he was not at fault or negligent and that the environmental damage caused resulted from acts of third parties.[153]

The liability laws cover civil liability for victims of oil pollution damage to claim compensation for personal injury, property damage and economic loss. These laws do not provide for restoring or replacing damaged public resources.[154] Thus, civil liability is enshrined in Nigerian common law doctrines and has become an established part of these liability laws.[155] The Nigerian common law comprises negligence, strict liability, and nuisance, which are included in existing environmental liability in Nigeria.

Courts in Nigeria have used the common law doctrines to hold operators/defendants liable for damage to plaintiffs' ponds, lakes, and farmlands.[156] In the case of *Shell Petroleum Development Company of Nigeria Ltd against Abel Isaiah* and others,[157] the trial Court and the Court of Appeal upheld the plaintiff's claim for damages based on the common law doctrines

[153] OPA (n117) Section 11 5 c

[154] Oil Pipelines Act (1956) Cap. (226) §11(5) (Nigeria). See also Nigerian Minerals & Mining Act §125 (2007); Petroleum Act (1969) (Cap. 350) §37, sched. 1 (Nigeria) (obligating operators to pay "adequate compensation" to any person whose fishing rights are interfered with by the unreasonable exercise of the operator's rights)

[155] OPA (n117) at sections 11(5) and 20, Section 125 (b) of the Minerals Act, and Section 19 of the NOSDRA Act all establish grounds for compensating victims of oil pollution damage. For clarity, the Oil Pipelines Act Section 11(5) Act 1965 requires a licence holder to compensate any person whose land or interest in land is injuriously affected by exercising the right conferred by the licence. Section 19 authorises NOSDRA to mediate between impacted communities and the oil spiller to ensure remediation and compensation is paid.

[156] *Edhemowe v. Shell BP Petroleum Dev. Co. of Nigeria, Ltd*., Suit No. UHC/12/70 (Ughelli High Court Jan. 29, 1971) (unreported) (discussed in Ambrose 0.0. Ekpu,' Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria',(1995) 24 DENV. J. INT'L L. & POL'Y (55), 93

[157] *Shell Petroleum Development Company of Nigeria Ltd* [2001] 2 NWLR (Pt 723) 168 at 178-179

of negligence and strict liability and upheld compensation for the victims.[158] Similarly, In *San Ikpede v Shell Petroleum Development Company Nigeria Ltd*,[159] *Umudje & Anor v Shell-BP Petroleum Development Company Nigeria Ltd.*[160] The Supreme Court of Nigeria also upheld claims for compensation to victims of oil spills based on the common law doctrines stated above.

In addition, courts have expanded the scope of a private cause of action to encompass compensation based on the common law principles to hold operators liable for traditional damages on behalf of entire communities.[161] For instance, in *Agbara v. Shell Petroleum,* the Federal High Court granted the *Ejama-Ebubu* Community the sum of 14,500,000,000 billion Naira as compensation for the damages caused by an oil leak. The award comprised N4,500,000,000 billion allocated for specific damages, including agricultural damage, forestry, fishing and hunting losses, and health hazards, and N10 billion was awarded as punitive damages. While the court noted the need for remediation and clean-up of the affected area to baseline status, it did not order a restoration or replacement of environmental resources lost to environmental damage.[162]

While civil liability for oil pollution damage is limited to only private tort actions, potential victims are deterred from initiating any such claims due to this prolonged process of litigation in Nigeria. Hence, victims and operators tend to favour resolving disputes outside the court system through settlements. For instance, the lawsuit filed by *Isaiah Ogar against Chevron* aimed to obtain a legal remedy for an initial claim of N100 million but was ultimately resolved through an out-of-court settlement for a meagre sum of N20 million after almost ten years of

[158] RA Mmadu,"Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from Kiobel." (2013), 2 *Afe Babalola University: Journal of Sustainable Development Law and Policy* (1) pp. 149-170
[159] [1973] MWSJ 61 (Per Ovie Whiskey J)
[160] *Umudje v. Shell BP Petroleum* Dev. Co. of Nigeria, Ltd. (1975) 9-11 S.C. 155
[161] *Agbara v. Shell Petroleum Dev. Co. of* Nigeria, Ltd., No. FHC/ASB/ CS/231/2001 (June 14, 2010).
[162] Ibid

seemingly endless legal proceedings. Similarly, in *Ekeremor Zion v. Shell, a* case was filed in March 1985, and the lower court delivered a judgment with a compensation of N30 million awarded to the claimant in 1997. Shell refused to comply and instead appealed against the judgment delivered on 27th May 1997, with the Court of Appeal affirming the judgement on 22nd May 2000 and dismissing Shell's appeal. Shell further appealed the judgment, and The Supreme Court upheld the decisions of both Courts below in 2015 after 30 years of the legal battle.[163] Like many other operators, Shell exploited the weak legal/court systems to its advantage and minimised their liability while the degradation continued. The above legislation indicates that the primary objective is not to hold operators accountable for environmental damage and the degradation of natural resources in Nigeria, and this falls below international best practices as already espoused in this work.

2.3.3. How Does the Nigerian Law Define the Damage?

When oil spills occur, they cause harm to both traditional damages, that is, harm to people and the environment, which is harm to the natural resources in the environment.[164] Traditional damage is damage to people's health, properties and economic losses,[165] while damage to the environment's natural resources, such as water, air, wild animals, sea fauna and flora, wild fish, aesthetic and natural value, and the common good of nature is environmental damage.[166] The focus of this chapter is basically on environmental damage and excludes traditional damage, as explained above.

[163] Ikechukwu Nnochiri '32 Years After, S-Court Orders Shell To Pay N30m To Four Delta Communities Over Oil Spillage' https://www.vanguardngr.com/2015/06/oil-spillage-s-court-orders-shell-to-pay-n30m-to-four-communities-in-delta/ accesed 20th August 2023

[164] M Lee Tort, regulation and environmental liability Published online by Cambridge University Press: 02 January 2018

[165] B J. Goldsmith 'Environmental Damage Liability Regimes Concerning Oil Spills - A Global Review And Comparison'. (2014).*International Oil Spill Conference Proceedings* (1): 2172–2192.

[166] P Laurent, and H Bocken. "Environmental damage and Belgian law." *Marine resource damage assessment: liability and compensation for environmental damage*. 2005 Dordrecht: Springer Netherlands, 27-41.

Environmental damage must be explicitly defined when examining the liability for environmental damage. Currently, the regulatory framework for liability in the oil industry and as a sector, the NOSDRA, does not define environmental damage but deplores oil spillage and multiple meanings.[167] The concept of 'environmental damage' in Nigeria has no separate meaning. It can be understood broadly to encompass several forms of harm resulting from the degradation of the environment (both traditional and environmental damages).[168] Oil spillages, oil pollution, environmental degradation, and environmental pollution damage are some words used in literature to describe environmental damage.[169] To the average Nigerian, environmental damage follows the visible damage they see, like living next to spites, lack of access to drinking water, dying of cancers, dead crops and aquatic life.

This narrow view of environmental damage in Nigeria generally reflects the harms for which liability for compensation provided is a private cause of action, as seen above and the destruction of nature that liability for restoration is not far from reality. Thus, it is argued that the NOSDRA Act does not separate the harm in line with the Lugano Convention of 1993. That distinguished environmental damage as damage to natural resources encompassing land, fish, wild animals, air, water, and drinking water, which do not comprise NOSDRA liability, while traditional damage refers to loss of property, bodily injury, and loss of life.[170] The

[167]JA Adoga-Ikong, EB. Inyang 'Re-Echoing the Common Law Principles in Controlling Oil Pollution in Nigeria'. (2017) Calabar Journal of Public and International law.;(2) 1-7

[168] F Maes (ed.), Marine Resource Damage Assessment, Liability and Compensation for Environmental Damage, Springer 2005 27–41. Printed in the Netherlands

[169] EA, Premoboere, and M.O Raimi. "Corporate civil liability and compensation regime for environmental pollution in the Niger Delta." (2018) 5 *International Journal of Recent Advances in Multidisciplinary Research* (6) 3870-3893.

[170] Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment - Explanatory Report - [1993] COETSER 2 (21 June 1993) Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. http://www.worldlii.org/int/other/treaties/COETSER/1993/2.html#:~:text=The%20Convention%20on%20Civil%20Liability,the%20European%20Ministers%20of%20Justice. Accessed 20th Dec 2022

recognition of compensable harm to people is an established aspect of tort and Nigerian Law.[171]

However, a broader view of environmental damage is expressed under Article 2 of the Environmental Liability Directive regarding the prevention and remedying of environmental damage.[172] According to The ELD, environmental damage refers to damage done to protected species, natural habitats, water, and soil.[173] The scope of the 'environmental damage' in the ELD is unambiguous. The ELD deals with pure environmental damage, and it is on the powers and duties of the public authorities to determine and assess the extent of environmental damage that has occurred and agree with the responsible parties of the damage (or threat thereof) the preventive or remediation measures to be taken.[174]

Under the ELD, the obligation of operators responsible for damage or the immediate threat of it is prevention in case of an imminent threat of damage. Immediate control or containing measures during the incident and remediation measures, including primary, complementary and compensatory remediation.[175] Primary remediation encompasses all remedial actions conducted directly at the impacted location, with the aim of restoring the original state of the damaged natural resources and impaired services if the initial remediation efforts fail to completely restore the damaged site to its previous state. In such a case, additional remediation procedures should be implemented at a different site potentially connected geographically to the damaged site. If there is a delay in fully restoring the natural resources and services, it is necessary to implement compensation measures to address the interim loss.[176] The ELD does

[171] See Section 11 (5) (C) OPA see also Faure, M.G 'Environmental Liability of Companies in Europe' (2022) 39 Ariz J Int'l & Comp L (1)1-151
[172] Directive 2004/35/EC of the European Parliament and of the Council 2021/C 118/01
[173]E .H. P. Brans, 'Liability for Damage to Public Natural Resources under the 2004 EC Environmental Liability Directive Standing and Assessment of Damages' (2005) 7 Envtl L Rev 90-109
[174] Ibid
[175] Ibid
[176] Brans, 'Liability for Damage to Public (n173) 105-107

not cover criminal liability, although there is a form of amendment to this, or liability for traditional damage which falls under national civil law (property damage, personal injury).

In the United States, the term natural resources' is employed. Natural resources are land, fish, water, and wildlife owned or governed by the United States, a state, a local authority, a foreign authority, or an Indian tribe. [177] While the concept of environmental damage is straightforward and clear in the US and Europe, the definition of environmental damage in Nigeria is still unclear and poorly developed. The broad use of numerous terms, such as deterioration, oil pollution, degradation, etc., that share a similar meaning to describe harmful environmental effects is primarily what described this concept. Even though the debate regarding the precise definition of environmental damage is far from over, the merit of the discussion above may help the perspective in Nigeria, where environmental damage is unfortunately not dealt with explicitly and separately under any Nigerian Law.

2.3.4. How 'Natural Resources' are Defined and the 'Gaps'

This section examines how the concept of natural resource damage is understood under the Nigerian liability law, the extent of coverage and the gaps, if any. Under Nigerian law, natural resources are raw materials or substances, such as forest reserves, wildlife, land, water, air, minerals, and energy resources.[178] The notion of pollution is mainly used in Nigeria's legal system to refer to an alteration in the environment resulting from the release of substances, radioactive or dust, or heat from any human activity that harms human health, well-being, structure and productivity of natural ecosystems.[179]

In light of the above, pollution damage is defined as the damage suffered by identifiable individuals or natural resources, which implies damage to the natural elements. There are

[177] Brans, 'Liability for Damage to Public (n173) 105-107
[178] See section 164 of the Nigerian Mining Act 2007
[179] Ibid

several constraints in the Nigerian liability law regarding compensation for pollution damage that apply to aspects of this harm to natural resources.

The NOSDRA liability for pollution harm in section 6 (2) creates fault-based liability. Section 6 (3) creates administrative liability for oil spillers to be held liable for clean-up and remediating impacted sites. Section 19 (c) provides that the Agency shall undertake a post-spill impact assessment to determine the extent and intensity of damage and long-term effect (d) to advise the government on the possible effect on the health of the people and ensure appropriate remedial action is taken for the restoration and compensation of the environment. (e) Assist in mediating between the affected communities and the oil spiller, which allows civil liability for oil spillers to be held liable for the harm they create and suffer by individuals or communities.

Violating these specific provisions or any other regulation that breaches the general duty of care (negligence) cannot give rise to liability that guarantees restoration except compensation in tort for victims of oil pollution damage.[180] Even though there is evidence of harm or destruction of natural resources, it can be assured that only harm to health, physical damage, and economic losses, among others, will be compensated. Damage to these resources has never been historically compensable (restoration), except to the extent of value people derived from it as a natural resource.[181] Unfortunately, these restoration costs are not always included in the market price of petroleum products, and it can be challenging to set a penalty that appropriately captures these costs.[182] For clarity and insights into natural resource damage, it is important to

[180] O Adekile 'Compensating victims of personal injury in tort: The Nigerian experience so far'. (2013) 9 *Acta Universitatis Danubius. Juridica*.(2):144-158; see also RH Fallon 'Bidding Farewell to Constitutional Torts'. (2019) 107 California Law Review. (3):933-98.

[181] ET Bristol-Alagbariya,. 'Costs and Benefits of Energy and Major Natural Resources Extractive Industrial Operations on Communities: Spotlight on Host Communities Development Regime in Nigeria's Petroleum Industry Act, 2021'. (2023) 11 *International Journal of Development and Economic Sustainability*, (1), pp.1-36.

[182] N Oranye and A Adenikinju, £55M Shell Petroleum Development Company's Compensation to the Bodo Fishermen and Community: The Effectiveness of Polluter Pays Principle in the Liability Settlement. In *SPE Nigeria Annual International Conference and Exhibition*. Paper presented at the SPE Nigeria Annual International Conference and Exhibition, Virtual, August 2020. doi: https://doi.org/10.2118/203763-MS accessed 10th March 2023 . see also John Vidal,'Shell announces £55m pay out for Nigeria oil spills Settlement avoids London High Court case and will be split with £35m paid directly to affected individuals and £20m for the Bodo

consider the understanding of US and EU natural resources under their liabilities framework. (i.e. the Comprehensive Environmental Response, Compensation and Liability Act and ELD):

Scholars define damage to natural resources as a change that has a measurable adversarial impact on the quality of any of its components and is considered environmental damage'.[183] This includes the environment's use and non-use values, its capacity for sustenance, and its ability to sustain an acceptable value of life and a viable ecological balance.[184] The literature on valuing natural resource damage distinguishes types of values for natural goods. Therefore, a natural good may possess both use value and passive values (such as existence and intrinsic value). The concept of use values refers to the worth of natural resources based on their utilisation by individuals, such as the use of fish in a lake by fishermen, the use of beaches by tourists and the use of a forest by hunters.[185] In addition to these use values, the concept of passive (or "non-use") values refers to the value of goods based just on their existence.[186] Although humans may not utilise certain portions of nature, they nonetheless possess inherent value.[187] However, whereas it is reasonably straightforward to determine the financial worth of natural goods that have commercial value, such as timber or fish, that are traded in the market, it is exceedingly challenging to assign a value to passive values.[188] While the notions of 'use values' and 'passive values' are not used in the Nigerian legal system, the non-economically quantifiable losses in the environment might be considered as a decline in the intrinsic worth of goods within the environment.

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community2020,August.http://rgiocuments.s3.amazonaws.com/e80bc4dcc0951c5dff32f2e3814ae4e0ff5621df.pdf. accessed 2 June 2023.

[183]A Jernelöv, 'The threats from oil spills: now, then, and in the future'. (2010) 39 Ambio. (5):353-366. *See also D Ibrahima* 'Recovering Damage to the Environment *per se* Following an Oil Spill: The Shadows and Lights of the Civil Liability and Fund Conventions of 1992'.(2005) 14 *RECIEL (1) 63-72.* Hereinafter referred to as CERCLA' CERCLA came into force in 1980 and was fundamentally reviewed in 1986 by the Superfund Amendments and Reauthorisation Act. (land, birds, fish, wild animals, air, water, and drinking water.)

[184] Ibrahima ibid at 65

[185] Ibid

[186] Ibid

[187] Ibid

[188] Ibid

It should be noted that damage to natural resources is difficult to recover in Nigeria. The baseline condition is the condition the affected natural resources and services would have had if the incident that caused the damage had not occurred. In the NOSDRA Act, no guidance is provided on how to determine whether a specific oil spill caused significant adverse changes to the affected natural resources and the services provided by these natural resources. One of the factors to be considered is the capacity of these natural resources for natural recovery.

Within the current framework of tort law, there are several impediments that hinder the complete compensation for harm caused to the environment. The injury to public natural resources does not align with compensable forms of traditional damage, as it does not include financial loss or fall under recoverable non-financial or intangible losses. Moreover, as no individual experienced direct damage when harm was caused to public natural resources, the issue of who has the right to seek compensation for the damage to these resources arises. Another issue pertains to privately possessed natural resources. While *locus standi* is not a significant obstacle in this case, the ownership of natural resources does not guarantee the restoration of these resources. Due to lengthy delays and litigation costs, the owner may hesitate to commence legal proceedings for compensation or allocate the monetary compensation received towards restoration efforts.

2.4. Gaps in Nigeria's Environmental Damage Provisions Law

2.4.1. No Clear Definition of Environmental Damage in the Legal Framework

Neither the NOSDRA nor any other Act gives a precise definition; however, oil contamination may be deemed as environmental harm within the framework of liability rules.[189] Pollution is any alteration of the environment's chemical, physical, or biological characteristics caused by

[189]Section 164 of the Nigerian Mining Act 2007 and section 37 of the National Environmental Standards and Regulations Enforcement Agency Act (NESREA) 2007

human activities that harm the environment, exceeding acceptable limits.[190] Environmental damage provisions such as section 37 of NESREA, section 6 and 19 NOSDRA, and 164 of the Mining Act represent the philosophy of law that aims to restore the injured resources to the condition they would have been but for the incident and compensate the public for the interim loss.[191]

Generally, under Nigerian law, types of restoration are personal damage, property damage, and loss of profit, also known as pure economic losses, sustained as a direct result of damage to the environment and damage to the ecosystem and other living components of the environment.[192] Only the last item on this list could legitimately be referred to as an act that is harmful to the environment in and of itself.[193] Others are, more or less, equivalent to the basic types of damage called traditional damages that are already protected by tort law in many jurisdictions, including Nigeria.[194]

Regrettably, most legal instruments in Nigeria that deal with regulation or liability do not define these Natural resources separately but group them under a single concept covering everything. The losses incurred by the host communities are often remedied as payment of compensation pursued through civil claims of common law.[195] However, legal proceedings initiated by dissatisfied members of the host communities based on common law frequently yield unsatisfactory results.[196] The application of common law is frequently employed due to the inadequacy of remedies provided by the statutory framework for environmental protection

[190]National Environmental Standards and Regulations Enforcement Agency Act NESREA 2007 https://www.nesrea.gov.ng/ accessed 20 June 2023
[191]NESREA s.37 defines pollution signifying liability for resources loss as a result of man-made activities, the thinking of restoration and compensation is missing from the Oil and gas frameworks such as NOSDRA and EGSAPIN, PIA, OPA.
[192] Jernelöv (n183) at p357
[193] Ibid
[194] EN Olowokere, "Oil Exploration in the Niger Delta: A Critique of the Legal Framework for Compensation." (2019) 49 *Envtl. Pol'y & L.* (4-5) 276-286
[195] Ibid
[196] See section 19 of NOSDRA 2006 and section 20 of Oil Pipeline Act 2004

in Nigeria, which does not explicitly address the harm caused by the oil and gas industry along these lines for the restoration of natural resources.[197] Most international instruments dealing with liability fail to provide distinct definitions for these components of harm.[198]

2.4.2. Absence of Financial Security Mechanisms

To be able to cover the risk of liability, scholars suggest the implementation of financial security requirements targeting particular enterprises whose activities have adverse effects on the environment. Alberto Monti proposed one example of an institutional model that addresses environmental harm.[199] This model integrates various components, including regulation, liability, funds, and insurance.[200] Based on these models, it is imperative for a company seeking market entry or environmental sustainability to fulfil specific financial requirements.[201]

Various financial instruments, such as environmental insurance, can fulfil these requirements.[202] Operators holding oil exploration or mining permits or notification certificates for classified installations and activities designated by the government as harmful to the environment could be obligated to furnish financial assurances in cases where they may be held responsible for environmental damage or degradation. According to this policy, there is an absence of a national obligation in Nigeria for financial security across all classified installations. In contrast, the government or administrative authorities determine the type and

[197] NOSDRA (n126) s.19; OPA (n117) s.20
[198] United Nations Environment Programme, Liability and Compensation Regimes Related to Environmental Damage: A Review by UNEP Secretariat for an Expert Meeting 13–15 May 2002, Geneva (UNEP, 2002), at 6. See also M.C. Maffei, 'The Compensation for Ecological Damage in the Patmos Case', in F. Francioni and T. Scovazzi (eds), International Responsibility for Environmental Harm (Kluwer Law International, 1991), at 381; and B. Sandvik and S. Suikkari, 'Harm and Reparation in International Treaty Regimes: An Overview', in P. Wetterstein (ed.), Harm to the Environment: The Right to Compensation and the Assessment of Damages (Clarendon Press, 1996), at 61.
[199] A Monti, 'Environmental Risk: A Comparative Law and Economics Approach to Liability and Insurance', (2001) 9. EUR. REV. PRIVATE L (1). 51-.
[200] Ibid
[201] Ibid
[202] Ibid

quantity of financial security.[203] There are several financial instruments available to fulfil the financial security requirement. These include an insurance policy, a guarantee offered by a financial institution, and deposits; a full discussion of these instruments can be seen in Chapter 5 of this thesis. The implementation of a compulsory financial responsibility system is highly endorsed by numerous scholars.[204] The existing body of literature demonstrates that some financial liability regimes require the operator to establish financial security, which is usually accomplished by obtaining insurance.[205] One example is 'the Directive 92/43/EEC on the Conservation of Natural Habitats, Wild Fauna, and Flora' (Habitats Directive).[206] 'The Habitat Directive provide that member states should take measures to ensure environmental protection and overall coherence. Even the ELD that requires remedial measures urges member states to require financial security for some projects.[207]

The primary benefit of mandatory insurance coverage under a regulatory framework is the certainty that victims of environmental damage will receive compensation or restoration, even if the operator is undercapitalised or declares bankruptcy.[208] While this appears to be a useful solution to the risk of polluters entering insolvency proceedings and being unable to bear their environmental liabilities, it is absent in the NOSDRA and its regulation.

[203] MG Faure & DJ Grimeaud, '*Financial Assurance Issues of Environmental Liability, in* Deterrence, Insurability, And Compensation In Environmental Liability- Future Development In The European Union' 19-20 (Michael Faure ed., 2003).
[204] MG Faure, 'Regulatory strategies in environmental liability'.(2009). 129 *The Regulatory Function Of Eiropean Private Law,* (Edward Elgar Publishing, 2009). 187..see also J Kehne,'*Encouraging Safety Through Insurance-Based Incentives: Financial Responsibility for Hazardous Waste', (1986)* 96 YALE L.J (2).403-427
[205] B Richardson 'Mandating Environmental Liability Insurance' (2002) 12 Duke Envtl. L. & Pol'y F.(2) 293-329
[206]Council Directive 92/43/EEC**,** of the Council of the European Communities of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, 1992 O.J. (L 206).
[207] See Art 8 of the ELD
[208] Ibid

2.4.3. Disincentives for Breach of Liability to Clean or Remediate the Environment

The inadequacy of fines levied on the liable operators for refusal to clean up or remediate impacted sites makes them prefer to pay the penalties while harming the environment.[209] For instance, the Oil Navigable Waters Act, notably sections 10 (1) and (2), tends to hold vessel owners liable for summary conviction if their vessels pollute water. It did not only create exceptions in favour of the ship-owner under section 4; the Act further stated that if the ship-owner fails to notify the authority of the oil spill, the ship-owner will pay a N400 fine, an equivalent of (0.30 pence) as punishment for withholding information.[210] There is no evidence of such conviction since the Act came into force in 1968. Similarly, Section 6(2) of the NOSDRA Act penalises polluters who fail to report oil spills with a fine of N500, 000, the equivalent of £400 a day until the incident is reported, and 1 million if the oil spill is not cleaned. There is no reasonable incentive for due diligence in operation.

In contrast, the 2010 changes to the US Oil Pollution Act of 1990 increased liability for similar incidents to about $1.5 billion.[211] The US Oil Pollution Act increases penalties and requires polluters to clean up their oil spills. Also, the size and location of spills determine the weight of liability to be attached. In the event of a 3,000-tonne spill, the projected liability is $10,000,000. Offshore spills boost liabilities to $1.5 billion.[212] If the operator pays the penalty, the environment will remain degraded, posing further environmental damage. Such conditions undermine the intended goal of the legislation. Thus, penalties instituted by the National Oil Spills Detection and Response Act must be reconsidered. Establishing a high disincentive and full accountability for spill clean-up is also critical. It is not enough that the National Oil Spills

[209] UJ Orji, 'An appraisal of the legal frameworks for the control of environmental pollution in Nigeria' (2012) 38 Commonwealth Law Bulletin (2) 321-329
[210] Oil in Navigable Waters Act - CAP. 06 L.EN. 1968, section 6
[211] Oil PollutionAct 33 U.S.C. §2701 et seq. (1990) see section 3 Part I
[212] Ibid Section 1004

Detection and Response Act requires site remediation without the desire for the restoration of the resources.[213]

2.4.4. Access to Participate, Review, Justice and the Question of Standing

Access to justice refers not only to the ability to bring a case in the first place but also to the availability of domestic courts and remedies without undue delay or prejudice. *Locus standi* is an essential component of the legal system, and under Nigerian law, an affected person must have a direct legal interest in initiating an environmental claim and demanding the discontinuation of an activity causing ecological damage.[214] However, the question arises: who can claim for the environment since no individual has a locus? In cases where they own the land, the owner might be unwilling to initiate an action for damages or spend the monetary compensation they received on restoring the lost natural resources. Secondly, they might be deterred from pursuing claims as the cases may go on endlessly for decades. Although much has been written about the common law doctrine of standing, there is still no clear guidance on how to approach the notion from a liberal standpoint to preserve citizens' rights and prevent meddlesome interlopers, that is, to prevent litigants without legitimate interests in the subject of an action to flood the courts, leading to adverse consequences.[215]

While public trustees are appointed to recover natural resource damages under US CERCLA and OPA, the regular civil system in Nigeria is not permissible in this response. When people's rights to life, property, the environment, and other basic rights are infringed or threatened, one significant strategy used by many governments is to reduce the hurdles victims must jump

[213] NOSDRA (126) S. 6(3)

[214] D.E Omukoro 'Ensuring Environmental Accountability in Nigeria through the Liberalisation of the *Locus Standi* Rule: Lessons from some Selected Jurisdictions' (2019) 27 African Journal of International and Comparative Law,. (4): 473-496. See also AC Ekeke 'Liberalization of the Rule on *Locus Standi* before Nigerian Courts: Lessons from India' (2022) 66 Journal of African Law, (2) 339–354; KO. Mrabure 'Miscarriage Of Justice In The Restrictive Application Of Locus Standi Under Nigerian Law' (2016) 1 Ajayi Crowther University Law Journal (1) 1-22

[215] OJ Oyebode Impact of Environmental Laws and Regulations on Nigerian Environment World'(2018) 7 Journal of Research and Review (WJRR) (3), 09-14...

through to gain access to the courts and seek remedy. The concept of *'locus 'standi'*, a rule establishing whether a claimant has standing to file an action before a court to assert his rights, manifests this idea in the common law. Nigerian law does not obligate public trustees to act on behalf of the public to recover damages to natural resources. However, the public trustee system offers the following advantages: (1) It allows the government to undertake one of its traditional roles, protecting the public interest; and (2) it allows for the creation of agencies with a high level of technical expertise necessary to undertake meaningful restoration planning and implementation.

Also, the Environmental Impact Assessment (EIA) Act allows for public engagement but does not allow individuals or non-governmental organisations (NGOs) to review the procedure legally. Environmental law enforcement goes beyond participation or giving the Attorney General of the Federation sole enforcement responsibility. The framework covers three fundamental rights: access, participation, and review. Environmental contamination victims must be able to review or start legal proceedings to ensure the effective execution of environmental protection laws. According to the Rio Declaration Principle 10, the UNEP Bali Guidelines grant NGOs the freedom to evaluate.

In contrast, Nigeria's Environmental Impact Assessment Acts do not explicitly grant individuals, particularly NGOs, the right to initiate legal proceedings. In *Douglas v. Shell*,[216] The claimant brought an action against the Nigeria National Petroleum Corporation, Shell Petroleum Development Corporation, Mobil, and Nigeria Liquefied Natural Gas for violating the Environment Impact Assessment Act in a joint project the defendants were embarking on. The Federal High Court ruled that the project did not affect the plaintiff despite its devastating

[216] Unreported Suit No.FHC/L/CS/573/96

environmental effects;[217] the suit failed and showed the conflict between revenue generation and appropriate environmental management in Nigeria.

The EIA allows the public to participate in the environmental assessment as a prospect that communities leverage.[218] The wording of section 7 of the EIA provides that before a grant of approval to operators on the decision to proceed with a project, the public authority shall allow the public an opportunity to review their decision. However, public participation in environmental assessment activities has been treated as a discretion of the public authority. Where the authority decides not to allow public participation, they are absolved.

2.4.5. Appointing Proficient Governing Trustees

Evaluating the characteristics and magnitude of the damages to natural resources and determining a suitable range of restoration options, such as primary and compensatory restoration, are intricate undertakings. The NOSDRA did not designate a 'competent body' as trustees and assigned them to evaluate the magnitude of the damages to natural resources and decide on suitable measures for their restoration.[219] However, the NOSDRA, as an agency, seems to be designated as the agency entitled to assess and recover damages, and this responsibility for the recovery and restoration of the injured natural resources is far from reality. The effectiveness of the NOSDRA may depend on the critical choice to appoint a responsible authority, allocate the mentioned functions, and offer guidelines on the assessment of damages. The NOSDRA has no explicit provisions designating an entity accountable for recovering damages and restoring injured natural resources. The absence of clearly assigned responsibilities resulted in no organisation having the incentive or authorisation to create the systematic programme required to conduct regular assessments. Under the CERCLA and OPA,

[217] Suit No.FHC/L/CS/573/96 (n216) paragraph 23
[218] Environmental Impact Assessment Act sections 7 and 8
[219] NOSDRA(n126) section 19

governmental entities have been assigned the role of trustee for specific natural resources.[220] These agencies have the authority to evaluate harm and losses; file claims to seek compensation for damages, and manage the funds obtained from these claims.[221] The perception is that this, in conjunction with the accessibility of comprehensive NRDA guidelines, contributed to an increase in NRD claims in the United States.[222] Equally important is the creation of regional damage assessment teams that assist the trustees in evaluating harm to natural resources, as well as formulating and assessing restoration programmes and pursuing compensation through negotiation or legal action.[223] These teams, comprised of biologists, resource economists, and attorneys, often perform natural resource damage assessments and have extensive expertise in determining such assessments.[224] The analysis focuses on the scope and magnitude of the damages to natural resources, the formulation and assessment of potential methods for restoring them, and the execution of strategies to carry out the restoration.[225] To ensure the success of the NOSDRA in this regard, the government should contemplate the establishment of equivalent teams within the NOSDRA agency or alternatively delegate the responsibility to the National Environmental Standards, Regulation and Enforcement Agency to assist the NOSDRA as a 'responsible authorities' in conducting assessments and in the formulation and evaluation of restoration solutions.

2.4.6. Financial Liability Limit

The NOSDRA is based on strict liability, meaning that fault does not need to be proven in the event of an oil spill and, by implication, leaves no limits to operators' liability even though it has little efficacy in Nigeria. Assuming strict liability is allowed to remain open-ended, for

[220] Brans (n173) 105
[221] RB Stewart, "Liability for natural resource injury: Beyond tort." *Analyzing Superfund*. 2016. Routledge, 219-247.
[222] Brans (n1173) 105
[223] Ibid
[224] Ibid
[225] Ibid

instance, in Nigeria, where oil pollution is never-ending, it may lead to endless monetary claims or damages in an economy that prioritises income over environmental sustainability, resulting in significant financial burdens, disincentives to invest, and decreased economic efficiency.[226]

Above all, it is important to note that establishing a ceiling for financial liability for all environmental damage involving oil spills might not be difficult, as the magnitude of the damage caused by an oil spill can be ascertained. Since the management of oil spills is categorised in tiers in Nigeria,[227] for instance, Tier 3 or Tier 2 oil spills can potentially present calculable risks for compensation claims. In this regard, a strategy that considers financial liability limits on the oil sector may be required.

2.4.7. Damage Assessment

The NOSDRA's primary objective as a liability framework in the oil and gas sector should be to restore the harm inflicted on natural resources. However, the NOSDRA does not prioritise the assessment of damages by considering restoration costs as the primary and preferable approach. Secondly, despite the time required to return natural resources to their original state, no guidelines state how the responsible party could be held accountable for the depletion of natural resources. Thirdly, assuming but not conceding that restoration of damaged natural resources is ongoing, no provision is made for operators to account for the inaccessibility of associated services the natural resource offers during the interim (temporary losses) and restoration period. Again, apart from the costs incurred for restoring the damages and any temporary financial losses, there is also no provision for the responsible party to be held accountable for the expenses associated with evaluating the extent of the damages, as well as the expenditures related to administrative, legal, and enforcement procedures, data gathering,

[226] OS Gozie, AC Umadia. 'A Case for the Application of Strict Liability in Oil and Gas Pollution Cases in Nigeria in International Law and Development in the Global South' (2023) Cham: Springer (1) 273-299
[227] Section 5 of NOSDRA Act 2006

and monitoring, and supervision. NOSDRA's assessment of financial compensation is not similar to that of financial compensation under the US Oil Pollution Act and the ELD. This is not surprising, as the NOSDRA Act drew no inspiration from the 1990 Oil Pollution Act and its regulations on natural resource damage assessment (NRDA rules).[228] According to US law, a responsible party can be liable as follows: (a) the expenses associated with returning the damaged natural resources and services to their original state, (b) the expenses related to restoring the resources and services that were temporarily lost from the time of the incident until they are fully recovered; and (c) the reasonable expenses incurred in evaluating the damages.

Even though the NOSDRA regulations prioritise the effects of oil spills on human health,[229] however, human use of services is affected throughout the clean-up and remediation phase of resources, such losses that include the deprivation of beach access for leisure purposes or the decline in recreational activities at the parks and or fishing opportunities in the rivers are never compensated. Thus, NOSDRA does not provide for the loss of natural resource services, which refers to the functions performed by a natural resource to benefit another natural resource or the public as a measure of damages. However, there appears to be less focus on the loss of services that humans use when efforts are made to restore the injured natural resources and services to their original condition.

2.5. Conclusion

This chapter examined the first research question. 'To what extent can polluters be held liable for damage to environmental resources arising from oil spillage in Nigeria.' In conclusion, the examination of the extent to which polluters can be held liable for damage to environmental

[228] E.H. P. Brans, 'Liability for Damage to Public Natural Resources under the 2004 EC Environmental Liability Directive Standing and Assessment of Damages' Envtl L Rev 90 (2005) 7
[229] See section 19 (e)

resources arising from oil spills reveals significant shortcomings in Nigeria's legal framework and regulatory practices. Despite the implicit recognition of polluter liability in various legal instruments, such as NOSDRA, regulations such as EGASPIN, and judicial decisions such as *San Ikpede v Shell, Umudje & Anor v Shell-BP Petroleum Development,* the failure of polluters to account for liability for environmental damage to public lands, water, and natural resources as much as liability for traditional damage to private property damage, economic loss and personal injury poses significant challenges to effective environmental governance. The lack of clear delineation between liability for environmental damage and traditional damage undermines efforts to hold polluters accountable for the full extent of their actions and the resulting damage to public resources and ecosystems. This ambiguity contributes to uncertainty in legal proceedings, hinders the assessment of environmental damages, and limits opportunities for affected communities and stakeholders to seek redress and compensation for the loss of environmental resources and ecosystem services.

Furthermore, the absence of specific provisions addressing liability for damage to environmental resources exacerbates disparities in access to justice and exacerbates inequalities in the distribution of environmental costs and benefits. While liability regimes may offer recourse for private property damage and personal injury, the failure to adequately address environmental harm to public lands, waterways, and natural resources perpetuates a cycle of environmental degradation and undermines efforts to achieve sustainable development objectives. Addressing these shortcomings requires comprehensive reforms that enhance the clarity, coherence, and effectiveness of Nigeria's legal framework for environmental liability. This includes the development of specific provisions and mechanisms for addressing liability for damage to environmental resources, improving the assessment and valuation of environmental damages, and promoting the equitable distribution of environmental costs and benefits among affected stakeholders. Moreover, efforts to enhance environmental governance

and promote sustainable development must prioritise stakeholder engagement, transparency, and accountability to ensure that polluters are held accountable for the full extent of their environmental impact and that affected communities have access to meaningful remedies and redress for the loss of environmental resources and ecosystem services. By addressing these challenges and strengthening the legal and regulatory frameworks governing polluter liability for environmental damage, Nigeria can move towards a more equitable, resilient, and sustainable approach to environmental governance that protects the rights and interests of present and future generations and ensures the sustainable management of its natural resources and ecosystems.

Chapter 3

Barriers to Regulation of Oil Activities in Nigeria

3.1. Introduction

This chapter examines the second research question: *What are the barriers to the regulation of oil and gas activities in Nigeria?* The chapter considers legal, economic, social, cultural, and political barriers that shaped the regulation of Nigeria's oil and gas activities?' To make sense of the oil dynamics in Nigeria, it is important to explain the ownership structure of oil resources. The chapter discusses the ownership structure of the oil resources under Nigerian law before examining the factors above. The chapter is divided into five sections. Section 3.1 introduces the chapter; Section 3.2 briefly discusses Nigeria's oil resources and political intrigues that impede the regulation of oil activities in the oil industry. Section 3.3 examines legal, social, cultural, political, and economic factors inhibiting the regulation of oil and gas activities in Nigeria. Section 3.4 impediments, and finally, section 3.5 concludes.

3.2. Ownership Structure and Political Intrigues of Nigeria's Oil Industry

This section discusses ownership interest in Nigeria's oil and gas resources and shows the ineptitudes of regulating oil activities. We begin this section with the geographical and political composition of Nigeria. Nigeria is a federation consisting of the federal government, 36 constituent states, and 774 local government areas.[1] Unevenly spread along the North, South, East, and West, these four regions are further divided into six political zones: Northwest, North East, Northcentral, Southwest, South-east and South-south.[2] Geographically, oil and gas resources are located in about nine states, with 95% in the south-south region, also called the Niger Delta region. However, within the context of ownership, the federal government solely

[1] Schedule 1 Part 1 (States of the Federation) The Constitution of the Federal Republic of Nigeria 1999. See also L Adamolekun: 'The Nigerian Federation at the Crossroads: The Way Forward': (2005) 35 Summer, (3). 383-405
[2] Ibid

owns and exercises exclusive rights over the resources.[3] Ownership rights over oil resources are contingent upon a country's prevailing political system and legal framework.[4] Given what the legal framework in place may require, it is probable for states and individuals to exercise ownership rights over minerals located within their respective boundaries.[5] In Nigeria, the political system had endured an extensive period of military dictatorship, which played a prominent role in consolidating the federal government's grip on ownership and control of oil and gas resources in Nigeria.[6] In the 65 years since Nigeria's independence from Great Britain, the military has governed Nigeria for 39 years. A chunk of the legal order in Nigeria was promulgated by the military juntas, as well as the laws relating to ownership of the oil industry in Nigeria. Hence, the Nigerian system exhibits a unitary governance over natural resources and leans towards socialist or centrist ideologies.[7]

In 1971, Nigeria joined the Organisation of Petroleum Exporting Countries (OPEC) and had participatory power under Article 90 and Resolution XVI of 1968 of OPEC, which enhances the host nations' rights over their natural resources.[8] The combined effect of the United Nations resolution and that of the OPEC acted as a catalyst for Nigeria to evolve the legal frameworks for the state to take practical steps in managing the oil and gas business.[9] The Nigerian Constitution 1999, as amended, the Petroleum Industry Act 2021, which repealed the 1968

[3] Section 44(3) of the Constitution vests in the federal government, exclusive control and management of minerals, mineral oils and natural gas in Nigeria ,see the Constitution of the Federal Republic of Nigeria 1999 as Amended
[4] E.O Ekhator, 'Public regulation of the oil and gas industry in Nigeria: an evaluation. (2016).21 *Ann. Surv. Int'l & Comp. L.*, *1*, 43-91
[5] F Nlerum, 'Reflections on Participation Regimes in Nigeria's Oil Sector', (2007) 5 NIGRIAN Current L.R jiv. (149) 146-162
[6] For example, the Petroleum Decree (now Petroleum Industry Act 2021) was enacted by the military administration of General Yakubu Gowon in 1969 during the course of the Nigerian-Biafra Civil War, which was fought primarily because of resource control.
[7] Ekhator (n4) 53
[8]Chapter 2 Article 7 of OPEC Stature 2021 available on the https://www.opec.org/opec_web/static_files_project/media/downloads/publications/OPEC_Statute.pdf accessed 10 9 2023.accessed 10th May 2023
[9] Resolution XVI was titled 'Declaratory Statement of Petroleum Policy in Member Countries,' proposing that its members should actively engage in and exercise authority over the oil and gas activities within their respective nations.

Petroleum Act, and the Exclusive Economic Zone Act are the legal frameworks governing ownership of oil and gas resources in Nigeria.[10] These statutes vest exclusive ownership rights of oil and gas resources on the federal government of Nigeria, disadvantaging the states, local governments, and the local communities where these resources are located. Divesting the constituent states and local populations where oil resources are located has been seen by many as an injustice to the people of oil-bearing communities.[11] In light of the skewed framework governing ownership of Nigeria's oil resources, locals complained of neglect and abandoned environmental damage, and the crisis has deepened.[12]

While some scholars have argued that the federal government's control of mineral resources has adversely affected the people of the oil-producing regions in Nigeria,[13] Others believe that it is the powers oil and gas legislation and policies confer on the federal government that is to be blamed and not the government of Nigeria.[14] Hence, the most contentious and highly politicised issues in Nigeria's contemporary legal history have been regulated activities in the oil sector.[15] There is no gainsaying that Nigeria runs a mono-economy where oil rent dominates. Given its political and economic history, Nigeria could be best described as a 'rentier state' dependent on oil rents and royalties from operators.

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[10] Somel international instruments that have advocated for the ownership of natural resources are. For instance, the United Nations General Assembly Resolution No. 626 (VII), enacted in 1952, which affirms the inherent right of individual states to freely utilise and harness their natural resources within their realm of authority. Also, in the year 1962, the General Assembly officially approved Resolution 1803 (XVII), commonly known as the "Permanent Sovereignty over Natural Resources." This resolution encompasses various provisions, including the recognition of the right of both peoples and nations to exercise permanent sovereignty over their natural wealth and resources. It emphasises that this exercise should be carried out in a manner that prioritises the national development and overall welfare of the people residing within the respective state.Resolution No. 3281 (XXIX) was adopted by the United Nations General Assembly in 1974

[11] Different countries have different prevailing ideas regarding the ownership of oil and gas resources.

[12] F.0 Ayodele-Akaakar, 'Appraising The Oil And Gas Laws: A Search For Enduring Legislation For The Niger Delta Region', (2001)3 J. Sustainable Dev. Amt. (1), 7-8

[13]W Akpan, 'Oil, People and the Environment: Understanding Land-Related Controversies in Nigeria's Oil Region, (2010 5, http://www.codesia.org/IMG/pdf/akpan.pdf aceesed 20/05/2023

[14] J.G. Frynas, Corporate and State Responses to Anti-Oil Protests in the Niger Delta', (2001) 100 AFR. AFFAIRS (398):27-54

[15] The new Petroleum Industry Act was accented to by the president last month about twenty years after it was first initiated. Even then, the federal government restricted the implementation of the Petroleum Industry Act (PIA) till August 2022.

