

The Limitations of Law in Promoting Synergy between Environment and Development Policies in Developing Countries: A Case Study of the Petroleum Industry in Nigeria*

Abstract

Since the Stockholm Conference, there has been an increasing use of law as a tool for promoting synergy between environment and other sectoral policies at both the international and national levels. One area which has recorded a marked increase in legislation has been the integration of environment considerations into development projects in order to address the apparent conflict between environment and development policy. However, the existence of several laws has not been matched by a corresponding positive impact on the environment in several developing countries.

Using both qualitative and quantitative research methodology, the paper uses the petroleum industry in Nigeria, as a case study, to answer the questions whether this is merely a problem of law enforcement or whether there are wider issues of policy involved.

The paper argues that while ineffective laws and/or inefficient enforcement is largely the apparent cause, yet, this is not just a failing of the enforcement process but rather a much wider issue of the ability of law to effectively promote synergies in policy across sectors without the supporting institutions and environment necessary for this. Inefficient enforcement is itself a result of several factors which include issues of coherence of policy across sectors, governance and accountability, international trade and investment policies and laws, accountability and governance of multi national corporations, poverty, organization and capacity of civil society and non governmental organizations, amongst others. Consequently, mere strengthening of legislation or institutional capacity of enforcement agencies will not suffice to ensure that law is an effective tool for promoting integration. There needs to be coherence in policy in the overall governance structure both at the national and international level.

1. Law as a Tool for Policy Integration

Since the Stockholm Conference,¹ there has been an increase in international and national environmental laws although law was not specifically promoted as a tool for environmental protection.² Rather, the conference's contributions appeared to be more in the realm of articulation of environmental norms and establishing more pragmatic, institutional and financial arrangements for addressing global environmental issues.³

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¹ United Nations Conference on the Human Environment (UNCHE), held at Stockholm, Sweden in June, 1972. This first major international conference on the environment was attended by 113 governments of both the developed and developing countries with the exception of the Soviet Union and most of its allies. See UNEP, Global Environmental Outlook 3: Past Present and Future Perspectives, (London, UK: Earthscan, 2002), chapter 1, particularly pages 4-5. (Referred to after now as GEO 3).

² The need to regulate the use of environmental resources was one of the fundamental principles of Stockholm, but the means of achieving this, or using law as a tool was not specifically stated. Only Principle 22 of the Stockholm Declaration specifically mentions law and this is only with respect to the development of a legal regime for liability and compensation for victims of pollution at international law. It provides "States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction." Furthermore, apart from a few provisions such as Item 32, the Stockholm Action Plan does not include law as one of the tools for the management of the environment

³ See the main documents and resolutions from the conference: the Declaration of the UN Conference on the Human Environment (Stockholm Declaration), the Plan of Action for the Human Environment

Indeed as Professor M.K Tolba, Head of the Egyptian delegation to the Conference⁴ said at the time, the “prominent responsibilities in this conference is to issue an international declaration on the human environment; a document with *no binding legislative imperatives*, but — we hope — with moral authority, that will inspire in the hearts of men the desire to live in harmony with each other, and with their environment.”⁵

However, immediately following the Stockholm Conference, there was a marked increase in the number of major national and international environmental laws.⁶ The Stockholm Declaration became the first “soft law” on the environment and its principles have had a significant impact in development of environmental legislation at both the international and national levels.⁷ At this time however, the focus was more on conservation and environmental management than integration of environment into development policies. It was not until the World Commission on Environment and Development (WCED, also known as the Brundtland Commission)⁸ specifically examined and highlighted the interdependence of environmental concerns and economic development that emphasis was placed on the role of law as a tool for integrating environment and development policy.

This commission, set up by the UN General Assembly in 1984 was, to amongst others, address one of the major apprehensions, especially of the developing countries, - the apparent conflict between environmental protection and economic development.⁹ Its report,¹⁰ submitted after three years in which it gathered information from the scientific community and also from public hearings, supported the then growing body of opinion¹¹ that economic development could not be achieved at the expense of the environment but rather there was an inextricable link between

(Action Plan) and the Resolution on Institutional and Financial Arrangements See 1972, 11 ILM 1416, (1972). Available online on the UNEP website at <http://www.unep.org/Documents/Default.asp?DocumentID=97>. (Last visited 20/10/2004). Also see generally, P. Birnie and A. Boyle, *International Law & the Environment* (2nd edn) (Oxford, UK: OUP 2002) at pp. 38-40.

⁴ He later became the Executive Director of the United Nations Environment Programme from 1975–1993.

⁵ Emphasis mine. See GEO 3, supra note 1 at p. 3. See also the preamble to the Stockholm Declaration which states that it is intended “to inspire and guide the peoples of the world in the preservation and enhancement of the human environment”

⁶ For instance, “during 1971-75, 31 major national environmental laws were passed in countries of the Organization for Economic Cooperation and Development (OECD), compared to just 4 during 1956-60, 10 during 1960-65 and 18 during 1966-70.” Also, the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and the 1979 Convention on the Conservation of Migratory Species of Wild Animals (CMS) are some of the international agreements on environment that were concluded following Stockholm. See GEO 3, supra note 1 at pp. 4-5.

⁷ See generally, P. Sands, *Principles of International Environmental Law: Frameworks, Standards and Implementation* (vol. 1) ((Manchester, UK: Manchester University Press, 1995) at pp. 34-37. (Referred to after now as Sands)

⁸ This is named after its chairperson, former Norwegian Prime-Minister Gro Harlem Brundtland.

⁹ These countries, from Africa, Asia and Latin America, feared that environment regulation would impede their ability to develop along the patterns of the developed countries. See GEO 3, supra note 1 at p. 2; See also, Y. Osibanjo and O. Ajayi, “Human Rights and Economic Development in Developing Countries” (1994) 28 Int’l Law 727 at p.740.

¹⁰ WCED, *Our Common Future* (Oxford, UK: Oxford University Press, 1987) (Referred to after now as Brundtland Report).

