

SUSTAINABLE DEVELOPMENT OF OIL & GAS IN THE NIGER DELTA

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Kingsley Ekwere
aus Nigeria

Erstgutachter: Prof. Dr. Lagoni
Zweitgutachter: Prof. Dr. Klatt

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**SUSTAINABLE DEVELOPMENT OF
OIL AND GAS IN THE NIGER DELTA**
LEGAL AND POLITICAL ISSUES

University of Hamburg

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OIL AND GAS IN THE NIGER DELTA
LEGAL AND POLITICAL ISSUES**

By

KINGSLEY UDO EKWERE

**Under the Supervision of
Professor Rainer Lagoni**

A DISSERTATION

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DEDICATION

Dedicated to my wife Ofonime and children

Idiongo

Ibiangake

NdunoAbasi

Star and Gold

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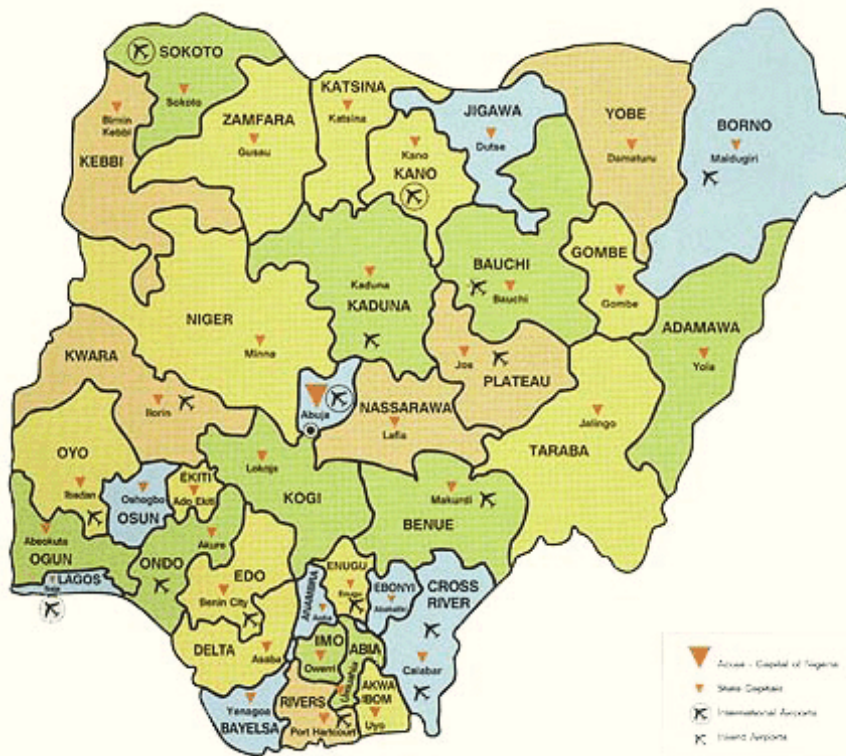
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Nigeria. Nigeria is located on the West Coast of Africa and is the most populous black country in the world, bordering the North Atlantic Ocean, between Benin and Cameroon. Nigeria covers 356,668 sq miles (923,7770 sq kilometres). It is about the same size as California, Nevada and Utah combined. Nigeria is diverse in people and culture. The history of the country goes beyond to 500 BC when the Nok people were the inhabitants. In 1861 Lagos was colonized by the British and in 1914, the Northern and Southern Protectorates were amalgamated into a single country. Nigeria became independent in 1960.



LISTS OF ABBREVIATIONS

ADF	African Development Bank
API	American Petroleum Institute
B/D	Barrel per day
BBL	Barrels
BCF	Billion Cubic Feet
BEP	Best Environment Practice
BP	British Petroleum
CAA	Clean Air Act
CAAA	Clean Air Act Amendment
C-A-C	Command and Control
CFC	Chlorofluorocarbon
CFT	Cubic Feet
CSD	Commission for Sustainable Development
CSOs	Civil Society Organisations
DPR	Department of Petroleum Resources (Nigeria)
DTI	Department of Trade and Industry (UK)
E&P	Exploration and Production
EC	European Community
ECA	Economic Commission for Africa
ECOWAS	Economic Community of West African States
EEC	European Economic Commission
EEZ	Exclusive Economic Zone
EIA	Environmental Impact Assessment
ELJ	Environmental Law Journal
EM&E	Environmental Monitoring and Evaluation
EMP	Environmental Management Plan
ER&I	Environmental Reporting and Information

FDI	Foreign Direct Investment
FEPA	Federal Environmental Protection Agency
GDP	Gross Domestic Product
GEF	Global Environment Facility
GNP	Gross National Product
HNS	Hazardous and Noxious Substance by Sea
IAGC	International Association of Geographic Contractors
ICC	International Chamber of Commerce
ICJ	International Court of Justice
IFC	International Finance Corporation
IGO	Inter-Governmental Organisation
ILC	International Law Commission
ILO	International Labour Organisation
ILM	International Legal Materials
ILR	International Law Reports
IMF	International Monetary Fund
IMO	International Maritime Organisation
IOC	International Oil Company
IOCs	International Oil Companies
IP	Institute of Petroleum
IUCN	International Union for the Conservation of Nature
JV	Joint Venture
LNG	Liquefied Natural Gas
MEAs	Multilateral Environment Agreements
MMSCFD	Million Standard Cubic Feet Daily
MNEs	Multinational Enterprises
MNOCs	Multinational Oil Companies
MOSOP	Movement for the Survival of Ogoni People
MOU	Memorandum of Understanding

MUP	Manchester University Press
NAFTA	North American Free Trade Agreement
ND	Niger Delta
NDDC	Niger Delta Development Commission
NGOs	Non-governmental Organisations
NNPC	Nigeria National Petroleum Corporation
NPE	National Policy on the Environment
NRCC	Natural Resources Conservation Council
OAU	Organisation of African Unity
OBM	Oil Based Mud
ODA	Overseas Development Assistance
OECD	Organisation for Economic Co-operation and Development
OEL	Oil Exploration Licence
OML	Oil Mining Lease
OMPADEC	Oil Mineral Producing Areas Development Commission
OPEC	Organisation of Petroleum Exporting Countries
OPL	Oil Prospecting Licence
PPP	Public Private Partnership
PSA	Production Sharing Agreement
PSC	Production Sharing Contract
PTF	Petroleum Trust Fund
SADC	South African Development Co-operation
SARP	Site Abandonment and Rehabilitation Plan
SIA	Strategic Integrated Assessment
SIA	Social Impact Assessment
SMP	Social Management Plan
SMS	Safety Management Systems

SPP	Spill Prevention Plan
SRP	Spill Response Plan
TBL	Triple Bottom Line
TCF	Trillion Cubic Feet
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNCTD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNGAOR	United Nations General Assembly Official Records
UNIDO	United Nations Industrial Development Organisation
UNTS	United Nations Treaty Series
US	United States
USAID	United States Agency for International Development
WCED	World Commission on Environment and Development
WMDDP	Waste Management Disposal and Deposit Plan
WTO	World Trade Organisation

JOURNAL ABBREVIATIONS

AC	Appeal Cases
All ER	All England Law Report
AJIL	American Journal of International Law
CZMJ	Coastal Zone Management Journal
Geo.Int`I Env. L. Rev.	Georgetown International Environmental Law Review
Harv. LR	Harvard Law Review
HRLJ	Human Rights Law Journal
ICLQ	International and Comparative Law Quarterly
IJMCL	The International Journal of Marine and Coastal Law
JAL	Journal of African Law
JEL	Journal of Environmental Law
JENRL	Journal of Energy and Natural Resources Law
JWTL	Journal of World Trade Law
L.& Pol`y	Law and Policy
Mel.ULR	Melbourne University Law Review
MEAs	Multilateral Environment Agreements
MLR	Modern Law Review
NLR	Nigerian Law Report
N.Y.U.L.Rev.	New York University Law Review
NRF	Natural Resources Forum
NRJ	Natural Resources Journal
NWLR	Nigerian Weekly Law Report
OGJ	Oil and Gas Journal
OGLTR	Oil and Gas Law and Taxation Review
OJL	Official Journal of the European Community

PE	Petroleum Economist
PIW	Petroleum Intelligent Weekly
RFF	Resources for the Future Fund
Rocky Mt.Min.L.Inst.	Rocky Mountain Mineral Law Institute
Stan.J.Int`I L.	Stanford Journal of International Law
Tex.Int` L. J.	Texas International Law Journal
UILR	University of Ibadan Law Review
World Dev.	World Development
Yale JIL	Yale Journal of International Law
Yale LJ	Yale Law Journal

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CHAPTER ONE

INTRODUCTION

1.1 APPROACH AND THEORETICAL FRAMEWORK OF THE STUDY

1.1.1 Purpose and the Subject Matter of the Inquiry

Since the late 1980s, the Niger Delta region of Nigeria has become the venue for mobilization and protests by littoral states on the one hand and oil bearing communities and civil society groups¹ on the other hand. They are protesting not only against ownership and control of oil and gas² and the distribution of its benefits, but also challenging policies and practices that disadvantage the region, destroy its environment³ and impoverish its people.

The purposes of this study are four fold. Our first task is to attempt an overview of the issue of ownership of oil and gas in Nigeria. The

¹ In the broadest sense, civil society has been characterised as a sphere of social life that is public but excludes government activities. See Errol Meidinger, "Law Making by Global Civil Society: The Forest Certification Prototype", Baldy Centre for Law and Social Policy, State University of New York at Buffalo, Buffalo, NY (2001). As used in this work, civil society includes the organisations of the professions, labour, children and youth, women, peasants, indigenous peoples and communities, non-governmental organisations, the scientific and technological community, development, environmental and civil right groups that build identities and platforms in respect of collective claims, civil actions and solutions. It is the layer of voluntary, popular, public and social action of non-state actors that utilize social, cultural, political and ethnic networks and non-state activities in pursuance of objectives, which are usually of a public nature. See C. Young, "In search of Civil society in Harbeson *et al.*, *Civil Society and the State in Africa*, (1992), p. 35-50.

² In Nigeria, petroleum or oil and gas is defined as "...mineral oil (or any related hydrocarbon) or natural gas as it exists in its natural state..." In this work, except as otherwise stated, Petroleum or oil and gas is used as a generic term for oil and gas resources. Petroleum Act 1969, Laws of the Federation 1990, C. 350, S.14. (hereinafter Petroleum Act). See also Elsvier, *The Petroleum Handbook*, 6th ed. (The Netherlands: Shell International Petroleum Company Limited, 1983), p.1

³ Environment is defined as the whole complex of factors (as soil, climate, and living things) that determine the form and survival of an organism or ecological community or "the social and cultural conditions that influence the life of a person or human community". See Webster's New Encyclopedic Dictionary (New York: Black Dog and Leventhal Publishers Inc., 1993, p. 336). For the purpose of this work, the term 'environment' encompasses the totality of physical and

second task is to investigate if the principles of law and contemporary development in international environmental law have been applied to protect the environment and safeguard the environmental rights of individuals, communities and the society in the Niger Delta. Our third task is to examine the principles of sustainable development⁴ and its implication on petroleum development in Nigeria. In spite of its contribution to national wealth, the Niger Delta is the poorest in terms of economic and infrastructural development. This has given rise to the emergence of NGOs and civil society groups demanding equity in the distribution of oil wealth. They are also involved in the formulation, implementation, and enforcement of environmental laws in the Niger Delta. Accordingly, our final task is to probe the real significance of increased activities and influence of NGOs and civil society groups in the Niger Delta.

1.1.2 Research Questions

In relation to the first task, the question to ask is as between the Federal Government, littoral states and oil bearing communities, who is vested with ownership of oil and gas in Nigeria? This enquiry has become necessary following agitations by littoral states/oil bearing communities that they, and not the Federal Government are vested with ownership of oil and gas located onshore and offshore in the territorial sea and continental shelf of Nigeria.

For the second task, the question to ask is what is the state of the existing petroleum, and oil related environmental laws and regulations in

human conditions on earth. For other definitions of the environment, see Birnie, P. W. and Boyle, A. E. *International Law and the Environment* (2nd ed. Oxford, 2002), pp. 3-5

⁴ Sustainable development has been described as “development that meets the needs of the present without compromising the ability of future generations to meet their needs”. See World Commission on Environment and Development (WCED), *our common future*, (Oxford University Press, Oxford, 1987), p. ix.

Nigeria? Another related question is, how have the various problems associated with petroleum development been address in the Niger Delta? Our aim is to see how effective have the laws been in addressing environmental issues.

The question to ask for the third task is, in relation to petroleum development, what is sustainable development of petroleum in Nigeria? Our aim is to find out if the petroleum industry in the Niger Delta region has embraced the concept of sustainable development.

Finally, in relation to the fourth task, the question to ask is, is the rise in influence and prominence of NGOs and civil society groups in the Niger Delta region an indication of the relative decline in the duties and responsibilities of the government in environmental governance?

1.2 LITERATURE ON NIGERIA'S OIL AND GAS

The literature on oil and gas and the environment in Nigeria are enormous. Studies conducted on petroleum development in the Niger Delta have concentrated on the pros and cons of ownership of petroleum resources. There are also some studies on sustainable development of natural resources in the Niger Delta. However, very few writers have gone beyond these pros and cons to design a legal and institutional framework for a lasting peace in the Niger Delta. This is what this study intends to accomplish.

Etikerentse,⁵ Frynas,⁶ Ahmad Khan⁷, Kachikwu⁸, Akpan⁹ and Omoregbe¹⁰ have all made very brilliant and excellent contributions.

⁵ Etikerentse, G. Nigeria: Nigerian Petroleum Law (Macmillan, 1985)

⁶ Frynas, Georg. Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities, Transaction Publishers, New Brunswick/London, 2000 at p. 9.

⁷ Ahmad Khan, S. Nigeria: The Political Economy of Oil (Oxford: Oxford University Press, 1994)

⁸ Kachikwu, E.I. "Legal Issues in the Oil and Gas Industry" Vol. 2 No. 9 1989 G.R.B.P.L. 33

⁹ Akpan, G.S. "Nigeria's LNG Programme: Problems and Prospects" (1997) 7 O. G.T.L.R. 264

Kachikwu, for instance, has given a broad overview of the relevant legal issues in the Nigeria's oil and gas sector and various legislations that relate to them.

Omotola¹¹ and Worika¹² have both given very insightful, literate and succinct analysis of environmental laws and policy of petroleum development and compensation.

One very significant contribution to the ongoing bathymetrical mappings of the littoral states of Nigeria is the work of Mobolaji Aluko,¹³ on the bathymetric data of the 200 meters isobaths of the littoral states. It shows the main sites of onshore production wells and offshore blocks in Nigeria's deep and ultra deep waters.

The brilliant contributions of S. M. Ng'ang'a, S. Nichols and D.Monahan,¹⁴ on the delineation of seaward limits of a coastal marine protected area are very useful as guide in the identification of resources and the legal boundaries for hydrocarbons and natural gas.

Some NGOs like the Global Policy Forum,¹⁵ World Council of Churches¹⁶ and Human Rights Watch,¹⁷ have studied the environmental and social impacts of oil operations in Nigeria.

¹⁰ Omoregbe, Y. 'The Question of the Ownership of Natural Gas in Nigeria' (1988/89) 3 O.G.T.L.R.75

¹¹ Omotola, J. A. ed., Environmental Laws in Nigeria including Compensation (Lagos : Faculty of Law, University of Lagos, 1990)

¹² Worika, I.L. Environmental Law and Policy of Petroleum Development (Port Harcourt, Nigeria : Anpez Centre for Environment and Development, 2002)

¹³ Aluko, M.E. " On the Resource Control Battle : From Dichotomy to Quantonomy, From Isopatial to Isobaths in <http://www.ngex.com/personalities/voices/mwe021903baluko.htm> visited on 27.06.09

¹⁴ N'ang'a, S. M., S. N. Nichols and D. Monahan " The Role of Bathymetry Data in a Marine Cadastre: Lessons from the Proposed Muequash Marine Protected Areas in http://www.thsoa.org/hy03/9a_1.pdf visited 27.06.07

¹⁵ See <http://www.globalpolicy.org/security/natres/oil/2004/0729reckless...visited> 27.06.09

¹⁶ Robinson, Deborah. Ogoni – The Struggle Continues, (2nd ed. Geneva: World Council of Churches, 1996), p. 9

¹⁷ See <http://hrw.org/reports/1999/nigeria/> 27.06.09

The present work is to review and co-ordinate all these strategies within an overall orientation to provide a way forward to the lingering crisis in the Niger Delta.

1.3 METHODOLOGY

The approach to be adopted in this study is historical, comparative and analytical. Nigeria's long history of oil and gas operations coupled with the marginalisation of oil producing communities makes the historical approach a preferred option.

The comparative approach is a derivative of the need to draw from the experience in other jurisdictions such as New Zealand, Australia and the United States.

The account is also analytical in its critical examination as well as appraisal of the emerging issues and trends. It also adopts a multidisciplinary approach which seeks to draw from the principles and rules of international environmental law, petroleum law and international law of the sea.

It is equally prescriptive as it recommends equity in the distribution of oil wealth through dividend transfers as one panacea of solving the Niger Delta crisis.

The debate on the seaward limit of littoral states and resource control in Nigeria has gone on for a long time and is unlikely to end any time soon. Many papers, articles and policy briefs have been written on this subject, both supporting and rejecting the idea of extending littoral state's seaward reach to the continental shelf.

Many expected the 200 meters isobaths granted littoral states to finally address the issue. This was not to be.

To date, this debate has not been conducted in a constructive manner. The venues range from public speeches, newspapers, articles and conference proceedings to articles in learned journals.

These articles and texts are found in diverse sources which make it difficult for scholars, students, practitioners or policy makers to study all proposals together.

So far, there has been no comprehensive text on the tripartite relationship between the law of the sea, environmental law and oil and gas operations which the interested researcher or decision-maker could turn to. This work is intended to fill that gap.

The work draws on the findings of the current debate and elaborates the issues further in the light of the emerging trends.

1.4 SIGNIFICANCE OF THE STUDY

Concerns about the environmental consequences of petroleum development in the Niger Delta has brought to the fore the necessity of examining the relationship between exploration and exploitation of the country's natural resources and the management of the environment for economic development. The present work is significant not only because it reviews environmental policies and programmes put in place to promote sustainable development, but because it goes ahead to design legal and institutional framework, which if put in place, will reduce the tensions in the region to the barest minimum.

1.5 OUTLINE OF THE STUDY

The work is organised in ten chapters with **chapter 1** providing the approach and theoretical framework of the study.

The **Chapter 2** surveys the ownership of oil by investigating the common Law, pre and post independence constitutional and statutory arrangements on ownership of petroleum in Nigeria. **Chapter 3** provides a brief analysis of land ownership in the Niger Delta area of Nigeria. The Niger Delta is chosen because it is the only area in Nigeria that is endowed with abundant oil and gas resources.

Chapter 4 critically appraises the landmark decision of the Supreme Court of Nigeria on the seaward limit of littoral states. This chapter will probe the legal principles applied by the Supreme Court to define Nigeria's coastline and the numerous maritime zones which are measured from it. The chapter further investigates the Supreme Court's application of colonial Orders in Council and foreign cases to determine the seaward limit of littoral states. The attitude of the Supreme Court towards historical claim to certain portions of the sea by communities indigenous to the littoral states is also examined.

Chapter 5 delves into the issue of environmental regulation of oil and gas exploration and production in Nigeria. This chapter will identify major issues involved in the environmental regulation of the oil and gas industry in Nigeria.

The people of Niger Delta have been exposed to environmental hazards of unimaginable proportion since oil was discovered in the region about four decades ago. **Chapter 6** gives an overview of petroleum development process and highlights the potential environmental impacts of oil and gas activities. The incidents of environmental and socio-cultural impacts of oil production on the Nigerian environment are also examined.

Chapter 7 considers the strategic aspects of environmental management and recommends some proactive management tools for regulating the environmental aspects of petroleum development in the Niger Delta.

Chapter 8 is devoted to sustainable development of oil and gas in the Niger Delta, a question of vital importance but one overlooked by the petroleum industry in Nigeria.

The emerging role of individuals, civil society, and NGOs in the formulation, implementation and enforcement of environmental laws are examined in **Chapter 9**.

Chapter 10 is conclusion

Tables showing Nigeria's natural Gas and crude oil production

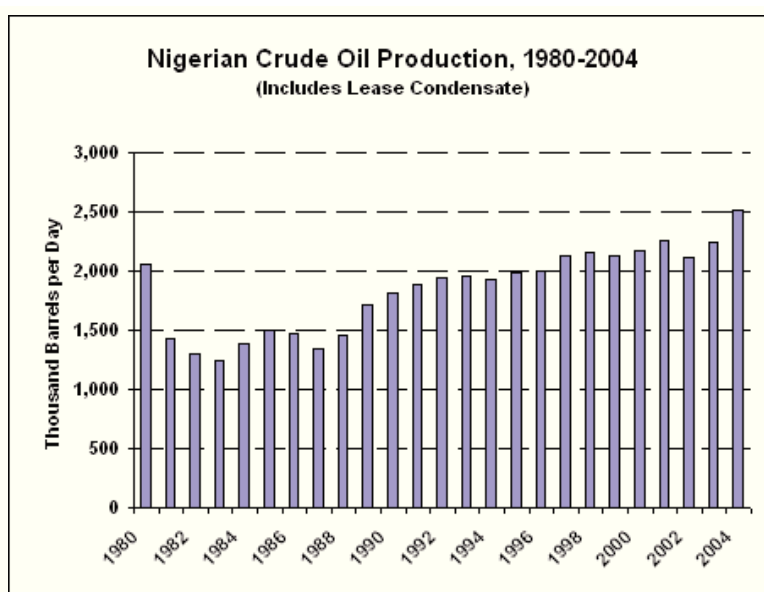


Table 1

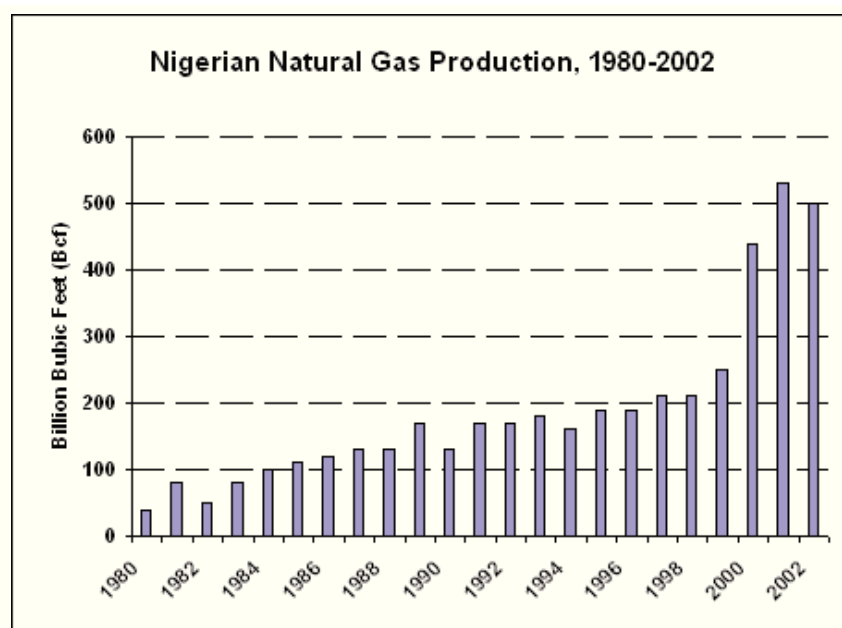


Table 2

Source¹⁸

¹⁸ Nigeria Country Analysis Brief

CHAPTER TWO

OWNERSHIP OF OIL AND GAS IN NIGERIA

2.1 INTRODUCTION

For almost two decades, the Niger Delta region has been the venue for increased mobilization and protests by oil bearing communities and NGO's against multinational oil companies and the government of Nigeria.

This chapter, which discusses the legal and institutional framework of petroleum operations in Nigeria, focuses on the evolution of the Nigeria's oil industry and the numerous petroleum legislations in Nigeria.

It is intended as background to an analysis of the ownership of oil and gas in Nigeria. Our main concern is to find out if indeed ownership of oil is vested in the littoral states and oil bearing communities or in the Federal Government.

The issue of ownership of natural resources is presently at the center of crisis in the Niger Delta. It is thus imperative to examine the legal framework regulating oil operations in Nigeria. It is also important to find out how these laws have shaped the relationship between the Federal Government and multinational oil companies on the one hand and the oil producing States/communities on the other.

In assessing the relationship between the Federal Government and the oil producing States/communities for example, the following questions may be asked: who owns mineral oil and gas in, under, or upon land or in, under the territorial waters and the continental shelf of Nigeria? What are the laws that regulate the management and control of oil and gas in Nigeria? How did the laws originate and evolve to this present day?

We now attempt to address these issues by examining the origins of Nigeria's oil before and after independence.

2.2 PRE-INDEPENDENCE ERA

The earliest recorded concessionaire in the Nigerian oil industry was a German bitumen company granted rights to prospect for oil in the British protectorate of Lagos in 1908, with a consortium of Shell D'Arcy Petroleum Company and British Petroleum Company (Shell B.P.) acquiring a second concession in 1937.¹⁹

Shell-BP drilled its first well in 1951 at a site close to Ihuo village, some sixteen kilometers northeast of Owerri. In 1953, Shell-BP moved its operations to its Akata site where some 450 barrels of oil were drilled. Shell-BP discovered oil in commercial quantity in 1956 at Oloibiri in Bayelsa State and production began in 1958. Between 1958 and 1960, Shell-BP discovered its Bomu oil field located in the Ogoni land area.

In the early 1960s, revenue from oil accounted for less than 10% of Nigeria's revenue base. By this time, agricultural products such as palm oil, palm kernels, groundnuts, cocoa, rubber and mineral resources such as tin, coal, iron and columbite were the major revenue earners for the country. More than 70% of the people were employed in agriculture or related fields.²⁰

¹⁹ This pioneering work was disrupted following the outbreak of World War 1. At the end of the war, the Nigerian Bitumen Company was not allowed to resume operations in Nigeria. The strained relationship between Britain and Germany during and after the war may have been responsible for non resumption of exploratory work by the German firm in Nigeria. Nigeria was then a colony of Britain. See Etikerentse, supra n. 5, p.11

²⁰ Ikein, Augustine. *The Impact of Oil on a Developing Country: The case of Nigeria*, New York: Pareger, (1990) p. 1

While the late 1960s witnessed a shift away from agricultural production, the early 1970s saw Nigeria becoming a major oil producing nation with an average production of 2.3 million barrels per day.²¹

The impact of oil boom on agriculture is captured thus:

“During the early post-World War II era, agricultural products dominated the export trade; Nigeria was one of the world’s leading exporters of cocoa, groundnuts and palm oil, and a notable exporter of rubber, cotton, and hides. There has, however, been a rapid decline in the size of the agricultural sector, whose contribution to the gross domestic products (or GDP) fell from around 60 percent in 1960 to about 21 percent in 1977, and eventually to less than 10 percent in 1978. Unlike agriculture, however, oil production employs a relatively small number of workers and accounts for only 1.3 percent of the total modern sector employment in Nigeria. Consequently, the oil industry has almost displaced the agricultural economy, making Nigeria a petroleum-based single commodity reliance economy”²²

From the colonial era to the eve of Nigeria’s independence in 1960, Shell BP²³ dominated the petroleum industry in Nigeria.

2.3 PRE-INDEPENDENCE LEGAL PROVISIONS

The Policies and legal framework guiding petroleum development in Nigeria date back to 1914, when the British colonial administration enacted the Mineral Oils Ordinance No. 17 (1914) and the Mineral (Amendment) Ordinance No. 1 (1925).

The 1914 Mineral Oil Ordinance was enacted:

²¹ Id. P. 1

²² Id. pp. 19-20.

²³ From 1979, Nigerian assets of British Petroleum (BP) were nationalized. See Frynas, supra n. 6, p.32

“To regulate the right to search for, win and work mineral oil”

These ordinances granted Britain a total right of alienation or disposition of all crude oil discovered in Nigeria. The mineral concession regime at that time gave Britain a monopoly covering the whole Nigerian territory and consequently barred non-British companies and citizens from acquiring mineral-oil rights.²⁴

Although the 1914 Mineral Oil Ordinance made no provisions for ownership of oil in Nigeria, subsequent amendments were unequivocal regarding ownership of oil and gas in Nigeria. For instance section 3 (1) of the Mineral Oil Act 1946 provided that:

The entire property in and control of all mineral oils, on, under or upon any lands in Nigeria, and all rivers, streams and water courses throughout Nigeria, is and shall be vested in the crown. Save in so far as such rights may in any case have been limited by an express grant made before the commencement of this Act.

This was the inception of the legal regime that has shaped the ownership of oil in Nigeria. The result of all these laws was to vest in the Crown/State the absolute right and control over oil resources.

By subsequent further amendment, the entire submarine areas of Nigeria’s territorial areas were vested in the crown. Following the transfer of political power to Nigeria at independence in 1960, ownership of mineral resources hitherto under the authority of the British Crown, became vested in the government of Nigeria.

²⁴ Section 6(1)(a) of the Mineral Oils Ordinance No. 17 of 1914 provided that: "No lease or license shall be granted except to a British subject or a British company and its principal place of business within Her Majesty's dominions: the Chairman and the Managing Director (if any) and the majority of the other directors of which are British subjects. "

2.4 NIGERIA'S OIL INDUSTRY AFTER INDEPENDENCE

From the later part of 1959 to the eve of Nigeria's independence in 1960, the dominance of Shell-BP in the Nigerian oil industry was gradually eroded with the arrival of other international companies from Europe and the United States of America. The amendment of the Mineral Oils Ordinance No. 17 (1914) and the Oil Mineral (Amendment) Ordinance No.1 (1925) by the Mineral Oils (Amendment) Act of 1958, paved the way for the entry of foreign (non-British) companies into the Nigerian petroleum industry. However, the terms of the concession granted to Shell-BP gave it an early start and ensured the dominance it maintains today.

Some of the non-British oil companies granted license to explore for oil in Nigeria included: Socony-Vacuum (later renamed Mobil) obtained its first license in 1955, Tennessee (also known as Tenneco) was granted license in 1960, Gulf (later Chevron) got its license in 1961, American Overseas (also known as Amoseas) was granted license in 1961, Agip (an Italian State-owned oil company) was granted license in 1962, SAFRAP of France (later Elf) was granted license in 1962, Philips and Esso got theirs in 1965

Frynas has asserted that:

“All six major foreign oil companies, which dominate the Nigerian oil industry today (Shell, Mobil, Chevron, Elf and Texaco) were already present in Nigeria by the early 1960s and were all producing by 1971.”²⁵

²⁵ Frynas, supra n. 6, p. 32.

2.5 POST INDEPENDENCE LEGAL PROVISIONS

On attainment of independence in 1960, the Federal Government was vested with the exclusive power to “legislate on mines and minerals, including oil fields, oil mining, geological surveys and natural gas in Nigeria.”²⁶

Interestingly, both 1960 and 1963 Constitutions maintained the colonial legacy in which ownership of mineral resources was vested in the crown.

The promulgation of the Petroleum Act of 1969 marked a watershed in the history of petroleum legislation in Nigeria. Its significance is that, among other things, it stipulates for the first time that the entire ownership and control of all petroleum in Nigeria is vested in the Federal Government of Nigeria. It also revised all the terms and conditions under which pre-1969 concessions were granted and indeed repealed *in toto* the Minerals Oils Ordinance of (1914), as amended. One of the fundamental changes introduced by the 1969 Petroleum Act is that it prescribes three types of grants to regulate petroleum operations in Nigeria: (i) the oil exploration license (OEL); (ii) the oil prospecting license (OPL); (iii); and the oil mining lease (OML).

The Petroleum Act Cap. 350 and its subsidiary legislation, the Petroleum (Drilling and Production) Regulations 1969, apart from vesting ownership and control of crude oil in the Federal Government, form the legal framework for petroleum development in Nigeria.

²⁶ See Part 1 item 25 Exclusive Legislative List, 1960 Constitution.

The position of the federal government as the owner and controller of oil in Nigeria is further substantiated by both 1979 and 1999 Constitutions.²⁷

In providing for the ownership of oil in Nigeria, the 1999 Constitution for instance stipulates under section 44 (3) that:

Notwithstanding the forgoing provisions in this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall be vested in the Government of the Federation.

A significant milestone in the history of ownership of oil and gas in Nigeria was reached in 2002 when the Supreme Court²⁸ held that the seaward limit of littoral states was the low-water mark of the land surface, and therefore, littoral states could not derive revenues from natural resources (including oil and gas) located beyond the low-water mark.

The Federal government had contended that

“Natural resources derivable from Nigeria’s territorial waters, continental shelf and exclusive economic zone are not derivable from any littoral state.”²⁹

Each of the littoral states contended that

“Its territory extends beyond the low-water mark onto the territorial waters and even onto the continental shelf and the exclusive economic zone.”³⁰

²⁷ In both Constitutions, the power to legislate on mines and minerals, including oil fields, oil mining, geological surveys and natural gas is vested in the Federal Government. See e.g., Second Schedule, Exclusive Legislative List, item 39, 1999 Constitution.

²⁸ Attorney General of the Federation v Attorney General of Abia State, (2002) 6 N.W.L.R. (Part 764), 542

²⁹ Id. p. 639

³⁰ Id. p. 637

The Court reviewed the history of the common law, colonial and post colonial statutes and constitutional laws in Nigeria and found that, as successor to the British crown, the Federal Government owns and controls natural resources seaward of the low-water mark. With that history the court had no trouble concluding that:

“The powers and authority of the Federal Government over the entire maritime belt, or ‘territorial waters’ of Nigeria are beyond dispute. In my view, it is only the Federal Government, and it alone, that can lawfully exercise governmental powers over the maritime belt or territorial waters of Nigeria.”³¹

2.6 OIL COMPANY AGREEMENTS

To further demonstrate its control and ownership of oil and gas in Nigeria, only the Federal Government through its appropriate agencies like the Nigerian National Petroleum Corporation (NNPC) and the Department of Petroleum Resources (DPR) can conclude petroleum exploration, exploitation and production agreements. Apart from oil exploration license, oil prospecting license and oil mining lease mentioned above, there are also other types of contractual arrangements for the exploration and production of petroleum in Nigeria. These are the Joint Ventures (JVs), Production-sharing Contracts (PSCs) and Service Contracts (SCs).

2.6.1 Joint Ventures

Joint ventures come into being after an initial agreement has been signed. It is established when oil companies form an operating company for exploration and exploitation purposes with the host country

³¹ Id. p. 890. For more analysis on this case, see chapter 4 below.

participating.³² It is sometimes called a participation agreement and may lead to the formation of a third corporation. In the very early years of oil production, the Joint venture was the medium through which the Nigeria government (through NNPC) participated in oil operations.³³ In all Joint ventures, there is a working partnership between the contractors and the State oil company.

2.6.2 Production-sharing contracts

In this type of agreement, the contractors work principally for the government. Under this agreement, oil companies must agree to bear the cost involved in exploration, drilling and production. The company is also responsible for providing technical expertise. The company can only be reimbursed if oil is discovered in commercial quantity.³⁴

2.6.3 Services Contracts

The most common type of service contract is the risk service contract. Here, the contractor (usually an oil company) accepts all investment risks and provides all the funds and technical expertise needed for exploring, developing and producing oil. If oil is not found, the company receives no compensation for its exploration expenditures. If oil is discovered, the company has the obligation to work the field. When production begins, the contractor is reimbursed for its investment in cash, or with the right to purchase oil at a discount rate.³⁵

³² Etikerentse, supra n. 5 p. 41.

³³ Id.

³⁴ Id. p.42

³⁵ Id. p. 47

In all three arrangements, the title to the oil produced is vested in the Government while the investment risk and cost of production is assigned to the contractors and profit is shared on agreed percentage.³⁶

2.7 GAS

Apart from oil, Nigeria is endowed with abundant natural gas found mainly in the swampy areas of the Niger Delta. Nigeria is the eight largest producer of natural gas in the world, with probable reserves of 250 trillion cubic feet.