Consequently, the primary interests of the government are rent-seeking and *'prebendal* accumulation of oil resources', which defines a range of government policies, statutes, and institutional practices in Nigeria.[16] Beblawi defined rent as "*exports earned or income derived from a gift of nature*".[17] *Prebendalism* entails a political practice where public resources are *prebends* appropriated by politicians holding key offices, using their influence to appropriate material benefits for themselves, their constituents, and kin groups.[18] Following this state of affairs, the conduct of politics and public administration in Nigeria follows such primordial patterns as nepotism, cronyism, and ethnic solidarity, without legal or institutional limits against corrupt enrichment and abuse of office.[19]

With average crude oil production of about 2 million barrels daily, Nigeria is Africa's largest oil-producing country and the sixth-largest oil exporter globally.[20] Crude oil constitutes 95% of overall export earnings and 80% of the national budget.[21] A constitutionally prescribed revenue-sharing formula for the federal, state and local governments is established under section 162(1) of the Constitution, designated as the federation account.[22] The law provides that all revenues from the federal government's sale of oil and gas resources should be deposited into the federation account. Brent Crude oil is the livewire of Nigeria's economy; hence, accruable revenue and control have become critical defining influences on the Nigerian State.[23] However, the Nigerian State is dominated by an uneven federation of ethnic majority leaders whose geographical native land has no oil reserves, unlike the politically lightweight ethnic

[16] H Beblawi, 'The Rentier State in the Arab World', in Luciani, G., (ed.), the Arab State. Berkeley University Press, 1998 Berkeley, pp. 85–98
[17]Ibid
[18] RA Joseph,'*Democracy and prebendal politics in Nigeria' (2014)* 56 (Cambridge University Press, 2014).
[19] K Omeje,'The rentier state: Oil-related legislation and conflict in the Niger Delta, Nigeria: Analysis'. (2006) *6 Conflict, Security & Development,* (2),.211-230.
[20] Global oil tracker, https://www.eia.gov/international/analysis/country/NGA. Accessed 20th August 2021.
[21]O E Ogbonna, IA Mobosi, & OW Ugwuoke,'Economic growth in an oil-dominant economy of Nigeria: The role of financial system development. (2020). 8 *Cogent Economics & Finance*,(1), 1-16
[22] CFRN (n1) section 162 CFRN 1999
[23] Omeje (n19) at 213.

minorities.[24] The dominance of these ethnic majority leaders manifests in the drawback of the ethnic minorities of the Niger Delta region. These minorities can, at best, be described as 'the hen that lays the golden egg' due to the heavy geographical concentration of Nigeria's oil resources. With this background, let's now deal with the legal, economic, social, and political factors inhibiting the decree of control of oil and gas activities in Nigeria.

3.3. What are the Barriers to Regulating Oil and Gas Activities in Nigeria?

This section identifies and examines the legal, economic, social, and political barriers plaguing the regulation of oil and gas activities in Nigeria.

3.3.1. Legal Barriers to the Regulation of Oil and Gas Activities in Nigeria

Legal barriers to regulating oil and gas activities in Nigeria stem from procedural and substantive perspectives. While substantive barriers deal more with operators' liability obligations, which have already been discussed in Chapter 2, Procedural barriers are more institutional barriers to regulatory activities under the NOSDRA Act and other enabling laws. Therefore, the primary institutional barrier to the regulation of oil activities under the National Oil Spill Detection and Response Agency (NOSDRA) Act in Nigeria is the overlap and fragmentation of regulatory responsibilities among various government agencies. This overlap creates inefficiencies and conflicts that hinder effective regulation. Thus, we shall focus on these overlapping mandates regarding environmental regulation and oil spill management. This leads to confusion and conflicts over who has ultimate authority. Also, the lack of a clear, integrated framework for coordination among these agencies results in poor collaboration, making it difficult to enforce regulations consistently and effectively. This section also explores the resource constraints that regulators face. NOSDRA often faces limitations in terms of funding, technical expertise, and manpower, which hampers its ability to monitor and respond

[24] Omeje (n19) at 213

to oil spills comprehensively. Lastly, inconsistencies and gaps in the legal and regulatory frameworks further complicate the enforcement of environmental standards and oil spill responses. These barriers collectively weaken the regulatory oversight and effectiveness of NOSDRA in managing oil-related environmental impacts in Nigeria.

3.3.1.1. Jurisdictional Conflicts and Dominance of Federal Government

Regulating oil and gas activities in Nigeria is complicated by a number of issues stemming from the country's three levels of government—federal, state, and local government. These issues create significant challenges that affect the effectiveness of regulation and oversight. It is important to note that Nigeria's three levels of government (federal, state, and local governments) have separate legislative powers to make laws governing differently within their jurisdictional competence.[25] Section 44 (3) of the Nigerian Constitution grants the federal government significant control over oil and gas resources, often sidelining state and local governments.

Additionally, the Exclusive Legislative List in the Second Schedule of the 1999 Constitution, specifically Item 39, empowered the Nigeria Federal Government's exclusive legislative authority over all mineral resources, including oil fields, oil mining, geological surveys, and natural gas. This means that only the National Assembly has the authority to legislate on these matters, further solidifying federal control over the oil and gas sector. Nigeria's three levels of government create a complex regulatory atmosphere for the oil and gas sector, characterised by jurisdictional conflicts, overlapping responsibilities, and regulatory inconsistencies. These issues impede effective regulation, enforcement, and sustainable management of oil and gas resources, necessitating comprehensive reforms to improve coordination, clarity, and

[25] The local government is the third tier of government with no legislative competence in this regard. Section 7 of the Constitution of the Federal Republic of Nigeria 1999 ('Constitution') requires a democratically elected local government to be put in place and its functions set out in the fourth schedule to the Constitution.

accountability in the regulatory framework. Also, Section 1 of the Nigerian Petroleum Industry Act (PIA) 2021 clearly establishes the ownership and control of petroleum resources in Nigeria. The section states: 1. (1) The ownership of petroleum within Nigeria and its territorial waters is vested in the Government of the Federation. This section reaffirms the principle that the Federal Government of Nigeria holds the property rights and control over all petroleum resources within its jurisdiction. The PIA 2021 consolidates various aspects of petroleum industry regulation, seeking to create a more efficient and transparent framework for managing Nigeria's petroleum resources. This provision aligns with the broader legal context established by the 1999 Constitution, particularly Section 44(3), which vests ownership and control of mineral resources in the federal government. This centralisation leads to tensions and conflicts as state and local authorities seek greater influence and benefits from the resources within their territories. Disputes over revenue allocation and regulatory authority lead to inconsistent enforcement and hinder collaborative efforts to manage the sector effectively.

3.3.1.2. Conflict of Interest amongst Regulators

There are three areas where institutional conflict appears to hinder the regulation of oil and gas activities in Nigeria. First, there is a conflict in implementing the provisions of the law and the desire to drive development in Nigeria, thereby prioritising oil profits to cure the many years of infrastructural deficit as a developing nation. As a rentier State, the oil economy significantly increased the impediments to balancing the development and regulation of -the system. Regulation of activities has been subdued to allow for the growth of oil exports, for which the government rely principally on revenues.[26] The conflict of interest is that Nigeria lacks the technical know-how and self-sufficiency to explore its oil resources; hence, it relies on major

[26] Nigeria's fiscal and infrastructural transformation is believed to come from meeting its crude exports for public finance, economic strategy, and private economic activity.

multinational operators to partner, such as Shell, Mobil, Eni, and Chevron.[27] Thus, the regulatory authorities such as NOSDRA officials that implement, supervise, and enforce environmental protection laws in the oil sector cannot be seen working at cross purposes with the government;[28] hence, its top executives are appointed and funded by the federal government.[29] This arrangement is not expected to engender serious supervision monitoring and develop independent enforcement capabilities to control oil and gas activities.

The regulatory agency staff appointed at the behest of the government have always appeared to serve at the pleasure of their appointor. Most of the time, they unarguably play to the gallery and neglect to enforce the laws depending on the so-called 'government's body language'.[30] Moreover, they often create a safety net to preserve their jobs by remaining self-serving rather than safeguarding public interests.[31] For example, Mr Biriyai Dambo, the Attorney-General and Commissioner for Justice in Bayelsa, during the joint investigation visit by the Joint Investigative Panel (JVI)[32] to the OML29 spill site in Dec 2021, noted that similar oil spillage incidents from the same Wellhead OML 29 occurring in 2018 and 2019 with no significant response. Notably, Aiteo, the wellhead operator, had admitted this the claim of the stakeholder.

[27] The big five international oil companies in Nigeria are Shell, Exxon-Mobil, Chevron-Texaco, Total, and Agip. They are variously engaged in JVI operations with the Nigerian government, with the latter holding 60 percent of the equity in the venture under the NNPC.

[28] Section 1 of the NOSDRA Act

[29] For instance, the Department of Petroleum Resources (D.P.R.), a Nigerian government regulator in charge of the operations of the oil industry laws Compliance, safety, licencing and permitting, the National Petroleum Investment Management of Oil Field Services Companies (NAPIMS), the investment arm of Nigeria National Petroleum Corporation (which manages the government equity shares in the joint venture operations), the Nigerian Local Content Development Board (NLCDB), an oil and gas industry regulator charged with the implementation and supervision of Nigerian local content policy, the Nigerian National Petroleum Corporation (NNPC) which is also an oil industry regulator that operates its subsidiaries in the upstream and downstream marketing and distribution operations, NOSDRA, charged with the detection and containment of oil spillages, and the National Environmental Standards and Regulations Enforcement Agency (NESREA) charged with the implementation of standard regulations and the enforcement of broader environmental laws excluding oil and gas environment laws.

[30] M Ele, "Oil Spills in the Niger Delta-Does the Petroleum Industry Act 2022 Offer Guidance for Solving this Problem?." (2022) 13 *Journal of Sustainable Development Law and Policy (*.1):130-161.

[31] E Oshionebo' 'Transnational corporations, civil society organisations and social accountability in Nigeria's oil and gas industry' (2007) 15 A.J.I.C.L (1), 107-129

[32] The JVI is a statutory on the spot assessment following a reported incident of oil spill with the aim to unravel the cause and volume of crude spilt into the environment.

However, NOSDRA has not put in place or enforced any remediation measures against future spills. Thus, the 2018 and 2019 spills remained unremedied. Dambo further noted that requests for remediation of these earlier spills by the affected people were rebuffed until the major blowout occurred in November 2021, which lasted for over 54 days. He noted they were shocked that on the day of the latest JIV, when asked about these previous incidents at the same wellhead, Aiteo (the operator) denied their occurrence, and NOSDRA (the regulator) remained silent.[33] Below 3.1 shows Aiteo leaking well head that lasted 54 days in 2021, and figures 3.2 and 3.3 show some spilt areas that remained unremediated within the ND many years after occurring.

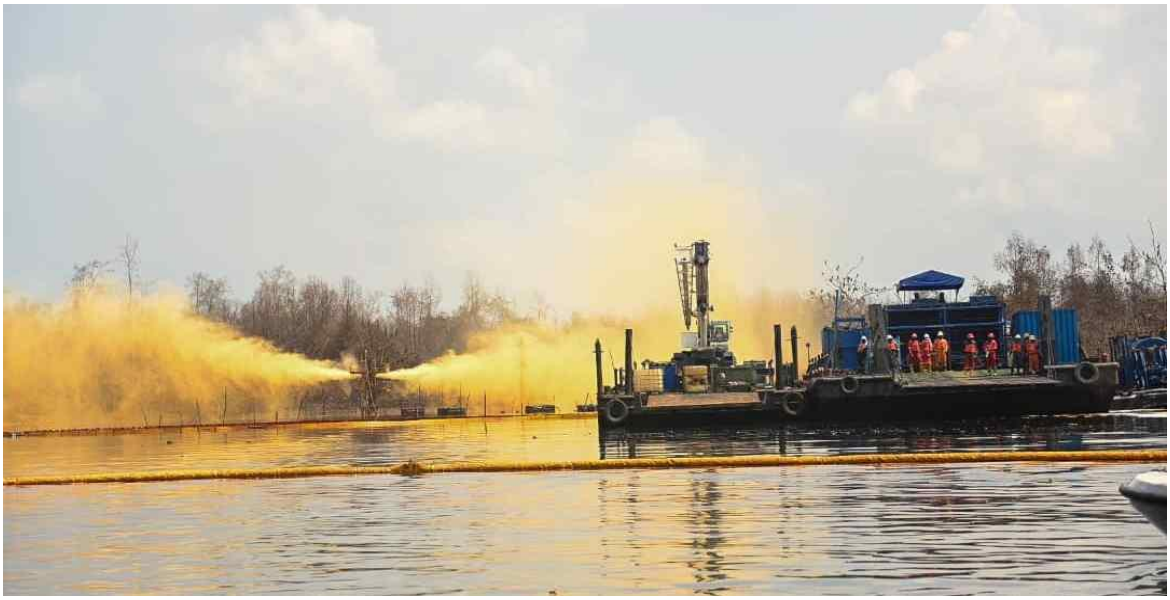

Figure 3.2 shows a 54-day well blowout at OML29 operated by AITEO in Nov 2021. Picture courtesy Agency Report

[33] Nembe Oil Spill: Bayelsa govt faults Aiteo, regulators on sabotage claim available online at https://www.premiumtimesng.com/news/top-news/502779-nembe-oil-spill-bayelsa-govt-faults-aiteo-regulators-on-sabotage-claim.html accessed 20th February 2022

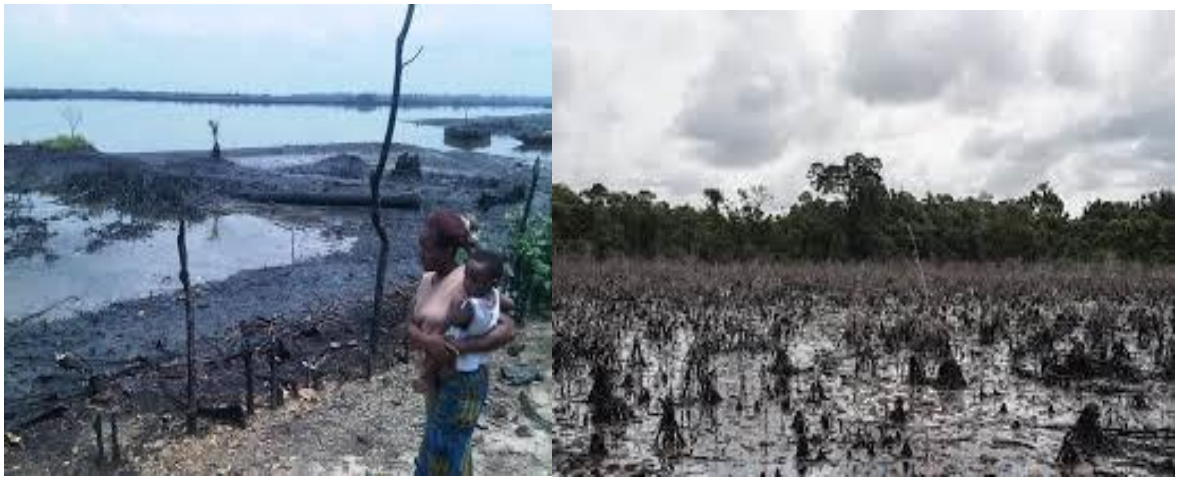

Figure 3.3 Oil Spill site, farmland, Aquatic life and affected

Figure 4.3 The agony of the oil spill on farmland locations in Nigeria's Niger Delta

Such compromises have seriously negated the government's role enshrined in the Nigerian Constitution.[34]

Second, the NUPRC was created by the MPR to ensure operators act in conformity with the regulations and guidelines of petroleum laws. The MPR manages the oil resources, constituting

[34] There cannot be a complete burden on the government other than the environmental objectives under s.20 of the Constitution. Considering the critical role of petroleum resources in Nigeria's overall economic well-being and the burden of environmental degradation suffered by the communities that inhabit the oil-producing region, the need to balance effective regulation of the Nigeria oil and gas sector is undoubtedly the *sine qua non* for industrial harmony in oil and gas production in the region. This is important because the Niger Delta region is home to Nigeria's petroleum production, hosting all of the country's oil wells. A practical, sustainable strategy to regulate oil and gas activities will help development in the region.

98% of Nigeria's exports and 80% of the national budget.[35] Hence, there is an established principal-agent relationship which promotes regulatory ineffectiveness.[36] This relationship does not augur well for regulation as it appears like a system set against itself. Moreover, it is susceptible to official abuse and conflict of interest. Finally, the necessary connection between Nigeria's fiscal, economic, and political dynamics of oil resources and development lacks the required balance. The current legislation, which advocated licence revocation and operator imprisonment for wrongdoing, would have a secondary impact on production and, remarkably, conflicts with the desire to generate revenue and keep up with economic demand.

3.3.1.3. Insufficiencies of Supervisory and Logistical Gap of NOSDRA

NOSDRA functions include setting a National Oil Spill Contingency Plan to undertake emergency response systems and develop capacity for such exercises. However, the capacity has remained limited for more than a decade. First, the agency operates on a slim budget, which has constrained its proactive capacity for overall oil spill management. Second, the path to swift oil spill management is spill detection. NOSDRA does not have this capability but relies on reports from the operator or locals regarding any spill incident, including mobilising staff to the spill location for inspection if it eventually receives an incident report.[37] Third, it is important to emphasise that the Niger Delta terrain is such that motor vehicles cannot navigate. As such, helicopters and engine boats are required to traverse the estuaries if an oil spill occurs. NOSDRA does not possess such a transportation system in its fleet, and it relies on the operator for aid. This leaves the agency unable to plan inspection trips without wholly relying on the

[35] A Gboyega, T Søreide, 'Political Economy of the Petroleum Sector in Nigeria'. World Bank Policy Research Working Papers 5779, (201) available online at http://econ.worldbank.org. accessed 20th August 2020
[36] Ibid
[37] Section 5 (b) and (c) empower NOSDRA to undertake, clean up and or supervise the clean up of the impacted site to the best practical extent.

operator and the dictates of the operator's terms. Such an arrangement only breeds inefficiency, which is intrinsically wrong in an ideal system.

3.3.1.4. Regulatory Intersections, Overlapping Responsibilities among Agencies in Nigeria

Regulatory Overlap: Multiple agencies at the federal level often have overlapping mandates, leading to duplication of efforts, inefficiencies, and regulatory gaps. For example, both the DPR and NOSDRA have roles in regulating environmental aspects of oil and gas, which can cause confusion and conflict. Under the Petroleum Industry Act (PIA) 2021, the primary legislation responsible for issuing licences in the Nigerian petroleum industry is a function shared by many stakeholders.[38] The Minister of Petroleum Resources supervises the Nigerian National Petroleum Corporation Limited (NNPCL) and the Nigerian Upstream Petroleum Regulation Commission (NUPRC), formerly the Department of Petroleum Resources (DPR).[39] Whilst the NOSDRA and the Nigerian Upstream Petroleum Commission (NUPRC) are legally mandated to oversee, the petroleum industry complies with and enforces environmental liability regulations.[40] There have been glaring cases of the minister's interference with the operations and efficiency of regulators, which is caused by an inherent conflict of interest. As head of petroleum resources, the minister also superintended over the revenue-generating NNPCL and the regulator, the NUPRC. Even the clear-cut power delineation, which sets the operational limits for NNPC and NUPRC on government revenue generation, the optics for NOSDRA and NUPRC regarding the clean-up of impacted site's supervision, monitoring, and certification of post-clean-up approval remains a tussle among NOSDRA and NUPRC.

[38] The PIA signed into law on 16 August 2021, replaced the old Petroleum Act 1969, Cap P10, LFN 2004; Mineral Oils (Safety) Regulations (1997), Petroleum Regulations 1967, Petroleum (Drilling and Production) Regulations (1969) .
[39] Nigeria National Petroleum Corporation (NNPC) Act, Cap N123, LFN 2004 ss. 10 & 11;before it became the NNPCL see also G Etikerentse, Nigerian Petroleum Law (2nd ed, Dredew Publishers, 2004) 21.
[40] Roles of DPR – Upstream https://www.nuprc.gov.ng/upstream/ accessed 24th January 2023

In addition, NOSDRA and the Nigeria Maritime Administration and Security Agency (NIMASA) have often disagreed over the operational limits of NOSDRA regarding fees, penalties, and fines imposed separately on the same spiller and the same incident. NOSDRA and NIMASA rivalry came to the limelight in 2012 over who held the precise mandate to award administrative fines over maritime spills. NOSDRA had imposed a fine of $5 billion on Shell (SNEPCO) for its 2011 offshore oil spill in *Bonga*, while NIMASA imposed a further $6 billion fine on SNEPCO for the same spill. As a result, SNEPCO failed to pay the $11 billion fine imposed by the two agencies and remained in operation. Indeed, the two agencies debated who was legally empowered to award the fine. The Nigeria Assembly Joint Committee on Environment later resolved the impasse, and SNEPCO's hitherto objection to the double fine was addressed.[41] The political decision approved the payment of the fine to NOSDRA; however, it is unclear if the $5 billion fine was eventually paid in full.

3.3.1.5. Victim Manipulations Using the Judicial System by Operators

A prevalent characteristic that operators in the Niger Delta have in common is their strong aversion to compensating victims and restoring the environment, even in cases where the oil spills in question are clearly evident.[42] For instance, the operators prefer protracted legal disputes over oil spill causes and compensation rather than address the concerns of victims of oil pollution damage and those adversely affected by their operational activities.[43] Traditional damage victims of oil spills are usually compensated with meagre sums, not without

[41] C Nwachukwu, "Bonga oil spill: Presidency approves $5bn fine against Shell" (July 24 2012) <http://www.vanguardngr.com/2012/07/bonga-oil-spill-presidency-approves-5bn-fine-against-shell/ > accessed January 12 2021; Terhemba Daka, "Reps wade into $11.5b charges on S.N.E.P.C.O. overspill" (B.N.N. April 2, 2013) <http://news.bestnaira.com/posts/view/reps-wade-into-115b-charges-on-snepco-over-spill> accessed January 12 2021.

[42] BE Ewulum, *et al*. "An Appraisal of the Impact of the National Oil Spill Detection and Response Agency on Environmental Pollution in Nigeria." (2020): 2 *IJOCLLEP* 58.; see also O. O Amao, 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States' (2008) 52 Journal of African Law. (1) 89-113

[43] Ibid

disagreement.[44] However, in the event that there is disagreement over the amount demanded by victims, parties may proceed to court, and operators, particularly multinational corporations, will enlist a multitude of highly skilled lawyers to advocate on their behalf. They may employ tactics to intimidate the affected parties and the court in certain circumstances. Multinational corporations (MNOCs) are more inclined to allocate substantial financial resources towards covering the legal expenses of renowned lawyers rather than compensating the individuals affected by their actions.[45]

For example, in *SPDC v Agbara*,[46] the claimants, who were *Ejama-Ebubu* community representatives, stated that the appellants' (Shell) oil facilities in *Ejama Ebubu* had experienced a significant blowout and spilt more than 2,000 000 barrels of crude oil in their waters and environment. Due to the appellants' (SPDC) failure to clean up the spill, the oil flooded Eleme Ochani Stream and their properties. They also asserted that the surface and groundwater had been rendered unsuitable for human consumption. The appellants were accused of causing general inconvenience, refuted any responsibility, and expressed their readiness and willingness to challenge the claim. So, the claimants sued and sought damages exceeding 17 billion Naira and obtained a judgment. Having lost at the lower court, the appellants proceeded to the Court of Appeal and lost even at the Supreme Court. The appellants then applied to the Supreme Court, requesting a review of its previous decision. In the process, astonishingly, the legal team comprised revered legal practitioners, including Chief Wole Olanipekun (SAN), Lateef Fagbami (SAN), Chief Kanu Agabi (SAN), Dr Wale Babalakin (SAN), and Wale Akoni (SAN). These lawyers are currently among Nigeria's most proficient legal professionals, whose services are above and beyond that of any average litigant in Nigeria.

[44] JA Adoga-Ikong, et al. "Compensation for Oil Pollution under Nigerian Law and the Problems of the Victims in Assessing the Damage." (2021) 3 *Journal of Public Administration and Government* (1): 66-71.
[45] Ibid
[46] [2015] LPELR-25987 (SC)

Engaging the services of highly skilled lawyers or employing multiple lawyers to file frivolous applications raises the question of whether such actions align with operators' business objectives. The environment and persons affected by oil spills are predominantly the residents of areas where multinational oil corporations (MNOCs) operate. Despite successfully litigating against their victims for various reasons, these operators insist on returning to their communities to resume their activities. These operators' attitudes often serve as the main catalyst for attacks on operator installations over an extended period.[47] As correctly indicated, this case endured 36 years of claimants chasing justice from the trial court to the Supreme Court. Due to the prolonged court delay, some victims of the ecological disaster, unfortunately, passed away before the final determination of the case without receiving any compensation.[48] Given the inevitability of spillage in oil operations and the defiant nature of operators to assume responsibility, the law must ensure the safeguarding of the environment and prioritise operators' accountability for restoration in the incident of an oil spill incident.

3.3.2. Social Barriers to Regulation of Oil and Gas Activities in Nigeria.

Regulating oil and gas activities in Nigeria faces several significant social barriers. These barriers stem from community dynamics, the social impacts of the industry, and broader societal issues. Here are the key social barriers to regulation in Nigeria's oil and gas sector: Community Resistance, Conflict, Environmental and Livelihood Impacts, Disagreement over the cause of oil spills, Oil Spill Report: Investigation by the Joint Investigation Team to Ascertain Liability, Good Oil Field Practice, Politically Repressive Stance on Non-Governmental Organisations, Ethnic minorities, Militancy and Environmental Security.

[47] JN Aloh, & FC Uwakwe, 'Expanding the Frontiers of Compensatory Rights of Victims of Environmental Pollution in Nigeria: A Perspective of Spdc V. Agbara. *Chukwuemeka Odumegwu Ojukwu University Journal of Private and Public Law*, (2023) *4*(1).
[48] Ibid

3.3.2.1. Community Resistance, Conflict, Environmental and Livelihood Impacts:

Oil and gas activities often lead to environmental degradation, such as oil spills, gas flaring, and pollution, which adversely affect the source of revenue of local communities, particularly those dependent on fishing and farming.[49] This fosters resistance to regulatory measures perceived as inadequate in addressing these impacts. The Niger Delta's long-standing grievances over environmental damage, neglect, and inequitable distribution of oil revenues have fueled militancy and sabotage of oil infrastructure. Such activities disrupt regulatory efforts and complicate enforcement. Many communities in oil-producing areas have experienced historical neglect and marginalisation by both the government and oil companies. This lack of trust makes cooperation with regulatory initiatives challenging. The inefficiency within regulatory agencies undermines community trust and cooperation with regulatory efforts. Communities often believe that regulatory agencies and government officials are more aligned with oil company interests than with their interest in curbing environmental damage.

3.3.2.2. Disagreement over the cause of oil spills

Operators often attributed many oil spill incidents to third-party interference, even those occurring from their facilities, to sabotage and vandalism to exculpate themselves of any liability to pay compensation.[50] This is the case because Section 11 of the Oil Pipelines Act excludes an operator from paying any compensation for any oil spill resulting from sabotage or a malicious third party. Operators have exploited Section 11 to avoid responsibility for environmental and traditional damages. On account of this, many oil spill cases are attributed to sabotage. However, oil-bearing communities and local environmentalists have denied the claim that most oil spills are due to sabotage. They dismissed operators' sabotage claims as

[49] K Ojukwu, ' "Managing Abandonment Issues in Nigerian Oil & Gas Industry" ' [2020] 20(OGEL,(2) 1-20

[50] Particularly from the NNPC partners Shell, Chevron, Texaco, Agip, Eni and Mobil with many onshore and coastal operations have often contested their oil spills.

exaggerated pretexts to avoid clean-up, remediation, and compensation liability.[51] A prominent Niger Delta anti-oil activist, in reaction to the allegation of the prevalence of oil pipeline sabotage, said:[52]

"*Most of the oil pipelines were laid in the 60s and 70s, and our parents, who are in their old age now, will tell you; hence, they joined as labourers in laying the pipes, that since after laying the pipes, they have never seen the pipelines changed*".[53]

Even though one cannot underestimate the fundamental challenges to oil facilities and the impact of third-party activities, empirical studies rigorously support the belief that the deplorable State of oil pipelines could be responsible for most oil spillages rather than sabotage incidents.[54] As operators and stakeholders differ on the contributory factors to oil spillage, attention to addressing environmental damage in the region worsens.[55] The situation is compounded by a lack of technical and logistical competence to effectively track or find if the leak resulted from corrosion or vandalism for the law to apply potentially. NOSDRA, despite being the supervising agency, lacks spill detection and response capabilities; thus, it relies on operators to notify it of oil spill incidents.[56] The natural consequence of this 'self-reporting system' is that operators may under-report, and some may go unreported unless NOSDRA's attention is drawn to it by local people. There is a legal advantage to under-reporting spills

[51] D. Moffat, 0. Linden, 'Perception and Reality: Assessing Priorities for Sustainable Development in the Niger Delta', (1994) 24 *Ambio*, 527-538.
[52] The ex-Executive Officer of the Ijaw Youth Council (IYC) and leading socio-cultural organisation in the Niger Delta, the interview was granted on December 15 2002, during one of his anti-oil campaigns in Bradford, UK.
[53] Indeed, most oil pipelines carrying refined products do not belong to Shell or any of the other multinational corporations. The pipelines belonged to the Petroleum Products Marketing Company (PPMC), NNPC and the federal government of Nigeria.
[54] JA Alawode, and I. O. Ogunleye. "Maintenance, Security, and Environmental Implications of Pipeline Damage and Ruptures in the Niger Delta Region." (2011): 12 *Maintenance, Security, and Environmental Implications of Pipeline Damage and Ruptures in the Niger Delta Region.* .(1) 1-9.
[55] Ibid
[56] Section 33 2 OSRCRDAR

from the operators' perspective; hence, they are not obligated to clean up and remediate spills undetected by the regulator.

3.3.2.3. Oil Spill Report: Investigation by the Joint Investigation Team to Ascertain Liability

When an oil spill occurs in Nigeria, a JIV is constituted immediately to mobilise and visit the oil spill site to ascertain the cause of the spill, the extent of damage and the affected areas.[57] The JIV will generally include the representatives of regulatory authorities, including NOSDRA, the NUPRC, the operator, community leaders, and representatives of the federal and state ministries of the environment. However, the JIV process is heavily skewed in many ways. First, the process relies on operators for the technical information knowledge and logistical arrangements, including transport to and from the site.[58] Second, operators provide the officers of regulatory agencies on JIV assignment with food, transport and accommodation allowances for participating in the exercise. Most of the time, the monetary offers by the operators rather than the impact of the spill make taking part in the JIV exercise a coveted task. Third, technical knowledge strategic to the effective evaluation and enforcement of environmental harm from the oil spill is also within the operator's control. Fourth, the lack of expertise among the regulatory agencies effectively means that the operator who is potentially liable for the oil spill appears to have substantial control over the same process that is set to investigate their role, conduct and liability. The operator's dominant role in the JIV investigative process indicates the deep concerns concerning the regulation of oil activities in Nigeria regarding the prevention, cleaning up and remedy of environmental damage involving oil spills.

[57] Section 33 2 OSRCRDAR

[58] Amnesty International November 2013 Bad Information Oil spill investigations in the Niger Delta Amnesty International has not found any case where the regulators do post-JIV investigations.

3.3.2.4. Good Oil Field Practice

Good oil field practice entails that operators protect their oil facilities and oil pipelines against the risks of malicious third-party interference.[59] Good oil practice is the standard guidelines set by the American Petroleum Institute (API) adopted and recommended by the Nigerian authorities as a best practice guide, as well as the coeds by the American Society of Mechanical Engineers (ASME) known as standards for petroleum production,[60] focusing primarily on reducing oil spills.[61] The Petroleum Industry Act 2021 also requires that Nigerian oil and gas operations conform to the 'good oil field practice' – globally acceptable oil field practice embodied in the API and ASME standards.[62] The API standards require operators to prevent the risk of sabotage by ensuring measures are taken against sabotage and vandalism, including periodic pipeline repairs [63] and robust design features (such as thicker-walled pipes, sabotage-resistant pipe requirements, pipeline leak detection technology and deeply buried pipelines).[64]

3.3.2.5. Politically Repressive Stance on Non-Governmental Organisations

Globally, NGOs in general and environmental NGOs, in particular, contribute considerably to safeguarding better environmental standards and enforcement.[65] However, the capacity to do this immensely depends on the type of government in place and the weight of the NGO's political and economic strength. A government that is not answerable to its citizens or is required to pay attention to public opinion is unlikely to listen to NGOs regarding

[59] R Steiner 'Double standard https://www.foei.org/wp-content/uploads/2014/01/20101109-rapport-Double-Standard.pdf November 2010. accessed 21June 2022; M Zimmer, 'Oil companies in Nigeria: Emerging good practice or still fuelling conflict?. In *Corporate Security Responsibility? Corporate Governance Contributions to Peace and Security in Zones of Conflict* ' (London: Palgrave Macmillan UK 2010) 58-84
[60] Ele, (n30) 134
[61] Ibid
[62] Formerly Section 9 of the petroleum Act 1969
[63] Ele, (n30) 134.
[64] Shell was recently held responsible in The Hague in a case involving *Nigeria farmers' vs Shell* to install a leak detection system on its pipelines. Milieudefensie et al. v. Royal Dutch Shell plc. ECLI:NL:RBDHA:2013:BY9845, 2.2.
[65] Conservation International (CI) http://www.conservation.org/Greenpeace:http://www.greenpeace.org/ Friends of the Earth Netherlands https://www.foei.org/member-groups/europe/netherlands

environmental harm. For example, local NGOs, such as the Centre for Oil Pollution Watch and Socio-Economic Rights and Accountability Project (SERAP), have led efforts to clean up oil pollution in the Niger Delta region. Along with other local environmental activists, these NGOs have been critical of operators and their reckless environmental practices. However, these NGOs may not be on the same level as Greenpeace, Friends of the Earth and Amnesty International; hence, their advocacy may be limited. Moreover, the lack of accountability of Nigerian regulators makes them aggressive toward the NGOs and, in some cases, wield state power to silence them out of the Niger Delta.[66]

3.3.2.6. Ethnic Minorities

As a nation, Nigeria is sturdily divided along ethnic and religious lines. On the one hand, the politically dominant Muslim North has governed for the majority of Nigeria's history. On the other hand, the politically disadvantaged Christian south of Nigeria holds virtually all the oil host communities.[67]

[66] There are notable cases that have attracted international reproaches, such as the movement led by renowned environmental activist Ogoni son Ken Saro Wiwa whose voices were suppressed between 1993 and 1994 and culminating in the conviction and execution for the murder of Ken Saro Wiwa, and eight of his associates after a trial that was widely criticised as not meeting the minimum standards of a fair trial. Other cases include the Umuechem massacre of 1991, the Odi massacre of 2000, and the killing of Ijaw youths following the Kaiama Declaration 1998. For more details on these incidents, see the following: H.R.W., 'Corporations and Human Rights: Recent Human Rights Violations in Nigeria's Oil Producing Region' (February 23 1999) (last visited on January 20 2024);

[67] Oil and gas production is concentrated in 9 out of Nigeria's 36 states – Abia, Akwa Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo, and Rivers. The Niger Delta basin contains around 246 production fields and 3,446 active wells.

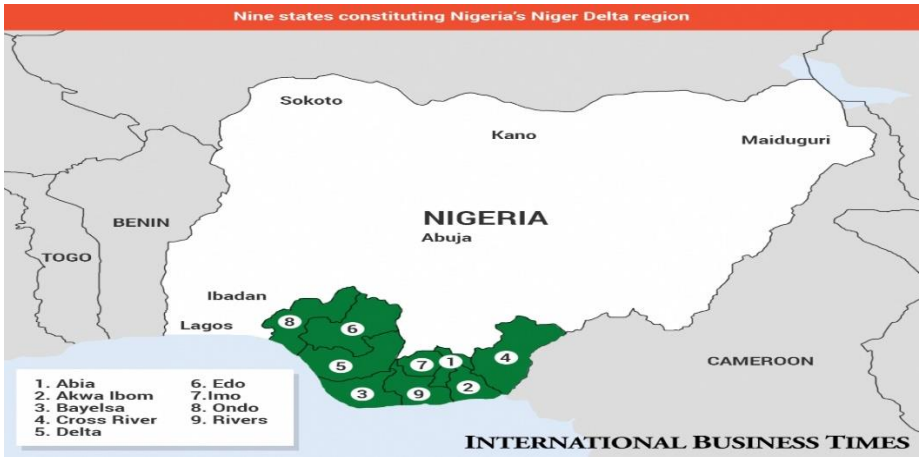

Figure 3.1 is a map showing nine oil-producing states.

Thus, Nigeria's oil-producing areas predominantly reside in the southern ethnic minority and politically vulnerable regions. Due to the small population factor, these groups include the *Efik*, the *Ogoni*, the *Itsekiri*, *the Ibibio*, the *Etche*, and the *Urhobo*, amongst many others, who wield little political influence.[68] At independence in 1960, political power was shared among the three most populous ethnic nationalities of the *Hausa/Fulani*, *Yoruba*, and the *Ibo*, who dominated Nigeria's northern, western, and eastern parts, respectively. While the oil-producing areas have been mainly in the Christian south, the Muslim North has wielded significantly more political influence throughout Nigeria's history. However, primordial allegiance is believed to be a catalyst for the regional growth seen amongst minority groups in Nigeria, but it has its limits. It is not always the case that when ethnic minority leaders participate in government, it will yield better treatment and growth for the ethnic minority groups in question. For instance, President Goodluck Ebele Jonathan was the first and only president to have emerged from the ethnic minority oil-producing region.[69] However, his government did not develop any policy

[68] Typically, ethnic loyalty must be understood with circumspection as it has limits. It is not all the time that participation of ethnic minority leaders in government yields result relating to better treatment for the same ethnic group. For instance, President Goodluck Ebele Jonathan was the first and only president to have come from the ethnic minority group and oil producing region, and his government did not produce any policy to better the lives or environment of his people. In a similar vein, Dan Etete (Nigeria oil minister 1995-1998) was also from the oil producing region. However, Etete concentrated on arranging lucrative oil wells deals for himself and his cronies rather than helping with policies to lift the region from the environmental crisis.

[69] Goodluck Ebele Jonathan was elected president of the FRN from 2010-2016, held from the Niger Delta.

to better the lives or environment of his people. Dan Etete, Nigeria's oil minister from 1995 to 1998, was also from the oil-producing region.

Similarly, Etete focused on arranging money-spinning oil well deals for himself and his cronies rather than helping with policies that could boost the region plagued with environmental catastrophe. Similarly, former petroleum minister Diezani Alison-Madueke who served under President Goodluck from the Niger Delta region, is only remembered for syphoning billions of Naira to buy private jets, yachts, jewellery, and mansions in the UK and Nigeria. Alison-Madueke purchased three London properties using suspected bribes from oil deals.[70] Alison-Madueke is on trial in the UK for money laundering, and a Nigerian court has also issued a warrant for her arrest.[71]

Regarding regulating oil and gas activities, the federal government appoints the heads of the regulatory agencies who have no connection with the oil-bearing communities whose environment is highly impacted by oil. Moreover, these appointments are often ethnically skewed, favouring the politically strong North and not necessarily guided by the person's competence. For instance, NOSDRA has had six northern and one southern Director General since its inception. In addition, the current Director-General of NOSDRA, Mr. Musa Idris, is from the northern part of Nigeria.[72] Thus, there is no incentive to ensure regulatory efficacy. Again, NOSDRA is headquartered away from the people and oil activities, making it difficult to supervise and monitor the oil and gas activities effectively. Moreover, poverty, literacy, and a lack of access to mass media to disseminate information have severely limited the victims'

[70] In fact, under the Goodluck regime, GB£325 billion (US$419 billion) is estimated to have flowed through the UK from corrupt Nigerian oil deals.
[71] Billions Worth of Private Jets, Superyachts, And Mansions Have Been Bought with Corrupt Wealth. https://www.forbes.com/sites/oliverwilliams1/2019/10/24/billions-worth-of-private-jets-superyachts-and-mansions-have-been-bought-with-corrupt-wealth/?sh=21a96c8d32ea
[72] From the inception of NOSDRA in 2006 to now, only Peter Idabor was the DG from the Niger Delta. The current DG, Mr. Musa Idris from the northern part of the country, like those before, has been accused of incompetence by the Nigerian senate yet still holds on to his office as DG.

desire for an influential campaign that could draw the necessary response from within and outside the oil-polluted region.

3.3.2.7. Militancy and Environmental Security

Regulatory processes often fail to involve local communities and their concerns adequately in decision-making. This exclusion often leads to regulatory measures that do not fully address local concerns or leverage local knowledge. This exacerbates misunderstandings and resistance. The effects of this unrest lead to wide-ranging environmental security, and the core illustration of what constitutes environmental security may no longer be concealed from understanding against the backdrop of some scholars' arguments.[73] However, Environmental security is a term developed from martial language, environmental groups and social thinkers.[74] Environmental security guarantees the ecosystem's functioning as the basis for human well-being and existence. In addition, environmental security aims to prevent any conflict that could lead to the State losing its authority due to the environmental factors that individuals and communities suffer.[75] Environmental degradation and the resultant long-term poor environment can cause people to suffer, often resulting in violent behaviours and conflict.[76] Conflict is often generated by environmental damage caused by human activities, whether by accident, negligence, or design.[77]

Environmental pollution in Nigeria poses severe security implications. For instance, the period from late 2005 to mid-2017 witnessed severe tensions, leading to violent attacks on oil installations and the kidnapping and outright carnage, and obliteration of oil companies

[73] A. O. Ayeni and F.B. Olorunfemi *Reflections on Environmental Security, Indigenous Knowledge and the Implications for Sustainable Development in Nigeria. (2014) 12 Jorind* (1) June, 2014. Transcampus.org/journals; www.ajol.info/journals/jorind 46
[74] Ibid
[75] Ibid
[76] T Hagmann, "Conflicting the concept of environmentally induced conflict" (2005) 6 Peace, Conflict and Development. (6), 1-22.
[77] Ibid

workers in the Niger Delta.[78] In late 2005, the Movement for the Emancipation of the Niger Delta (MEND)[79] detonated two bombs in the creeks of the Niger Delta. The bombs wrecked two oil pipelines belonging to SPDC. On January 11, 2006, another SPDC oilfield located a few kilometres offshore was attacked, and in the process, four expatriate oil workers were kidnapped and taken hostage by the fighters. A week later, in 2006, MEND attacked and destroyed one flow station and two military boats belonging to SPDC.[80] A point to note is that the bombing of oil pipelines and other installations worsens oil pollution in the environment.

Moreover, under the law, no operator is responsible for cleaning up. Until mid-2017, more than twenty groups have formed to target oil infrastructure. The protagonists claimed that the oil pollution damage must be addressed. These activities have raised security concerns for the regulators to visit most oil facilities and spill sites for inspection purposes, fearing being kidnapped or even killed. Effective regulation requires transparent, consistent, and culturally appropriate communication strategies. The social inequalities in the wealth generated from oil and gas often contrast sharply with the poverty experienced by local communities. This disparity leads to social unrest and resistance to regulatory measures seen as perpetuating inequalities. - Local communities frequently feel that they do not benefit from the exploration and extraction of resources from their lands. A lack of access to jobs, education, and healthcare exacerbates social tensions and undermines support for regulatory initiatives.

3.3.2.8. Indigenous Culture and Social Disruption and Cultural Erosion and Regulation

Oil and gas activities have displaced communities and disrupted traditional ways of life in the Niger Delta. This leads to social dislocation and cultural erosion, fueling resistance to

[78] A Ikelegbe, "The economy of conflict in the oil-rich Niger Delta region of Nigeria', (2006) 14 Nordic Journal of African Studies, (2),208-234 see also U Idemudia, and IE Uwen "Demystifying the Niger Delta Conflict: Towards an Integrated Explanation", (2006) 33 Review of African Political Economy, (109) (2006),391-406
[79] FC, Onuoha, 'Oil pipeline sabotage in Nigeria: Dimensions, actors and implications for national security (2008) 17 African Security Review (3):99-115,
[80] Ibid

regulatory measures that do not adequately protect community interests. The influx of these oil-related activities disrupts local social structures and cohesion and leads to conflicts and resistance against regulatory interventions that fail to consider these social dynamics. In Africa, Indigenous peoples generally have a well-developed local understanding and arrangements for environmental management strategies, making them more resilient to environmental alteration. This indigenous knowledge has a high degree of acceptability amongst most local communities in Nigeria.[81] Thus, Goodenough sees culture as anything that a "*person knows and believes in acceptable members while in any role... It is the types of things people have in mind, for perceiving, relating and otherwise interpreting them*".[82] The cultural significance of Oil in Nigeria is not different from the perception among indigenous peoples elsewhere globally:[83] they view the natural environment and its elements (natural resources) as a component of nature endowed with sacred virtues representing their identity and existence as a people.[84] Therefore, crude oil, some plant species, and rivers are not mere environmental resources; they are also seen as extraordinary creatures that are part of an indigenous people's culture and divine creation.[85] Therefore, adequate protection is strategic to preserving these cultural legacies. In addition, several farming technologies that have consequences across the whole spectrum of conservation are routinely used as environmental management practices that may appear as land management matters but have implications for forests, wetlands, water, and biodiversity conservation.