¹¹ For a review of some of these, see GEO 3, supra note 1 at pp 6-7.

the two. The report emphasised the finiteness of resources and the need to take into account the long term impacts of human actions in policy development and implementation. Thus while not opposed to continued growth, it makes this dependent on a responsibility to future generations. This it encapsulated in the now popular concept of sustainable development, defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”¹² To achieve this, the commission stated that “human laws must be reformulated to keep human activities in harmony with the unchanging and universal laws of nature.”¹³

The commission’s articulation of the concept of sustainable development was widely accepted by governments and NGOs and has since become the policy goal of the international community. This in spite of the fact that the ambit, exact legal status at international law and mode of implementation is still the subject of ongoing debate albeit with a general consensus that its three main pillars are the economic, social and environmental aspects.¹⁴ The international consensus on the goal of sustainable development appears to have been consolidated by the second world summit on environment, aptly called the United Nations Conference on Environment and Development (UNCED).¹⁵ Principles 3 and 4 of the Rio Declaration¹⁶ essentially capture the concept of sustainable development as defined by the Commission.

Rio also assigned a critical role to law in achieving integration between environment and development policy. Principle 11 urges states to “enact effective environmental legislation” which should “reflect the environmental and development context to which they apply.” The language of Principle 13 regarding development of a liability and compensation regime for victims of pollution and other environmental damage is more urgent than principle 22 of the Stockholm Declaration, and is also broader as it provides for establishment of similar regimes at the national level. In addition, chapter 8 of Agenda 21 which sets out mechanisms for “integrating environment and development in decision-making” provides *inter alia*, that “**laws and regulations** suited to country-specific conditions **are among the most important instruments** for transforming environment and development policies into action.”¹⁷ Furthermore, chapter 39 dedicated to International Legal Instruments and Mechanisms provides for “[T]he further development of international law on sustainable development, giving

¹² The Brundtland Report, supra note 10, at p. 43.

¹³ Ibid, at p. 330.

¹⁴ See Sands, supra note 7, at pp. 198-208; G. D. Meyers and S. C. Muller, “The Ethical Implications, Political Ramifications and Practical Limitations of Adopting Sustainable Development as National and International Policy,” (1996) 4 Buff. Env’tl. L.J. 1; S.L. Smith, “Ecologically Sustainable Development: Integrating Economics, Ecology, and Law,” (1995) 31 Willamette L. Rev. 261; S.W. Onuosa, “Sustainable Development of Petroleum Resources: The Rumpus and Resolution” in Environmental Regulation of Oil and Gas (Gao, Z., ed., London, United Kingdom: Kluwer, 1998) at p. 433.

¹⁵ Also known as the Earth Summit and held at Rio de Janeiro, Brazil in June 1992, this is the largest gathering of its kind ever held. It was attended by 176 governments, including more than 100 heads of state (only two attended the Stockholm Conference) and an estimated 10,000 delegates, 1,400 nongovernmental organizations (NGOs) and about 9,000 journalists. See GEO 3, supra note 1, at p. 15

¹⁶ Rio Declaration on Environment and Development, 1992, 31 ILM 874 (1992). Available online at <http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163>. (Last visited 20/10/04).

¹⁷ Emphasis mine. See Agenda 21, Para 8.13. Available online at <http://www.unep.org/Documents/Default.asp?DocumentID=52>. (Last visited 20/10/04).

special attention to the delicate balance between environmental and developmental concerns.” Unlike the Stockholm Conference, Rio also produced two very important binding international law instruments, the United Nations Framework Convention on Climate Change (UNFCCC) and the United Nations Convention on Biological Diversity (UNCBD), the provisions of which seek to maintain the balance between sovereign right to development and the need to protect natural resources and reduce environmental pollution.

Following Rio, there has been an even greater increase in both international and national environmental laws and it is claimed that environmental law is the fastest growing field of law today.¹⁸ Although some countries already had some body of environmental laws, especially since after Stockholm, Agenda 21 highlighted that “law-making in many countries seems to be ad hoc and piecemeal, or has not been endowed with the necessary institutional machinery and authority for enforcement and timely adjustment.”¹⁹ Considerable effort has therefore been put into establishment of more effective environmental regimes. Developing countries have not been left out in this process. Either on their own or through the assistance of United Nations agencies and other international NGOs,²⁰ most developing countries now have in place more modern environmental laws and institutional framework for enforcement.

Various approaches have been used to integrate environment concerns into all levels of policy and decision making processes. At the highest level, the environment has been included either as a fundamental right or as a policy goal of government in national constitutions²¹ and most governments have developed national environmental policies and action plans aimed at a holistic approach to environmental management.²² The second main approach has been the enactment of framework environmental legislations applicable to all sectors and establishment of environment agencies with the task of coordinating environmental management, compliance and enforcement.²³ Thirdly, based on the precautionary principle, environmental impact assessment (EIA) is made mandatory for development projects with potential environmental and social impacts. These laws require not only proper assessment of the environment and social impact of the project throughout its life cycle, but also that mitigating mechanisms are put in place.²⁴ Finally, there has been enactment of new

¹⁸ N. A. Robinson, “Attaining Systems for Sustainability Through Environmental Law”, in Capacity Building for Environmental Law in the Asian and Pacific Region: Approaches and Resources (vol. 1) 1146 (D. G. Craig, N. A. Robinson, K. Kheng-Lian. eds., ADB, 2002).

¹⁹ See Chapter 8:13 of Agenda 21. Available online at <http://www.unep.org/Documents/Default.asp?DocumentID=52>. Last visited 20/10/04)

²⁰ Such as UNEP’s Partnership for Development of Environmental Law and Institutions in Africa project (PADELIA) and the International Network for Compliance and Enforcement (INECE).

²¹ See for instance, Article 48A of the Indian Constitution 1949, as amended in 1976, section 41 of the Constitution of Argentina 1853, as amended in 1994, section 20 of the Constitution of the Federal Republic of Nigeria, 1999.

²² See for instance the National Environmental Policy (NEP) and the National Environmental Action Plan of Ghana, 1993; the Environmental Action Plan of India, 1993, the National Policy on Environment, Nigeria, 1988, as amended in 1999 and Nigeria’s Agenda 21, 1999.

²³ See for instance, the Chilean Law of Basis of the Environment, 1993, the Environment (Protection) Act of India, 1986, and the Federal Environmental Protection Act of Nigeria 1988, as amended in 1992 and 1999.