Although gas production is increasingly becoming important to Nigeria, there is a lack of gas utilization infrastructure with the result that between 70-75 per cent of produced gas is flared. The Government has mandated all oil companies to end gas flaring by 2009. This objective, it is believed, will result in many investment opportunities for gas projects. To encourage domestic gas investment, the Government has introduced some fiscal incentives, including exemption from valued added tax (VAT) and import duty on equipment and machinery intended for gas-projects development, together with a tax holiday under pioneer status for a period of five years. However, compared to oil, gas production in Nigeria is still relatively insignificant. Tables 1 and 2, shows natural gas production from 1980 to 2002, and crude oil production from 1980 and 2004.

For the time being, the largest gas project in Nigeria is the liquefied natural gas (LNG) venture³⁷ designed to utilize Nigeria enormous gas reserves. Moreover, the planned West African Gas Pipeline Project (WAGP) intended to export Nigerian gas to Ghana, Benin and Togo is finally moving towards construction, and there are good prospects for the

³⁶ Ikenna, Nwosu, "International Petroleum Law": Has it Emerged as a Distinct Legal Discipline? *African Journal of International and Comparative Law*, Vol. 8 (1996), p.443.

³⁷ For more on incentives for the (LNG) project, see Emiola Chijioko, "Nigeria's LNG venture: Fiscal Incentives, Investment Protection Schemes and ICSID Arbitration", *African Journal of International and Comparative Law*, vol. 8 (1996), p.169.

realization of the of the \$ 7 billion Trans-Saharan Gas Pipeline, linking Nigeria to the Algerian gas-pipeline network and the European markets.

2.8 MULTINATIONAL COMPANIES OPERATING IN NIGERIA

About 90 per cent of foreign direct investments in Nigeria are in the oil and gas extraction sector. The industry is dominated by multinational oil companies, which accounts for 99.5 per cent of total production of 2.04 million barrels of oil and 1,900 million standard cubic feet of gas daily.

These companies operate in joint partnership with the State owned Nigerian National Petroleum Corporation (NNPC). While the NNPC controls 60 per cent of all the concessions, it lacks the technical and organisational expertise to engage in actual production. Thus, actual control remains with the multinational oil companies.

The key players in the oil and gas sector in Nigeria are the Royal Dutch Shell, which is the biggest and the oldest oil producer, Chevron, Agip, Mobil, Exxon and others.

The statistics is shown below:

Table 3

Consortium	Shareholder	Operators	Production Barrels/daily	%
Shell petroleum development company of Nigeria	NNPC (55%) Shell (Neth./GB (30%) Elf (France, 10%) Agip (Italy, 5%)	Shell	895,000	42.2%
Mobil Producing Nigeria Unlimited	NNPC (58%) Mobil (U.S., 42%)	Mobil	450,000	21.2%

Chevron Nigeria Limited	NNPC (58%) Chevron (US, 42%)	Chevron	395,000	18.6%
Nigeria Agip Oil Company (NAOC)	NNPC (60%) Agip, (Italy, 20%) Phillips (US, 20%)	Agip	160,000	7.5%
Elf Petroleum Nigeria Limited	NNPC (60%) Elf (France, 40%)	Elf	130,000	6.1%
Texaco Overseas (Nigeria) Petroleum Company	NNPC (60%) Texaco (US, 20%) Chevron (US, 20%)	Texaco	55,000	2.6%
Other Producers	Ashland (US) Deminex (Germany) Pan Ocean (Switzerland) British Gas (GB) Sun Oil (US) Conoco (US) BP (GB) Stetoil (Norway) Conoil (Nigeria) Dubri Oil (Nigeria)	Various	35,000	1.7%
Total Nigeria			2,120,0000	100 %

Source³⁸

³⁸ The Niger Delta: A Disrupted Ecology. The Role of Shell and other oils companies, Jan Williem Van Gelder and Jos Moerkamp (Amsterdam: Greenpeace, 1996:13)

2.9 CONCLUSION

Ownership of oil is of colonial heritage. As successor to the British Crown, the government of Nigeria is vested with the ownership of oil in any land or under her territorial waters and in the continental shelf. As the law stands today, neither the States nor oil bearing communities can legally assert title to crude oil anywhere in Nigeria.

It should however be observed that none of the above provisions made mention of ownership of Land even though oil is entrapped in land and cannot be exploited unless one has access to the land. Hence, the next chapter will briefly investigate ownership of land in Nigeria.

CHAPTER THREE

OWNERSHIP OF LAND IN NIGERIA

3.1 INTRODUCTION

Before colonialism, the territory of Nigeria was home to a variety of traditional customary laws, which were not only derived from, ancient custom but differed from one community to the other.

When Britain subsequently introduced common law into Nigeria, the existing customary rules were permitted to operate side by side with common law thus resulting in the plurality of legal systems.³⁹ The same could be said of other African Countries, like Ghana.⁴⁰

Prior to 1978, land tenure system in Nigeria was based on various systems of customary law. In the southern states of Nigeria, there was a dual system of land tenure, namely; customary land tenure system and land tenure system under the received English law. Under customary law, families and communities owned land, while under English law; the English legal concepts of individual ownership were recognized. However, the Nigerian Customary Law also has a concept of individual ownership.

The situation was somewhat different in the Northern states where control and disposition of native's land was vested on the colonial government.⁴¹ A significant turning point in the ownership of land in Nigeria was the promulgation of the Land Use Act in 1978. This chapter examines ownership of land before and after the passage of Land Use Act. It is important to stress from the onset that our discussion on land

³⁹ Allot, "The Future of African Law", in Hilda Kuper and Leo Kuper (eds.) African Development: University of California Press, 1965, pp. 220-221.

⁴⁰ Date-Bah, "Rights of Indigenous Peoples in Relation to Natural Resources Development: An African's Perspective" vol. 16, Journal of Energy and Natural Resources Law (1998), p. 396.

⁴¹ See Land and Native Rights Ordinance 1910.

ownership in Nigeria will only be limited to southern Nigeria which is presently the center of oil and gas activities.

3.2 OWNERSHIP OF LAND IN SOUTHERN NIGERIA PRIOR TO 1978

As already indicated, customary land tenure system in southern Nigeria is based on the native laws and customs of the various communities. These customary laws differ from village to village. However, these customary laws share a number of common features. One such feature is common ownership by the family or community. The principle of common ownership in customary land tenure was recognized by the Privy Council in *Amodu Tijani v. Secretary Southern Nigeria*⁴² when the court stated:

*“The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, the village or family have an equal right to the land, but in every case the chief or headman of the community or village, or head of the family, has charge of the land, and in the loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build upon, goes to him for it. But the land still remains the property of the community or family. He cannot make any important disposition of the land without consulting elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger.”*⁴³

⁴² (1923) 4 N.L.R. 18

⁴³ Id. p. 404. See also Elias, *Nigerian Land Law*, 4th ed. Sweet & Maxwell, London, 1971, p.72.

The above judgment clearly recognizes common ownership of land under customary law either within a family, village or community level. Each member of the family, village or community who desires a portion of it for cultivation or to build on it approaches the chief or the headman for a grant.

Among the Ibibio tribe for instance, land belongs to the family, village or the entire community. Land can also be inherited from ones ancestors. The family head or chief has the prerogative to make grants to whosoever desires a portion of it. Once granted, land could be held indefinitely. The chief is not an owner of village or family land but a trustee and therefore, cannot sell or dispose of any family or village land without the consent of the family or village as the case may be. Any money received by the chief for selling communal land must be shared within the community.

In the previous chapter, the fact that oil is vested in the Federal Government is not in dispute. But land continued to be commonly owned by families, villages and communities. This meant that while the necessary licenses for oil exploration and exploitation must be obtained from the government,⁴⁴ the oil companies had to approach oil-bearing/land owning families, villages and communities for a right of access to the land for its operations. This method ensured that families, villages and communities had some sense of participation in oil operations, as they received some compensation for granting access and for any damage to land and any surface rights thereon.

Until 1978, families, villages and communities could exercise their right of ownership over land by challenging compulsory acquisition by the government. In *Ereku v. the Military Governor of Mid-Western State*,⁴⁵

⁴⁴ In return, the oil company pays rents and royalties to government.

⁴⁵ (1974) 10 S.C. 59.

the Itsekiri Communal Land Trustees and other community representatives sued the government for compulsorily acquiring their land on behalf of a foreign oil company. The Supreme Court set aside the compulsory acquisitions⁴⁶ as unconstitutional, ultra vires and void.⁴⁷

Communal ownership was not only acknowledged, but well recognized by officers of government down from the colonial era⁴⁸. During this period, there was a clear distinction between oil rights and land ownership. While the government reserved the sole right to dispose of oil resources, the land was left in the hands of the local people, who collectively, reserved the right to either sale or lease it.

The chief as custodian and protector of communal land in most cases was reluctant and unwilling to sell or lease such land to outsiders. However, the government and oil companies viewed communal land ownership as an obstacle for easy access to land, for oil operations. This then prompted the government to look for ways of taking over land from the people to ensure that such lands were easily allocated for oil operations.

In 1978, the Land Use Act⁴⁹ was enacted with the result that land right was united with oil right thereby abolishing the pluralistic land tenure system in Nigeria and replacing it with a uniform land tenure system. The Act dealt a fatal blow on communal ownership by providing as follows:

“subject to the provisions of this Decree⁵⁰, all the land comprised in the territory of each state of the

⁴⁶ The Edict was made under the Public Lands Acquisition law (Amendment) Edict 1972 of Mid-Western State and allowed compulsory land acquisition if the land was, "required by any company or industrialist for industrial purposes."

⁴⁷ Erelu v. the Mil. Gov. Supra n. 45 at p. 74-75

⁴⁸ Ajomo, Ownership of Oil and the Land Use Act (1982), *Nigerian Current Law Review* 330 at p. 339.

⁴⁹ Cap 202. Laws of the Federation of Nigeria 1990 edition.

⁵⁰ The Act was initially promulgated as a Decree by a military government.

federation are hereby vested in the military governor of the state and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this decree”⁵¹

Although there may be disagreements on the actual interpretation of the above section⁵², as it stands today, the governors are the owners of lands located in each state of the federation. This implies that customary land owners have lost their communal land ownership derivable from the customary land tenure system. There are plethora of judicial authorities supporting the view that the governors are now vested with the ownership and title to lands in Nigeria.

In *L.S.D.P.C. v. Foreign Finance Corporation*⁵³, the Court of Appeal⁵⁴ held that:

“The ownership and title to land in Nigeria is now vested in the governors of the various states of the federation for the benefit of all Nigerians as a whole. Communal and individual title ownership (sic) to land is now a thing of the past. The conception of land being in the family for the past, present and future members of it is no longer valid. The freedom of alienation and dealing with the land which was vested in the heads of the family or traditional authorities is now vested in the government.”⁵⁵

The Supreme Court settled all divergent views on the ownership of land in Nigeria in the case of *Abioye v. Yakubu*⁵⁶. The apex Court held:

⁵¹ Section 1 of the Land Use Act 1978

⁵² See *Ajomo*, Supra n. 48 at 340 and *Omotola*, Supra n. 11 at 57.

⁵³ (1987) I.N.W.L.R (part 50) 413.

⁵⁴ The Supreme Court is the highest court in Nigeria with the court of Appeal being the next in ranking.

⁵⁵ See p. 444

⁵⁶ (1991) 5 NWLR (Pt. 190) 130.

- that the Land Use Act has removed the radical title in land from individuals Nigerians, families, and communities and vested the same in the governor of each state of the federation in the federation in trust for the use and benefit of all Nigerians (leaving individuals, etc with rights of occupancy); and
- that the Act has also removed the control and management of lands from family and community heads/chiefs and vested the same in the governors of each state of the federation (in case of urban lands) and in the appropriate local government (in the case of rural lands). Since the promulgation of the Act, land acquisition is now done under the Act.

One advantage of the Act from the point of view of the oil companies is that there is no delay in land acquisition for oil operation. With both oil and land now being vested in the government, procuring the necessary licenses to drill oil and leases to enter upon land are now relatively quicker and easier. On the government side, in addition to royalty and rents from oil, the government, as land owner, now receives compensation for land hitherto paid to families and communities. For the local people, once there is an acquisition of land by the government, they are only entitled to compensation for improvements to the land.⁵⁷

3.3 CONCLUSION

Since the chief, family head, village or community head were in most cases unwilling or reluctant to sell communal land to outsider including oil companies for oil operations, the key objective of the Land Use Act was to remove obstacles to land acquisition associated with communal land tenure system.

⁵⁷ Section 29 (29 of the Land Use Act 1978.

The government then enacted the Land Use Act which, was intended to disposed local people of title and ownership to land and vest the same on the government. Government action was prompted by the desire to ensure economic development of the region. Unfortunately, several decades of petroleum development rather than enhance the socio-economic well being of the people, has turned out to be a curse. Be that as it may, the above analysis has demonstrated that both oil and land are currently vested in the government.

CHAPTER FOUR

THE LANDMARK DECISION OF THE SUPREME COURT OF NIGERIA ON THE SEAWARD LIMIT OF LITTORAL STATES

4.1 INTRODUCTION

Nigeria is located on the West Coast of Africa in the Gulf of Guinea with an approximate coastline of about 853 kilometres.⁵⁸ The country is endowed with enormous oil and gas resources found both onshore on the swampy areas of the Niger Delta and offshore on her territorial sea and continental shelf.

The Federal Government currently owns all natural resources in Nigeria. The National Assembly is empowered by the Constitution to determine the formula for the distribution of funds in the Federation Account. Whatever formula is approved, the National Assembly is enjoined to take into account the derivation principle by "which not less than thirteen percent" of the revenue accruing to the Federation Account directly from natural resources shall be payable to a state of the Federation from which such resources are derived.⁵⁹

The issue which was not however addressed by the so-called derivation formula⁶⁰ was whether the offshore bed of the territorial sea, exclusive economic zone and continental shelf belonged either to the littoral states or the federal government. This culminated in a legal battle between the Federal Government and the 36 states of the Federation, including the eight littoral states as to the southern (or seaward), boundary of each of the littoral states.

⁵⁸ E. Egede, "The Nigerian Territorial Waters Legislation and the 1982 Law of the Sea Convention", 19 No. 2 *The International Journal of Marine and Coastal Law*, (2004), p.151.

⁵⁹ Section 162(2) of the 1999 Constitution.

⁶⁰ For more on the historical analysis of the derivation principle, see K. Ebeku, "Nigerian Supreme Court and ownership of offshore oil", (2003) 27 *National Resources Forum* 291-299

The boundary was important because of the extensive petroleum reserves that lay both onshore and offshore of the states coast. At stake were each party's proportionate share of the reserve, which would be based on where the state's legal shoreline was determined to be, and the extent of the state's seaward jurisdiction.

This chapter will consider mainly that aspect of the Supreme Court's decision on the seaward limit of littoral states. Our purpose is to probe the legal principles applied by the Supreme Court to define Nigeria's coastline and the numerous maritime zones which are measured from it. We will interrogate not only the Supreme Court's application of foreign cases and colonial orders-in-council in determining the seaward limit of littoral states, but also its attitude towards historical claims of certain parts of the sea by communities indigenous to the littoral states.

Following the 200 meters water depth isobaths granted littoral states, our search light will focus on the grant to find out if it was made under the 1958 Continental Shelf Convention⁶¹ or under the 1982 Law of the Sea Convention.⁶² We will also investigate if the grant is a quitclaim of the Federal Government's interest in that belt of water.

Ownership of oil and gas has pitched some nations in the Gulf of Guinea⁶³ against each other in a legal battle aimed at delimiting maritime

⁶¹ This Convention was adopted during the Law of the Sea Conference of 1958 (UNCLOS 1), and entered into force on 11th June 1964. Nigeria became a party to this Convention by virtue of Britain acceding to it on Nigeria's behalf - Nigeria being a British colony at that time. Upon gaining independence in 1960, this and other conventions and treaties earlier acceded to by Britain, were resubmitted to the United Nations Organisation as conventions to which Nigeria as an independent nation would be party. For a summary of UNCLOS 1, see G.G. Fitzmaurice, "Some Results of the Geneva Conference on the Law of the Sea", in 9 (1958) *International and Comparative Law Quarterly*, at 73-121

⁶² The 1982 Law of the Sea Convention described as the "Constitution of the Sea" was adopted on the 10 of December 1982 at Montego Bay, Jamaica by 130 votes to four with 17 abstentions. It entered into force on the 16 of November 1994. See UNCLOS 111, Official Records, vol. XVI, pp.152-167. Nigeria ratified the Convention on the 14 of August 1986.

⁶³ The Gulf of Guinea also known as the Bight of Biafra (or Bight of Bonny), has one of the most complex geographical settings with a deep indentation on the African continental coastline between cape Formoso and Cape Lopez. The territories of five states---Nigeria, Cameroon, Equatorial Guinea, Gabon, and São Tome and Principe---abut on the waters of the Gulf. See Nuno Antunes, "The Pending Maritime Delimitation in the Cameroon v Nigeria Case: A Piece in the Jigsaw Puzzle of the Gulf of Guinea", 15 No. 2 *The International Journal of Marine and Coastal Law*, (2000), p. 163 at 166-167 and p. 191.

boundaries between them. One such dispute was the Cameroon and Nigeria case decided by the International Court of Justice on the 10th of October 2002.⁶⁴ In the above case, the ICJ divided the maritime boundary between the two countries into two sectors. Sector one covered the territorial sea while sector two covered maritime delimitation of the exclusive economic zones and the continental shelves.⁶⁵ In view of the claim of ownership by the littoral states beyond the territorial sea into the continental shelf of Nigeria, this case is therefore crucial.

The positions of international authorities on the law of the sea are reviewed to indicate how their interpretation either support or conflict with the decision of the Supreme Court.

4.2 ATTORNEY GENERAL OF THE FEDERATION v ATTORNEY GENERAL OF ABIA STATE & 35 ORS.⁶⁶

The issue before the Supreme Court was not merely a determination of the seaward limit of littoral states but more importantly, a determination of the ownership of the sea-bed between the littoral states and the Federal Government. The Federal Government (the Plaintiff) based its case on the constitutional powers of the Federal Government as the only authority in Nigeria empowered to legislate on external matters, its sovereign powers as a Nation State recognised by international law, and on the 1982 United Nations Convention on the Law of the Sea and 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.

⁶⁴ Case concerning the land and maritime boundary between Cameroon and Nigeria (*Cameroon v Nigeria: Equatorial Guinea intervening*), 10 Oct. 2002. The records of the decision is available on the Court's website <http://www.icj-cij.org> Memorial, Counter-Memorial, Reply and Verbatim Records are available at the above internet address.

⁶⁵ See Y. Tanaka, "Reflections on the Maritime Delimitation in the *Cameroon/Nigeria Case*" *International and Comparative Law Quarterly*, vol. 53 (2004), p.369 at 373.

⁶⁶ See *Attorney General of the Federation v Attorney General of Abia State*, supra n. 28.

The Federal Government asserted that "the southern (or seaward) boundary of each of the littoral states is the low-water mark of the land surface of such state or, the seaward limit of inland waters within the state, as the case so requires."⁶⁷ In addition, the Federal Government contended "that natural resources located beyond the low-water mark and within the continental shelf of Nigeria are not derivable from any state of the federation."⁶⁸

The defendants (including the eight littoral states), contended that the territory of the littoral state extended offshore as far as the continental shelf and even beyond. The states relied in their defence on the Section 4A (6) (as amended) of Cap 16 and on Section 1 (1) of the Offshore Oil Revenue (Registration of Grants) Act, Cap 336, as evidence of the Federal Government's acknowledgement or acceptance that the continental shelf forms part of the littoral states to which it is contiguous.⁶⁹ They maintained that natural resources derived from both onshore and offshore are derivable from their respective territory and in respect thereof each is entitled to "not less than 13 percent" allocation as provided in the proviso to subsection (2) of section 162 of the 1999 Constitution.⁷⁰

And this is where the issue was joined. The Supreme Court was then saddled with the first opportunity ever to determine the southern (or seaward) limit of each of the eight littoral states. Willing to disentangle the legal issues involved, but unable to find Nigerian legislation's dealing

⁶⁷ Id. pp. 636-637

⁶⁸ Id. p. 637

⁶⁹ The relevant Section 1(1) of Cap 336 states that: "All registrable instruments relating to any lease, license, permit or right issued or granted to any person in respect of the territorial waters and the continental shelf of Nigeria shall, notwithstanding anything to the contrary in any enactment continue to be registrable in the States of the Federation, respectively, which are contiguous to the said territorial waters and the continental shelf."

⁷⁰ See note 28 above, p. 637

expressly on the issue, the Supreme Court embarked on a voyage through the instrumentality of the political history of Nigeria and in the end relied heavily on colonial Orders-in-Council, foreign cases and international law.⁷¹

In the final analysis, the Court decided that the offshore seabed of the territorial sea, exclusive economic zone and the continental shelf belonged to the Federal Government and consequently did not form part of the littoral states. The Supreme Court held that the southern boundary of each of the littoral states (except Cross River State) end at the low-water mark along the coast. It was also held with respect to the boundary of Cross River State, which has an archipelago of islands constituting part of its territory, that the boundary is the seaward limit of its inland waters.⁷²

How did the Supreme Court arrive at this conclusion? We propose to carefully scrutinise the basis of this judgement especially from the perspectives of colonial-orders-in-council and foreign cases.

⁷¹ There appears to be no Nigerian legislation dealing expressly with the precise location of the seaward boundary between the littoral states and the Federal Government. When the Federal Government through its counsel, attempted to establish the precise location by inference from the Nigerian Territorial Waters Act, Cap. 428, Laws of the Federation of Nigeria, 1990, as amended by Territorial Waters (Amendment) Act No. 1 of 1998, the purport of this amendment, was to reduce the breadth of Nigeria's territorial sea from 30 nautical miles to 12 nautical miles; the Exclusive Economic Zone Act, Cap. 116, Laws of the Federation of Nigeria 1990 and the Sea Fisheries Act, Cap.404, Laws of the Federation of Nigeria, the inference, were rejected by the Court. See on this point, Uwais, C.J.N., above, n. 28 at 721-722, where His Lordship said "Chief Williams has tried to show this by inference or implication under the provisions of the Territorial Waters Act, the Sea Fisheries Act and the Exclusive Economic Zone Act, all of which made reference to the territorial waters of Nigeria. However, with respect, none of the legislations (sic) expressly defines the seaward boundary of the littoral states. This in my opinion cannot be inferred from the legislations (sic)." Even the 1999 Constitution does not have an express provision on the seaward limit of littoral states.

⁷² Id. p. 660.

4.3 THE EFFECT OF COLONIAL ORDERS-IN-COUNCIL

The captivating effect of colonial Orders in Council on the Court is easily discernible especially on the issue of littoral states seaward boundary ending at the low-water mark. According to the Supreme Court, the first instrument that defined the boundaries of Nigeria was the Colony of Nigeria (Boundaries) Order in Council 1913,⁷³ reaffirmed in the Nigerian Protectorate Order in Council 1922.⁷⁴ Section 11 of the 1922 Order in Council defined the Protectorate of Nigeria as:

"The territories of Africa which are bounded on the south by the Atlantic Ocean, on the West, North and North-East by the line of the frontier between the British and French territories, and on the East by the territories known as the Cameroon's."

The Court also relied on the Lagos Local Government (Delimitation of Towns and Division into Wards) Order in Council 1950 and held that:

"The southern boundary of Lagos is the sea and that remains the boundaries of Nigeria and of Lagos to this date. The southern boundary of Nigeria is the Atlantic Ocean that is the sea. The Bight of Benin is a long inward curve on the coast of the Atlantic Ocean."⁷⁵

The Court explained that:

"By further constitutional changes -Nigerian (Constitution) Order in Council No. 1172 of 1951, Nigeria was divided into Northern, Western (including Lagos) and Eastern Regions. By Legal Notice 126 of 1954, entitled Northern Region, Western and Eastern Region (Definition of Boundaries) Proclamation 1954, the boundaries of the three regions to

⁷³ Id. p. 642

⁷⁴ Id. p. 642

⁷⁵ Id. p. 642

which the country had been divided were given."⁷⁶ From this the Court found that:

“At independence in 1960, Nigeria still had the three regional structures. However, in 1964, a fourth region- the Mid-West Region was carved out of the Western region. In May 1967, the Federal Military Government abolished the regional arrangement and divided the Country into twelve states. By 1996, the number of states in the country was increased to thirty-six"⁷⁷. The Court observed that “all the eight littoral states were carved out of the old eastern, mid-west and western regions and constitute the coastal areas of those regions.”⁷⁸

In determining the southern boundaries of the eight littoral states, the Court said:

"It goes without saying that the southern boundaries of these littoral defendant states must be the southern boundaries of the Western and Eastern Regions as defined in LN 126 of 1954, that is ‘the sea’. And this is co-terminus with the southern boundary of Nigeria as defined in section 11 of the Nigerian Protectorate Order in Council 1922 and of Lagos as defined in the Colony of Nigeria (Boundary) Order in Council 1913."⁷⁹

From the above, the justices of the Supreme Court were strong in their persuasion that from the point of view of colonial Orders in Council, the seaward boundaries of the defendant littoral states was the sea. Reading the lead judgement of the Court, OGUNDARE, J.S.C., said:

“One thing, however, is clear. If the boundary is with the sea, then by logical reasoning, the sea cannot be part of the territory of any of the

⁷⁶ Id. p. 642

⁷⁷ Id. p. 643

⁷⁸ Id. p. 643

⁷⁹ Id. p. 643

old region (out of which the littoral states emerged).⁸⁰

Still on the issue, the Chief Justice of Nigeria, Uwais, J. S. C., relied on the Concise Oxford Dictionary definition of the "sea" as an:

"expanse of salt water that covers most of earth's surface and enclosed its continent and islands, the ocean, any part of this as opposed to dry land or fresh water and concluded that the sea was not part of the littoral state."⁸¹

Unfortunately, the word "sea" has not been expressly defined by the Orders-in-Council and relying on the dictionary definition in our opinion, may not properly convey the intentions of the legislature at the time.⁸² It would equally be strange if the Court interpreted the word "sea" as used in the Orders-in-Council to be synonymous with the low-water mark.

To rely on colonial Orders-in-Council as a basis for fixing the seaward limit of littoral states at the low-water mark, in our opinion, was improper as there could be no such inference on the face of these legislations. Apart from the low-water mark, there are also the high water mark, outer limits of the territorial sea and even the continental shelf. All these are constituents of the sea. On our part, we submit that, the old colonial Orders-in-Council were unhelpful on this point. We submit further that the Court could still have come to the same conclusion, which in our opinion is the right position, but not through the Orders-in-Council.

Low-water mark is a Common Law concept which recognises the Sovereign as the holder of title to the bed of navigable waters in trust for the public. This Common Law rule was applied in the early American case

⁸⁰ Id. 643

⁸¹ Id. p. 728

⁸² E. Egede, "Who Owns the Nigerian Offshore Seabed: Federal or States? An Examination of the Attorney General of the Federation v Attorney General of Abia State & 35 ORS", *Journal of African Law*, 4, 1 (2005), 73 at 76-79.

of *Martin v. Waddel*,⁸³ where it was held that the State of New Jersey became the successor to the British Crown after the Revolution and was therefore vested with title to lands under navigable waters.

4.4 LOW-WATER MARK AND MARITIME ZONES IN NIGERIA

The use of the low-water mark as a base point from which the breadth of the territorial sea is measured received judicial endorsement when the Supreme Court in the present case under review held that the low-water mark was the seaward boundary for littoral states in Nigeria. There is also a legislative backing for this point. Under the Nigerian Territorial Waters Act, as amended,⁸⁴ the low-water mark is specified as the base point for measuring the breadth of the territorial sea. The Act provides that:

“The territorial waters of Nigeria shall for all purposes include every part of the open sea within twelve nautical miles of the coast of Nigeria (measured from the low-water mark) or seaward limit of inland waters.”⁸⁵ From the above provisions, there seem to be no doubt that in Nigeria, the seaward limit of inland waters or the low-water mark is the baseline for measuring the breadth of territorial waters.

⁸³ 41 U.S. (16 pet 367 (1842), cited in Shalowitz; A.L. Shore and Sea Boundaries, vol.1 (Washington: U.S. Government Printing Office, 1962), p. 6.

⁸⁴ The first piece of legislation enacted by the Nigerian government on the territorial waters was the Territorial Waters Decree of 8th March 1967 which came into force on April 1967. This enactment provided for 12 nautical miles breadth for the Nigerian territorial sea. See section 3(1) of the Territorial Waters Decree 1967. Before this time, the breadth of Nigeria's territorial sea was three nautical miles by virtue of the English Territorial Waters Jurisdiction Act 1878. This colonial legislation which was repealed in 1967 was received and applied in Nigeria as part of common law, principles of equity and statutes of general application in force in England as at 1 January 1900. See (Section 45(1) of the Interpretation Act 1964). On 26 August 1971, the 1967 Decree was amended, principally to extend the breadth of the territorial sea to thirty nautical miles (see Section 1(1) of the Territorial Waters (Amendment) Decree 1971. There was another amendment in 1998 entitled Territorial Waters (Amendment) Decree 1998 which rolled back the breadth of the Nigerian territorial sea from thirty nautical miles to 12 nautical miles. The 1998 Decree is now renamed "Act" as it is deemed to have been enacted by the National Assembly (see Section 315 of the Constitution of the Federal Republic of Nigeria 1999).

⁸⁵ See Section (1) Territorial Waters Act as amended.

What then is the low-water mark? The low-water mark has been defined as the interface between the land and the sea at low tide.⁸⁶ The difficulty that sometime arises is the physical location of the actual baseline on the coast since the low-water mark is not a line but a zone.⁸⁷ Yet the baseline is very important as other maritime zones are measured from it.

Under the United Nations Convention on the Law of the Sea 1982, the seaward limit of the different maritime zones are 12 nautical miles for the territorial sea,⁸⁸ 24 nautical miles for the contiguous zone⁸⁹ and 200 nautical miles for the exclusive economic zone.⁹⁰ The continental shelf extends to the outer edge of the continental margin, or to a distance of 200 nautical miles where the outer edge of the continental margin does not extend up to that distance. When the margin extends beyond 200 nautical miles, the outer edge limits of the continental shelf shall be determined by a complex formula contained in article 76 paragraphs 4 to 6 of the Convention. It should be emphasised that the outer limits of the aforementioned maritime zones are measured from the baseline. The LOSC provides detailed rules on the baselines from which the breadth of the territorial sea is measured.⁹¹ These baselines range from the normal

⁸⁶ M. Reed, *Shore and sea boundaries*, vol. 3, (Washington: US Government Printing Office, 2000), p.178, saying that the line is obtained by measuring low waters when the maximum declination of the moon is 23 degrees 30 minutes; *Handbook on the delimitation of maritime boundaries*, Division for Ocean affairs and Law of the Sea, Office of Legal Affairs, United Nations: New York, 2000, p. 155. See also Aurocochea, I. and Pethick, J. S. "The coastline its physical and legal definition" (1986-87), 1&2 *International Journal of Estuarine and Coastal Law*, pp.29-42.

⁸⁷ Aurocochea and Pethick, *supra* p. 86.

⁸⁸ Article 3.

⁸⁹ Article 33.

⁹⁰ Article 57.

⁹¹ See *The Law of the Sea: Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (United Nations publication, sales No. E88.V.5); *A Manual-Technical Aspects of the United Nations Convention on the Law of the Sea, 1982*, Special publication No. 51, 3rd ed. (Monaco, International Hydrographic Bureau, July 1993), pp. 7-27; Churchill, R. R. and Lowe, A. V. *The Law of the Sea* (Dartmouth, Manchester University Press, 1999), pp. 77-81. See also E. D. Brown, *The International Law of the Sea*, (Aldershot/Brookfield, USA/Singapore, Sydney, Dartmouth, 1994), vol. 1, *Introductory Manual*, pp. 18-36

rule of the low-water line,⁹² to the peculiar ones applicable to special geographic conditions, including straight baselines for coasts that are deeply indented or fringed with islands,⁹³ reefs,⁹⁴ mouth of rivers,⁹⁵ bay,⁹⁶ ports,⁹⁷ roadsteads,⁹⁸ low-tide elevations,⁹⁹ islands¹⁰⁰ and archipelagos.¹⁰¹ The Convention also permits states to use any of the methods that suit their different conditions.¹⁰² Any of the methods chosen by a state is expected to be shown on charts of a scale or scales adequate for ascertaining their position or in the alternative, by a list of co-ordinates specifying the geodetic datum.¹⁰³ These charts or lists of co-ordinates are to be given due publicity by the coastal state, which is required to deposit a copy of such charts or lists with the Secretary-General of the United Nations.¹⁰⁴

Nigeria has in accordance with the LOSC, established five maritime zones namely: Internal waters, territorial sea (reduced from 30 nautical miles to 12 nautical miles through the adoption of the Territorial Waters (Amendment) Decree 1998; Contiguous zone of 24 nautical; 200 nautical miles exclusive economic zone and a continental shelf.

⁹² Article 5.

⁹³ Article 7.

⁹⁴ Article 6.

⁹⁵ Article 9.

⁹⁶ Article 10

⁹⁷ Article 11

⁹⁸ Article 12.

⁹⁹ Article 13

¹⁰⁰ Article 121

¹⁰¹ Article 47

¹⁰² Article 14

¹⁰³ Article 16 (1)

¹⁰⁴ Article 16(2). It should be noted that in the case of information permanently describing the outer limits of the continental shelf extending beyond 200 nautical miles, the publicity is to be given by the UN Secretary-General.

Under the Petroleum Decree No. 51 of 1969, the Continental Shelf of Nigeria means "the sea-bed and the subsoil of those submarine areas adjacent to the coast of Nigeria the surface of which lies at a depth not greater than two hundred metres (or, where its natural resources are capable of exploitation, at any depth) below the surface. This is the exploitability criterion based on the 1958 Continental Shelf Convention. The modern criteria as contained in article 76 (1) of the 1982 LOSC, provides a different method of natural prolongation of the land territory/distance of 200 nautical miles. The LOSC, pursuant to its article 311, paragraph 1, prevails as between States Parties, over the 1958 Continental Shelf Convention. Having ratified the LOSC, Nigeria is thus expected to harmonise its national legislation with the provisions of the Convention.

Under the provisions of article 76 of the LOSC, the continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extends beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baseline from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend to that distance.

Returning back to the Supreme Court case, it is fairly settled that the low-water mark is the baseline for determining the breadth of the territorial sea. Interestingly however, the decision of the Court and a look at the map of Nigeria raises the possibility of the application of straight baselines. Firstly, the Court considered Cross River State as having archipelagic islands fringing its coasts, thus raising the prospect of the use of straight baseline. Secondly, the Niger Delta region of Nigeria's coastline, having one of the largest deltas in the world with deep indentation, equally brings to the fore the relevance of straight baselines in

certain parts of the Nigerian coast. Whether the straight baselines of measuring the territorial sea may be applied in Nigeria, the Territorial Waters Act as amended, which is the relevant law, is silent.

Articles 16, 75 and 84 of the LOSC deal with a country's publication of charts showing the limits of claims to internal waters, territorial seas, exclusive economic zones and continental shelf. It is stipulated that the charts will be drawn at scales adequate to fix the position of the limits.

It is doubtful whether Nigeria has such charts as the Territorial Waters Act as amended, apart from stating that the territorial sea of Nigeria shall be measured from the low-water line, gave no indication whether such baselines should be shown on charts and given due publicity as is obtained in countries like Tanzania¹⁰⁵ and Namibia.¹⁰⁶ An opportunity for the Federal Government of Nigeria to prove the existence of charts marking Nigeria's baselines and the various maritime zones was when the Supreme Court was requested to determine the seaward limit between the littoral states and the Federal Government.¹⁰⁷ Unfortunately, this opportunity was not taken and despite objections filed by some littoral states demanding proof of the exact location of the offshore zones in Nigeria, the Federal Government proceeded to argue its case on point of law without producing evidence showing the exact location of the low-water mark and the various maritime zones in Nigeria.

¹⁰⁵ See Section 5 of the Tanzanian Territorial Sea and Exclusive Economic Zone Act 1989, stipulating that the low-water line from which the country's territorial sea is measured shall be "marked on a large-scale chart or map officially recognised by the Government of the United Republic."