[81] A Fentiman, and N Zabbey. "Environmental degradation and cultural erosion in Ogoniland: a case study of the oil spills in Bodo." (2015) 2 *The Extractive Industries and Society* (4): 615-624.
[82] W H Goodenough, 'Cultural Anthropology and Linguistics' in Dell Hymes (ed), *Language in Culture and Society* (Harper and Raw 1964) 36.
[83] Inter-Am. Common on Human Rights, Org. of Am. States, Rep. on the Situation of Human Rights in Ecuador, 110 OEA/Ser.L/V/II.96, doc. 10 rev. 1 (April 24, 1997) available at http://www.cidh.org/countryrep/ecuador-eng/chaper-9.htm (hereinafter I.A.C.H.R. Ecuador Report). Accessed February 24 2020.
[84] O Fagbohun, 'The Law of Oil Pollution and Environmental Restoration: A Comparative Review' (Odade Publishers) (2010) 115
[85] Ibid

3.3.2.9. Land Use Act and its Implication for Environmental Management

Land acquisition in Nigeria can be viewed from the pre-and post-1978 period, primarily as the Act actively expropriated Land from its owners.[86] Before enacting the 1978 Land Use Act, operators obtained land consent from the locals. Post-1978, the process changed from villagers granting consent for oil activities to the government granting consent. This procedure entrenched the anti-local, open-ended annihilation of compensation to the people with the Land Use Act. This position is consistent with and reinforced by the provision of Section 44 of the Nigerian Constitution. Thus, the Land Use Act monopolises all access rights to oil-rich land in Nigeria without providing any legal option for any landowner to influence any change to control oil pollution. Section 1 of the Land Use Act authorises the governor to allocate and grant a certificate of occupancy to any individual or corporate person with the rent for the Land.

Before 1978, oil operations did not evidence any conflict, especially when operators entered Land without a landowner's permission.[87] Moreover, once the operators paid the necessary compensation, the relationship between operators and the locals was cordial.[88] However, since 1978, following the compulsory land acquisition, operators are no longer under a legal obligation to pay rent or compensation to hitherto landowners. At this point, two cardinal interests developed simultaneously. First, the *hitherto* landowner became interested in recovering damages for personal injury, economic loss and loss to property resulting from oil pollution. Second, the government became more focused on the oil rent even if the environment suffered.

Accordingly, operators found a new operating culture concerning oil spill management, just like the people and government. Indeed, an average Nigerian operator is characterised by oil

[86] The Act maintains a technical distinction between payment for land (a property of the state) and compensation for investments (e.g. destroyed buildings, economic trees, crops) made by previous owners on the land.
[87] JG Frynas, 'Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities' (Lit Verlag, 2000) 176
[88] Ibid

pollution faults, poor maintenance culture on oil installations and a lack of investment in new technologies. However, the adverse impact of oil pollution became horrendous, and operators' reckless culture leaned towards the critical refurbishment of facilities and Land for farming.[89] This implies a shift in the operator's operating standard to reduce or avoid the amount of oil spilt.

Furthermore, the government's approach to environmental issues influences Nigeria's corporate culture of environmental management. This includes enacting weak laws that lead to little real change in regulating oil and gas activities. A former SPDC health and safety adviser claimed that environmental protection or improvement was a function of decision-making, culture and the age of oil installations rather than the law.[90] At the same time, the fiscal policy for environmental protection implies that the operator's decision-making may be tilted to more spending and investment in research and development. Hence, the culture of resistance persists with SPDC's shirking liability. Cultural influences also appear to be very important; this entails the social values guiding decisions made by the firm's board. For instance, a subsidiary of a multinational company could be assumed to develop a specific corporate culture influenced by the host country's national culture and the corporate headquarters' cultural values.[91] Thus, the dynamics of cultural change in Nigeria's oil industry environmental performance are the oil firms' values regarding environmental issues and the posture of the Nigerian government. Unlike the Ogoni, the Sakhalin oil and gas project was said to disrupt the environment and society where it was sited.

However, after NGOs took up these issues and made international headlines, pressure mounted on Shell management, requiring the Russian government to change its stance in supporting the

[89] The Court in the case *Nigerian Farmers vs. SPDC* had to order the operator to install leak detectors on its pipelines, a global standard practice that is completely non-existent among Nigerian operators.
[90] Frynas (n87) at 179
[91] Frynas (n87) at 180

project. Sakhalin's stakeholders were disappointed by Shell's approaches to environmental conservation. As a result, the almost $20 billion project that endangered the environment suffered a delay and near abandonment.[92] The Sakhalin brings the challenges of balancing oil and gas project execution and stakeholder commitments against sustainability. The Sakhalin project serves as a reminder of the culture of dereliction of social responsibility challenges in Shell and other oil multinationals' operations. SPDC's culture was the same until the Russian government tackled it with an uncompromising stance on the environment in Sakhalin.

In contrast, the Nigerian government is a willing collaborator; hence, it has not been critical of the operators regarding their reckless practice of the environment of the Niger Delta.[93] From an operator's perspective, however, it makes good business sense to minimise the adverse impacts of oil operations when the monetary costs are low. In addition, reducing the frequency of oil spills by upgrading facilities and investing in oil pipeline surveillance can mitigate environmental damage. However, as seen above, the cultural approaches of operators prevent them from adopting many initiatives and investments that could reduce the adverse impact of oil operations on the environment.

3.3.3. Political Factors Inhibiting the Regulation of Oil and Gas Activities

Although the operators are undoubtedly critical to Nigeria's economy, this section argues that oil politics has left the Nigerian State in a set-up where the regulation of oil activities and oil policies are captured and ultimately skewed in favour of the operators. The section itemises that several political factors, including Regulatory Capture in Nigeria, Corruption, Political Influence and Interests and political interference, inhibit the regulation of oil and gas in Nigeria.

[92]RussiainvestigatesShell'sSakhalin-2project; 25 Oct 2006 https://www.theguardian.com/environment/2006/oct/25/energy.oilandpetrol. accessed 20th june 2021

[93]Shell bows to Kremlin pressure on Sakhalin project - Business - International Herald Tribune https://www.nytimes.com/2006/12/11/business/worldbusiness/11iht-shell.3864505.html accessed 20th June 2021.

3.3.3.1. Regulatory Capture in Nigeria

Regulatory capture within regulatory agencies undermines the integrity and impartiality of regulatory processes. The influence of vested interests and political connections has resulted in regulatory decisions that prioritise private gain over public interest. Regulatory agencies may be susceptible to capture by powerful industry players or political interests, compromising their ability to act in the public interest. The capture of regulatory institutions results in lax enforcement, selective application of regulations, and regulatory decisions biased towards industry preferences. Posner argued in 1974 that it has been challenging to establish the appropriate role of government intervention in the market within social theory.[94] According to Posner, regulations are government interventions implemented to address existing inequality and inefficiency market issues.[95] The phrase to describe this regulatory involvement is 'regulatory theory', which can be further classified into 'public interest theory' and 'captured regulatory theory'.

Furthermore, the literature indicates that capitalists, driven by their inherent character, consistently strive to optimise earnings. Consequently, they seek to exploit rules as a means to accomplish their objectives.[96] According to Uche, capture theory suggests that the industry organises its members to undermine legislation that is not in their favour.[97] It is evident that capture theory primarily concerns how the regulated entities exert influence over the regulators in various ways.[98] Posner contends that the theory does not explain how the regulated entities

[94] R A. Posner, 'Economic Approach to Law' (1975) 53 Tex L Rev (75) 757-782
[95] Ibid
[96] OE Olugbenga, "Juxtaposing Regulation Theory with Agency Behaviour: Understanding the Role of the Regulator in the Developing World with Evidences from Nigeria." (2013) 18 *JL Pol'y & Globalization* 33-44. Noah, A., et al. "Corporate environmental accountability in Nigeria: An example of regulatory failure and regulatory capture." (2021) 11 *Journal of Accounting in Emerging Economies* (1): 70-93.
[97] Olugbanga (n96) at p37 ,
[98] Noah (n96) at p8

might exert influence over or control the regulators. Therefore, the focus should be on the process of capture rather than on the regulators themselves.[99]

Thus, capture arises when every component of a given entity's legal, social, political and economic structures is held captive by a more significant interest that influences or directs the activities of the very essence of the entity under capture.[100] For example, comprehensive capture of a state's regulatory agencies, institutional decision-making mechanisms, and detecting big economic decisions amounts to being a complete hostage.[101] Two types of capture operate in Nigeria: state capture and regulatory capture. It is beyond the scope of this thesis to identify individual captor firms and their specific forms of control in Nigeria. A state is captured when the duration of control by the captor is sustained for as long as the captor is interested in the benefits that accrue to its drives.[102] In Nigeria, oil rents play a dominant role in shaping national political and economic discourses. However, while operators make a substantial profit, negative externalities generated by their operations cause a strain on other parts of the economy. For the most part, these externalities are left unremedied in the environment with little or no consequence. Thus, the prosperity of the Nigerian State is predictably tied to the prosperity of the oil firms. Some people have argued to the extreme that Nigeria is a creation of multinational oil firms that continue to govern and influence its decisions.[103] Understandably, oil companies like Shell, Chevron, Mobil, and Elf effectively dictate the direction of the Nigerian economy and influence policies affecting their operations. The potential intersecting nature of interactions between the operators and the State has resulted in institutional capture, albeit because the rents, royalties, taxes, and equities shared between

[99] Posner (n94) at 773
[100] G Stigler "The Theory of Economic Regulation"(1971) Bell Journal of Economics (2). 393-397.
[101] Ibid
[102] Ibid
[103] 'Assassins in foreign lands: A CorpWatch radio interview with Nigerian human rights activist Oronto Douglas', Third World Traveller, available at http://www.thirdworldtraveller.corn/Africa/Oronto_Douglas_Nigeria.html; and Wale Abedanwi, 'Nigeria: Shell of a state', Dollars and Sense Magazine, July/August, 2001, available at http://www.thirdworldtraveller.com/Africa/Nigeria_shell_state.html. Accessed 19th Feb 2022

the operators and the State ultimately meant that the State must distribute regulatory and legal advantages to the relevant operators.[104]

Although Nigeria can still generate income from rents, royalties, taxes, and benefits from its equity investment with the operators, operator prosperity is indeed regarded as Nigeria's success. The hegemonic interaction between Nigeria and operators is seen in the appointment of many former executive employees of oil firms to top government offices. For instance, one-time Group Managing Director of the state-owned NNPC, Funsho Kupolokun, who had earlier served as presidential Special Assistant on Petroleum Matters, was a former staff member of Shell before joining the NNPC.[105] Frynas seemingly offered more persuasive evidence showing this interaction when he indicated that it was no coincidence that a former Shell director, Ernest Shonekan, would become Nigeria's Head of State in 1993. Less than a year later, another former Shell staff member, Edmund Daukoru, was appointed Group Managing Director of the NNPC in 1992 and later retired from SPDC before becoming a Minister of Petroleum Resources. There are also several examples of others that followed in different positions in government.

Regulatory capture involves a situation where the administrative machinery is influenced by interested persons, whether private or corporate, who manipulate and exert substantial influence on government policies in a way that suggests the satisfaction of their interest. State capture pursues the realisation of favourable laws to shield and uphold the dominant private interest(s), a form of corruption that seeks the selective enforcement of extant laws or influences the trajectory of new enactments. As a result, most oil legislation in Nigeria appears

[104] This can be seen in the nature of lax legislation, and the failure to punish oil spill prevalence caused by non-adherence to industry best practice for good oil fields. It is worth comparing this to the steep regulation witnessed in the banking or telecommunications sectors.
[105] K Omeje "Oil conflict in Nigeria: Contending issues and perspectives of the local Niger Delta people." (2005) 10 *New Political Economy* (3): 321-334..

primarily biased in favour of the operators.[106] The current State of capture gives the impression that an imminent environmental catastrophe looms and is likely to occur as rules and regulations are circumvented. Some have argued that capture was a major contributor to the Deepwater Horizon oil spill catastrophe near the Gulf of Mexico.[107] This point is argued in this light because of the inelegant behaviour of regulators. Hence, capture occurs when the regulator consistently makes judgements that benefit specific industry actors, particularly in a given environment like the Nigerian oil and gas sector. Particularly if the industry actors have taken advantage of opportunities to secure their preferences; thus, the regulated industries consistently circumvent restrictions by leveraging their available resources.[108]

3.3.3.2. Corruption

High levels of corruption within the government and regulatory bodies undermine efforts to regulate the oil and gas industry effectively. Bribes and kickbacks are common, leading to lax enforcement of regulations. Corruption is synonymous with the Nigerian oil industry.[109] It represents a culture of sleaze and underhand dealing that has perverted the oil sector and is more or less a norm that has enveloped the regulation of oil and gas activities in the country.[110] As a result, operators regularly avoid liability for environmental harm due to the corruption of regulatory officers.[111] Instead, they are made to pay incredibly diminutive penalties for such liabilities.[112]

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[106] See the exceptions in the various enactments and the implementation of the PPP

[107] J.B Zygmunt. 'Plater, *Learning from Disasters: Twenty-One Years After the Exxon Valdez Oil Spill, Will Reactions to the Deepwater Horizon Blowout Finally Address the Systemic Flaws Revealed in Alaska?* (2010) 40 ENVTL. L. REP. (11) 11041-11047.

[108]Ibid

[109] OJ Olusola. "Legal framework for combating corruption in Nigeria-the upstream petroleum sector in perspective." *JARLE* 8.25: (2017) 956-970.

[110] Olusola. ibid (n109) at 951

[111] For instance, officers tend to agree with operators during JIVs that oil spills were due to sabotage rather than corrosion.

[112] See for instance s. 3 and 4 of the Oil in Navigable Waters Act.

Moreover, the sleaze happens at all levels from the start of a business (licencing, permits, concessions) to when environmental liability arises, indicating that the regulators may have even compromised the future if environmental harm occurs. For instance, in 2010, a $182M deal was uncovered in Nigeria. A network of cryptic banks was used as a conduit to transfer over $182 million in kickbacks to Nigerian government officials in exchange for $6 billion worth of contracts involving an international syndicate of corporations that included a then Halliburton subsidiary (KBR).[113] When docked at a Houston courtroom, a contrite Tesler, a North London lawyer involved in the transaction, stated: "*There is no day when I do not regret my weakness of character. I gave in to the expectations of behaviour in a corporate culture that in no way excuses what I did. I came to terms with Nigeria's crooked form of governance. I am guilty of the charges charged because I chose to ignore what was going on.*.[114] Tesler was handed a 21-month prison sentence. He also forfeited $149 million to the US government from his Swiss bank accounts for serving as the intermediary for collecting kickbacks paid to secure the Bonny Island Natural Liquefied Gas Project contracts for KBR, the former Halliburton subsidiary. Interestingly, between 2009 and 2011, the consortium members were fined more than $1.5 billion in penalties for their role in the bribery scheme, yet none of their Nigerian collaborators has been found guilty.

Similarly, Global Witness, a UK-based international press outfit dedicated to the transparency and accountability of the global extractive industry, exposed US$1.1 billion in payments made by Shell and ENI that ended up in Malabu's accounts. An account controlled by a convicted criminal and former Nigerian Minister of Petroleum, Dan Etete. Shell and ENI made the payment into the Nigerian government's account for the controversial oil block, OPL 245. In a

[113] Files Open New Window on $182-Million Halliburton Bribery Scandal in Nigeria available online at https://www.icij.org/investigations/swiss-leaks/files-open-new-window-182-million-halliburton-bribery-scandal-nigeria/ accessed 10th January 2021

[114] Ibid; Nigeria: Leaked Files Link Abdulsalami Abubakar, Chris Garba to U.S.$182 Million Halliburton Bribery Scandal. https://www.freevoiceradio.com/nigeria-leaked-files-link-abdulsalami-abubakar-chris-garba-to-u-s-182-million-halliburton-bribery-scandal/ accessed 20th March 2024.

grand scheme that reeked of corruption involving top government officials, the Attorney General of the Federation, Mohammed Adoke, and Minister of State for Finance, Yerima Ngama, who, with the tacit approval of President Goodluck Jonathan, transferred the money into Malabu's account.[115] Had these companies commenced operations like many others not exposed, they would appear to be shielded from any infractions resulting in environmental damage. Moreover, it is doubtful how effectively the regulators operating under the minister involved in such scandalous dealing would be allowed to enforce the law freely and independently.

3.3.3.3. Political Influence and Interests, Political Interference in the Regulatory Independence

Powerful political figures and vested interests often have significant stakes in the oil and gas sector. These individuals and groups can influence regulatory decisions to favour their interests, leading to weak and inconsistent institutional enforcement.[116] There is a weakness of regulatory bodies in Nigeria, which often end up lacking the necessary autonomy, resources, and technical expertise to enforce regulations effectively. Political interference can further weaken these institutions, making them less effective. Nigeria's diverse ethnic contestation and regional composition of regulatory bodies, as already shown above, also lead to conflicts over resource control and revenue sharing. These tensions complicate the implementation of national regulations and policies, as local and regional interests conflict and may resist centralised control and implementation of regulations.

[115]Global witness 'Shell and Eni's Misadventures in Nigeria'(17th Nov, 2015) www.globalwitness.org/en/campaigns/oil-gas-and-mining/shell-and-enis-misadventures-nigeria/ accessed 20th January 2021

[116] For Kupolokun, an honour well-deserved', Daily Sun, 11 November 2004, available at http://www. sunnewsonline.com/webpages/features/money/2004/nov/11/money. Accessed 20th Jan 2021

The lack of political will that is needed to enforce and implement rules often lacks genuine commitment from political leaders to enforce stringent regulations in the oil and gas sector. This is partly due to the economic importance of the industry and the fear of disrupting revenue flows. Political interference, patronage, and vested interests in the oil and gas sector can impede regulatory independence and effectiveness. Political elites may prioritise short-term gains or electoral considerations over long-term sustainability and environmental protection. Policy and security Instability: Frequent changes in government and policy direction can lead to regulatory uncertainty. Inconsistent policies and frequent regulatory changes deter long-term planning and investment in proper regulatory frameworks. In regions like the Niger Delta, militant groups disrupt oil and gas operations, making it difficult to implement and enforce regulations. The security challenges divert attention and resources away from regulatory activities. These factors create a complex environment where effective regulation of the oil and gas industry is challenging despite the critical need for it to ensure sustainable development and environmental protection in Nigeria.

3.3.3.4. Economic Factors Inhibiting the Regulation of Oil and Gas Activities

The regulation of oil and gas in Nigeria faces several barriers, but the key economic barriers are as follows: Revenue Dependence and Rentierism in Nigeria, Nigeria's Dutch Disease: A Deflection on Regulation.

1. Revenue Dependence and Rentierism in Nigeria

Nigeria's economy heavily relies on revenue from the oil industry, which is responsible for a significant portion of government income and export earnings. This dependence creates resistance to regulation that could potentially reduce production and revenues. The emergence of the oil economy in Nigeria considerably increased the administrative and political inhibitions to regulation. As seen above, the growth of oil exports created a rentier state, where

one government after another relied largely on revenues from oil rents.[117] The federal structure and various *hitherto* export profiles produced substantial fiscal decentralisation in the early days of Nigeria's independence in 1960. At independence, three regions (the North, Eastern and Western) had different cash crops and mineral deposits, and governments of the regions retained their export revenues.[118] Their economic self-sufficiency and the reliance of regional governments on agriculture (Northern Nigeria groundnut pyramid, Eastern Nigeria palm produce, and Western Nigeria cocoa) created incentives for promoting and sustaining production across the economy. However, successive military administrations in Nigeria dished the three regional administrations. They divided them into twelve states to centralise oil revenue from the Eastern region to benefit the entire federation.

Consequently, with the advent of petroleum for exports, the incentives for agriculture shifted sharply to oil money in several aspects. Firstly, oil revenues became substantially centralised in the hands of the federal government. Secondly, the fiscal discretion of the central government significantly increased. Thirdly, the replacement of 3 regions by states limited the fiscal autonomy of subnational governments, and the continual growth of petroleum exports quickly overshadowed other revenue sources.[119] The quick decline of non-oil exports prompted the concentration of resources at the centre.[120]

From the early 1970s onwards, Nigeria's economy has become profoundly dependent on the revenue from the oil industry.[121] Nigeria's oil production accounts for 98% of government

[117] JO Onoh, and OE Ndu-Okereke. "Dependence on Oil Income Earnings and Diversification of the Economy–The Nigerian response." (2010) 8 IISTE (2), 95-106

[118] BO Iganiga, & D O Unemhilin, 'The impact of federal government agricultural expenditure on agricultural output in Nigeria'(2011). 2 *Journal of Economics*, (2), 81-88; see also OT Olajide, BH Akinlabi, & AA Tijani,'Agriculture resource and economic growth in Nigeria'. (2012) 8 *European scientific journal*, (22).103-115

[119] P Lewis, 'The dysfunctional state of Nigeria' (2006) 3 *Center for Global Development*, 83-116.

[120] Ibid

[121] K Omeje 'Oil conflict in Nigeria: Contending issues and perspectives of the local Niger Delta people', (2005) 10 New Political Economy, ((3)321-334;

exports and nearly 80% of its revenue.[122] Investment Concerns in the sector where it is feared Stricter regulations could deter foreign investment in the oil and gas sector. Investors might perceive Nigeria as a less attractive destination if regulatory compliance costs increase, leading to reduced capital inflows to the national budget. This may also lead to a lack of adequate infrastructure to support the enforcement of regulations, such as monitoring equipment and transportation networks, which undermines regulatory efforts. At the same time, these Oil activities of operators cause the ultimate oil pollution risk, resulting in environmental damage in Nigeria. Although several environmental protection laws are in force against oil-polluting activities in Nigeria, the relevant authorities cannot effectively enforce the legislation without halting oil operations. Enforcing environmental laws against any operators may be a catalyst for the withdrawal of both the capital and the technology needed to exploit oil for Nigeria's development, which may lead to the potential collapse of the economy.[123] This is the economics-based argument that has defined the regulation of oil activities over the last five decades. The Nigerian courts also follow this economic argument trajectory when deciding oil pollution cases. For instance, in *Chinda v. Shell-BP*,[124] the claimants sought an order of the court to restrain Shell from continuing oil activities at least within a five-mile radius of their village due to the adverse effects of the activities on their daily lives and crops.[125] The court declined to make an order of injunction. Instead, it termed the relief sought "*an absurd and needlessly wide demand*".[126] Economic and the overprotective attitude of the regulatory

[122] The World Factbook: Nigeria, CENT. INTELLIGENCE AGENCY https://www.cia.gov/the-world-factbook/countries/nigeria/#economy accessed 20th February 2021.
[123] KSA Ebeku, 'Judicial Attitudes to Redress for Oil-Related Environmental Damage in Nigeria' (2003) 12 Rev Eur Comp & Int'l Envtl L 199-208
[124] *Chinda v Shell-B9 [1974]* 2 RSLR 1.
[125] Since 1956 when oil operations began in Nigeria operators have continuously flared associated gas, i.e. gas produced alongside crude oil. The practice is still ongoing with no end in sight, despite protests from local communities within the Niger Delta area where oil operations take place.
[126] *Chinda (n124)* at 14.

institutions to keep pace with economic growth has continued to fuel environmental damage in Nigeria.[127]

Moreover, the view that the relief sought by the plaintiffs in *Chinda's* case was *absurd and needlessly wide* indicates that the courts, like the regulators, were constrained to refuse any claim that would be inimical to Nigeria's economic growth. Similarly, fluctuations in global oil prices affect Nigeria's ability to maintain stable regulatory frameworks, and this is because, during periods of low prices, there is increased pressure to relax regulations to boost production and revenue. Efforts to diversify the economy away from oil and gas have been slow, making it difficult to implement stringent regulations without significant economic repercussions.

2. Nigeria's Dutch Disease: A Deflection on Regulation

Corruption within the government and oil industry hampers effective regulation. Regulatory bodies lack the autonomy or will to enforce rules due to vested interests and illicit financial flows. The Dutch disease is an economic word used to depict the corrupt tendencies and negative effects that arise from a spike in the value of a country's exports. It is mostly associated with the discovery and exploitation of a valued mineral resource and the unintended outcomes that such a finding can have on the overall economy of a nation.[128] Dutch disease is a pattern of price distortions and structural changes in resource exportation of countries that are mostly adverse to growth.[129] The inflow of the exchange rate and appreciation of the Nigerian Naira from oil exports in the 70s caused a lax in regulated activities in return for higher oil exports. The dynamics of the Dutch disease are often heightened corruption and inflation, which are

[127] M.A. Ajomo, 'An Examination of Federal Environmental Laws in Nigeria', in M.A. Ajomo and 0. Adewale (eds), *Environmental Law and Sustainable Development in Nigeria* (Nigeria Institute for Advanced Legal Studies, 1994), 11

[128] J O Olusi, & MA Olagunju, 'The primary sectors of the economy and the Dutch disease in Nigeria'. (2005) 44 The Pakistan Development Review (2) 159-175. See also JI Otaha, "Dutch disease and Nigeria oil economy." (2012) 6 *African Research Review* (1) 82-90.

[129] G Alan, 'Adjustment to Windfall Gains: A Comparative Analysis of Oil Exporting Countries, in Natural Resources and the Macro economy', edited by J. P. Neary and S. van Wijnbergen (Oxford: Basil Blackwell, 1986); and A Richards and J Waterbury, A Political Economy of the Middle East, 2d ed. (Boulder, Colo.: Westview Press, 1998).

certainly evident in Nigeria.[130] This is because the state becomes a font of resources, the gatekeeper of economic opportunities, and the regulator of activities which it has only chosen to relax. Nigeria fosters a rentier economy, where the critical pathways of revenue accumulation are found in access to politically facilitated rents. The leaders are the central arbitral of resource distribution and ease of market entry. The outcome is fiscal discretion, a lack of accountability, and pressures on industry regulators for special preferences, which generate massive corruption throughout the public and private sectors and impede regulation.[131]

Finally, as is the case with many developing countries, the priority is to create a favourable investment climate to attract investors to the sector and maintain economic stability.[132] This suggests one of the reasons for Nigeria's failings in environmental regulations. At the same time, there is no evidence that countries with consistent and strict approaches to environmental law have experienced or are experiencing a decline in investment profile in their economy.

3.4. Conclusion

This chapter examined the legal, social, political and economic barriers to the regulation of oil activities in Nigeria. In conclusion, the multifaceted examination of legal, social, political, and economic barriers to the regulation of oil and gas activities in Nigeria provides valuable insights into the complex dynamics shaping environmental governance in the country. Legally, the presence of regulatory loopholes, inconsistencies, and inadequate enforcement mechanisms undermines the effectiveness of environmental regulations, allowing oil and gas companies to evade accountability for their actions and perpetuate environmental harm. Socially, tensions between oil and gas companies and local communities stem from a lack of meaningful

[130] Lewis (n119) at p97
[131] Ibid
[132] E Bastida, 'Integrating Sustainability into Legal Frameworks for Mining in Some Selected Latin American Countries' (2002) 129 *MMSD, 4-33*

consultation, inadequate compensation for environmental damage, and a failure to address social and cultural concerns. These tensions escalate into conflicts that further exacerbate environmental degradation and undermine efforts to achieve sustainable regulation. Politically, the prevalence of corruption, regulatory capture, and weak governance structures compromises the impartiality and effectiveness of regulatory agencies, hindering efforts to enforce environmental standards and hold polluters accountable. Economically, Nigeria's heavy reliance on oil revenue, coupled with vested interests in the industry, creates incentives to prioritise profit over environmental protection. This economic dependency perpetuates a cycle of regulatory capture, where regulatory agencies prioritize the interests of the oil and gas industry over environmental sustainability and public welfare. Addressing these barriers requires comprehensive reforms that strengthen the legal framework, enhance governance and transparency, foster meaningful stakeholder engagement, and diversify the economy away from oil dependency. It also necessitates a shift towards a more comprehensive and sustainable approach to environmental governance that prioritizes the well-being of communities, ecosystems, and future generations over short-term economic gains. By acknowledging and addressing these barriers, Nigeria can move towards a more equitable, resilient, and environmentally sustainable future, where the regulation of oil and gas activities promotes the common good and protects the rights and interests of all stakeholders.

Chapter 4

The Extent of the Polluter Pays Approach is enshrined in Nigerian Law.

4.1. Introduction

This chapter examines the third subresearch question: *To what extent is a polluter-pays approach enshrined in the law in Nigeria*? This principle is part of the normative basis of Nigeria's environmental policy and the law governing the oil and gas industry environment.[1] This chapter answers the third research question: ' *To what extent is a polluter pays approach enshrined in the Nigerian Law?'* The chapter is divided into 6 sections. Section 1 introduces the PPP, Section 2 discusses the origin and evolution of PPP, Section 3 discusses the PPP approach in Nigeria, Section 4 discusses factors that impede PPP in Nigeria, and Section 5 examines the judicial implementation of PPP in Nigeria. Finally, section 6 concludes.

4.2. The Origin, Evolution and Context of PPP

The notion of polluter pays originated in the early 1970s.[2] While the OECD officially embraced it in 1972, prior to the introduction of the PPP, there was no obligation to assign significant importance to the cost of environmental deterioration. This was because the environment, its resources, and utilisation were regarded as free, resulting in inevitable natural consequences.[3] The principle was then formally recommended in the 'Guiding Principle Concerning the International Economic Aspects of Environmental Policies'.[4] The OECD recommends the implementation of the 'Polluter Pays approach' to allocate costs of pollution prevention and control measures. This approach aims to promote the efficient use of limited environmental

[1] JO Ezeanokwasa, "Polluter-Pays Principle and the Regulation of Environmental Pollution in Nigeria: Major Challenges." (2018): 70 *JL Pol'y & Globalization* 45-55. See also G Elvis-Imo 'An analysis of the polluter pays principle in Nigeria'.(2017) 31 Ajayi Crowther University Law Journal.(1) 1-40; OO Ojo, "Polluter pays principle under Nigerian environmental law." (2021).26 ENV. LIABILITY (3) 91-105

[2] Organization for Economic Cooperation, *Council Recommendation on the Implementation of the Polluter-Pays Principle*, 14 I.L.M. 234, 239 (Jan. 1975) [hereinafter *OECD, Polluter-Pays Principle]*. OECD, Polluter-Pays Principle, at 234.

[3] SA Atapattu 'Emerging Principles of International Environmntal Law' (Transnational Publishers 2006) 437–39

[4] OECD (n2) at p234

resources and prevent distortions in international trade and investment. This idea suggests that the party responsible for pollution should assume the financial burden associated with it. In 1974, the OECD's Recommendation on Implementation of the PPP further elaborated on the guiding concept. This recommendation affirmed the principle's purpose, which is to assign the financial burden of pollution prevention and control measures to the responsible parties, including public bodies. The recommendation proposed that the government can only provide a certain level of financial support, such as tax reliefs, subsidies, or other forms of help, to cover the costs associated with environmental degradation in rare situations.[5]

These extraordinary situations arise when there is an urgent requirement to swiftly enforce a rigorous pollution control system or when socio-economic issues may escalate to a substantial degree, warranting the provision of government aid.[6] According to the mainstream law and economics literatures, the PPP emerged due to the necessity to discover an effective resolution to the simple issue of environmental damage between two entities of similar bargaining power.[7] Traditional environmental economics has determined that the polluter pays concept is the sole effective approach for addressing pollution in terms of holding individuals accountable for private damages and as a more comprehensive preventive strategy.[8]

The pollution from companies was regarded as "social damage," and their "social cost" was considered as "externalities" that the community bears through property damage, health issues, and loss of species.[9] There were also no established legal or economic frameworks to determine how the costs of cleaning up pollution should be allocated since it was often believed that the oceans and air had unlimited capacity to absorb humanity's waste.[10] Despite attempts to

[5] OECD 'Recommendation of the Council on the Implementation of the Polluter-Pays Principle' OECD/LEGAL/0132 https:// legalinstruments.oecd.org/public/doc/11/11.en.pdf accessed 19th Feb 2022
[6] Ibid
[7] Atapattu (n3) at439
[8] RV. Percival, 'The Globalization of Environmental Law' (2009)326 PACE ENVTL. L. REV. (451), 461-62
[9] M Woodroof 'Pollution control: why not cost allocation?' (1971) 21 Drake Law Review (146) 133-152.
[10] Atapatu, (n3), at 438.

determine and quantify externalities, there was significant ambiguity in assigning social costs to environmental harm.[11]

Economists proposed different solutions to address the issue of externality, but it is generally acknowledged that, with the exception of industries that incorporate external costs within, will not achieve efficiency.[12] As a result, several economic incentives were suggested to encourage polluters to take responsibility for the external costs associated with their actions, which will ultimately be incorporated into the prices they pay.[13] This led to the incorporation of external costs into the economic system, serving as the fundamental basis for the PPP.[14]

The issue of externalities was acknowledged far before the 1970s, dating back to the respected British economist Arthur Cecil Pigou. Pigou's in his influential work titled "The Economics of Welfare" was published in 1932.[15] There was substantial debate during this time about the social costs of pollution[16] and the necessity of incorporating the costs and benefits of pollution into the decision-making process.[17] The father of modern economics, Adam Smith, stressed the need to internalise external costs through taxation as an implementation instrument.[18] He explained the need to tax proportionally from the carriage of goods to the road damage they caused.[19] Smith's idea uses tax policy as the standard instrument to make the polluter pay. The

[11] Atapattu (n3) at 439
[12] Ibid
[13] Ibid
[14] Ibid
[15] Arthur, C. Pigou, 'The Economics of Welfare 183 (4th ed. 1932); see also D Kennedy, 'Cost-Benefit Analysis of Entitlement Problems: A Critique', (1981) 33 STANFORD L. REV. (3), 387-445.
[16] RH. Coase, 'The Problems of Social Cost', (1960) 3 J.L. & Econ. (1), 1-2
[17] Atapattu, (n3), at p438
[18] A Smith, 'the *Wealth of Nations: An Inquiry into the Nature and Causes of the Wealth of Nations'* (London: Strahan and Cadell, 1776), Adam Smith, '*The Theory of Moral Sentiments'.* (London: Millar ithe Strand, 1759),
[19] Ibid Smith, "Of the public Works and Institutions for facilitating the Commerce of the Society"), which gives the example of taxing carriages in proportion to the damages they cause to roads and recommends this idea.

PPP is also traced to Plato,[20] but its modern manifestation is rooted in Pigou's economic findings of internalising external costs.

Coase's theorem of external (social) costs[21] and Herfindahl and Kneese formulated the theory of public goods.[22] The PPP was introduced in an official document by the Organisation of Economic Cooperation and Development (OECD) in its Recommendation of 1972 concerning the economic aspects of environmental policies.[23] The OECD Council later defined the PPP and articulated its implementation methods in subsequent recommendations.[24] The OECD recommendations cover broad aspects of policies that include economic aspects of environmental policies,[25] subsidy and sustainable development,[26] accidental pollution,[27] taxation and the environment,[28] agriculture and the environment,[29] trade and the environment,[30] and implementation of the PPP.[31]

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[20] B Jowett (tr), The Dialogues of Plato: (1953) 4 Laws & Index to Writings of Plato (OUP 1953) "If anyone intentionally spoils the water of another… let him not only pay damages but purify the stream or cistern which contains the water".

[21] R. H. Coase, 'The Problem of Social Cost' (2013) 56 JL & Econ (4):837-77,; see also H. Vedder, *Competition Law and Environmental Protection in Europe; Towards Sustainability? (2003) 3* Europa Law Publishing, Groningen 49-59.

[22] O.C. Herfindahl, A.V. Kneese, '*Economic Theory of Natural Resources', (*Charles E. Merrill, 1974); see also . J. N, A. Dean, P. Hoeller, *Economics and the Environment; a Survey of Issues and Policy Options',(1991)* OECD Economic Studies (16).

[23] Organisation of Economic Cooperation and Development (OECD), *Recommendation of the Council on guiding principles concerning international economic aspects of environmental policies;* Council Document C (72) I28, 26.5.1972.

[24] Organisation of Economic Cooperation and Development (OECD), *Recommendation of the Council on the Implementation of the Polluter-Pays Principle*, Council Document C(74)223, 14.11.1974; *Recommendation of the Council concerning the Application of the Polluter-Pays Principle to Accidental Pollution;* Council Document C(89)88/Final, 7.7.1989.

[25] Ibid

[26] S Barg, A Cosbey and R Steenblik, 'A Sustainable Development Framework for Assessing the Benefits of Subsidy Reform' in OECD (ed), *Subsidy Reform and Sustainable Development: Political Economy Aspects* (OECD Publishing 2007); and OECD *Environmentally Harmful Subsidies: Challenges for Reform* (OECD Publications 2005).

[27] OECD Recommendation of the Council concerning the Application of the Polluter-Pays Principle to Accidental Pollution. 7 July 1989 - C (89)88/FINAL.

[28] OECD, *Taxation and the Environment: Complementary Policies* (OECD 1993).

[29] Joint Working Party on Agriculture and Environment, *Improving the Environmental Performance of Agriculture: Policy Options and Market Approaches* (OECD 2001).

[30] Joint Working Party on Trade and Environment (JWPTE), *The Polluter-Pays Principle as it Relates to International Trade* (OECD 2002).

[31] OECD, Council Recommendation on the Implementation of the Polluter-Pays Principle (Jan. 1975), 14 I.L.M. 234, 235

At the same time, it is discernible from the first OECD documents that market failure in the context of environmental protection lies in economic activity that failed to internalise negative externalities.[32] In general terms, external costs are costs generated by an undertaking but not included in its structure of costs and shifted to the public (e.g. the costs of pollution of public goods such as air or water).[33] Thus, the PPP was based on the postulation that external costs should be included in the costs of economic activity. Indeed, it is assumed that the elimination of market failures that cause environmental pollution requires the achievement of a situation where the prices of goods and services reflect their total social costs, including environmental ones.[34]

4.2.1. The Shifting Meaning Implications and Functions of PPP

The PPP is a multifaceted notion that could have different interpretations depending on the context.[35] The notion of "polluter pays" in domestic law holds that entities responsible for pollution are legally and financially liable for the detrimental effects caused by their pollution.[36] Conversely, within the realm of international law, the Organisation for Economic Cooperation and Development (OECD) imposes a partially regulatory system of environmental taxation to enforce the PPP.[37] The OECD Companies are subject to taxation based on the extent of their pollution emissions. The PPP is a theoretical framework that determines how environmental damage is assigned and reduced.[38] It stipulates that the party responsible for pollution, whether it be an individual, company, or country, should face the financial burden

[32] M Stoczkiewicz 'The polluter pays principle and State aid for environmental protection' (2009) 6 *jEEPL* 2 *I7I-I96*
[33] Ibid
[34] GV Calster, 'Will the EC Get a Finger in Each Pie - EC Law and Policy Developments in Soil Protection and Brownfields Redevelopment' (2004) 16 J Envtl L (1) 3-18
[35] ET Larson, 'Why Environmental Liability Regimes in the United States, the European Community, and Japan Have Grown Synonymous with the Polluter Pays Principle' (2005), 38 VAND. J. TRANSNAT'L L. (2) 541-576
[36] S Sommers, 'The Brownfield Problem: Liability for Lenders, Owners, and Developers in Canada and the United States' (2008) 19 Colo J Int'l Envtl L & Pol'y 259 -291
[37] Organization for Economic Cooperation, Council Recommendation on the Implementation of the Polluter-Pays Principle, 14 I.L.M. 234, 239 (Jan. 1975)
[38] OECD (n2) at pp234-35

of addressing the pollution.[39] In the absence of this process, the expenses associated with environmental harm are borne by the general public, either through taxation to finance government-led clean-up efforts or through a decline in environmental conditions.[40] In a legal context, the PPP is a fair concept that ensures entities responsible for pollution should be financially responsible for the expenses associated with remediating the pollution they cause.[41] Consequently, the notion of making the polluter bear the costs has been widely adopted in mainstream and environmental economics in its vague and undefined state.[42] Surprisingly, there is strong disagreement over the applicability of the general principle and the soundness of its economic arguments.[43]

Although the PPP may seem simple, the more one tries to clarify its meaning and description, the more difficult it is to properly understand the theory.[44] A concise definition derived from some sources justifies our position here and confirms the inherent confusion, as can be seen in the following: Hoitink argues that the notion of polluter pay should be seen within a larger framework, specifically as a policy aimed at promoting the internalisation of environmental costs and the adoption of economic instruments.[45] The polluter-pays concept is an economic principle for assigning costs, which originates directly from the theory of externalities.[46] The fundamental concept gets even more elusive as pollution grows more widespread and rooted in the past, rather than being easily recognised and occurring simultaneously as the resulting

[39] Atapattu (n3) at 475
[40] B N. Mamlyuk, 'Analyzing the Polluter Pays Principle through Law and Economics' (2009) 18 Se Envtl LJ 39-80
[41] OECD, PPP n2, at 234-35.
[42] PGG. Davies, 'European Union Environmental Law: An Introduction To Key Selected Issues' 52-55 (Ashgate Publ'g, Ltd. 2004); see also A Griffiths & Stuart Wall, Applied Economics 117 (11th Ed., 2007)
[43] M Faure, "A Shift toward Alternative Compensation Mechanisms for Environmental Damage?." *Shifts in Compensation for Environmental Damage'*. (Springer, Vienna, 2007). 73-102.
[44] Ibid
[45] Ibid at 75
[46] HC Bugge, 'The Principles of "Polluter-Pays " in Economics and Law, in Law And Economics Of The Environment (*Erling Eide & Roger van den Bergh eds., 1996*). 53, 73-74

harm. Another writer observes that the PPP has become ambiguous and lost its significance due to its broad interpretation.[47]

In the foreword of *The Law and Economics of the Environment*, Richard Posner noted that we are now in a "second generation" of the economic study of environmental law, where the primary focus has shifted away from fundamental economic issues.[48] Instead, the focus has now turned to the pragmatic aspects of environmental legislation.[49] The current dominant academic research is based on unexpressed human-centred value assessments, which makes the subsequent economic analysis not only morally unsound but also inconsequential in a real-world application.[50] Therefore, the prevailing liability allocation models are currently ineffective in assessing pollution abatement techniques.[51] Thus, the act of revaluating the assignment of responsibility by impartially considering the concerns of both humans and the environment is especially applicable to evaluating the leading theory of liability attribution, which forms the basis of the PPP.[52] By modifying the prevailing liability model in Nigeria to consider the well-being of the environment, an important factor that is often ignored can be incorporated: the legal recognition of the environment as a distinct legal entity with its right to protection.[53]

Over the years, the meaning of the PPP as an economic principle has evolved due to its adoption of new roles and interpretations. For instance, the PPP has evolved beyond being purely an economic theory aimed at preventing competition distortion and now holds some legal significance. Initially, it referred to steps taken by polluters to prevent pollution. Later, it was

[47] C Stevens,'Interpreting the Polluter Pays Principle in the Trade and Environment Context', (1994).27 CORNELL INT'LL.J. (3) 577- 590
[48]A Heyes, ed., *The law and economics of the environment*. (Edward Elgar Publishing 2001) 265.
[49] Ibid
[50]C Becker, 'The Human Actor in Ecological Economics: Philosophical Approach and Research Perspectives', (2006).60 ECOLOGICAL ECON.(1), 17-23
[51] Ibid
[52] OECD (n2) pp at 234-35
[53] S Emmenegger & A Tschentscher, 'Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law', (1994).6 GEO. INT'L ENVTL. L. REv. (6) 545- 592

expanded to include the expenses incurred by the government for administrative procedures related to pollution. [54] The 1972 OECD Recommendation initially presented the PPP as an economic rather than a liability principle. The notion was regarded as a means for governments to combat domestic pollution by allocating costs and avoiding subsidies. According to this view, which is often known as the "weak" approach, the principle states that polluters should bear the costs of reducing pollution, at least to the extent mandated by the government. There are several environmental regulations that fall into this classification. The latter is applicable when the term, or sometimes just the concept, "polluter pays principle," is mentioned in a legal document.[55]

Another writer proposed that the PPP comprises multiple principles that share a fundamental economic premise of efficiency, as well as the necessity to internalise the external effects of pollution.[56] The several concepts, which are interconnected and have overlapping characteristics, encompass: 1. The PPP is an economic principle, serving as a principle of efficiency. 2. The PPP is a legal idea that serves as a basis for the fair division of costs. 3. The PPP is a principle for achieving international harmonisation of national environmental policy. 4. The PPP is a principle of allocating costs between states known as the PPP.[57] Each of these "main principles" raises several questions regarding interpretation and implementation. In essence, the fundamental concept of the PPP in terms of economic efficiency is that the social costs of pollution should be internalised in their cost by those who cause the pollution.[58] On the contrary, as a legal theory (specifically, an implicit legal principle), the PPP operates on the belief that "no individual possesses a universal, pre-existing right to engage in pollution".[59] This version of PPP allocates the cost of pollution between the polluter and victim and typically

[54] MR Grossman, 'Agriculture and the Polluter Pays Principle: An Introduction' (2006) 59 Okla L Rev(1) 1-52
[55] Mamlyuk, (40) 52
[56] Bugge, (n46), at 84.
[57] Bugge, (n46) at 57.
[58] Ibid at 59.
[59] Bugge n(46) at 65

holds the polluter accountable for the costs associated with prevention, compensation and damage.[60] What remained challenging were the questions of the nature of pollution, the polluter's identity,[61] who should pay, and what should be paid.[62] While lacking legal enforceability, the OECD principle imposes restrictions on government subsidies for pollution prevention measures.