²⁴ See E. Bastida, “Integrating Sustainability into Legal Frameworks for Mining in Some Selected Latin American Countries” MMSD, No 120. (2002). (Referred to after now as Bastida)

sectoral laws, strengthening environmental provisions in existing laws through amendments and development of guidelines and standards.²⁵ These laws all provide for various forms of liability for contravention of their provisions.

In spite of these efforts, environment problems are still a major challenge for most developing countries.²⁶ While the causes of these problems are multifaceted, environmental impacts from development projects are a major issue.²⁷ There is a vicious cycle in which development activities cause environmental problems and this in turn leads to other socio economic, health, environmental and political problems, thus effectively denying achievement of sustainable development. To redress this, a lot of attention is being paid to strengthening of the legislative framework by having an effective mix of command and control and economic instruments as well as institutional capacity building and training of enforcement officers.²⁸ This seems to indicate that lack of enforcement is mainly a function of inadequate laws and weak enforcement capacity²⁹ and once these are addressed, it will translate into more efficient enforcement and a better environment.

This paper concedes that there is an enforcement problem. However, law making and enforcement function within the matrix of the overall governance system, both national and international. Consequently, failure of enforcement is not merely a result of poor legislation and weak enforcement capacity but is symptomatic of inadequate governance and supporting structures. Therefore, while capacity building efforts are laudable, these will not achieve much without the existence of adequate governance structures and an enabling environment.

To support this assertion, this paper studies the regulation and enforcement of environmental damage occasioned by the oil industry in Nigeria against the background of the prevailing governance environment. The choice of the oil industry is relevant for various reasons. First it epitomises the reality of the current trend in several developing countries i.e., the reliance on the resources sector for economic development. Also, the extractive industry is one area where there are serious and relatively more visible environmental impacts.³⁰

²⁵ See for instance the Air (Prevention and Control of Pollution) Act 1981 of India and the Argentinean Law of Mining Protection 1995.

²⁶ See the following: Report of the Secretary General of the United Nations, "We the Peoples: The Role of the United Nations in the 21st Century" April 2002, available online on the UN Website at <http://www.un.org/millennium/sg/report/>; United Nations Millennium Declaration, UNGA Res of 18th September 2000, A/Res/55/2. Available online at the UN Website at <http://www.un.org/millennium/declaration/ares552e.pdf>; UNEP, Africa Environment Outlook: Past Present and Future Trends, (Hertfordshire, England: EarthPrint, 2002).

²⁷ See M. Cohen, "New Menu for the Hard-Rock Café: International Mining Ventures and Environmental Cooperation in Developing Countries", (1996) 15 *Stan. Envtl. L.J.* 130; E. D. McCutcheon, "Think Globally, (En)Act Locally: Promoting Effective National Environmental Regulatory Infrastructures In Developing Nations" (1998) 31 *Cornell Int'l L.J.* 395. (referred to after now as McCutcheon).

²⁸ M.G. Faure, "Enforcement Issues for Environmental Legislation in Developing Countries," (UNU/INTECH Working Paper No 19) 1995. Available online at <http://www.intech.unu.edu/publications/working-papers/wp19.pdf>, (Last visited 15/10/04).

²⁹ See for instance P. Slater, "Environmental Law in Third World Countries, Can it be Enforced by Other Countries?" (1999) 5 *ILSA J. Int'l & Comp. L.* 519. (Referred to after now as Slater)

³⁰ This is exemplified in the cases of degraded environments that have recently attracted international attention such as the Nigerian Delta, the Brazilian Amazon forests, the Ecuadorian and Papua New Guinea cases.

The analysis is done in three main stages. First is a brief overview of the Nigerian oil industry which is meant to highlight the apparent conflict between environmental concerns and economic development goal of the country. Thereafter an analysis of the regulatory framework is done. Against this background, an assessment is made of the environmental impact of the industry, relying on both secondary sources as well as analysis of official oil spill statistics, especially in the light of the improved regulatory framework. In light of the lack of formal enforcement in spite of this, the paper then goes on to analyse the possible reasons for this against the backdrop of the existing regulatory and governance structure. This section draws from interviews of regulatory agents as well as other sources of information.

2. Integrating Environment Concerns into Oil Development Projects in Nigeria

Nigeria is Africa's largest oil producer and the 6th largest exporter in the world.³¹ Several new fields are still being discovered, particularly offshore and government intends to achieve a reserves target of 40 billion barrels by 2010.³² There are also ongoing major Liquefied Natural Gas projects to harness the huge reserve of natural gas, which until quite recently has remained largely unutilized.³³ The Nigerian economy is largely dependent on oil as this is the country's major export and accounts for over 90% of government revenue.³⁴ Oil development projects consequently have great economic significance for Nigeria.

On the other hand, all stages of oil industry activities are potentially harmful³⁵ to the environment and hence the stringent regulation at international law and also by the national law of most nations of the world.³⁶ The Nigerian oil industry, the main actors of which are major multinational companies, operates predominantly in the

³¹ Current crude oil reserves are estimated at 31.5 billion barrels, with a daily output of about 2 million barrels. See OPEC, *Annual Statistical Bulletin 2002* 9 <http://www.opec.org/Publications/AB/pdf/AB002002.pdf> (Last visited 16/02/04). See also Mbendi, *Nigeria Oil and Gas Industry*, <http://www.mbendi.co.za/indy/oilg/af/ng/p0005.htm> , (Last visited 16/02/2004). However, more conservative estimates put this at 24 billion barrels. See Energy Information Administration (US EIA), "Country Analysis: Nigeria" <http://www.eia.doe.gov/emeu/cabs/nigeria.html> (Last visited 20/02/2004).

³² At the end of 2003, the government announced achieving a target of 34 billion barrels. See "Nigeria Records Healthy Rise in Oil Reserves" <http://www.busrep.co.za/index.php?fArticleId=305761> (Last visited 20/11/2004).

³³ Most of Nigeria's associated natural gas is routinely flared, and as will be shown later, Nigeria currently has the highest rate of flared gas anywhere in the world. After several unsuccessful policy and legislative initiatives, government's current target, as agreed with the oil companies, is to stop flaring associated gas by 2008. The take off of the Nigerian Liquefied Natural Gas project in Bonny is expected to address some of the problem of gas utilization. See Energy Information Administration (US EIA), "Country Analysis: Nigeria" <http://www.eia.doe.gov/emeu/cabs/nigeria.html> (Last visited 20/10/2004).