¹⁰⁶ See Section 2 (1) of the Namibian Territorial Sea and Exclusive Economic Zone Act No. 3 of 1990.

¹⁰⁷ *Supra* n. 28 above.

However, the Supreme Court in our opinion, was right to have agreed with the Federal Government that the exact location of Nigeria's low-water mark and other maritime zones could be proved on point of law, since the Nigerian Territorial waters legislation, has no provision on evidentiary proof of the low-water mark. But this is not the preferred option. It has to be emphasised that the location of the low-water mark goes beyond abstract law and demands the actual production of officially recognised charts or a list of geographic co-ordinates marking the baselines.

The responsibility of producing charts or geographic co-ordinates in the alternative and the requirement of due publicity and deposit with the UN is not a matter of choice, but an obligation under international law.

Be that as it may, from the totality of the above, the low-water line is the base point but definitely not the sea, indicating that the inference drawn by the Supreme Court from the old Colonial Orders in Council, were not only inappropriate, but irrelevant.

4.5 THE SUPREME COURT AND FOREIGN CASES

The fact that the Supreme Court cited and relied on some cases especially from the United States makes a brief history of U.S. imperative.¹⁰⁸ The Original Thirteen Colonies¹⁰⁹ and some Indian tribes inhabited the territory which the British discovered and possessed as the New World. The British Crown thus acquired dominion and ownership

¹⁰⁸ The Nigerian Supreme Court also relied on: *R v Keyn* (1876) 2 Ex. D. 63; *New South Wales v Commonwealth* 8 ALR (1975-6) 1; and *Re. Ownership Offshore Mineral Rights*, Vol. 65 DLR 2nd, 354, 1967.

¹⁰⁹ The Original American States comprised of New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

over lands in the new territories and made grants to individual proprietors and proprietary companies.

After the American Revolution, the title of the British Crown passed directly to the Original Thirteen States.¹¹⁰ Thereafter, other States not among the Original Thirteen, upon joining the Union, also demanded titles to submerged lands on an "equal footing" with the Thirteen Original States.¹¹¹

About a century later, the Federal Government of United States and the coastal states were plunged into more than fifty years litigation to determine the extent of States offshore title and how it should be determined. This was the genesis of the "Federal Paramount" doctrine established by the U.S Supreme Court.

In the first of these cases, *United States v California*, the United States sought an injunction against the execution of certain leases California had contracted with private companies.¹¹² The leases authorised the companies to extract petroleum, gas, and other mineral deposits from the Pacific Ocean. The argument of the United States was that it possessed "paramount rights" in the land and "other things of value" underlying the Pacific Ocean, lying seaward of the ordinary low-water mark on the coast of California and outside of the inland waters of the state..."¹¹³

¹¹⁰ This included title to lands under navigable waters or submerged lands. See *Martin v Waddell*, 41 U.S. (16 Pet.) 367 (1842), (holding that title to lands under navigable waters was transferred from the British Crown to the State of New Jersey after the Revolution).

¹¹¹ In *Pollard v Hagan*, 44 U.S. (3 How .) 212 (1845), cited in Shalowitz, A. L. *Shore and Sea Boundaries*, supra. n. 94 at p.6 (the U.S. agreed that Alabama, a subsequently admitted state joined the Union with title to submerged land on "equal footing" with the Original States).

¹¹² 332 U.S. 19 (1947).

¹¹³ *Id.* p. 22

California in turn insisted that the territorial sea i.e., the area extending from the low-water mark of the state's coast three miles into the ocean was within its boundaries.¹¹⁴ California argued further that insofar as the original colonies had acquired from the English or Dutch Crown a title to all the land within their boundaries under navigable waters (including a three-mile appurtenance in adjacent seas), and because California was admitted into the Union on an "equal footing" with the original states, it also became vested with title to the seabed when it became part of the United States.¹¹⁵

The issue before the Supreme Court was whether the State or Federation had the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or thereafter discovered, may be exploited.¹¹⁶

The Court was of the view that the acquisition of the three-mile marginal belt was always a function of "national external sovereignty".¹¹⁷ The Court reasoned further that, the Federal Government "must have powers of dominion and regulation in the interest of its revenue, its health, and the security of its people from wars waged on or too near its coasts".¹¹⁸ Consequently, the Court concluded that "California is not the owner of the three-mile marginal belt along its coast and the Federal Government rather than the state has paramount right in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including the oil."

¹¹⁴ Id. p. 22

¹¹⁵ Id. p. 23

¹¹⁶ Id. p. 29

¹¹⁷ Id. p. 34

¹¹⁸ Id. p. 35.

Following its victory in the California case, the United States then moved to confirm its title to other seabed adjacent to coastal states. In 1950, The United States sued another coastal state Louisiana at the Supreme Court contending that it held title to the land beneath the sea extending twenty-seven miles into the Gulf of Mexico.¹¹⁹ On its part, Louisiana argued that before and since the time of its admission into the Union, it had exercised control over the area in question and had even statutorily included the twenty-mile marginal sea within its State territory. The Court was not persuaded by this argument and held instead that protection and control of the area are indeed functions of national external sovereignty. The marginal sea is a national, not a state concern.

According to the Court, national interests, national responsibility, national concerns are involved. The problem of commerce, national defence, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.¹²⁰

About the same time a similar case was also brought against Texas. In *United States v Texas*, the Supreme Court again requested the Court to confirm the Federal Government's paramount interests in the seabed.¹²¹ Prior to its admission to the Union, Texas was neither an English Colony nor an American territory. It was a sovereign republic recognised by the United States and the community of nations and had a statutory boundary reaching to the outer edge of the continental shelf, i.e., to 200 miles from its coast.¹²² Texas contended that as a separate republic prior to its entry into the United States, it enjoyed *plenum* of title (both *dominium* and *imperium*) over lands, minerals, and other fruits which underlay the marginal seas and that on entering the Union, it conveyed to the Federal

¹¹⁹ *United States v Louisiana*, 339 U.S. 699 (1950).

¹²⁰ *Id.* p. 704.

¹²¹ 339 U.S. 707 (1950).

¹²² *Id.* *Id.* p. 720

Government its power of *imperium*, i.e., its sovereignty, over marginal sea, but reserved its *dominium*.¹²³

Although the Court conceded that the republic of Texas held full sovereignty over the marginal belt, it went on to describe the legal consequences of its joining the Union. “When Texas came into the Union, she ceased to be an independent nation the United States then took her place as respects foreign commerce, the waging of war, the making of treaties, defence of shores, and the like.”¹²⁴ Upon surrendering its sovereignty, any “claim that Texas may have had to the marginal sea, was relinquished to the United States.” The Court stressed further that “this is an instance where property interest is so subordinated to the right of sovereignty as to follow sovereignty.”¹²⁵ In conclusion the Court said: “once the low-water mark is passed the international domain is reached. Property rights must then be so subordinated to political rights as in substance to coalesce and unit in the national sovereignty. Today, the controversy is over oil. Tomorrow it may be over some other substance or minerals or perhaps the bed of the ocean itself. If the property, whatever it may be, lies seaward of the low-water mark, its use, disposition, management, and control involve national interests and national responsibilities.”¹²⁶

Twenty-five years later, the United States brought another action against the original thirteen Atlantic coastal states. In this last of the paramount cases, *United States v Maine*, the United States claimed sovereignty over the seabed from the low-water mark to the outer continental shelf in order to explore and exploit the area and its natural resources.¹²⁷ With the exception of Florida, the other coastal states claimed that, as successors in title to certain grantees of the Crown of

¹²³ Id. pp. 712-13.

¹²⁴ Id. pp. 717-18

¹²⁵ Id. p. 718

¹²⁶ Id. p. 718

¹²⁷ *United States v Maine*, 420 U.S. 515, 516-17 (1975).

England and Holland, they were entitled to exclusive *dominium* and *imperium* over the seabed underlying the Atlantic from the coastline to the limit of United States jurisdiction.”¹²⁸

The Supreme Court held that: “As a matter of purely legal principle, the Constitution allotted to the Federal Government jurisdiction over foreign commerce, it certainly follows as a matter of constitutional law, that as attributes of these external sovereign powers, the Federal Government has paramount rights in the marginal sea.”¹²⁹

Looking at these cases carefully, two issues are central to all of them i.e. “paramount doctrine” and the “equal footing” doctrine. These doctrines in our opinion are based on the peculiar constitutional history of the United States. The Thirteen Original States formed the Union while the other States joined the Union by consent. This by implication meant a surrender of their offshore rights to the central government. These cases further demonstrate that all the subsequent States were admitted into the Union on “equal footing” with the Thirteen Original Colonies and since there was no historical support to show that the original colonies acquired ownership of the territorial sea, all subsequent states could not be said to have acquired such ownership.

Although these cases lay down the correct principles of law that the seaward limit of littoral states is the low-water mark, coming from a different historical and constitutional background, make them inappropriate and inapplicable to Nigeria. In the American scheme, all the subsequent States, joined the Union by consent, and by implication, surrendered their offshore rights to the central government. In the case of Nigeria, the situation is somewhat different. It is clear from the constitutional history of Nigeria that the territory which later became

¹²⁸ Id. pp. 517-18

¹²⁹ Id. pp. 522-23

Nigeria, existed as sovereign states made up of ethnic groups that were independent with separate governmental authority. These native tribes and indigenous communities were later on brought together by a non consensual amalgamation, deliberately created and given official authority from England. What later came to be regarded as the federal and component units, emerged at the same time and there could be no implication of surrender of offshore rights as was the case in the United States. The “paramount doctrine” is predicated on the consent to be governed. When this consent is not given, political legitimacy becomes questionable.¹³⁰ The Nigerian federalism is peculiar. It is neither a product of consent nor compromise and this explains the clarion call from oil bearing littoral states for a re-negotiation of the basis of the Nigerian Federation.

The federal “paramount doctrine” in our opinion is only applicable where there is a consensual surrender from the unit to the centre and not when such ‘surrender’ as in the case of Nigeria was imposed by official permission and approval. Since these cases were relied upon by the United States Supreme Court to show the supremacy of the Federal Government over the units consequent upon consensual transfer of sovereign rights, there are inapplicable to the Nigerian situation as there was no such consent in the case of Nigeria.

¹³⁰ American Declaration of Independence, Para. 2 (U.S. 1776); John H. Ely, *Democracy and Distrust*, 89-90 (1980); Frederic W. Maitland, *A Historical Sketch of Liberty and Equality*, in *The Collected Papers of Frederic William Maitland* 1-161 (H.A.L. Fisher ed. 1911).

4.6 NATIVE MARINE RIGHTS

Before the amalgamation, the present littoral states existed as kingdoms and empires¹³¹. As sovereign entities, they had leadership structures headed by government that was independent from each other. In matters of trade, commerce and wars, they were equals. In addition to exercising ownership rights over lands within their domain, these kingdoms were known to be engaged in international maritime trade with European nations. They accordingly controlled the marginal seas, and by implication, the land under it.

Although the Nigerian Supreme Court seemed to have appreciated the above points, its attitude towards the affidavit evidence placed before it by some of the defendant littoral states indicating historical claim of certain parts of the sea by native communities indigenous to such states, was to say the least strange.

In our opinion, the Supreme Court failed to properly evaluate the evidence of indigenous community ownership of parts of the sea and erroneously came to the conclusion that such evidence was “against the grain of statutory instrument (Orders in Council) and the Common Law and international law.”¹³²

Based on geographic research in Australia, customary marine tenure has long been recognised and scholars have even demonstrated that indigenous estates included some sections of the sea.¹³³ Prescott and Davis have even gone ahead to suggest that the width of maritime domain for indigenous communities may be influenced by factors such as "nature of the sea in terms of generally rough or calm weather; the presence of nearby islands; the availability of craft; the food resources of the sea and

¹³¹ Supra n. 28 pp. 640-642

¹³² Above, n. 28, per OGUNDARE, J.S.C., pp. 652-653 and UWAI, C.J.N. pp. 722-724.

¹³³ V. Prescott and S. Davis, "Aboriginal claims to seas in Australia", 17 (1) *International Journal of Marine and Coastal Law*, (2002), pp.1-31.

islands; the nearness of other clans, especially on offshore islands; the skill of the navigators; and the role of the sea and reefs in the clan's spiritual lore."¹³⁴

These writers suggest that the evidence that could aid indigenous claim to the sea may include detailed knowledge of current and past members of the clan about various sites on land and their connections with reefs, rocks, channels, current and tides as well as precise knowledge about the seasonal variations that occur in the type, quality and amount of food that can be obtained from the sea.¹³⁵

A judicial caution against the temptation of rendering indigenous claim in the same terms as the states common law claims to title was contained in a famous obiter of Viscount Haldane of the Privy Council when he said:

*"There is a tendency, operating at times unconsciously, to render (aboriginal) title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the sovereign where that exists. In such cases the title of the sovereign is a pure legal estate, to which beneficial right may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading."*¹³⁶

¹³⁴ Id. pp. 1-31.

¹³⁵ Id. pp. 1-31.

¹³⁶ See *Amodu Tijani v Secretary, Southern Nigeria*, supra n. 42, pp. 403-404.

This appeal which came from Southern Nigeria, involved the cessation of Lagos and its surrounding territory to the British Crown. The Privy Council said, although Lagos and the territory around it were ceded to the British Crown, ownership rights under native law and custom were intact. The Privy Council then cautioned against the tendency of equating title under native law and custom with concepts familiar only in English law. It should also be borne in mind that, in Nigeria, just like in other commonwealth countries, common law was received subject to local custom, including indigenous property rights.¹³⁷ Unfortunately, the Nigerian Supreme Court failed to heed the warning of Viscount Haldane and in the process misunderstood the fundamental nature of indigenous title which is not a creature of common law but primordial in nature.

One case that significantly changed the political and legal landscape in which indigenous issues are being considered was the Australian case of *Mabo v Queensland (No. 2)*.¹³⁸ The issue in this case was a claim for traditional native property rights by one Mr Eddie Mabo and four other islanders against the Queensland government. Eddie was a member of the Meriam people of Murray Island in the Torres Strait. In May 1982 he and four other islanders began action in the High Court of Australia seeking confirmation of their traditional land rights. They claimed that Murray island (Mer) and surrounding islands and reefs have been continually inhabited and exclusively possessed by the Meriam people who lived in permanent communities with their own social and political organisation.

¹³⁷ See *Laoye & ORS v Oyetunde* (1944) A.C. 170 at 172-173, where Lord Wright stated "The policy of the British Government, is to use for the purpose of the administration of the country (Nigeria) the native laws and customs in so far as possible and in so far as they have not been varied or suspended by statutes or ordinances affecting Nigeria. The courts which have been established by the British Government have the duty of enforcing these native laws and customs, so far as they are not barbarous, as part of the law of the land."

¹³⁸ (1992) 175 CLR 1. For an examination of this case, see A. Bergin, "A rising tide of aboriginal sea claims: implications of the Mabo case in Australia", (1993) 8 *International Journal of Marine and Coastal Law* 3, 359-72

They conceded that the British Crown (in the form of the colony of Queensland) became sovereign of the islands when they were annexed in 1879. Nevertheless, they claimed continued enjoyment of their rights and that these had not been validly extinguished by the sovereign. They sought recognition of these continuing rights from the Australian legal system. After over a period of ten years, the High Court of Australia in 1992 by a majority of six to one, upheld the plaintiff's claim and ruled that "the lands of this continent were not terra nullius when settled by the British in 1788, but occupied by Aboriginals and Torres Strait Islander peoples, who had their own laws and customs, and whose 'native title' to land survived the Crown's annexation of Australia. The Court accordingly held that the Meriam people were "entitled against the whole world to possession, occupation, use and enjoyment of the lands of Murray Island.

Although the Court did not have the opportunity of addressing the issue of rights to the sea, seabed and reefs of Murray island in its final judgement since the islanders had withdrawn that aspect for a negotiated settlement, Sutherland sees no justification in restricting the Mabo principle to land right only.¹³⁹ His support for the recognition of customary marine tenure is endorsed by Bergin, although Bergin says there has to be a continuing traditional association with the seabed.¹⁴⁰

In yet another Australian case involving native title to the seabed under the Native Title Act of 1993, the High Court of Australia explained how a native title should be treated. According to the Court:

¹³⁹ J. Sutherland, "Human Rights, Aboriginal Maritime Culture and the Evolving Regulatory Framework for the East Coast of Queensland" (paper given at 47th Annual Conference, Australian Law Teachers Association, Brisbane 9-12 July 1992).

¹⁴⁰ A. Bergin, above, n. 137, p. 363.

*“Those (native title) rights and interests may have some or all features which a common (law) lawyer might recognise as species of property. Neither the use of the word ‘title’ nor the fact that the rights and interests include some rights and interests in relation to lands should, however, be seen as necessarily requiring identification of the rights and interests as what the common law traditionally recognised as items of ‘real property’. Still less do those facts necessarily require analysis of the content of those rights and interests according to those feature which the common law would traditionally identify as necessary or sufficient to constitute ‘property’.”*¹⁴¹

Even in New Zealand it is fairly settled that native interest in the offshore seabed may exist concurrently with that of the Crown, without undermining that interest. The issue of sovereignty and ownership of offshore seabed came up for consideration in the New Zealand case of *Ngati Apa & Ors v. Ki Te Tau Ihu Trust & Ors*.¹⁴² The litigation was begun by eight Maori tribes: Ngati Apa, Ngati Koata, Ngati Kuia, Ngati Rarua, Ngati Tama, Ngati Toa, Rangitana and Te Atiawa, who were concerned about local government's marine farming policies and accordingly applied to the Maori Land Court seeking exclusive title over the foreshore and seabed in the South Pacific. The Attorney-General and certain non-Maori parties filed preliminary objections saying that an application of that nature was bound to fail since lands falling under the

¹⁴¹ *Commonwealth v Yarmirr* (2001) 208 CLR 1, 16 (AusH.).

¹⁴² (2003) NZCA 117 (19 June, 2003). See J.S. Davidson, "New Zealand: ownership of the foreshore and sea-bed", (1998) 13(4), *International Journal of Marine and Coastal Law* 617-622.

foreshore and territorial sea of New Zealand were, under common law and certain legislations,¹⁴³ vested in the Crown.

The main issue before the Appeal Court was the legal doctrine of native title to property which provided that "on acquisition of sovereignty by the Crown, the property rights of the indigenous population continue in force and effect until such a time as they have been legally extinguished." The Appeal Court was of the view that the mere fact that the foreshore and the bed of the territorial sea were vested in the Crown did not in itself exclude Maori ownership of such offshore lands under native law and custom. The Court made a distinction between territorial sovereignty vested in the Crown (*imperium*) in respect of the foreshore and seabed of the territorial sea and the right of ownership of such (*dominium*). The Court reasoned that although the Crown had *imperium* over such offshore lands by reason of sovereignty, this did not in itself exclude the *dominium* of the Maoris over such land if there was evidentiary proof, to be placed before the Maori Land Court, proving such native rights. The Court stressed that sovereignty vested in the Crown under common law over such offshore lands will only apply subject to local customs. The Court equally emphasised that legislation vesting such offshore lands on the Crown, since it had no express expropriatory purpose, could only be read as vesting such right on the Crown subject to the preservation of existing property interest, including Maori property rights, if satisfactorily established by evidence. The Court found that Maori customary title to the foreshore has not been extinguished by any general enactment and held accordingly that the seabed and the foreshore was not necessarily Crown property.

¹⁴³ Some of the legislations referred to here are: New Zealand Territorial Sea and Fishing Zone Act, 1965 and the Contiguous Zone and Exclusive Economic Zone Act, 1977; Foreshore and Seabed Endowment Revesting Act, 1991; Resource Management Act, 1991 and the Harbours Act 1878 and 1950.

It was no surprise when the government reacted quickly by enacting the New Zealand Foreshore and Seabed Act 2004, which is intended to explicitly vest foreshore and seabed on the Crown. It is not immediately known how far this Act will affect the status quo especially as it has not been subjected to judicial interpretation. There is however a general feeling among the Maoris that the Act may signal the beginning of the process of extinguishing the victory given them by the Appeal Court and how far this is true, only time will tell.¹⁴⁴

The issue of native claim to the outer continental shelf also came up for consideration in the United States case of *Native Village of Eyak v Trawler Diane Marie, Inc.*¹⁴⁵ The background of this case indicates that for more than 7000 years members of the Indian villages of Eyak, Tatitlek, Chanenga, Port Graham, and Nanwalek have inhabited the Prince William Sound and the lower Cook Inlet regions in the Gulf of Alaska. From time immemorial, these federally recognised tribes have depended on the resources of the coastal waters, sea and seabed for their livelihood. The villages, located at the water's edge, rely on fish and wildlife of the territorial sea and their continued socio-economic and cultural well-being depends on their continued ability to live in their traditional home and utilise these resources.

In 1995, the villages instituted a suit in the federal district court against the Secretary of Commerce, the Secretary of Interior, and the Trawler Diane Corporation seeking a declaratory judgement confirming their aboriginal title to their traditional fishing grounds in the outer

¹⁴⁴ The New Zealand Foreshore and Seabed Act 2004 has been criticised as being discriminatory against the Maoris. See International Convention on the Elimination of all Forms of Racial Discrimination, United Nations: Sixty-sixth session, (2005), p. 1.

¹⁴⁵ No. CV-95-0063 (D. Alaska Oct.9, 1997). This is the citation for the district court's final judgement.

continental shelf (OCS) in the Gulf of Alaska.¹⁴⁶ They villages want exclusive aboriginal rights to use, occupy, possess, hunt, fish in, and otherwise exploit the waters and seabed beneath them. In addition, they sought an injunction restraining the Secretary of Commerce from implementing commercial and non commercial fishing regulations in the area at issue, also, to prevent the Trawler Diane Marie vessel from fishing within the territory with a license issued by the Secretary of Commerce and finally, to prevent the Secretary of Interior from conducting an oil and gas lease sale in the lower Cook Inlet.

The district court decided against the villages and held that "federal paramount" precluded, as a matter of law, aboriginal title to the OCS. As already shown, the "federal paramount doctrine" was established by four Supreme Court cases in which the Federal Government and various coastal states in the United States contested ownership and control of territorial waters and seabed of the outer continental shelf OCS.¹⁴⁷

The villages lodged an appeal to the Ninth Circuit, challenging the district's court's holding that there could be no aboriginal title to the OCS.¹⁴⁸ This appeal was equally unsuccessful as the Ninth Circuit restated the district court's conclusion that, "if the states have no property rights in the OCS via the paramount doctrine, *a fortiori*, it cannot be otherwise for a tribal entity which, even if possessed of sovereign rights, is dependent upon the United States in the same manner as a state with regard to *inter alia*, national defence, foreign affairs, and world commerce."¹⁴⁹

¹⁴⁶ Under the U.S. law, OCS includes submerged lands lying seaward and outside of the area of lands beneath navigable waters (defined in Section 1331 (a) (2000).

¹⁴⁷ See n. 124, n. 131, n. 133, and n. 139 above.

¹⁴⁸ *Native Village of Eyak v Trawler Diane Marie, Inc.*, 154 F. 3D 1090 (9th Cir.1998).

¹⁴⁹ *Id.* p. 1094.

Here again, both district court and the Ninth Circuit disregarded the warning of Viscount Haldane by erroneously treating native title as similar to state's common law claims to title. Described as "judicial divestiture of tribal sovereignty", one writer is concerned that the sovereignty of Native Americans tribes in existence and well respected since the Republic's founding, is not only diminished, but completely eroded by this decision.¹⁵⁰ He posits that the judicial methodology adopted by both courts was alien and unsuited to native claims which according to him had occupied a unique judicial space historically, legally and even politically. Rendering the villages' aboriginal claims in the same terms as the states' common law claim to title, for him, amounted to colonial evil, brought about by the doctrine of discovery which permitted Europeans to appropriate and own virtually everything they discovered, including man and lands. The author recalls with nostalgia, the words of Chief Justice Marshall, made almost two centuries ago that Indians are the "rightful occupants of the soil" colonised first by Europeans powers and then by the United States.¹⁵¹ The two court's in his opinion, also failed to appreciate the underlying nature of native title recognised under international and common law and accepted in judicial resolution of native claims in the West and the Commonwealth: that upon a sovereign's conquest or acquisition of a new territory, imperium over the region passed to the new sovereign, but the dominium was left unaffected.¹⁵²

¹⁵⁰ Bloch, D. J., "Colonizing the Last Frontier" (1995) 29 (1) American Indian Law Review 1-3.

¹⁵¹ See *Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543,574 (1823); cited in Bloch, D.J. "Colonising the Last Frontier" supra. at 149 and *Cherokee Nation v Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) cited in Bloch D.J. Colonising the Last Frontier supra. at 149 (holding that Indian tribes are domestic dependent nations possessed of their own limited sovereignty, but in a state of pupillage to the United States); *Worcester v Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (holding that the Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessor of the soil, from time immemorial).

¹⁵² *Western Australia v Commonwealth* (1995) 183 C.L.R. 373, 422-23 (AusH.) (Holding that at common law, a mere change in sovereignty does not extinguish pre-existing rights and interests in land in that territory).

Unwilling to give up the fight, the villages in 1998, filed a new action, *Native village of Eyak v. Evans*, seeking a declaratory judgement confirming their non exclusive aboriginal rights in the territorial sea, an order prohibiting the Secretary for Commerce from authorising or permitting any one to interfere with those rights.¹⁵³

This case, equally decided on appeal,¹⁵⁴ was a victory for the villages. The Ninth Circuit after receiving new pleadings critically evaluated the village's substantive rights vis-à-vis the federal responsibilities offshore. The appeal court was satisfied that the paramount doctrine did not foreclose native's offshore claims and held accordingly that native rights may continue to be exercised so long as they do not conflict with foreign relations.¹⁵⁵

The common law came with the notion that sovereignty carried ownership and utilise the instrumentality of colonialism to possess people and annex their territory. As has been demonstrated above, this notion is changing. Unknown to the Nigerian Supreme Court, there has been a shift in thinking heralded by a new approach to redressing historical dispositions occasioned by common law's failure to recognise rights which originates in a system of law that differs significantly from it.

In 1988 in Bangalore, India, some senior Commonwealth lawyers formulated some principles which have come to be accepted throughout the Commonwealth as applicable principles for dealing with gaps in the common law. The meeting which was chaired by Justice P. N. Bhagwati, the former Chief Justice of India, was also attended by Justice Kirby of New Zealand, Anthony Lester Q. C, Justice R. Lallah (former Chief Justice of Mauritius) and Justice E. Dumbutshena (then Chief Justice of

¹⁵³ No. 98-0365 (D. Alaska Sept. 25, 2002). While the present case requested for non exclusive rights in the territorial sea, the previous request was for an exclusive right to the territorial sea.

¹⁵⁴ *Eyak Native village v Daley*, 364 F. 3d 1057 (9th Cir. 2004).

¹⁵⁵ *Eyak Native village v Daley*, 375, F.3d 1218 (9th Cir. 2004).

Zimbabwe). Also in attendance was Justice Ruth Bader Ginsburg of the US, then of the Federal Circuit Court in the US and now of the Supreme Court, who joined these Commonwealth lawyers to draw up an international human rights jurisprudence popularly called the *Bangalore Principles*. These principles state in effect that: (i) International law (whether human rights norms or otherwise) is not, as such, part of domestic law in most common law countries; (ii) Such laws do not become part of domestic law until Parliament so enacts or the judges (as another source of law-making) declare the norms thereby established to be part of domestic law; (iii) The judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty - even one ratified by their own country; (iv) But if an issue of uncertainty arises (as by a *lacuna* in the common law, obscurity in its meaning or ambiguity in a relevant statute), a judge may seek guidance in the general principles of international law, as accepted by the community of nations; and (v) From this source material, the judge may ascertain and declare what the relevant rule of domestic law is. It is the action of the judge, incorporating the rule into domestic law, which makes it part of domestic law.

The crusading effect of international human rights principles provided for in the *Bangalore Principles*, demands a reconsideration of the entire import of common law. A judicial voice in support of this view, is the remark of Brennan J (with the concurrence of Mason CJ and McHugh J) in the celebrated Australian case of *Mabo v Queensland* (No.2),¹⁵⁶ condemning the evil of the common doctrine of *terra nullius*, which England used as a cover to annex and dispossess lands from the indigenous peoples of Australia.

¹⁵⁶ Above, n. 138.

In the words of Brennan J, "The expectations of the international community accord in this respect with the contemporary values of the Australian people". The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and international standards it imports. The common law does not necessarily conform to international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.

It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands."¹⁵⁷

The recognition given to native title sea rights laid down in the above cases, represents the most authoritative statement of law today, and in our opinion, would have assisted the Nigerian Supreme Court in dealing with marine rights of communities indigenous to the littoral states. Unfortunately however, indigenous people or communities were not involved as Parties before the Supreme Court, thus explaining the reluctance of the Apex court to embark on such a jurisprudential exercise.

¹⁵⁷ Id. p. 42.

Be that as it may, this new thinking, although germane, will definitely encounter some obstacles especially as the concept of indigenous people is yet to take root in Nigeria. Doubting the possibility of Africans qualifying as indigenous peoples, a writer sees the evolution of the concept of indigenous people as Western perception of non-western peoples, particularly in states where these people constitute a minority.¹⁵⁸ According to this writer, "indigenous peoples or population within international human right parlance are the peoples the West encountered during the period of their colonial expansion, conquest and annexation of territory. The post-colonial states which have emerged from the period of European colonisation have within their jurisdiction these indigenous peoples."¹⁵⁹ This writer agrees with another author, who expresses almost a similar opinion about indigenous peoples.

According to this author, "Half a millennium ago, people living on the continents now called North and South America began to have encounters of a kind they had not experienced before. Europeans arrived and started to lay claims to their lands, overpowering their political institutions and disrupting the integrity of their economies and cultures. The Europeans' encroachments frequently were accompanied by the slaughter of the children, women and men who stood in their way. For many of the people who survived, the Europeans brought disease and slavery. Similar patterns of empire and conquest extended to other parts of the globe, resulting in human suffering and turmoil on a massive scale. As empire building and colonial settlement proceeded from the sixteenth century onward, those who already inhabited the encroached-upon lands and who were subjected to oppressive forces became known as indigenous, native or aboriginal. Such designation has continued to apply

¹⁵⁸ Date-Bah, S. K, supra n. 40, p. 389.

¹⁵⁹ Id. p. 389.

to people by virtue of their place and condition within the life-altering human encounter set in motion by colonialism. Today, the term *indigenous* refers broadly to the living descendants of pre-invasion inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities are culturally distinct groups that find themselves engulfed by settler societies born of the forces of empire and conquest. The diverse surviving Indian communities and nations of the Western Hemisphere, the Inuit and Aleut of the Arctic, the Aboriginal of Australia, the Maoris of New Zealand, the tribal peoples of Asia, and such other groups among those are generally regarded as indigenous. They are *indigenous* because their ancestral roots are imbedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. Furthermore, they are *peoples* to the extent that they comprise distinct communities with a continuity of existence and identity that links them to communities, tribes or nations of their ancestral past"¹⁶⁰

Even though there is as yet no authoritative definition of indigenous peoples or population, the above description of indigenous peoples comports with International Labour Organisation Convention Guide No. 167.¹⁶¹ According to the above Convention, the concept of indigenous people excludes people who have mainstreamed themselves in the political and economic life of their post-colonial state. The Guide states that "the term indigenous refers to those who, while retaining totally, or partially their traditional languages, institutions and life styles which distinguish them from the dominant society, occupy a particular area before other population groups arrived. This is a description which is valid in North

¹⁶⁰ Anaya, James S, *Indigenous Peoples in International Law* (Oxford University Press, New York and Oxford, 1996), p. 3

¹⁶¹ Tomei, M, and Swepston, L, *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169* (ILO, Geneva, 1996).

and South America, and in some areas of the Pacific. In most of the world, however, there is very little distinction between the time at which tribal and other population arrived."

Although the Convention appears to have brought under its ambit contemporary African States, it is doubtful whether they are covered under this Convention. In recent times, Africans have resorted to the concept of indigenous peoples to lay claim to natural resources development taking place in their locality. While we concede that some traditional political entities in Africa possess "socio-cultural and economic conditions which distinguish them from other sections of the national community" and their "status is regulated wholly or partially by their own customs or tradition" as required under the ILO Convention, the concept of indigenous people in our opinion seems to target people who need special protection from their national government or dominant section of the society owing to their vulnerability. Accordingly, it excludes those having equal right of access to the political and economic process of their state. Whether Africans, qualify as indigenous people is therefore debatable.

In Nigeria for instance, many of the traditional political entities which were overpowered by colonialism and forcefully brought together by amalgamation, have now been mainstreamed into Nigeria's national, economic, and political life. Even though some of these entities consider their socio-cultural and economic conditions as distinct from other sections of the national community, this in our opinion, do not qualify them as indigenous people, especially as the policy thrust of post-colonial Nigeria is to bring the different political entities together, development wise.

In relation to the development of natural resources in the Niger Delta region of Nigeria, some people indigenous to the communities where natural resource exploitation is taking place have endeavoured to

bring themselves within the ambit of the ILO Convention to enable them benefit from natural resource development. In this writer's view, predicating such rights on belonging to indigenous people is meaningless.

In our opinion, it is unnecessary for a people, whether, local, tribal, indigenous, or ethnic minorities to endeavour to bring themselves within the ambit of the ILO Convention to enable them benefit from natural resource development in their locality. It is equally meaningless to overemphasise the issue of ownership of natural resources as between the federal, state, and local, indigenous or tribal peoples.

The problem with Nigeria in relation to oil and gas development has nothing to do with a people being local, native, tribal, indigenous or ethnic minority. The problem with Nigeria is not who owns the land and the oil. The real problem arises from failure to sustainably explore and exploit oil and gas which entails compliance, implementation and enforcement of the numerous national regulation and regional and multilateral environmental treaties and the Plan of Action embodied in the Agenda 21. The need to allow people a say and encourage their participation in the process of ensuring environmental protection and putting back substantial proceeds from the exploitation of natural resources into the developmental aspirations of the oil producing regions. For more on this, see the chapters below.

4.7 THE ALLOCATION OF REVENUE (ABOLITION OF DICHOTOMY IN THE APPLICATION OF THE PRINCIPLE OF DERIVATION) ACT 2004

As stated already, the Nigerian Supreme Court held that the southern boundary of each of the littoral states (except Cross River State) end at the low-water mark along the coast. It also held with respect to the boundary of Cross River State which has an archipelago of islands

constituting part of its territory, that the boundary is the seaward limits of its inland waters.

This decision raised a storm of unending protest from the littoral states and increased the level of political and violent agitation there. It meant that revenue derivable from the areas southward of or beyond these boundaries belonged exclusively to the Federal Government and the littoral states were no longer entitled even to the minimum of 13 percent provided in the 1999 Constitution. This brought the economy of states like Akwa Ibom State, whose share of revenue from the Federation Account is derived from offshore production, to a stand still.

In the aftermath of the Supreme Court Judgement, the Federal Government fashioned a "political solution" following the recommendation of a Presidential Committee headed by the then Works and Housing Minister Chief Tony Anenih. The "political solution" according to the committee was to be in the nature of an enactment from the National Assembly stating that natural resources found offshore be deemed to be found within the territory of the adjacent littoral state for the purpose of the application of the derivation principle. Based on the committee's recommendations, the former President sent to the National Assembly a Bill entitled "Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act 2004". The Bill as originally sent provided that:

*"As from the commencement of this Act, the contiguous zone of a State of the Federation shall be deemed to be part of that State for the purposes of computing the revenue accruing to the Federation Account from that state pursuant to the provisions of subsection (2) of Section 162 of the Constitution of the Federal Republic of Nigeria 1999."*¹⁶²

¹⁶² Section 1 (2) of the original Bill sent to the National Assembly.

However, the National Assembly when passing the Bill, extended the resource limit beyond the contiguous zone as recommended by the President, to the "continental shelf and exclusive economic zone" contiguous to the littoral state. This extension resulted in a stalemate between the National Assembly and the President. As a compromise, the President later on proposed the "200 metres water depth isobaths" to replace the "contiguous zone" originally proposed by the President and the continental shelf and exclusive economic zone" suggested by the National Assembly. The Bill was passed into law by the National Assembly on the 10th of February, 2004.