4.2.2. Theoretical Variations of the Polluter Pays Principle

The polluter pays principle pertains to allocating and internalising costs, as well as legal liability.[63] There is a disagreement among scholars over whether the polluter pays principle considers cost allocation in addition to determining liability.[64] There is a scholarly debate on the feasibility of implementing the PPP without relying on liability; the PPP is a liability allocation paradigm in which an individual or entity responsible for causing harm is held accountable and required to compensate those negatively affected.[65] The polluter pays approach can be seen as a proactive distribution of the cost related to preventing and controlling pollution, which aims to promote the efficient use of limited environmental resources.[66] The polluter-pays approach distributes the financial burden of environmental damage to both intermediate users and end-consumers, hence creating incentives for optimal resource utilisation at all stages.[67] The polluter pays idea is based on the concept of cost internalisation.[68]

Governments often face political challenges when distributing pollution costs among many players or enforcing preventive measures on polluters since the parties involved hold different

[60] Bugge n(46) at 65
[61] ET Larson, 'Why Environmental Liability Regimes in the United States, the European Community, and Japan Have Grown Synonymous with the Polluter Pays Principle, 38 VAND. J. TRANSNAT'L L. (2005) 541, 550
[62] Bugge, (n46), at 65-76
[63] JR Nash, Too Much Market? The Conflict between Tradeable Pollution Allowances and the "Polluter Pays" Principle, (2000) 24 HARV. ENVTL. L. REV. 465, 472-78
[64] Atapattu, (n3), at 441
[65] Mamlyuks (n40) at 44
[66] Ibid
[67] Atapattu, (n3) at 482.
[68] Stevens, (n47) at 578

perspectives and priorities.[69] These political impediments are resolved by appealing to the inherently efficient value of cost internalisation, accomplished through implementing the polluter pays concept.[70] According to the internalisation theory, producers who cause pollution ought to assume the financial responsibility for remedying the damaged resources and subsequently transfer those expenses to the consumers of the products.[71] This internalises the externalities in market decisions by ensuring that the producers responsible for the damage bear the financial burden of the environmental damages.[72] Ultimately, consumers pay the actual cost of the products, while innocent individuals are not made to bear the pollution costs.

Additional rationales exist for the implementation of the polluter pays principle.[73] Environmental taxes can serve as a means of allocating costs or combining cost and liability allocation.[74] Industry-wide and polluter-specific taxes theoretically achieve the objective of assigning responsibility based on the origin of pollution.[75] There are many different environmental tax systems, but in general, a tax system assigns responsibility for potential environmental damage, which helps to distribute the cost and risk of accidents over a long period.[76] Environmental taxes effectively address the government's needs to generate extra income and redistribute resources and wealth.[77] Additionally, environmental taxes manifest a government's "desire to correct a negative externality by regulating and reducing environmental pollution through economic instruments rather than solely a regulatory scheme.[78]

[69] Stevens, (n47) at 578
[70] Ibid
[71] Ibid at 585
[72] Ibid
[73] Stevens at 578-81.
[74] Ibid
[75] Stevens at 578-81
[76] Ibid
[77] J Andrew 'White, III, Decentralised Environmental Taxation in Indonesia: A Proposed Double Dividend for Revenue Allocation and Environmental Regulation', (2007).19 J. ENVTL. L. 43, 44
[78] Ibid

In the context of the OECD, the notion of "Polluter Pays" refers to allocating costs or avoiding subsidies, which is aimed at helping governments deal with pollution inside their own countries.[79] Within the broader global framework, environmental taxes, government levies, and other costs are imposed on utilising natural resources or the resulting damage. This leads to enhanced resource efficiency and reduced pollution.[80] In addition, environmental taxes generate funds to finance the clean-up of pollution and other environmental harm, as well as government expenses that may not be directly related.[81] Additional iterations of the polluter pays principle involve evaluating liability based on the likelihood of each company's impact on real harm.[82] The polluter pays principle can be understood as a regulatory framework that assigns regulatory fines or criminal penalties based on the level of responsibility of each party involved in a specific case.[83] On the whole, there have been different ways to execute environmental policies, which are tradeable pollution licences, penalty models, and pollution abatement subsidy schemes.[84]

4.3. The Extent of the PPP's Approach under Nigerian Law

The PPP is one of the fundamental principles underlying Nigeria's environmental policy.[85] While the PPP is not explicitly defined in Nigerian laws, it applies more impliedly since it has only been in the secondary regulations.[86] Some legislative measures that embody the PPP emphasise its importance and delineate the consequences of not following the rules.[87] According to Nigerian law, operators are solely liable for their pollution; they are not held responsible for earlier conduct. Therefore, it is expected that the polluter will adhere to all

[79] Stevens,(n47) at 578
[80] Ibid
[81] Ibid
[82] CL Albert in, Beyond Tort: Compensating Victims of Environmental Toxic Injury, 78 S. CAL. L. REv. (2005) 1439, 1499
[83] Stevens, (n47) at 578-81.
[84] Atapattu (n3) at 458.
[85] Stevens (n47) at p585
[86] Regulation to the NOSDRA 2011
[87] Elvis-Imo (n1) at p55

environmental specifications and regulations when undertaking their activities. The PPP is implemented in Nigeria by using command and control and tort-based claims to incorporate rules for pollution control and prevention.

We begin this analysis by looking at the national policy on the environment. In order to effectively tackle environmental issues and difficulties, the Nigerian government enacted a national environmental policy in 1989, which was subsequently amended in 1999 and 2016.[88] The objective of the national environmental policy is to attain sustainable development through effective environmental management, ensuring a high-quality environment that meets the health and well-being needs of all Nigerians. It aims to utilise natural resources for the benefit of both current and future generations while also promoting environmental education. To raise public consciousness and to rehabilitate and improve ecosystems, the national environmental policy suggests further policies, strategies, and management methods to effectively include environmental considerations in the economic decision-making process.[89] The policy explicitly specifies that environmental policies, strategies, and techniques used in Nigeria must adhere to the PPP, which implies that the party responsible for pollution should incur the costs of preventing and managing it.[90] The National Environmental Policy advocates the remediation of impacted sites where pollution occurs and the polluters bearing such costs.[91]

In the oil and gas sector, the National Oil Spill Detection and Response Agency (NOSDRA) is at the forefront of driving this initiative.[92] NOSDRA is an agency established under the National Oil Spill Detection and Remediation Agency Establishment Act, and its primary

[88]National Policy on the Environment https://www.nesrea.gov.ng/ wp-content/uploads/2017/09/National-Policy-on-Environment.pdf.
[89] Section 2 of the National policy
[90] Ojo (n1) at p94
[91]K Gbenemene & BK Ubleble 'A Critique On Nigeria National Policy On Environment: Reasons For Policy Review (2021) 11 International Journal of Social Sciences and Humanities Reviews (1) 268 – 280
[92] National Oil Spill Detection and Response Agency Establishment Act 2006

responsibility is to monitor and regulate tiers One and two oil spills and harmonise, implement and review the National Oil Spill Contingency Plan for Nigeria.[93]

Under Section 6 of the NOSDRA Act, the operator must clean and remediate the environment during an oil spill. As seen in Chapter 2, Section 6 (2) (3) of the NOSDRA prescribed that "the failure to clean up the oil spill and remediate the affected area as much as is reasonably possible, including to attract a fine of one million naira." The above section thus makes a polluter responsible for cleaning up an impacted site or risk a fine and criminal sanction for noncompliance with the law. In an oil spill incident, the law requires the operator to immediately contain the spread to minimise the damage that may ensue, notwithstanding whether the spill occurs from its actions or not.[94] It is made clear in the light of PPP that the' operator of oil installation' is the person (legal or natural) responsible for its proper operation under the applicable law.[95] However, due to the complicated relations between the government and operators, as explained in this chapter below, the burden created under the law has remained unenforceable even with the present PPP.[96] The application of PPP has been misunderstood, misinterpreted and misapplied as a civil and criminal liability principle.[97] The relevant question arising from the failure of NOSDRA to discharge its responsibilities effectively has to do with whether stakeholders understood the tenets of PPP.

Furthermore, the Nigeria Upstream Petroleum Regulatory Commission (NUPRC), which replaces the Department of Petroleum Resources, adopts the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) guidelines.[98] These guidelines are

[93] See sections 5,6,7 of NOSDRA Act 2006s
[94] EGASPIN, section B, paragraph 2.6.
[95] OECD, Recommendation of the Council concerning the Application of the Polluter-Pays Principle to Accidental Pollution, OECD/LEGAL/0251 at 5
[96] These complications are explained below under the section 4.4
[97] Ibid
[98] Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) 1991 (revised 2002) https://ngfcp.dpr.gov.ng/media/1066/dprs-egaspin-2002-revisededition.pdf

soft law environmental standards and safety guidelines that oil and gas operators in Nigeria need to comply with to prevent or mitigate oil pollution. EGASPIN, in principle, seeks to adopt best practices, using guidelines consistent with international best practices and standards, and it indirectly adopts the PPP.[99] While these Guidelines did not specifically mention the PPP, its provisions in the Guidelines indirectly express the PPP; for instance, Part VIII, Article B, 2.11.1 provides that: 'it shall be the oil spiller's responsibility to restore to as much as possible the original state of any impacted site'. The guidelines further state that an oil spiller shall be liable for the damage from the spill for which he is responsible.[100]

However, where more than one spiller is responsible, the liability shall be joint and several.[101] EGASPIN guidelines in Article F, 1.2.2, provide that: 'the polluter is required to clean up the oil spilt as practicable and as may be directed by the Commission. Article 4.6.2(b), (c) provides that: 'the oil spiller shall pay adequate compensation to victims and restore/remediate the contaminated sites to an acceptable level as shall be directed by the Commission. These regulations stipulate a 24-hour window within which clean-up exercises must commence.[102] However, operators have claimed that they respond expeditiously to oil spill incidents, even faster than the law requires.[103] The administrative imposition of the burden of pollution costs on the operators is regarded as one of the most effective instruments for environmental protection.[104] Despite this being reflected in the law, Nigeria has no effective PPP application mechanism.[105]

[99] EGASPIN (n98) Part VIII, Article B, 2.11.1
[100] Madubuko, Christian. "Environment Pollution: The Rise of Militarism and Terrorism in the Niger Delta of Nigeria." 2014, https://doi.org/10.5130/ijrlp.i1.2014.3847.
[101] Ojo, (n1) at 89
[102] EGASPIN (n99) at Section B, paragraph 2.6.3.
[103]See Shell Annual 'Sustainability Report from 2011' 4 http://reports.shell.com/sustainability-report/2011/servicepages/downloads/files/entir e_shell_sr11.pdf accessed 19 April 2020.
[104]CM Inwang, 'Application of polluter pays principle in environmental management. 2021 International Journal of Innovative Legal and Political Studies. 9 (1):74–80
[105] Ibid

Considering the fact that effective monitoring and enforcement by a regulator remains crucial for the efficacy of any regulatory system, the system must be enabled by adequate, robust laws that are inclusive and consistent with an array of sanctions to help compel compliance and maintain effective enforcement.[106] This is the foundation for establishing the EU Environmental Liability Directive,[107] which is a framework of environmental liability based on the 'polluter-pays' approach to prevent and remedy environmental damage.[108] In Nigeria, the PPP only imposes the implicit obligation on the operator to the extent defined by the existing legislation. The obligations NOSDRA and NUPRC impose for clean-up and remediation are not explicitly done according to the PPP regulations. Hence, the legislation falls short of the necessary provision for internalising this to realise the legal obligations imposed on the operators. There is no provision in the law on how, when, and limits for the cost to be paid by polluters under Nigerian law. In practice, Nigerian taxpayers effectively bear the costs of externalities from oil production.[109] Despite this, the PPP in Nigeria aims to ensure that the polluters require restoration/remediation of the damage and not the society that covers pollution costs, but this is hardly enforced.[110] The implementation of PPP in Nigeria has only been made to remedy traditional damage (personal injury, property damage, and economic loss) rather than cover the restoration cost.[111]

Depending on the particular framework, the principle's broad conceptual understanding has different meanings and implications.[112] This suggests that the PPP has the potential to be

[106] These are elements that spelt out polluter responsibilities reflect how the PPP is understood and applied in other jurisdictions, such as the EU.
[107] L Bergkamp, and B Goldsmith, eds. '*The EU environmental liability directive: a commentary*.' (Oxford University Press, USA, 2013).
[108] Ibid
[109]E, Onyekachi, et al. "Impediments to Environmental Forensics in the Implementation of Polluter Pays Principle in Nigeria's Extractive Industry." (2023) 35 *Environmental Claims Journal* (1) 52-72.
[110] Ibid
[111]A Olaniyan, 'Imposing Liability for Oil Spill Clean-ups in Nigeria: An Examination of the Role of the Polluter-Pays Principle' (2015) 40 JL Pol'y & Globalisation 73
[112] Larson, (n61) 550

interpreted differently. However, its critical foundations of cost allocation and internalisation to tackle environmental damage must not be displaced. In Nigeria, the PPP is partially implemented against what NOSDRA law prescribes in many ways. First, the priority is for the operator to assuage or relieve victims of oil pollution by paying compensation, not necessarily about environmental restoration.[113] In other words, the *traditional ex-post* liability of operators is the practical way that operators cover the cost of production and their undertaking in Nigeria. This is neither economically efficient, as polluters do not bear the proper cost of their activities nor any cost-internalised,[114] as the main thrust of the PPP, hence, the taxpayers' money is still used for environmental restoration in the Niger Delta.[115] Second, no legal or economic mechanisms are available for cost allocation to reflect the cost internalisation idea of the PPP. The PPP in Nigeria relies on compensatory through negotiated terms or judicial intervention brought through Civil Liability, as will be shown below.

4.4. Enforcement and Implementation of PPP in Nigeria

This section examines how the courts in Nigeria have interpreted the PPP in oil pollution cases. The PPP has not undergone serious judicial scrutiny as there has been no decided case in Nigeria that explicitly examines and embraces the principle.[116] It is worth mentioning that the courts in Nigeria have not authoritatively interpreted the PPP and the majority of environmental law principles.[117] Nevertheless, Nigerian courts have often employed Nigerian common law of negligence, nuisance and strict liability in their handling of environmental matters.[118]

[113] *Shell Petroleum Development Company Nigeria Ltd v. Chief G.B.A. Tiebo & Others (2005) 3-4 SC*
[114] N De Sadeleer *Environmental principles: from political slogans to legal rules*. (Oxford University Press, 2002).
[115] Federal Government of Nigeria launches $1 billion *ogoniland* Clean Up and Restoration programme. https://www.unenvironment.org/news-and-stories/story/nigeria-launches-1-billion-ogoniland-clean-and accessed 20th January 2021
[116] Ojo (n1) 97
[117] Ibid
[118] Ojo (n1) 101

Particularly in ascribing costs for operators' liability for oil pollution damage in line with the PPP, albeit for traditional injury.[119]

The preponderance of the judicial opinion is that for an operator to be liable, they would have violated the relevant environmental standards and enactment, giving rise to an action for common law/civil liability.[120] It is important to mention that the PPP is commonly understood to enforce strict liability.[121] The liability threshold for operators under Nigeria's civil liability is strict but not absolute. The rationale behind implementing strict liability is to guarantee swift and sufficient compensation, which may include the provision of clean-up and restoration of environmental damage. The guideline that establishes the criterion for determining the Liability for oil spills is the NOSDRA. For instance, by the provision of section 6 (2) (3), the party responsible will be held accountable for clean-up and remedying any harm to the environment resulting from the specified action. To successfully claim damages, the claimant is only required to establish a direct connection between the conduct and the resulting harm.

Civil liability is an orthodox form of incentivising compliance with environmental standards in Nigeria; the regulatory authority may or may not be involved. Generally, the relief sought under a civil liability regime includes financial compensation for traditional damage.[122] However, it may also involve an order for clean-up and remediation or a restrictive order for a defendant to refrain from a particular activity.[123] The PPP has been applied and implemented judicially through civil liability claims, using basic tort law principles in Nigeria.[124] Tort fundamentally entails a civil wrong against an individual.[125] Thus, the cardinal idea of torts law

[119] Elvis-Imo, (n1) p4
[120] Ibid
[121] AN Craik, "Determining the standard for liability for environmental harm from deep seabed mining activities." (2018). (2) 1-24
[122] C Abbot, 'The Regulatory Enforcement of Pollution Control Laws: The Australian Experience' (2005) 17(2) Journal of Environmental Law 161 163.
[123] BT Umukoro, and O Ituru. "Conceptual Challenges to the Recognition and Enforcement of the Right to Clean, Safe and Healthy Environment." (2002) 2 *J. Envtl. L. & Pol'y* : (2).1-22
[124] J Cooke, '*Law of Tor't* (9th edn, Pearson Educational Limited 2009) 3.
[125]Ojo (n1) at P101

is an inherent individual interest that must be protected under the law.[126] In Nigeria, the PPP is seen as a tort law breach to be enforced through negligence, nuisance, and strict liability, and these are theories of implementing tort law. The following paragraphs now discuss the negligence and strict liability principles as measures to implement the PPP.

4.4.1. Judicial Approach to the Application and Implementation of PPP in Nigeria

4.4.1.1. Negligence

Negligence is a tort-based wrong that forms the basis for the application and enforcement of the PPP, albeit for traditional damage. Since the decision in *Donoghue v. Stevenson*,[127] which is widely known as the 'Paisley snail' or 'snail in the bottle' case, the tort of negligence has gained prominence. In this case, Mrs. Donoghue drank a bottle of ginger beer containing a dead snail in a cafe. She sued Mr Stevenson, the maker of the ginger beer when she became sick from the drink. The House of Lords held that the producer owed a duty of care to Ms Donoghue. That duty was breached because it was reasonably foreseeable that failure to ensure the safety of a product would cause harm to consumers. As Lord Atkin said, "Whether you style the liability for negligence, as such or treat it in another way as a species of 'law, it will in no doubt still be anchored on the general perception moral wrongdoing for which the offender must pay or be accounted for its consequences.… *therefore on* must take reasonable step to avoid acts or omissions that one reasonably foresee would likely injure their neighbour.[128]

Thus, it behoves the plaintiff to show that the defendant owed him (the claimant) a duty of care, that the defendant was in default of that duty, and that the plaintiff suffered injuries.[129] However, the principle of *res Ipas loquitur* aligns with the purpose of the PPP, requiring

[126] Cooke (n124) 3
[127] *Donoghue v. Stevenson UKHL 100,* (1932), SC(HL) 31, AC 562, All ER Rep 1;
[128] *Ibid* at p580
[129] Cooke (n124) at 31.

operators of installations to control their operations adequately. Hence, it serves as an exception to the requirement for proof of duty of care.[130] Thus, a negligence claim will succeed even if the claimant is unable to prove that the defendant defaults on the duty of care owed to them.[131] However, a plaintiff relying on *res ipas loquitur* must prove that the incident complained of occurred and that the incident would not have occurred in the ordinary course of the event without the negligence of another other than the plaintiff's issue complained of was within the defendant's control.[132] Thus, even though the impact on the environment can be immediately evident in oil spill incidents, the plaintiff still needs to show that the defendant/operator was responsible for the oil pollution. Therefore, the defendant had breached the duty of care he owed to the claimants, and the oil pollution was due to the breach of that duty. Thus, the Nigerian judiciary has applied the three civil liability principles to interpret the PPP and the operator's liability for oil pollution, which is consistent with the view that traditional damage and not environmental damage clouds the meaning of PPP in Nigeria.[133]

In *Seismograph Services Ltd. v. Benedict Onokpasa*,[134] the appellant engaged in seismographic activities where the respondent's house collapsed. The appellant/defendant did not deny undertaking the seismic operations. However, they contended that the seismic operations were not to the extent as to cause the alleged damage to the plaintiff's house.[135] The court agreed with the appellant. Thus, the action for negligence failed as the respondent could not prove the duty of care owed to him by the appellant. In *Umudje v. Shell-BP*,[136] the Supreme Court held that the defendants/appellants were negligent and strictly liable for damage to the

[130] Means 'the facts speaks for itself'. See *Scott v. London and St Katherine's Dock Co*. (1865) 3H & C 596
[131] Ibid
[132] R A Percy, *Charles worth and Percy on Negligence* (7th edn, Sweet and Maxwell 1983) 350.
[133] Nigeria courts restrict PPP to tort and damages to cover personal injuries, property damage and economic loss.
[134] [1972] 1 All NLR 343
[135] Ibid 346-347; Also see, Seismograph *Service v. Mark* (1993) 7 NWLR (Pt. 304) 203
[136] *Umudje v. Shell-BP Petroleum, (1975) 9-11 S.C. 155, as well as Edhemowe v. Shell-BP, Suit No. UHC/12/70,* judgment of the Ughelli High Court (29 January 1971) unreported, see Ekpu (1995), id., at 93. See also: Frynas, J.G., Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria ', Journal of African Law, vol.433 (1999) 121-150, at 126-127.

plaintiffs/respondents whose ponds and lakes suffered pollution from the spilt oil from their facility.[137] Thus, the court endorsed strict liability to allocate the economic cost. In the preceding cases, the court awarded pecuniary damages for traditional damage to the victim. In *SPDC v. Chief Otoko & Ors*, the Court of Appeal held that the defendant was negligent for oil spills which caused the plaintiff some injuries and divested them of the use of the Andoni River and Creeks and is thus liable to pay compensation for the damage, but neither clean-up of the Andoni River nor remediation was ordered. This case is an example of communal injuries, yet the court still awarded pecuniary damages for traditional damages.

In June 2021, a Federal High Court ordered NNPC and Mobil Producing Nigeria (MPN) to pay 82 billion naira (US$199.5 million) as reparation for the oil spill that occurred in the *Ibeno* Community of Akwa Ibom State. The spills occurred from 2000 to 2010. The court held that the negligence of MPN and NNPC for failing to control the risk adequately from their facility had caused environmental damage to a significant proportion of the village. The court conceded that Section 11 (5) of the Oil Pipelines Act made it compulsory for operators to monitor and repair their pipelines to avoid spillages and environmental damage in line with the preventive measures of the PPP. However, the court failed to make any order regarding clean-up and remediation of the environment. Although no court goes overboard to make orders, not prayed, the suit was instituted by two aggrieved persons on behalf of the Community who only sought compensation for the traditional damages they suffered. They sought a one hundred million naira compensation for economic losses they suffered from oil spillages caused by the defendant and not an order to remedy the environment.

[137] See also: *Shell-BP Ltd. v. Cole & Ors.* [1978] N.S.C.C, vol. 11 at 96. For a comprehensive treatment of the application of the negligence and strict liability rule in Nigeria, see: Adewale, O., Rylands v. Fletcher and the Nigerian petroleum industry ', Journal of Private and Property Law, vols. 8 & 9 (1987/88) 37.

4.4.1.2. Strict Liability

Strict liability imposes absolute liability on the polluters for environmental damage regardless of whether they were at fault or negligent.[138] The foundation of strict liability tort is set in *Rylands v. Fletcher*.[139] The defendant, in this case, sought and obtained approval to build a reservoir to provide water for his mill factory; the water escaped from the defendant's reservoir and permeated the old coal shafts beneath the defendant's land, flooding the plaintiff's mine. The defendant was found not liable at the Court of Exchequer. The plaintiff appealed to the Exchequer 3Chamber, and the court gave judgment in favour of the plaintiff. Per Blackburn J, in delivering the judgement, stated: "*A person who, for his own purposes, brings on his lands… whatever likely to cause mischief if it escapes, must keep it at his risk, and, if he does not do so, he is on the face value prima facially liable for any harm which is the natural consequence of its escape*".[140] Strict liability imposes the full burden of environmental costs on the polluter, regardless of any preventive measures the polluter may have taken.[141] Thus, theoretically, as with any other liability concept, strict liability is correctly connected to the original idea underpinning the PPP, which is cost internalisation.

Strict liability regimes are frequently pursued for compensation in Nigerian courts by victims of oil spills.[142] However, this is not implemented to secure the restoration of natural resources even after significant oil spills, such as the Bodo oil incidents; meanwhile, strict liability regimes are typically meant to forestall these sorts of dangers that instil intense fear for people and valuable resources irrespective of the probability that the event might occur or not. Implementing a strict liability plan is a means for the government to demonstrate its seriousness

[138] H Schafer and F Muller-Langer 'Strict Liability versus Negligence' (2012) 2008 SSRN Electronic Journal (5) 1-35
[139] *Rylands v. Fletcher (1868), L.R. 3 HL 330; [1861–73] All ER.*
[140] Ibid
[141] E Lees, "The polluter pays principle and the remediation of the land." (2016) 8 *International Journal of Law in the Built Environment* (1): 2-20.
[142] P Cane, 'Are Environmental Harms Special' (2001) 13 J Envtl L (1), 3-20.

in addressing certain disasters and serves as a method for society to penalise large corporations.[143]

Strict liability can be enforced without requiring proof of wrongdoing and is frequently used to penalise suspected fault without the need to demonstrate any fault. The potential for enduring extensive, financially onerous, and irreparable damage to natural resources may appear to justify the imposition of strict liability to convey a strong message of disapproval to polluters. Strict liability is a more onerous legal concept for those causing harm than fault liability.[144] This makes it an appropriate method to convey to polluters that activities that harm the natural environment are unacceptable, even if carried out cautiously.[145] Nevertheless, if strict liability for damage to natural resources is deemed favourable, the next thing to ask is who the eligible parties are that are entitled to seek compensation.[146] In terms of costs related to clean-up and restoration or expenses incurred to prevent or mitigate damage to the environmental resources, the solution may appear self-evident: individuals who bear the financial burden of preventing harm or remedying its consequences should be reimbursed, as long as the incurred costs were reasonable. In most nations, the level of public support for environmental protection and restoration is insufficient to justify discouraging private individuals from taking the initiative by denying them compensation for their expenses.

In Nigeria, determining the rightful person to be compensated for damage to natural resources poses a significant challenge because natural resource damage is not recognised and actionable through tort law strategies.[147] In the United States, where strict liability is firmly established, the government is entitled to receive compensation as trustees. Furthermore, it is important to emphasise that to offset the irreversible harm caused to natural resources, it is imperative to

[143] Cane (n142) 12
[144] Cane (n142) 12-15
[145] Ibid
[146] Ibid
[147] Cane n142 at 12-15

utilise the resulting damages to establish suitable environmental alternatives. However, Cane argued that if the purpose of compensating for natural resource damages is considered, it raises the question of why only governments should have the right to seek such compensation.[148] Suppose a private entity is even allowed to develop a well-designed strategy for safeguarding and enhancing the environment, which is appropriately linked to the harm caused, such as an oil spill? In that case, there is no reason why it should not be entitled to seek compensation for the depletion of natural resources.[149] If the objective of natural resource damages is to address damaged resources, it would likely be more efficacious to establish stringent liability for criminal crimes and achieve financial compensation through fines.[150] If the objective of natural resource damages is to generate funds for the preservation and enhancement of the environment as a means of offsetting the irreversible harm caused by the polluter, it would be more convenient and effective to collect these funds through the market-oriented system to ensure the polluter pays, rather than in the form of damages.[151] A system of natural resource damages essentially involves the transfer of funds from private business to public usage. Therefore, it diverges significantly from conventional tort law, which commonly reallocates assets from one individual to another, while the government serves as a final means of enforcing the law.

Furthermore, implementing the PPP through strict liability, in *Ikpede v. Shell BP Development Company Nigeria Limited*,[152] the plaintiff alleged damage to his fish pond from the oil leakage on the defendant's pipelines. However, the court held that the pipeline laying was in line with the license granted under the Oil Pipeline Act. Thus, the defendants were not liable even though the rule for applying strict liability was met. One should think that an operator found judicially

[148]Cane (n142) at 12-15
[149] Ibid
[150] Cane (n142) at 14
[151] Ibid
[152] *Ikpede v. Shell BP Development Company Nigeria Limited* (1973) All NLR 61

liable for traditional damage should inevitably be judicially imposed with liability for environmental damage simultaneously, but this was not the case.

In summary, as can be gleaned from the above cases, the courts hesitate to grant the plaintiffs' prayers in the few instances of environmental damage that have come before them. Dismissing claims they believe government revenue may be affected; for example, in *Chinda v. Shell BP*, the court declined to grant the plaintiff's prayer for injunctive relief against the defendant to stop gas flaring.[153] The court described the request as being an unnecessarily broad demand. Similarly, the court in *Allar Iron v. Shell-BP* declined to grant an injunction stopping the extraction of oil minerals causing environmental degradation.[154] The court viewed this as an attempt to reduce economic activity, an action adverse to the Nigerian economy. Thus, it is evident that Nigerian courts seldom grant injunctive reliefs in environmental actions, which is not consistent with the objective of environmental law to prevent ecological harm.[155]

Despite the Nigerian government's acknowledgement of the importance of the PPP in environmental policymaking, Nigeria's environmental law does not establish the PPP as a fundamental principle in a comprehensive manner. Contrary to popular belief, Nigeria does not adopt a comprehensive strategy to address pollution in all its various manifestations. The absence of a comprehensive legal framework liability law in Nigeria does not comply with the PPP's basic principles. Nevertheless, we have assessed the manner and degree to which the PPP is indirectly included and implemented in NOSDRA legislative measures. Thus, operators now exploit the gaps in the law to their advantage; for example, in 1988, the then SPDC head of legal claimed that the law was on their side; hence, SPDC would not have to stop its

[153] *Chinda & Ors v. Shell B.P.,* (1974) 2 R.S.L.R
[154] Unreported. Suit No.W/89/71 190
[155] Ibid

operations due to disputes. Cases in foreign courts recently reached the same conclusion as the Nigerian courts but with far-reaching implications for the parent companies.

4.4.2. Foreign Direct Liability Claims against Parent Companies on the Duty of Care

In the last twenty years, Nigerians have observed an increasing inclination towards what is commonly referred to as foreign direct responsibility cases. Courts in Western societies are increasingly facing transnational civil liability actions against multinational businesses for the harm they cause to people and the environment in developing host countries.[156] The phenomenon of foreign direct accountability cases has extended to the United Kingdom, the United States and the Netherlands. Foreign direct liability cases against parent corporations have a twofold objective: firstly, they strive to make firms accountable for their irresponsible business activities, for which they have ultimate responsibility.[157] And secondly, they seek to secure remedies for the victims.[158] Furthermore, it can act as a stabilising force that allows claimants to pursue legal action against foreign companies as co-defendants. Typically, cases in Nigeria are marked by prolonged procedural litigation before reaching the stage where the actual merits of the issue are considered, hence the drive for direct liability.

In the UK, the determination of whether a duty of care exists under English common law is typically based on the threefold test established in the *Caparo v Dickman* case,[159] where the appellate courts in the UK have extensively examined the legal issues in parent company disputes during the past 25 years. Furthermore, in the *Lubbe v Cape* case,[160] Lord Bingham

[156] R Chambers, "Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the UK Supreme Court." (2020) 42 *U. Pa. J. Int'l L.* (3) 519 -579
[157] R, Lucas, and D Leader. "*Okpabi v Shell and Four Nigerian Farmers v Shell: parent company liability* back in court." (2021) 6 *Business and Human Rights Journal* (2): 368-376
[158] Ibid
[159] *Caparo Industries v Dickman [1990*] 2 AC 605, consisting of whether the damage was foreseeable, whether Defendant and claimant are in sufficient proximity to each other, and whether it would be 'fair, just and reasonable' to impose a duty of care.
[160] Lubbe v Cape plc [2000] UKHL 41, 20, 26

concluded that a parent firm could potentially have a legal obligation to overseas claimants.[161] Although, the case was resolved before a final ruling on the merits could be made.[162] Nonetheless, The UK Supreme Court (UKSC) re-examined the issue of the legal responsibility of parent companies in the case of *Vedanta v Lungowe* in 2019.[163] Although the central issue in the *Vedanta* case was the challenge to the authority of English courts over the Zambian subsidiary of an English firm, in which the UK Supreme Court had to evaluate the validity of the claim against the English parent company.[164] The UKSC dismissed the contention that a duty of care could only exist in extraordinary circumstances similar to Chandler. However, the Court provided a more extensive range of methods in which the parent companies may be held responsible, which are now referred to as the *Vedanta* 'routes'.[165] In the case of *Chandler v Cape*,[166] the Court of Appeal concluded that the proximity requirement could be met if the parent company possessed greater knowledge and skills than its subsidiary relied upon for the harmful activities in question but failed to utilise that expertise.[167]

The *Okpabi v. Shell*[168] comprises two interconnected legal actions, one initiated by around 40,000 individuals residing in the *Ogale* village in Rivers State, Nigeria, and another initiated by 2,335 members of the *Bille* Community in Rivers State.[169] The claimants assert that both RDS and its Nigerian subsidiary SPDC are responsible for environmental harm involving oil spills from pipelines and infrastructure poorly managed by SPDC. They alleged that this harm is a consequence of inadequate maintenance of the pipelines and a negligent reaction to oil

[161] Lucas, and Leader(n157) p370
[162] Ibid
[163] Vedanta Resources plc v Lungowe [2019] UKSC 20.
[164]M Croser *et al*, '*Vedanta v Lungowe and Kiobel v Shell*: The Implications for Parent Company Accountability' (2019) 5 Business and Human Rights Journal (130), 131–132.
[165] Ibid, paras 52–53, and Croser *et al,* (n164) 133
[166] Chandler v Cape plc [2012] EWCA Civ 525
[167] Ibid
[168] Okpabi and others v Royal Dutch Shell plc and another [2021] UKSC 3. Okpabi, note 2, para 3.
[169] Okpabi, at para 3.

spills by the operating firm. They additionally contend that RDS had a legal obligation to provide them with proper care since it has substantial authority and guidance over its subsidiary. This is evident through establishing, supervising, and enforcing company-wide health, safety, and environmental regulations and standards.

The primary matter of the Okpabi proceedings thus far has been the defendants' challenge to the jurisdiction of the claimants' action. The claimants sought authorisation to serve the action against SPDC, which is outside the jurisdiction of the English courts, on the grounds that it is an essential and appropriate party to the claim against anchor defendant RDS. The defendants contended that there was no substantial matter to be contested against RDS, as the duty of care claim was unlikely to be successful. Both the High Court and the Court of Appeal concurred with the defendants, ruling that, according to the evidence available to the public, the claimants did not have a plausible case against RDS. Consequently, the service of claim against SPDC was invalidated. The plaintiffs were granted permission to appeal to the Supreme Court after its ruling in the *Vedanta* case. The Supreme Court has reversed the ruling made by the Court of Appeal. In a unanimous ruling by Lord Hamblen, the Court restated its position in the *Vedanta* case that the duty of care of parent companies is not extraordinary and should be evaluated according to standard principles of tort law, as exemplified by the non-exhaustive 'routes' outlined in *Vedanta*, rather than the *Caparo* criteria. Subsequently, it detailed the comprehensive investigation performed by both the High Court and the Court of Appeal into the evidence, reaching a thorough conclusion where this resulted in 'mini-trials'.[170]

The Supreme Court observed that conducting a mini-trial at the jurisdictional stage would be unsuitable, as claimants have not yet obtained access to disclosure and crucial information in internal corporate records. Instead, the Court of Appeal should have limited itself to

[170] Okpabi, (n168) para 103–140

determining whether the claimants' case against RDS was clearly false or unsupported.[171] As per the UKSC, it was evident that the claimants had successfully shown that there was a genuine matter to be examined, thereby contradicting the previous belief. Consequently, the case against RDS was permitted to continue.[172]

In the same way, a suit instituted by *Four Nigerian Farmers and Stichting Milieudefensie v Shell* in the Dutch Court of Appeals bears significant factual and legal similarities to the Okpabi case.[173] With the backing of the nongovernmental organisation (NGO) *Milieudefensie*, the Nigerian farmers have made three claims from three distinct oil spills in the *Oruma, Goi, and Ikot Ada Udo* communities. These spills originated from pipelines and wellheads operated by Shell. The defendants contested the allegations, claiming sabotage caused the spills and claimed they responded fully by turning off pipelines, preventing leaks, and cleaning the damaged soil. The District Court initially upheld farmer Friday Alfred Akpan's claim for the Ikot Ada Udo spill, determining that sabotage was likely the cause but that the defendants failed to protect the infrastructure adequately.[174]

The Court of Appeal overturned the District Court's decision[175], determined the Oruma and Goi cases, and granted an interlocutory decision in the Ikot Ada Udo case.[176] The court ruled that SPDC was liable for oil spill damage under Nigerian law in the first two cases. The court decided that the defendants failed to prove that illegal conduct like sabotage caused the leaks,

[171] Okpabi, (n168) para 153.
[172] Okpabi, (n168) paras 154–160
[173] Four Nigerian Farmers and Stichting Milieudefensie v Royal Dutch Shell plc and another [2021] ECLI:NL: GHDHA: 2021:132 (Oruma), ECLI:NL:GHDHA:2021:133 (Goi) and ECLI:NL:GHDHA:2021:134 (Ikot Ada Udo).
[174] *Friday Alfred Akpan and others v Shell and another* [2013] ECLI:NL:RBDHA:2013:BY9845
[175] Four Nigerian Farmers, ECLI:NL:GHDHA:2021:132 (Oruma) and ECLI:NL:GHDHA:2021:133 (Goi). Jurisdiction and applicable law had already been determined in an interlocutory decision, see Four Nigerian Farmers and Stichting Milieudefensie v Royal Dutch Shell plc and another [2015] ECLI:NL:GHDHA:2015:3588.
[176] Four Nigerian Farmers, ECLI:NL:GHDHA:2021:134 (Ikot Ada Udo). The court agreed in this case with the District Court's finding that the cause of this particular spill was sabotage, and ordered the parties to produce further evidence on the extent of the defendants' precautionary measures, and the consequences of this particular spill

which was the only potential defence. The court ruled SPDC's spill responses negligent under common law standards, stating that installing a 'Lead Detection System' (LDS) would have prevented the spills earlier. After intervening with its subsidiary in 2011, the court determined that RDS had a duty of care to secure the installation of an LDS for the claimants. The claimants filed a lawsuit against both RDS and SPDC as joint defendants, asserting that the spills resulted from the defendants' irresponsible maintenance of oil facilities and caused significant harm to the plaintiffs' farmlands and fishing areas. The defendants refuted the accusations, contending that the spills resulted from deliberate sabotage.

Furthermore, they asserted that they promptly addressed the spills by shutting down the pipelines, sealing the breaches, and remedying the contaminated soil. At first, the District Court only confirmed farmer Friday Alfred Akpan's claim regarding the Ikot Ada Udo spill, but later it concluded that the spills were most likely caused by deliberate damage, but the defendants failed to adequately safeguard the infrastructure- the Oruma pipeline- from such sabotage. The court dismissed all additional claims, including the negligence claim against RDS pertaining to the spill's source and the claims about insufficient clean-up. Compensation was set aside for subsequent hearings.

The critical issue in a series of these cases has been whether a parent company has a legal obligation to take care of those affected by the actions of its subsidiary, such as external parties impacted by detrimental factors like pollution.[177] Most of these cases have been brought before English courts and rely on English legal precedents applicable to other common law jurisdictions such as Nigeria,[178] Zambia,[179] and Kenya.[180] Foreign courts have also referred to this legal precedent in circumstances where the governing law was the common law, as seen

[177] Lucas, and Leader (n157) at 372
[178] Okpabi, (n168) paras 160
[179] See Vedanta, (n163) 59
[180] AAA v Unilever plc [2018] EWCA Civ 1532

in the Four Nigerian Farmers case. Similar to the Okpabi case, the viability of the lawsuit against the parent companies was important not only for the main claim but also in relation to the polluter pays idea in environmental situations where we make two submissions. Firstly, in addition to imposing a legal obligation on the source of pollution to compensate for harm done to innocent victims, the liability principle, as seen above, also requires the source to decrease the pollution at its own cost to lower the effects of the pollution on innocent victims to a level that is socially and legally acceptable.[181] Governments, in the event that pollution becomes a widespread problem as it is in the ND, generalise the legal obligation of abatement to all sources by enacting laws and regulations that set pollution limits.[182] Gains argued that, as a result, the question of cost becomes one of economic allocation within the framework as who bears the financial responsibility for implementing pollution control measures. Due to apparent factors discussed in the next section, the allocation of responsibility for pollution control is largely to the general public through financial support to polluters from taxpayers' money. The question is whether it is legal for polluters to shift a portion of their costs to the victims who do not cause pollution. While this is the precise point at which the Polluter pays idea responds in the negative. It typically forbids public assistance and chooses a "tight" cost internalisation strategy instead.[183] Coase emphasised that the rights of the pollution "victim" should not take precedence over the rights of the source.[184] The law has primarily disregarded his guidance to establish obligations on the liability concept.

Coase concluded that when transaction costs were taken into account, giving the victim of pollution had a right to compensation. However, the compensation provided yields no better outcome than giving the polluter a right to pollute. In both cases, the informed party responsible

[181] SE. Gaines, 'The Polluter-Pays Principle: From Economic Equity to Environmental Ethos' (1991) 26 Tex Int'l L J (3) 463-496
[182] Ibid Gains (n at 469
[183] Ibid
[184] Ibid

for the pollution and the injured party would negotiate for the economically optimal balance or best possible economic arrangement between reducing pollution, preventing pollution, and paying for damages.[185] The second submission to be made in these two cases exemplifies what can be described as a step forward for new legal grounds with implications on where and what subject matter may constitute future cases. Environmental degradation from oil spills in the Niger Delta is a complex issue, stimulating protracted and unending or long-term legal battles in Nigeria and abroad. These prolonged lawsuits highlight the worsening faith in Nigeria's court system and environmental governance regime. However, these judgements offered the government, regulatory authorities, and operators an opportunity to assume responsibility and ensure the restoration of the fragile environmental ecosystem through systematic approaches like forestalling a robust legal regime with new techniques like Environmental Financial Security.

4.5. **Limitations** of a **Polluter Pays Approach in Nigerian Oil Pollution Problems**

Flowing his work on social cost, Ronald Coase explained that social cost is by and large caused by two or more parties who are jointly and severally liable, and this complex notion reinforces Coase's idea of identifying a polluter. Thus, following Coase's perspective, merely labelling a single person, whether an operator or a facility controller, as a polluter is problematic and insufficient. For this reason, Langlet and Mahmoudi posed the question of whether a chain of parties from a car driver or manufacturer of the vehicle or whether it is the producer of fuel or distributor of fuel or even all of them are polluters in relation to emissions from car traffic causing environmental damage.[186] It is pretty difficult to point at one of them as a polluter without considering the role of others in the chain for cost allocation. In the legal texts discussed above, the polluter would have been identified as the operator, the controller of an

[185] Coase, (n21) 862
[186]D Langlet and S Mahmoudi, '*EU Environmental Law and Policy'* (Oxford: Oxford University Press, 2016), 56

oil facility that generates the pollution, but when contrasted with the situations in Nigeria, a reinterpretative approach is required to identify who is the appropriate polluter.

It is uncommon for a government to be a contributor to pollution, but its responsibility in the chain of contributors is not defined.[187] As a beneficiary of market failure, a modified form of the PPP to adequately capture these polluters can be developed through the 'Beneficiary Pays Principle' in Nigeria. As noted in the argument above, government participation in oil activities creates an implicit obligation in the legal reception of the PPP. The person who pollutes is, for example, a person who owns substantial equity stakes or interests in the polluting agent (oil firm). However, it may not participate in the everyday operation of the equipment, which causes oil pollution. Still, the responsibility to clean up and remediate the environment should be ascribed to it. Most literature on ecological damage relating to oil pollution did not imagine the government as an equal contributor to environmental harm, albeit vicariously. The operator undertakes the activity that directly causes environmental impacts, but the government has demanded the operator do so as a joint owner in the operator's firm. Given this premise, how should we determine the operators' and governments' relative share of responsibility in the implementation of the PPP?

Coase argued that when bargaining is possible between parties, one side should not be regarded as having caused all the external costs.[188] Thus, in two-sided externalities, the harm is not one-sided but shared and proportioned.[189] When considering these perspectives collectively, the question arises as to whether it is significant if the PPP is implemented for either the operator or government to assign burden for externalities caused or whether, as beneficiary(s), the financial assurance requirement be implemented either way as PPP Beneficiary Pays Principle.