³⁴ The exact amount varies slightly from year to year. In recent times, disruptions of oil activities have been alleged to have affected production and consequently revenue from oil. In the same vein, the amount accruing from oil exports has significantly increased in recent times owing to huge rises in price in the international market. See Mbendi Website, *The Nigerian Upstream Oil Industry*, www.mbendi.co.za/cyngoius.htm (last visited on 29/10/ 2004).

³⁵ For an evaluation of the impacts during the upstream stage, see UNEP/ E&P Forum, *Environmental Management in Oil and Gas Exploration and Production: An Overview of Issues and Management Approaches* (UNEP, 1997), p. 4. (referred to after now as E&P Forum).

³⁶ See Z. Gao, *Environmental Regulation of Oil and Gas* (London, United Kingdom: Kluwer, 1998).

ecologically rich and delicate wetlands of the Niger Delta area.³⁷ This area, rich in fresh water resources has a dynamic ecosystem with a very wide variety of flora and fauna. People in the rural areas where most of the downstream activities of the oil industry take place depend on these resources for their livelihoods³⁸ and also for domestic purposes.³⁹ The region is home to a diverse number of minority ethnic groups in the Nigerian polity. In spite of the amount of revenue generated from oil, the Niger Delta is amongst the most under developed regions of the country, with little or no basic infrastructure and a very high level of poverty.⁴⁰

The oil industry in Nigeria therefore typifies the challenge of harmonizing the apparent conflict between environment and development through the concept of sustainable development. As will be shown later, the economic, ecological and socio-political issues (the three pillars of sustainable development) highlighted in the brief background above, individually and collectively, are crucial for a proper understanding of the environmental problems of the oil producing Niger Delta region. They influence the political will of government towards formulating law and policy to redress the environmental impacts of oil activities, enforcement of existing laws by regulatory agencies and finally reaction of local communities.⁴¹

3. Legislative and Institutional Framework for Environmental Regulation of the Oil Industry

Nigeria is a federation with both the Federal and State Governments having legislative competence.⁴² Consequently, there are two sets of laws. In our discussions below, we shall be looking at Federal laws, first because the Constitution gives exclusive legislative competence over “[M]ines and minerals, including oil fields, oil mining, geological surveys and natural gas” to the Federal government.⁴³ Also, analysis of this set of laws allows for uniformity because except for minor differences, most of the

³⁷The largest in Africa and one of the largest in the world, encompassing over 20,000 sq. Km. It comprises four ecological zones of coastal barrier islands, mangroves, freshwater swamp forests and lowland rainforests. 60 % of the nation’s mangrove forest is found in the Niger Delta and the Nigerian Mangrove forest is the largest in Africa and the 3rd largest in the world. See The Shell Petroleum Development Company of Nigeria, *The Ecology of the Niger Delta* <http://www.shellnigeria.com/frame.asp?Page=tourHome> (Last visited on the 10/03/ 2004). See also Human Rights Watch, *The price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria’s Oil Producing Communities* <http://www.hrw.org/reports/1999/nigeria/Nigew991-05.htm#TopOfPage> (last visited 11/03/04. (Referred to after as The Price of Oil)

³⁸ The main occupation of the people are fishing, farming and distilling of local gin from mangrove forests. N. Ashton-Jones *The Human Ecosystems of the Niger Delta: An ERA Handbook* (Benin-City, Nigeria: ERA,1998) (Referred to after now as ERA Handbook); World Bank, *Defining an Environmental Strategy for the Niger Delta_ (vol 1) (1995)*, at pp. 5-6. (Referred to after now as World Bank Report).

³⁹ Including drinking water because of the lack of infrastructure for potable water supply. See World Bank Report , *Ibid*, at p.76.

⁴⁰ See *ERA Handbook* , *supra* note 38, at pp. 163-169.

⁴¹ See J.G. Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (Hamburg: LIT, 2000)at pp 8-58.

⁴² The third tier, the local governments have no legislative competence although the system of a democratically elected Local government is guaranteed under section 7 of the Constitution of the Federal Republic of Nigeria, 1999 (Referred to after now as the Constitution) and its functions set out in the fourth schedule to the Constitution.

⁴³ See Section 4 (2) (4), read together with Item 39 of Part 1 of the Second Schedule to the Constitution.

relevant State environmental laws replicate the Federal laws which apply to all the states.

The environmental regulation of the oil industry in Nigeria can broadly be divided into two phases, i.e., pre and post 1988. Before 1988, there was no clear national policy to regulate the environmental impacts of the oil industry, nor was there any specific environmental legislation,⁴⁴ although there were provisions scattered through the various petroleum⁴⁵ and other sectoral laws⁴⁶ which had relevance to oil pollution. However, in 1988 the federal government developed a National Policy on the environment,⁴⁷ enacted the Harmful Wastes (Special Criminal Provisions) Act,⁴⁸ and framework legislation on the environment.⁴⁹ This was followed in 1992, with the enactment of the Environmental Impact Assessment Decree (EIA Decree).⁵⁰ While there is as yet no specific comprehensive environmental legislation on oil pollution, some of the regulations made pursuant to the framework legislation⁵¹ and the sectoral guidelines for the EIA Decree⁵² have provisions made directly for the oil industry. The mechanism for integrating environmental concerns into oil development projects, at least since 1992 is in the first instance preventive, through carrying out an EIA. Where environmental damage actually occurs, the laws provide for remediation and restoration of the damaged environment and for compensation to the injured party. The laws also provide for administrative, civil and criminal liability.

The next section, starting with the constitutional and policy framework for environmental legislation, is a brief analysis of the specific laws relevant to environmental regulation. The aim of the section is not an in-depth analysis of the contents of these laws but merely to highlight the existence of a comprehensive legislative framework, which integrates environment concerns into oil industry activities and an institutional framework for enforcement. Owing to the fact that they are many, these laws shall be discussed under three main heads, i.e., environmental, petroleum and other relevant laws.