Unfortunately, the so-called "Abrogation Act" was not accompanied with a contour map indicating the precise limit of the 200 metres water depth isobaths. This gives rise to the following practical questions: (i) how is the 200 metres to be delineated? (ii) What is the breadth of this grant and which baseline is the grant to be measured? (iii) Is the grant a quitclaim of Federal Government's interest in that belt of water and has the dichotomy been abolished?

The Act is silent on these issues and we foresee a spate of litigation to resolve these questions which were either not foreseen by the National Assembly or deliberately left for judicial determination.

4.8 DELINEATING 200 METRES WATER DEPTH ISOBATHS

An isobaths is a "line representing the horizontal contour of the seabed at a given depth"¹⁶³ Applying this to the grant, 200 metres isobaths off the coast of Nigeria, is a line joining all points off the coast of Nigeria

¹⁶³ Handbook on the Delimitation of Maritime Boundaries, Division for Ocean Affairs and Law of the Sea, Office of Legal Affairs, United Nations: New York, 2002, p. 155.

(from Lagos to Nigeria's maritime boundary with Cameroon), where the sea is 200 metres deep. Again, looking at this grant carefully, it appears the President was guided by the 1958 Continental Shelf Convention, where 200 metres depth or the exploitability criterion was used to describe the continental shelf. As already indicated, even the Nigerian Petroleum Decree No. 51 of 1969, defines the continental shelf of Nigeria as extending to 200 metres or to the depth of exploitability. There is no doubt that the Nigerian Petroleum Decree is based on the 1958 Continental Shelf Convention, which explains the discrepancy between Nigerian legislation and the modern definition of the continental shelf as contained in article 76 of the 1982 LOSC. It should be noted that the 1958 Continental Shelf Convention and the exploitability criterion have been superseded by the modern criteria of natural prolongation of the land territory/distance of 200 nautical miles under article 76 of the 1982 LOSC. The difference between the two criteria is that while the criterion of exploitability is geographically uncertain, the criterion of distance has a fixed limit. It is thus necessary to harmonise the different interpretations. Alternatively, Nigeria may opt for the mixed criterion which permits a combination of depth and distance.

Delineating an isobaths under the LOSC requires complying with the complex formula prescribed under article 76 of the Convention. Article 76, which requires the vertical measurement of depth and the production of an isobaths, combines "geography, geology, geomorphology and jurisprudence."¹⁶⁴ Ocean mapping and the production of an isobaths entails enormous cost, technology and expertise, which developing countries such as Nigeria may not readily have. Nigeria is thus advised to

¹⁶⁴ Johnson, D. M., *The Theory and History of Ocean Boundary-Making*, McGill-Queen's University Press, Montreal, p. 91

take advantage of the technical assistance offered by the Division of Ocean Affairs of the United Nations in undertaking such ventures.

Returning back to the grant, the candid opinion of this writer is that, to solve the unending crisis in the Niger Delta, an enhanced proceeds from oil needs to be put back into the region to cushion the effect of several decades of environmental degradation and neglect and this by implication means more derivation funds. This can only happen if the derivation zone is extended to the continental shelf as originally proposed by the National Assembly. The text of the 2004 Abrogation Act should accordingly be changed to read "200 nautical miles" in line with the modern criteria under the 1982 LOSC.

In relation to the issue of baseline for measuring the breadth of the grant, there is as yet no official map or chart published by the government indicating the breadth of this grant and none has been deposited with the United Nations.¹⁶⁵

The effect of the so-called Abrogation Act is that, littoral states may only derive revenue from oil located within the 200 metres and not beyond. To that extent, the 200 metres is a mere resource limit which may ambulate landward or seaward depending on the wish of the National Assembly. The functional line between the Federal Government and the littoral States still remains the low-water mark. It follows therefore that the grant is not a quitclaim since the Federal Government still retains title to all natural resources within the beds of the territorial sea and the continental shelf of Nigeria.

¹⁶⁵ See the United Nations Organisation, "Maritime Space: Maritime Zones and Maritime Delimitation," <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/depositpublicity.htm> (accessed 28 June, 2009).

One positive effect of the Act is that it has partially removed the dichotomy between onshore and offshore oil, introduced by the Supreme Court judgement as littoral states with offshore oil wells may now earn derivation from oil produced from those wells. For more funds to accrue to the littoral states, we recommend a complete removal of the dichotomy and the extension of the derivation zone to the continental shelf.

4.9 DELIMITATION OF MARITIME BOUNDARY BETWEEN NIGERIA AND HER NEIGHBOURS

The claim of ownership by littoral states to the territorial sea and the continental shelf of Nigeria make it expedient to throw some light on the areas of the sea the ICJ was requested to delimit between Nigeria and Cameroon.¹⁶⁶ On 29 March 1994, Cameroon seized the International Court of Justice of a dispute against Nigeria. Apart from the question of sovereignty over the Bakassi Peninsular, Cameroon requested the Court "to proceed to prolong the course of its maritime boundary with the Federal Republic of Nigeria up to the limit of the maritime zones which international law places under their respective jurisdictions."¹⁶⁷ The Gulf of Guinea, which is the area to be delimited, is bounded by five coastal states: Nigeria, Cameroon, Equatorial Guinea, Gabon, and São Tome and Principe.¹⁶⁸ Taking into account the geographic setting that characterises the Gulf of Guinea, the maritime claims/entitlements of the five states overlap considerably. Considering that its rights and interests might be affected by the Court's decision on this matter, Equatorial Guinea filed an

¹⁶⁶ See supra n. 64 above. For more on this case, see Y. Tanaka, supra, n. 65, pp369-406

¹⁶⁷ Nuno Antunes, above, supra n. 63, p. 164.

¹⁶⁸ All five States ratified the UN Convention on the Law of the Sea. Cameroon, 19th November 1985; Nigeria, 14th August 1986; Equatorial Guinea, 21st July 1997; Gabon, 11th March 1998; and São Tome and Principe, 3rd November 1987.

Application for Permission to intervene in the Cameroon and Nigeria case. By an order of 21 October 1999, the Court granted Equatorial Guinea's request.¹⁶⁹

The maritime delimitation between Cameroon and Nigeria involved two sectors. Sector one was limited to the territorial seas, while sector two dealt with the exclusive economic zones and the continental shelves. The central issue in sector one was whether the territorial sea between Cameroon and Nigeria had already been established on the basis of three international legal instruments, i.e., the Anglo-German Agreement of 11 March 1913, the Cameroon-Nigeria Agreement of 4 April 1971 including the Yaoundé 11 Declaration and appended Chart 3433, and the Maroua Declaration of 1 June 1975.¹⁷⁰ The Court held unanimously that the Maroua Declaration, popularly called "Maroua Line" was binding on the Parties. Hence the maritime boundary between the two states relating to their territorial seas had already been established.

Going back to the issue of claim of ownership over the territorial sea and the continental shelf of Nigeria, the question one may ask, is, if littoral states can "own" a territorial sea which is the subject of a contest by two sovereign nations. The simple answer in our opinion is no. We take the position that littoral states may not rightfully lay claim to a subject matter which may involve the rights and interests of international parties/states and which international courts and tribunals may rightfully adjudicate upon. This view is in fact endorsed by the Supreme Court of Nigeria, when the apex court recently rejected the claim by the Attorney General of Cross Rivers State over the Bakassi Peninsula and the surrounding islands. With the Attorney General of the Federation, and the Attorney General of Akwa Ibom State as the first and second defendants,

¹⁶⁹ Above, *supra*, n. 63, p. 163

¹⁷⁰ *Id* at p. 166

the plaintiff requested the Supreme Court to declare among other things that: "all cities, towns and villages in Bakassi Local Government Area, (particularly Bakassi Peninsula and its surrounding islands) are vested in the Government of Cross Rivers State (to the exclusion of the Government of Akwa Ibom State).¹⁷¹ Although the plaintiff later abandoned this claim and instead asked for a "declaration that the boundary between Cross River State and Akwa Ibom is as shown in the boundary delimitation by the NBC dated 30th March, 2004 and revised on July 2004," and persuaded the Court to proceed to delimit the maritime boundary between it (Cross River State) and Akwa Ibom State, even when the ICJ had adjudged Bakassi Peninsula as belonging to Cameroon, the Court rejected this claim and held that: "If the 'median line' principle or the 'thalweg' principle is to be adopted in drawing the boundary line along the Cross River between Cross River State and Akwa Ibom State, the line must intersect the new maritime boundary line (maroua line) between Nigeria and Cameroon with the result that Cross River no longer has a seaward boundary."¹⁷² Even without the judgement of the ICJ, it is doubtful if the Supreme Court would have granted this request, in view of its earlier decision that the seaward limit of littoral state was the low-water mark.

The above analysis has shown succinctly that littoral states in Nigeria may not validly claim ownership of the territorial sea and the continental shelf of Nigeria since to do so would involve international responsibility which only sovereign nations may lawfully embark.

¹⁷¹ *The Attorney General of Cross River State v The Attorney General of the Federation & Attorney General of Akwa Ibom State* (2005) 15 N.W.L.R. Part 947 p. 71 at p. 76.

¹⁷² *Id* pp. 107-108.

4.10 CONCLUSION

We have demonstrated in the three preceding chapters that both legal and institutional framework has shown that ownership of oil and gas in Nigeria is vested in the Federal Government. This position has equally been endorsed by both municipal and international courts. We also moved beyond the issue of ownership and emphasised the importance of sustainable development of petroleum in Nigeria. This as we have indicated involves compliance, enforcement and the implementation of the numerous environmental law treaties and the Plan of Action embodied in Agenda 21 of the 1992 Rio Summit. These, in addition to putting back an enhanced proceeds from oil and gas exploitation, into the developmental aspirations of the oil producing communities, is the panacea for lasting peace in the region.

CHAPTER FIVE

ENVIRONMENTAL REGULATION OF OIL AND GAS EXPLORATION AND PRODUCTION IN NIGERIA

5.1 INTRODUCTION

Oil spills, blowouts and gas flaring. The list is endless. Petroleum development has resulted in the devastation of the environment with tremendous effects on human health and the environment. These developments have not only generated local, national and international attention, but have prompted the environmental regulation of oil and gas activities to minimise or prevent gas pollution.

This chapter will examine some major international environmental treaties, 'soft law' and regional agreements relevant to the petroleum industry. Our aim is to analyse the efforts already made at the international level to address environmental aspects of petroleum development.

The need for effective regulation coupled with an efficient enforcement mechanism in ensuring improved human health and better environmental standards cannot be overemphasised.

It is against this background that we go further to examine environmental regulation as contained in the existing petroleum and environmental regulation in Nigeria to find out how the various problems associated with petroleum development are addressed. Our aim is to see how effective have the laws and regulations been in addressing environmental issues and ensuring sustainable development.

5.2 EARLY DEVELOPMENT OF INTERNATIONAL LEGAL INSTRUMENTS

Although there were sporadic efforts to remedy local forms of pollution, a global move for an international environmental regulation of

oil and gas activities is a relatively recent phenomenon. While prominence was accorded to conservation of some valuable species such as birds and fishes by early international environmental law,¹⁷³ very little attention was given to oil and gas operations. This is however not to say that early international legal developments totally negated the oil and gas industry.

As early as 1941, the foundation for an eventual development of international environmental law¹⁷⁴ was laid when an Arbitral Tribunal held that under international law, "no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."¹⁷⁵ The arbitration arose between the United States and Canada over the emission of sulphur fumes from a smelter situated in Canada, which caused environmental damages to its neighbouring state of Washington. Seen as a landmark case in establishing states responsibility in international environmental law, the rules laid down herein have ossified into customary international law.

At the international level, rules governing the oil and gas industry were minimal during the early days. However, about the middle of the 20th century, especially following the formation of the United Nations in 1945, a combination of international legal framework, regional agreements and national legislations has been formulated to regulate oil and gas activities.

¹⁷³ See Alexandre, K. and Dianah S. *International Environmental Law* (2nd edn. New York: Transnational Publishers, Inc. 2000), p. 55.

¹⁷⁴ For a discussion of the history of international environmental law, see P. Sands, *Principles of International Environmental Law: Frameworks, Standards and Implementation*, vol. 1 (Manchester University Press, Manchester, 1995), pp. 25-62.

¹⁷⁵ See the *Trail Smelter Arbitration*, 35 AJIL 716 (1941); ILR 317 (1941); also printed in *United Nations Reports of International Arbitral Awards*, vol. 3, p. 1905 (1941).

In dealing with international environmental regulation of oil and gas development, priority will be given to treaties ratified by Nigeria.

5.3 GLOBAL TREATIES

There are numerous international environmental treaties relevant to petroleum development. This study will only undertake a brief overview of some of them.

In reviewing contemporary international law in relation to petroleum, a convenient starting point is the 1982 Law of the Sea Convention.¹⁷⁶

5.3.1 1982 Law of the Sea Convention (UNCLOS)

The Law of the Sea Convention is a global treaty that contains elaborate provisions for the protection and preservation of the marine and coastal environment. The Convention is designed to consolidate all relevant rules and principles, both customary and conventional, into a single framework. It provides in (Part XII) for the protection and preservation of the marine environment. It requires states to take measures to prevent, reduce, and control the pollution of the marine environment. In relation to offshore operations, it calls upon member states to take measures to prevent, reduce and control pollution of the marine environment and, in particular:

"Pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such

¹⁷⁶ The 1982 Law of the Sea now supercedes the 1958 Geneva Conventions.

installations or device."¹⁷⁷ States are further enjoined to adopt laws and regulations, which are no less effective than international rules, standards and recommended practices and procedures, to deal with pollution from or in connection with offshore activities; and shall cooperate in the protection of the marine environment on a global and regional basis.¹⁷⁸

Although these provisions do not contain operational obligations, they nonetheless provide an excellent framework for the development of legal rules governing petroleum operations both nationally and globally. Nigeria has ratified UNCLOS.

5.3.2 1972 London Dumping Convention

This Convention was adopted in London in 1972 and came into force in 1975¹⁷⁹. Its purpose is to control pollution of the oceans by deliberate dumping of wastes (other than the discharging of wastes that is part of the normal operation of ships and aircrafts over the seas). It is a major global environmental instrument applicable to all marine areas other than the internal waters.

According to the Convention, dumping is defined as:

- (a) (i) any deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structure at sea;
- (ii) any deliberate disposal at sea of vessels, aircraft, platforms or other man-made structure at sea;

The disposal of wastes or other matter directly arising from, or related to the exploration, exploitation and associated offshore

¹⁷⁷ Art. 194.3(c).

¹⁷⁸ Art. 208 (1 & 5).

¹⁷⁹ Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters, 29 December 1972, in force 30 August 1975, 1064 UNTS 120.

(b) processing of seabed mineral resources will not be covered by the provisions of this Convention.¹⁸⁰

On November 7th 1996, contracting parties to the London Dumping Convention adopted a new protocol which expanded and clarified the definition of 'dumping' to include: "Any abandonment or toppling at site of platforms or other man-made structures at sea, for the purpose of deliberate disposal. By regulating the disposal of offshore installations and structures, the Convention and the new protocol have significant bearing on offshore oil and gas activities. Nigeria has acceded to this Convention.

5.3.3 1992 Biodiversity Convention

The growing concern by the international community about the loss of biodiversity on the planet earth prompted the adoption of the Biodiversity Convention at the Rio Conference in 1992.¹⁸¹ Its relevance to the petroleum industry is quite apparent since upstream operations are bound to interfere with biological sources such as land, vegetation and forests, while downstream operations are known to cause serious environmental problem such as air pollution and climate change.

State parties under the Convention are enjoined to identify and monitor the effects of such processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biodiversity; and establish a system of protected area or areas where special measures need to be taken to conserve biodiversity.¹⁸² Nigeria is a party to this treaty.

¹⁸⁰ Id. n. 179.

¹⁸¹ The United Nations Convention on Biological Diversity, reprinted in 31 ILM 822 (1992).

¹⁸² Id., Arts. 7 (c) and 8 (a).

5.3.4 1992 Climate Change Convention

The United Nations Framework Convention on Climate Change (UNFCCC) was adopted against the international backdrop of global climate change caused by emission of greenhouse gases, to which the consumption of fossil fuels, including coal, oil and gas, are top on the list. The Convention was opened for signature on May 9, 1992. It entered into force on March 21, 1994. Its stated objective is to “achieve stabilization of greenhouse gas concentrations in the atmosphere at a low enough level to prevent dangerous anthropogenic interference with the climate system.”

Signatories to the UNFCCC are split into three groups: the Annex 1 countries (made up of industrialised countries); the Annex 11 countries (made up of developed countries which pay for the costs of developing countries); and the developing countries.

The Kyoto Protocol is an agreement under the UNFCCC, wherein countries that ratify the protocol are committed to the reduction of their emissions of greenhouse gases or engage in emission trading if they maintain or increase emissions of these gases.

Under the Kyoto Protocol, there are some flexible mechanisms intended to lower the overall costs of achieving emissions targets. These flexible mechanisms or Kyoto mechanisms are: emission trading, clean development mechanism and joint implementation. Nigeria ratified the Kyoto protocol on the December 12, 2004.

5.4 THE "SOFT LAW" FAMILY

In addition to the above "hard" international instruments, there have also been a number of "soft" international agreements relevant to the topic at hand. Some of the very essential ones are discussed below.

5.4.1 Declaration of the Conference on the Human Environment (Stockholm Declaration)

This document resulted from the 1972 United Nations Conference on the Human Environment held in Stockholm. A non-binding document, it has served as a guide to national and international efforts to protect the environment. Its famous Principle 21 provides that states have the sovereign right to exploit their own resources and the responsibility to ensure that activities within their jurisdiction or control do not cause environmental damages.¹⁸³

Another important international environmental declaration of relevance to the oil and gas industry is the 1992 United Nations Conference on Environment and Development (UNCED, also known as the `Earth Summit`). The Conference came up with some non-binding documents including the Rio Declaration and Agenda 21.

5.4.2 The Rio Declaration

The Rio Declaration comprises 27 principles which address such issues as:

- Integrating environmental protection into the development process;
- common but differentiated responsibilities to conserve, protect and restore the Earth's ecosystem;
- Public participation and access to information at the national level out and the need to reduce and eliminate unsustainable patterns of production and consumption;
- National environmental laws to address liability and compensation for the victims of pollution and other environmental damages;

¹⁸³ Stockholm Declaration of the United Nations Conference on the Human Environment, 16 June 1972, UN Doc. A/CONF.48/14M, 16 June 1972, also reprinted in 11 ILM 1416 (1972).

- Polluter pays principle;
- Making EIAs standard practice for proposed activities likely to have a significant adverse environmental impact;
- Indigenous people and their communities to participate in development activities; and
- Settlement of environmental disputes, in a peaceful and appropriate means.¹⁸⁴

The aforementioned principles lay down the foundation for achieving sustainable development for peoples and communities, especially in localities where oil and gas development is taking place.

5.4.3 Agenda 21

This is a blue print for countries to adopt their own ‘national action plans’ towards sustainable development. It comprises a preamble and four sections to address such issues as social and economic dimensions (chapters 2 - 8); conservation and management of resources for development (chapters 9-22); strengthening the roles of major groups (chapters 23-32), and means of implementation (chapters 33-40).¹⁸⁵ In relation to oil and gas development, Agenda 21 encourage states to assess the need for additional measures to protect the marine environment against pollution arising from offshore oil and gas operations.¹⁸⁶

Also included in the list of "soft laws" are some guidelines and standards of international organisations such as: UNEP’s environmental law guidelines and principles ‘Offshore Mining and Drilling’¹⁸⁷ and IMO

¹⁸⁴ Id., Arts. 1, 4, 7, 8, 10, 13, 16, 17, 22, 25, and 27.

¹⁸⁵ For the text, see UNCED Report, A/CONF.151/26/Rev. 1, vol. 1, 1993.

¹⁸⁶ Id., 17 (30.c).

¹⁸⁷ UNEP, *Environmental Law Guidelines and Principles: Offshore Mining and Drilling*, Decision 10/14/VI of the Governing Council, 31 May 1982, Nairobi, Kenya.

Guidelines;¹⁸⁸ international technical standard adopted by International Standards Organisation (ISO); operational directives and environmental guidelines developed by the International Bank for Reconstruction and Development (the World Bank)¹⁸⁹; ‘Business Charter for Sustainable Development’,¹⁹⁰ and the Oil Industry International Exploration and Production Forum (E & P Forum).¹⁹¹

5.5 REGIONAL AGREEMENTS

Apart from the above mentioned international ‘hard’ and ‘soft laws’, there are also a number of environmental agreements concluded at the regional level to which Nigeria is a party. The aim of most regional treaties is to reinforce global instruments, by filling in gaps, facilitating joint action and mutual understanding in environmental policy and management, and enabling environmental issues to be treated on a regional rather than on a national basis.

Environmental cooperation is also enshrined in broad-based agreements such as the African Union Treaty establishing the African Economic Community relating to natural resource, energy, environment and control of hazardous waste;¹⁹² the African Charter on Human and Peoples Rights¹⁹³; the Economic Community of West African States¹⁹⁴

¹⁸⁸ See IMO, MSC/Circ. 490, 4 May 1988, pp. 1-2 and its Annex, pp. 1-6, reprinted in 4 Int’l J. Est. & Coastal L. 76-79 (1992).

¹⁸⁹ The World Bank, ‘Guidelines for an Environmental Assessment of Energy and Industry Project: Oil and Gas Pipelines; Oil and Gas Development-Offshore; Oil and Gas Development-Onshore’, in The World Bank, Environment Assessment Sourcesbook, vol. 111 (The World Bank, Washington DC, 1991), pp. 32-62.

¹⁹⁰ International Chamber of Commerce, ‘Business Charter for Sustainable Development’, reprinted in 21 Env’tl Policy & L (EPL) 35 (1991).

¹⁹¹ UNEP and E&P Forum, *Guidelines on Environmental Management in Oil Exploration and Production* (London, E & P Forum: 1997).

¹⁹² Arts, 56-59 of African Union Treaty.

¹⁹³ Sections 16 (1), (2) & 24 of the African Charter on Human and Peoples’ Rights (Bangul, 27 June 1981) (the Banjul Charter). It should be noted that Nigeria has incorporated the African Charter on Human and peoples’ Rights into its domestic law, see African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act 1983, Cap. 10 Revised Laws

¹⁹⁴ See <http://www.sec.ecowas.int/sitecedea0/english/achievements-2.htm> (accessed 5 July 2009).

and the biennial African Ministers Conference on the Environment.¹⁹⁵ Again, although there are many such treaties, just one has relevance to oil and gas development.

5.5.1 Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (The Abidjan Convention)

The Convention, was adopted in Abidjan in 1981 and entered into force on the 5 of August 1984; the same date that Nigeria ratified the Treaty. It covers coasts from Mauritania to Namibia, a distance of about 8000 kilometres.¹⁹⁶

Contracting Parties under the Convention are enjoined to protect and preserve the fragile ecosystems of the region. To this end, they are required to take appropriate measures to prevent, combat and control pollution of the Convention area and to ensure sound environmental management of natural resources. Appropriate measures are to be taken to forestall pollution of the Convention area from exploration and exploitation activities from the seabed. The Convention also provides for the development of guidelines for conducting environmental impact assessment and for the formulation of procedures for the determination of liability and compensation.¹⁹⁷

¹⁹⁵ See Land and Native Rights Ordinance 1910.

¹⁹⁶ For geographical coverage of the Convention, see Article 1 of the Convention. See also, Vernier, N. A Framework for Integrated Coastal Zone Management in Sub-Saharan Africa. In Building Blocks: Towards Environmentally Sustainable Development in Sub-Saharan Africa: A World Bank Perspective, Paper No. 4 World Bank, and Washington DC, United States, (1995).

¹⁹⁷ See Arts. 4 (1) & (3), 8 and 13 of the Convention. See also, UNEP (1981). Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region. Protocol Concerning Cooperation in Combating Pollution in Cases of Emergency. United Nations Environment Programme, Nairobi, Kenya.

This convention is implemented in Nigeria through the establishment of a national focal point with reporting mechanism for compiling national status reports on the coastal and marine environment. Among other things, the focal point serves as a channel for all formal communications between the regional coordinating unit, the Government and national collaborating institutions. It equally facilitates the internationalisation of all agreements on policy, legal and regulatory framework of the convention and its protocols for timely implementation.

The national focal point remains a veritable tool for the promotion of the objectives and implementation of the work plan of the Abidjan Convention.

5.6 SOME OBSERVATIONS

Looking very carefully at the aforementioned international instruments, “soft laws” and the regional agreement, one feature that runs through them is the fact that, although they all regulate oil and gas activities, their concentration is more on exploration and exploitation in the seabed areas. That these regulations have clearly left out oil and gas activities onshore is very apparent.

One possible explanation for this is that, apart from oil and gas development, other legitimate uses of the offshore such as freedom of navigation, conduct of scientific research and the construction of artificial islands and installations, involves the rights of other states. Therefore, international law needs to regulate activities within the seabed areas.

Secondly, activities in the seabed are mostly extractive in nature such as oil and gas exploration and exploitation. These activities may result in pollution which may affect the ecology of many States bordering the offshore areas. It is therefore necessary to bring these activities within the ambit of international law.

Finally, since onshore oil production is undertaken within the land domain of individual States, international law may be very reluctant to regulate such activities on the grounds of sovereignty.

In our opinion, excluding onshore oil and gas development from the ambit of international law, may be the very reason for the lack of effective regulation and monitoring of onshore oil activities.

Yet onshore oil development, has had the most devastating environmental effects in the Niger Delta region, where Shell, Texaco and other multi-national oil companies have been engaged in petroleum development for over four decades.

Since onshore oil development involves the active participation of multi-national oil companies, there is need for an effective international treaty such as obtained offshore, to curb the excesses of multi-national oil companies engaged in onshore oil development. Such instrument should address issues of sustainability and environmental protection. Multi-national companies must be compelled by legislation to set aside a certain percentage of their earnings directly to oil bearing communities, this will in no small measure help to reduce tension between them and local communities.

5.7 PETROLEUM ENVIRONMENTAL REGULATIONS UNDER NIGERIAN LAW

Attention is now focused on examining the legislative framework for the environmental regulation of oil and gas activities in Nigeria.

5.7.1 National Policy on Environment

The framework for overall environmental management goals in Nigeria was conceived in 1989 following the emergence of global concern for the environment. The launching of a National Policy on Environment by the former **Federal Environmental Protection Agency (FEPA)**¹⁹⁸, was intended to be the most comprehensive environmental legislation to promote sustainable development and ensure the protection and preservation of the environment.

Broadly, the policy recognises and emphasises national economic policies that promotes sustainable development. The major policy goals includes:

1. securing for Nigerians a quality of environment adequate for their health and well-being;
2. conserving and using the environment and natural resources for the benefit of present and future generations;
3. restoring, maintaining, and enhancing ecosystems;
4. raising public awareness, especially on the linkages between environment and economic development, and encouraging community or individual participation in environmental improvement; and
5. seeking international cooperation in environmental matters.¹⁹⁹

The Nigerian national environmental policy, no doubt, adopts an integrated and holistic view of environmental issues and is predicated on some broad strategies for implementation. These strategies include the establishment of institutional and legal frameworks, the development of

¹⁹⁸ FEPA Act 1988, Cap. 131 Revised Laws of the Federation of Nigeria 1990. It should be noted that the activities of this agency has now been handed over to the Ministry of Environment both at the federal and state levels.

¹⁹⁹ Id., para. 2.

appropriate research, documentation, monitoring, evaluation, public information as well as the creation of appropriate standards.

The above national policy embraces all aspects of the environment with detailed guidelines and strategies for achieving the various goals. The Act empowered FEPA to “establish such environmental criteria, guidelines, specifications or standards for the nation’s air and interstate waters as may be necessary to protect the health and welfare of the population from environmental degradation” and “maintain a programme of technical assistance, to bodies (public or private) concerning implementation of environmental criteria, guidelines, regulations and standards and monitoring enforcement of the regulations and standards thereof.”²⁰⁰

In relation to the production and use of energy, the policy provides that:

*"As energy consumption increases with increase in industrialisation, it is essential to ensure a balanced mix of various energy types which will be compatible with sound environmental practice and the reduction of negative impact of energy production and use on the environment."*²⁰¹

Other important sections of the Act dealing with the environmental aspect of oil and gas development are sections 20 and 21. Section 20 (1) prohibits the discharge of harmful quantities of any hazardous substance into the air or upon the land and the waters of Nigeria or adjoining shoreline, except where such discharge is permitted or authorised under any law in force in Nigeria.²⁰² The section provides a criminal penalty for any breach committed by an individual or a corporate body. An individual

²⁰⁰ See sections 5 (g) and (I) respectively. For detailed implementation strategies for various sectors, see Articles 3.1 to 3.14.

²⁰¹ Id. n. 199

who violates any standards set by FEPA will on conviction be liable to pay a fine of 100, 000 naira, or serve a term of ten years' imprisonment or both. Where the offence is committed by a corporate body, a penalty of 500,000 naira and an additional fine of one thousand naira for every day the offence subsists is imposed. Furthermore, section 20(4), the Act holds any official in charge of a violating corporate body at the time the offence was committed, liable, unless he can prove that he had no knowledge of the offence or that he exercised all due diligence to prevent the discharge.

Also, Section 21 provides that, in addition to the criminal penalty stated in Section 20, an offender shall be liable to pay the cost of removal of the offending substance, including any costs which may be incurred by any government body or agency in the restoration or replacement of any natural resources damaged or destroyed as a result of the discharge, and also the costs of third parties in the form of reparation, restoration, restitution or compensation.

A careful look at section 20 shows that the discharge of hazardous substances through sources like oil spills is still permissible provided it is done within acceptable limits. Furthermore, a polluter is not liable to face criminal sanction if he is granted a permit or authorisation to discharge any hazardous substance.

In 1992, the requirement for a mandatory environmental impact assessment (**EIA**) of projects was added as one of the legal framework for regulating petroleum development.²⁰³ The Decree prohibits both public and private sectors of the Nigerian economy from embarking or

²⁰² "Hazardous substance" under this section includes crude oil. See Y. Omorogbe and O. Abiodun (eds), Report of National Workshop on Petroleum and Industrial Law (University of Lagos Press, 1992), p. 25.

²⁰³ Environmental Impact Assessment Decree No. 86 of 1992, published by FEPA

authorising projects or activities without prior consideration of their environmental impacts.²⁰⁴

5.7.2 Legal Framework

The first petroleum code in Nigeria which contained some elements of environmental regulation is the **Petroleum Act 1969**.²⁰⁵ Although the Act was promulgated to confer ownership of oil on the state, it contained some general provisions relating to pollution arising from petroleum development. The Petroleum Minister is for instance empowered to arrest and even suspend any oil operations which in his opinion are not being conducted in accordance with good oil field practice. The Minister is also authorised to make regulations on matters relating to prevention of pollution and safety in the conduct of oil operations.²⁰⁶

Another important regulations made under the Petroleum Act in terms of the environmental protection is the **Petroleum (Drilling and Production) Regulations 1969**. It requires the licensee or lessee to maintain all his equipment and all boreholes and wells capable of producing petroleum in good repair and condition, and to carry out all his operations in a proper and workmanlike manner in accordance with these and other relevant regulations and methods and practices accepted by the Director of Petroleum Resources as good oil field practice.²⁰⁷ The lessee or licensee is further required to take all practical steps to:

- a) Control the flow and to prevent the escape or avoidable waste of petroleum discovered in or obtained from the relevant area.
- b) To prevent damage to the adjoining petroleum -bearing strata.

²⁰⁴ Section 2 (1) of the EIA Decree 1992.

²⁰⁵ Petroleum Act, Cap 350, Laws of the Federation of Nigeria, 1990.

²⁰⁶ Sections 8 (9) and 9 of the Petroleum Act 1990.

²⁰⁷ See Regulation 36

- c) Except for the purpose of secondary recovery as authorised by the Director of Petroleum Resources to prevent the entrance of water through boreholes and wells to petroleum-bearing strata.
- d) To prevent the escape of petroleum into any water, well, spring, stream, river, lake, reservoir, estuary or harbour.
- e) To cause as little damage as possible to the surface of the relevant area and to the trees, crops, buildings, structures and other property thereon.²⁰⁸

Furthermore, regulation 36 requires the lessee or licensee to adopt approved methods and practices for the production of crude oil and natural gas from the pools and reservoir.

The Minister is empowered to revoke any oil prospecting licence or oil mining leases if the holder of such a licence or lease fails to comply with the conditions or provisions of the Petroleum Act and accompanying regulations as stated in Regulation 24 of Schedule one to the Petroleum Act, 1969.

Under section 4 (2) (b) this Act, a polluter will be exempted from liability if he can establish that the discharge was for the purpose of securing the safety of the vessel or preventing damage to any vessel or cargo or to save lives.

The Associated Gas Re-injection Act 1979, cap. 26 Laws of the Federation of Nigeria 1990

This Act was promulgated in response to the criticism against gas flaring in Nigeria. Under section 3(2) of the Act, oil operators are required to submit detailed preliminary programmes and plans for the implementation of gas re-injection in their various fields. Furthermore, the

²⁰⁸ Id. n. 207

Minister is vested with the power to issue certificates to any oil company to continue to flare gas if such a company pays the sum prescribed by the Minister. This Act was followed by the **Associated Gas Re-injection (Continued Flaring of Gas) Regulation 1984, Laws of the Federation 1990**. Under this regulation, the Minister may allow gas flaring:

- a) Where more than 75 percent of the produced gas is effectively utilised or conserved;
- b) where the produced gas contains more than 75 percent impurities, rendering it unsuitable for industrial purpose,
- c) where an ongoing utilisation programme is interrupted by equipment failure, provided that such failures are not considered too frequently by the Minister and that the period of any one interruption is not more than three months;
- d) where the ratio of the volume of gas produced per day to the distance of the field from the nearest gas line or a possible point is less than 50,000SCF/Km.

Provided that the gas to oil ratio of the field is less than 3,500 SCF/bbl, and that it is not technically advisable to re-inject the gas in the field;

- e) where the Minister, in appropriate cases as he may deemed fit, orders the production of oil from a field that does not satisfy any of the conditions specified in this regulations.

One striking feature of the above Act and the accompanying Regulation is the permission given to oil companies to continue to flare gas on the payment of minimal fees. Oil companies would rather pay the prescribed fee for gas flaring than incurring more costs in the re-injection of produced gas.

5.7.3 Institutional Arrangements

In Nigeria, the responsibility of monitoring the enforcement and compliance with environmental legal standards and obligations rests with the Federal Ministry of Environment. This Ministry took over the functions of the former FEPA. The policy thrust of the Ministry, which is also the environmental agenda of the present administration, is popularly called Environmental Renewal and Development Initiatives. ‘The objective of this initiative is to take full inventory of Nigeria’s natural resources, assess the level of environmental damage and design and implement restoration and rejuvenation measures. It also includes evolving and implementing additional measures to halt further environmental degradation in Nigerian. The coordination of the entire national policy on environment is vested in the Ministry of Environment. The Ministry has very wide powers covering all industries, including the petroleum industry. In relation to petroleum development, a vital role played by the Ministry is the approval of environmental impact assessment. New oil and gas projects require EIA approved by the Ministry before construction can commence. The recently introduced public hearing to the approval process has now ensured participation of members of the wider community, particularly people inhabiting the project site. Other institutions such as the National Conservation Council,²⁰⁹ the Directorate of Petroleum Resources and the Nigerian National Petroleum Corporation are major stakeholders in regulating the environmental aspects of petroleum development.

²⁰⁹ The National Resources Conservation Council was established through Decree (No. 50) 1998 to: coordinate matters concerning the conservation of natural resources, formulate a national policy on natural resources conservation, monitor the activities of conservation agencies, and carry out research and other activities to enhance conservation efforts.

5.7.4 Observations

It is at this juncture necessary to assess the wide range of environmental laws and regulations and the institutional framework established to regulate the environmental aspects of petroleum development in Nigeria. The aim is to find out whether the presence of comprehensive rules and institutional arrangement results in better compliance and enforcement thereby ensuring sustainable development of petroleum in Nigeria.

5.7.4.1 Environmental Provisions

In Nigeria the movement towards a more coherent environmental policy and coordinated control could be said to be a major mark of the 1980s and 1990s with the creation of FEPA in 1988, the launching of a National Policy on Environment in 1989 and the institution of environmental impact assessment (EIA) in 1992.