[187] K Lidgren and G Skogh, 'Extended Producer Responsibility Recycling, Liability, and Guarantee Funds', (1996), 21*Geneva Papers on Risk and Insurance (79)* 170 -181.
[188] Coase, (n21) at 860.
[189] Ibid

Shaping the economic analysis of causation under tort law to ascertain the guilt or otherwise of the Nigerian government in oil pollution. The test for such a question is the '*but for*' *test.*[190] This test spans across civil and criminal law, and the test broadly asks the question: "*But for the actions of the defendant (A), would the harm (B) have happened?*" If B's existence is contingent on A, the test is satisfied, and causation is established. If B would have occurred regardless of A, then the defendant cannot be liable. The test attributes causation to a party if harm had not happened but for the activity undertaken by the party.[191]

In applying this test to the causation of oil pollution problems in Nigeria, the but-for test implies that environmental damage involving oil pollution would not have occurred if the government had not entered a joint venture agreement with the polluting operator. The operator is only in business because the government wants the oil exploited to serve its economic needs. It is equally arguable that the oil pollution would not have occurred had the operator not adopted the polluting technology for oil production. Both lines seem to work, so both government and the operator(s) may have caused the environmental damage in the Niger Delta.

The '*but for test*' effect on the operator who fails to internalise its social cost in line with the PPP is that the but-for-test uses information consumers have about the demand function of a particular product. As a result, consumers would be utterly willing to change their source of supply of petroleum products away from the polluting operator to that of a non-polluting operator. Another way the '*but-for test'* condition has an effect on the PPP is that the operator's social welfare would be higher but for the operator's reluctance to use a non-polluting technology. Again, the social welfare would have been higher, but for the government's resolve

[190] *Barnett v Chelsea & Kensington Hospital*, 2 WLR 422,, 1 QB 428,, 1 All ER 1068 (hospital escaped a finding of negligence after sending a seriously sick man to go home from the Accident and Emergency unit. Although the man later died of arsenic poisoning, the courts held that he would have still died even if he had been examined and admitted for treatment in the hospital).

[191] J. Stapleton, 'An Extended But-For'test for the causal relation in the law of obligations. (2015) 35 *Oxford Journal of Legal Studies*, (4), 697-726.

to rely on only or primarily oil as its source of revenue. Thus, it would appear again that operators and government are sharing causation equally.

On the other hand, if cost is internalised, the cost burden will only affect the polluting products they produce, and the marginal costs of the petroleum product will, therefore, rise. If the operator in the JVA incorporates the cost into its prices, all the customers of their petroleum product will shift away to other operators in the market. This is because, in a competitive market, an operator cannot afford to do business with zero profit; hence, if the operator cannot absorb the costs, it goes out of business. This way, neither the polluting operator, the Nigerian government, nor their customers will pay the price for the polluting petroleum product. At this point, they all share the zero burden equally. Thus, the financial burden to be borne by the operator and government and their related responsibility for the environmental damage is equal.

Another way the *but-for test* can be used to vary the impact of environmental damage is from the customers' point of view. For instance, social welfare could be higher, but for the consumers' choice to buy the petroleum products of the polluting operator and social welfare could be increased, but for the operator's choice to use the polluting technology. When the operators imbibe the financial security requirement to internalise costs, the polluting operator is possible that the company will not instantly go bankrupt as it has the financial capacity to handle a small increase in its marginal costs. Still, it would not be able to pass on the cost in prices. If the operator does increase the price, the consumers will shift to other operators. It is not feasible to argue that "Social well-being might have been higher if not for the customers." *retaining choices to buy from the polluting operator*". Instead, the consumer's decision to shift from demanding the supply of the polluting operator's product would lead to an increase in social welfare, as the consumers would no longer be causing the loss of social welfare. Thus, if the operator wants to continue the business, they must absorb the cost through financial security requirements.

The nature of causation considered here concerns the convoluted relationships in the oil sector that significantly impede the application of PPP. However, the nature of causation depends on the demand and supply conditions for petroleum products that cause environmental damage in Nigeria.[192] Upon introducing the FSR, the actor who insisted on carrying on the current polluting state of affairs is considered to have caused that pollution to a greater extent.[193] Thus, in this case, the decision to continue oil pollution in the Niger Delta is due to the polluting operator continuing its crude oil production. The government is unlikely to give up on dependence on petroleum products. The proportion of causality corresponded to the respective proportions of the FSR burden borne by the operator and the government.[194] Thus, intuitively, the degree to which any of the two actors insists on maintaining the production of crude oil increases that actor's risk of causal contribution to the environmental damage in the Niger Delta. The idea of causation considered here aligns with the intuitive reaction to harm and how the FSR burden can separate the obligations. The notion that the incidence of fund contribution defines relative causation aligns with the notion that relative causation is linked to the relative advantages of taking action.[195]

In the scenario above, the operator is not the only person who benefits from the oil pollution in the Niger Delta. A substantial benefit is derived from the petroleum products produced with the polluting technology that caused environmental damage for the government. Therefore, the sharing of the FSR incidence should be proportionate to the sharing of the benefits of crude oil pollution. This idea of causation is consistent with the perception that the more an actor benefits from the crude product, the more they are responsible for the damage that ensues from it. This

[192] Under EU law, it has been argued that society has partly caused pollution damage through their demand for oil based products.
[193] SPDC is already divesting heavily from Nigeria and shifting focus elsewhere due to the public outcry of its polluting activities in the Niger Delta.
[194] Dirk Heine, Michael G. Faure & Goran Dominioni, 'The Polluter-Pays Principle in Climate Change Law: An Economic Appraisal' (2020) 10 Climate L 94 -115
[195] Ibid

is in line with Smith's statement that the ultimate consumer bears the burden of taxation: "His payment is precisely commensurate with his gain."[196]

This analysis shows that a framework must be put in place to determine *ex-ante* the relative share of the operator and government burden in causing environmental damage involving oil pollution when JVAs and Production Sharing Contracts are transacted. Thus, under the proposed framework of FAR, the Nigerian government needs to determine *ex-ante* the weight of liability for environmental damage involving oil pollution between it and its *JVA* partners: as the incidence of FAR is defined *ex-ante*, parties may decide on their share of responsibility and, importantly, whether to increase or reduce it.

4.6. Conclusion

This chapter examines the third research question: *To what extent is a polluter-pays approach enshrined in the law in Nigeria?* The chapter finds that a number of issues surface in the understanding, application and implementation of the polluter pays approach in Nigeria. In conclusion, while the polluter pays principle may not be explicitly enshrined in Nigerian law, its application is evident across various legal instruments and regulatory frameworks. Despite the absence of a specific statute codifying the principle, Nigerian courts have recognised and incompletely applied it as an underlying principle in environmental litigation and jurisprudence for the award of damages for traditional damage using common law remedies of strict liability, nuisance and negligence. The Nigerian legal system incorporates elements of the polluter pays principle through statutes like section 6 of NOSDRA, regulations like EGASPIN, and judicial decisions that impose liability on polluters for traditional damage and require them to bear the costs of cleanup, remediation and compensation.

[196] D Heine *et al* (n194) 108

Moreover, Nigeria's international obligations under environmental treaties and conventions, such as the Rio Declaration, further reinforce the principle's application and influence domestic law and policy. However, challenges remain in fully realising the idea of polluter pay in practice. Inconsistent enforcement, limited institutional capacity, and regulatory gaps undermine efforts to hold polluters accountable and ensure equitable distribution of environmental costs. Addressing these challenges requires strengthening legal frameworks, enhancing enforcement mechanisms, and promoting accountability. Furthermore, fostering a culture of environmental responsibility and promoting sustainable development practices are essential to prevent pollution, mitigate environmental damage, and uphold the polluter pays approach. By addressing these challenges and promoting a holistic approach to environmental governance, Nigeria can strive towards a more equitable, sustainable, and resilient future where the polluter bears the full cost of environmental harm, thus safeguarding the rights and well-being of present and future generations.

Chapter 5

Environmental Financial Security Requirements

5.1. Introduction

This chapter examines the fourth research question: *'What is the regulatory potential of financial assurance to prevent and remedy environmental damage caused by oil and gas operations?* Theoretically, liability regulations and remediation obligations facilitate the internalisation of polluter costs. Practically, liability rules and any other penalties or duties imposed following an incident are significantly weakened.[1] This issue of operators externalising their environmental obligations as a result of lax regulations or insolvency is increasingly recognised in environmental laws across the globe.[2] Financial assurance rules, alternatively referred to as financial responsibility or bonding requirements, facilitate the internalisation of costs by mandating that prospective polluters exhibit the requisite financial means to offset potential environmental harm that may occur in the future.[3] Therefore, assurance plays a crucial role in complementing liability regulations, restoration obligations, and other standards of compliance with the law.[4]

As shown previously under chapters 2 and 3, the absence of FAR greatly disincentivises cost recovery and deterrents, enforcing operators' compliance with clean-up and remediation responsibilities in Nigeria, especially when it is difficult for the company to pay. Financial Assurance regulations can strengthen both legal efficacy, cost internalisation and economic efficiency.[5] Environmental clean-up and remediation in Nigeria is never certain

[1] J Boyd, 'Financial Responsibility for Environmental Obligations: Are Bonding and Assurance Rules Fulfilling their Promise?' (2002) 20 Rsch in L & Econ 417

[2] C Mackie & V Fogleman, 'Self-Insuring Environmental Liabilities: A Residual Risk-Bearer's Perspective' (2016) 16 J Corp L Stud 293

[3] Boyd (n1) at 418

[4] Ibid at 418 see also A Staccione, J Mysiak, M Ostrich, & A Marcomini, A.'Financial liability for environmental damage: insurance market in Italy, focus on Veneto region experience. (2019) *26 Envtal Sci and Poll Res*, (25), 25749-25761

[5] Boyd (n1) at 418

since FSRs are not covered under NOSDRA, which is the national legislation. This chapter argues that there is regulatory potential in financial security rules to stir operators in Nigeria to mitigate and reduce their environmental liability obligation in line with PPP. Suppose they cannot do so because they are insolvent or extinct. In that case, the authorities can apply the chosen measure to complete the works on their behalf without recourse to public funds, Provided that the level of assurance is sufficient to cover the costs. This legal response would be a novel development in Nigeria's regulatory regime, which has received scant attention on policy reforms. The chapter is divided into seven sections. Section 5.1 is the introduction, section 5.2 defines the theory and concept of financial security rules, and section 5.3 discusses the different mechanisms of FSR rules. Section 5.4 accessed the factors to consider before deploying financial security rules. Section 5.6 discusses the effect of absent FSR, and section 5.7 concludes with remarks.

5.2. The Concept of Financial Assurance Requirements

This section discusses the underlying purpose of financial assurance in environmental law by framing a practical mechanism where the possibility of a polluter-paying approach for environmental costs may be assured.[6] At the same time, operators are required to internalise the costs of their activities that cause environmental harm.[7] As an opening to this, it is important to bear in mind that oil and gas activities pose long- and short-term risks because of the time prospect on which they operate.[8] Also, depending on the abundance of crude deposits, production activities in a given oil well may go on for 50 or even 100 years after an initial period of intense exploration activity.[9]

[6] Boris N. Mamlyuk, 'Analyzing the Polluter Pays Principle through Law and Economics' (2009) 18 Se Envtl LJ 39(1), pp. 39-80
[7] Ibid
[8] David A. Dana & Hannah J. Wiseman, 'A Market Approach to Regulating the Energy Revolution: Assurance Bonds, Insurance, and the Certain and Uncertain Risks of Hydraulic Fracturing' (2015) 45 Envtl L Rep News & Analysis 10746-10751
[9] Dana & Wiseman, (n8) at p10746

The environmental harms associated with the operations can be broken down into certain and uncertain environmental harms for proper cost allocation.[10] Certain risks are predictable harms that are directly or inextricably linked to the oil and gas drilling process, such as decommissioning, which are predictable risks.[11] Whereas uncertain harms are uncertain pollution-related events such as Pipeline breakages, though common, are not certain to occur in the ordinary cause of business, potential seismic activity contaminating groundwater is also less predictable. These harms form operators' short-term, medium-term, and long-term environmental liabilities.[12] Accordingly, whilst some FSR mechanisms may be appropriate for some liabilities, others may not, as some may prove more effective than others, given the type of risk deployed risk.[13]

The most apparent environmental cost under the PPP involves an operator's obligation to remediate land damage and water pollution caused by oil production activities. Remediation obligation includes present remediation costs (such as clean-up and remediation costs to return the land to an acceptable state after the oil spill) and future impact costs, e.g. water quality.[14] To predict the future risk vis-à-vis the potential costs to be attached in the Naira figure for an appropriate FSR mechanism can be tricky. Hence, regulatory efforts must reflect the prospect of the supposed potential environmental harm based on identified inputs and calculated results.[15]

Nigeria adopts the command-and-control regulatory system to regulate environmental liabilities. (i.e., the rules promulgated by legislative action directing an operator's activities in

[10] W. Blaine Early III, 'Bond What You Know and Insure What You Don't: A Comment on a Market Approach to Regulating the Energy Revolution'. , (2015) 45 ENVTL. L. REP. 10756-10759.
[11] As well as decommissioning
[12] Dana & Wiseman, (n8) at p107488
[13] Ibid
[14] S J. Surber, 'Writing a Check that the State Can't Cash: Water Pollution from Coal Mining and the Imminent and Inevitable Failure of the West Virginia Special Reclamation Water Fund, (2013) 27 TUL. ENVTL. L.J. 1, (1) 2- 41
[15] J Malone & T Winslow, 'Financial Assurance: Environmental Protection as a Cost of Doing Business' (2018) 93 ND L Rev (1) 1-56

a certain manner).[16] Noncompliance with any directive provided in law carries consequences, including fines, directives to comply, and a withdrawal/licence suspension.[17] Under the command and control regime, an operator must obtain a permit before commencing its operations under the established commands of the regulator and guarantee that they will continue to do so throughout their operations.[18] Some weaknesses are that for the command and control regime to be effective, the regulator must constantly review the law and maintain efficient requirements based on the operators' changing technology and activities.[19] Secondly, regulators rely on information operators give them on their actions and technological advancements that could affect the extant regulations. Hence, operators have little or no incentive to provide the information to regulators.[20] Thirdly, the operators have no desire to exceed the minimum requirements set by the regulation.[21]

Some scholars have argued that command and control is an effective short-term means of curbing environmental degradation.[22] However, it comes at a high cost of compliance and loss of long-term effectiveness.[23] The proponents of the command and control regime in Nigeria advocate for stiffer sanctions against operators.[24] However, there has been less political and policy debate on mechanisms to make their argument plausible, such as a market-based approach to addressing certain and uncertain risks from oil and gas activities, except for emission taxes on gas flaring.[25] A market-based strategy addresses any circumstances in which

[16] Malone & Winslow (n15) 1547 see also HN. Butler, 'A Defense of Common Law Environmentalism: The Discovery of Better Environmental Policy' (2008) 58 Case W Res L Rev 705

[17] DS. Olawuyi, Z Tubodenyefa 'Review of the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) (2018) OGEES & Article 4:1 of EGASPIN Rules 2018 & Section 6 (2) of NOSDRA

[18] Malone & Winslow (n15) 1547

[19] Dana & Wiseman (n8), at p1548

[20] Ibid

[21] Ibid

[22] RB. Stewart, Models for Environmental Regulation: Central Planning Versus Market-Based Approaches, (1992) 19 B.C. ENVTL. AFF. L. REV. 547, 551

[23] Ibid

[24] B Oyewole & MO Ayodele, Adequate compensation as a tool for conflict resolution in oil-polluted wetlands of Niger Delta region of Nigeria'. (2017). 4 *CU Journal of Politics and Intal Affairs, (2) 455-461*

[25] OJ Olujobi, "Analysis of the legal framework governing gas flaring in Nigeria's upstream petroleum sector and the need for overhauling." (2020) 9 *Social Sciences* (8), 132.

the free market is utilised to mitigate environmental degradation.[26] This approach incentivises operators to avoid or reduce external environmental costs.[27] In a market-based regime, to address environmental harms, the sources of the harms face financial incentives to avoid or mitigate the harms subject to the operator's control.[28] Under this system, the market approaches are the FAR instruments thoroughly examined below (i.e. assurance bonds, surety bonds, bank guarantees and letters of credit), and environmental trusts, mandatory insurance).

It has been argued that market-based regulation places a lesser information burden on regulators as agencies implementing this approach do not need to specify precisely what practices operators should follow in diverse technical situations.[29] However, instead, they only have to put a price on the costs of the risk of environmental harm.[30] Thus, policymakers cannot easily formulate command-and-control guidelines that assure a reasonable safety level because information on the risks from emerging technologies is not well understood.[31] However, market-based approaches tap into the industry's understanding of the environmental risks associated with its activities and incentivise a specialised actor (insurers) to generate more appropriate information about the activities and behaviours that are more or less risky.[32] Market approaches are thus information-generating and more meaningful and comprehensive than, for example, information-forcing regulations associated with command and control rules.[33] Generating information is critical in managing the oil and gas environment, where stakeholders poorly understand several environmental risks.[34] Market-based instruments offer a reasonable

[26] Dana Wiseman (n8) p10747
[27] Ibid
[28] Ibid
[29] Dana & Wiseman (n8) p10748
[30] Ibid
[31] U.S. Govt Accountability Office, Gao- 12-732, Oil And Gas: Information On Shale Resources, Development, And Environmental And Public Health Risks' 5 Sept (2012) 4, available at http://www.gao.gov/assets/650/647791.pdf accessed 13th March 2024
[32] Dana & Wiseman (n8) p10748
[33] KB. Hall, 'Hydraulic Fracturing: Trade Secrets and the Mandatory Disclosure of Fracturing Water Composition' (2013). 49 IDAHO L. REV. (1) 399-435.
[34] Ibid

alternative between a proactive preventive approach and the reactive polluter pays approach, allowing economic activity to continue until environmental damage occurs.[35] Second, market-based instruments influence the behaviour of industry actors and generate a pool of resources to remedy the environmental harms that the actors created.[36] Thus, keeping a pool of funds is critical to environmental restoration. Without such funds, there is a high prospect that operators or public authorities will never undertake environmental remediation, which is typical of the case in Nigeria's regulatory regime, where lack of funds in a pool results in a number of pitfalls, including operators abandoning obligations.

Abandoned environmental obligations are commonplace, and contaminated oil spill sites are practically all over in the Niger Delta region.[37] Such sites pose environmental and health risks to the people of the Niger Delta,[38] yet as can be observed, the Nigerian government only recently initiated for the first time in 50 years of oil exploration a remediation project to clean historically contaminated sites.[39] The commencement of oil and gas development in any environment indicates apparent environmental damage.[40] Hence, policymakers end up with a virement of public funds meant for other uses to tackle environmental damage caused by private operators. Hence, if there is no source of remediation funds other than public funds, remediation will not occur, especially in a poor and less politically influential nation like Nigeria. Nigeria might be rich in mineral resources but lacks the know-how and political will to make informed decisions and exploit these resources, hence the over-dependence on expatriate partners. Thus, the market-based mechanism in the form of FAR must be a central part of the regulatory approach in response to oil spill contamination in Nigeria. Even though

[35] Dana and Wiseman (n8) at p10747
[36] Ibid
[37] SO Adelana, *et al*, 'Environmental pollution and remediation: challenges and management of oil Spillage in the Nigerian coastal areas'. (2011) 2 Am. J. Sci. Ind. Res (6): 834-845
[38] J Nriagu, EA Udofia, I Ekong, & G Ebuk, 'Health risks associated with oil pollution in the Niger Delta, Nigeria. (2016) 13 *Inttal j ER*,PH (346) 1-23.
[39] DA. Dana, 'State Brownfields Programs as Laboratories of Democracy? (2005), 14 N.Y.U. ENVTL. L.J.86 - 105
[40] Dana and Wiseman (n8) at p10747

FAR requirements are also a form of command and control in the sense that there is a command, i.e., obtain FA, then a control that does not occur, i.e. revocation of the permit. In the next section, these FAR instruments are defined and explained in situations that may be used to evidence financial assurance and their strengths and weaknesses. While the objectives and features of particular FARs differ for each application, they share a basic incentive: the internalisation of costs by polluters to save taxpayers money and incentivise operators' optimum care to mitigate environmental degradation.[41] Also, financial assurance may sometimes be desirable and necessary to complement liability-based laws and other regulatory mechanisms requiring future environmental performance.[42] Strict liability seeks to impose the entire burden of environmental costs on the operator who caused or from whose facility the pollution occurred.[43] Thus, in principle, strict liability may lead to internalising otherwise externalised costs if the operators can pay.[44] However, as shown in Chapter 4.4, this measure is limited to liability for victims' personal harm, not environmental damage. Cost internalisation is desirable for both distributive and normative reasons, which converges with strict liability to provide the distributive goals of compensating victims of environmental damage. In addition, the normative goals create financial incentives that lead to optimal levels of deterrence.[45] Despite these advantages, strict liability would fail to induce efficient environmental protection and adequate compensation to victims if an operator is undercapitalised relative to its environmental liability obligations.[46] Also, insolvency limits the operator's capacity to pay the fines borne by strictly liable tort, reintroducing the possibility of externalised social costs.[47]

[41] J Boyd Financial Assurance Rules and Natural Resource Damage Liability: A Working Marriage? (2001) Discussion Paper 01–11, (2001) https://core.ac.uk/download/pdf/9307995.pdf 1-43 accessed 20th Feb 2023
[42] Ibid
[43] Section 6 (2) (3) of NOSDRA Act, Cap. N157, LFN, 2006 see also B. E. Ewulum, Ejike Okaphor & Nnedimma Ezenwa-Ohaeto Okoli, 'An Appraisal of the Impact of the National Oil Spill Detection and Response Agency on Environmental Pollution in Nigeria' (2020) 2 IJOCLLEP 58
[44] Boyd (n41) at 4
[45] Ibid
[46] Boyd (n41) at p.3-4
[47] Ibid

This externalised cost implies that operators will not be sufficiently incentivised to take precautions against environmental risks. Worse still, an operator may actively seek to reduce their exposure to environmental liabilities by divesting assets.[48]

Financial assurance rules are most desirable when the scale of environmental costs is higher relative to the share capital value of the operator, which creates environmental risks.[49] However, financial assurance is not required for any commercial operations liable for causing environmental damage under NOSDRA. As this chapter focuses on the intersection of NOSDRA legislation and FSR regulation, it is important to note that operators are also liable for both traditional and environmental damages under NOSDRA, including response costs, removal costs, and personal property damage. If adequately structured to work, the financial assurance regime has been heralded as effectively implementing the PPP.[50] The FAR regime would impose an obligation of accountability on the operator or any other person undertaking oil and gas operations to provide and maintain a document to prove that adequate funds will be available to meet potential environmental costs.

5.3. Enshrining a Culture of Accountability through Implementing FAR Rules in Nigeria

This section presents the theoretical basis and seeks to establish a normative explanation of the role of FSRs. This explanation is based on the economic concept of cost internalisation that is inherent in the 'polluter pays' approach to strategically design environmental law and policy.[51] Theoretically, the party responsible for pollution possesses the choice to either shift the entirety or a fraction of the environmental costs to the consumers or assume the costs themselves.

[48] Boyd (n41) at 4
[49] Ibid
[50] C Mackie, 'The Regulatory Potential of Financial Security to Reduce Environmental Risk' (2014) 26 J Envtl L (2):189-214.
[51] C Mackie & L Besco, 'Rethinking the Function of Financial Assurance for End-of-Life Obligations' (2020) 50 Envtl L Rep 10573-10603

Attempts to incorporate environmental costs may face a comparable challenge if the costs are overly broad, potentially expensive, and, most importantly, exceedingly difficult to eliminate.[52] The fundamental objective of FAR in environmental law is for the polluter to pay for their environmental obligations through regulatory programmes that compel regulated entities to internalise the social costs of their actions.[53] The economic emphasis of the PPP encompasses the role of FARs influenced by the normative objective of allocating the costs related to oil spill clean-up and remediation responsibilities to operators to accomplish the necessary regulatory objectives.[54] The foundation of the PPP is based on the notion of cost allocation (i.e. who should pay) as articulated by the OECD,[55] which is indicative of the concept frequently referred to as cost internalisation, which is widely employed in the literature. Still, the OECD did not give a precise meaning to the term when they initially introduced the PPP.[56] According to Mackie and Besco, it has been suggested that the OECD intended to promote cost internalisation through cost allocation.[57] The OECD's utilisation of the term 'allocate' and its various forms reflected an underlying understanding, wherein the OECD foresaw that the polluter would internalise the costs associated with the allocation.[58] This reveals the role of FARs as a tool for implementing the PPP, which assigns the financial responsibility for pollution to the responsible operator or firm and serves as a conceptual structure for allocating and mitigating environmental damage.[59] In the absence of this approach, the public assumes the financial burden of environmental damage, either by paying taxes used to fund government initiatives for restoration or by compromising environmental regulations.[60]

[52] EB Weiss Et Al., International Environmental Law And Policy (2d ed. 2007) 85- 90 in Mamlyuk (n6) at 55
[53] Mamlyuk (n6) at 42
[54]Ibid
[55] C Stevens,'Interpreting the Polluter Pays Principle in the Trade and Environment Context', (1994).27 CORNELL INT'LL.J. (3) 577- 590
[56] Mackie and Besco (n51) at p10588
[57] Ibid
[58] Ibid
[59] Mamlyuk (n9) at 42, see also Atapattu, Sumudu. *Emerging principles of international environmental law.* (Vol. 7. Brill, 2007). 470
[60] Mamlyuk (n6) at 42

According to Mackie and Besco, two conceptual difficulties exist regarding the legal implications of cost internalisation and the practical requirements it imposes on polluters (operators). They argue that while environmental costs may be theoretically assigned to a polluter within a legal framework, the polluter may not actually bear these costs unless they are obligated or adequately compelled to do so.[61]

Furthermore, similar to Boyd, they contend that even if an operator were to internalise their environmental obligations, if the existing FAR measures are inadequate, it might not effectively achieve the intention for the operators to perform their obligations.[62] Although cost internalisation may have occurred when the operator implemented one of the various elements of FAR, it does not guarantee that the operators will carry out their environmental responsibilities at their own cost.[63] As Mackie and Besco contended, the operator plans to fulfil their environmental obligations using any of the several FARs measures. Nevertheless, any of these methods carries the risk of complete failure, resulting in the unavailability of the necessary private finances for the works at the appropriate time.[64] Although the cost internalisation may have officially taken place when the FAR measure was posted, it does not guarantee that the operator will bear the cost of fulfilling its restorative obligations.[65]

According to Macey and Salovaara, FARs serve two unique purposes: ensuring compliance with environmental obligations and internalising environmental costs linked to their activities.[66] The economic basis of PPP necessitates that an operator integrate the costs linked to an activity that results in environmental damage. The above analysis demonstrates that the theoretical framework of PPP is grounded in cost internalisation.[67] According to Boyd and

[61] Mackie and Besco (n51)at p10589
[62] Ibid
[63] Ibid
[64] Ibid
[65] Ibid
[66] J Macey & J Salovaara, 'Bankruptcy as Bailout: Coal Company Insolvency and the Erosion of Federal Law' (2019) 71 Stan L Rev 879-962
[67] Mackie and Besco (51) p10588

Ingberman, the incentive for cost internalisation is to improve investment in precaution. In order for cost internalisation to effectively promote the desired objective of improved deterrence and compensation, there must be a degree of capital reserves to cover operators' liabilities, even in the event of operator insolvency.[68]

In essence, creating capital reserves is necessary to ensure that operators meet their obligations.[69] Cost internalisation occurs when the operator carries out the tasks or when the regulator relies on the assurance to carry out the tasks on behalf of the operator.[70] Mackie and Besco deem it risky if costs are considered internalised when the costs associated with carrying out the obligation are incorporated into the company's business strategy.[71] (Even if funds are not explicitly allocated to meet such expenses). It is a risk and shows the limits of cost internationalisation in the normative goal of FARs.[72] Having financial assurance did not necessarily imply that costs were internalised, as cost internalisation was assumed to occur. For example, when future costs are set out in financial accounts, there is no indication that the funds are actually available to meet these future obligations. The internalisation of costs by operators represents a very equitable approach to addressing remediation of environmental damage, especially when compared to the alternative scenarios where no compensation is offered or if compensation is provided, it is financed by public funds.[73]

The internalisation of costs by operators also enhances deterrence and risk reduction due to the potential for operators to lose a bond while fostering research and innovation to mitigate environmental harm. Nevertheless, it is worth noting that most Nigerian environmental laws, except retroactive liability, lack provisions for cost internalisation in relation to operators being

[68] J Boyd, and D Ingberman, '*The Law and Economics of the Environment*, '*The Vertical Extension of Environmental Liability Through Chains of Ownership in Contract and Supply*, *in* The Law and Economics of the Environment (Elgar Publishing 2001) 44-70
[69] Mackie and Besco (n51) 10590
[70] Ibid
[71] Ibid
[72] Ibid
[73] Boyd (n41) at 3

held responsible for environmental damages resulting from oil exploration activities that harm public health and cause damage to property or natural resources.[74] Hopefully, the imposition of liability for environmental damage can facilitate a degree of cost internalisation. Consequently, the PPP has evolved into a concept of environmental management in Nigeria, characterised by its lack of clarity, ambiguity, and imprecision. Unfortunately, the significance of cost internalisation is greatly reduced in the laws and regulations, failing the PPP to achieve its intended objective in practice.

In Nigeria, the current legislative framework lacks a proper method or requirement for operators to internalise possible costs and demonstrate accountability, posing a hurdle. The regulatory objectives of PPP in Nigeria are impeded by various issues, including a lack of clarity in the Nigerian framework law pertaining to the oil and gas sector. It follows that the fault lines in PPP implementation have a corresponding effect on the desire to internalise cost. Nevertheless, it should be noted that the economic concept of cost internalisation, which serves as the regulatory mechanism for FARs, is not infallible. When incorporating FAR into a regulation, there are two practical questions to consider. Firstly, the liability ceiling for operators must be determined in advance to prevent any excessively burdensome conditions from being imposed on operators after the event.[75] Secondly, legislation must also establish financial liability caps.[76] The following FSR measures discussed under section 5.4 are analysed in light of two criteria: (1) the ability to encourage a greater level of third-party regulation of operators and the prevention of environmental damage, and (2) the ability to guarantee that operators are responsible for the costs associated with their remedial obligations (cost internalisation). Both of these standards might be interpreted as embodying the original intention of the OECD in establishing the Polluter-Pays Principle (PPP). Here, we will argue

[74] See ss6 of NOSDRA, s3 of AGRA, S 11 OPA,
[75] Mackie and Besco (n51) p10590.
[76] Ibid.

that the legislation plays an important part in figuring out whether a mandatory FSR system. Although these procedures may be feasible for adequately implementing the polluter pays principle (PPP), their effectiveness would be rendered futile if the legislation does not mandate operators to provide evidence of their compliance when granting permits.

5.4. Financial Security Measures and Their Regulatory Potentials through the PPP

Environmental Liability Insurance

One financial security tool that a risk-averse operator might employ to shift possible environmental risk to a third party (the insurer) in exchange for a premium payment is environmental liability insurance.[77] Independent insurance companies typically set premiums based on the risk level associated with the insured.[78] The underwriter promises to reimburse the policyholder for the claims specified in the insurance policy.[79] Private insurance contracts commonly utilise risk-based pricing.[80] The primary method for generating incentives to mitigate risk is through the implementation of differentiated premiums. Insurers offer reduced premiums to policyholders who demonstrate that they use effective strategies to mitigate the risks covered by the insurance.[81]

Specialised insurance provides environmental liability insurance with unique environmental impairment policies tailored for sectors such as oil and gas.[82] Faure contends that environmental liability insurance can be implemented through many means, including first-party insurance, general third-party insurance, and environmental liability impairment.[83] First-

[77] B J Richardson, 'Mandating Environmental Liability Insurance (2002) 12 Duke Envtl L & Pol'y F (2) 293-329.
[78] Boyd (n1) 432.
[79] Ibid.
[80] H Yin, H Kunreuther and MW White, 'Risk-Based Pricing and Risk-Reducing Effort: Does the Private Insurance Market Reduce Environmental Accidents?' (2011) 54 Law and Economics (2) 325-363.
[81] O Ben-Shahar & KD Logue, 'Outsourcing Regulation: How Insurance Reduces Moral Hazard' (2012) 111 Mich L Rev (2) 197-248
[82] MG Faure, 'Environmental Damage Insurance in Theory and Practice' (2002). In Swanson T. (Ed.), An Introduction to the Law and Economics of Environmental Policy: Issues in Institutional Design (pp. 283-328).
[83] MT. Katzman, '*Pollution Liability Insurance and Catastrophic Environmental Risk', (1988); 55* The Journal of Risk and Insurance (1) 75-100

party insurance is coverage that victims obtain to protect themselves directly.[84] The individual facing potential environmental damage purchases this insurance policy and then pays the premium.[85] The policy offers immediate coverage and compensation to the victim of environmental damage.[86] Nevertheless, this type of insurance is not a feasible method for offering protection against natural resource damage as much as it provides an individual seeking cover against the effect of environmental damage arising from pollution caused by their facility.[87] This is different from third-party or liability insurance, which is when a private individual seeks coverage for the possibility of compensating a third party due to being found responsible.[88]

In theory, third-party insurance maximises value by allowing risk-averse parties to transfer their risks for a negligible cost.[89] This shields the operator (insured) from expensive liabilities and frees them up to engage in socially valuable activities. From the social perspective, society benefits from indemnity for unanticipated loss and the restoration of resources for productive purposes in cases of loss.[90] According to Abraham, liability insurance functions can be summed up in three distinct but connected duties carried out by insurance.[91] Firstly, insurance transfers risk from risk-averse parties to firms that are more ready to accept risk.[92] Secondly, insurance mitigates risk by consolidating individual risks into a pool established by the insurer.[93] Thirdly, insurance serves a risk-allocation role via setting premiums based on the risk level of each covered individual or company.[94] One way to think of insurance is as a tool for self-regulation;

[84] MG Faure "A Shift toward Alternative Compensation Mechanisms for Environmental Damage?" *Shifts in Compensation for Environmental Damage*.(2007). 73 Springer, Vienna, 73-102)
[85] Ibid at 2
[86] Ibid
[87] Faure (n 79) 18.
[88] Faure (n 81) 2.
[89] Richardson (n 74) 294.
[90] Richardson, (n74) at 295
[91] KS. Abraham, 'Environmental Liability and the Limits of Insurance' (1988) 88 Colum L Rev 942
[92] Ben-Shahar & Logue (n81) at 203
[93] Abraham (91) at 945-6
[94] Abraham (91) at 946

it offers incentives to businesses to act more responsibly and serves as a framework for explaining to economic players the nature and cost of environmental risks.[95]

There is a misunderstanding regarding environmental concerns, both in terms of facts and legal aspects, for liability insurance to function correctly.[96] Insurers want data about the likelihood of a specific incident happening and the potential extent of the resulting damage.[97] Reliable information about the chance of an oil spill incident occurring and the potential extent of damage, after it occurs is vital for an environmental liability insurance plan.[98] However, one common problem often debated is the absence of adequate information available to insurance companies to cover environmental risks.[99] Additionally, insurers emphasised that the primary issue with environmental risks is the possibility of missing reliable statistics, which jeopardises the risk's capacity to be insured.[100] The literature suggests a potential solution to address the issue of 'insurer ambiguity'. If an insurer is unsure about the likelihood of an event occurring or the extent of potential harm, they may impose a risk premium to cover this uncertainty.[101] The magnitude of the risk premium can indicate the level of uncertainty related to the risk.[102] High uncertainty and the resulting high-risk premiums charged by insurers may decrease the demand for insurance.[103]

Another frequently cited issue regarding environmental insurance is the extent of the damage. Some claim that environmental damage can be so severe that a single insurer may not have the resources to cover the costs.[104] Standard solutions for insufficient capacity may include co-

[95] Richardson, (n77) at 295
[96] A. Monti, Environmental Risk: A Comparative Law and Economics Approach to Liability and insurance', (2001), *European Review of Private Law* 59-62
[97] Ibid
[98] Faure (n82) at 286
[99] Faure (84) at 5
[100] Ibid
[101] H. Kunreuther, R. Hogarth and J. Meszaros, Insurer Ambiguity and market Failure, (1993),7 *Journal of Risk and Uncertainty* 71-87.
[102] Ibid
[103] Ibid
[104] Faure (n82) at 6

insurance, re-insurance, and pooling.[105] Finally, the issue of moral hazard and adverse selection is another problem that ELI faces.[106] To implement the standard remedy of risk differentiation, the insurer must gather sufficient information regarding the likelihood that the specific insured potential polluter may be liable to third parties.[107] Insurers can assess the environmental reliability of an insured by specialising in environmental risk or by using third-party audits. An issue with liability insurance is that the insurer must manage the insured's environmental behaviour to prevent moral hazard and consider the probability of the insured being found liable in a specific liability case.[108]

Research has shown that providing varied premiums motivated storage gasoline tank owners to enhance facility safety, resulting in a more than 20% decrease in accidents compared to when just public regulations were in place.[109] Over 3,000 gasoline tank accidents were prevented in Michigan, saving nearly US$400 million in 8 years.[110] This was due to the state implementing private insurance requirements, eliminating the need for costly clean-up actions.[111] Insurers frequently collaborate with governmental regulatory bodies to advance the insured risk's preventative and associated risk management objectives.[112] This feature of regulation-by-insurance demonstrates the collaboration between the state and insurers in preventing losses. Moreover, insurers tend to influence public authorities in charge of safety standards and environmental clean-up.[113]

Even if there are immediate benefits to insure adverse risk, operators may be discouraged from willingly taking on environmental liability insurance if doing so will negatively impact their

[105]Faure (n82) at 6
[106] Ibid
[107] Ibid
[108] Ibid
[109] Yin et al. (n80) at 327
[110] Ibid
[111] Yin et al. (n80) at 327
[112] Ibid
[113]GM. Cohen, 'Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions' (1997) 4 Conn Ins LJ (1), 305-352.

trading capital or if the risk they face is greater than their assets.[114] Risk-averse operators in a poorly regulated system like Nigeria must get mandatory liability insurance. Data shows that most operators in the ND significantly underestimate the costs associated with prospective environmental harm and the likelihood of facing legal consequences for the harm. This drives operators to underinvest in their abilities to cover their potential obligations. It is reasonable to suppose that polluters are undervaluing the cost of environmental harm, which should be considered a reason to support mandatory insurance.[115]

5.4.1. The ability of ELI to Strengthen Public Regulation against Environmental Harm

The idea of regulation-through-insurance has received a lot of attention in the literature. Colin Mackie's work on the regulatory potential of financial security to reduce environmental risk argues that mandating operators to possess financial security to address their environmental responsibilities may lead to third-party financial security providers acting as 'surrogate' regulators overseeing the operator's operations.[116] Steven Shavell's research highlighted how insurers might establish effective incentives for careful behaviour by examining the connection between insurance and tort liability.[117] Kenneth Abraham introduced the phrase "surrogate regulation" to describe the new regulatory responsibility imposed on liability insurers to oversee hazardous tort and environmental hazards.[118] Omri Ben-Shahar and Kyle Logue explore the potential value of insurance as a substitute for government safety regulation.[119] These scholars and many others have discussed the many regulatory strategies employed by liability insurers to mitigate the risks they cover, notwithstanding the inherent moral hazard question.[120] The phrase "moral hazard" refers to how minimising the unfavourable effects of

[114] Richardson (n77) at p327.
[115] Faure (n82) at 307
[116] Mackie, (n50) at 196-197
[117] S Shavell, *Minimum Asset Requirements and Compulsory Liability Insurance as Solutions to the Judgment-Proof Problem, (2005); 36* RAND J. EcON. (1):63-77
[118] Abraham, (n91), at 57.
[119] Ben-Shahar and Logue (n81) at 225
[120] T Baker, 'On the genealogy of moral hazard'. 1996; 75 Tex. L. Rev.. (2), 237-292.

unethical conduct encourages it. The concept of moral hazard posits that mitigating the level of risk or possible harm associated with a situation results in improved outcomes.[121]

There are notable instances of how insurance may reduce environmental hazard issues observed in environmental liability insurance. Inspecting policyholder compliance with licencing requirements and other environmental standards strengthens already-existing government regulations.[122] Insurers' agreements provide policy conditions that replicate and enhance the law's command and control restrictions.[123] Mackie and Feess, and Hege argued that insurers may go beyond simply requiring the implementation of 'risk-reducing' technology as a condition for providing coverage.[124] They may also conduct scheduled inspections at the operator's site to inspect and monitor the situation.[125] Insurers can also offer premium incentives of a reasonable percentage in reduction for participating in private Environmental Management Systems that enforce higher environmental compliance requirements, conduct on-site audits, and assess performance.[126] Also, Insurers possess superior knowledge in evaluating environmental risks and determining the viability of different solutions; they provide this expertise to assist their clients in meeting environmental regulations.[127]

5.4.2. Self-Insurance

Self-insurance, also known as self-demonstration, is another measure of FSRs. Usually, operators buy assurance from a third party or an outside source. Private financial providers, such as insurers, sureties, and lenders, offer the option to purchase insurance, bonds, and letters

[121] Bake (n120) 329
[122] Ben-Shahar and Logue (n78) at 225
[123] N Gunningham, P Grabosky and D Sinclair, *Smart Regulation: Designing Environmental Policy* **(**OUP 1998) in Mackie(n50) at 197
[124] Mackie (n50) 197 see also Feess, E. and Hege, U., Environmental harm and financial responsibility. 2000). *25, The Geneva Papers on Risk and Insurance-Issues and Practice*, pp.220-234.
[125]Mackie (n50) 197
[126] Richardson (n77) at 300
[127] SA. Kunzman**, 'T**h)e Insurer as Surrogate Regulator of the Hazardous Waste Industry: Solution or Perversio*n? (1985).* 20 FORUM **(3)** 469-488 477

of credit.[128] On the other hand, certain measures allow parties to demonstrate their assurance instead of purchasing it.[129] Self-insurance is fundamentally an exhibition of the operator's profitability and stability.[130] Theoretically, financially prosperous and secure companies can take responsibility for their future costs without needing assistance from external funding sources.[131]

In comparison, a parent firm can exercise the option to assume responsibility for its subsidiary's clean-up and remediation obligation. However, the parent company must adhere to the same specific criteria, particularly by providing evidence of its financial stability to prove its ability to fulfil the responsibilities stated in a permit or licence. This happens only if it enters into a parent company guarantee.[132] Beyond this, Operators may be required to meet asset tests to ensure environmental cost restoration; such assets can include the working capital, representing the value of the operator's current assets minus the current liabilities.[133] Thus, this can be mandated in legislation, leases, or permits that the operator or its guarantor must provide and maintain evidence of financial security to cover the operator's environmental liability costs.[134] Self-insurance is an instrument available only to profitable operators who demonstrate that they can bear their environmental liabilities obligations without the assistance of third parties, such as insurers.[135] Mackie and Fogleman argued that there are two ways of exhibiting self-insurance,[136] which tests must be passed independently before this instrument can be approved as a safeguard against potential liability costs.[137] They argued that the first option could be

[128]Boyd (n1) at 430
[129] Ibid
[130] Ibid
[131] Ibid
[132]Mackie (n50) at p.196
[133] C Mackie, and V Fogleman, 'Self-insuring environmental liabilities: a residual risk bearer's perspective.(2016) 2 Journal of Corporate Law Studies 293-332 See also the rules governing vessels carrying oil and hazardous substances, 33 CFR § 138.80(b)(3); 40 CFR 258.74
[134] Mackie (n153) at 293
[135] Boyd, (n41) p16
[136] Mackie, and Fogleman (n153) at 294
[137] Ibid

putting aside money or assets with a third party, assigning environmental risks to them, and the second, self-insuring based on the operator's or its parent company's financial stability.[138] In this case, the parent company arranges with the regulator and the subsidiary to provide the necessary funds through a guarantee or a bond.[139] According to Boyd, asset ratios, profitability indicators, and bond ratings can also be utilised to complete a self-insurance test.[140]

A number of significant differences exist between assurance obtained through purchase and assurance obtained through purchase and assurance demonstrated by oneself. The primary distinction lies in the government's surveillance function, as self-insurance necessitates ongoing government oversight of the operator's financial state.[141] Therefore, public authorities must regularly audit the operator's financial data to ascertain their accuracy and sufficiency.[142] It should be noted that environmental regulators do not typically excel in company financial auditing, making purchasing assurance from third parties rather simple.[143] The presence of a legitimate insurance agreement with a third-party entity and the financial stability of an operator are two fundamental requirements that regulators need to confirm.[144] Monitoring the financial strength of capital providers is straightforward due to the pre-existing oversight mechanisms bodies like the Central Bank, National Insurance Commission, and the Securities and Exchange Commission could offer as the bodies maintain a register of government-endorsed sureties.[145]

The ability of self-insurance to address the ultimate responsibility for the environmental liabilities passed on in the event of insolvency is fundamental. This can be determined by two variables. The degree to which the operator can be guaranteed sufficient funds to meet its

[138] Mackie, and Fogleman (n153) at 294
[139] Boyd (n1)at 434
[140] Ibid
[141] Boyd (n1)434.
[142] Ibid.
[143] Ibid.
[144] Ibid.
[145] Mackie (n 51) 196.

environmental responsibilities by demonstrating financial strength and any conditions imposed on their satisfaction shows a semblance of remedial possibilities.[146]

5.4.3. Environmental Assurance Bonds (EAB)

An Environmental Assurance Bond (EAB) is a contractual arrangement in which a borrower commits a certain sum of money for a fixed duration in exchange for a mutually agreed-upon interest rate.[147] Bonding instruments offer a range of assurances, with a guarantee being a commitment to fulfil a specific action or obligation.[148] Several types of environmental assurance bonds exist that are specifically designed to ensure guaranteed performance.[149] Surety bonds, cash, letters of credit, and bond pools are the most popular types of environmental assurance bonds. A guarantee is a form of assurance that ensures the fulfilment of what is being guaranteed.