Constitutional and Policy Basis of Environmental Regulation

⁴⁴ This is except for the Oil in Navigable Waters Act, 1968, now Cap 337, LFN, 1990. The long title to the Act, expressly states that it was enacted to implement the terms of the International Convention for the Prevention of Pollution of the Sea by Oil 1954/1962.

⁴⁵ Such as Petroleum Act, Cap 350, LFN, 1990; Mineral Oil Safety Regulations, Petroleum (Drilling and Production) Amendment Regulations 1996, Petroleum Refining Regulations 1974, etc.

⁴⁶ Such as the Land Use Act, 1978, now Cap 20, LFN, 1990; Criminal Code Act, 1916, Cap 77, LFN, 1990, River Basins Development Authorities Act, Cap 396, LFN, 1990, Sea Fisheries Act, Cap 404, LFN, 1990, Water Resources Decree, 1993, etc.

⁴⁷ National Policy on Environment 1999. This document revises the 1988 National Policy on the Environment. It is made pursuant to the powers granted to FEPA under s. 4 of the FEPA Act, Cap 131, LFN 1990 as amended by Decree 59 of 1992 and Decree 14 of 1999.

⁴⁸ 1988, Cap 165, LFN, 1990.

⁴⁹ This is the Federal Environmental Protection Agency Act, 1988, Cap 131, LFN, 1990 as amended by Decree No. 59 of 1992 & Decree No 14 of 1999.

⁵⁰ Decree No 86 of 1992.

⁵¹ Such as the National Environmental Protection (Effluent Limitation) Regulations, S.1.8, 1991; National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations, S.1.9, 1991; and National Guidelines and Standards For Industrial Effluents, Gaseous Emissions and Hazardous Waste Management In Nigeria, 1991.

⁵² Sectoral Guidelines For Environmental Impact Assessment (Decree 86, 1992).

Section 20 of the Nigerian Constitution provides that “[T]he State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.”⁵³ Also the African Charter which was specifically enacted as part of Nigerian Law⁵⁴ provides in Article 4 that “[A]ll peoples shall have the right to a satisfactory environment favourable to their development.” Furthermore, more general provisions such as those giving both the Federal and State Governments power to make laws “for ... peace, order and good government” and “maintenance and securing of public safety and public order”,⁵⁵ can be used as the basis of environmental legislation. In addition, the National Policy on the Environment identifies establishment and/or strengthening of legal, institutional and regulatory framework as part of the holistic strategy for implementation of its goal of achieving sustainable development.⁵⁶ Paragraph 4.14 specifically deals with strategies specific to the oil industry. Also, Nigeria’s Agenda 21⁵⁷ identifies rational use of oil and gas as one of the existing environmental challenges.⁵⁸ Relevant programs and activities aimed at addressing this challenge includes to “monitor and ensure full compliance with legislation, regulations and standards set by the Federal Environment Protection Agency, the Department of Petroleum Resources and other regulatory agencies”.⁵⁹

Consequently, there exists sound constitutional and policy basis for environmental legislation and enforcement.

Environmental Laws

The main environmental laws relevant to the oil industry are the Federal Environmental Protection Agency (FEPA) Act, the various guidelines and regulations made pursuant to the FEPA act, the Environmental Impact Assessment (EIA) Decree, the Oil in Navigable Waters Act, and the Harmful Wastes, (Special Criminal Provisions) Act.

The Federal Environmental Protection Agency (FEPA) Act⁶⁰ is a framework legislation. As with all framework legislations, it provides for a comprehensive system of environmental management in Nigeria. It includes provisions on establishment of a regulatory agency with general oversight and coordination of management of all aspects of the environment,⁶¹ pollution control, environmental liability and enforcement powers. FEPA, whose functions have been taken over by the Federal Ministry of Environment (FME) has very wide powers regarding any matter that is “expedient for full discharge of the functions of the agency”.⁶² Several provisions of this law such as section 20 prohibit acts damaging to the environment

⁵³ This is however under the Fundamental Objectives and Directive Principles of State Policy and hence not justiciable.

⁵⁴ See African Charter on Human and Peoples Rights (Ratification and Enforcement) Act. Cap 10 LFN, 1990. In *Chief Gani Fawehinmi v General Abacha & ors.* [1996] 9 NWLR 710, the Supreme Court of Nigeria recognised the African Charter as part of Nigerian law, and that its provisions were justiciable.

⁵⁵ Section 4 (2) and 11 (1) of the 1999 Constitution.

⁵⁶ See Paragraph 4.0 of the Policy.

⁵⁷ 1999. This is a blueprint by FEPA, after the fashion of the Earth summit’s Agenda 21 and it sets out strategies designed to address major existing environmental problems.

⁵⁸ Paragraph 2.6

⁵⁹ Paragraph 2.6 (x) of Nigeria’s Agenda 21.

⁶⁰ 1988, Cap 131, LFN 1990 as amended by Decree 59 of 1992 & Decree 14 of 1999.

⁶¹ The Federal Environmental Protection Agency (FEPA), now Federal Ministry of Environment (FME) since 1999. See Section 4 of the Act.

⁶² Section 4 (f) of the FEPA Act.

and creates criminal penalties for their breach for both corporate bodies and individuals. In particular, Section 21 specifically extends the liability for violation of section 20 in the case of a “spiller” to include costs for clean up and restoration of the environment as well as compensation to injured third parties which would be determined by the Agency.⁶³

FEPA has developed various Regulations and Guidelines pursuant to the powers granted it under the Act.⁶⁴ These provide effluent discharge limits, and other environmental standards. Violation of any of the provisions of these regulations could give rise to criminal sanctions even where there is no specific provision for this under the regulation.⁶⁵ In addition, the Directorate of Petroleum Resources (DPR) has also issued a set of guidelines for the oil industry.⁶⁶

In 1992, the Environmental Impact Assessment Decree⁶⁷ was enacted primarily to avoid negative environmental consequences from projects within specified industries, of which the oil industry is one. Section 2 of Decree provides that “[T]he public or private sector of the economy shall not undertake or embark or authorise projects or activities without prior consideration, at an early stages, of their environmental effects”. Pursuant to this, FEPA has developed General Guidelines as well as a set of Sectoral Guidelines specific to the oil industry.⁶⁸ Failure to undertake an EIA before a project begins is a criminal offence punishable by a fine or imprisonment or both.⁶⁹

Other Environmental Laws include the Oil in Navigable Waters Act⁷⁰ which prohibits the discharge of oil into the waters specified in the Act and the Harmful Wastes (Special Criminal Provisions) Act⁷¹ that prohibits the dumping, transportation, depositing of harmful wastes on the land, territorial waters and Exclusive Economic Zone of Nigeria.⁷² Contravention of its provisions gives rise to criminal sanctions against natural persons and corporate bodies.