Aware of the interrelationship between economic activities and their environmental consequences and the need to ensure environmentally sound and sustainable development, there was a gradual effort at building environmental considerations into petroleum development. Furthermore, a tendency towards a multi-dimensional integrated approach to environmental regulation also began during this period.

The institution of EIA for instance, heightened the need and the importance of developing anticipatory policies of preventing, mitigating and monitoring significant adverse environmental impact. It also emphasised the need to give explicit consideration to environmental factors at an early stage in the decision-making process by applying environmental impact assessments at all appropriate administrative levels as a necessary tool to improve the quality of information presented to

decision makers so that environmentally sound decisions can be made paying careful attention to minimising significant adverse impact.

Although the institution of EIA represents a significant step towards greater environmental sustainability, EIAs alone are not enough to secure sustainable development. Environmental sustainability in the Niger Delta need to be anchored and reinforced by incorporating, equity assessment as an integral part of decision-making. Greater equity is needed throughout the region in the distribution of wealth, opportunities and the benefits of economic development.

Furthermore, environmental regulations in Nigeria have traditionally been based on a broadly prescriptive approach of command and control. The recent trend is towards performance-based regulations, rather than the command and control strategy. This new approach, which involves goals setting, has the potential to stimulate more innovative and effective environmental management in petroleum development.

5.7.4.2 Petroleum Legislations

The command and control strategy involving standards, bans and cancellations are still prevalent in petroleum licensing, agreements and legislations in Nigeria. These legislations do not adequately address environmental protection and conservation measures. Much emphasise is placed on remedial measures as against prevention. While fines are meager, the enforcement mechanisms are lacking.

5.7.4.3 Institutional Arrangements

Nigeria has shown greater commitment in establishing institutions for monitoring compliance with environmental standards. The Ministry of Environment at the federal and state levels and the

Directorate of Petroleum Resources are all involved in monitoring compliance with environmental standards. Even the proposed National Environmental Standards Enforcement Agency, when operational, will also be engaged in compliance monitoring and enforcement.

One unfortunate result of the commitment to strengthen environmental protection measures has been a significant fragmentation and duplication of authority and responsibilities as indicated above. One should hope that the activities of these bodies would be streamlined to reduce overlap and conflict.

5.8 CONCLUSION

The above analysis of the major regulatory and institutional framework for managing petroleum development in Nigeria has shown very little progress in the area of prevention. While the current efforts at rejuvenation and restoration of Nigeria's environment are steps in the right direction, proactive measures should be adequately integrated into the development process. Nigeria needs a petroleum development action plan with emphasis on the oil industry properly linked and integrated with the National Policy on the Environment.

The largely regulatory approach to environmental protection and management need to be supplemented with progressive empowerment of the oil-bearing communities to ensure equitable and social sustainability. Sadly too, the proposed Petroleum Industry Bill 2008 has not offered much hope in the area of sustainable development, environmental protection and equitable distribution of oil revenue for oil-bearing communities. Coming almost thirty years after its predecessor, the Petroleum Act 1969, the proposed Petroleum Bill is

not proactive. Apart from creating several boards and commission, the Bill has not made provisions for strategic and integrated impact assessment suggested by this author. A Petroleum Bill for the 21st century must provide for environmental protection and ecological sustainability.

CHAPTER SIX

IMPACT OF PETROLEUM DEVELOPMENT ON THE NIGERIAN ENVIRONMENT

6.1 INTRODUCTION

Petroleum development comprises two main parts- 'upstream'- the exploration and production sector of the industry; and 'downstream'- the sector which deals with refining and processing of crude oil and gas products.

For a proper appreciation of the origins of the potential impacts of petroleum development on the environment, it is useful to highlight the activities involved at the different stages of oil and gas operations. These stages involve pre-drilling activities (exploration surveying), exploratory drilling, appraisal drilling, development and production and decommissioning.

Oil and gas operations have the potential for a variety of impacts on the environment. These impacts depend upon the stage, size and complexity of the project and may be avoided, mitigated or minimised with adequate care. The potential environmental impacts will be discussed in this order, namely: impacts associated with pre-drilling activities, exploration and production activities, decommissioning and socio-cultural impacts.

The actual incidents of environmental and socio-cultural damage arising from petroleum development in Nigeria in the form of oil spills, air pollution, water pollution, loss of biological diversity and socio-cultural damage are also examined.

6.2 OVERVIEW OF PETROLEUM DEVELOPMENT PROCESS

6.2.1 Exploration Surveying (Pre-drilling activities)

The first stage is to search for hydrocarbon-bearing rock formations and major sedimentary basins. Aerial photography may also be used to locate faults and anticlines.²¹⁰ More information is gathered using field geological assessment and several survey methods. The most common survey method used at this stage is the seismic survey. In seismic survey, soundwaves transmitted through the Earth's crust are reflected back to surface vessels and allow a picture to be formed of rock formations deep underground. These reflections are recorded in sensitive receivers called geophones or seismometers on land, or hydrophones submerged in water.²¹¹ In view of environmental concerns, lower-energy sources such as fibrosis on land (hydraulically transmitting vibrations into the earth) and the air gun (releasing compressed air in offshore operations) are recommended. However, in areas where preservation of vegetation is important, the shot hole (dynamite) method is preferable.²¹² Seismic operations usually involves the management and support of hundreds of personnel for the movement of equipments and the laying of seismic lines. It may also require the construction of access routes (usually between 1-3 meters width) and helicopter pad.

²¹⁰ UNEP, *Environmental Management in Oil and Gas Exploration and Production: An Overview of Issues and Management Approaches* (London: Exploration and Production Forum (E&P) Forum/UNEP, (1997), p. 4

²¹¹ G. S. Roonwal, *The Indian Ocean: Exploitable Mineral and Petroleum Resources*, (Spriger-Verlag: Berlin, Heidelberg, New York, 1986), p. 33. See also Fact Sheet, Norwegian Petroleum Activity, (Norway: The Royal Ministry of Industry and Energy, February 1995), p. 50.

²¹² UNEP, *Environmental Management in Oil and Gas Exploration and Production*, supra. n 191 p. 4

6.2.2 Exploratory Drilling

Upon the identification and confirmation of the presence of hydrocarbon, the next step is to drill exploratory boreholes commonly called ‘wildcats’. The location of the drill site depends on the sequence of the underlying geological formations.

The construction of a pad is needed for land-based operations while self-contained mobile offshore drilling units (MODUs) are used for seabed operations. If the exploratory drilling results in the discovery of commercial quantities of hydrocarbon, a wellhead valve assembly is installed. This involves the construction of steel casing down the well carrying strings of tubing to enable the oil seep in.

However, if the well does not contain commercial quantities of hydrocarbon, the site is decommissioned and the wellhead capped with a cement plug.²¹³

6.2.3 Appraisal Drilling

When exploratory drilling is success, appraisal wells are drilled to determine the size and the extent of the field. The appraisal phase aims to evaluate the size and nature of the reservoir, to determine the number of wells required. A number of wells may be drilled from a single site. This involves the appraisal of other parts of the reservoir through deviated or directional drilling.²¹⁴ This is particularly encouraged to reduce the land used or ‘foot print’.

²¹³ Id at p. 7

²¹⁴ Deviated or directional drilling is usually done at an angle from a site adjacent to the original borehole.

6.2.4 Development and Production

Upon establishing the size of the oil field, the subsequent wells drilled are called development or production wells. The stage is now set for oil and gas production. However, the rate of flow will depend on the permeability of the reservoir rock, the underground pressure and the viscosity of the oil.²¹⁵ In wells that are free flowing, the underground pressure drives the liquid and gas up the wellbore to the surface. However, when oil cannot reach the surface unaided, gas, water or steam is injected into the reservoir to maintain pressure and optimise production rates. Once hydrocarbon reaches the surface, it is channelled to the central production facility which gathers and separates the produced fluids (oil, gas and water). The production facility processes the hydrocarbon fluids and separates oil, gas and water. It is usually at this stage that gas is flared. The oil must be free of dissolved gas before export. Also the gas must be stabilised and free of liquids and unwanted components such as hydrogen sulphide and carbon dioxide. Further more, any water produced must be treated before disposal.²¹⁶ The infrastructure required for development drilling for onshore and offshore are the same. Recent advancement in technology now makes it possible for seabed systems to be remotely operated thus removing the requirement for satellite platforms.

6.2.5 Decommissioning and rehabilitation

Decommissioning and rehabilitation involves removal of buildings and equipments, restoration of the site to environmentally-sound conditions, implementation of measures to encourage site re-vegetation, and continued monitoring of the site after closure.

²¹⁵ UNEP, *Environmental Management in Oil and Gas Exploration and Production*, supra. n. 191 p. 8

²¹⁶ Id. p. 9

The forgoing briefly describes the different phases in petroleum development from the search for crude oil deposits to the decommissioning and rehabilitation of the sites.

6.3 POTENTIAL ENVIRONMENTAL IMPACTS

Below, attention will now be focused on potential impacts associated with the different phases of oil development. The impacts described hereunder are potential impacts, which may be avoided, minimised or mitigated with proper care and attention.

6.3.1 Environmental Impact of Oil and Gas (Pre-drilling Activities)

The initial phase of exploration is usually accompanied with noise from surveying aircraft and explosions from seismic activities. Noise generated from these activities may scare wild and domestic animals to flee the area. Furthermore, vibrations from seismic explosions may cause cracks on buildings around the area. The cutting of seismic lines may cause erosion, contamination or sedimentation of streams.²¹⁷ The presence of hundreds of personnel around the site, construction of base camps, transportation of equipments and opening of access routes, entails massive occupation of communal lands, forest and mangrove swamps. Offshore operations are not free of impacts. The uses of under water explosives have been known to kill fish and other aquatic organisms. During seismic operations, waste volumes from base camps if not properly managed may contaminate local streams, resulting in serious environmental degradation.²¹⁸

²¹⁷ International Association of Geophysical Contractors, *Environmental Guidelines for Worldwide Geophysical Operations* (IAGC, Houston, TX, August 1992), p. 9.

²¹⁸ A. Avbovbo, "Geophysical Structure of the Oil Habitat", *National Workshop on Petroleum Law* (28th - 2nd June, 1984), p. 379.

6.3.2 Environmental Impact of Production Drillings

The major environmental impacts during this stage of operation are oil and gas pollution. Extensive drilling and waste generated during production, if not carefully handled, can pose a devastating threat to the environment and the surrounding communities. Drill cuttings containing oil, heavy metals and rock fragments are known to contaminate ground water where there is no proper care.²¹⁹ In the tropics, oil slumps constructed to store drilling mud have been known to overflow its banks especially during rainy season. They constitute another source of contamination to drinking water, soil, plant and animal life. During production, oil may also escape into the environment through breaks in pipelines, flow-line leakage or even sabotage. These have been known to result in fire outbreaks that have killed humans and wildlife.²²⁰ Oil spills can irreversibly destroy the ecosystem if not properly managed.

Production drilling also has some potential impacts on the atmosphere. During drilling excess produced gas, which comes to the surface, are burned instead of being re-injected into the formation. This burning is a major source of airborne pollutants, such as carbon dioxide, Sulphur dioxide and Methane. These greenhouse gases, especially Methane and Sulphur dioxide are known to be toxic and may contribute to climate change and fall back as acid rain. Furthermore, gas flaring and burning of oil are particularly dangerous in the tropics, as they increase the risk of bush burning during dry season.²²¹

²¹⁹ British Petroleum Company (BP), *Our Industry* (London: BP, 1977), p. 74.

²²⁰ I. P. Enemo, "Liability for Damages Arising from Wilful Interference with Oil Pipeline-The Jesse Incident", *Essays In Honour of Professor C. O. Okonkwo, Nwauche and Asogwah* (eds.), (Port Harcourt: Jite Books, 2000), p. 176.

²²¹ British Petroleum Company, *supra*. p. 219.

6.3.3 Environmental Impact of Decommissioning

Decommissioning involves the restoration of the drill site to its former state. This process entails removing equipments and structures from the drill site. Apart from physical disturbance on the environment, improper waste disposal have been known to pollute streams, rivers and watercourses. Offshore decommissioning if not properly done may obstruct navigation and fishing.

6.3.4 Human and Socio-Cultural Impacts

Exploration and production operations are likely to induce human and socio-cultural changes especially in relation to the traditional lifestyle of local communities. The key impacts can include the disruption of traditional production systems and land-use such as agriculture, fishing, logging and hunting. It may also lead to dislocation of social structures, cultural heritage, beliefs and values systems. Increase in local population levels following a large influx of people both local and foreigners into the oil producing communities, has led to contact and demographic changes resulting in over crowding and spread of diseases such as HIV and AIDS.

6.4 INCIDENTS OF ENVIRONMENTAL AND SOCIO-CULTURAL DAMAGE IN NIGERIA

As already shown, Nigeria has abundant deposits of oil and natural gas and their exploitation has improved the economy substantially, but with severe environmental consequences. Serious ecological devastation has occurred in the Niger Delta region where almost all the extractive industries are located. During the last four decades, hundreds of billions worth of crude oil have been extracted from the Niger Delta wetlands, earning huge profits for the government, while virtually robbing the oil producing communities of both live and livelihood. Environmental

problems associated with petroleum development in Nigeria are numerous. They range from oil spills, air pollution, loss of biodiversity and socio-cultural dislocations. These problems will be briefly discussed in turn.

6.4.1 Oil spills

While petroleum development may not be completely free from spills, the frequency and magnitude with which spills have occurred in the Niger Delta is somewhat alarming. For instance, between 1976 and 1990, it has been estimated that about 2696 oil spill incidents, representing about 2.1 million barrels of oil occurred in Nigeria.²²² Three main sources of oil spill have been identified in the Niger Delta. These are spills from old, corroded and rusty pipelines, spills from sabotage. Poor monitoring of leaks and effective and timely clean-up exercise contribute to the spills.

In Nigeria, there are networks of pipelines that deliver crude and finished products to many parts of the country. Some of these pipelines, which can be visibly seen criss-crossing villages and land, are old, corroded and rusty. Some of them have been known to rupture spilling enormous quantities of oil in states such as Akwa Ibom, Rivers, Delta and Edo States.²²³

The second source of oil spill in the Niger Delta is sabotage of pipelines. Following disagreements between oil companies and local communities over ecological damage and lack of adequate compensation, irate youths sometimes destroy pipelines to siphon crude and finished products, at very great cost to their lives.

²²² Oyekan, A. J. (1991) The Nigerian Experience in Health Safety and Environmental Matters during Oil and Gas Exploration and Production Operation. *Proceedings of the first international conference on health, safety and environment in oil and gas exploration and production*, pp. 11-39.

²²³ Hutchful, E. "Oil companies and environmental pollution in Nigeria." In Claude Ake (ed.), *Political economy of Nigeria*, London: Longman Press, (1985), p. 118.

The third source relates to poor monitoring of spills and effective and timely clean-up. The author witnessed a spill in an open beach in Eket following a leakage of over 1000 barrels of oil from one of Mobil town farm in 2004. There was no clean-up for several weeks.

Spills and leaks not only pollute sources of drinking water, they also destroy and contaminate agricultural lands, fishing creeks and pose serious threats to human life. In October 1998, a pipeline leak that flooded a large region near the village of Jesse in Delta State of Nigeria, exploded killing over 700 people, mostly women and children.²²⁴

6.4.2 Air Pollution

Apart from environmental destruction associated with spills, petroleum development has greatly affected air quality in the Niger Delta. Gas flares are a major feature of the Niger Delta landscape.

Although it has not been scientifically proven, the author observed from the aircraft thick smoke over Eket, Ibeno and Onna Local Government Areas of Akwa Ibom State of Nigeria.

In the process of oil production, natural gas is released as a by-product of oil extraction. This "associated" gas is often burned off or flared thus creating huge flames. Natural gas does not have to be flared off but rather captured and sold or used as local source of energy or re-injected into the subsoil. In Nigeria, however, companies prefer the cheaper option of flaring with minimal fines paid to the government, rather the other viable alternatives as mentioned above.

Flaring results in increased emission of greenhouse gases such as carbon dioxide and methane into the atmosphere with serious health and environmental consequences. Gas flaring affects human and plant life, pollutes the air, water surface and also results in acid rain. Acid rain-

related degradation was a visible phenomenon in places like Eastern Obolo, Ikot Abasi and Onna Local Government Areas of Akwa Ibom State of Nigeria. In these communities, corrugated iron sheets used for roofing, which would normally have lasted for 7 to 10 years, were destroyed by acid rain within a year or two.²²⁵ Residents had no alternative than to revert back to thatched roofing or the more expensive but hazardous roofing sheets such as asbestos.²²⁶

Human beings are not spared the agony of oil development in the Niger Delta. Cases of respiratory problems, skin infections and cancer resulting from inhaling polluted air, bathing and drinking polluted water are rampant in these regions. Protein intakes in these communities have greatly declined following the depletion of protein sources such as fish as a result of pollution.²²⁷

6.4.3 Loss of biological diversity

The significance of mangrove forests for the people of Niger Delta cannot be overemphasised. However, this valuable asset has been contaminated, degraded and destroyed by oil pollution. Petroleum development has also threatened several endangered species such as the Delta elephant, the white-crested monkey and the river hippopotamus.²²⁸

6.4.4 Socio-cultural damage

Petroleum development has attracted many people both local and foreigners into the local communities resulting in the dislocation of social

²²⁴ I. P. Enemo, *supra* n. 220, p. 176.

²²⁵ Henry Clark et al, *Oil for Nothing: Multinational Corporation, Environmental Destruction, Death and Impunity in the Niger Delta*, A U.S. Nongovernmental Organisation Trip Delegation Report, September 6-20, 1999, p. 5.

²²⁶ *Id.* p. 5.

²²⁷ *Id.* at p. 7

²²⁸ *Id.* at p. 8.

values in oil producing communities such as Warri, Port Harcourt and Eket.

6.5 CONCLUSION

This chapter gave a brief overview of the different phases of petroleum development and the potential impacts of the respective phases. With proper care and attention, these impacts could be avoided, minimised or mitigated. Attention was equally given to specific incidents of environmental impacts of petroleum development in Nigeria.

It is submitted that these impacts could have been avoided or greatly minimised if sound management strategies were employed. We take the position that petroleum development in Nigeria can safely be carried out with minimal adverse impact to the environment.

Furthermore, the widespread protests and the occasional disruption of oil activities and hostage taking could equally be minimised if the industry shows a strong commitment to environmental protection. An *ad hoc* approach to problem solving is no longer considered effective.

Petroleum development necessarily creates a variety of relationships from the industry to the government and the public and since environmental issues are now numerous, complex, interconnected and continuously evolving, there is, therefore a need for a strategic and integrated approach to environmental issues. It requires a common ground in handling issues such as health, safety, environment and wealth distribution. All sides should play a complementary role in achieving these objectives. These issues are fully canvassed in the next chapter.

CHAPTER SEVEN

ENVIRONMENTAL MANAGEMENT IN THE PETROLEUM INDUSTRY

7.1 INTRODUCTION

Petroleum development has never been without some ecological side effects. The purpose of this chapter is to offer a set of proposals relating to new tools and institutions for the management of oil and gas in the Niger Delta.

The proposals formulated in this chapter are not designed to avoid or even reduce petroleum development in the region. Instead, the objective is to introduce a regime that will facilitate the exploitation of resources in such a way as to avoid both inefficiency and damage to the environmental resources of the region.

Thus, a desirable regime for the Niger Delta would be one that: (1) allowed for a reasonable economic efficiency in petroleum development in the region, (2) provides for a justifiable distribution of wealth among citizens of the oil producing communities²²⁹, and (3) safeguard the principal environmental resources of the region. As already indicated, these proposals require co-operation and co-ordination between the industry, government and the local communities.

7.2 ENVIRONMENTAL ROLES AND RESPONSIBILITIES

The main stakeholders, namely the industry, the host government and the local people have different, but complementary roles to play to minimise or avoid ecological impacts. These roles are now considered below.

²²⁹ Numerous criteria have been suggested for the distribution of oil dividend in the Niger Delta. An attractive method of handling this task has been provided in chapter 8.

7.2.1 The Industry

The industry has a duty to adopt a comprehensive management strategy coupled with best practices for petroleum development. There is currently a paradigm shift in the direction of sustainability and best practice in petroleum development, especially in the tropics. Oil companies need to embrace this breakthrough thinking and set new ecological and social goals in their operations.

7.2.2 The Host Government

The host government has a role in establishing a regulatory and institutional framework with effective enforcement mechanisms to ensure compliance. For this purpose therefore, the government needs to have a solid understanding of exploration and production operations and how they may adversely affect the environment. To avoid duplication of functions, a single government ministry or agency such as the ministry of environment should be responsible for overseeing and approving a company's environmental strategy and work plan.

7.2.3 Local people

Another key factor is consultation with local communities around the project site and integrating their perceptions into the development project. Local communities have a duty to influence governments and oil companies by ensuring that they are informed and educated on the new strategies and standards to mitigate environmental destruction. They should network with informed NGOs and remain relevant at all times. All sides should play a complementary role to achieve the most cost-effective²³⁰ and environmentally sound and integrated strategy. This

²³⁰ Cost- effectiveness simply means searching for the lowest-cost ways of achieving an objective. It helps to eliminate those actions that cost more. For more on cost-effectiveness analysis, see Lipton, Douglas W., Katherine Wellman, Isobel C. Sheilfer and Rodney F. Weiher.

strategic partnership is acknowledged as having the capability of: (1) systematically integrating environmental issues into business decisions through use of formal management systems; (2) integrating health, safety and environmental management into a single programme; (3) considering all environmental components-air, water, soil, etc., in decision making at strategic and operational levels; (4) preventing waste at its source through pollution prevention techniques and making maximum re-use of waste components, rather than installing expensive treatment for discharges; (5) evaluating alternatives on a cost/benefit/risk basis that includes environmental values; (6) minimising resource inputs; and (7) encouraging innovation and continual improvement.²³¹

7.3 MANAGEMENT TOOLS AND INSTITUTIONS

To avoid significant adverse environmental impact during oil operations, modern regulatory tools, techniques and standards have been introduced for the industry. Some of these tools are considered below.

7.3.1 Environmental Impact Assessment (EIA)

The oil industry is expected to maintain a systematic process of identifying the hazards and effects associated with petroleum development from the commencement of operations to decommissioning. One of the methods of identifying these hazards and their effects is the EIA process. Although numerous definitions and variations exist, EIA is a systematic process of identifying and evaluating the environmental consequences of

1995. Economic Valuation of Natural Resources-A Handbook for Coastal Resources Policymakers. NOAA Coastal Ocean Program Decision Analysis Series No.5. NOAA Coastal Ocean Office, Silver Spring, MD. 131 pp. 131

²³¹ UNEP, *Environmental Management in Oil and Gas Exploration and Production*, supra n. 191 p. 27.

proposed action on the environment during decision-making for the purpose of mitigating those consequences.²³²

EIA was originally designed as a response to the environmental movement of the late 1960s and the early 1970s to focus on the environmental impacts of proposed projects. Although environmental evaluation began in the United States as early as 1902,²³³ it was the National Environmental Policy Act of 1969 as amended, which specifically established the requirement of an environmental impact assessment. Under the Act, federal government agencies are required to conduct an assessment of environmental impacts of proposed legislation and "other major federal actions significantly affecting the quality of the human environment."²³⁴

However, it was in 1972 at the Stockholm Conference that the EIA process gained international prominence as a tool for integrating environmental considerations into socio-economic development and decision-making process.

The 1992 Earth Summit in Brazil came up with Agenda 21, which includes many recommendations calling for the wider use and integration of environmental impact assessments in all major economic and sectoral, policies and programmes.²³⁵

Under the United Nations Environment Programme, all environmental impact assessment should include at least:

- a) description of the proposed activity;

²³² Olokesusi, A., 1984. The Environmental Assessment Process: Initiating and Making it Work for Nigeria. *Proceeding of the NNPC seminar on the petroleum industry and the Nigerian Environment*, 1984, NNPC, Lagos.

²³³ Under the Rivers and Harbor Act 1902, the costs and benefits analysis was used to determine the desirability of the river and harbor projects.

²³⁴ National Environmental Policy Act 1969 42 USC Para. 4332(2) (C) (1998).

²³⁵ Principle 17 of the Rio Declaration provides that "environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority." UN DOC. A/CONE151/5.

- (b) description of the environment that may be affected;
- (c) description of practical alternatives;
- d) an assessment of likely and potential environmental impacts, both direct and indirect and short term and long term;
- e) a description and assessment of possible mitigation measures;
- f) a description of any uncertainties or missing information which may impact the assessment;
- g) a discussion whether other states or countries may be affected by the activity; and
- (d) a brief non-technical summary of the above.²³⁶

As has already been discussed, the requirement for a mandatory EIA of projects was published in Nigeria by FEPA in 1992.²³⁷ Under the Act, projects subject to mandatory studies include *inter alia*, oil and gas field development, construction of offshore pipeline in excess of 50 kilometres in length, construction of oil and gas separation, processing, handling and storage facilities, construction of oil refineries, construction of product depots for the storage of petrol, gas or diesel (excluding service stations) which are located within 3 kilometres of any commercial, industrial or residential areas and which have a combined storage capacity of 60,000 barrels or more.²³⁸

In Nigeria, the requirement of public participation is covered under sections 7 and 8 of the Act. Under these sections, interested groups or parties are given sufficient time to make comments on the EIA of such activities.

²³⁶ "UNEP: Principles of Environmental Impact Assessment", *Environmental Policy and Law 17/1* (Elsevier Science Publishers, B. V., North Holland, 1987), p. 36.

²³⁷ See supra n. 202. It should be noted that EIA is neither mentioned in the petroleum legislation nor in the petroleum contracts.

The Federal Ministry of Environment (successor to the former FEPA), has the responsibility of allowing sufficient time for such comments before taking a decision authorising such projects.²³⁹ Upon making its report in writing, the Ministry has a further responsibility to make it available to interested parties, or publish it, even if interested parties made no such request.

However, during a period of emergency declared by the government or when the Ministry concludes that the project is in the interest of public health, an EIA is normally excluded.²⁴⁰ In Nigeria, EIA requirements are essentially as those provided for under the United Nations Environment Programme's Principles for EIAs.²⁴¹ It is also essential that an EIA procedure in Nigeria must include: a screening or mandatory study and the preparation of a screening report, a mandatory assessment by a review panel as provided under the decree and the preparation of a report, the design and implementation of a follow-up program.²⁴²

It is useful to state at this juncture that, while EIAs are intended for new projects, the environmental problems in the Niger Delta are associated with petroleum developments that began over four decades ago when EIA was unknown in Nigeria. This is however not to say that from

²³⁸ See schedule of S. 13 of the 1992 EIA Decree.

²³⁹ See sections 7 and 8 of the 1992 EIA Decree.

²⁴⁰ *Id.*, S. 15.

²⁴¹ EIAs in Nigeria must contain the following: a description of the proposed project; a description of the potentially affected environment including specific information necessary to identify and assess the environmental effects of the proposed activities; a description of the practical alternatives as appropriate; an assessment of the likely or potential environmental impacts of the proposed alternatives, including the direct or indirect cumulative, short-term or long-term effects; an identification and description of measures to mitigate adverse environmental impacts of the proposed activity and assessment of those measures; an indication of gaps in knowledge and uncertainty which will be encountered in computing the required information; an indication of whether the environment of any other state or local government area or areas outside Nigeria is likely to be affected by the proposed activity or its alternatives; and a brief and non-technical summary of the information in the above paragraphs. See also Sectoral Guidelines for Environmental Impact Assessment 1994.

²⁴² *Id.*, S. 16.

1992, when the mandatory requirement for an EIA was instituted, the oil industry in Nigeria has done better. From the late 1980s to the late 1990s and beyond, the environmental impact of petroleum development in the Niger Delta is unimaginable. As we have already shown in the previous chapter, not only is the air and water affected by oil pollution, farmlands are also not spared. The result is that while oil has made the government and the oil companies very rich, the people of the oil producing regions are amongst the poorest in Nigeria.

EIAs can and should make valuable contributions towards sustainability. But sadly this is not the case in Nigeria.

EIAs in Nigeria have over the years concentrated on impact reduction instead of focusing more on improving the well-being of the local people. For petroleum development to have a positive impact on the local people, EIAs need to move beyond the traditional project-level assessment which aims at impact reduction, to encourage greater community and ecological sustainability. This can be done by embracing the more proactive EIA, called the objectives-led strategic and integrated assessment which aims at getting things better rather than mere prevention. Furthermore, a very crucial element that is missing in the traditional EIAs is equity. Equity assessment examines policies and actions on the distribution of wealth within a region. This method of assessment ensures that the poor and other vulnerable groups such as the children and the economically disadvantaged are properly taken care of from the proceeds of the resources generated from the region. For more on the distribution of oil dividend in the Niger Delta, see chapter 8.

This probably explains the paradigm shift from the traditional project-driven EIA to a more proactive objectives-led strategic integrated assessment. Scholars have recently made a distinction between EIA-driven

assessment and objectives-led strategic integrated assessment.²⁴³ According to these writers, EIA-driven assessment is essentially a project-level assessment applied to an already formulated policy, plan and programme.²⁴⁴ It is basically a reactive, ex-post process that aims to evaluate the environmental impacts of a policy, plan or programme for which decision-making is well advanced or complete against a baseline, to evaluate the acceptability of the impacts and to identify potential modifications to improve the environmental outcomes.²⁴⁵ The main disadvantage of the EIA-driven approach is that it is limited in scope and may not allow the consideration of other alternatives.²⁴⁶

The EIA-driven approach is reflected in UNEP's requirements which is currently adopted in Nigeria and in other jurisdictions. EIAs in Nigeria aim to identify the environmental, social and economic "the three pillar" or "triple bottom line" (TBL) impacts of a project after a proposal has been designed. These impacts are then compared with baseline conditions to determine whether or not they are acceptable. In terms of its contribution to sustainability, EIA-driven approach aims to ensure that impacts are not unacceptably negative in any of the three pillar-categories.

Whereas, the process involved in the objectives-led strategic integrated assessment is to evaluate potential impacts of a proposal against a series of aspirational environmental objectives rather than against a baseline.²⁴⁷ The objectives-led SEA aims to be a proactive, ex-ante process where policies, plans and programmes are developed at the same time rather than being evaluated afterwards and accordingly promotes comprehensive analysis and consideration of alternatives.

²⁴³ J. Pope *et al*, 'Conceptualising Sustainability Assessment' *Environmental Impact Assessment Review*, 24 (2004) 595-616.

²⁴⁴ *Id.*, p. 599.

²⁴⁵ *Id.*, p. 600.

²⁴⁶ *Id.*, p. 600.

²⁴⁷ *Id.* P. 262.

This method of assessment determines the extent to which a proposal contributes to define environmental, social and economic goals, before a proposal has been designed and to determine the best available options in terms of meeting these goals. In this approach, the focus is how to get things better, not prevention. It sees sustainability as a goal or series of goals to which society is aspiring. This approach moves beyond minimising negative TBL outcomes and emphasises the maximisation of TBL outcomes.

This position is supported by other EIA practitioners and writers. For instance, according to one writer,

*"Adopting contributions to sustainability as a key objective and test in environmental assessment clearly implies that minimisation of negative effects is not enough. Assessment requirements must encourage positive steps-towards greater community and ecological sustainability, towards a future that is more viable, pleasant and secure."*²⁴⁸

This approach is more likely to result in "win-win" outcomes between the three pillars of sustainability, and is therefore less likely to generate conflicts and trade-offs. It requires an agreement on a broad set of objectives reflecting the needs of all stakeholders at the commencement of the process. Since the objectives define the required outcomes of the proposal under development, specifying objectives at the commencement of the process places the onus of identifying and maximising "win-win" on those responsible for developing the proposal rather than on those who

²⁴⁸ Gibson R. Specification of sustainability-based environmental assessment decision criteria and implications for determining "significance" in environmental assessment. <http://www.sustreport.org/downloadsSustainabilityE.A.doc2001>(Accessed 3rd July 2009).

may be conducting a reactive impact assessment once the proposal has been largely developed”.

The United Kingdom Department of Environment, Transport and Regions process, offers a good example of an objective-led strategic and integrated assessment. Under this process, regional plans are subject to:

*"A systematic and iterative process, undertaken during the preparation of a plan or strategy, which identifies and reports on the extent to which the implementation of the plan or strategy would achieve the environmental, economic and social objectives by which sustainable development can be defined, in order that the performance of the strategy and policies is improved."*²⁴⁹

The above UK process indicates the importance given to environmental, social and economic objectives within the decision-making process. Moreover, policies, plans and strategies are developed at the same time rather than being examined later on. Equally, the needs of all the stakeholders are evaluated and agreed upon at the commencement of the process.

EIAs in Nigeria have largely concentrated on minimising negative impacts rather than being anchored on the aspirations of sustainability. This, no doubt, explains the weak sustainability posture and trade-offs between the TBL in Nigeria. The wide spread environmental degradation and poverty in the Niger Delta in our opinion has to do with conflicts and trade-offs inherent in the traditional EIAs resulting in environmental standards and equity being traded-off against economic development.

It is thus imperative for the petroleum industry in Nigeria to embrace the objectives-led SEA since it is development oriented and looks beyond minimising impacts. The government should take the initiative and

²⁴⁹ J. Pope et al, supra n. 243, p. 605.

incorporate the objectives-led SEA into its petroleum and environmental legislations.

7.3.2 Environmental Management Plan

An Environmental management plan (EMP) is another modern regulatory tool for environmental control and management. It normally specifies the company's environmental objectives and policies, environmental personnel and their responsibilities and contingency plans.

The EMP is usually created immediately after the EIA and contains detailed information and procedures put in place to mitigate impacts based on the outcome of the EIA. It should include measures put in place for emergency response to accidents such as oil spills, fire outbreak, explosions etc. The contingency plan should ensure timely mobilisation of personnel and equipment for emergency operations. To prevent or reduce oil spills in the Niger Delta for instance, proactive preventive techniques such as the Cleaner Production²⁵⁰ and the Eco-Efficiency²⁵¹ programmes enunciated by the United Nations Environment Programme (UNEP) and the World Business Council for Sustainable Development (WBCSD) respectively should be embraced in Nigeria.

The EMP should equally state measures put in place for institutional environmental training. The training should equip the environmental personnel with appropriate skills to meet the environmental and socio-cultural needs of the oil producing areas.

²⁵⁰ According to the UNEP, "Cleaner production is the continuous use of industrial processes and products to increase efficiency, to prevent pollution of air, water and land, to reduce wastes at source, and to minimise risks to the human population and the environment." See UNEP, *Environmental Management in Oil and Gas Exploration and Production*, supra n. 191 p. 50.

²⁵¹ The concept of Eco-Efficiency believes in the "the delivery of competitively priced goods and services that satisfy human needs and bring quality of life, while progressively reducing ecological impacts and resource intensity throughout the life-cycle, to level at least in line with the earth's estimated carrying capacity." See Id.

The EMP should also have a program for waste management. Wastes that cannot be eliminated through pollution prevention, should be re-used, recycled or treated and responsibly disposed.

Site decommissioning and rehabilitation are very crucial aspects of environmental management and should be developed very early in the planning process using details gathered during the environmental assessment.

An EMP is very important for the oil industry in Nigeria. It should in our opinion, be made a requirement for both existing and new projects. It should also form part of Nigeria's petroleum and environmental legislations.

7.3.3 Environmental monitoring and evaluation

To ensure adequate protection against the unforeseen effects of petroleum development especially in very sensitive areas, environmental monitoring and evaluation is a must for the oil industry. Monitoring and evaluation is a major tool in confirming corporate commitment to responsible environment management. Even the most detailed environmental impact assessment and environmental management plan are inadequate in providing protection in the event of unforeseen impacts and regular contacts between oil workers and the local people.²⁵²

The essence of monitoring and evaluation is to ensure that commitments undertaken during the planning process are being met. For example, it may take the form of measuring concentrations of discharges, emissions and wastes against corporate or statutory standards.²⁵³ It may

²⁵² Amy B. Rosenfeld, Debra L. Gordon and Marianne Guerin-McManus, "Approaches to Minimizing the Environmental and social Impacts of Oil Developments in the Tropics", in Z. Gao, ed., *Environmental Regulation of Oil and Gas*, (London: Kluwer Law International Publishers, 1998), p. 288.