Nevertheless, it is desirable to approach some assurances made by a responsible operator with a healthy dose of scepticism.[150] The assurance techniques presented here are commonly used by operators that unsettle the natural environment and need to ensure that they will restore it.[151] Financial assurance forms are not universally utilised across all industries, nor are they all of comparable quality or standard. These assurances may take the form of contractual,[152] fidelity,[153] fiduciary,[154] and legal bonds.[155] Hence, the focus of this piece is oil spill clean-up and restoration. The bonds discussed herein are those most employed by the oil and gas industry stakeholders, who must guarantee that they will clean up and remediate impacted sites.

[146] Mackie and Fogleman (n153) 304.
[147] Malone, and Winslow (n3) 11-12.
[148] Ibid.
[149] Ibid.
[150] Malone, and Winslow. (n15) at 11
[151] Ibid
[152] This bond is used to guarantee the fulfilment of contractual obligations.
[153] This bond is used to guarantee honesty
[154] This bond is used to guarantee the proper management of assets.
[155] This bond is used to ensure compliance with judicial decisions.

Thus, environmental assurance bonds are likened to contractual bonds.[156] They also play the role of a traditional bond, which comes in the form of a 'cash deposit-refund' scheme or asset deposit and is not in the form of a letter of credit instrument.[157]

5.4.3.1 Environmental Liability Assurance Bonds in the Oil and Gas Sector

With the explicit goal of encouraging the prevention and remediation of environmental harm associated with oil contamination, the oil and gas industry is interested in two classes of environmental assurance bonds. There are financial bonds, which ensure payment of a specific amount determined by the regulatory agency if an environmental obligation is not met, and performance bonds, which guarantee the fulfilment of contractual obligations, such as those stated in a permit.[158] In certain jurisdictions, such as the United States, oil and gas operators needing a permit, licence, or lease must obtain a financial bond from a third-party provider, typically an insurer. This bond serves as a guarantee, ensuring that there is a sufficient amount of money to satisfy the financial responsibilities outlined in the contractual agreement.[159]

The utilisation of assurance bonds in addressing environmental issues may be traced back to the concept of "materials-use fees" proposed by Solow,[160] which is grounded in the fundamental principle of the conservation of mass.[161] When natural resources are used, they eventually find their way back into the ecosystem, albeit in altered forms that might not be beneficial to others.[162] According to the materials-use fee, the person using the resource would be required to pay a price equivalent to the social cost of disposing of the "used" material in

[156] These are further divided into: performance bonds; construction bonds; bid bonds; service and materials bonds; advanced payment bonds; retention bonds; maintenance bonds; transport bonds; customs bonds; license financial bonds; government regulatory bonds; and authorisation bonds.
[157]ML Mathis and PB Baker, 'Assurance bonds: a tool for managing environmental costs in aquaculture' (2002) 6 Aquaculture Economics & Management *(*1–2), 1–17
[158] D. Ferreira et al. "A decision model for financial assurance instruments in the upstream petroleum sector." (2004): 10 *Energy Policy* (32) 1173–1184
[159] Ibid such as to cover regular payments of rents and royalties, civil penalties and fines arising from their operations
[160] RM Solow, 'The economist's approach to pollution and its control'. (1972) 47 *Social Science,* (1) 15-25.
[161] Ibid at 20
[162] Mathis & Baker (n157) at 4,

the most socially damaging manner.[163] This fee would be paid before the resource is extracted; if the resource is returned to the environment without any societal costs, the money will be fully repaid.[164]

Describing a generic environmental bond system that also seeks to internalise the external costs of using natural resources, Costanza and Perrings expanded on the idea of a materials-use fee.[165] They explain a system intended to "safeguard society" against the unpredictable and possible external costs associated with using natural resources.[166] According to the proposal of Costanza and Perrings, a company would deposit a bond into an escrow account that earns income.[167] The bond can be refunded on a specific date.[168] The bond's value would be enough to cover the estimated cost of rectifying the most severe environmental harm caused by the firm's activity, just like the materials-use fee.[169] If the actual external costs of the company's production were lower than the predicted amount determined when the bond was set, the bond would be fully or partially refunded at the designated date.[170] The life of the bond is also contingent upon legally mandated restrictions on the firm's liability for future consequences.[171] Costanza and Perrings propose the use of several bonds issued at regular intervals for long-term use as long as the company is in business.[172] This allows for the possibility of modifying the value of each new bond, taking into account the firm's track record, updated information on the expenses related to environmental harm, or the advancement of new technology that decreases the environmental expenses of production.[173] The flexibility of Costanza's and

[163] Mathis & Baker (n157) at 4
[164] Mathis & Baker (n157) at 6
[165] R Costanza, & C Perrings, 'A flexible assurance bonding system for improved environmental management.' (1990) 2 Ecological Economics,(1) 57-75
[166] Ibid at 66
[167] Costanza And Perrisgs (n165) 66
[168] Ibid
[169] Ibid
[170] Ibid
[171] Mathis & Baker (n165) at 6
[172] Costanza and Perrisgs (n165) 67
[173] Ibid

Perrings' system is further enhanced by allowing the adjustment of active bonds issued in prior years to match the value of the current bond.[174]

Mackie conceptually grouped trust funds, escrow accounts, and environmental assurance bonds as a "deposit-refund" scheme, which should be understood in the light of EAB.[175] Mathis and Baker described the deposit component of the EAB as an entry fee. Hence, it might be considered an initial payment required to enter the industry, as it must be paid prior to the firm's commencement of production.[176] The deposit is made in the form of an interest-bearing bond, and the refund is subject to a number of criteria and limitations, such as a future date for reimbursement and requirements under through which the refund can be obtained.[177]

Usually, a lump sum is deposited in a trust fund created in favour of the regulator.[178] The oil and gas companies with more than one operational base may opt for 'blanket bonds'. This unique single bond is accepted as assurance for multiple oil and gas fields. It is available to an operator with many exploration sites to provide a single bond as covered.[179] It is not a free-for-all, but an operator with a track record of good operational behaviour and who passed the financial tests may be allowed to bond many wells for a reasonably small part of the assurance cost.[180] It helps the operator who would otherwise have incurred a higher price to demonstrate assurance had the many oil wells been bonded independently.[181] However, blanket bonds cannot guarantee the total recovery cost since the single bond assurance has a lower value than the operator's obligations in all its sites combined.

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[174] Costanza and Perrisgs (n165) 67
[175] Mackie (n50) at 203
[176] Ibid
[177] Mathis & Baker (n157) at 6
[178] Mathis and Baker, (n157) at p9 also Mackie (n50) at 204
[179] D. Ferreira et al. (n158) at 1179
[180] Ibid
[181] Federal Financial Responsibility Demonstrations for Owners and Operators of Class II Injection Wells, (EPA 570/9-84-007). Federal blanket bond coverage is accepted only if the operator: (1) has a spotless past record of plugged and abandoned wells; (2) has at least one oil field or lease with an estimated remaining economic life exceeding 5 years; (3) has been in the oil business for more than 5 years; (4) is producing from more than one production field; (5) operates more than 10 injection wells; and (6) can pass a financial test.

In essence, it is the cost that the regulator calculates as the most accurate evaluation of the most severe potential environmental harm that can result from the operator's actions at a given moment.[182] The efficacy of a performance bond can be evaluated when it is utilised as a standalone bond for a specific oil facility.[183] Although it is possible to have numerous performance bonds for a certain oil facility under a permit, licence, or lease agreement, it is not permissible to have a single performance bond that covers all the operations of the facility.[184] Once executed, a performance bond must be maintained until the responsibilities under the lease are fulfilled, transferred, or terminated because the objective for which each bond is valued is to serve a specified function, such as clean-up or remediation.[185]

In the event that a performance bond includes multiple objectives, such as covering and implementing concurrent clean-up, remediation, and closing actions, the regulator may approve the bond's proportionate release in stages or through a segmented manner.[186] Otherwise, the extent of harm caused to the environment, whether greater or lesser than anticipated by the regulatory body, will determine whether the bond will be retained or refunded, either in full or partially, on the agreed-upon date.[187] There are several reasons why a bond may be withheld or subject to forfeiture. First, if an exploration site, well, or installation project is abandoned or temporarily closed without following the proper procedures. Secondly, if an operator does not fulfil their responsibilities for closing a well according to the standard design. Lastly, if an operator does not maintain the required amount of the bond. If any of these three events occur, the bond is partially subject to forfeiture or a refund.[188]

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[182] JF Shogren, JA. Herriges, and R Govindasamy. "Limits to environmental bonds." (1993):8 *Ecological Economics* .(2) 109-133

[183] Ibid

[184] Shogren et al. (n182) at 110

[185] Mackie (n50) at 203

[186] D Ferreira et al. (n158) at 1179, Mackie (n56) at 203,

[187] Costanza And Perrisgs (n165) 66-68

[188] Mackie (n50) at 204, D Ferreira et al. (n158) at 1179; Financial security instruments used as a cover to meet both financial and performance bonding requirements come in different forms with unique features to satisfy the desired objective. In some instances, a company may pledge its assets (floating and fixed) in the form of cash, securities, real estate, machinery, escrow account, and salvage. Others can be guaranteed for a company's

5.4.3.1. Capacity to Incentivise the Prevention of Environmental Damage

The comparative analysis of Costanza and Perrings, Mackie, Mill & Baker and Shogren et al. poses a crucial question about the advantages of EABs in incentivising the prevention of environmental damage. Whether the EAB encourages firms to adopt more environmentally cautious practices, as proposed by Shogren et al., Mackie or serves as a social insurance mechanism that compensates for environmental damages caused by a firm's activities, as explained by Mackie and Costanza & Perrings. When behaviour is not well monitored, the regulator's concern is how to persuade the company to offer an effective degree of pollution control.[189]

The complete return of the operator's bond serves as proof of their adherence to sound environmental standards, resulting in a diminished adverse effect on the environment as opposed to what was initially anticipated by the regulatory body.[190] Hence, the operator, in turn, directly obtains advantages from the low cost of purchasing assurance products as a result of their exceptional performance in mitigating anticipated environmental hazards.[191] The operator is motivated to devise efficient strategies to mitigate environmental harm caused by oil spills.[192] Furthermore, the relationship between the operator and the regulatory authorities might be described as a formal agreement or pact. Adhering to the provisions of the agreement ensures that the bond will be keeping to the terms of the agreement, which means that the bond will efficiently achieve the socially desirable goal of pollution control. However, operators may formulate such defences as sabotage or acts of God to explain the shirking of the terms of the agreement to challenge the loss of a bond. However, confiscating a bond may be an unfair

performance, fulfilment of obligations (surety bonds), or the transferring of potential financial liabilities to other agents.

[189] Shogren et al. (n182) at 110

[190] Ibid

[191] Mackie (n50) At p207-208

[192] C.A., Perrings, 'Environmental bonds and environmental research in innovative activities.' (1989a).1 Ecol. Econ.,(1): 95-110.

penalty, especially if actual third-party interference is involved and the bond is set high relative to any damages.

Fourth, the incentive to adopt the pollution reduction technique in operation arises from the fact that the EAB value changes with the predicted outcomes of the activity.[193] Fifth, to reduce the bond's value, the operators may deploy considerable resources to acquire information about helpful technologies in the pollution reduction process. Investing in research is one way to attract scientific innovations that can reduce environmental costs.[194] The operator must demonstrate that the newly acquired technology (method) can lower the predicted environmental cost. By demonstrating the viability of the process to the regulator, the operator takes advantage of the accompanying financial benefit.[195]

5.4.3.2. Capacity to Remedy Environmental Damage

Bonds ensure that funds exist to clean up and remedy oil spills before environmental damage may ensue or even indemnify society if they had incurred the environmental costs of oil pollution. Surely, the presence of bonds would prevent any costs from being passed on to society in the first place, thus making EABs capable of remedying environmental damage. First, because funds are set aside from the assets of the operator, the regulator can easily access the funds to remedy any damage if any occurs. However, bond value changes from time to time in proportion to reflecting the average experience of industry practices and regulatory interventions to the perceived risks. Thus, if the funds set aside are equal to or greater than the liability covered by the bond, the regulator would have no problems applying the operator's assets.

This also places the regulator in an advantageous position to apply the operator's assets to cover its liabilities should there be a competing interest over the same assets from creditors with other

[193] Perrings, (n192) at 102.
[194] Mackie (n50), p209
[195] Ibid

creditors upon the operator's insolvency.[196] There is no gainsaying that this is one of the straightforward and effective ways of implementing the remedial function of the PPP, which will help reinforce public regulation in Nigeria. Hence, PPP enforcement appears misapplied in Nigeria and may also compensate victims of environmental damage. There are more than 30,000 oil spill cases in the courts regarding the Niger Delta, and all are claiming compensation for traditional damages involving oil spillages.

Second, environmental remediation is not limited to clean-up and remediation costs alone. It involves future costs that impact resources such as water quality.[197] Thus, the operators may be ineligible to claim the immediate refund of their bond until the environmental cost covered by the bond is satisfied or proven not to have happened.[198] This process incentivises operators to sustain the monitoring, control and supervision of the site against the harmful environmental impact of their activities despite no longer being in business.[199] In the event that the operator fails to fulfil any obligation related to pollution management, they will be required to surrender the entire or a portion of the bond.[200]

5.4.3.3. Limits of Bonds

While bonds have the potential to be effective, environmental bonds have demonstrated a degree of efficacy in some jurisdictions, such as the USA states of West Virginia and Pennsylvania.[201] However, bonds possess inherent limitations. Shogren et al. contend that they are not suitable for addressing all environmental issues.[202] While this opinion may be criticised, the limitations are far from being justified and not productive, but they may encompass

[196] Mackie (n50) at p.206
[197] SJ. Surber, 'writing a Check that the State Can't Cash: Water Pollution from Coal Mining and the Imminent and Inevitable Failure of the West Virginia Special Reclamation Water Fund', (2013) 27 TUL. ENVTL. L.J. 1, 2-4
[198] Ibid
[199] Mackie (n50) at p.206.
[200] Perrings (n192), p. 99 & 102
[201] Shogren Et Al (n182) 130
[202] Ibid

concerns of moral hazard and constraints on the operators' liquidity.[203] In the context of environmental damage, such as oil pollution, efforts are made to minimise the limitations imposed by these factors with other financial security instrument like insurance and trust funds. Regarding moral hazards, Shogren et al. argue that environmental bonds might give rise to the issue of government moral hazards,[204] Which can occur when the regulator is motivated to seize the bond, regardless of the operator's level of care.[205] Particularly if a regulator is driven by self-interest, seizing the bond would provide additional income for the agency and enhance its authority. The regulator will evaluate the costs and advantages of moral hazard and may establish a regulatory framework that facilitates the easy acquisition of the bond. [206]

There is a comparable possibility of government moral hazard from the perspective of public choice theory. Suppose regulators prioritise their own private benefit over social welfare. In that case, there is a significant chance that the government may designate the operator as a shirker and seize a portion of the bond's full value.[207] Companies seeking to engage in commercial activities within a particular nation are confronted with the potential hazard of the government unlawfully appropriating the full worth of the bond.[208]

Shogren et al. further argued that bureaucratic theory posits that moral hazard could be an especially grave issue in the realm of the environment.[209] The idea posits that bureaucrats acquire greater money and influence by enlarging the scale and reach of their agencies, accomplished by maximising the agency's budget.[210] If the goal is to optimise the budget, the agency has a significant motivation to assert that the operator has neglected its responsibilities. After the bond is obtained, the agency can utilise the funds to enforce stricter environmental

[203] Shogren Et Al (n182) 130
[204] Shogren Et Al (n182) 113
[205] Ibid
[206]Ibid
[207] Shogren Et Al (n182) 115
[208] Ibid
[209] Ibid
[210] Shogren et al (n 182) 115

regulations, hence raising the probability of more companies violating environmental standards and forfeiting their bond.[211]

Another significant barrier that hampers the utilisation of bonds is the liquidity limitations regulated firms encounter.[212] An environmental bond has the potential to encumber a substantial proportion of a company's assets. Despite a low likelihood of happening, the bond will be substantial if the potential cost of ineffective precaution is significant. Thin credit occurs when a company lacks the necessary assets to issue a bond. The bond's liquidity limits can compel a company to cease production or limit its ability to enter new markets.[213]

Liquidity concerns similarly limit the popularity of environmental bonds.[214] When faced with the prospect of environmental harm, the financial implications might potentially reach several hundred millions of naira. Hence, mandating an operator to issue a bond of such magnitude can significantly limit its assets; as the bond size increases, the likelihood of operators having inadequate liquid assets to deposit in advance also increases.[215] In the event that the operator is unable to issue the bond, there is a possibility that the operations could be terminated, despite the potential benefits the society may derive from the operator's activities from a social welfare perspective.[216] This is in contrast to Costanza and Perrings, who put forth a flexible environmental assurance bonding system that seeks to promote eco-technological innovation by positioning it as the option with the best long- and short-term economics.[217] According to them, the proposed scheme offers the advantage of minimising interference with the regulated industries' internal operations while simultaneously ensuring that these industries are subjected to the marginal social cost of their activities.[218] This measure would offer a financial motivation

[211] Shogren et al (n 182) 115
[212] Ibid 116
[213] Ibid
[214] Ibid
[215] Ibid
[216] Costanza and Perrings (165) at72
[217]Ibid
[218] Ibid

for firms to harness their technical innovation to mitigate the environmental harm they presently generate. Hence, operators who demonstrated strong performance in mitigating environmental harm would receive rewards, while those who exhibited poor performance would face penalties.[219] Shogren *et al*. argue that liquidity constraints often impact the firm's ability to borrow as well as its default risk.[220] The optimism of Costanza and Perrings is based on the premise that insurance markets will evolve in a way that allows companies to combine their risk and insure against the loss of their bond.

A secondary or indirect impact of the liquidity challenge is that, despite the possibility of borrowing assets for bonds, the operator's borrowing power for other critical capital is reduced.[221] If the operator has utilised a significant portion of its borrowing capacity to post the bond, it will have limitations in obtaining new cash for production or research, this secondary impact will limit the general growth of the business, which may not be advantageous from a social welfare perspective.[222]

In Nigeria, the environmental bond market is still underdeveloped; the government needs to revise the laws to provide legal backing to the sellers of bonds. The policy backing an environmental bond and EFSR will significantly limit the possibility of operators defaulting. An operator would have no choice but to either post the bond or not go into the oil and gas business. Operators who want to do business in Nigeria face the risk that the government will unjustifiably take the entire value of the bond. In addition, NOSDRA creates strict liability for oil spills; thus, regulators may argue that NOSDRA does not require proof that oily substances found on a site had been released or threatened to be released from the operator. Thus, liability is attached to the mere presence of the oily substance at the site. This strict liability stance of

[219] Costanza and Perrings (165) at72
[220] Shogren *etal* (n182) 116
[221] Shogren *Et al (*n182) 117
[222] Ibid

NOSDRA might create significant uncertainty for operators, as the regulator could still find them liable and withhold the bond even if the oil spill was caused by sabotage.

5.4.4. Letter of Credit,

The act of one individual providing temporary assistance for the advantage of another individual is a role that has existed since the beginning of human civilisation. Suretyship is observed in certain societies by the implementation of a practice wherein groups are compelled to collectively bear responsibility for the infractions committed by their individual members.[223] Currently, the word Suretyship is most frequently employed when an individual consents to assume responsibility for another's debt. The historical origins of suretyship in contexts beyond credit have been overlooked in Nigeria, resulting in a lack of comprehension regarding the use in environmental liabilities matters and distinctions among intricate financial instruments that share a common objective of providing third-party credit backing for liabilities. Third-party liability can be guaranteed either by individuals and corporations, supported by letters of credit from commercial banks, insurance companies using financial guaranty policies or surety bonds, and everyone becoming an investor in credit.[224]

5.4.4.1. Letter of Credit (LCs)

A "letter of credit" is an attestation by a financial institution or any other entity responsible for issuing the letter of credit (referred to as the "issuer") to disburse funds to a designated recipient (referred to as the "beneficiary") on behalf of a third party (referred to as the "applicant") once the particular condition(s) laid out in the letter of credit are met.[225] To utilise the letter of credit

[223] RD. Aicher, DL 'Cotton & TK Khan, 'Credit Enhancement: Letters of Credit, Guaranties, Insurance and Swaps (The Clash of Cultures)'(2004) 59 Bus Law, (3), 897-974

[224] Malone & Winslow,(n15) at 12, see also Aicher *etal*, (n223) at 898; see also WT. W. Blaine Early III, 'Bond what You Know and Insure what You Don't: A Comment on a Market Approach to Regulating the Energy Revolution,(2015) 45 ENVTL. L. REP. (8) 10756-10759, See also Gorton III & W. B Early III, 'Environmental Reclamation Financial Assurances: Back to The Future,RockyMountain (2010) MineralLawInst.(2010) ,Https://Www.Bestlawyers.Com/Content/Downloads/Articles/2266 1.Pdf (accessed 20th May 2020)

[225] DJ. Barru, 'How to Guarantee Contractor Performance on International Construction Projects: Comparing Surety Bonds with Bank Guarantees and Standby Letters of Credit' (2005) 37 Geo Wash Int'l L Rev (1) 51-108

and obtain payment from the issuer, it is often necessary for a beneficiary to submit the letter of credit to the issuer, together with any accompanying documentation as stipulated by the terms of the letter of credit. The issuer will subsequently either comply with the draw request, which entails making payment to the beneficiary or decline to comply with the draw request, which involves not making payment to the beneficiary.

Generally, a letter of credit comprises three distinct commitments: (i) the transaction that underlies the relationship between the applicant and the person who benefits from it; (ii) the agreement between the applicant and the issuer that outlines the terms of the letter of credit and requires the applicant to repay the issuer for payments made in compliance with those terms (iii) the letter of credit itself, which requires the issuer to respect the terms of the agreement.[226] As long as the letter of credit exists, the issuer is duty-bound to honour the beneficiary's draw request.[227] An annual maintenance fee is charged alongside the repayment of the instrument and interest on the security.[228] More importantly, the environmental agency can only request payment from the financial institution (bank) because the applicant/purchaser failed to perform certain environmental obligations, which they ought to have done. For example, a financial institution may need security or deposits before providing a letter of credit.[229] The issuer provides letters of credit depending on the financial health of the applicant/purchaser.[230] They are usually valued at a small fraction of their face value and have a one-year lifespan. The purchaser has a chance to automatically extend it after the one-year period, but it is only subject to the continually suitable credit rating and compliance with the agreement.[231] Once issued, the instrument cannot be altered without the tripartite agreement of the applicant/purchaser, the

[226] Aicher *etal*, (n223) at 89
[227] Gorton & *Early, (n224) at 7*
[228] EG. Gallagher & MH. McCallum, 'The Importance of Surety Bond Verification' (2010) 39 Pub Cont LJ (2) 269-284 see also A Gharagozlou, 'Cordelia Returns - Using Letters of Credit to Reduce Borrowing Costs' (2009) 34 U Dayton L Rev (3), 305-376.
[229]Boyd, (n1) at 433
[230] Boyd, (n1) at p434
[231] Ibid

issuer/provider and the beneficiary.[232] If appropriately designed, the beneficiary can draw on the letter of credit even if the terms are not extended beyond one year or an additional form of assurance is lodged in its place.[233]

The relevant legislation often clearly states that a letter of credit establishes a primary duty of the issuer towards the recipient.[234] A letter of credit represents a fundamental responsibility on the issuer to uphold the beneficiary's request for payment, independent of the conditions and satisfaction of the original transaction for which the credit was extended.[235] The idea of independence serves to differentiate the letter of credit from a guaranty, which represents a supplementary obligation undertaken by the guarantor.[236]

5.4.4.2. Capacity to Incentivise the Prevention of Environmental Damage

Letters of credit can incentivise the prevention of environmental damage by providing financial assurance and accountability mechanisms that encourage responsible environmental stewardship. Here's how: 1. Letters of credit serve as a financial guarantee from a bank to an environmental agency, ensuring that payment will be made upon the fulfilment of specified conditions. By requiring a letter of credit from operators, environmental regulators ensure that there are resources available to address any potential environmental damage that may occur from oil spillages. 2. Compliance Incentives: Letters of credit can be structured to include environmental performance criteria or compliance standards that the applicant must meet. This incentivises the implementation of best environmental practices and compliance with environmental regulations to avoid the forfeiture of the letter of credit or penalties for non-compliance. Operators are motivated to invest in pollution prevention measures, resource conservation, and sustainable practices to maintain access to financial resources. 3. Risk

[232] Boyd, (n1) at p434
[233] Ibid
[234] Aicher *etal*, (n223) at 902
[235] Ibid
[236]Aicher *etal*, (n223) at 902

Management: Letters of credit mitigate the financial risks associated with environmental damage by ensuring that funds are available for remediation efforts if environmental harm occurs. This encourages operators to proactively identify and mitigate environmental risks, implement risk management strategies, and adopt preventive measures to minimise the likelihood of environmental incidents. 4. Third-Party Verification: Letters of credit can be contingent upon third-party verification or certification of environmental compliance or performance.[237] This creates an extra degree of accountability and ensures independent assessment of environmental practices, enhancing transparency and credibility. Companies may seek certification from reputable environmental organisations or adhere to internationally recognised environmental management standards to demonstrate their commitment to environmental responsibility. 5. Community Confidence: The existence of a letter of credit provides assurance to local communities, environmental advocates, and other stakeholders that financial resources are available to address environmental concerns and mitigate potential harm. This fosters trust and confidence in project proponents and can facilitate constructive dialogue and engagement with affected communities.

5.4.4.3. Capacity to Remedy Environmental Damage

Letters of credit have the capacity to contribute to the remediation of environmental damage in several ways: 1. Financial Assurance: LCs provide a financial guarantee from a bank that funds will be available to cover specified obligations. In the context of environmental damage, LCs can ensure that sufficient funds are earmarked for the remediation and restoration of affected ecosystems, providing assurance to regulators and stakeholders that resources are available to address environmental harm. 2. Contractual Obligations: LCs are often used as a form of security in contractual agreements between parties. By including provisions in contracts

[237] Sharmin, F., & Chowdhury, T. A. '*Assessment of Letter of Credit of HSBC'(2007)* (Doctoral dissertation, East West University) .

requiring the establishment of an LC to cover environmental remediation costs in case of damage, parties can ensure that responsible parties are financially liable for their environmental obligations. 3. Enforcement Mechanism: LCs can serve as an enforcement mechanism to ensure compliance with environmental regulations and contractual obligations. In the event of environmental damage, regulators or affected parties can draw on the LC to access funds for remediation, incentivising compliance and providing a mechanism for swift and effective enforcement. 4. International Transactions: In cases where environmental damage crosses international borders or involves multinational corporations, LCs can facilitate transactions and ensure accountability across jurisdictions. By requiring the establishment of an LC for environmental remediation purposes, parties can mitigate the risk of non-compliance and ensure that responsible parties are held accountable regardless of their location. 5. Risk Management: LCs offer a means of managing environmental risks associated with business operations, investments, and development projects. By requiring the establishment of an LC to cover potential environmental liabilities, parties can hedge against the financial risks of environmental damage and ensure that adequate resources are available to address unforeseen contingencies.

5.4.5. Surety Bonds

Environmental Surety bonds are similar to letters of credit but are usually obtained from insurance companies. However, in the context of environmental suretyship, it refers to a three-party agreement that includes the following parties:[238] the 'principal' (operator), who is the main party responsible for the obligations; the surety (insurance firm) as the secondary party responsible for the obligations; and the regulatory agency as the "oblige," where the commitment to carry out specified environmental activities, such as restoring environmental

[238] Malone & Winslow,(n15) at 12 see also Gallagher & McCallum (n228) 272

damage.[239] Put simply, a surety bond is a commitment to take accountability for the deeds or omissions of the party who requested the assurance.[240] The principal assumes primary responsibility for the agency, and in the event of their inability to meet their obligations, the party responsible for providing the guarantee, known as the surety, becomes accountable to the agency.[241] The surety has the right to pursue compensation from the principal if the principal fails to meet their commitments, resulting in the surety assuming liability.[242] It is important to note that while bonding businesses (sureties) have the ability to collaborate with insurance organisations, it is crucial to distinguish between a surety and an insurer. In the context of insurance, a connection exists solely between the principal and the insurer, wherein the insurer assumes responsibility in accordance with an insurance policy.[243]

In contrast to an insurance agreement, a surety bears a secondary obligation in the event of primary default, whereas the insurer has the right to pursue compensation from the principal for any responsibility borne by the surety.[244] Typically, sureties/bonding businesses expect the principal to sign an indemnity agreement and provide collateral, which will be released if the principal's duties are successfully completed.[245] Surety bonds, like a letter of credit, cannot be cancelled without first giving notice to the regulator, the beneficiary of the bond.[246] Corporate surety bonds are deemed to be efficacious and readily overseen by agencies due to the fact that the surety bears the responsibility for financial loss.[247]The surety is responsible for regularly monitoring the principal's financial well-being and assumes the risk of a possible default by an

[239] Gallagher & McCallum (n228) at 270-271
[240] Boyd, Financial Assurance for Environmental Obligations (n1) 435
[241] Malone & Winslow,(n15) at 12
[242] Ibid
[243] Ibid
[244] Gorton & *Early, (n224) at 7.*
[245] Malone & Winslow, 'Financial Assurance,(n15) at 12
[246] Boyd (n1) p.433
[247] Gorton & Early(224) at 7

insolvent principal.[248] Consequently, the availability of surety bonds may vary depending on the creditworthiness of the principal and the surety's eligibility criteria.

5.4.5.1. Capacity to Incentivise the Prevention of Environmental Damage

Surety bonds have the capacity to incentivise the prevention of environmental damage in several ways. Surety bonds serve as a valuable tool for incentivising the prevention of environmental damage by imposing financial obligations on operators and encouraging compliance with environmental regulations. By aligning financial interests with environmental objectives, surety bonds contribute to a more sustainable approach to business operations and environmental management through the following ways.

1. Financial Responsibility: Surety bonds require the bondholder to pay a certain amount if they fail to meet their obligations. This financial liability incentivises companies to prioritize environmental protection measures to avoid costly penalties or claims against the bond. 2. Risk Management: The existence of a surety bond encourages companies to implement robust risk management practices to prevent environmental damage. By demonstrating financial responsibility, operators may be more inclined to invest in technologies, training, and procedures aimed at minimising the risk of environmental incidents. 3. Regulatory Compliance: Surety bonds serve as a mechanism to ensure compliance with environmental regulations. Companies that post bonds are motivated to adhere to regulatory requirements to maintain their bond status and avoid potential penalties or loss of bonding privileges. 4. Public Accountability: Surety bonds provide a form of public accountability by holding operators financially responsible for environmental damage. The public's faith in the system can be strengthened by this transparency and the company's commitment to environmental stewardship, thereby incentivising responsible behaviour. 5. Market Access: Many regulatory

[248] Gorton & Early(224) at 7

agencies require surety bonds as a prerequisite to obtaining authorisations or licences to operate. Compliance with environmental regulations facilitated by surety bonds can help companies access markets, secure contracts, and maintain a competitive edge in the industry. 6. Continuous Improvement: Companies may use surety bonds as a catalyst for continuous improvement in environmental performance. The financial commitment associated with the bond can incentivise companies to invest in research and development of innovative solutions for environmental protection and pollution prevention.

5.4.5.2. Capacity to Remedy Environmental Damage

Surety bonds can play a significant role in remedying environmental damage by providing a financial mechanism to cover the costs of restoration and mitigation efforts. Here's how surety bonds can effectively remedy environmental damage: 1. Financial Guarantee: Surety bonds serve as a financial guarantee that ensures funds are available for environmental remediation in the event of damage caused by the bonded party. This financial security helps facilitate prompt and effective response to situations involving the environment, including oil spills or hazardous oily waste contamination. 2. Enforcement of Environmental Regulations: Surety bonds can be used as a regulatory tool to enforce compliance with environmental laws and regulations.[249] Bonding requirements incentivise operators to adhere to environmental standards by imposing financial consequences for non-compliance, thereby reducing the likelihood of environmental harm. 3. Risk Transfer Mechanism: Surety bonds transfer the financial risk of environmental damage from affected parties, such as communities or governments, to the bonded party and the surety company. This ensures that the responsible party bears the financial responsibility for remediation rather than externalising the costs onto taxpayers or impacted communities. 4. Prompt Remediation: By providing immediate access

[249] Boyd (n1) p.433

to financial resources, surety bonds enable timely and efficient remediation of environmental damage. This helps minimise the spread of pollutants, mitigate ecological impacts, and protect human health and natural habitats. 5. Accountability and Deterrence: Surety bonds hold the bonded party accountable for environmental liabilities by providing financial rewards for adhering to rules and preventing environmental harm. The potential loss of the bond serves as a deterrent against negligent behaviour, encouraging operators to implement proactive measures to minimise environmental risks. 6. Community Protection: Surety bonds offer protection to communities and ecosystems affected by environmental damage by ensuring that sufficient funds are available for cleanup and restoration efforts. This helps alleviate the burden on impacted communities by holding polluters responsible for their actions.

5.4.6. Banks Guarantees

In more precise language, bank guarantees refer to the commitments or obligations made by the issuer (bank), in contrast to a surety (insurance company), to uphold a request for payment of a designated sum to a third party (the beneficiary) in accordance with the stipulations delineated in the agreement.[250] Bank guarantees have a long-standing track record of efficacy in the realm of business, with their origins dating back over 3,000 years.[251] The instrument has seemingly experienced significant growth in recent years as a result of its perceived attributes of reliability, convenience, economy, and adaptability.[252] The operator normally submits the credit application for environmental assurance, and the government regulatory agency is the beneficiary. The bank that issues the guarantee is not required to offer additional support to the operator beyond providing a cover. Consequently, the bank does not have an obligation to provide additional services such as oversight and monitoring functions that a credit provider

[250] Malone & Winslow, 'Financial Assurance,(n15) at 13,see also E Guttman, 'Bank Guarantees and Standby Letters of Credit: Moving Toward a Uniform Approach' (1990) 56 Brook L Rev (1), 167-182.
[251] B Wunnicke,, and PS. Turner. *Standby and Commercial Letters of Credit.*' (2000) Wolters Kluwer, 2-55
[252] Ibid at 2 &27

may offer to the operator regarding their environmental activities or to ensure the operator's full compliance with any obligations. However, the beneficiary maintains its operator oversight to independently and proactively assess whether any damage has been done to the environment and request compensation for restoration.[253]

Moreover, upon the beneficiary's initiation of a claim and subsequent execution of payments, the bank will endeavour to obtain complete reimbursement from its customer, specifically the credit applicant. Therefore, a significant benefit of the bank guarantee is in the convenience it offers to the recipient in terms of receiving payment from the bank that issued it.[254] This unique characteristic stands in stark contrast to another type of assurance bond, such as a surety bond, which may necessitate the obligee (i.e. regulatory agency) to persuade the surety of the operator's inability to meet any duty prior to the surety-taking action on the terms of the agreement. It is unnecessary to provide any more proof of the operator's non-performance or default under the original contract's terms.

5.4.6.1. Capacity to Incentivise the Prevention of Environmental Damage

Bank guarantees have the capacity to incentivise the prevention of environmental damage in several ways—for example, 1. Financial Security Bank guarantees to provide financial security by ensuring that funds are available to pay for environmental remediation costs should damage occur. This acts as a deterrent for companies to prevent environmental harm, knowing that they will be financially liable if damage occurs. 2. Risk Management Bank guarantees incentivise companies to implement robust environmental management systems and risk mitigation measures to minimise the likelihood of environmental damage. Companies can show their dedication to environmental responsibility and negotiate more favourable terms for their guarantees, thereby reducing their financial risk. 3. Compliance Assurance: Bank *guarantees*

[253] Mackie (n50), p203
[254] Ibid

can serve as a mechanism to ensure compliance with environmental regulations. Companies may be required to maintain a guarantee as a condition of obtaining permits or licenses, providing assurance to regulators that they have the financial means to address any environmental harm that may occur. 4. Reputation Protection: Bank guarantees help protect a company's reputation by signalling to stakeholders, including investors, customers, and the public, that the company takes its environmental responsibilities seriously. A strong guarantee demonstrates the company's financial stability and commitment to environmental sustainability, enhancing its credibility and trustworthiness. 5. Market Access: Companies with robust environmental management practices and strong guarantees may have greater access to capital and markets. Financial institutions and investors may be more willing to lend or invest in companies that can demonstrate their ability to prevent and address environmental risks, thereby incentivising proactive environmental stewardship. Generally, bank guarantees play a critical role in incentivising the prevention of environmental damage by providing financial security, encouraging risk management, ensuring compliance, protecting reputation, and facilitating market access. By aligning financial interests with environmental outcomes, bank guarantees can help promote sustainable business practices and minimise the damaging effects that the oil industry in Nigeria has on the environment.

5.4.6.2. Capacity to Remedy Environmental Damage

Bank guarantees have the capacity to remedy environmental damage in several ways: 1. Financial Resources: Bank guarantees provide a ready source of financial resources to cover the costs of environmental remediation. In the event of environmental damage, the guarantee ensures that funds are available for immediate cleanup, restoration, and compensation efforts, minimising the impact on affected ecosystems, communities, and public health. 2. Timely Response: Bank guarantees facilitate a prompt response to environmental incidents by providing assurance that financial resources will be readily accessible when needed. This

enables swift action to contain and mitigate the spread of pollution, prevent further environmental harm, and protect sensitive habitats and resources. 3. Legal Compliance: Bank guarantees serve as a mechanism to enforce compliance with environmental regulations and requirements. Companies may be required to maintain a guarantee as a condition of operating permits or licenses, making sure they possess the resources necessary to complete their environmental obligations and liabilities. 4. Accountability: Bank guarantees to hold polluters accountable for their environmental responsibilities by providing a mechanism for covering the costs of remediation and compensation. In cases of environmental damage, the guarantee ensures that the responsible party is financially liable for restoring affected ecosystems, compensating affected communities, and mitigating the long-term impacts of pollution. 5. Restoration and Rehabilitation: Bank guarantees support efforts to restore and rehabilitate ecosystems affected by environmental damage. The funds provided through the guarantee can be used to implement restoration projects, rehabilitate degraded habitats, and support the recovery of biodiversity and ecosystem services. 6. Community Reassurance: Bank guarantees offer reassurance to affected communities and stakeholders that resources are available to address environmental damage and mitigate its impacts. This fosters a sense of confidence and trust in the remediation process, fosters cooperation between polluters and affected communities, and promotes transparency and accountability in environmental management.

5.4.7. Parent Company Guarantees

A Parent Company guarantee (PCG) implies a guarantee by a self-interested corporation, specifically a parent company, which entails notable risks, including the potential for insolvency of both the guarantor and the obligor.[255] On the other hand, a PCG agreement, also known as an indemnity agreement, enables a different entity, such as a parent company, to

[255] Boyd (n1) at 433

meet the coverage obligation.[256] In order to assume liability for a potentially responsible corporation, financial guarantors are required to successfully undergo the corporate financial test and provide their consent to guarantee the liabilities.[257] The conditions are the same as those for self-insurers, which includes the necessity for domestic assets to be present.[258] The regulated community often favours self-insurance and PCG as financial security mechanisms due to their ability to eliminate the need for third-party involvement and compensation.[259] A frequently recurring theme is the consensus within the industry that is regulated that the financial standards should be relaxed to enable a greater number of operators to meet the eligibility criteria.

Nevertheless, these instruments are considered less desirable from a regulatory perspective.[260] Hence, they necessitate greater administrative supervision compared to insurance and sureties, and they offer a lesser assurance of future cost recoverability.[261] According to the US Coast Guard, self-insurance and corporate financial guaranties are not regarded as reliable means of demonstrating financial security.[262] The Coast Guard may be unaware of the dissipation of assets, and it is not practical to continuously monitor the asset base of a self-insured company. The Coast Guard thinks any modification to the financial guarantor provision that diminishes the safeguards provided by said provision is inconsistent with the notion of financial security.[263] All three aforementioned instruments have the potential to be issued in either a revocable or irrevocable form. Revocability of the instrument occurs when the provider has the power to change the conditions of the instrument shortly prior to the expiration of the tenor.

[256] Boyd (n41) at 24 and 25
[257]Boyd (n41)at 25
[258] Ibid
[259] Ibid at 25
[260] Boyd at 25
[261] Ibid
[262] See 61 FR 9270, 1996
[263] Boyd (n1) at 25

Conversely, irrevocability arises when the provider is unable to alter the conditions of the instrument until the mandate is fully satisfied.

5.4.7.1. Capacity to Incentivise Prevention of Environmental Damage

Parent company guarantees have the capacity to significantly incentivise the prevention and remedy of environmental damage in several ways: 1. Financial Accountability: By providing a financial safety net, PCG ensure that subsidiaries are held accountable for preventing environmental damage. Knowing that the parent company may be liable for environmental liabilities encourages subsidiaries to invest in proactive steps to reduce potential risks and prevent incidents. 2. Risk Management Parent company guarantees incentivise subsidiaries to prioritise environmental stewardship and risk management practices. Subsidiaries are more likely to implement robust environmental management systems, conduct thorough risk assessments, and adopt preventive measures to avoid costly environmental incidents that could trigger the parent company's guarantee. 3. Long-Term Sustainability: The PCG promote a long-term perspective on environmental sustainability. Companies are motivated to invest in sustainable practices, technology, and innovation to minimise their environmental footprint and reduce the likelihood of environmental damage, thus protecting their reputation and financial interests in the long run. 4. Stakeholder Confidence: PCG enhances stakeholder confidence by signalling a commitment to environmental responsibility and accountability. This can strengthen relationships with communities, investors, regulators, and other stakeholders, fostering trust and goodwill that can be beneficial for business operations and reputation management. 5. Regulatory Compliance: PCG helps ensure compliance with environmental regulations by providing a financial incentive to subsidiaries to meet or exceed regulatory standards. Companies are more likely to invest in compliance measures and remediation efforts to avoid penalties, legal liabilities, and reputational damage associated with non-compliance. Overall, parent company guarantees serve as a powerful tool to incentivise subsidiaries to

prevent and remedy environmental damage by aligning financial interests with environmental outcomes, promoting risk management and sustainability practices, enhancing stakeholder confidence, and ensuring regulatory compliance.

5.4.7.2. Capacity to Remedy Environmental Damage

The parent company guarantees a robust financial safety net, ensuring that sufficient funds are available to address environmental damage caused by oil spills. This financial assurance is critical for promptly initiating cleanup and remediation efforts, mitigating the spread of pollution, and minimizing the long-term impacts on ecosystems and communities. 2. Responsibility and Accountability: PCG holds the parent company accountable for the actions of its subsidiaries, including environmental violations such as oil spills. By assuming financial responsibility for environmental damage, parent companies are incentivized to implement proactive measures to prevent spills, invest in spill response preparedness, and ensure compliance with environmental regulations. 3. Resource Allocation: Parent company guarantees facilitate the allocation of resources for environmental remediation efforts. In the event of an oil spill, the guarantee ensures that adequate funds are available to cover the costs of cleanup, restoration, and compensation, thereby avoiding delays in response efforts and ensuring a comprehensive and effective remediation process. 4. Stakeholder Confidence: Parent company guarantees to enhance stakeholder confidence by signalling a commitment to environmental responsibility and accountability. Communities, regulators, investors, and other stakeholders are reassured, knowing that the parent company stands behind its subsidiaries and is prepared to address any environmental harm resulting from its operations. 5. Long-Term Sustainability: Parent company guarantees to promote a long-term perspective on environmental stewardship and sustainability. By assuming financial liability for environmental damage, parent companies are incentivised to invest in measures that prevent spills, minimise risks, and enhance environmental performance, thereby fostering a culture of

responsible corporate conduct and safeguarding the environment for future generations. 6. Legal Compliance: Parent company guarantees ensure subsidiaries are compliant with environmental regulations by providing a mechanism for swift and effective remediation of oil spills.