⁶³ Section 21 (1) (a) &(b) of the FEPA Act. From words such as onshore, offshore facility used in the section, it is clear that spiller here is referring to oil although it could apply to other kinds of spills.

⁶⁴ See section 4 (g), and sections 15-17 of the Act. Some of the Regulations relevant to the oil industry include the National Environmental Protection (Effluent Limitation) Regulations, 1991, the National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations, 1991, the National Guidelines and Standards for Industrial Effluents, Gaseous Emissions and Hazardous Waste Management in Nigeria, 1991, the National Environmental Protection Management of Solid and Hazardous Wastes Regulation 1991, Sectoral Guidelines For Environmental Impact Assessment (Decree 86, 1992), National Guidelines and Standards for Water Quality in Nigeria 1999, National Guidelines on Environmental Management Systems in Nigeria 1999 and The National Guidelines for Environmental Audit 1999.

⁶⁵ By virtue of section 35 and 36 of the FEPA Act which makes it an offence to contravene any of the provisions of the Act itself or any regulations made under it.

⁶⁶ Environmental Guidelines and Standards for the Petroleum Industry in Nigeria 1991, as reviewed in 2002.

⁶⁷ Decree No 86 of 1992.

⁶⁸ Environmental Impact Assessment Sectoral Guidelines for Oil and Gas Industry Projects, 1995

⁶⁹ See section 62 of the EIA Decree.

⁷⁰ 1968, Cap 337, Laws of the Federation of Nigeria 1990. This is the only legislation that deals specifically with water pollution by oil and as is expressly contained in the long title to the Act, it was enacted to implement the terms of the International Convention for the Prevention of Pollution of the Sea by Oil 1954 to 1962.

⁷¹ 1988, Cap 165, LFN, 1990.

⁷² See section 2.

Petroleum Laws

As earlier noted there is no specific oil pollution law and all the petroleum laws with provisions relevant to the environment were enacted prior to 1988. The ones considered in this section are the Petroleum Act⁷³ and some of the regulations made thereunder (such as the Petroleum (Drilling and Production) Regulations,⁷⁴ the Mineral Oils (Safety) Regulations,⁷⁵ and the Petroleum Refining Regulations⁷⁶) and the Oil Pipelines Act⁷⁷

The Petroleum Act is the main legislation on the industry and regulates the exploration, exploitation and production of petroleum resources in the country. Section 9 of this Act gives the Minister power to make regulations for the oil industry including its environmental impacts.⁷⁸ Under this Act, the Minister has a general administrative power to suspend operations under a licence where they are not in accordance with “good oilfield practice”.⁷⁹ Regulation 16 of the Mineral Oils (Safety) Regulations defines “good oil field practice” to be that which is in accordance with “the appropriate Institute of Petroleum Safety Codes, the American Petroleum Institute Codes, or the American Society of Mechanical Engineers Codes.” Also, Regulation 7 of the Petroleum Refining Regulations provides that “practices conforming with international standards shall be observed subject to the approval of the Director.” Consequently, while these laws are not new, they ensure that the standard applicable to the industry is the current international practice.

The regulations also provide that precautions be taken against occurrence of pollution and where it does occur to end it promptly.⁸⁰ In the event that harm occurs, the holder of a licence or lease “... shall be liable to pay fair and adequate compensation for the disturbance of surface and other rights to any person who owns or is in lawful occupation of the licensed and leased lands.”⁸¹

Common Law and other Relevant Legislation

⁷³ 1969, Cap 350, LFN 1990.

⁷⁴ Legal Notice 69 of 1969, now contained in Cap 350, LFN, 1990.

⁷⁵ Legal Notice 45 of 1963, now in Cap 350, LFN, 1990.

⁷⁶ Legal Notice 45, 1974. now in Cap 350, LFN, 1990.

⁷⁷ 1956, as amended in 1965; Now Cap 338, LFN 1990.

⁷⁸ The relevant sections provide “S.9. (1) The Minister may make regulations- (b) providing generally for matters relating to licences and leases granted under this Act and Operations carried on thereunder, including- (i) safe working, (ii) the prevention of pollution of water Courses and the atmosphere. ... (c) regulating the construction, maintenance and operation of installations used in pursuance of this Act; (e)(viii) Subject to subsection (2) of this section, regulating the transport of petroleum and Petroleum products, prescribing the quantity of petroleum and petroleum products which may be carried in any vessel, cart, truck, railway, wagon or other vehicle, so carried, the receptacles in which they shall be contained when so carried and the quantities to be contained in those receptacles, and providing for the search and inspection of any such vessel, cart, truck, railway wagon or other vehicle. (2) Regulations made under subsection (1) (e) (viii) of this section shall apply only where petroleum or petroleum products are being transported- (a) on the waters mentioned in item 35 (a) and (b) of part 1 of the second schedule to the Constitution” Under the 1999 Constitution it is item 36.

⁷⁹ See section 8 (1) (f) (g) (h).

⁸⁰ See Regulation 25 of the Petroleum (Drilling and Production) Regulations and Regulation 43 of the Petroleum Refining Regulations.

⁸¹ See Paragraph 36 of the first Schedule to the Petroleum Act. See also sections 11 (5), 19 and 20 (2) of the Oil Pipelines Act. The licensee could also be criminally liable under the Petroleum Refining Regulations. See Regulation 45.