²⁵³ UNEP, *Environmental Management in Oil and Gas Exploration and Production*, supra n. 191 p.33.

also require using ecological, physical and chemical indicators to measure the environmental quality in the production area.²⁵⁴

The EIA process in Nigeria provides for monitoring through continuous self-assessment of impacts by management.²⁵⁵ The key aims of monitoring are to: (a) ensure that legal standards for emissions are not exceeded; (b) ensure compliance with mitigation measures in the EIA report; (c) provide an early warning of environmental damage so that emergency procedures can be activated to prevent or reduce deterioration of the environment²⁵⁶; (d) include periodic environmental audit of the project's operations and of the discharges as part of compliance monitoring requirement and ensuring environmental sustainability of the project.²⁵⁷ The monitoring programme shall also discuss the following: (1) scope of monitoring; (2) how the monitoring programme will be implemented; (3) selection of parameters to be monitored in the environmental media (land, air and water) example, methane, hydrocarbons, nickel and vanadium; (4) selection of sampling locations; (5) sampling procedures and frequency of sampling; (6) methodology for testing of parameters; (7) monitoring schedule.²⁵⁸

It is the responsibility of the Federal Ministry of Environment to monitor the progress of projects to ensure compliance with statutory and corporate requirements.²⁵⁹

²⁵⁴ Id. p.33.

²⁵⁵ Guidelines for Environmental Impact Assessment (Decree 86, 1992). Draft Sectoral Guidelines for Oil and Gas Industry Projects (Oil and Gas Exploration and Production-Offshore) FEPA September, 1994, p. 7.

²⁵⁶ Id. p. 7.

²⁵⁷ Id. p. 7.

²⁵⁸ Id, p. 15.

²⁵⁹ FEPA, Environmental Impact Assessment Procedure for Nigeria, The Presidency August, 1994, p. 10.

Environmental monitoring tracks down changes in ecological composition over time and changes in ecosystems that result secondarily from project activities.²⁶⁰ Monitoring and evaluation programmes should therefore be designed and carried out before any explorations begin. Since these programmes are a tool for measuring the success of environmental and social standards, preventing mistakes by gathering baseline information about ecosystems and human communities, and measuring changes over time, they should be undertaken during the pre-seismic phase, when seismic activity commences and after seismic surveying has been completed.²⁶¹

7.3.4 Environmental Audit and Review

According to the International Chamber of Commerce (ICC),²⁶² an environmental audit is defined as "a management tool comprising a systematic, documented, periodic and objective evaluation of how well environmental organization, management and equipment are performing, with the aim of helping to safeguard the environment by (i) facilitating management control of environmental practices; (ii) assessing compliance with company policies, which would include meeting regulatory requirements".

Review and audit is essentially a management tool developed and used by the industry for verification and feedback on the effectiveness of organization system and environmental performance.

An environmental audit serves as a follow-up or monitoring procedure, which facilitates the management and control of environmental protection, evaluates the environmental performance, and ensures

²⁶⁰ Claire Kremen, Adina M. Merenlender and Dennis D. Murphy, "Ecological Monitoring: A Vital Need for Integrated Conservation and Development Programs in the Tropics", 2, *Conservation Biology*, 8, p. 388. In Amy B. Rosenfeld, et al, supra note 252, p. 289.

²⁶¹ Id., p. 289.

²⁶² *Environmental Auditing*. International Chamber of Commerce Paris. June 1989.

compliance with environmental obligations. It is considered as one of the most effective tools in ensuring environmental protection.²⁶³ Increased internal and external awareness, communication and credibility of company environmental activities are some of the other benefits of auditing.²⁶⁴ In addition to management and compliance audits mentioned above, other audits such as, waste and emissions audits, energy audits, site (contamination) audits, emergency countermeasures audits, workers health and safety audits, may be carried out as part of a broader management audit.²⁶⁵

What needs to be said here is that audits and reviews are very crucial in monitoring programmes and compliance to ensure that site environmental plans, procedures and standards are both effective and fit for the purpose for which they were originally intended.

In Nigeria, there are no specific legislative and contractual requirements for an environmental audit. The only mention of an audit is in the 1994 Draft Sectoral Guidelines for Environmental Impact Assessment. The Draft Guidelines requires monitoring plans to include periodic environmental audit of the project's operations and of the discharges as part of compliance monitoring requirement aimed at ensuring environmental sustainability of the project.²⁶⁶

The absence of an express provision for an environmental audit especially for the oil and gas industry in Nigeria, is most unfortunate. Even though oil and gas projects are mandated to carry out an EIA, failure

²⁶³ G. Vinten, "The Blossoming of the Environmental Audit", 91 *Industrial Management and Data Systems* 19 (1991), in Z. Gao ed., *Environmental Regulation of Oil and Gas*, supra note 254 p. 42.

²⁶⁴ UNEP, *Environmental Management in Oil and Gas Exploration and Production*, supra n. 191 p.34

²⁶⁵ Id. p.34

²⁶⁶ See Para 7 of the Guideline for EIA (Decree 86, 1992); Draft Sectoral Guidelines for Oil and Gas Industry Projects; 1994.

to also require an environmental audit for an industry that has caused serious environmental damage is a grave omission.

However, the absence of an express enactment for environmental audit and review should not absolve the oil companies from carrying out self-assessment programmes on their environmental performance. It should be stressed that such voluntary audit report should not be used as a basis to initiate civil or criminal actions against such oil companies. Rather it should be used to monitor compliance with applicable laws, regulations guidelines and to effect corrections where appropriate.

Audit and review procedures, in conjunction with the objectives-led strategic EIA, are urgently needed to transform the oil and gas sector in Nigeria.

7.3.5 Environmental Report and Provision of Information

Petroleum operators and contractors are obliged to file at regular intervals or immediately upon an incident, an environmental report on the environmental situation, cause of the pollution accidents, and the measures adopted to mitigate adverse effects and prevent recurrence. The filing of environmental reports at timely intervals is very crucial as “the availability of, and access to information allows preventive and mitigating measures to be taken, ensure participation of citizens in the national decision-making processes and can influence consumer behaviour.”²⁶⁷

In Nigeria, there are no express provisions requiring operators to file environmental reports at regular intervals. There is however a provision for the creation of a public registry where members of the public could access records relating to environmental assessment, including any follow-up programme in respect of the project.²⁶⁸ The public registry shall

²⁶⁷ P. Sands, *Principles of International Environmental Law* vol. 1 (Manchester: MUP, 1995), p. 596.

²⁶⁸ See Section 57(1) and (2) (a)(b) of the EIA decree 1992.

contain all records and information produced, collected or submitted with respect to the environmental assessment of the project, including:

(a) any report relating to the assessment, (b) any comment filed by the public in relation to the assessment, and (c) any record prepared by the Ministry for the purposes of its review panel.²⁶⁹

The importance of environmental reports and the availability and access to environmental information are acknowledged globally as very effective means for ensuring compliance with environmental regulations. It is therefore expedient for Nigeria to incorporate environmental reports and information as a mandatory requirement, especially for the petroleum industry.

7.4 TECHNICAL AND FINANCIAL ASSISTANCE AND COMPLIANCE

The above explained sustainable management strategy would need substantial funds and technical capability in order to be implemented,²⁷⁰ which Nigeria, like other developing economies, may not be able to generate internally. It is therefore needful for Nigeria to strengthen her capacity through financial and technical assistance.

The trend in financial environmental action through financial and technical assistance was recognised as early as 1972 with the establishment of the Environmental Fund under the auspices of the United Nations Environment Programme (UNEP).²⁷¹ The need to strengthen

²⁶⁹ Id. Section 57(3).

²⁷⁰ A. Chayes, A. H. Chayes and R. B. Mitchell. "Managing Compliance: Comparative Perspective", in E. Brown Weiss and H. K. Jacobson, *Engaging Countries, Strengthening Compliance with International Environmental Accords*, MIT Press, Cambridge, 1998, at 52-53

²⁷¹ See *Stockholm Declaration on Human Development*, Principle 12; the United Nations General Assembly Resolution 2997 (XXVII): Institutional and financial arrangements for international environment cooperation (15 December 1972).

capacity was reaffirmed twenty years later in the Agenda 21 programme of action adopted at the Earth Summit in Brazil.²⁷²

Agenda 21 recognised that developing countries would require substantial funds and technical assistance to implement sustainable development. In addition to funds generated internally by the government the industry should bear the responsibility of providing funds and technical assistances.

Recourse may also be had to international, regional and sub-regional organisations for financial and technical assistance to enhance environmental programmes.

7.5 SOURCES OF INTERNATIONAL FINANCE

7.5.1 Environmental Funds

These are innovative financial mechanisms that can pool revenues together from various types of resources such as grants or loans, debt-for-nature swaps, to provide long-term funding and technical assistance for environmental programmes. Two of such financial and technical assistance are the 1991 Global Environment Facility (GEF) and the 1987 Montreal Protocol as amended.

- (a) **Global Environment Facility:** The GEF was established through a Resolution adopted by the Executive Directors of the World Bank in 1991²⁷³, with the mandate of assisting eligible countries including developing countries to implement measures to solve the global environmental problems of ozone depletion, climate change,

²⁷² See Chapter 33.1, which enjoins the international community to identify ways and means of providing new and additional financial resources particularly to developing countries, for environmentally sound development programmes and projects in accordance with national development objectives, priorities and plans and to consider ways of effectively monitoring the provisions of such new additional financial resources, particularly to developing countries, so as to enable the international community to take further action on the basis of accurate and reliable data." See also Chapter 34 "Transfer of Environmentally Sound Technology, Cooperation and Capacity Building in Developing Countries.

²⁷³ World Bank, Resolution No. 91-5, (1991).

bio-diversity and pollution of international waters. The three implementing agencies of the GEF are the World Bank, the UNDP and the UNEP. The GEF have over the years transferred financial resources to developing countries for investments related to the protection of the global environment. Since its inception in 1991, GEF has achieved a strong track record in support to developing countries and countries with economies in transition, providing \$6.8 billion in grants and leveraging \$24 billion in co-financing for over 1, 900 projects in over 160 countries. Through its Small Grants Programme (SGP), GEF has also made more than 7,000 small grants, up to \$50,000 each, directly to nongovernmental organisations.²⁷⁴ The GEF has recently approved \$562 million life line for developing countries to help combat climate change, biodiversity and land degradation and other global environmental problems.²⁷⁵ It has also given a \$50 million green light to a new pilot Public Private Partnership (PPP). The PPP is a strategic investment program to foster innovative technological and financial solutions to intractable environmental problems in developing countries.²⁷⁶ It should be noted that following the growing environmental concerns regarding desertification and pollution caused by the persistent organic pollutants, the GEF Instrument was amended. By virtue of this amendment the GEF became the financial mechanism of the *Convention to Combat Desertification*²⁷⁷ and the *Stockholm Convention on Persistent Organic Pollutants*.²⁷⁸ Land degradation has also been included as one of the focal areas of the GEF.

²⁷⁴ See <http://www.gefweb.org/interior.aspx?id=18276>, accessed 10 July 2009.

²⁷⁵ Id. n. 274

²⁷⁶ Id. n. 274

²⁷⁷ *Convention to Combat Desertification*, Art.20. See also *Convention to Combat Desertification*, Report of the Sixth Conference of the Parties, Decision VI/6, 2003, ICCD/COP (6)/11/Add.1.

²⁷⁸ *Stockholm Convention on Persistent Organic Pollutants*, 32 ILM (2001) 1069, Article 14.

The Multilateral Fund for the Montreal Protocol: The United Nations Environment Programme recognised the serious threats to environment from the potential ozone depletion in 1976. The Vienna Convention for the Protection of the Ozone Layer 1985, was the first response of the world's governments to the problem of ozone depletion. Following the scientific discovery of an "ozone hole" over the Antarctic and the role of halocarbons in ozone depletion, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer was arrived at, under the Convention, to control the emissions of ozone depleting substances (ODS).²⁷⁹ The Protocol, which has been amended several times, now mandates total phase out of the production and consumption of 96 listed ODS by all the Parties. To this end, the Protocol provides for the establishment of the *Multilateral Fund*, whose funding originates from developed countries, to "meet all agreed incremental costs of (developing countries) Parties in order to enable their compliance with the control measures."²⁸⁰ Incremental costs include "cost of conversion of existing production facilities", cost of establishing new production facilities for substitutes of capacity equivalent to capacity lost when plants are converted or scrapped, including: cost of patents and designs and incremental cost of royalties; capital cost; cost of training, as well as the cost of research to adapt technology to local circumstances."²⁸¹ The Montreal Protocol also requires each Party to take "every practical step" to ensure that the substitutes and sound technology are expeditiously transferred under "fair and most favourable conditions" to developing States.²⁸²

²⁷⁹ *Montreal Protocol to the 1985 Vienna Convention on the Substance that Deplete the Ozone Layer*.

²⁸⁰ *Id.*, Art. 10 (1).

²⁸¹ *Montreal Protocol*, Report of the Fourth Meeting of the Parties. Annex VII "Indicating List of Categories of Incremental Costs, UNEP/OzL.Pro.4/15.

²⁸² *Montreal Protocol*, Art. 10 A.

The World Bank administers the fund with the assistance of UNDP and UNEP.

- (c) **UNEP Environment Funds:** This is a voluntary fund set up under the authority of the Governing Council to finance wholly or partly the costs of new environment initiatives such as environmental monitoring, assessment, information and research.

7.6 MULTILATERAL DEVELOPMENT FINANCIAL INSTITUTIONS

7.6.1 The World Bank

The World Bank group, which consists of four multilateral agencies, namely: the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), and the Multilateral Investment Guarantee Agency (MIGA), is a veritable source of funding for development projects generally and oil and gas projects in particular.

In November 2004, the World Bank's insurance arm, the Multilateral Investment Guarantee Agency (MIGA), approved 125 million dollars in guarantee supporting the construction of a 678-km West African Gas pipeline from the Niger Delta to Benin, Togo and Ghana.²⁸³ Furthermore, the International Finance Corporation and the World Bank are collaborating with the Nigerian National Petroleum Corporation through the Nigeria's Kwale Partners' flaring reduction project. The project is expected to eliminate a projected 1.5-million tons of carbon dioxide yearly.²⁸⁴

Following criticism of its policies on environmental protection, the Bank created an environment unit and also adopted some Operational

²⁸³ It should be noted that local communities around the project site have filed a complaint against the World Bank before an internal auditor claiming that the construction will harm the environment and local residents. See <http://www.corpwatch.org/article.php?id=13566&printsafe=1>, accessed on 09.01.2009.

²⁸⁴ The project is intended to stimulate interest in using associated gas to generate electricity and for other purposes. See <http://www.businessdayonline.com/?c=45&a=9723>, accessed on 09.01.2009.

Directives such as Operational Directive 4.30 (1989) on involuntary resettlement, Operational Directive 4.20 (1989) on indigenous people, Operational Directive 4.70 (1990) on non-governmental organisations, Operational Directive 4.01 (1991) on environmental assessment, Operational Directive 4.02 (1992) in relation to National Environmental Action Plans etc., all aimed at enhancing its environmental profile.

7.7 REGIONAL AND SUB-REGIONAL DEVELOPMENT BANKS

7.7.1 African Development Bank (ADB)

The ADB was established in 1964 under the aegis of the UN Economic Commission for Africa (ECA). Its cardinal objective is to contribute to the economic development and social progress of its members jointly and severally. To further the industrial development of African countries, the ADB adopted the Guidelines on Industrial Sector in 1987²⁸⁵ with emphasis on environmental protection.²⁸⁶ One of the General Environmental Policies of the ADB is to ensure that adverse environmental effects are avoided or minimised in its investment programmes and projects in Regional Member Countries. The Policy also includes the need for environmental impact assessment of projects.

7.8 OVERSEAS DEVELOPMENT ASSOCIATION (ODA)

ODA is one of the main sources of external funding for developing countries. It comprises soft loans and grants which may be granted bilaterally without repayments. From the 1990s, ODA has been declining

²⁸⁵ The Guideline includes: stringent project selection, emphasis on productive investment, emphasis on resource-based industries, expansion of the private sector, focus on rehabilitation, strengthening financial intermediaries, re-emphasising the role of small and medium scale enterprises (SMSEs) emphasis on managerial development, effective use of equity participation, co-ordinated approach to the financing of industrial projects and flexibility with regard to loan guarantees. This Document was approved at the 226th and 154th meeting of the Board of Directors (B.O.D.) of the ADB and the ADF respectively, in a joint session held on September 23, 1986 in Abidjan. The new policy guideline went into effect from December 1, 1986.

both in real terms and as a percentage of GNP.²⁸⁷ There was however a slight rise from 37% in 1990 to 39% in 1998,²⁸⁸ with donors attaching conditions such as sound environmental policy, good governance and democracy to their aid.²⁸⁹

7.9 INDUSTRY AND NEW TECHNOLOGIES

To minimise the effect of petroleum development in the Niger Delta, the need for the transfer of environmentally sound technology within the framework of sustainable development cannot be overemphasised.

Technology transfer addresses the problem of technological backwardness, and sets to transplant advanced means of production in order to improve efficiency and productive capacity of any given industrial sector.

Technology generates new standards and involves among other things, equipment, patents, processes, and foreign know-how. Environmental technology transfer designates the varying mechanisms through which know-how are shared between countries that produce environmentally friendly technologies and countries that desire them.

Under Agenda 21, "environmentally sound technologies protect the environment, are less polluting, use all resources in a more sustainable manner, recycle more of their wastes and products, handle residual wastes

²⁸⁶ The ADB established an Environmental Unit in 1987 and adopted an Environmental Policy Paper (EPP) in 1990.

²⁸⁷ There was a consensus by the international community that the developed countries should set aside 0.7 per cent of their GNP for ODA as soon as possible. See Para. 33.13 of Agenda 21 in N. A. Robinson, ed., *Agenda 21 Earth's Action* (New York: Oceana Publications, Inc., 1993), p. 549.

²⁸⁸ World Bank (1999). *Global Development Finance 1999: Analysis and Summary Tables*. World Bank; Washington DC, United States

²⁸⁹ *Id.* n. 288

in a more acceptable manner than the technologies for which they were substitutes."²⁹⁰

In the context of pollution, environmentally sound technologies are "process and product technologies" that generate low or no waste, for the prevention of pollution. They also encompass "end of the pipe" technologies for the treatment of pollution after it has been generated.²⁹¹

Three types of technology transfer have been identified: international subcontracting (granting partial or full production responsibility and accompanying technology to a foreign firm), foreign direct investment (investing technology in a subsidiary or a joint-venture) and turn key projects (providing a finished product but not the know-how).²⁹²

Since sustainable development prescribes the guidelines for the preservation of the environment, it should be the basis for every technology transfer. The relevance and importance of sustainable development, as a crucial step in confronting the environmental problems in the Niger Delta, cannot therefore be over-emphasised. The Niger Delta region is in dire need of new and efficient technologies capable of protecting the environment and alleviating poverty and human suffering.

The transfer of environmentally sound technology to the Niger Delta should be one which ensures greater access to scientific and technological information, which would aid informed choices and improve access to and transfer of environmentally sound technology. The aim of such transfer should be to evolve as well as strengthen the technological capabilities of the oil and gas industry in the region.

Since technology transfers involve issues that relate to knowledge, it is therefore very important for the recipient country to have receiving

²⁹⁰ Agenda 21: Chapter 34.1

²⁹¹ Id. Chapter 34.2

structures that can accommodate foreign know-how. Accordingly, the various oil and gas regulatory bodies in Nigeria (Nigerian National Petroleum Corporation, Department of Petroleum Resources, the Ministry of Environment and the Ministry of Science and Technology), should be prepared to play increasing roles in the acquisition, adaptation and evolution of environmentally sound technology.

7.10 TRAINING AND RESEARCH

They should initiate measures to strengthen manpower training in various aspects of environmentally sound technology transfer. It calls for the improvement of technology currently used and its replacement, when appropriate, with more accessible and more environmentally sound technology.

Furthermore, research and development efforts should be geared towards innovation, dissemination and management of environmentally sound technologies. Education and training should be structured to meet the need for environmentally sound technologies with an inter-disciplinary outlook. Achieving this involves tapping the foreign knowledge and recombining it with local innovations to generate alternative technologies. It also involves building the capabilities of craftspeople, technicians and middle-level managers, scientists, engineers and educators, as well as developing their corresponding social or managerial support systems. It equally involves innovatively adapting and incorporating environmentally sound technologies into local and national cultures as well as providing fair incentives to innovators that promotes research and development in these areas.

²⁹² Jacques Perrin, Less transferts de technologie, Paris, La Découverte, 1983.

On the whole, there is need for cooperation involving government, the private sector, and research and development facilities to ensure the best possible results from transfer of technology.

The transfer and utilisation of environmentally sound technology within the guidelines of sustainable development is not an easy task. It requires large financial, technical and human investments which Nigeria cannot single-handedly provide. In a globalised, interdependent and technology-driven world, no nation can afford to be an island. There is need for co-operation. Accordingly, avenues for bilateral, regional and multilateral co-operation should be explored and exploited. Regional and international instruments dealing with the transfer of environmentally sound technology should be embraced.

7.11 CONCLUSION

While some ecological side effects may not be entirely eliminated in the course of petroleum development, the forgoing analyses have shown that these impacts could be reduced to the barest minimum if some precautions are taken by the industry.

The industry has the responsibility to utilise modern regulatory tools and techniques and equally adhere strictly to standards introduced for the industry.

The government on its part should put in place effective institutional framework with appropriate enforcement mechanisms to ensure compliance. Both the industry and the government should ensure that all technologies acquired for industrial and commercial uses are environmentally friendly with no restrictive clauses with regard to adaptations.

While the local communities should give peace a chance, they should however be carried along and their perceptions integrated in development projects. There is need for strategic partnership between the industry, the government and the local communities.

CHAPTER EIGHT

SUSTAINABLE DEVELOPMENT OF PETROLEUM IN NIGERIA

8.1 INTRODUCTION

In the last four decades, petroleum resources have earned several billion dollars to the Nigerian Government. However, the Niger Delta where oil is being produced has experienced conflicts, poverty, environmental degradation and non-existence of basic infrastructure.

The purpose of this chapter is to attempt an explanation on why, in spite of its huge oil wealth, the Niger Delta's potential for sustainable development has remained unfulfilled and why the region has become a theatre for youth restiveness, pipeline vandalisation, inter-ethnic strife and hostage taking.

For convenience, the discussion has been organised around five central themes. Firstly, we shall explore the concept of sustainable development and find out its implication for petroleum development in the Niger Delta. The objective here is to provide some background materials which may be useful in alleviating the problems in the Niger Delta.

This will be followed by a review of the numerous development commissions created by the government, aimed at not only minimising the negative externalities of oil development, but also improving the living conditions of the inhabitants of the Niger Delta region. Thereafter, the vexed issue of poverty in the midst of plenty will be considered.

There is some debate concerning the best method for the distribution of oil dividend in the Niger Delta. We will undertake an assessment of these methods and find out its utility for the region.

The chapter concludes with an alternative regime for the management of oil dividend in the Niger Delta.

8.2 SUSTAINABLE DEVELOPMENT

The first formal international concern over environmental degradation came about with the 1972 United Nations (UN) Conference on the Human Environment in Stockholm, Sweden. The central themes of the conference were: the interdependence of human beings and the natural environment; the link between economic and social development and environment; and the need for a global vision and common principles. Although the Conference did not achieve a legally binding instrument on the environment, it represented a major landmark in placing environmental issues on the global agenda.²⁹³

In the years that followed, environmental movements both in North America and Western Europe gradually gained momentum and political leverage to raise the awareness of the harmful effects of human activities on the environment²⁹⁴. This awareness soon spread to other parts of the world, especially in the eighties following a series of industrial accidents such as the 1984 Bhopal disaster in India and the 1986 nuclear plant disaster in Tschernobyl. These events no doubt helped to inscribe environmental concerns on the global political agenda.

The United Nations in response to the 1983 General Assembly Resolution A/38/161 entitled "Process of the preparation of the Environmental Perspective to the Year 2000 and Beyond", requested the World Commission on Environment and Development to: (a) propose long-term environmental strategies for achieving sustainable development; (b) to recommend ways concern for the environment may be translated into greater co-operation among countries of the global South and between countries at different stages of economic and social development and lead

²⁹³ Runnalls David, "Environment and Development", in United Nations Reforms, Fawcett E., Toronto, Science for Peace Publication, 1995, p. 202.

²⁹⁴ Zhiguo Gao, "Environmental Regulation of Oil and Gas in the Twentieth Century and Beyond: An Introductory Overview", in Z. Gao, ed., Environmental Regulation of Oil and Gas, (London: Kluwer International Publishers, 1998), p. 3.

to the achievement of common and mutually supportive objectives that take account of the interrelationships between peoples, resources, environment, and development; (c) to consider ways and means by which the international community can deal more effectively with environmental concerns; and (d) to help define shared perceptions of long-term environmental issues and of the appropriate efforts needed to deal successfully with the problems of protecting and enhancing the environment, a long-term agenda for action during the coming decades, and aspirational goals for the world community.²⁹⁵

In 1987, the Commission published its report entitled, “Our Common Future”, the so-called Brundtland Report. Stressing the profound changes which had occurred in the relationship between human beings and their planet, the report called for dynamic new policies to provide a future basis for development based on enhanced environmental resources and publicly responsive decision making. The solution enclosed in the term sustainable development, calls for the incorporation of environmental concerns into economic development. Among other things, it defines sustainable development as: “Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”²⁹⁶

According to the Commission, the concept of ‘needs’ means that overriding priority should be given to the world’s poor while economic and social development must be defined in terms of sustainability. More specifically, the Commission stated that development involves a progressive transformation of economy and society. It stressed that a development path that is sustainable must pay attention to access to resources and the distribution of costs and benefits. This according to the

²⁹⁵ World Commission on Environment and Development (WCED), *Our Common Future*, (Oxford University Press, Oxford, 1987), p. ix.

²⁹⁶ *Id.* p. 43.

Commission implies a concern for social equity between and within generations. Continuing, the Commission said, the satisfaction of human needs and aspirations is a major objective of development. The Commission was worried that the essential needs of vast numbers of people in the world for food, clothing, shelter, and jobs are not being met. The Commission stressed in particular that a world in which poverty and inequity are endemic will always be prone to ecological and other crises. It also emphasised that sustainable development requires meeting the basic needs of all and extending to all the opportunity to satisfy their aspirations for a better life. It went on to say that sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potentials to meet human needs and aspirations.

A second landmark in the development of the concept of sustainable development was the UN General Assembly's 1989 resolution calling for the UN Conference on Environment and Development or UNCED. UNCED's mandate was to "elaborate strategies and measures to halt and reverse the effect of environmental degradation in the context of increased national and international efforts to promote sustainable development and environmentally sound development in all countries."

Taking place over 12 days in June 1992 in Rio de Janeiro in Brazil, the Earth Summit was the largest environmental conference ever held, attracting over 30,000 people including more than 100 heads of states. The objectives of the conference were to build upon the hopes and achievements of the Brundtland Report, in order to respond to pressing global environmental problems and to agree major treaties on biodiversity, climate change and forest management.

Five separate agreements were made at the Rio Earth Summit. These include: the Convention on Biological Diversity, the Framework Convention on Climate Change, Principles of Forest Management, the Rio Declaration on Environment and Development and the Agenda 21. Together these declarations cover every aspects of sustainable development.

On its part, the Earth Summit declared that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of the present and the future generations.

Sustainable development has been defined in several ways. Other definitions of sustainable development include “Development which ensures that the utilisation of resources and the environment today does not damage prospects for their use by future generations.”

It has also been contended that sustainable development is based on four clear ‘principles’, viz. environment, futurity, equity and participation. The principle of ‘environment’ states that true environmental cost of any human activity must be taken fully into account. The principle of ‘futurity’ provides that, in any human activity, the effects of that activity on the future generations must be considered, recognising that future generations have an equal right to the natural resources. The principle of ‘equity’ requires access to and control over natural resources to be much more evenly distributed within and amongst countries. Lastly, the principle of ‘participation’ states that development requires people sharing in decision-making with regards to goals and means of development, and as such participants should take an active role in pursuing such goals. Effective participation in decision-making by local people, for instance, can help them articulate and effectively enforce their common interest.

What comes out rather clear from the various definitions and analysis of the concept of sustainable development is that it encourages the conservation and preservation of natural resources and of the environment. The concept is also based on patterns of production and consumption that can be pursued into the future without degrading the human or natural environment. Most importantly, it involves the equitable sharing of the benefits of economic activity across all sections of society, to enhance the well-being of humans, protect health and alleviate poverty.

The concept of sustainable development was embraced in Nigeria as far back as 1989 and fully entrenched in the National Policy on Environment of the same year. The NPE recognises and emphasises national economic policies that promote sustainable development. However, whether these lofty policies have been translated into good quality of life, integrated decision-making and equity for the ordinary man on the streets leaves much to be desired.

8.3 IMPLICATIONS OF SUSTAINABLE DEVELOPMENT ON PETROLEUM DEVELOPMENT IN NIGERIA

It is fairly settled that sustainable development consists of four elements which often supplement and are linked to each other:²⁹⁷ (a) the principle of intergenerational equity; (b) the principle of sustainable use of natural resources; (c) the principle of equitable use of natural resources; and (d) the integration of environment and development.

²⁹⁷ Philippe Sands et al (eds), *Principles of International Environment Law, Volume 1: Frameworks, standards and implementation* (Manchester University Press, 1994) p. 199. For a detailed discussion on the principles of sustainable development, see G. Handl, *Sustainable Development and International Law* (Graham & Trotman, London, 1995), pp. 35-45.

From the findings of the Brundtland Commission, the implications of sustainable development for the energy²⁹⁸ sector generally are many. They include but by no means limited to: sufficient growth of energy supplies to meet human needs, putting in place energy-efficient and conservation measures to minimise waste of primary sources, recognising the problems of the risks to safety inherent in energy sources, and the protection of public health, the biosphere and the prevention of all forms of pollution. It should be noted that each of the numerous sources of energy has its own economic, health, and environmental costs, benefits and risks. Therefore, from the standpoint of sustainability, choosing an energy strategy means choosing an environmental strategy. It also means using the most energy-efficient technologies and processes currently in use in the energy sector.

In relation to petroleum development in Nigeria, which is the focus of this chapter, sustainable development will further mean that the rate of depletion should take into account the criticality of petroleum resources, knowing that its use reduces the stock available for future generations. This requires using little now and saving some for the future.

By far the most pressing problem in the Niger Delta after environmental degradation²⁹⁹ is inequity in the distribution of the benefits of petroleum development, and this will engage our attention in the subsequent discussion.

Communities located at the site of oil projects often have to be displaced or they are subject to pollution. They become the victims of petroleum development. Instead of seeing the projects as development,

²⁹⁸ Energy as used here encompasses both non-renewable and renewable. The primary sources of non-renewable energy are: natural gas, oil, coal, and conventional nuclear power. The renewable sources are: wood, plants, dung, falling water, geothermal sources, and solar, tidal, wind, and wave energy. All these sources form the energy mix. See WCED, *supra* n. 295 p. 168.

²⁹⁹ Ways and means of solving or minimising the negative externalities of petroleum development have been highlighted in the previous chapter.

they see it as a process whereby the government and the oil companies benefit from these projects at their expense. The victims of development then begin to oppose the projects. The whole problem in the Niger Delta is anchored on this.

For Nigeria, a major challenge is how it could effectively and efficiently manage its vast oil wealth. Nigeria is not poor because of a lack of resources. The nation is poor because it cannot manage its development process.

The history of natural resources management in Nigeria, especially during the military era, saw revenue generated from oil ending up in private pockets and in most cases kept away into foreign bank accounts.

The cardinal principle behind sustainable development is intra and inter generational equity. In relation to intra-generational equity, the Brundtland Commission identified the problems arising from inequalities in access to resources. It condemned monopolistic control over resources, emphasising that it could drive those who do not share in them to excessive exploitation of marginal resources. According to the Commission "those who are poor and hungry will often destroy their immediate environment in order to survive: They will cut down forests; their livestock will overgraze grasslands; they will overuse marginal land; and in growing number they will crowd into congested cities. The cumulative effect of these changes is so far-reaching as to make poverty itself a major global scourge."³⁰⁰ Other equity concerns relevant to sustainable development include inequities in decision-making processes and power. Often, a larger segment of the society, usually made up of women and youths, are excluded from environmental decisions, thus

³⁰⁰ WCED, supra n. 295 p. 72.

denying them the opportunity to influence decisions affecting their environment.

Equity is also concerned with future generations (the ability of future generations to meet their needs). The idea behind not reducing the ability of future generations to meet their needs is that, although future generations might benefit from economic development, those gains might be more than offset by environmental deterioration. Accordingly, future generations should not inherit a degraded environment, no matter how many extra sources of wealth are available to them.

Emphasising the importance of fairness and justice in the distribution of value and resources among individuals and groups in the society, the Earth Summit reaffirmed the centrality of equity in its Agenda 21 and the Rio Declaration.³⁰¹

Equity is about fairness. It is a concept that is derived from social justice and represents "a belief that there are some things which people should have, that there are basic needs that should be fulfilled, that burdens and rewards should not be spread too divergently across the community, and that policy should be directed with impartiality, fairness and justice towards these ends."³⁰²

Equity means that there should be a minimum level of income and environmental quality below which nobody falls. Within a community, it usually also means that everyone should have equal access to community resources and opportunities, and that no individuals or groups of people should be made to carry a greater environmental burden than the rest of the community as a result of government policies and actions. It means further that everyone must be entitled to an acceptable quality and

³⁰¹ See Principle 3 of Rio Declaration.

³⁰² Falk, Jim Hampton, Greg, Hodgkinson, Ann, Parker, Kevin and Rorris, Arthur, 1993, *Social Equity and Urban Environment*, Report to the Commonwealth Environment Protection Agency, AGPS, Canberra, p. 2.

standard of living. Furthermore, equity principle emphasises the proportionality of burdens or rewards vis-à-vis the relevant inputs. The implication of this is that areas or parties that pollute should bear a proportionate burden while areas or parties which suffer from the polluting effects of an activity should, if there are any benefits from the activity, enjoy rewards proportionate to the degree of pollution.

In the Niger Delta, a lot of environmental inequalities already exist. As it were, the 'losers' in the Niger Delta are the poor masses who suffer more than their fair share of the health, property, and ecosystem damage costs of pollution.

While we are not advocating a cessation of petroleum development in the Niger Delta, our major concern is how best resources can be exploited to ensure environmental equity in the impacted area.

Since the region has experienced environment-impacting exploitation of natural resources for over four decades now, distribution of oil dividend should ideally reflect the unequal risk borne by the people of the Niger Delta if environmental equity is to be ensured. The Niger Delta should retain a socio-economically just proportion of the revenue accruing from petroleum development. This is necessary, not only to ensure environmental rehabilitation, but also to put money in the hands of the local people.

Given the fact that an overwhelming proportion of the impact from petroleum development is restricted to the Niger Delta, how proportional are the burden and reward? Put differently, are the financial and associated resources accruing from petroleum appropriately allocated to indemnify the environmental costs inflicted on the Niger Delta?

As previously indicated, the Federal Government in Nigeria has the exclusive right to petroleum resources. All rents, royalties, taxes and other associated financial resources are collected and controlled by the Federal Government and shared among the three tiers of government i.e. the federal, states, and the local councils.

Although revenue allocations to states and local councils have changed over the decades, the most important criteria used in the allocation of revenue among the states and local government areas are population size, equity and land area (geographical size). What this means is that all states and local government councils receive a portion of oil revenue on the basis of these determinants rather than the negative externalities that oil-producing states endure. The implication is that the larger the population and areal extent of a state or local government area the more the revenue.

Given the fact that the oil-producing states are typically small, the revenue accruing to them from petroleum are smaller, compared to other states with no crude oil, but with larger population.

8.4 LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE DEVELOPMENT OF THE NIGER DELTA REGION

In recognition of the peculiar development challenges of the Niger Delta, several development commissions have been created to minimise the negative effects of petroleum exploration and ensure the sustainable development of the region.