In summ*ary,* there is clear evidence that surety bonds, bank guarantees, and letters of credit can encourage environmental damage prevention and ensure that the polluter pays for the harm caused to the environment. Prior to issuing the instrument, credit providers frequently mandate operators or applicants to furnish collateral or deposits.[264] In order to acquire the product, operators are obligated to put their assets at risk as collateral.[265] The potential loss of these assets serves as a motivating factor for operators to take measures to minimise environmental harm or try to prevent it from materialising.

Furthermore, surety bonds, letters of credit, bank guarantees, and parent company guarantees play a dual role in establishing market incentives to mitigate the danger of insolvency and minimise the likelihood of environmental harm occurring without appropriate remediation. Hence, the regulatory agency is provided with financial resources to address and rectify any damage caused without experiencing competition from other unsecured creditors of the insolvent operator, as is typically observed in the context of self-insurance.[266] Therefore, when a company declares insolvency, an automatic hold is enforced until all of its creditors align their priorities.

Also, in order to make claims and receive bank guarantees, a beneficiary is only required to provide the issuing bank with a statement indicating that the operator has failed to meet any commitments. Hence, payment is required in accordance with the credit terms. These characteristics differ significantly from other types of guarantee that may necessitate the

[264] Shogren *Et al (*n182) 111
[265] Mackie (n50), p206
[266] Ibid

obligee to persuade the surety of the operator's failure to meet obligations before the surety can take action on the bond.[267]

LCs and bank guarantees can be considered as risk-shifting mechanisms within the realm of economics.[268] These instruments involve a monetary cost initiated in response to alleged noncompliance with obligations or failure to conform to the terms of an underlying contract.[269] Under such situations, financial institutions may lack the ability to identify any particular collateral associated with the underlying transaction that guarantees its repayment in the event that its obligation has been met.[270] Similarly, there is a significant chance that the principal for whom the commitment was made will not compensate the provider because the principal may have had financial difficulties before failing to perform.[271]

Hence, the financial institution's commitment is considered unsecured unless it obtains collateral from sources other than the contract.[272] However, the growing focus on the long-term environmental concerns of mineral extraction has decreased the availability of surety and letters of credit services, resulting in a shift in demand towards the idea of trust.[273] This growing focus on the long-term impacts of mineral extraction has led to a decrease in the availability of surety and letters of credit services in the US, resulting in a shift in demand towards the idea of trust.[274] Financial institutions and banks possess the requisite longevity to effectively meet their obligations. Financial companies and banks need to improve in making extended commitments of this nature.[275] Consequently, authorities and mineral developers have started

[267] Mackie (n50), p206
[268] Guttman, (n250) 167
[269] Ibid at 171
[270] Ibid
[271] Ibid
[272] Ibid
[273] MJ. Orlando, 'Financial Assurance for Environmental Protection: Trends and Opportunities'.(2012.) *PERC Research Paper*, (12-17). 1-
[274] Ibid At 12
[275] Ibid 11

adopting the trust structure as a means of regulatory oversight. Why is long-term financial assurance important?

5.4.8. Environmental Trust Fund

Trust funds are financial security instruments used to accumulate funds that are specifically set aside for a particular purpose.[276] Third-party trust funds are managed by an independent trustee responsible for collecting, investing, and distributing monies.[277] Payment is usually made gradually over a specific duration. Therefore, it is possible that trust funds may not possess complete funding at the moment of a claim. Hence, shorter pay-in periods are more desirable for ensuring certainty at moments of a claim.[278] The regulator should be the exclusive beneficiary of any trust fund of this nature.[279]

Trusts have the potential to offer a more adaptable approach to environmental restoration lies in this context: the operator, acting as the "settlor," establishes and finances a trust with the intention of benefiting a specific agency, which is designated as the sole "beneficiary."[280] A third party assumes the role of the "trustee" responsible for overseeing the trust fund in accordance with the trust instrument, which must adhere to the beneficiary's specified conditions.[281] The person designated as the Trustee must possess the requisite authority to function as a trustee, and its trust operations must be subject to regulation and scrutiny by a relevant body.[282] Trustees may be obligated to carry out their responsibilities regarding the trust fund exclusively in the best interest of the beneficiaries. They must do so with the same level

[276] Boyd, Financial Assurance for Environmental Obligations (n1) at 434
[277] Ibid
[278] Boyd (n1) at 434
[279] Boyd, (n1), at 434; Malone & Winslow, (n15) at 15
[280] Boyd, (n1), at 434; see also G E. Conrad, 'Mine Reclamation Bonding - From Dilemma to Crisis to Reinvention: What's a State Regulator to Do'(2014), 11 http://www.imcc.isa.us/EMLF%20Bonding%20Presentation%20Final.pdf; at 5
[281] Boyd,(n1), at 434
[282] Ibid

of care, skill, prudence, and diligence as prudent individuals who are familiar with similar matters and would use them in a similar capacity and with similar objectives.[283]

Additionally, trusts possess the capacity to generate interest or income on the contributions, so enabling the utilisation of those funds in diverse manners.[284] The termination of the trust occurs when the assets are returned to the business (settlor) either through satisfactory restoration or in accordance with the provisions outlined in the trust instrument.[285] Depending on the degree of completion of obligations, money may be refunded gradually over time.

5.4.8.1. Capacity to Incentivise Prevention of Environmental Damage

Trust funds possess considerable potential in promoting the remediation of environmental harm and guaranteeing that the party responsible for pollution suffers the financial burden of restoration costs, which can be demonstrated in the following ways. Firstly, trusts facilitate the growth of donated assets or, at the very least, prevent loss caused by inflation, unlike assurance bonds.[286] In the event that the trusts are overseen by an independent trustee, it is plausible that the trust could yield higher profits compared to when handled by a state entity like the regulatory authority.[287] Secondly, under trust funds, it is possible to work out a more affordable way of providing assurance; for instance, by gradually allowing contributions when negotiating the trusts' terms with the operators, it makes the assurance more affordable but appears in the account books of the operator. The negotiations will ultimately result in the issuance of an authorisation order and the establishment of a tripartite agreement with the operator, the independent trustee, and the public agency, which assumes the role of the irrevocable beneficiary.[288] Third, there is no gainsaying that the operator is the sole contributor when

[283] Boyd, (n1), at 434
[284] Conrad,(n280) at 5.
[285] Boyd, (n1), at 434
[286] Malone & Winslow, 'Financial Assurance,(n15) at 25
[287] Ibid
[288] Malone & Winslow, 'Financial Assurance,(n15) at 25

making payments into the trust fund, the operator being aware that such contributions and accruable interest on the trust will revert to the operator as long as any adverse environmental effects are abated. The operator will thus be incentivised to adopt high-tech measures to remediate or, at the very least, reduce the occurrence of environmental damage. Fourth, since the operator is the sole contributor to the trust, the terms of the trust can be negotiated by agreeing to a gradual contribution plan to help the operator with overall liquidity flow. This will appear as the most cost-effective means of environmental assurance.[289] Tripartite negotiation results in a consent order and an agreement between the operator, the independent trustee, and the regulatory agency.[290] Fifth, the difficulty associated with blanket bonds as an assurance instrument appears to be advantageous in environmental trusts. By its nature, environmental trusts work perfectly, and an operator with multiple exploration sites can effectively organise all the sites under a single trust. Similarly, a group of smaller firms can also pool collective resources managed by a single environmental trust fund and take advantage of reduced fees.[291]

However, a couple of factors may limit the entire operation of a trust. There are constraints associated with trust fund operations, including the potential tax payable, contribution plans, choice of trustee, and setting off the trustee's fees. Regarding taxation, it is essential to describe the trust as a charity to incentivise the prevention of environmental damage through assurance trusts.[292] For instance, creating environmental trusts as non-taxable charitable trusts makes any income on the trust non-taxable;[293] hence, this cannot generate revenue for activities beyond the mandate in which the trust was set up. Another issue with environmental trusts is the compulsory contribution firms must make at the start of the trust and continuously at every

[289] *Conrad, (*n280), at 5 .
[290] Ibid
[291] Ibid
[292] Malone & Winslow (n258) at p25
[293] Ibid

phase of their operations.[294] The operator's capital or cash held up in the trust account may starve liquidity in the sector. However, the operator needs to make the scheduled contribution because if the operator fails to follow through on their obligations to remedy environmental damage, the monies already contributed and any accrued interest will be available to apply to the resultant costs.[295] An environmental trust typically requires a lump sum upfront contribution that the operator pays as part of the monies to be returned upon satisfying his environmental obligation.[296] The upfront payment can take the form of a bond or posting a bond together with a trust instrument.[297]

5.4.8.2. Capacity to Remedy Environmental Damage

An Environmental Trust Fund serves as a dedicated pool of financial resources specifically allocated for environmental remediation and restoration efforts. This guarantees that sufficient finances are available to deal with environmental damage promptly and effectively. Environmental Trust Funds are often designed to operate long-term, offering a dependable source of funding for ongoing environmental management and remediation activities. This ensures that environmental damage can be remedied comprehensively, even in cases where remediation efforts span years or decades. Environmental Trust Funds often involve community stakeholders in procedures for making decisions pertaining to the distribution of finances and prioritisation of remediation projects. This fosters community engagement and ensures that remediation efforts address the specific needs and concerns of affected communities. Environmental Trust Funds may provide support for technical expertise and assistance, including environmental monitoring, assessment, and remediation technologies. This ensures that remediation efforts are conducted using best practices and state-of-the-art

[294] Malone & Winslow (n15) at p25
[295] Ibid
[296]Ibid at p25
[297] The bonds can then be released based upon the agreed stages of reclamation.

technologies to maximize effectiveness. Environmental Trust Funds can help ensure compliance with environmental regulations by providing a mechanism for operators to fulfill their financial obligations for environmental remediation. By contributing to the Trust Fund, an operator is able to exhibit their dedication to environmental responsibility and compliance with regulatory requirements. Environmental Trust Funds can support research and development efforts to identify and implement innovative solutions for environmental remediation. This includes the development of new technologies, approaches, and strategies for addressing complex environmental challenges. Environmental Trust Funds are typically subject to governance structures that ensure transparency and accountability in the allocation and management of funds. This promotes stakeholder trust and guarantees that monies are used effectively and efficiently to remedy environmental damage.

5.5. Factors to Consider When Integrating FSR and the Regulator's Role

FAR is a simple concept, but operators must demonstrate that they can use it to achieve their environmental obligations. The implementation of a mandatory environmental financial assurance system may encounter some challenges. While Richardson argued that the acceptability of laws being passed may be contingent upon various factors that need consideration, such as the conditions under which assurance is provided.[298] These conditions encompass the necessary preventive measures, the particular types of pollution, and damage that assurance can be required for, such as whether progressive spontaneous or accidental pollution of the environment. The approaches used to assess environmental risks, the basis for coverage, and claims made.[299]

Additionally, there is a concern regarding the current state of polluting facilities that are already linked to ongoing pollution and historically contaminated areas, which underwriters would

[298] Richardson, (n77) at 328
[299] Ibid

prefer not to be affiliated with. If, for instance, insurers refuse to assume obligations as mandatory insurers, governments will be required to offer financial incentives.[300] Instead of implementing general obligations for mandatory insurance, it is advisable for regulatory bodies to adopt an adaptable strategy that allows them to assess the necessity of insurance or other forms of financial security on a case-by-case basis.[301] This assessment should consider the distinct qualities of the operator, the economic sector in which it operates, and the environmental risks associated with the situation.

Boyd, however, argues that the seeming simplicity of FARs conceals a series of significant design concerns.[302] First and foremost, what is the suitable extent of assurance requirements? Secondly, what measures may be taken to ensure the assurance mechanism is guaranteed?[303] Coverage difficulties pertain to the liability and responsibility that assurance covers, as well as the monetary worth of coverage or bonding that needs to be proven.[304] In order to ensure that operators can internalise costs and meet environmental obligations, assurance requirements must be in place to guarantee their ability to do so in the future.[305] The question that arises is, what, then, is the recommended level of coverage requirements? Boyd demonstrated how the optimal level is one that ensures the successful fulfilment of the necessary obligation or the internalisation of imminent liabilities.[306] If it is established that an operator is going to experience a future restoration obligation, then the suitable level of assurance is equal to the value of the expected restoration. Reducing the level of assurance increases the likelihood of the operator's inability to fully internalise the associated costs.[307]

[300] Richardson, (n77) at 328
[301] Richardson, (n77) at 328
[302] Boyd, (n1), at (441)
[303] Ibid
[304] Ibid
[305] Boyd, (n1), at 441
[306] Boyd, (n1), at 441
[307] Ibid

On the other hand, excessive coverage requirements may be considered inefficient as they result in the improper allocation of capital, which inherently carries an opportunity cost without providing any social advantage to operators or regulatory agencies.[308] Therefore, coverage requirements falling below these specified limits are considered undesirable due to their failure to ensure cost internalisation, resulting in insufficient deterrents for operators and compensating for environmental costs. Even though direct statutory regulations will continue to be utilised to exert influence on company behaviour, it may be necessary to establish an additional compensation fund in order to pay for historic restoration efforts and to compensate victims in cases where polluters cannot be located, or areas abandoned by bankrupt companies endanger the environment and public health.

Notwithstanding the preceding views expressed by scholars above, when introducing FA to a new legal framework like NOSDRA, critical factors must be considered to ensure the effectiveness, fairness, and sustainability of the system. These factors could include legal, economic, technical, and social aspects, among others. The Legal and Regulatory Factors to consider may include: 1. Clear Legislative Mandate: The legal framework should clearly define the requirements for financial assurance, specifying who must comply, what forms of assurance are acceptable, and the circumstances under which they must be provided. 2. Compliance and Enforcement: Provisions must be made for rigorous compliance monitoring and enforcement mechanisms to ensure that operators adhere to the financial assurance requirements. 3. Integration with Existing Laws. The new financial assurance requirements should be harmonised with existing environmental and industry regulations to avoid conflicts and overlaps. 4. Flexibility and Adaptability: The framework should allow for adjustments based on evolving industry practices, economic conditions, and environmental standards.

[308] Boyd, (n1), at 441

Secondly, economic and Financial Factors, the economic factors to consider may include the following: 1. Cost Implications for Industry: The economic impact on operators, particularly smaller companies, should be considered. The cost of compliance should not be prohibitively high, yet sufficient to cover potential environmental liabilities. 2. Types of Financial Assurance: Various forms of financial assurance should be evaluated, including bonds, insurance, guarantees, and trust funds, to determine which are most appropriate for the specific context. 3. Assessment of Financial Risk: Thorough risk assessments are carried out in order to ascertain the possible environmental liabilities and ensure that the financial assurance mechanisms are adequate to cover these risks.[309] 4. Market Availability: The availability and maturity of financial products in the market to support financial assurance requirements must be assessed to ensure that companies can access necessary financial instruments.

Furthermore, the technical and operational Factors to consider may rest on the following: 1. Adequate Coverage: The financial assurance mechanisms should be sufficient to cover the costs of cleanup, remediation, and compensation for environmental damage. 2. Assessment and Valuation Methods: Robust methods for assessing and valuing potential environmental damage should be developed to determine the appropriate levels of financial assurance.[310] 3. Monitoring and Reporting: Effective systems for ongoing monitoring and reporting of compliance with financial assurance requirements should be established.

The Social and Environmental Factors to consider may include: 1. Stakeholder Engagement: Input from various stakeholders, including industry representatives, environmental groups, and community organisations from the Niger Delta, should be sought to ensure the framework is balanced and addresses the concerns of all affected parties. 2. Public Transparency: The framework should include provisions for public disclosure of financial assurance arrangements

[309] Boyd (n1) 441
[310] Ibid

to enhance transparency and accountability in a system ridden with corruption and activities shredded in secrecy; transparency and accountability are critical.

Administrative and Institutional Factors may be as follows: 1. Capacity Building: Regulatory agencies need the capacity to implement and oversee financial assurance requirements effectively, which may necessitate additional training and resources. 2. Institutional Coordination: Mechanisms for coordination between different regulatory bodies should be established to ensure a cohesive approach to financial assurance. 3. Review and Improvement The framework should include provisions for regular review and improvement based on feedback and changing circumstances.

Case Study and Benchmarking 1. Learn from Best Practices: Study successful financial assurance frameworks in other jurisdictions to identify best practices and potential pitfalls. 2. Pilot Programs: Consider implementing pilot programs to test the financial assurance mechanisms and make necessary adjustments before full-scale implementation. By carefully considering these factors, policymakers can develop a robust and effective financial assurance framework that mitigates environmental risks, ensures corporate accountability, and supports sustainable development.

5.6. The Effects of Financial Security on the Regulation of Operators' Behaviour.

In this section, the statutory frameworks to address the issues of operators' liability for oil pollution damage in Nigeria were considered. Theoretically, liability regulations and restoration obligations facilitate the internalisation of polluter costs.[311] Practically speaking, the National Oil Spill Detection and Response Agency Establishment Act (NOSDRA) 2006[312] established a framework for liability along with a number of administrative requirements and fines after the oil spills continued to be vulnerable to serious flaws. Some of the flaws arise

[311] Boyd (n1) at 423

[312] N Ezenwa-Ohaeto, BE Ewulum, E Okaphor 'An Appraisal Of The Impact Of The National Oil Spill Detection And Response Agency On Environmental Pollution In Nigeria'.(2020) 19 AJC and Adm Law. (4) 48-62

from financial losses or obligations, if any, that are only incurred after environmental harm has already occurred. The NOSDRA does not provide strong measures that incentivise operators to promote responsible management of oil spills from the time they occur until urgent repair is carried out.

Also, polluters have the ability to avoid the internalisation of costs through prior divestment, corporate dissolution or insolvency.[313] Financial security regulations mitigate this hole in the system. Financial security is a crucial aspect that guarantees the inclusion of anticipated expenses related to environmental risks in a company's financial statements and operational assessments. The establishment of FARs holds significant policy implications for the minimum threshold at which an operator is incentivised to adopt a socially efficient degree of strategic planning and preventive measures to mitigate environmental damage.[314] It goes without saying that third-party security providers may have fears that operators' future liabilities would wipe out their capital. Hence, they are highly motivated to oversee the environmental safety of the operators to whom they fund their coverage.

Consequently, third-party providers can determine the cost of premiums by considering discernible characteristics of the operators to which they offer security. Thus, operators who demonstrate relevant risk management and safety programmes can be provided with discounted premiums. Whereas operators that do not meet the required standards of safety may face complete denial of financial coverage or pay higher premiums.[315] As we have seen above, insurance serves three basic interconnected yet separate functions,[316] including allocating risk by imposing premiums that accurately represent the degree of risk associated with each insured operator.[317] The idea of regulation-through-insurance has received a lot of attention in the

[313] Boyd (n1) at 423
[314] Mathis & Baker (n157) at 6
[315] Boyd (n1) at 423
[316] Abraham, (n88) at 945 & 946
[317] Ibid.

scholarship.[318] For instance, Steven Shavell's studies on the correlation between insurance and tort liability highlighted the power of insurers to establish ideal motivations for operator's responsibility.[319] The Resource Conservation and Recovery Act's (RCRA) financial responsibility provisions in the US include insurers as surrogate regulators.[320] The Environmental Protection Agency (EPA) and the United States Congress expect insurers to assist in managing risks related to hazardous waste disposal.[321] Insurers were expected to promote safe facility management and oversee a policyholder's conduct through risk assessments during underwriting, premium schedule modifications, and terms in the insurance agreement.[322] The phrase "surrogate regulation" was introduced by Kenneth Abraham to describe the regulatory responsibility that liability insurers were being assigned to oversee toxic tort and environmental hazards.[323]

Scholars argued that insurers could be considered an implicit form of government due to their alignment with some aims of the state, such as risk minimisation and the categorisation of operators based on behavioural patterns.[324] Black sees alternative regulators for the operator's operations can be tied to the interest on their capital.[325]Kuzman thinks that third parties, particularly insurers, have the potential to enhance the monitoring and enforcement capacities of public regulators.[326] Richardson argued that although individual insurers may not have the means or experience to conduct thorough risk assessments that might reveal uninsurable risks, they can address these risks with adequate investment in technological advancements.[327] An

[318] Mackie, (n50) at 207
[319] S Shavell, Minimum Asset Requirements and Compulsory Liability Insurance as Solutions to the Judgment-Proof Problem,(2005) 36 RAND J. EcON. 63, 63-64
[320] S Black, 'The Fact and Fiction of Financial Responsibility for Hazardous Waste Management' (1990)17 Ecol LQ581, 609-10
[321] Ibid
[322] Ibid
[323] Abraham,(n88) at 57 in Ben-Shar and Logue (n78) at 200
[324] RV Ericson, et al. *Insurance as governance*. (University of Toronto Press, 2003).
[325] Black (n320) at 583 .
[326] **S** Kunzman, 'The Insurer as Surrogate Regulator of the Hazardous Waste Industry: Solution or Perversion' (1984) Forum 20 469
[327] Richardson (n157) at 314

environmental assessment can help underwriters accurately specify and describe the hazards to be covered, potentially leading to lower premiums and reducing the danger of insurers exploiting non-disclosure to reject claims.[328] Richardson thinks an environmental study could be used to develop company safety practices and contingency plans for pollution occurrences.[329] He opines that leading environmental insurance companies in the United States frequently offer environmental engineering assistance to insured operators. Such assistance enhances project oversight and evaluates project information crucial for underwriting assessments.[330] Insurers occasionally collaborate with government agencies to strengthen public environmental safety regulations. The objectives of insurers to improve and strengthen the substance and implementation of state rules are evident in all areas. According to Mackie, surrogate regulation entails private parties setting strict requirements that operators must follow. If operators don't comply with the requirements, insurers may use their authority to penalise them.[331] When it comes to establishing the rules that operators must adhere to, the ability of each FAR to effectively minimise environmental irresponsibility varies significantly, which can be attributed to the differing commercial objectives of the involved third parties.[332] The foregoing has illustrated that insurance serves as a prevalent mechanism of regulation within today's economic system. Although private insurance companies play a role as private regulators of safety, it is important to acknowledge that government regulation remains significant. State regulation spans a large area. Certain regulatory instruments are only limited to the relevant state agencies that exhibit the ability to support their objectives through the use of criminal punishments, but private insurance companies are unable to employ such measures.[333] It is imperative to enhance safety in situations where unsafe behaviour cannot be

[328] Richardson (n157) at 314
[329] Ibid
[330] Ibid
[331] Mackie, (n50) at 208
[332] Ibid
[333] Ben-Shahar and Logue (n78) at 229

prevented or halted through means other than criminal penalties. In the absence of criminal penalties, it is imperative to completely cease certain detrimental practices, such as the disposal of contaminated substances into a river. The police have the authority to practically halt pollutants, while private insurers are unable to do so. For instance, the dumping of chemical waste at the Koko port was popularly referred to as the koko incident in 1988. In 1988, Nigerians became aware of the disposal of toxic waste at the Koko port, a town located in mid-western Nigeria. The disposal of hazardous waste at Koko prompted a probe by Nigerian authorities. The studies revealed that a firm owned and operated by two Italian nationals, with assistance from Nigerian accomplices, transported more than 3,884 tonnes of dangerous toxic waste into Nigeria, dumping it in Koko in 1988.[334]

5.7. Implication for No FSR in the Regulatory Framework for Environmental Liabilities.

Government policies in a market economy influence the prices of private goods and services. Over the years, scholars have examined the possible contradiction between free trade and environmental regulations, the influence of environmental regulations on international trade patterns, and the utilisation of trade measures in environmental policies.[335] International and environmental economics have addressed the problems regarding government policy failures that result in increased external costs to society.[336] Subsidies come in a wide range of forms, and reaching a consensus on a precise definition of a subsidy has proven to be challenging. The OECD defines subsidies as any policies that maintain consumer prices below market level, raise producer prices above market level, or decrease costs for consumers and producers

[334] OA Ladapo, "The contribution of cartoonists to environmental debates in Nigeria: The Koko toxic-waste-dumping incident." (2013): *RCC Perspectives (1)* 61-72.
[335] C Van Beers & JCJM van den Bergh 'ANALYSIS Perseverance of perverse subsidies and their impact on trade and environment' (2001) 36 Ecological Economics 475–486
[336] Ibid

through direct or indirect price support.[337] From an economic standpoint, they have the potential to manipulate pricing and production levels, hinder the process of structural adjustment, and worsen the deficits in the budget.[338] Subsidies have a negative effect on the growth potential of firms of non-OECD nations at the international level by distorting trade and competition. In relation to the environment, subsidies have the potential to incentivise excessive exploitation of petroleum and natural gas resources, hence leading to further environmental damage.[339]

Theoretically, regulating subsidies has proven challenging due to their inherent ambiguity, and subsidies can manifest in soft loans or credit guarantees or as tax incentives provided by the state and targeted towards specific businesses.[340] Stakeholders in nations with stringent environmental regulations argue that lenient environmental standards might be seen as an indirect kind of subsidy, as the commodities manufactured in those countries do not fully cover the production costs.[341] Stakeholders such as firms fear that their costs from stricter environmental laws will make them less competitive when compared to overseas companies that are not subject to the same rules.[342] Environmentalists criticise lax environmental regulations because they are an indirect kind of subsidy resulting from serious policy errors. They argue that environmental costs will be externalised because these regulations are too low to cover production costs.[343]

State subsidies are financial assistance offered by the government to the private sector, which might involve government loans at preferential interest rates, direct capital investments, and

[337] OECD Sustainable Development Studies Subsidy Reform and Sustainable Development Economic, Environmental And Social AspectS https://www.cbd.int/financial/fiscalenviron/several-subsidiesreform-oecd.pdf accessed 2 March 2024
[338] OECD Sustainable Development Studies (n337)
[339] Ibid
[340] RJ King, 'Regional Trade and the Environment: European Lessons for North America' (1995) 14 UCLA J Envtl L & Pol'y (2), 209-246.
[341] Environmentalists, manufacturers, and political leaders
[342] King (n340) at 222
[343] Ibid

the forgiveness of government debt.[344] Various subsidies exist for different objectives. Agricultural and export subsidies are designed to support food security and export industries. Subsidies can exacerbate environmental harm by offering incentives such as the adoption of seemingly low environmental regulations or lax enforcement of these regulations.[345] One key feature of ecologically damaging subsidies (EDS), often known as 'perverse subsidies', is their secretive or concealed nature.[346] Environmentally harmful subsidies are often used for purposes other than environmental protection, resulting in unintended adverse environmental effects.[347] In addition, Mackie and Combe contended that the absence or ineffectiveness of FARs in a legal system can lead to indirect state subsidies through the provision of specific cost-saving measures to operators or entire subsectors of the economy.[348] Their conclusions express the viewpoint that cost savings might manifest in either direct or indirect forms, specifically referring to the direct or indirect state subsidisation of environmental costs.[349] Direct savings are observed when operators within a certain sector are not required to secure a bond or guarantee from a third party, nor do they need to make a cash deposit with the regulator to demonstrate their assurance.[350] Indirect savings in costs arise when operators choose to excuse themselves of their environmental responsibilities, such as clean-up or remediation, as a result of bankruptcy or if regulators overlook the non-compliance with obligations.[351] In any case, environmental costs may become externalised. In the words of Mackie and Besco, the act of indirectly subsidising environmental obligations by the state serves to mask this hidden social cost associated with production within a sector, granting a trade advantage for local

[344] Mackie, and Besco,' (n51) at p10583) See also King (n336) at 222; H Kim, '*Subsidy, Polluter Pays Principle, and Financial Assistance among Countries'(2000)* , 34 J. World Trade 115, at 125.
[345] Mackie and Besco (n97) at p10583
[346] Van Beers, & Van den Bergh (n335) 477
[347] Ibid at 478
[348] Mackie and Besco (n51) at p10584
[349] Mackie and Besco (n51) at p10584
[350] Ibid
[351]Ibid

operators.[352] King contends that advocates of free trade believe that governments may have valid reasons for having lower standards and should be allowed to benefit from the price advantage resulting from these lower requirements as long as there are no pollution ripple effects.[353] He contended that States often have minimal standards due to financial constraints preventing them from instituting and maintaining a suitable environmental protection regime.[354] It is worth mentioning that establishing sector-specific exclusions, exemptions, and special circumstances that reduce the regulatory burden for an operator or operators can be an indirect subsidy.[355]

According to Simms, subsidies can be classified as a unique and separate form of financial support provided by communities affected by the negative impact on their natural resources.[356] The communities exposed to environmental damage bear a significant portion associated with operators' activities; if the responsible operator that ought to control, remediate, or avoid the damage could not perform the obligation because such industry activities are exempt from regulatory obligations.[357] These externalities give the impression of cost-effectiveness from the industry's point of view since they impose neglected social costs without requiring the industrial actor to take corrective action in tandem, making the production cost appear cheaper.[358] Scholars hold the belief that the environmental costs associated with oil and gas operations, sometimes referred to as "indirect and covert subsidies," are comparable to, if not surpassing, the traditional and acknowledged costs of subsidies.[359] According to Simms, an exemption from a statutory obligation enables the transfer of certain environmental costs,

[352] Mackie and Besco (n51) at p10584
[353] King (n340) at 222
[354] Ibid
[355] Ibid
[356] PL. Simms, 'Furtive Subsidies: Reframing Fossil Fuel's Regulatory Exceptionalism' (2017) 35 Va Envtl LJ (3), 420-473.
[357] Ibid at 433
[358] Ibid
[359] Ibid at 429

thereby externalising a portion of the actual costs associated with industrial operations.[360] From an industrial standpoint, externalities give the false impression of cost efficiency by seemingly reducing production costs without requiring the industrial actor to address the unaccounted public costs incurred.[361] Simms argued that operators may avoid incurring costs until their financial situation declines to an unacceptable threshold, and at this point, they may be obligated to provide assurance.[362] Simms explains that these instances illustrate exclusions that alleviate the regulatory burden in a particular area, like clean-up and remediation.[363] In the context of environmental liability legislation, exemptions from FAR requirements can be categorised as subsidies.

Beyond the exclusions in a framework, some scholars contended that when FSRs are absent, it amounts to subsiding the private operators in a regulatory framework. According to Mackie and Besco, the absence or exclusion of FARs within a regulatory framework might result in cost-saving benefits for private operators.[364] Since operators are not required to provide assurance or pay for it, regulatory discretion is utilised to waive the necessity for assurance.[365] They contend that the operator can save a significant amount of money by not having to provide assurance, given the high costs that are usually associated with fulfilling environmental responsibilities.[366] It represents monetary assets that can be distributed to other aspects of the business in order to enhance its profitability.[367]The absence of a strong emphasis on a guarantee to remedy environmental liabilities gives rise to a clear potential for governmental funding through indirect channels.[368] Environmental externalities arising from Nigeria's oil and gas industry sectors are prevalent primarily due to two key factors. According to Mackie and

[360] Simms, (*n*356), at 421
[361] Ibid at 433
[362] Ibid , at 420-21.
[363] Ibid
[364] Mackie and Besco (n51) at p10584
[365] Ibid at p10583
[366] Ibid at p10584
[367] Ibid
[368] Ibid (n51) at p10584

Besco, implementing less stringent FARs can decrease an operator's compliance costs, resulting in cost savings, and enable them to allocate those funds more efficiently than operators in regimes with stricter regulations.[369] Therefore, suppose other operators stop exploration before their environmental responsibilities ultimately surface, as in Shell's case. In that case, Mackie and Besco argued that the operator would have been allowed to produce without considering the actual social cost of their production unless they had provided adequate financial assurance, which they did not.[370]

5.7.1. Absence of FAR in Nigeria's Regulatory Regime: A Case Study of Shell Nigeria

As Mackie and Besco argue, implementing a less stringent or no FARs regime can reduce an operator's compliance expenses, resulting in cost savings and enabling operators to deploy these funds more efficiently compared to operators operating under regimes with harsher restrictions.[371] The lack of a legal requirement for the responsible operator to provide FARs is resulting in the neglect of environmental responsibilities and the failure to internalise costs.

Shell's statement on January 16, 2024, regarding its onshore divestment, did not include a comprehensive strategy for repairing and remedying the longstanding environmental obligation in the ND.[372] Shell announced that it had reached an agreement to sell its onshore operations in Nigeria's Niger Delta to a consortium of companies for a total of $2.4 billion. Shell characterised it as a strategy to streamline its operations in a nation where it has been operational for more than six decades.

Shell has made this decision as a component of its continuous endeavours to diminish its engagement in the Nigerian oil sector, driven by enduring apprehensions regarding

[369] Mackie and Besco (n51) at p10584
[370] Ibid
[371] Ibid (n51) at p10584
[372] Shell will sell big piece of its Nigeria oil business, but activists want pollution cleaned up first https://apnews.com/article/nigeria-shell-onshore-assets-niger-delta-509baf4e7df6d1ef4eb88d17410cf6f5 accessed 20th March 2024.

environmental contamination in the area.[373] This move is a direct response to the criticism surrounding oil leaks that have resulted in the contamination of waterways and agricultural land, so exacerbating tensions in a region that has been plagued by persistent militant activity. The actions undertaken by Shell have elicited a substantial public response to the unresolved environmental obligations in the Niger Delta region, as well as the adverse impact experienced by the vulnerable local community residing within a degraded ecological setting.[374]

Activists in the Niger Delta, where Shell has faced sustained local criticism for its oil drilling operations, plan to ask the government to withhold approval of the sale until Shell makes up for the environmental damage it has caused.[375] Ledum Mitee, an environmentalist and the former president of the Ogoni People's Movement for Survival, expressed concern regarding the lack of sufficient and transparent attention given to the evident legacy issues, specifically the harm brought about by the oil leak and the challenges associated with clean-up, remediation and decommissioning, before any potential divestment process.[376]

According to the NOSDRA Act, operators are not legally mandated to provide guarantees regarding the clean-up and remediation of environmental harm. Furthermore, the NOSDRA lacks the authority to effectively tackle orphaned sites, a responsibility that is increasingly neglected by both the government and operators in Nigeria, as shown in Chapter 2. The issue revolves around the allocation of indirect financial support for the cleanup and restoration of abandoned sites facilitated by the creation of HYPREP, as mentioned in Chapter 2. This impedes the progress towards implementing more stringent measures, such as regular maintenance of infrastructure and immediate cleanup and restoration of oil spill sites.

[373] Ibid
[374] Advocacy Groups Call for Halt to Shell's Planned Exit from Nigeria https://www.voanews.com/a/advocacy-groups-call-for-halt-to-shell-s-planned-exit-from-nigeria/7510313.html accessed 3/3/2024
[375] Shell will sell big piece of its Nigeria oil business (n368)
[376] See AP report at (n368)

The absence of FARs in the regulatory framework has been demonstrated by the detrimental impact experienced, as exemplified by Shell's actions in Nigeria. If the government does not utilise public funds to carry out Shell's operations, the costs associated with unfulfilled environmental duties will be shifted (externalised) to society. The allocation of public funds for clean-up and remediation costs is borne by society through taxes, or the populace will experience the adverse consequences of pollution in all areas. These consequences include detrimental effects on aquatic species that are crucial for the sustenance and economic activities of the ND people, diminished agricultural land for farming, and compromised health of communities reliant on polluted water sources for drinking.

The environment will bear the costs by enduring a decline in environmental quality as the regulator fails to carry out its responsibilities. These two scenarios imply that the government's indirect subsidisation of operators' production costs is active in Nigeria. When operators are not obligated to fully cover the costs of their environmental responsibilities, they are motivated to continue the activity until they can no longer benefit from it (i.e., overuse it), which worsens the harm and deterioration.[377] This concern is particularly relevant to the oil and gas industry, as operators want to maximise crude extraction despite being aware that they cannot fulfil their environmental obligations during and after their operations. In Nigeria, there is a growing concern with the number of bankruptcies and divestments by multinationals and the magnitude of the financial obligations involved in the environmental obligations incurred (clean-up and remediation) of existing and orphan sites in the ND. Create a compelling reason to rejig the regulatory role of the polluter pays approach in Nigeria's oil and gas industry through the eye of FARs.[378]

[377] Shell will sell big piece of its Nigeria oil business (n368)

[378] Shell made a public statement on January 16, 2024, stating that they have reached an agreement to sell their Nigerian onshore subsidiary, The Shell Petroleum Development Company of Nigeria Limited (SPDC), to Renaissance. Renaissance is a consortium consisting of four Nigerian exploration and production companies and an international energy group. https://www.shell.com/media/news-and-media-releases/2024/shell-agrees-to-sell-nigerian-onshore-subsidiary-spdc/spdc-sale.html accessed 21/01/24

Shell's decision on divestment without fulfilling its obligation demonstrates how effectively absent FAR can significantly impact the structure and extent of the nation's regulatory framework. It is not unexpected that without FAR provisions, regulators cannot hold significant value for communities and the environment. These disadvantages for the sector come together with adverse effects on the general public's health and environment. The communities affected by pollution primarily bear the cost associated with these adverse effects. The costs would otherwise be the responsibility of the industrial actor, who would need to control, remedy, or prevent them had the FAR regulatory regime been in place.

In terms of trade distortions, the current type of indirect subsidisation through the absence of (FARs) on Free Trade gives operators in Nigeria a competitive edge over others in the African Continental Free Trade Area (AFCTA).[379] Operators operating in less stringent regulatory settings like Nigeria will have a competitive edge over operators operating in tougher regulatory environments since they incur lower expenses in achieving compliance requirements. In terms of efficiency, it is imperative for the operator to have reflected costs associated with meeting those standards. Operators that have not successfully internalised their costs are able to obtain a competitive advantage over their counterparts. Consumers possess the capacity to exploit market pricing mechanisms that fail to appropriately reflect the true social cost associated with production.[380] Hence, the financial burdens faced by a producer in manufacturing goods, encompassing the expenses related to meeting clean-up and remediation obligations, can be significantly impacted by the stringency of a jurisdiction's FSRs or the lack thereof, as well as the permissible approaches to meet these commitments.[381] This could affect

[379] See Shell's public statement of January 16, 2024 (373)
[380]See generally Mackie, and Besco, 'Rethinking the function of financial assurance for end-of-life obligations. (n51) at p10584
[381] Mackie and Besco (n51) at p10584

the appeal of a country as a business destination. The level of subsidisation can operate as an attraction when it is high and as a motivation when it is low.[382]

Generally speaking, subsidies might be justified in cases where the activity holds significant value for the general public, where the social advantages would not be obtained without the provision of a subsidy, and when the adverse consequences of the activity or the subsidy are not deemed unacceptable.[383] An industry's current level of government-funded direct or indirect subsidies, among other considerations, may influence the shape or appropriateness of new subsidies.

According to King, several ways can be implemented to effectively tackle the matter of differing environmental rules across nations engaged in trade.[384] He argued that the measures might involve enforcing countervailing charges on foreign producers who violate environmental regulations and harmonising environmental standards among participating nations.[385] The efficacy of countervailing tariffs in correcting environmental issues or practices within the jurisdiction is limited, especially when the underlying cause of the existing low standards may be attributed to a deficiency in economic development.[386] Also, free trade agreements like ACFTA may encumber the countervailing solution. Hence, standard economic and trade strategies such as border tax modifications and harmonisation may not consistently serve as appropriate remedies for tackling indirect environmental subsidies.[387] As a tool of environmental policy for Nigeria, indirect state subsidisation should stop by introducing a safety net such as FAR measures.

[382] Mackie and Besco (n51) at p10584
[383] Simms (n 356)) at 231
[384] King (n340) at 223
[385]Ibid
[386] Ibid
[387] King (n340) at 223

5.8. Conclusion

This chapter examined the regulatory potential of financial assurance to prevent and remedy environmental damage caused by oil and gas operations. The analysis showed that implementing the required FSR is critical in Nigeria, not just to guarantee the satisfaction of any imposed liability under NOSDRA but also to impact the level of accountability imposed on operators. Capital providers/ policyholders are motivated to collect data and adopt measures that enhance the safety of their activities beyond the standards set by, for instance, NOSDRA and EGASPIN guidelines. On the one hand, the operator employs this information and data on their practices to support a rebate or premium reduction claim for the upcoming policy period.[388] On the other hand, capital providers can determine the cost of capital or premiums by considering the observable characteristics of each operator they offer assurance. For instance, operators with significant risk management and safety programmes can receive more advantageous premiums. In such circumstances, operators that do not meet the required standards of safety may face complete denial of financial coverage.[389] In other words, capital markets that emerge to meet the need for financial accountability create motivations to mitigate environmental concerns.[390]

In this context, environmental liability insurers impose or provide substantial premium reductions for adherence to private environmental safety codes supervised and evaluated by independent bodies and adopt more stringent standards than government environmental regulations.[391] Ultimately, mandatory insurance ensures that the insured and insurers are motivated to acquire knowledge about safety and strive to enhance safety measures in the environment from the insured's activities. The absence of an objective, independent assessment and tracking of environmental risk, which is critical to the framework of the FAR regime, can

[388] Haitao Yin et al (77) at 36
[389] Boyd (n1) at 423
[390] Ibid
[391] Ben-Shahar & Logue, (78), at 211

be circumvented by self-insurance, making it unsuitable as a mechanism for assurance. Financial instruments, such as letters of credit, provide regulators with nearly immediate access to restricted cash. This transfers the responsibility of providing evidence from the government to the operator to show otherwise. Instead of the government assuming the responsibility of proving its claim to payment and pursuing the necessary cash, the onus is placed upon the polluter to substantiate the absence of liability.

Also, bonds offered by the industry to guarantee the appropriate assurance for clean-up and remediation obligations must encompass all possible costs and be rigorously enforced. The EAB not only reflects the environmental costs of production but also transfers the liability for environmental risk associated with these costs to the operators, rather than externalising it to the government or society. In order to achieve this objective, the EAB integrates components from two economic mechanisms: (1) a deposit refund incentive designed to promote preventive behaviour and (2) guaranteed liability coverage aimed at remediating environmental damage. The determination of the EAB's scale is contingent upon the policymaker's aims and ultimately encompasses an array of economic, political, and social considerations. For example, considering potential limitations on income, policymakers may decide that the EAB amount should be adequately large to promote conscious behaviour while remaining below the amount needed to pay the cost of the most severe damages in the event of their occurrence. It is essential to have comprehensive safeguards in place to guarantee sufficient risk safeguards. The regulations must be tailored to the unique location and apply to all parties who possess interests in oil and gas or related facilities. Consequently, governmental oversight is necessary to guarantee that FAR coverage remains in effect even during changes in ownership.

Finally, from the analysis, we can see that each mechanism of FAR had the ability to assign a value, in the form of a price, to an operator's decision on whether or not to engage in environmentally harmful activity. This value serves as form. It is argued that this price, and

particularly its sensitivity to the operator's adoption of measures to reduce risk, could incentivise them to change their recklessness in the Niger Delta.

Letters of credit offer a valuable tool for incentivising the prevention of environmental damage by providing financial assurance, compliance incentives, risk management mechanisms, third-party verification, and community confidence. By incorporating environmental criteria into letters of credit and promoting responsible environmental practices, operators, regulators, and financial institutions can contribute to sustainable regulation and environmental protection.

and accountability in the regulatory framework

Surety bonds, on the other hand, provide a valuable tool for remedying environmental damage by offering, transferring risk, facilitating prompt remediation, promoting accountability, and protecting communities and ecosystems. Incorporating surety bonding requirements into environmental management strategies can enhance the effectiveness of regulatory frameworks and contribute to the viable management of natural resources.

Bank guarantees play a crucial role in remedying environmental damage by providing financial resources, facilitating timely response and compliance, holding polluters accountable, supporting restoration efforts, and reassuring affected communities. As a tool for environmental risk management, bank guarantees contribute to the sustainable handling of natural resources and preserving the environment for present and future generations.

Parent company guarantees play a crucial role in remedying environmental damage involving oil spills through responsibility and accountability, facilitating resource allocation, enhancing stakeholder confidence, promoting long-term sustainability, and ensuring legal compliance. As a proactive risk management tool, the parent company guarantees that it will contribute to the protection of ecosystems, communities, and public health and encourage the shift to more environmentally friendly and accountable oil and gas operations.

Environmental Trust Funds play a critical role in remedying environmental damage by providing financial resources, fostering long-term sustainability, engaging communities, supporting expertise and technical assistance, ensuring legal compliance, promoting innovation, and upholding transparency and accountability. By leveraging the capacity of Environmental Trust Funds, stakeholders can work together to address environmental challenges and safeguard natural resources for future generations.

Chapter 6

Recommendation and Conclusion

6.1. Recommendations

The following are the recommendations for answering the main research question in this thesis: How can Nigerian law be reformed to ensure polluters are held liable for damage to natural resources? Chapters 2, 3, and 4 already outline the causes that motivate operators to take advantage of the system to shirk accountability for environmental obligations against the tenets of PPP and NOSDRA-related costs. These issues can be addressed with understanding in Chapters 4 and 5 by examining the complete application and implementation of PPP in Chapter 4. The financial security discussed in Chapter 5 establishes how the operator's accountability can be resolved. In addition to what Chapter 5 explains, this section will propose a system to prevent operators from shirking the costs associated with NOSDRA liability to the public.