The Common Law is part of the laws of Nigeria by virtue of its being a former colony of Britain. Consequently, the general law of torts and specifically the torts⁸² of Negligence, Nuisance, Strict Liability (otherwise known as the Rule in Rylands and Fletcher) form a part of the body of laws relevant to liability for oil pollution. Other relevant laws include the Criminal Code Act,⁸³ the Sea Fisheries Act,⁸⁴ the National Inland Waterways Authority Decree 1997, the Water Resources Decree 1993 and the Ports Act.⁸⁵

Institutional Framework for Enforcement

As with most countries, there are various agencies charged with the responsibility of monitoring and enforcing different laws and various environmental media. For instance the Federal Ministry of Water Resources is charged with monitoring and enforcement of water pollution.⁸⁶ In the same vein, the Department of Petroleum Resources (DPR) is specifically charged with monitoring and enforcement of the petroleum laws and regulations.⁸⁷ However, as earlier noted FEPA (now FME) has overall responsibility for management of the environment in Nigeria. Interestingly, it is only the oil industry where the sectoral regulatory agency (DPR) is given a supervisory role over FEPA.⁸⁸ Finally private individuals or communities affected by oil pollution activities can also institute civil actions against the oil companies.

4. Environmental Impact of the Oil Industry in Nigeria and Enforcement by Regulators

There is as yet no comprehensive independent study of the environmental impacts of the oil industry on the Niger Delta environment.⁸⁹ Assessing the actual impact of the industry is therefore problematic owing to naturally occurring factors⁹⁰ as well as

⁸² G. Kodilinye, *The Nigerian Law of Torts*, (London, Sweet and Maxwell, 1982) at p. 1 defines a tort as “a civil wrong involving a breach of duty fixed by law, such duty being owed to persons generally and its breach being redressible primarily by an action for damages. The essential aim of the law of torts is to compensate persons harmed by the wrongful conduct of others ... damage takes several different forms – such as physical injury to persons; physical damage to property;... and damage to economic interests”.

⁸³ 1916, Now Cap 77, LFN, 1990.

⁸⁴ Cap 404, LFN, 1990

⁸⁵ Cap 361, LFN, 1990. Also the new Nigerian Ports Authority Decree 1999. Specifically the enforcement mechanisms for the Oil on Navigable Waters Act are vested on the Nigerian Maritime Authority created under this Act.

⁸⁶ Sections 1 and 5 of the Water Resources decree 1993.

⁸⁷ Section 9 Petroleum Act supra, and “Assignment of Responsibilities” Federal Government of Nigeria Official Gazette No 15, vol. 7 Of 3rd March, 1989.

⁸⁸ Section 23 of the FEPA Act, supra.

⁸⁹ The Shell Petroleum Development Company Nigeria, (SPDC) sponsored The Niger Delta Environment Survey in 1995 . Unfortunately the final is yet to be published. In any event it is arguable whether it will be accepted as independent because of the involvement of the oil company in it. The late Professor Claude Ake, Director of Centre for Advanced Social Science (CASS) in Nigeria resigned from the steering committee in protest over such concerns. See Greenpeace, Press Statement, “Prof. Resigns From Shell Niger Delta Enviro Survey”, London, 23 November 1995. <http://archive.greenpeace.org/search.shtml> (Last visited 20/10/04).

⁹⁰ One of these is diurnal and severe annual flooding of about two to five months. The annual flooding is due to very high levels of rainfall, together with a low, flat terrain and poorly drained soil. Flooding in turn causes coastal and riverbank erosion, degradation of agricultural land and destruction of crops, displacement of people, loss of life and property etc. See ERA Handbook, supra note 38, World Bank Report, supra note 39, at pp. 1, 7-8.

other human and industrial sources of environmental problems.⁹¹ There is therefore a divergence of opinion on the priority to be accorded pollution from oil industry activities amidst the various sources of environmental problems.⁹² In spite of this however, there is sufficient evidence showing that over fifty years of oil operations have had serious negative impacts on the environment and the socio – economic life of the people of the Niger Delta. A general picture can be gleaned from official oil spill records,⁹³ international studies on the impacts of the oil industry, especially on tropical regions and mangrove ecosystems,⁹⁴ as well as from small independent studies undertaken by individuals in the Niger Delta especially with regard to specific spill incidents.⁹⁵ Furthermore, court cases, where individuals have to prove their claims have also been a good source for assessing the economic and social impact of the industry.⁹⁶ Although environmental harm occurs at all stages, greater local and international attention has been drawn to oil spills, gas flaring and more recently pipeline fires, perhaps because of their visibility and frequency. As a result of this and also due to the availability of information, the discussions below will concentrate on these sources of pollution. Also, attention will only be paid to the prevalence of these incidents below and not analysis of their impacts which are very well documented in the studies earlier mentioned.

Oil Spills in the Delta

There have been a very high number of incidents and volume of oil spills in the Niger Delta. Relying on official statistics, Fekumoh found that from May 1980 - May 1990,

⁹¹ These include increased populations, and other human activities such as damming higher up the river, construction of break waters and jetties, gravel and sand mining, dredging, land reclamation, logging and other industrial activities such as ports and fertilizer companies which also produce effluents and other environmentally degrading substances.

⁹² It is questionable whether it would not be more relevant to explore how the natural occurring factors have been exacerbated by oil industry activities. For the various opinions however, see World Bank Report, *supra* note 38, at pp. 86-88; *The Price of Oil*, *supra* note 37 at p. 2.; Memorandum of the Rivers Chiefs and People's Conference, Port Harcourt, Nigeria, "The Endangered Environment of the Niger Delta: Constraints and Strategies for Sustainable Development", (Prepared for the World Conference of Indigenous Peoples on Environment and Development and UNCED, Rio, 1992, (Referred to after now as Rivers Chiefs Report); *Era Handbook*, *supra* note 38; Greenpeace, *Shell-Shocked: The environmental and social costs of living with Shell in Nigeria* (1994); I. Okonta and O. Douglas, *Where Vultures Feast: Shell Human Rights and Oil in the Niger Delta* (New York, USA: Sierra Books, 2001).

⁹³ However, these records are not comprehensive as it relies mainly on self reports.

⁹⁴ Such studies will however need to be interpreted in the light of the peculiar situation of the Niger Delta, criss- crossed by pipelines, oil wells and gas flare points. Also relevant are volume and frequency of spills over a relatively small area with a delicate ecosystem, speed and efficiency of clean up and remediation, proximity to inhabited areas and local uses of the polluted or damaged environment.