We will now undertake an assessment of these commissions to find out how they contributed to the development of the region.

8.4.1 The Niger Delta Development Board

The first step taken to address the neglect of the region and its inaccessible wetland environment was the appointment of Henry Willink-led Minority Rights Commission in September 1957 to recommend how the area should be developed.³⁰³

The Commission described the region as “poor, backward and neglected, the whole of Nigeria is concerned (about the region), and we suggest that there should be a Federal Board appointed to consider the problems of the Niger Delta”.

The Commission recommended, among others the following:

1. That the development of a Special Area should be placed on the concurrent list.
2. That a board with a federal chairman should be created for the Special Area to which the Federal, Western and Eastern Regions should contribute funds and staff for the purpose of a survey of the special problems of the special Area, and which would draw up plans for its development.
3. That the board should initiate schemes to supplement the normal development of the Special Area which should be carried out by the government concerned, the Federal Government contribution being one-third of the capital cost and one-third of the recurrent cost for the periods which may extend to ten years.
4. That a report regarding the plans made by the board and the progress made in carrying them out should be laid annually on the tables of the Federal House of Representatives and the Western and Eastern Houses of Assembly.

³⁰³ African Network for Environment and Economic Justice, *Oil of Poverty in Niger Delta* (Lagos: African Network for Environment and Economic Justice, 2004).

5. That the existence of any Special Area should be under continual review and that as soon as the need for its continued existence appears to have been reduced, consideration should be given to its termination or to the desirability of it becoming a minority area.

These recommendations led to the creation of the Niger Delta Development Board by the 1960 Constitution. Under section 14 (4) of the 1960 Constitution, the Board was enjoined to:

- a) Cause the Niger Delta to be surveyed in order to ascertain what measures are required to promote its physical development;
- b) Prepare schemes designed to promote the physical development of the Niger Delta together with estimates of the costs of putting such schemes into effects;
- c) Submit to the government of the Federation and the government of Western and Eastern Nigeria an initial report describing the survey of the Niger Delta and the measures that appear to the board to be desirable in order to promote the physical development thereof, having regard to the information derived from the survey, and subsequent annual reports describing the work of the board and the measures taken in pursuance of its advice.

The board could not provide any meaningful development for the region because it lacked both political will and commitment.

8.4.2 Oil Mineral Producing Areas Development Commission (OMPADEC)

The Federal Military Government of General Ibrahim Babangida promulgated the Oil Mineral Producing Area Development Commission (OMPADEC) Decree No 23 of 1992 to redress not only the grievances but

also to address the years of neglect of the Niger Delta Region. Section 2 of the decree states:

1. The objective of the commission shall be
 - (a) To receive and administer the monthly sums from the allocation of the Federal Account in accordance with confirmed ratio of oil production in each state;
 - (i) For the rehabilitation and development of all mineral areas;
 - (ii) For tackling ecological problems that have arisen from the exploration of oil minerals;
 - (b) To determine and identify through the Commission and the respective oil producing states, the actual oil mineral-producing areas and embark on the development of projects properly agreed upon with the local communities of the oil mineral-producing areas;
 - (c) To consult with the relevant Federal and State Government authorities on the control and effective methods of tackling the problems of oil pollution and spillages;
 - (d) To liaise with the various oil companies on matters of pollution control;
 - (e) To obtain from the Nigerian National Petroleum Corporation the proper formula for actual oil mineral production of each state, local government area and distribution of projects, services and employment of personnel in accordance with recognised percentage production;
 - (f) To consult with the Federal Government through the Presidency, the state, local governments and oil mineral-

producing communities regarding projects, services and all other requirements relating to the special fund;

- (g) To render annual returns to the President, Commander-in-Chief of the Armed Forces and copy the state and local governments on all matters relating to the special fund;
- (h) To advice the Federal, State and Local Governments on all matters relating to the special fund;
- (i) To liaise with the oil-producing companies regarding the proper number, location and other relevant data regarding oil-mineral producing areas; and
- (j) To execute other works and perform such other functions which in the opinion of the Commission is geared towards the development of the oil-mineral producing areas.

2. The sums received by the Commission under Subsection (1) (a) of this section shall

- (a) Be used for the rehabilitation and development of the oil mineral-producing areas on the basis of the ratio of the oil produced in the particular areas and not on the basis of dichotomy of on-shore or offshore oil production.

Under Section 4a (2) of the Allocation of Revenue (Federation Account) (Amendment Act No 106 of 1992), OMPADEC was to administer three percent of the Federation Account derived from mineral revenue.

Regrettably, OMPADEC also failed to ensure the development of the Niger Delta region as some of the projects undertaken by that Commission were either abandoned or uncompleted.

OMPADEC failed largely because of corruption and undue influence from the government. Although the Commission was set up as an independent body, in practice, most critical decisions (such a major contracts) were taken by the government. Furthermore, the setting up of a special development fund (the Petroleum Trust Fund) by the government, which concentrated more on development of projects in the northern states at the detriment of oil-producing areas, showed that the government was not genuinely concerned in solving the environmental and socio-economic problems in the Niger Delta.

8.4.3 Niger Delta Development Commission

Desiring to "facilitate the rapid, even and sustainable development of the Niger Delta into a region that is economically prosperous, socially stable, ecologically regenerative and politically peaceful"³⁰⁴, The former President in 2000, submitted the Niger Delta Development Commission bill to the National Assembly. The bill was subsequently passed into law as the Niger Delta Development Commission (NDDC) Act 2000.

Section 7 of the Act provides that:

The Commission shall:

- (a) Formulate policies and guidelines for the development of the Niger Delta area;
- (b) Conceive, plan and implement in accordance with set rules and regulations, projects and programmes for sustainable transportation including roads, jetties and waterways, health, education, employment, industrialisation, agriculture and

³⁰⁴ Niger Delta Development Commission," Mission Statement, Vision and Strategy of the Commission," Niger Delta Development Commission, <http://www.nddconline.org> (accessed March 29, 2009).

- fisheries, housing and urban development, water supply, electricity and telecommunication;
- (c) Cause the Niger Delta area to be surveyed in order to ascertain measures which are necessary to promote its physical and socio-economic development;
 - (d) Prepare master plans and schemes designed to promote the physical development of the Niger Delta area and the estimates of the costs of implementing such master plans and schemes;
 - (e) Implement all the measures approved for the development of the Niger Delta by the federal government and the member-states of the commission;
 - (f) Identify factors inhibiting the development of the Niger Delta area and assist the member-states in the formulation and implementation of policies to ensure sound and efficient management of the resources of the Niger Delta;
 - (g) Assess and report on any project being funded and carried out in the Niger Delta by oil and gas-producing companies and any other company including non-governmental organisations and ensure that funds released for such projects are properly utilised;
 - (h) Tackle ecological and environmental problems that arise from the exploration of oil mineral in the Niger Delta area and advise the Federal Government and member-states on the prevention and control of spillage, gas flaring and environmental pollution;

- (i) Liaise with the various oil and gas prospecting and producing companies on all matters of pollution prevention and control;
 - (j) Execute such other works and perform such other functions which, in the opinion of the Commission, are required for the sustainable development of the Niger Delta area and its people; and
1. In exercising its functions and powers under this section, the Commission shall have regard to the varied and specific contributions of each member-states of the Commission to the total national production of oil and gas.
 2. The Commission shall be subject to the direction, control or supervision in the performance of its functions under this Act by the President, Commander-in-chief of the Armed Forces of the Federal Republic of Nigeria.

Section 14 of the Act deals with funding of the NDDC and provides that:

1. The Commission shall establish and maintain a fund from which shall be defrayed all expenditure incurred by the commission.
2. There shall be paid and credited to the fund established pursuant to Subsection (1) of this Section;
 - (a) From the Federal Government, the equivalent of 15 percent of the total monthly statutory allocation due to member-states of the commission from the Federation Account; this being the contribution of the Federal Government to the commission;

- (b) 3 percent of the total annual budget of any oil-producing oil company operating, onshore and offshore in the Niger Delta area;
 - (c) 50 percent of monies due to member states of the commission from the ecological fund;
 - (d) Such monies as may from time to time be granted or lent to or deposited with the commission by the federal or a state government, any other body or institution whether local or foreign;
 - (e) All monies raised for the purpose of the commission by way of gifts, loans, grants-in-aid, testamentary disposition or otherwise; and
 - (f) Proceeds from all other assets that may, from time to time accrue to the commission.
3. The fund shall be managed in accordance with rules made by board, and without prejudice to the generality of the power to make rules under this subsection; the rules shall in particular contain provisions specifying the manner in which the assets or the funds of the commission are to be held, and regulating the making or payments into and out of the fund; and requiring the keeping of proper accounts and records for the purpose of the fund in such form as may be specified in the rules.

The organisational structure of the NDDC in terms of the selection and dismissal process is predominately controlled by the President. Initially, the President appoints board member nominees who are subsequently subjected to senatorial confirmation for a four-year term with the possibility of re-election.

These board members include an indigene from each oil-producing state, a rotating chairperson from each state; three representatives from non-oil producing states; an individual selected by the oil producing companies, the Federal Ministry of Finance, the Ministry of Environment, the managing commission director, two executive directors. The Board jointly assesses the development needs of a region as well as determines implementation strategies, in concert with the Advisory Committee. The committee is composed of the governors of Niger Delta as well as two individuals personally selected by the President from the civil service. Moreover, a Monitoring Committee, responsible to the President, oversees the management and implementation of projects, and financial statements.³⁰⁵

In the eight years of its existence, the NDDC has recorded some progress in providing physical development for the Niger Delta region compared to its predecessors.

In spite of its under-funding, reports across the region indicates that road projects, landing jetties, water schemes, electricity projects, schools and health centers have been completed.

Yet the Federal Government, instead of increasing its percentage contribution to the NDDC, is seeking "to reduce its contribution from 15 percent to 10 percent of the total monthly statutory allocations due to member states of the commission from the federation account, and the percentage contribution of oil companies operating in the Niger Delta region from 3 to 2 percent of their total annual budget".³⁰⁶

³⁰⁵ Niger Delta Development Commission, "Niger-Delta Development Commission Act, 2000," Niger Delta Development Commission, <http://www.nddconline.org> (accessed March 29 2009).

³⁰⁶ Amaechi Okonkwo, "Obasanjo, Edem disagree over NDDC funding formula." *Business Day*, November 15 2005, <http://www.businessdayonline.com> (accessed March 29 2009).

This notwithstanding, the complaints against the commission range from lack of transparency and collaboration in oil revenue utilisation, inappropriate and incomplete projects, non-participation from recipient communities in project building and maintenance, and minimal accountability by board members and NDDC contractors.

Aware of these inadequacies and intending to improve its utility, relevance and effectiveness, the commission retained the service of consultants to undertake a comprehensive analysis of development challenges and needs of the Niger Delta region. Their findings indicates that inspite of the huge oil revenue generated from the region, public insecurity and disorder, poor and opaque governance, ineffective and inefficient institutional structures, minimal economic diversification, poor infrastructure, environmental degradation and low human development are the root causes of enduring poverty in the region.³⁰⁷

Why has the big revenue gains from oil not been able to finance productive physical and social investment thereby shaping the political economy of Nigeria in general and the Niger Delta in particular into a more stable and sustained economy? These issues are examined below.

8.5 POVERTY IN THE MIDST OF PLENTY

While income from oil has helped to stabilise and transform the economies of some nations, this has unfortunately not been the case with Nigeria. Some insights have been offered to explain how some countries have been able to manage oil revenues well, whilst the economic records of others have generally been disappointing. We will attempt to identify

³⁰⁷ GTZ and Wilbahi Engineering Limited, "Niger Delta Regional Development Master Plan", Niger Delta Development Commission, <http://www.nddconline.org> (accessed March 29 2009).

factors that have helped some countries to manage their oil revenues effectively and what lessons may be drawn from them.

Recent studies have offered some insights that can help build an analytical framework for a better understanding of, and improvements in, fiscal and economic management policies in oil rich countries.

Using analytical tools from political science, *Eifert et al.*³⁰⁸ have identified five main groups to which oil exporting countries may be classified. These political regimes include: mature democracies, factional democracies, paternalistic autocracies, predatory autocracies, and reformist autocracies.

These regimes reflect qualitative distinctions in the stability of political framework, and of party systems, the degree of social consensus, and the legitimisation of authority and means through which governments (or aspiring governments) obtain and maintain support, and the role of state institutions in distributing or using oil revenues fairly. These political regimes usually produce differences in the length of political horizons, levels of transparency, policy stability and quality and the political power of other sectors to produce tradable other than oil. We will deal with these regimes in turn.

8.5.1 Mature Democracies

Countries under this category are characterised by a stable party system, strong electoral institutions and policies are based on broad social consensus. In view of stability in the polity and the presence of institutional accountability, policymakers are encouraged to think in the long term as economic performance become central to competition for political power. The result is that policies in these kinds of regimes are

³⁰⁸ Eifert, B. *et al* (2003). "Managing Oil Wealth". *Finance & Development* 40, (1st March, 2003), pp 40-44.

based on transparent information and property rights are clearly defined. Furthermore, a change in government does not lead to a sweeping alteration of government priorities. The bureaucracy in mature democracies are competent and relatively insulated while professional judicial systems foster depersonalised functioning of markets with reasonable stability in rules. Political competition over economic performance encourage state investment and the provision of public goods which in turn enhances the productivity of the private sector thus giving rise to a strong, resilient and prudent economy. These features give citizens the opportunity to provide a critical counterbalance to the influence of interests benefiting from government policies. Norway, the American state of Alaska, and the Canadian province of Alberta are examples of this category.

8.5.2 Factional Democracies

Under factional democracies, governments are often unstable, and where they are stable, a single party usually dominates the others. Political parties are often weak and party loyalty gravitates around charismatic leaders. Furthermore, electoral institutions are fragile and military intervention in politics is commonplace. The short-horizon politics of competition for power and state-allocated resources gives rise to unstable policy regimes and non-transparent mechanisms for distributing oil earnings. Income distribution is unequal and social consensus elusive while political support derives from systems of patronage. Economic returns to state investment are often low because political strategies allow for the provision of goods to parochial interests. Bureaucracies, political elites and the military often succeed in earmarking state spending for their

use. Ecuador, Colombia and Venezuela are examples of this category of countries.

8.5.3 Paternalistic Autocracies

Under this category, governments base their legitimacy on tradition and religion. Although not based on democratic institutions, these governments can be stable for extended periods. Development programmes implemented by the governments of these states over the past three decades have met with considerable successes. Examples of countries in this category are Saudi Arabia, Kuwait, Gulf States and Indonesia.

8.5.4 Predatory Autocracies

These regimes are not based on broad public support or economic performance, rather, military power and the support of a narrow elite are the basis for authority. State power faces few constraints or counterbalance influence. The exploitation of public and private resources for the gains of the elites is embedded in institutionalised practices. Such regimes are non-transparent and corrupt. Under such conditions, oil wealth is bound to deliver little or no benefits to the generality of the populace. Nigeria under successive military regimes is given as one example of predatory autocracy.

8.5.5 Reformist Autocracies

Although lacking a broad democratic base, these regimes generate legitimacy through success in attacking poverty through productive investment and economic growth. The result is a long horizon in policymaking with competent and politically insulated technocratic elites. Indonesia early in President Suharto's rule is one such example.

8.5.6 Conclusion

The above analysis have shown clearly that mature democracies have the advantage of managing oil revenues and thus are capable of delivering the benefits of oil wealth to the people. They have well educated and informed electorate and are able to reach consensus easily. This type of regime also encourages a level of transparency on how to use oil revenues over a long horizon.

Unfortunately, the features that have made mature democracy work are lacking in Nigeria. This explains why the nation under successive military rule has been cited as an example of predatory autocracy.

Evidence that Nigeria until 1999 was a predatory democracy is overwhelming. From lack of development, to gross imbalance in wealth distribution, weak political institutions, uneducated and uninformed electorate, lack of consensus on strong competing interests, lack of transparency in managing oil wealth, short horizon and the tendency to siphon money from state coffers, the list is endless. Very little good can be expected from predatory autocracies.

Oil resources are a potential source of blessing to the entire population if properly managed.³⁰⁹ On the other hand, the presence of oil in a nation may generate negative outcome if the management of oil-related revenue is not based on transparency, accountability and fairness.

While oil has transformed the economic and political landscape of Nigeria, having earned the nation an estimated \$350 billion in thirty-five years, the presence of oil has generated more negative than positive impacts.

³⁰⁹ Gary; I and T. Karl. "Bottom of the barrel: Africa's oil boom and the Poor". Catholic Relief service, New York, (2000).

Firstly, rent-seeking activities have been on the increase in Nigeria. For several decades, oil revenues have been controlled by a small group of elites who have used oil money to grease the functioning of an extensive machinery of rent seeking and political patronage. In the end, economic infrastructure remains underdeveloped while broad provision of public goods is scarce.

Secondly, oil revenue has completely displaced the culture of paying taxes in Nigeria. An improved tax administration provides greater fiscal flexibility and macroeconomic stabilisation. Mature democracies are driven and sustained by efficient tax administration.

Thirdly, there is the problem of “Dutch disease” where non-oil sectors such as agriculture and manufacturing are completely eclipsed by oil windfall.

Fourthly, the problems of environmental degradation, pollution of the air, water and land are other negative impacts associated with the presence of oil in Nigeria.

Fifthly, oil-related conflicts have also impacted negatively on the Nigerian economy. As have been shown especially in mature democracies, these negative outcomes can be avoided or reduced to the barest minimum in an atmosphere of good governance, public accountability and transparent resource management. This is the only way of reversing the paradox of poverty in the midst of plenty.

8.6 MANAGEMENT AND DISTRIBUTION OF OIL DIVIDEND IN NIGERIA

From the inception of the current civilian administration in Nigeria, enhanced revenue has been accruing to the states of the Niger Delta region. Table 4 shows statutory revenue allocation to the Niger Delta

states from 1999 to 2003 while table 5 shows allocation of 13% derivation fund to Niger Delta states from 2000 to 2003.

Table 4
Statutory Revenue Allocation to Niger Delta States (1999-2003)
(In million)

	1999	2000	2001	2002	2003
Abia	2300.8	6012.0	7539.8	7783.7	9646.2
Akwa Ibom	3318.4	18206.8	7539.8	11973.8	9646.2
Bayelsa	2597.3	14695.5	23525.4	16865.8	25553.8
Cross River	2621.0	6154.3	6788.9	7240.1	9269.1
Delta	3593.0	22613.2	29907.9	32396.9	38982.8
Edo	2648.5	6491.8	7277.2	7216.1	8882.9
Imo	2544.5	7164.5	8836.9	8048.7	10360.1
Ondo	2665.0	9589.7	12089.3	8516.2	11080.6
Rivers	3324.1	16400.6	21,171.9	22610.5	32489.4
Total	25612.6	107,328.4	136,297.6	122,651.2	167945.9

The 2003 figures are for January-September 2003.

Source³¹⁰

³¹⁰ Federation Account Allocation Committee Files, (Federal Revenue Allocation & Resource Mobilisation Committee Abuja.)

Table 5

Allocation of 13% Derivation Fund to Niger Delta States (2000-2003)
(In million)

	2000	2001	2002	2003
Abia	813.9	1,062.3	1871.7	2,320.6
Akwa Ibom	12,808.2	16,717.1	6,469.2	16,094.9
Bayelsa	10,571.2	13,797.4	17,485.8	22,726.4
Cross River	1.2	1.6	883.3	1,768.0
Delta	17,433.7	22,754.9	30,427.5	33,672.7
Edo	337.1	439.8	673.7	1,236.0
Imo	1,464.5	1,911.3	1,885.8	2,674.0
Ondo	4,098.9	5,350.0	2,196.3	3,567.2
Rivers	10,571.2	13,797.6	23,106.6	25,854.7
Delta/Ondo	NA	NA	136.7	111.4
Total	58,099.9	75,832.0	130,800.8	110,025.9

The figures for 2003 are for January-October 2003.

Source³¹¹

But has this translated to economic development and welfare enhancement for the people of the region? According to Human Rights Watch, state and local governments in the Niger Delta region have squandered rising revenue accruing to the region as little of the money paid by the Federal Government to them from the oil revenue is actually spent on genuine development projects.³¹²

While the period of eleven years may not be enough to assess the performance of the present civilian administration, the volume of revenue

³¹¹ Federation Account Allocation Committee Files Abuja.

³¹² See <http://hrw.org/english/docs/2007/01/28/nigeria15204.htm> (accessed 5 July 2009).

accruing to the Niger Delta region during the period would have remarkably transformed the economy of the region if transparency, accountability and fairness led the management of such revenues.

Currently, unemployment rates are higher in core Niger Delta states and mostly affects the youths between 15-24 age brackets. This explains why youth restiveness is prevalent in the region. Table 6 shows unemployment rates by states in the Niger Delta.

Table 6
Unemployment Rates by States in the Niger Delta

	Composite	Urban	Rural
Abia	10.6	8.7	10.8
Akwa Ibom	36.9	29.8	37.1
Bayelsa	23.6	20.7	24.1
Cross River	16.6	7.3	18.3
Delta	23.3	23.5	19.0
Edo	14.3	24.0	11.8
Imo	22.3	23.8	32.8
Ondo	17.0	14.0	19.8
Rivers	34.2	27.5	35.2
All Nigeria	18.1	14.2	19.8

Source³¹³

This development has prompted the search for the best strategy of distributing oil wealth in the Niger Delta.

8.6.1 Alaska Permanent Fund

Some scholars have suggested depositing oil revenues in a permanent fund as well as distributing dividends directly to the citizens of Niger Delta as it s obtained in Alaskan.³¹⁴ The proposal includes removal

³¹³ Federal Office of Statistical News No.327, August 2001

³¹⁴ See Hartzok, Alanna, "Citizen Dividends and Oil Resource Rents: A Focus on Alaska, Norway and Nigeria," Paper presented in the U.S. Basic Income Guarantee Network (USBIG) track of the Eastern Economic Association 30th Annual, <http://www.earths.net> (accessed March

of direct utilisation of oil revenues from the government and also, limiting government expenditure to taxes only.

The Alaska Permanent Fund (hereinafter referred to as the 'Fund'), is a dedicated fund owned by the State of Alaska whether this Fund could be replicated in the Niger Delta, a brief inquiry into the history of the dividend programme is illuminating.

In 1976, the Alaskan public were not only optimistic about the total revenues accruing to the State Treasury from oil, but also concerned about government spending and the future of Alaska once the oil revenue declined.

They accordingly desired a mechanism to slow or dampen the boom and bust cycle usually associated with increased oil revenues. The general consensus was the establishment of a fund that would save part of the windfall and also have the effect of reducing the immediate fiscal impact of oil and gas income.

Since the Constitution of Alaska prohibited dedicated funds, a Constitutional amendment was approved by the people of Alaska in 1976 which has permitted the existence of a dedicated fund since then. It also set the minimum amount and the sources of the revenues from which the Fund was to be created.

The Constitutional amendment made provisions for the placement of at least 25 percent of all mineral lease rentals, royalties and federal revenue sharing payments received by the State into a permanent fund. The fund is to be administered by a Board of Trustees appointed by the Governor. In investing the funds in income-producing ventures, the board

29 2009); Gordon Abiama, "The Challenges of Democracy and Natural Resource Management for Sustainable Development," Presented at the Democracy, Earth Rights and Ecotaxation Seminar, March 7, 2002, Earth Rights Institute, <http://www.earthrights.net> (accessed March 29 2009); and Xavier Sala-i-Martin and Arvind Subramania, "Addressing the Resource Curse: An Illustration from Nigeria," International Monetary Fund NBER Working Paper No. 9804, <http://www.imf.org> (accessed March 29 2009).

must exercise the judgment and care expected of an investor of ordinary prudence, discretion and intelligence. At the end of each fiscal year, income from the fund is transferred as dividend for distribution to ordinary citizens.

Replicating the Alaska Permanent Fund in the Niger Delta in our opinion represents one way of re-distributing oil wealth to the people of the region. The dividend programme is an equitable and efficient strategy in the distribution of collective wealth.

Lessons from Alaska have shown that oil money is better off in the hands of the people. It stands to reason that a small slice of oil revenue in the hands of the people of the Niger Delta might benefit the people more than in the hands of the government.

Several obstacles have been highlighted as likely impediments against the replication of the Alaska Permanent Fund in Nigeria and particularly in the Niger Delta.

The collapse of tax paying culture has been cited as one of them. While it is conceded that the willingness to pay tax has greatly diminished in Nigeria, there still exist some rudimentary tax structures in the country. The situation is not that hopeless. What needs to be done is to thoroughly revamp the tax system to enhance compliance and create a culture of paying taxes. Furthermore, measures focused on improving tax administration to provide greater fiscal flexibility should be undertaken.

Secondly, lack of reliable and accurate population census has also been quoted as another impediment. That an eligible population is the denominator in calculating per person dividend cannot be over-emphasised. Be that as it may, transparent transfers may be effected through communities, schools, churches and the mosques.

The third is the problem of in-migration and rip-off and run syndrome. This too can be avoided by using longevity of residency to determine eligibility of transfers.

Fourthly, there are also fears that creating such a trust fund without effective fund oversight will become a source of personal accumulation and patronage for greedy politicians in view of weak and ineffective political institutions in the country. While Nigeria may not be a corrupt-free society, this in no way represents institutional breakdown. Rather, the situation calls for gradual evolution of mature democracy and quality institutions, stable party system, social consensus, strong, competent and insulated bureaucracy, and competent, professional judicial institution. It calls for long policy horizon, policy stability and transparency, savings and direct transfer of oil wealth to the people. Direct transfer of oil wealth to the people is very crucial. While there may be numerous government programmes selectively dispersing portions of oil wealth in the form of expanded subsidised government programmes and low interest loans, these go only to selected few in the Niger Delta. Furthermore, the powerful and connected are already benefiting from oil wealth through special-interest appropriation often arranged behind closed doors. Direct dividend transfer will, therefore, undoubtedly raise the incomes of families many of whom live in rural communities in the Niger Delta.

Apart from being the most effective institution to ameliorate the negative externalities of petroleum development, the NDDC can be given the additional role of managing a dividend fund for the Niger Delta region. This will accordingly entail some amendments to the NDDC Act. The establishment of a "Niger Delta Permanent Fund" to manage oil dividend transfers to the people is here suggested. The amendment should require at least 25 percent of revenues received by the NDDC to be placed in the permanent fund for annual transfer to the people of the region. The

amendment should equally establish a "Future Generation Fund" in which at least 5 percent of revenues accruing to NDDC are invested and withdrawn for future development projects. The amendment should go further to create the "Niger Delta Renewable Resources Fund" in which at least 2 percent of revenues received by NDDC are placed to give grants and other financial assistance to projects and programmes that identify and demonstrate new products, markets and technologies in renewable resources.

These additional responsibilities will entail some structural and institutional changes within the NDDC especially in the areas of board appointments; increase funding, project implementation and investment responsibility.

While board appointments should still remain the responsibilities of both the President and the National Assembly, board members should be insulated but not isolated from political activities. We suggest the inclusion of representation from the civil society on the board to play a watch dog role.

To enable the NDDC carry out the additional responsibility of making dividend transfers to the Niger Delta people, there is need for an increase in NDDC funds. Rather than reduce its percentage contribution, the Federal Government should increase its contribution to 20 percent while the percentage contribution of oil companies operating in the Niger Delta region should equally be increased to 15 percent of their total annual budget. It is about time government raise taxes on the petroleum industry to increase state revenue.

In the area of project implementation, it is important that the people are carried along in the selection and placement of development projects. Participatory rural appraisal methods are most advantageous as it creates

stakeholders of community members and enable NDDC to implement appropriate projects on the basis of community needs.

Similarly the Prudent Investor Rule, whereby, prudence, discretion and intelligence are applied to all investments, should guide the commission in all its investment strategies.

The current democracy is already offering a glimmer of hope for the country. The government apart from putting in place measures to tackle and oppose economic malfeasance; there is now a new commitment to increasing transparency and accountability in the country.³¹⁵

The support given by the government for International Development's Extractive Industries Transparency Initiative to systematise the publication of revenues generated from natural resources is a case in point. This programme requires all extractive-based corporations to publicly disclose earnings, taxes, revenues and royalties paid to the Nigerian government as of 2004³¹⁶. Already, the National Stakeholders Working Group (NSWG) made up of representatives from the government, private industry, and NGOs, has been set up to devise strategies and policies to effectively disclose payments made to the federal government. The NSWG has conducted twelve audits of payments and receipts of oil corporations and the federal government. Even though there were some inconsistencies in crude volumes and royalties calculated,³¹⁷ this development represents a fundamental change in evolving transparency in the extractive industry.

³¹⁵ Transparency International, "National Integrity Systems: Transparency International Country Study Report," Transparency International, <http://www.transparency.org> (accessed March 29 2009).

³¹⁶ Nigerian Extractive Industries Transparency Initiative, "About NEITI," Niger Delta Development Commission, <http://www.neiti.org> (accessed March 29 2009).

³¹⁷ Hart Group, "Nigeria Extractive Industry Transparency Initiative (NEITI): Progress Report No. 12: 1-13 March 2006," <http://www.neiti.org> (accessed March 29 2009).

Recognising oil revenue as a catalyst for sustainable economic and human development, another initiative "Publish What You Pay" has also been put in place. This programme linked with aid provided by international financial institutions, demands mandatory full disclosure of extractive-based revenues, payments exchanged between companies and government, and contractual terms of joint venture operations. Incentives for compliance derive from conditional funds contained with structural adjustment and technical assistance for the oil and gas sectors.³¹⁸

Worthy of note is the setting up of anti-corruption agencies such as the Independent Corrupt Practices and Other Related Offences Commission and the Economic and Financial Crimes Commission. These agencies have not only investigated but have also tried corrupt officials.

However, much still needs to be done. We believe that, external agents of restraint may also have a role in strengthening accountability and good governance in Nigeria. Two agencies, the International Monetary Fund (IMF) and the World Bank, concern themselves with external accountability by using their influence and leverage to make states answerable for the quality of their programmes and pressurise or induce them to adopt institutional reforms to ensure good governance.³¹⁹ These agencies also establish standards in collecting and publishing financial data in all sectors of the economy.³²⁰

These two international financial institutions can combine their efforts in a complementary and coherent way by demanding transparency and accountability at all levels of government. Measures to achieve these goals include: standardising the collection and publication of financial data

³¹⁸ Publish What You Pay, "IMF and World Bank," Publish What You Pay, <http://www.publishwhatyoupay.org> (accessed March 29 2009).

³¹⁹ Diamond, Larry, "Building a System of Comprehensive Accountability to Control Corruption," Hoover Institute, 13, <http://www.stanford.edu/~ldiamond/papers.html> (accessed March 29 2009).

in government, banking and the oil and gas sectors; improve institutional capacity and building collaborative working relationships between government, private sector, civil society, and communities; providing increased technical and financial assistance for governmental monitoring agencies; and promoting independence for domestic oversight bodies and participatory rural appraisals.

Groups favouring long-term goals can encourage the cautious and transparent management of resources. Such groups can include a well-informed civil society and NGOs. These actors can create better governance by monitoring the activities of political officials. They can act as watchdog by informing the public of corrupt activities and educate the populace on their political and civil rights as well as initiate open debate to reach consensus on social issues.³²¹

8.7 ALTERNATIVE SCENARIO

Alternatively, the House of Assembly of each state in the Niger Delta could initiate legislation on behalf of the people, establishing a Permanent Fund and requiring the state government to place at least 25 percent of all revenues accruing from oil into the fund for the benefit of the present and future generations. Furthermore, 5 percent of the revenue should be set aside for investment in renewable energy. In relation to board appointment, while the different state governors should appoint members of the board, representatives of civil society organisations should also be on the board, as a watchdog on the activities of other members.

Currently, enhanced revenue is accruing to the Niger Delta states from federal allocation. It should be borne in mind that this money

³²⁰ Ian Gary and Terry Lynn Karl, "Bottom of the Barrel: Africa's Oil Boom and the Poor." Catholic Relief Services, 47, <http://www.catholicrelief.org> (accessed March 29 2009).

belongs to the people and that the government is holding the money on trust for the people.

Apart from ensuring that money gets into the hands of the people, a permanent fund has an added advantage of putting a stop to the “empty treasury syndrome.”

8.8 CONCLUSION

Direct dividend transfers represents one of the vehicles capable of striking a balance between state ownership of oil wealth and the utilisation of that wealth for the benefit of the present and future generations. Ultimately, since oil wealth belongs to the people, it is important to keep oil revenues out of the hands of politicians as in Alaska.

This development will require amending both the 1999 Constitution as well as the NDDC Act 2000 to enhance revenue accruing to littoral states. In relation to the 1999 Constitution, there is need to amend section 162(2) to increase the derivation from the present thirteen percent to fifty percent. This will guarantee sufficient revenue to littoral states for the proposed permanent fund. The increase in the derivation formula is legitimate, especially as Nigeria now has the prospect to claim an extended continental shelf.

In relation to the NDDC Act 2000, Part II Section 7 of the Act should be amended to empower the commission to establish a permanent fund/future generation fund where in at least fifty percent of its revenue will be deposited for distribution as dividends and a part reserved for future generation. The current ad hoc and haphazard arrangement of disbursing money to repentant militant should be properly channelled through the NDDC. Moreover, ten percent equity in the NNPC to be paid

³²¹ Larry Diamond, "What Civil Society Can Do to Develop Democracy," Presentation to NGO Leaders, Baghdad, <http://www.stanford.edu/~ldiamond/papers.html> (accessed March 29 2009).

to oil producing States should also be deposited in the proposed permanent fund for distribution directly to ordinary citizens.

This author sees great wisdom in the establishment of the Ministry of Niger Delta. Apart from offering employment to the people of Niger Delta, the Ministry will ensure that the perceptions of the people of the region are well articulated at the ministerial level.

CHAPTER NINE

THE ROLE OF NGOS AND CIVIL SOCIETY IN THE FORMULATION, IMPLEMENTATION AND ENFORCEMENT OF ENVIRONMENTAL LAW IN NIGERIA

9.1 INTRODUCTION

The last thirty years have witnessed an extraordinary rise in the level of international activities undertaken by NGOs and civil society, from Stockholm in 1972 via the Earth Summit in Rio in 1992, to the 2002 World Summit on Sustainable Development in South Africa.

In the Niger Delta, while the 1970s and 1980s witnessed uncoordinated and localised demands for social amenities by communities from the MNOCs, the 1990s saw the emergence of civil society as a mobilisation platform for popular struggle with considerable co-ordination and intensity in their demands for equity and environmental justice from the state and MNOCs.

Their rise in prominence may be seen as a symptom of the fact that states are in some cases insufficient as mechanisms in which certain interests (such as the protection and the preservation of the environment) can be represented and also of the need for these interests to obtain more recognition than they would receive through the instrumentality of the states.

NGOs and civil society groups in the Niger Delta have developed large networks of partnership at national and international levels to more efficiently and successfully achieve their objectives. In view of these networks of partnership, this chapter examines the role of NGOs and civil society groups in the formulation, implementation and enforcement of environmental law in the Niger Delta region and at the international level.

9.2 THE ROLE OF NGOS IN FORMULATING INTERNATIONAL ENVIRONMENTAL LAW

The term "formulate" refers to the act of putting something in a systematic form with clarity.³²² The formulation of international environmental law is traditionally regarded as the domain in which only sovereign States participate. Most international institutions and diplomatic conference leave the setting of agenda in conferences and its formal adoption entirely in the hands States.³²³

Although NGOs generally have no legal right to formally place matters on the agenda of a meeting, informally, they have played an enormous role in the development of environmental law. They have effectively utilised informal channels to shape the way in which problems are addressed, the priority they receive and the way in which governments collaborate to solve them. NGOs have used several methods to influence policy makers and determine the outcome of policy decisions. They are known to blow the whistle to alert policy makers on the need to take action on environmental matters. Their ability to define problems, provide cutting edge research on scientific and environmental matters, educate the public through media coverage and galvanise their membership networks to demand action by government, are widely acknowledged as fundamental to policy making process.

In the area of sustainable development, NGOs have put themselves forward as actors with solutions. They have not only raised, but have also generated ecological sensibility by bringing pressure on governments and individuals alike to put the environment first. The Brent Spar Campaign is

³²² Webster's New Encyclopaedic Dictionary, (New York: Black Dog & Leventhal Inc., 1993), p. 396.