In summary, a solution consisting of three-pronged approaches is proposed. Firstly, Nigeria needs to reform the law to ensure polluters are held liable for damage to natural resources by requesting operators place unencumbered assets, which can be either liquid or illiquid, into an Environmental Restoration Trust Fund for the benefit of the NOSDRA. Secondly, a review of the law should incorporate the components of economic efficiency, legal responsibility, and economic integration to ensure the complete application of the PPP in Nigeria. Thirdly, a list of specific policy issues to be incorporated into the law is also proposed.

6.1.1. Establish A Framework for a Compensation Fund

Although a Compensation Fund (C.F.) is another form of FSR, here, it can serve as a buffer or a stopgap in the event other FSR measures proposed in Chapter 5 fail or are inadequate. When functioning optimally, compensation funds allocate risks and rewards fairly while modifying the risk profile by reducing potential risks and increasing benefits. For example, the payment

structure of this fund would be linked to the level of risk presented by each operator. Hence, the proposed framework for establishing an Oil Impact Compensation Fund (OICF) is a government-operators level C.F. This framework suggests that joint venture and production sharing partners (i.e., the government, joint venture partners, and all major and minor operators) collaboratively create the OICF to cover the cost of potential environmental damage of their oil and gas activities. The question that arises is whether more financing should be provided through a compensation fund if FSR is introduced and what may be proposed regarding the effectiveness of such a fund mechanism.

With regards to the question of double financing, the Fund will complement any investment in FSR by the OICF stakeholders, specifically in the following several ways: 1) The OICF assures environmental damage can be immediately remedied where there is no assurance; 2) where there is assurance in place, the OICF serves as a buffer where no sufficient assurance is given, 3) the OICF reduces the evidentiary burden on claimants to proof and speeds up the process of handling claims for individuals seeking compensation for traditional damage; and finally, with the IOCF, private owners of natural resources serving public interest or purpose. For example, the Fund may allow private owners of natural resources offering benefits to the public to seek compensation for damages without the need to provide evidence that a specific resource or the site impacted offers public service and that the oil pollution was responsible for the harm. For such claims to be legitimate, it must be a question of fact, evidenced by a court visit to *locus inquo*. This would redirect such lawsuits to local and foreign courts after decades of trials away from those court systems and alleviate the pain and costs associated with such dispute resolution. The prevailing view here is that economic literature argues that when designing a compensation fund, efforts should be made to reduce costs.

On the effectiveness and preventative outcome of the IOCF, it can be argued that to determine the effectiveness of the fund, the responsibility to compensate for harm must be placed on all

the operators contributing to the harm. This means that the responsibility to contribute to the IOCF primarily falls on operators who generate the risk of oil pollution, calculated by the amount of their involvement and determined by the number of barrels each operator produces. Therefore, contributions to the IOCF system can be determined by proportionally contributing to the fund, inversely proportional to the amount of risk they generate. If considered this way, the design of the IOCF will fully adhere to the PPP criteria.

Practically, contributing to the IOCF means large operators (NNPCL, CHEVRON, TOTAL, SHELL, and ExxonMobil) will contribute the amount equal to the total number of barrels produced in a given year with an arrangement to set aside 0.5 per cent per barrel of Nigeria Bonny Light selling at US$96.61 as at April 12, 2024, which is an increase of $6 from two weeks prior on US$ 90.73 on April 2, and down $15 to US$82.28 May 15th 2024., be paid into the Fund.[1] This means larger/major operators contribute more from the aggregate of what was set aside from the daily sales, and small/minor operators pay their aggregate of what they also set aside. It is essential to state here that IOCF aims to guarantee funds for the remediation of damage. Hence, the funding structure identified here is to incentivise the oil industry to remedy environmental damage but does not encourage operators to operate at an optimal level of efficiency. Thus, a differential arrangement is put in place for a higher differential contribution to a larger capacity operator; at this point, incentives for prevention may be eroded, but the focus remains on the remediation of damage. This differentiation can only occur if the agency managing the fund has relevant knowledge of the extent and capacity of the operator's production that contributes to the risk. One crucial factor in managing funds is identifying the

[1] Figures from the Central Bank of Nigeria Daily Crude Oil Price Data & Statistics https://www.cbn.gov.ng/rates/dailycrude.asp accessed 15th May 2024

operator with the most accurate and comprehensive information to manage the associated contributions.[2]

Given the issue of how efficient a fund like the IOCF mechanism may be in terms of its capability to incentivise the prevention and remediation of environmental damage, IOCF might additionally function as a deterrent for harmful practices within the oil industry. If, for instance, evidence shows a failure to adhere to regulations on safety, cleanup, and remediation, it may render an operator ineligible for funds or result in increased payments to the IOCF fund. While liability frameworks work in tandem with the IOCF, they have a more potent deterrent effect on operators of unsafe practices in the industry. Thus, operators that pose higher risks beyond what the OICF can handle will face financial responsibility for this, so operators with this relatively minimal compliance level are motivated to do more than just meet the regulatory requirement because the liability to the fund they already face may increase and makes it worthwhile for them to be circumspect even though the money to avert and restore environmental damage would come from the fund. Finally, although the financial contribution to the Fund is determined solely by the size of the operator in terms of production capacity, without taking into account the operators' desire to prevent environmental damage by even investing in the use of cutting-edge or safer technology in their production process, it is believed that the incentives for preventing oil pollution damage should always stay intact when a compensation fund is in operation.[3] Differentiation in the contribution levels can incentivise operators to work safely. The contribution that is differentiated provides clear and specific estimation and assessment for operators' choices of care, similar to how Pigouvian taxes operate. A Pigouvian tax is a government-imposed fee on individuals or entities that produce negative externalities. This tax is designed to reflect the exact amount of harm caused by their

[2] M Faure & W Hui, 'Economic Analysis of Compensation for Oil Pollution Damage' (2006) 37 J Mar L & Com 179 *at* 191
[3] Ibid

actions, compelling them to consider these costs when making decisions.[4] Unlike command-and-control regulations, where the government agency has to decide whether or not to mandate a specific safety measure and weigh its benefits against its costs, the fund administrator has the discretion to decide if the investment in safety is reasonable enough to impact an operator's contribution rate to pay in the current year and the discounted benefits it offers in the same situation. Operators with a low cost-to-benefit ratio for safety precautions or those with low discount rates who highly value future contribution discounts will opt for it. On the other hand, operators who do not meet these criteria will not attract discounted contributions. This sorting method circumvents the inefficiencies of uniformly imposed safety measures and regulations.

6.1.2. Appointment of Natural Resource Trustees and Focus on Prevention

The recommendation proposed here is that the law should be reviewed to capture (1) the appointment of public trustees. Given that the environment directly or indirectly benefits the public and is consequently valuable to the public, the right to put forth a claim for damages should be considered by a designated public trustee, given the powers to do so and implement restorative measures at the cost of the polluters. (2) The trustee is to seek compensation for the interim loss of services to the people, including aesthetic and recreational services, due to the harm done to the environment. This would not have been possible without the express integration of PPP. (3) Ensure the prevention of damage to resources. Prevention should be the primary inventive characteristic of NOSDRA, and it is one of the factors that can set it apart from the Nigerian common law and tort civil liability systems. In traditional civil liability, the concept of the threat of injury to natural resources is completely immaterial and ought to be recognised. The NOSDRA did not expressly integrate an innovative strategy

[4] PN Salib. "The Pigouvian Constitution." (2021): 88 *The University of Chicago Law Review* 5 1081-1156.

into the application of the polluter pays principle. Hence, it is limited to the cleanup and remediation of pollution damage, while restoration and prevention of damage have remained immaterial. Therefore, if an operator engages in oil and gas activity that harms the environment, they are not responsible for restoring the damaged environment and compensating for the associated costs. Additionally, anyone who poses a potential threat can only be persuaded to take appropriate measures to prevent the actual occurrence of damage to the environment. Hence, the implementation of preventive measures serves a twofold purpose: firstly, it helps prevent or mitigate the risks of environmental harm; secondly, it spares the operator, who adopts these measures from incurring costs associated with restoring the otherwise inevitable damage. Therefore, NOSDRA must encompass the ideas of prevention and restoration as underpinnings and distinct sets of regulatory strategies.

6.1.3. Amendment to the design of NOSDRA Acts to contain the FSR.

First of all, there is no ongoing obligation for authorities to clean up and recoup the cost from the operator under the NOSDRA's section 6 and 19 requirements for operators to clean up and remediate the environment. Characteristically, FSR undoubtedly involves the meticulous planning and implementation of available resources to enhance a better-regulated environment away from the current state of affairs. Lax regulation, unclear operator liability obligations, and a lack of any FSR instruments like environmental liability insurance or deposit refund systems like bonds are characteristics of this. For example, an amendment to NOSDRA establishes that an operator must show the specified coverage for their potential liabilities and such liabilities clearly stated in their operating permit before being considered eligible to obtain a licence to operate within the sector. However, the thesis proposes utilising the Oil Impact Compensation Fund. This fund has the potential to complement other FSR techniques by improving the accuracy of risk distribution and encouraging initiatives to decrease risk.

The implementation of strict liability in Nigeria has not yielded positive results, especially for very confusing situations, such as the liability for joint venture partnerships between the government and some major operators, which have now recorded catastrophic environmental effects in N.D. This has caused most operators not to take the utmost care and instead choose a lower degree of caution. In the case of catastrophic occurrences, two operators readily come to mind. The first is Shell's divestment plan, as discussed in Chapter 5, where the company declared it would leave without remedying the catastrophic damage it had caused over the period of more than five decades. This poses a significant danger to both the environment and people. The second is Chevron Nigeria Limited, where, for instance, the inaction of the Federal Government and Chevron, operator of the joint venture between the Nigerian National Petroleum Corporation Limited (NNPCL) and Chevron Nigeria Limited (CNL), was on Thursday, April 18, 2019, at approximately 10 p.m., confirming that a fire was detected at Ojumole Well No. 1. The Ojumole well field is located in OML95 in the Western Niger Delta region of the NNPCL/CNL JV.[5] The ' 'operator's deliberate disregard for the burning fire on the Awoye shoreline for more than four years now indicates that the government is complicit in the environmental damage. This highlights the government and oil firms' lack of concern for both Nigerians and the natural environment. The Awoye village's story is a tragic illustration of how a once-thriving area has been transformed into a sacrificial zone by environmental damage involving the relentless extraction of oil and gas. If they are sufficiently strong, implementing a compensation fund and establishing bonding requirements and insurance could serve as supplementary measures to NOSDRA-related liability regulations and OICF to guarantee sufficient restoration of the environment. This kind of synergy can be seen in some real-world situations. For instance, the International Convention on Oil Pollution Damage at

[5] Only one Well is burning Chevron insist' 3/5/2019 https://africaoilgasreport.com/2019/05/in-the-news/only-one-well-is-burning-chevron-insists/ accessed 17th March 2024

Sea typically consists of three components to mitigate risk, including insurance schemes to provide liability coverage and compensation funds established to indemnify any damages resulting from an oil pollution event.

6.1.4. Create a charge on operators' assets when operators reorganise over failed regulatory obligations.

Under NOSDRA, a regulatory obligation is created to make operators take responsibility for the adverse effects of oil pollution damage. These obligations are often not met by operators, yet some operators seek to divest from the system with unmet obligations. Such operators seeking to divest must not be allowed to avoid these regulatory obligations through reorganisation unless the law has explicitly allowed it. The recent plans by Shell to reorganise its operations to shirk its regulatory obligations should be denied and compelled to be cleaned up and remediated. In this case, Shell's outstanding legal obligations should be prioritised when selling or distributing its assets. It makes sense that regulators want operators to internalise their environmental costs to avoid leaving the environment unremedied for taxpayers to pay the cost. However, once the environmental liabilities exceed a certain threshold, the operator should be seen as no longer financially capable of restoring the damaged environment. At this point, NOSDRA, as the regulator, can proceed to fulfil the ' 'operator's liabilities on their behalf. In this case, the evidence from ' 'Shell's case shows that operators facing financial difficulties are motivated to aggressively increase their outstanding environmental liabilities due to the lax regime.

6.1.5. Encourage the development of FSR primary and secondary markets in Nigeria.

There is a belief that, in terms of the use of FSR markets to address environmental issues, they possess adequate financial resources to handle claims. However, the financial resources of the FSR market, like those of other sectors, are limited. It seems implausible for third-party credit

providers to cover the full extent of environmental damages caused by operators. While third-party credit providers often mandate a minimum level of capital adequacy by their industry regulators, they are, however, like any other business entity, nevertheless susceptible to insolvency. It is important to note that third-party providers failing to assess risks accurately will likely face significant environmental liability claims. This has been recognised as a factor that may lead to the failure and financial instability of the FSR market. If a credit provider is insolvent, the government will ultimately use taxpayer money to fund the restoration of the environment. To address the issue of insuring against significant environmental risks, one potential solution is to establish secondary markets for trading risk.

Oil licencing in Nigeria is open to all applicants, regardless of their qualifications. However, to be granted a licence, potential oil operators must demonstrate financial capacity and membership in the Clean Nigeria initiative. This initiative is an organisation that seems to function as a risk-pooling arrangement for operators. It is advisable to incorporate these criteria into all the operator's liability terms to enhance this. As a result, the operator must establish and maintain its financial capacity to carry out a prospective duty by providing evidence of liability insurance, self-insurance, bonds, or other approved methods that show the ability to fulfil this responsibility in accordance with the law. However, this is possible if no market is developed, as third-party providers may be new to provide security for environmental liabilities; the market can be encouraged to collaborate with established peers in the U.K. and the U.S. for skills exchange and reinsurance programmes, assuring the risks are too high for local insurance.

6.1.6. Reinventing the wheels of PPP in Nigeria for complete understanding, application, and implementation.

As noted earlier, there was misapplication and misinterpretation in implementing the PPP via a criminal and civil approach in the Nigerian oil and gas sector. Nigeria must legislate explicitly

to incorporate the polluter pays principle into the legal framework for environmental liability in the oil and gas sector; this idea, expressly adopted in the country's approach to solving environmental damage, may help recalibrate the ecological baron ND environment. It remains incontestable to note that courts are helpless and cannot legally make individuals and corporations who engage in oil and gas activities accountable for any environmental harm when it is not provided in the law. It is essential to mention that the strict liability approach to implementing the PPP was solely intended to compensate the victims of oil pollution damage rather than to restore or clean up the environment. Thus, a strict liability strategy solely addresses a single facet of the polluter pays approach in tackling traditional damages and not environmental damage, as shown in Chapter 2. No Nigerian case has been determined to address and adopt the concept of PPP specifically. This is because the courts have not put it to the test. The court came close in the case of *Centre for Oil Pollution Watchv Nigeria National Petroleum Corporation.*[6] Due to the environmental harm from an oil leak, the *Acha* autonomous community in the *Isukwuato* Local Government Area of Abia State, Nigeria, specifically the *Inch* and *Aku* Streams, requires restoration and remediation. The scope of the laws did not define environmental damage and procedure for restoration in the event of an incident. Responsibility for environmental damage and implementation of FSR rules, elaborately discussed in Chapter 5, to ensure the complete implementation of PPP in the Nigerian oil and gas sector. Where the costs of remediation will be allocated appropriately rather than placed on the public or disregarded, same as is currently the case, establishing an apparent legislative and financial authority for the NOSDRA agency to demand for cleanup and remediation, along with a comprehensive set of guidelines outlining operators' environmental responsibilities, would enable a more precise approach to estimating costs, determining acceptable methods and instruments for accumulating funds for FSRs. The

[6] (2013) LPELR 20075

guidelines would guide the NOSDRA in exercising power to demand FSRs and serve as a limitation on utilising that power.

6.1.7. State involvement in the cleanups and restoration of environmental damage.

The government must not continue to deploy public funds for cleanup exercises; if it does so, it has to do so for risks that do not require financial security solutions, such as earthquakes, floods, and other natural disasters. Using taxpayer's funds to clean up private costs should be avoided to prevent indirect subsidisation of private operators' costs. Hence, government intervention should be limited to and determined by its share of contributions to IOCF that accurately correspond to the actual risk foundation of its partnership with operators. This Fund will cover the costs associated with environmental damage involving oil spills. It will be funded by contributions from all participating interests invested in the risks associated with oil spills. If this Fund comes alive, the government should consider implementing a standing purse, in which a government agency deploys funds for cleanup and recovers the funds from the responsible operators.

6.2. Conclusion

In conclusion, this thesis tackled 'how can Nigerian law be reformed to ensure polluters are held liable for damage to natural resources'. This thesis has offered a thorough analysis of the imperative task of reforming Nigerian law to ensure that polluters are held accountable for damages to critical natural resources, particularly within the oil and gas industry. By focusing on the polluter pays idea and market-oriented solutions like financial assurance, this research has elucidated pathways towards a more robust and equitable regulatory framework.

It is important to restate that the Nigerian oil and gas sector represents a vital engine of economic growth in the country. Yet, its operations have often resulted in significant environmental degradation and social dislocation. The current regulatory landscape,

characterised by fragmented enforcement mechanisms and inadequate penalties, has failed to deter harmful practices or provide restitution to affected communities adequately. This research underscores the urgent need for legal reforms that align with global best practices and address the unique challenges posed by the oil and gas industry.

Key recommendations emerging from this study advocate for the adoption of a multi-faceted approach that combines regulatory oversight with market-based incentives. Central to this approach is the incorporation of financial assurance mechanisms in the legal framework, whereby operators are required to provide upfront financial guarantees to cover the costs of potential environmental damages. By internalising the costs of pollution, operators are incentivised to adopt state-of-the-art technologies and practices, thereby reducing their environmental footprint and mitigating risks to natural resources.

Furthermore, strengthening institutional capacity, particularly within regulatory agencies, is crucial to ensure effective enforcement and monitoring of compliance with environmental regulations. Additionally, fostering partnerships between government, industry, civil society, and credit providers can facilitate knowledge-sharing and collaborative problem-solving, leading to more effective and sustainable outcomes.

In essence, this thesis serves as a call to action for policymakers, industry stakeholders, and civil society actors to collaborate in pursuit of a more resilient and environmentally responsible oil and gas sector in Nigeria. By embracing the principle of polluter pays, market-oriented solutions, and regulatory innovation, Nigeria can pave the way towards a future where economic prosperity is harmonised with ecological integrity and social equity. In order to answer the overall question set out in the study, this thesis developed subresearch questions presented across five chapters.

Chapter 2: Examines the first sub-research question, *'To what extent can polluters be held liable for damage to environmental resources arising from oil spillage in Nigeria*? The liability of polluters for damage to environmental resources arising from oil spillage in Nigeria is a complex issue that involves legal, regulatory, and environmental considerations. The factors to determine the extent to which polluters can be held liable include the legal framework, the nature and magnitude of the spill, the parties involved, and the effectiveness of enforcement mechanisms. On the Legal Framework, the chapter finds that Nigeria has various laws and regulations governing environmental protection and oil pollution control, including The constitution of the Federal Republic of Nigeria 1999 (CFRN), The Petroleum Industry Act 2021, the Oil Pipelines Act, the National Oil Spill Detection and Response Agency (NOSDRA) Act, The Environmental Guidelines for Petroleum Industry in Nigeria (EGASPIN) 2002, 2016 and 2018.

The chapter finds that although these laws establish the legal basis for holding polluters liable for damage caused by oil spills, these operators' obligation is only to the extent of performing traditional damage liabilities while not discharging their obligation to restoration of damaged natural resources, which is the crux of environmental damage. A clinical look at these laws showed that Nigerian law has serious shortcomings, such as the non-recognition of environmental damage (natural resources damage) as a form where the operator's obligation to restore is recognised and defined. This leaves a huge gap in the law for operators to shirk or transfer their NOSDRA-related costs of restoring damaged environmental resources. A notable feature of the law was its lack of inclusion of environmental damage (natural resource damage), legal status, ownership, and statutory definition of these resources. However, where the natural resources that have been impacted are privately owned, the private owner can generally pursue compensation for the loss under Nigerian common law.

The chapter further demonstrated a nuanced distinction in the legal consequences of oil pollution damage to privately owned and publicly owned resources. As previously said, the law does not include provisions for recovering environmental damage. In contrast, it effectively addresses "traditional damage," such as personal injury, damage to property, and direct financial loss, as demonstrated in the case mentioned above—chapter 2. In addition, findings from the chapter showed operator liability in the context of oil spills is limited to the extent defined in the law. Hence, operators of oil facilities, including oil companies and pipeline operators, are typically not held primarily liable for environmental damage resulting from spills that occur within their operational areas.

Consequently, these operators almost do not have a legal obligation to prevent spills, respond promptly to incidents, and clean up contaminated sites even though the law says otherwise. The facilities to enforce these operators are lacking under Nigerian law. The chapter finds that despite natural resource damage resulting in a decrease in the functionality of services provided by these resources. Whether temporarily during the destruction period or when the service is unavailable owing to the cleanup or restoration works, there is no liability for compensatory restoration on the polluter. Even though these services encompass a range of diverse functions, a natural resource can offer to enhance the well-being of other natural resources and the environment.[7] These services should also be accessible and available to all community members. In other words, natural resources like a coastal wetland or river basin, for example, serve as a source of nourishment and breeding grounds for avian and other organisms, supply unpolluted water for fish populations, and are essential to preserving biodiversity, which is essential for the absorption of pollution. On the other hand, human benefits from natural resources, such as a coastal wetland or a river basin, encompass benefits such as recreational

[7] EPH Brans, 'Liability for Damage to Public Natural Resources under the 2004 E.C. Environmental Liability Directive Standing and Assessment of Damages' (2005) 7 Envtl L Rev 90

activities, fishing, which is the primary sustenance of the people of the Niger Delta, boating, beach utilisation, wildlife observation, hiking, waterway navigation, and sustenance hunting.[8] Consequently, if the release of oily substances harms a coastal wetland or river basin, it can have an impact on environmental or inter-resource services as well as human uses or services.

Additionally, according to the NOSDRA, the assessment of damages is based on determining the amount of compensation to be given, albeit privately, rather than on the actions taken to restore the affected natural resources and their services to their original condition.[9] The assessment of damages should be grounded in the cleanup and potential remediation efforts. For polluters to even incur the cost as intended by the NOSDRA Act, it is crucial to establish a precise and legally sound understanding of the word "environmental damage." There is a lack of clear guidance in legal and textual definitions, resulting in uncertainty over the scope of the word "environmental damage" as defined by the act and case law in other contexts. The lack of clarity on the concept of environmental damage is disheartening and illogical to witness careless operators refusing to fulfil their legal duty to restore damaged resources, compensate for any short-term loss of use, and, in extreme circumstances, compensate for irreversible loss. Under the NOSDRA, natural resource damage relies mainly on natural recovery, which is now the lone available option for recovery. For clarity, natural recovery is the absence of deliberate intervention to restore the impacted natural resources and services.[10] While the approach is generally seen as a suitable initial course of action for restoration, requiring the establishment of a replacement habitat in a different area or implementing alternative measures, such as off-site supplementary restoration measures similar to the procedures obtained in the U.S. and

[8] For an overview of services provided by natural resources, see R.S. de Groot, *Functions of Nature,*(Wolters-Noordhof: Amsterdam, 1992) 15

[9] See section 25, The Oil Spill Recovery, Cleanup, Remediation and Damage Assessment Regulations, 2011 regulations of the NOSDRA Act (The assessment shall form the basis of the compensations for the losses

[10] GD Gann et al. "International principles and standards for the practice of ecological restoration." (2019) 27 *Restoration ecology* .S1 S1-S46

U.K., may also be considered.[11] However, the decision to implement these measures cannot be entirely at the operator's discretion; it must be enshrined in the framework law. Overall, while the legal framework in Nigeria provides avenues for holding polluters liable for damage resulting from oil spillage, challenges remain in terms of enforcement, accountability, and ensuring adequate compensation for affected communities. Efforts to strengthen regulatory oversight, improve spill response mechanisms, enhance community engagement, and promote corporate accountability are essential for effectively addressing the operator's liability impacts of oil spills on environmental resources in Nigeria.

Although environmental damage may not be explicitly defined in legislation, Nigerian courts can broadly interpret relevant statutes and regulations to encompass harm to the environment caused by oil spills. Unfortunately, this interpretation is prominent for traditional damage claims without the necessary consideration of the purpose and intent of the legislation, as well as the broader goals of environmental protection and conservation. The courts in Nigeria may look to international standards, norms, and principles established in international treaties, conventions, and customary international law. These international norms may guide assessing environmental harm and determining liability for oil spills. Also, regulatory agencies may develop administrative regulations and guidelines that specify criteria for assessing environmental damage and determining liability for oil spills. While not legally binding, these regulations can provide clarity and guidance to operators, regulators, and courts in addressing environmental issues. Over time, courts may develop jurisprudence through their interpretation of existing laws and their decisions in environmental litigation cases. This judicial interpretation can contribute to the evolution of legal standards and principles related to environmental damage and liability for oil spills. Also, it is hoped that Public awareness, advocacy efforts, and pressure from environmental groups and affected communities can also

[11] Gann, *et al (n16) at 83*

influence legal developments and hold operators accountable for environmental damage. Public outcry and media attention following oil spills can prompt legislative action, regulatory reforms, and judicial scrutiny of operator conduct. While the absence of a specific legal definition of environmental damage may pose challenges, these various legal mechanisms and sources of authority can still enable operators to incur liability for environmental damage resulting from oil spills.

Chapter 3: This chapter focused on analysing the second sub-research question, which *explores the barriers to regulating oil and gas activities in Nigeria.*

Regulating oil and gas activities in Nigeria faces numerous economic, legal, social, and political barriers, reflecting the complex interplay of interests, challenges, and dynamics in the country's oil and gas sector. The detailed exploration of these barriers, Economic Barriers, explores the effects of overdependence on Oil Revenue on Nigeria's economy, which is heavily reliant on revenue generated from oil and gas exports, which make an extensive contribution to the country's GDP, and additionally government revenue. Any regulation perceived as detrimental to oil production or investment may be met with resistance due to concerns about economic stability and revenue loss. Also, the myopic view of Nigerian public officials in the oil and gas industry is that since the oil and gas sector attracts substantial foreign investment, stringent regulations could deter investors or lead to capital flight. Regulatory uncertainty, inconsistent enforcement, and bureaucratic delays could erode investor trust and impede the growth of the sector.

Meanwhile, an infrastructural deficit is the result of a lack of foreign direct investment, as stated above. Inadequate infrastructure, such as pipelines and storage facilities, poses challenges for effective regulation and enforcement. The limited infrastructure capacity may increase the risk of oil spills and safety hazards associated with oil and gas activities due to overuse and poor turnaround maintenance.

Legal Barriers explored include a weak Regulatory Framework; one significant limitation of efficient regulatory enforcement of oil and gas activities is the numerous ambiguities in poor enforcement of NOSDRA regulations, as highlighted in the chapter. Efficient environmental enforcement relies on the regulated community's clear understanding of expectations, legal requirements, and the authority responsible for enforcing the law. An unambiguous policy promotes adherence. Nevertheless, the question remains whether state and regulatory capture will hinder the ability of these reform initiatives to establish channels that dismantle monopolistic regulatory institutions backed by influential political interests. While this solution may seem feasible, Nigeria should deliberately implement a progressive process of reducing the influence of public monopolies in its regulatory approach. In Nigeria, the regulatory structure governing the oil business is weak, resulting in a high level of predictability in developing and implementing regulations.

Furthermore, the dominant tort remedies available in Nigeria offer limited protection and advantages if times of insolvency kick in and invariably lead to the abandonment of potential environmental harm. Nigeria's regulatory framework for the oil and gas sector is fragmented, outdated, and often inadequately enforced. Regulatory agencies may lack sufficient authority, resources, as well as the ability to enforce adherence to existing regulations successfully. Legal Loopholes and ambiguities in laws and regulations, as well as loopholes that allow for regulatory evasion or circumvention, undermine the effectiveness of regulatory measures. Weaknesses in legal enforcement mechanisms contribute to a culture of impunity among industry players. While corruption and regulatory capture could be seen in bribery, regulatory capture within regulatory agencies undermines the integrity and impartiality of regulatory processes. The influence of vested interests and political connections can result in regulatory decisions that prioritise private gain over public interest. Social Barriers: such as community resistance to oil and gas activities often have significant social and environmental

impacts on local communities, including land degradation, pollution, and displacement. Communities affected by oil operations may resist regulatory measures perceived as insufficient to address their concerns or protect their rights. Social barriers could also be seen as conflict and Insecurity in the Niger Delta. Oil and gas resources are readily available in the ND region, which has been associated with conflict, insecurity, and social unrest. Militancy, pipeline vandalism, and sabotage pose challenges to regulatory enforcement and stability in oil-producing areas. Local communities living near oil and gas facilities may experience adverse health effects, loss of livelihoods, and disruption of traditional ways of life. These social impacts contribute to tensions and grievances that complicate efforts to regulate oil and gas activities effectively.

The political barriers examined in the chapter include political interference, patronage, and vested interests in the oil and gas sector, which can impede regulatory independence and effectiveness. Political elites may prioritise short-term gains or electoral considerations over long-term sustainability and environmental protection. Regulatory Capture could be seen again as regulatory agencies may be susceptible to capture by powerful industry players or political interests, compromising their ability to act in the public interest. Capture of regulatory institutions can result in lax enforcement, selective application of regulations, and regulatory decisions biased towards industry preferences. Also, Fragmented Governance in Nigeria's federal system of governance and overlapping jurisdictional responsibilities among different levels of government contribute to regulatory fragmentation and coordination challenges. Lack of coordination and coherence in regulatory efforts also hinder the development of a unified and strong legal foundation for the oil and gas sector. The legal and political interlock in Nigeria serves as a constraint to regulation because the law operates in relation to politics to foster certain objectives.[12] For instance, politics establishes specific legal values or institutions

[12] C Miro. "The relationship between law and politics." (2009) 15 *Ann. Surv. Int'l & Comp. L.* (1), 19-42.

as its primary objective in at least three major aspects, as follows: 1) as an objective, 2) as a method, or 3) as a hindrance. In this scenario, the political understanding of these values or institutions is nearly indistinguishable from a genuine legal understanding of the same values or institutions. For instance, the utter use of power by The government has been instrumental in enabling oil activity in both colonial and postcolonial Nigeria. The significant legal standard that is linked to political development grants the government the authority to appropriate some private properties, such as land and related investments, for the benefit of the public in exceptional circumstances. The development of oil discovery was significantly aided by certain colonial laws that were initially created to give a clear advantage to British companies, particularly Shell D'Arcy. This goal continued in postcolonial Nigeria, where politicians used the law to drive their political objectives, as seen in the chapter.

Since colonial times, the state has consistently and deliberately marginalised the native oil-bearing populations in the Niger Delta, preventing them from asserting or maintaining any significant ownership of the oil riches beneath their land. In this paradoxical political endeavour, the legal and public policy apparatus is utilised to favour and benefit itself and its corporate associates in the oil industry. The limited opportunities available to the oil-bearing communities result in their frequent recourse to violent protests and attacks on oil facilities, which lead to unmediated environmental damage.

However, like most postcolonial countries, Nigeria had weak institutional foundations at independence, and the institutional building process has been slow and irregular. The precipitous growth of the civil service magnified the challenges of institutional design and regulatory authority staffing in meeting the expertise required for regulated activities. Hence, the regulatory authorities are becoming overstretched, running on a low budget, and lacking competence while descending into inefficiency, disarray, and corruption. The combined effect of these barriers enumerated above on regulated activities in the oil and gas sector can only be

addressed if the state deprioritises its rent-seeking desire. No doubt, the constitutional mandate of the state to protect the environment conflicts with its rentier desires, which is causing the apparent outcome to be an intractable sequence of the people's resentment climaxing in petro-violence.

Also, the chapter found the regulator's reliance on the regulated for logistical support to carry out their oversight duties. It was found to impede the implementation of appropriate environmental standards and guidelines. The government should demonstrate unwavering dedication to executing its environmental policies. The Nigerian government must review the NOSDRA Act and provide strong practical assistance to NOSDRA, particularly regarding technological capacity, sufficient staffing, and appropriate financial resources, among other crucial factors. This may guarantee the efficacy of NOSDRA in achieving self-sufficiency from operators whose actions are governed and indirectly captured. It will decrease the probability of being held in regulatory capture by large corporations with significant financial resources.

The chapter also found that unless the government reduces its economic dependence on oil and implements policies that actively promote the diversification of the economy, the vicious circle will continue. This can be achieved through the development of manufacturing industries and solid mineral explorations, like gold, gemstones, and agriculture, which are in commercial quantities across Nigeria. To address these barriers to the regulation of oil and gas activities in Nigeria requires comprehensive reforms encompassing legal, institutional, economic, and social dimensions. Strengthening regulatory institutions, enhancing transparency and accountability, engaging with affected communities, promoting sustainable development, and fostering political will are essential for overcoming these challenges and ensuring the responsible and sustainable management of Nigeria's oil and gas resources.

Chapter 4: Examines the third sub-research question: To what extent is PPP implemented in Nigeria? The chapter finds that recalling well-established legal precedents, the Polluter Pays

Principle seeks to ensure that Polluters are responsible for the harm they cause. To the environment and to cover the costs of remedying the damage. However, considering the polluter pays principle merely as a straightforward confirmation of a liability principle would be a first misinterpretation, misunderstanding, and misapplication of the underlying idea. The chapter finds that the original formulation of the Polluter Pays principle does not consider liability but instead focuses on how the costs of pollution management should be allocated. In order to fully comprehend the PPP and its significance in environmental law and policy, it is crucial to differentiate between determining liability for addressing specific damages and determining how to distribute the costs of general preventive measures. In addition to imposing a legal obligation on the source of pollution to compensate for harm done to innocent parties, the liability idea may also mandate that the source mitigate the pollution at its own cost; this is the traditional approach to internalising social costs. The producer's allocation of resources towards pollution control includes the financial burden of the pollution it had previously imposed on other entities without any expense. While cost internalisation is an important factor, it is not the sole solution. Due to various factors, Nigeria often chooses to allocate the responsibility of pollution control to the general public, either entirely or partially, or provide support to polluters through financial means.

The chapter finds that the PPP is not firmly rooted in Nigeria's legal framework. The chapter finds that no legislation explicitly mentions the PPP, particularly the provisions of the NOSDRA Act. However, the chapter finds that the PPP possesses more than just this function. For the complete application of PPP, the chapter looks at the functional variations of PPP as it deals with allocating costs, internalising costs, and allocating legal responsibility for environmental harm. Regulators in Nigeria need more consensus on whether the PPP encompasses cost allocation and determines liability simultaneously. The chapter showed that the PPP in Nigeria generally refers to established legal standards that impose liability on the

party whose actions caused environmental damage and require them to provide compensation and cover the costs of remedying the damage. However, to view the PPP as merely reiterating or an affirmation liability would mean misinterpreting the original OECD idea. The chapter found that the basic concept of the PPP does not function as a liability theory but instead serves as a method for allocating the costs of pollution control. Hence, to fully understand the PPP and its significance in environmental law and policy, it is critical to differentiate between measures for determining liability for addressing specific damages and allocating the costs associated with general preventive actions.

Also, the chapter showed that PPP can be a proactive distribution of the costs of preventing and controlling damage. The chapter found that the PPP can perform and achieve these goals if well understood and implemented through the legal enhancement of market-based instructions. Only pollution victims frequently use it to pursue damages. While NOSDRA liabilities are left unremedied when relying on the PPP, its purpose has yet to be achieved to promote the efficient utilisation of limited environmental resources.

Furthermore, the chapter showed that the polluter pays idea is based on cost internalisation; however, it is due to differing perspectives and values among the operators and government through NNPCL as parties. The Nigerian government needs the political will to distribute pollution costs among various parties or enforce preventive measures on polluters. By utilising the polluter pays principle, it is possible to overcome these political obstacles because cost internalisation is inherently efficient. According to the internalisation theory, operators who cause pollution assume the costs of remedying the polluted resources and subsequently transfer those costs to the consumers of their products.[13] This approach internalises externalities into market decisions by ensuring that the producers are responsible for the harm and bear the

[13] B.N. Mamlyuk, 'Analysing the Polluter Pays Principle through Law and Economics' (2009) 18 Se Envtl LJ 39

financial burden of the social costs resulting from environmental damage. Ultimately, consumers pay the actual costs of the products, and individuals who are not involved are not burdened with the pollution costs. Thus, the justifications exist for implementing the PPP in Nigeria. Practically, the objective of assigning liability based on the origin of pollution can be achieved through financial security, which can serve as a means of allocating costs and liability in industry-wide polluter activities.

Finally, the chapter showed that practical cost allocation to be done through FSR is critical hence, it can be challenging to apply PPP in Nigeria in the absence of FSR. The issue of financial assurance is a legitimate concern in Nigeria. However, this will be an amazingly new concept in environmental management in Nigeria; a strong case is made for its adoption in Nigeria as it is in the EU and USA, as discussed in the next chapter. This will curb vestiges of 'orphan' pollution, which occurred in the past and where the PPP cannot be applied because the polluter is either unknown, no longer exists, or cannot be liable. The NOSDRA Act did not recognise this and could not apply the PPP to the pollution. The most significant sources of 'orphan' pollution are the abandoned impacted oil spill sites, which contaminated the soil. The government used taxpayers' money to fund the costs that polluters should have paid. As shown above, from 2016 to date, Nigeria's budget for cleanup and remediation policy (HYPREP Programme) amounts to about $1 billion on projects explicitly aimed at cleaning up the damaged environment.[14] As a result, public money had to be used to clean up the soil and remediate the N.D. region. This approach does not respect the PPP. It is established in this chapter that the PPP is a vital tool that could deliver Nigeria's environmental objectives if it is reasonably understood and effectively applied.

[14] Nigeria Launches $1 Billion Ogoniland Clean-up and Restoration Programme https://www.unep.org/news-and-stories/story/nigeria-launches-1-billion-ogoniland-clean-and-restoration-programme accessed 20th May 2023

Chapter 5: This chapter examines the regulatory potential of financial assurance to prevent and remedy environmental damage caused by oil and gas operations in Nigeria. The analysis showed that the implementation of the required FSR is critical in Nigeria, not just to guarantee the satisfaction of any imposed liability under NOSDRA but also to impact the level of accountability and proper allocation of cost on the polluters. This chapter finds that the environmental liabilities of polluters may be reduced if, for instance, environmental liability insurance is in place. Hence, insurers may offer significant premium discounts if polluters abide by the private environmental safety codes, which most insurers adopt and often contain more stringent standards than governmental environmental regulations. Ultimately, mandatory insurance ensures that both the insured and insurers are motivated to acquire safety knowledge and strive to enhance safety measures in the environment through the insured's activities. The chapter found that self-insurance may be an inappropriate mechanism for assurance because it can avoid an objective, independent assessment and tracking of environmental risk, which is essential to the framework of the FSR regime. It is also tricky since it does not necessitate specific financial assets or funds for potential financial security needs. Environmental assurance bonds, letters of credit, bank guarantees, and surety bonds possess a greater capacity to mitigate environmental damage while ensuring that the party responsible for such harm bears the financial burden. In addition, the chapter finds that the advantage of third parties could incentivise contracting parties as follows. Insurers/policyholders are often motivated to collect data and adopt measures that enhance the safety of their activities beyond the standards set by NOSDRA.

On the one hand, the operators may leverage the same information and data showcasing their good practices to support a claim for a rebate or reduction in premiums for the upcoming policy period. On the other hand, capital providers can determine the cost of capital or premiums by considering the observable characteristics of each operator they offer assurance.

For instance, operators that possess significant risk management and safety programmes can be provided with more advantageous premiums. In such circumstances, operators that do not meet the required standards of safety may face complete denial of financial coverage. The chapter also finds that some mechanisms, like letters of credit, provide regulatory agencies with nearly immediate access to restricted cash to remedy the damage by the polluter. The fact that under normal circumstances the burden shifts from the government agency responsible for proving its claim to payment and seeking the requisite funds to the polluter to provide evidence that they are not liable. The removal of such bottlenecks also makes this instrument attractive.

The chapter also found that bonds offered by the industry to guarantee the appropriate assurance for cleanup and remediation obligations must encompass all possible costs and be rigorously enforced. The chapter showed that even though EAB not only reflects the environmental costs of production but also transfers the liability for environmental risk associated with these costs to the operators, rather than externalising it to the government or society as a whole. In order to achieve this objective, the EAB integrates components from two economic mechanisms: (1) a deposit refund incentive designed to promote preventive behaviour and (2) guaranteed liability coverage aimed at remediating environmental damage. The determination of the EAB's scale is contingent upon the policymaker's aims and ultimately encompasses an array of economic, political, and social considerations. For example, considering potential limitations on income, policymakers may decide that the EAB amount should be adequately large to promote conscious behaviour while remaining below the amount needed to pay the cost of the most severe damages in the event of their occurrence. Implementing comprehensive strategies is essential in order to guarantee sufficient risk safeguards. The regulations must be tailored to the unique location and apply to all parties who possess interests in oil and gas or related facilities. Consequently, governmental oversight is necessary to guarantee that FSR coverage remains in effect even during changes in ownership.

Finally, from this analysis, the key findings in this chapter are financial security seeks to mitigate the danger of insolvency or unavailability of polluters caused by NOSDRA-related costs.

6.3. Implications from Summary Chapters

1) Legal and Regulatory Reforms - Enhanced Legal Framework: The study's findings indicate a need for comprehensive reforms to strengthen the legal framework governing corporate environmental liability (CEL) in the Nigerian oil and gas sector. This includes 1. clearer definitions of liability, stricter enforcement provisions, and the harmonisation of existing laws to reduce overlaps and conflicts between regulatory agencies. –

2). Polluter Pays Principle (PPP) Integration: Effective express integration of the Polluter Pays Principle into national legislation can ensure that oil and gas operators are held financially accountable for environmental damage, promoting better environmental practices and reducing the burden on the public funds used by government and the communities inhabited near the impacted sites.

3). Institutional Improvements - Coordination Among Agencies: The study underscores the importance of improving coordination between regulatory bodies such as NOSDRA, DPR, and MPR. Establishing a central coordinating body or enhancing inter-agency communication can streamline efforts, reduce jurisdictional conflicts, and improve regulatory efficiency.

4). Capacity Building: Investment in capacity building for regulatory institutions is crucial. This includes providing adequate funding, technical training, and resources necessary for effective monitoring, enforcement, and response to environmental incidents.

5). Financial Security Mechanisms – Introduction of Financial Instruments: The study highlights the need for robust financial security mechanisms, such as environmental bonds, insurance, and compensation funds, to ensure that sufficient financial resources are available to address environmental damages. These mechanisms can provide a safety net for rapid

response and remediation efforts. – Mandating Environmental Insurance: Requiring oil and gas companies to carry environmental liability insurance can provide additional financial security and ensure that polluters bear the cost of remediation and compensation.

6). Enhancing Compliance and Enforcement - Stricter Penalties and Incentives: Implementing stricter penalties for non-compliance and providing incentives for adherence to environmental standards can enhance regulatory compliance. This dual approach can motivate companies to adopt better environmental practices.

7). Transparency and Public Involvement: Increasing transparency in regulatory processes and involving local communities and civil society in monitoring and enforcement can enhance accountability. Publicly accessible databases of environmental incidents and company compliance records can drive better corporate behaviour through public scrutiny.

8). Broader Environmental and Economic Implications - Strengthening CEL and PPP frameworks can contribute to more sustainable development in Nigeria. By requiring firms to disclose their environmental impact, the country can reduce ecological degradation and promote long-term economic stability.

9). Community Protection and Empowerment: Improved regulatory frameworks can better protect local communities from environmental harm caused by the oil and gas industry. Empowering communities through involvement in regulatory processes can enhance their resilience and ability to advocate for their environmental rights.

10). International Comparisons and Best Practices – a) Learning from Global Examples: The comparative analysis with other jurisdictions highlights best practices that Nigeria can adopt. Also, implementing internationally recognised standards and practices can elevate the country's environmental regulatory framework and align it with global norms.

11). Regional Leadership: By adopting and enforcing robust CEL and PPP frameworks, Nigeria can position itself as a leader in environmental regulation within the region, potentially influencing neighbouring countries to improve their own environmental policies.

12). Impact of Technological Innovations: Exploring the impact of technological innovations in monitoring and managing environmental liabilities can provide new tools and methodologies for improving regulatory efficiency.

13). Economic Analysis: Detailed economic analysis of the cost-benefit implications of enhanced CEL frameworks can provide further justification for reforms and illustrate the economic advantages of robust environmental regulation. By addressing these implications, policymakers, regulatory agencies, and industry participants can cooperate to develop a more effective and sustainable framework for managing corporate environmental liability in the Nigerian oil and gas sector.

6.4 **Future Research Directions** –Future research should focus on longitudinal studies to assess the long-term effectiveness of implemented reforms and financial security mechanisms in reducing environmental damage and enhancing corporate accountability.

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