³²³ See the United Nations Framework Convention on Climate Change Rules of Procedure, Rule 9.

one such example.³²⁴ Furthermore, the lobbying presence of NGOs in international forums where final trade-offs and new rules are actually agreed is another tool used by NGOs to register their fingerprints in decision-making at the international level.

9.3 THE ROLE OF NGOS IN IMPLEMENTING INTERNATIONAL ENVIRONMENTAL LAW

The term "implement" means to carry out, fulfil or give practical effect to by positive action.³²⁵ The implementation of environmental law is mainly a national process requiring the execution of rules, plans or policies that have been agreed upon at the international level. The best laws in the world do not result in good environmental protection without some mechanism for implementing those laws. This is an area where the NGO role has become especially important. NGOs and civil society groups are perhaps best known for the role as watchdogs and whistle-blowers, crying 'foul' when governmental agencies neglect or refuse to follow their own rules and regulations or otherwise violate environmental laws. This will be illustrated below when dealing with implementation of environmental law at the national level.

9.4 THE ROLE OF NGOS IN THE ENFORCEMENT OF INTERNATIONAL ENVIRONMENTAL LAW

In its most basic sense, enforcement may be defined as "the act of compelling compliance with a law."³²⁶ In the context of international environmental law generally and Multilateral Environment Agreements

³²⁴ See N. Klein, *No Logo* (Harper Collins, 2000), p. 381.

³²⁵ Webster's Encyclopaedic Dictionary, *supra*. n. 322, p. 500.

³²⁶ *Black's Law Dictionary*, 7th Ed. (St. Paul, Minn: West, 1999), at 549.

(MEAs) in particular, compliance scholarship has been dominated by a debate between proponents of managerial and sanction-oriented models.

The managerial approach is championed by Chayes and Antonia Handler Chayes. This theory supports a "co-operative, problem-solving approach" to promote compliance with international environmental agreements.³²⁷ The Chayes assert that sanctions are "likely to be ineffective when used."³²⁸ According to them, compliance strategies should focus instead on the actual causes of non-compliance and require cautious management through positive means such as transparency, dispute settlement and capacity building.³²⁹ The main plank of this theory is persuasion, since according to them, treaty Parties' feel and accept general obligation to comply with a legally binding rule.³³⁰ They assert further that states will eagerly comply and carry out their international obligations in order to remain in good standing within the international system.³³¹ This school of thought, however, downplays the importance of the costs and benefits in the context of an individual regime.³³²

The sanctioned-oriented model is advanced by George Downs and colleagues.³³³ While encouraging the use of sanctions, Down *et al.* do not claim that sanctions are always required to ensure co-operation. They argue that sanctions are only needed where strong incentives exist for non-compliance. For Downs *et al.*, the managerial approach is weak in that it offers only policy advice without sufficient evidence,³³⁴ and is built on shallow co-operation. They claim further that the Chayes do not justify the

³²⁷ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass.: Oxford University Press, 1996), p. 3.

³²⁸ *Id.*, at pp. 32-3.

³²⁹ *Id.*, at pp. 22-5.

³³⁰ *Id.*, at p. 110.

³³¹ *Id.*, at p. 28.

³³² *Id.*, at p. 27.

³³³ George W. Downs, David M. Roake, and Peter N. Barsoom, "Is the Good News about Compliance Good News about Cooperation?" (1996) 50 *Int'l Org.* 379, at 382-7.

³³⁴ *Id.*, at p. 382-3

conclusion that sanctions are never required or appropriate to ensure co-operation.³³⁵

A candid assessment of the forgoing debate reveals that neither theory can assert global explanatory power. While the desire to comply may be inhibited by interests or capacity limitations, sanctions may be the only option in cases of deliberate non-compliance. Thus a blend between the two sides appears reasonable.

9.5 THE EMERGENCE OF NGOS AND CIVIL SOCIETY GROUPS IN NIGERIA

Regarded as the soul of a nation, NGOs and civil society groups have been at the forefront in the formulation, implementation and enforcement of environmental laws in Nigeria. They are regarded as a platform for popular and mass mobilisation, a bulwark against state excesses, resistance against improprieties and abuses of organisations. NGOs and civil society have contributed immensely to regime and policy changes, observance of civil rights and environmental and natural resource protection.

As already shown, the emergence of civil society groups in Nigeria was evident in the Niger Delta region from the mid-1980s as a reaction from a population that was exposed to hardship, and impoverishment, in spite of the enormous oil wealth generated from the region.³³⁶

The feelings of deprivation, neglect, marginalisation, injustice and inequity gave way to anger, disillusionment and frustration, thus resulting in an upsurge in agitation and protests. Local communities and civil society groups are not only protesting against ownership and control of oil

³³⁵ Id., at p. 391.

³³⁶ For more on the emergence of civil societies in Nigeria in the mid-1980s, see M. I. Abutudu, "The state, civil society and the decentralization process in Nigeria", Daker: CODESRIA, Monograph Series (1995), 1/95.

and the distribution of its benefits, they are also challenging policies and practices that disadvantage the region, destroy its environment and impoverish its people.

Initially the protests took the form of petition writing by traditional and opinion leaders demanding for social amenities from the MNOCs. Failure on the part of the MNOCs to impact positively on the lives of the people resulted in community mobilisation through community development associations. However, the benefits derived from the oil economy through the efforts of community development associations were marginal, limited and unsatisfactory.

The growing discontent of the Niger Delta people towards the practice and policies of the state and the MNOCs, elevated their grievances and demands beyond the community level to a regional concern. The region then became a fertile ground for the formation and mobilisation of civil groups to relate to the state and the MNOCs

The formal beginnings of civil associations in the Niger Delta can be traced to the formation of the Movement for the Survival of the Ogoni People (MOSOP) in 1990. Since the early 1990s, several community based and civil society groups have been formed. These include: the Conference of Traditional Rulers of Oil Producing States, Organisation for the Restoration of Actual Rights of Oil Communities, Concerned Youths of Oil Producing States, National Association of Oil Mineral Producing Communities, Ethnic Minority Rights Organisation of Nigeria and Niger Delta Peoples Movement for Self Determination and Environmental Protection. Others are Movement for the Protection and Survival of Oil, Mineral and Natural Gas Producing Communities of Nigeria, Association of Minority Oil States, the Delta Oil Producing Communities Association, Nigeria Society for the Protection of the Environment, Niger Delta Peace

and Development Forum, Pan Niger Delta Revolutionary Militia, and Committee on Vital Environmental Resources.

9.6 TYPES OF CIVIL SOCIETY GROUPS IN NIGERIA

Civil society groups in the Niger Delta are of varying types. They range from communal and ethnic groups such as MOSOP, a civil group of Ogoni people, Egbema National Congress (ENC), Ijaw Elders Forum (IEF), Movement for the Reparation of Ogbia, Movement for the Survival of Itsekiri Ethnic Nationality (MOSIEN), Movement for the Survival of Izon Nationality (MOSIN). Also included in this group are ethnic youth associations such as Niger Delta Volunteer Force (NDVF), Ijaw Youth Council, and Isoko National Youth Movement (INYM), just to mention a few.

The other category is the pan-ethnic civil society. Included in this group are Conference of Traditional Rulers of Oil Producing States, Niger Delta Peace Project Committee, Pan Niger Delta Revolutionary Militia, Niger Delta Elders Forum, Movement for South-South Peoples Conference, and Niger Delta Women for Justice, Niger Delta Professionals and Union of Niger Delta.

The third category is the civil and environmental rights groups. Within the civil and environmental rights group, three main stakeholders can be identified. The first in this group are Niger Delta-based environmental and civil rights groups such as the Niger Delta Human and Environmental Rescue Organisation (ND-HERO), Environmental Rights Action (ERA), Oil Watch Group, Ijaw Council for Human Rights (ICHR), and Institute of Human Rights and Humanitarian Law. The second type are national civil rights and democratic activist groups such as Civil Liberties Organisations (CLO), the Constitutional Rights Projects (CRP), Campaign for Democracy (CD), Committee for the Defence of Human

Rights (CDHR), and Joint Action Committee for Democracy (JACON). Third are international civil groups and NGOs such as Human Rights Watch (HRW), Sierra Club, Project Underground and Trans Africa.

This study will only examine the roles of civil society groups involved in the protection and preservation of the environment. We now consider the role of civil and environmental rights groups in the development, implementation and enforcement of environmental law in Nigeria.

9.7 THE ROLE OF CIVIL AND ENVIRONMENTAL RIGHTS GROUPS IN THE DEVELOPMENT OF ENVIRONMENTAL LAW IN NIGERIA

Civil societies in Nigeria are not directly involved in the development of environmental laws, policies and regulations. However, they have used informal methods and channels to instigate policy change.

Through consistent and sustained advocacy by civil society on the impact of petroleum development, the government has become more sensitive to the environmental and social responsibilities of MNOCs to the Niger Delta people. Consequently, the state is more concerned today about environmental issues, the relationship between MNOCs with host communities and the development of the region than before. MNOCs on their part are becoming more compelled to seek improvements in relations with host communities.

Furthermore, through campaigns, environmental education programmes and the dissemination of information, civil society groups have heightened the level of awareness about the environmental devastation of the Niger Delta region and compelled the entrance of the issue into national agenda.

Civil society groups in the Niger Delta have performed the central role of mobilising the local people, articulating their demands, strengthening participation among the people, forging commonality of objectives and building region-wide platforms to influence the policy making process.

9.8 THE ROLE OF CIVIL SOCIETY IN THE IMPLEMENTATION OF ENVIRONMENTAL LAW IN NIGERIA

Civil society organisations are not directly engaged in the implementation of environmental law in Nigeria. They are however playing informal role as watch dogs over implementation of environmental policies by the government, industry and financial institutions.

9.9 THE ROLE OF CIVIL SOCIETY IN THE ENFORCEMENT OF ENVIRONMENTAL LAW IN NIGERIA

Civil society groups have equally taken up enforcement role for ensuring the protection of the environment and natural resources. MOSOP for instance has initiated public interest litigation to defend the environment. Currently, NGOs, civil society groups and Nigerian communities have registered complaints with the World Bank Inspection Panel over the West African Gas Pipeline (WAGP) project.

The complaints filed by Environmental Rights Action and Friends of the Earth Nigeria, expressed serious concerns that the project, if implemented as presently designed, will do irreparable harm to the economic, social and environmental sustainability of the communities in the gas fields and pipeline routes. The complaints also include the absence of all inclusive Environmental Impact Assessment. The WAGP is

conceived as a 12-30 inch, 500 miles (800-kilometres) onshore and offshore pipeline to transport natural gas from the Niger Delta region of Nigeria to special consumers in Benin Republic, Togo and Ghana.

9.10 IMPROVING THE ROLE OF NGOS AND CIVIL SOCIETY IN ENVIRONMENTAL GOVERNANCE

9.10.1 At The National Level

The Niger Delta and indeed Nigeria, continues to face significant challenges and impediments to achieve good environmental governance. In a command and control regime currently in place, the government is primarily the instigator, designer, and enforcer of environmental laws and regulations with the result that public participation in environmental governance is minimal.

The key provision for public participation in environmental governance is the EIA Decree³³⁷ which requires an approving authority for development application to undertake an environmental impact assessment on whether the proposal is likely to cause a significant environmental or resource management impact, taking into account any public concerns relating to the development activity or undertaking. The EIA further requires conducting public hearing in the area of the proposed development. Public comments on the report and the inspection of the EIA are equally required.

While the EIA has the potential to promote good environmental governance, it is not enough to raise awareness of the public's environmental rights and provide the impetus for citizens involvement in formulating and implementing appropriate environmental protection

³³⁷ EIA Decree No. 86 of 1992.

policies and public participation in environmental decision-making for good environmental governance.

The concept of environmental governance encompasses the relationships and interactions among government and non-governmental structures, where power and responsibility are exercised in making environmental decisions. It concerns how decisions are made, with a particular emphasis on the need for citizens, interests groups, and communities generally, to participate and have their voices heard.³³⁸

Good environmental governance is measured by the effectiveness of strategies and initiatives implemented to achieve environmental goals and these goals range from capacity building, increased access to environmental information, participation, and justice.

Trends in environmental governance as exemplified in international and regional legal instruments emphasise procedural rights such as access to information, public participation and access to justice.

For instance, the Rio Declaration contains an emerging public participation norm in its Principle 10 and provides that “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making process. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

³³⁸ John Graham, Bruce Amos and Tim Plumptre, *Governance Principles for Protected Areas in the 21st Century*, 2003, World Parks Congress 2003, Durban, iii.

Agenda 21, which implements the principles in the Rio Declaration, equally relies on the role of civil society in developing, implementing, and enforcing environmental laws and policies. Access to information, public participation, and access to justice appear throughout Agenda 21, and particularly in Chapters 12, 19, 27, 36, 37, and 40.

Regional instruments promoting environmental governance have complemented the development of global norms, and continue to chart the course in clarifying and implementing those norms. Significant among them is the Aarhus Convention³³⁹. The Aarhus Convention, although a regional instrument, is globally recognised for the promotion of environmental governance. It provides a clear example of how governments and civil groups can jointly develop regional norms for environmental governance.

Article 1 of the Aarhus Convention provides that “... each party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”

The first pillar, access to information, is the foundation for sound environmental governance since it enables the public to learn about environmental threats and to decide the best to respond. It further ensures that citizens have the right to obtain information about the state of the environment and human health; factors affecting or potentially affecting the environment and proposed projects that could affect the environment. This right-to-know law requires the establishment of pollution release and transfer register to provide the public greater access to information about sources of pollution. Government need to collect and publish information

³³⁹ The 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public participation in Decision-making and Access to Justice in Environmental Matters, reprinted in 38 ILM 517.

on the quantities of pollutants released from petroleum development and other industrial sources.

The second pillar offers the public the opportunity to participate in decisions that will affect their wellbeing. The third pillar, access to justice, empowers citizens and civil society to assist governments to enforce environmental laws and ensure respect for environmental rights.

Procedural rights of access to information, participation and justice are also provided for in the 1981 African Charter on Human and Peoples' Rights (ACHPR). The ACHPR (incorporated as part of Nigeria's municipal law)³⁴⁰, provides for the rights of access to information (Article 9 (1)), participation (Article 13), and justice (Article 3 and 7), as well as "the right to a general satisfactory environment favourable to their development". The Constitution of the Federal Republic of Nigeria, equally guarantees the right to a general satisfactory environment.³⁴¹

Since the 1990s, an increasing environmental consciousness has emerged among the people of the Niger Delta. This consciousness stems in part from the ever-more-apparent environmental degradation and resource depletion which has accompanied petroleum development and in part from the increasing advocacy by environmental NGOs raising greater awareness of ecological decline in the region. Government need to harness this growing popular consciousness towards greatly improving environmental governance. Governments and official institutions alone can not adequately manage the challenges associated with environmental governance and sustainable development. Therefore, government needs the companionship of civil society to ensure effective environmental governance.

³⁴⁰ See supra n. 193.

³⁴¹ See Section 4 1999 Constitution.

Government currently has constraints in undertaking effective environmental governance. These limitations range from lack of political will, lack of technical and regulatory capacity, fiscal constraints and pressure to attract foreign direct investment. Civil society can help to overcoming these limitations by providing intellectual vision, advocacy and other inputs to supplement scarce government resources for the development of laws, as well as for monitoring, inspection, and enforcement of environmental laws. Furthermore, their watchdog role can help identify environmental threats or violations of applicable laws. Only civil society can help building the political will for a new approach to development which sets social and environmental goals as part of the development process. The creative engagement of civil society will be crucial in developing and implementing an effective model of environmental governance.

Government need to mobilise and enhance the transformative potential of civil society by ensuring:

9.10.1a Greater participation of civil society in the development and review of environmental law:

Environmental legislations and the enforcement process in Nigeria have largely been put in place during a period when there was little public involvement. With the recent growth in environmental awareness, inadequacies in the system are being brought to the fore and the Niger Delta is witnessing a growing number of environmental issues such as pollution of the air, water and farmlands following several decades of petroleum development.

Key issues for public participation are now part of the public debate, including the right of the public to question and know the activities and conduct of government and MNOCs in the Niger Delta region.

In the past, local communities and civil society groups were not part of the decision-making process and policy-formulation process. This was underpinned by colonial laws and statutes engineered by past military regimes aimed at denying communities their rights to natural resources, health and a clean environment. The absence of a people-centred approach, paralleled by the lack of democratic and accountable institutions, made it possible for the government and the industry to conduct their activities with impunity. There was little or no attention paid to the role of civil society in the development, implementation and enforcement of environmental laws.

Sustainable development requires not just civil society and community participation, but also their involvement in the management of the development process as well as the review of environmental laws. The following reasons may be advanced for this. Firstly, it creatively addresses the inadequate resources of government agencies (human, material, and financial resources). Secondly, civil society and community management promotes a sense of belonging, thus offering the prospects of people taking increased initiatives in their own economic and social development. A development process that is people-centred makes government and the industry learn more about public concerns and priorities, and about the environmental and social impacts of proposed projects. This knowledge can then substantially improve decision-making. The public in turn gains, insight into the multitude of concerns regarding the management of their own environment. This insight can help build the public's capacity to participate and also their support for the decision-making process. People and civil society groups have knowledge about the local environment and

social conditions affecting their communities. Initiatives by these groups can help facilitate the environmental protection decision-making process.

By allowing a wide range of the public to express their views regarding a proposed project, decision-makers can expand their knowledge base and incorporate valuable disparate points of view when reaching policy decisions

Increased public involvement can also identify and address potential problems at an early stage of project development. Allowing the public to have access to information about proposed projects and related decisions reduces the likelihood of a project being opposed or rejected. Public participation at the outset defuses opposition by allowing the public to have a voice and allow time to find a solution acceptable to all stakeholders. Increased public involvement ultimately helps build broad-based consensus and lessens impediments regarding project development.

9.10.1b) Greater Access to administrative and policy making institutions

The core intention of public access to administrative and policy making institutions is to open up and democratise state/civil society relations in policy-making. It involves open, formal and public consultation with civil society. It allows for the participation of a wider range of societal interests, and in the process allows representatives of public interest groups and social movement organisations to be involved in policy development. Public access has the capacity to open up and democratise the process through which societal interests influence state policy-making. Public consultation ensures that societal interests beyond the parochial interests of the elites are heard by decision-makers.

Access to administrative and policy making institutions equally entail access to documents held by institutions of government. As an essential part of information and communication policy, government should adopt a code of conduct on public access to their documents. The public's right of access should be enshrined in the Constitution giving citizens the right to obtain policy documents from the government, especially in environmental matters.

For an enhance involvement in environmental policy development, it is important for citizens to have access to information on request. Furthermore, there is need to hold consultations on plans and programmes on issues relating to the environment. It is equally essential for members of the public to have a right to request an administrative review of decisions or of a failure to decide.

The proposed Freedom of Information Law for Nigeria is a step in the right direction.³⁴² The law should among other things improve access to registers and ensure direct access to documents. It should also strike a balance between the public's right to know, and the protection of legitimate public and private interests. Generally, it should lead to better informing the public at large on the activities of government and its agencies.

9.10.1c) Increased standing and access to judicial procedures

The emerging trend in NGOs enforcement of environmental laws and obligations is one striking contributions that environmental law has achieved in recent times. In the field of environmental law, nations are broadening the scope of citizen's involvement in environmental governance.

³⁴² The Bill is yet to be signed into law.

The right of a citizen to enforce a statutory (or constitutional) obligation, when a fellow citizen, government official or any other institution is disregarding that obligation, is sometime referred to as “standing to sue” or “locus standi.”³⁴³

Much of the early judiciary-led movement to grant access to the courts began in England. The revolution in the law of standing can be traced to judicial review of administrative action in England.

Under English law, a party need not be aggrieved to have standing. It suffices if a party can show sufficient interest. In *Inland Revenue Commissioner v. National Federation of Self-Employed and Small Businesses*³⁴⁴ (known as the Fleet Street Casuals cases), the House of Lords ruled that a group of tax paying small businesses could sue the tax authorities in complaint against what the authorities were doing with regard to a different group of taxpayers. The argument that they were not more aggrieved than other taxpayers did not suffice.

In the field of environmental law, public interest groups have equally been granted locus standi to protect the environment. In the *Thorp Case*,³⁴⁵ Greenpeace (an environmental NGO) was granted standing to challenge a proposed licence for a nuclear power plant. In granting this application, the High Court said Greenpeace was a “responsible and respected body with a genuine concern for the environment.” Here the Court conferred standing not only on the basis of ideological commitment, but also on the efforts to follow up such commitment. Speaking the mind of the Court, Justice Otton said “I reject the argument that Greenpeace is a ‘mere’ or ‘meddlesome busybody’. I regard the applicants as eminently

³⁴³ Many other terms are in use as well-actio popularis (peoples legal action, acciones populares, acciones difusas, intereses difusas, acao popolare., jus tertii (third party rights), “next friends”, “informers` actions, “, “citizens suit”, la capacite d’ester en justice, “legal capacity to litigate”, Verbandsklagerecht, “right of access to justice.”

³⁴⁴ (1981) 2 All ER 93; (1982) AC 617.

³⁴⁵ R v. Inspectorate of Pollution, ex parte Greenpeace, Ltd. (No.2) (1994) 4 All ER 329 (High Court, by Justice Otton).

respected and responsible and their genuine interest in the issue raised is sufficient for them to be granted locus standi.”³⁴⁶

In Nigeria, the right to sue can be conferred by the Constitution, or a statute, or even under customary law. The courts in Nigeria have reiterated in several cases the principles behind locus standi. Under section 6(6)(b) of the 1999 Constitution, a person will have legal capacity to sue in a matter in which it has been clearly shown to the Court that his rights or obligations have been or are about to be violated or adversely affected by the act complained of. The Supreme Court in Nigeria has relied on cases such as *Adesanya v. President of the Federal Republic of Nigeria*³⁴⁷ and *Omoloye v. Attorney General of Oyo State*³⁴⁸ to narrowly construe the rights of access to the Court. For instance, the requirement that a litigant in public interest litigation should show that he suffered damages over and above others, represents a low point in the issue of standing.

What the Supreme Court in Nigeria should note is that barriers to take legal action by citizens and NGOs are falling in countless countries of Africa, the Americas, Asia, Europe and the Pacific. Courts and legislatures are recognising that citizens groups can and should play an enforcement role especially in environmental governance. There is need to broaden access to justice in environmental matters. Both the Courts and the legislature have very crucial roles to play.

The trend nearly everywhere is to broaden locus standi for citizen’s enforcers, against the industry and government agencies that violate the law.

³⁴⁶ Quoted in Fiona Darroch, Recent Developments in UK Environmental Law, in A WORLD SURVEY OF ENVIRONMENTAL LAW at 293, 300.

³⁴⁷ (1981) 5 S.C. 112, 149-150

³⁴⁸ (1987) 4 NWLR (Pt 61) 267 at 209.

In Tanzania, the law on increased standing has blossomed. In the case of *Mtikila v. Attorney General*,³⁴⁹ the High Court at Dodoma said “In matters of public interest litigation, this Court will not deny standing to a genuine and bona fide litigant even where he has no personal interest in the matter. Standing will be granted on the basis of public interest litigation where the petition is bona fide and evidently for the public good and where the Court can provide an effective remedy.”

In America, Congress has given citizens a place in environmental enforcement. This was accomplished through the citizen suit provision in many of the statutes that was passed in the early 1970s. Examples of statutes that provides for citizens enforcement include: Clean Air Act, 42 U.S.C. § 7604 (1994); Clean Water Act, 33 U.S.C. §1365 (1994); Endangered Species Act, 16 U.S.C. § 1540(g) (1994); Toxic Substances Control Act, 15 U.S.C. § 2619 (1994); and the Resource Conservation and recovery Act, 42 U.S.C. § 6972 (1994).

The power of citizen’s enforcement has proven extremely effective in the United States. The above mentioned statutes have given NGOs substantial powers in the environmental and natural resources protection. They have utilised these statutes to transform environmental protection in that country.³⁵⁰

Restrictions on access to courts in relation to public interest litigations have also been set aside in India. In *Sheela Barse v. Union of India*,³⁵¹ the Supreme Court held that “in a public interest litigation unlike traditional dispute resolution mechanisms, there is no determination or adjudication of individual rights. While in the ordinary conventional

³⁴⁹ Civ. Case No. 5 of 1993.

³⁵⁰ For more on the role of citizens and NGOs in the enforcement of environmental law in the US, see Susan Daggett, “NGOs as Lawmakers, Watchdogs, Whistle-Blowers, and Private Attorneys General”, 13:1 *Colo. J. Int’l Env’tl. L. & Pol’y* (2002), pp. 99-113.

³⁵¹ 1988 4 SCC 226, 234; 1988 AIR (SC) 2211, 2214, quoted in Susman, S. “Distant Voices in the Courts of India: Transformation of Standing in Public interest Litigation”, 13, *Wis. Int’l Law J.* (1994), 57, 66.

adjudications the party structure is merely bi-polar and controversy pertains to the determination of the legal consequences of past events and the remedy is essentially linked to and limited by the logic of the array of the parties, in a public interest action the proceedings cut across and transcend these traditional forms and inhibitions.”

Increased standing provides an important weapon in the hands of citizen groups to curtail excesses of the government and its agencies. It also has the advantage of supplementing government’s enforcement resources.

There is an urgent need for legal, constitutional and judicial reforms in Nigeria. The Constitution of the Federal Republic of Nigeria should explicitly provide for open standing for civil society groups as is done in other countries. For instance, article 88 (2) of the 1990 Constitution of the Kingdom of Nepal provides that the Supreme Court of Nepal shall have the extra ordinary power to issue necessary and appropriate orders to protect rights in suits of “public interest or concern.”

The Nigeria courts as guardians and trustee of the Constitution should equally rise up to the occasion to liberalise standing. An increased role for NGOs and civil society requires sweeping institutional and legal reforms to give them substantial powers not only in the development and implementation of environmental laws, but most importantly, in the enforcement process.

Although there are environmental standards in Nigeria, they have not been enforced because the agencies responsible for enforcing these standards are too weak and friendly with the industry. In examining the failure of environmental protection in the Niger Delta, it has to be borne in mind that in order to ensure widespread compliance with and enforcement of environmental provisions, NGOs and civil society groups need to play a significant role in the regulatory process.

To accomplish those ends, there is need for new environmental laws designed to encourage NGOs and civil society groups acting as private attorneys general, to sue the government, individuals and companies directly. The new law should include provisions empowering NGOs and civil society groups to enforce laws aimed at improving water and air quality, forestry and public lands, endangered species and resource conservation.

The law for instance may provide that any NGO or civil society group may commence a civil action against any person (including the Federal Republic of Nigeria, the industry and any other governmental instrumentality or agency), who is alleged to be in violation of environmental standards.

To provide additional incentives for NGOs to take up this enforcement role, the law should enable the prevailing plaintiffs to recover attorney's fees, and any cost associated with bringing the environmental action.

This proposal, if put in place, will encourage NGOs and civil society groups to take up and consolidate their role as watchdog and enforcers with zeal and enthusiasm.

9.10.2 At the International level

As shown already, civil societies have continued to play a very important role in global environment governance by providing up-to-date information on critical issues. Governments and intergovernmental organisations often turn to civil societies and NGOs to fill research gaps that stand in the way to effective decision-making. Their creativity, flexibility, and capacity for vision and long-term thinking often set NGOs apart from governmental bodies.

Whereas governmental bodies and intergovernmental organisations often lack analytical capacity or are hampered by bureaucratic constraints and other obligations, civil societies can focus on dynamic research agenda, and move quickly to address new issues.

Accordingly, there is need for a systematic and formalised integration of civil society into the global environmental governance.

Below, we consider some avenues of improving the role of civil societies and NGOs in the development, implementation and enforcement of environmental law.

9.10.2a Increased recognition of the role and interest of NGOs and civil society in the development, implementation and enforcement of environmental law

Over the past decades, NGOs have assumed a more active role in the process of agenda-setting and policy development. NGOs have been instrumental in notifying the public, governments and intergovernmental organisations of critical new issues for many years.

The ability of NGOs to place issues on the global agenda indicates that they can equally participate in the later stages of decision-making.

To this end, a formalised engagement of NGOs in the international decision-making process is necessary. Currently, modalities of engagement of NGOs before international bodies range from being observers, partners and sometimes, total denial of.

While participation at international fora should not be an all comers affair, each international agency need to structure participation standards to suit its particular objectives. In doing this, it is needful to set minimum criteria for NGO participation. The guidelines for the selection process, the rules, rights and responsibilities, should be clearly stated.

Apart from giving inputs into policy development, civil societies have been very useful in ensuring the implementation of environmental laws, policies and regulations. They are major actors in compliance monitoring of international agreements and in the collection and compilation of compliance data.

In the area of enforcement, NGOS have been extremely effective in initiating public interest litigation to defend environmental rights as well as to clarify and enforce laws.³⁵²

An increased role for civil society will entail a re-structuring of the current global environmental dispute settlement mechanisms to accommodate the interests and contributions of NGOs. A crucial step in this direction is the Aarhus Convention which envisions a process wherein NGOs could seek judicial remedy against entities such as national governments and private entities for environmental harms and crimes.

In the alternative, the proposed International Environmental Court to which states, individuals, NGOs and corporations may have access on equal footing, will greatly enhance the role of NGOs in the global environmental enforcement process.

A re-structured international system that will draw NGOs into global-scale policy development, implementation and enforcement, remain an important global challenge.

While the UN projects and programmes have already benefited from the contributions of NGOs, NGOs still have much to offer. Accordingly, re-structured global environmental governance system

³⁵² International Non-governmental organisations such as the Greenpeace International, and the Centre for International Environment Law, just to mention a few, have initiated dozens of public interest litigation to defend the environment.

should facilitate both an expansion of these roles, and the development of better-defined processes of participation for NGOs.

The current ad hoc acceptance of civil society participation must be replaced by institutionalised and formalised engagement of civil society in global environmental governance.

9.10.2b) Increased participation of NGOs and civil societies in the development of International environmental law principles and standards

There is need for increased participation of NGOs in the process of the development of international environmental law principles and standards. The general principles and rules of international environmental law as reflected in treatise, acts of international organisations, state practice, and soft law commitments, have broad and universal support and are frequently endorsed in practice.

These principles are general in the sense that they are potentially applicable to all members of the international community across the range of activities which they carry out or authorise and in respect of the protection of all aspects of the environment. Some examples of these principles, which represent global standards for the protection of the environment, are Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration.

These principles recognise the sovereignty of states over their natural resources and the responsibility not to cause transboundary environmental damage. Others include the principle of sustainable development and the precautionary principle.

These and other international environmental law principles are developed at the international level. NGOs and civil society groups should

be formally integrated into the international arena where these principles and standards are developed.

9.10.2c) Increased standing and access of NGOs to international judicial institutions

Currently, the role of NGOs in international dispute resolution mechanisms is normally one of lobbying, information and publicity. They often act as facilitators and investigators than actors in respect of international environmental disputes. Even in submitting *amicus curiae* briefs to dispute resolution mechanisms, the opportunities for NGOs are limited.

Yet, NGOs have an important role to play in ensuring the enforcement of international environmental laws and regulations. They are able to undertake performance assessment and monitoring of environmental conditions in ways that government and intergovernmental agencies could never accomplish. They are able to hold decision makers in the international arena publicly accountable for decisions affecting the environment. NGOs ability to make sensitive environmental information public and to initiate public interest litigations to defend the environment warrants their increased access and standing before international judicial institutions.

9.11 CONCLUSION

While the important role-played by civil societies have been widely acknowledged, some critics mainly from the government feel that the drawbacks of civil society participation in the development, implementation and enforcement of law both at the national and international levels, may outweigh the benefits. They point to policy distortions as one disadvantage of NGO involvement. Others fear that

national and intergovernmental decision making process would become bogged down by NGOs, which according to them are not necessarily representative of or accountable to their particular constituencies. Decision makers are also worried that NGOs may take over the sovereign powers of governments. However, considering the advantages of civil society involvement, these worries are unfounded.

The rise and continued influence of civil society in national and global environmental governance is evidence of the relative decline in the duties and responsibilities of governments. Civil society can help build the political will for a new approach to development that integrates environmental and social goals. Non-governmental organisations can serve as alternatives to weak and inadequate democratic institutions, as avenues for inclusive dialogue, and as conduits for dissemination of information on activities and issues within national and global systems.

It is important for states to accept these facts and acknowledge the contributions of civil societies in furthering sustainable development goals. NGOs participation in the development, implementation and enforcement of environmental law should accordingly be enhanced both at the national and the international level.

CHAPTER TEN

CONCLUSION

At the outset, the study attempted to find out as between the federal government and the littoral oil producing states, who owns not only the land but also oil and gas located onshore and in the beds of the territorial sea and the continental shelf of Nigeria.

It sought to carry out this task by analysing the various customary, legislative and constitutional provisions relevant to the subject. There is little doubt that as the law stands today, ownership over land as well as oil and gas located both onshore and offshore is vested in the Federal Government of Nigeria.

However, it is undeniable that inspite of its contribution to national wealth, the Niger Delta region is the poorest in terms of economic and infrastructural development. The region has equally experienced environmental degradation arising from both land-based operations and offshore activities.

In the past, very little attention was paid to the impact of petroleum development on the environment. The general rise in environmental consciousness has given rise to the emergence of NGOs and civil society groups advocating for the protection of the environment and demanding control and ownership of natural resources.

The study identified lack of equity in the distribution of oil wealth as a major factor in the Niger Delta crisis. It sought to fill this void by subsequently recommending equitable distribution of oil wealth to the inhabitants of the region.

As has been highlighted already, so much revenue is currently accruing to the Niger Delta region. Accordingly, the problems of the region go beyond ownership and increased revenue. The people of the

Niger Delta states should be concerned about the dissipation through state spending of revenues accruing from oil, and be determined to save some portions of the earnings.

This study advocates the establishment of a 'Fund' with a set of rules and principles such as the prudent investor rule, insulation from political pressures and accountability to the public. The fund which should be independent of the Governor, and the legislature, should be politically neutral. The people must be given an opportunity to participate in policy development and management of the fund.

We advocate direct and equal distribution of dividend paid from the fund to all citizens of the Niger Delta region. This will not only raise the incomes of many rural families, but would give each citizen a stake in oil revenue and thus give them an incentive to oppose 'empty treasury' syndrome.

The present state of the Niger Delta environment is evident of the inability of both the government and the industry to effectively handle environmental problems. This calls for an enhanced and formalised role for NGOs and civil society in environmental governance through a strategic partnership involving the government, the industry and the civil society.

Furthermore, the various environmental and oil and gas laws and regulations have been identified as the root cause of the current environmental problems in the region.

A closer look at these laws and regulations show their overemphasis on reaction and response rather than prevention. What this implies is that oil companies only react or attempt to control pollution after the occurrence of a spill or other related events. No concerted effort is made to ensure that pollution does not occur.

In view of the flaws associated with the reactive approach, the trend now in the petroleum industry is the use of the preventive approach which places high premium on the prevention of acts which may likely lead to pollution in any form.

The preventive or precautionary approach is significant in the sense that it ensures

“that a substance or activity posing a threat to the environment is prevented from adversely affecting the environment, even if there is no conclusive scientific proof linking that particular substance or activity to environmental damage. The precautionary principle is a guiding principle. Its purpose is to encourage – perhaps oblige – decision makers to consider the likely harmful effects of their activities on the environment before they pursue those activities. Proponents of the precautionary principle, as a new and progressive policy instrument, strive for a reversal of, or at least, a shift away from the current position whereby polluters can continue to discharge a wide variety of substances into the biosphere”.³⁵³

In view of the devastating effect of oil and gas activities on the environment, effective preventive regulations should be incorporated into oil-related environmental laws and regulations.

In the light of the preceding discussion, the author would like to recommend the following: equitable and direct dividend transfers of oil revenue to all Niger Delta citizens, an enhanced role for NGOs and civil society in environmental governance, and the revision and repeal of oil-related environmental laws and regulations.

³⁵³ James Cameron & Juli Abouchar, “The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment” (1991) 14:1 Boston Coll. Int. & Com. L. Rev. 1 at 2.

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