⁹⁵ B.A. Asuno, "Impact of Oil Industry on the Environment," in *Proceedings on Environmental Awareness Seminars for National Policy Makers* (Lagos, Nigeria: Federal Ministry of Housing and Environment, 1982) at p. 51; E.O. Adeniyi, "Environmental and Socio-Economic Impact of Oil Spillage in the Petroleum Producing Riverine Areas of Nigeria" in *The Petroleum Industry and the Nigerian Environment: Proceedings of 1983 NNPC Seminar* (1983) at p. 233; R. Abah (Ed) *Texaco Oil Blow –Out, January 1980-Being Survey and Valuation Report-Re Disturbance and Injurious Affection and Other Effects Arising from the Texaco Oil Blow Out at Apoi 20 (Otherwise known as Funiwa 5) off Sangana, Rivers State* (1980); R.J. Snowden, and I.K.E. Ekweozor,, "The Effect of a Minor Oil Spillage in the Estuarine Niger Delta" (1987) Vol. 18, No. 11 *Marine Pollution Bulletin*, 595.

⁹⁶ Frynas *supra* note 41, used this method in his study. So did Y. Belgore, in his PhD thesis, *Problems with Oil Pollution Injury Litigation in the Nigerian Legal System: Can Nigerian Litigants Gain Access to Courts in England and the U.S.A?* (University of Dundee, Scotland, 2003). (Referred to after now as Belgore).

approximately 433,076 barrels of crude oil (or similar substances) were released into the Nigerian environment from the Eastern operations alone.”⁹⁷ Another report⁹⁸ gives a more comprehensive analysis by factoring in the number and volume that is unreported, and therefore not recorded in official statistics. While from official records there is an annual average of 300 separate spill incidents resulting in approximately 2,300 cubic meters of oil, estimates taking into consideration unreported cases, put the actual figure at being up to ten times higher. It also shows that even based on oil industry sources, more than 1.07 million barrels (45 million U.S. gallons) of oil were spilled in Nigeria from 1960 to 1997. The largest single spill was an offshore well blow-out in January 1980, when at least 200,000 barrels of oil (8.4 million U.S. gallons), according to oil industry sources was spilled into the Atlantic Ocean from a Texaco facility and destroyed 340 hectares of mangroves. The Department of Petroleum Resources (the regulatory agency for the oil industry) estimates that more than 400,000 barrels (16.8 million U.S. gallons) were spilled in this incident.

TABLE 1: VOLUME OF OIL SPILLED FROM THE EASTERN REGION OPERATIONS IN NIGERIA FROM 1989-2001

Year	Total No Of Incidents	Approx. No. Of Barrels Spilled
1989	92	6,147.59
1990	119	15,264.11
1991	117	155,031.33
1992	184	27,161.54
1993	251	7,310.14
1994	270	32,259.70
1995	245	67,561.41
1996	264	43,841.35
1997	266	74,749.52
1998	133	69,338.68
1999	260	28,013.72
2000	240	71,788.58
2001	297	179,914.77
TOTAL	2441	598,467.67

Source: Collated from DPR records over this period.

Since a more comprehensive policy and legislative regime was developed in 1988, this study analysed spill records starting from 1999 when the benefits of this framework for enforcement would have been expected to yield dividends in terms of better enforcement and hopefully less pollution incidents. However, the analysis of the spill records for the period between 1989 and 2001 confirm similar high figures as earlier studies. As table I above shows, approximately 598,467 barrels were spilled in 2,441 incidents over this period. Recovery of spilled oil is very low as Table 2 below

⁹⁷ Oil operations are broken down into eastern and western operations in Nigeria. See J.F. Fekumoh, *Disturbance and Injurious Affection in the Nigerian Petroleum Industry*, (Owerri, Nigeria: Springfield Publishers, 1998) 1 (referred to after now as Fekumoh). See further, A. Ogbuigwe, “Compensation and Liability for Oil Pollution in Nigeria” (1985) 3 JPPL 23.

⁹⁸ See the Price of Oil, supra note 37.

shows. Of a total of about 526,679 barrels of oil spilled between 1989 -1999, over 95% was lost to the environment.

TABLE 2: PERCENTAGE RECOVERY OF SPILLED OIL FROM THE EASTERN REGION OPERATIONS IN NIGERIA FROM 1989-1999

Year	Approx. No. Of Barrels Spilled	Approx. No Of Barrels Recovered	Approx No Of Barrels Lost	% Recovered	% Lost
1989	6,147.59	1,467.25	4,680.34	23.87	76.13
1990	15,264.11	5,172.50	10,091.61	33.89	66.11
1991	155,031.33	1,402.25	153,629.08	0.90	99.10
1992	27,161.54	721.00	26,440.54	2.65	97.35
1993	7,310.14	1,973.50	5,336.64	27.00	73.00
1994	32,259.70	1,692.25	30,567.45	5.25	94.75
1995	67,561.41	8,846.39	58,715.02	13.09	86.91
1996	43,841.35	0.92	43,840.43	0.00	100.0
1997	74,749.52	1,243.50	73,506.02	1.66	98.34
1998	69,338.68	383.50	68,955.18	0.55	99.45
1999	28,013.72	100.80	27,912.92	0.36	99.64
TOTAL	526,679.09	23003.86	503,675.23	4.37	95.63

Source: Collated from DPR records over this period.

The causes of spills are recorded in the official records under the following heads- operational/maintenance error, equipment failure, third party/sabotage, accident, and unknown causes. Although oil companies have usually blamed majority of spills on sabotage, this is not borne out by the official statistics. For instance a study by Awobajo covering a period of five years (1976-1980) showed that sabotage accounted for only 2% of causes of spill and less than 5% of total volume of spills while equipment failure⁹⁹ alone accounted for 50% of spills.¹⁰⁰ The analysis of the 1989-2001 figures (see Table 3 below) show that while the number of incidents recorded as sabotage when compared to Awobajo's study has increased, this accounted for about 28% of total spills over the entire period. Interestingly there was a significant rise (56% and 46% respectively) in the number of spills attributed to sabotage in 2000 and 2001. These figures are however not conclusive evidence of the actual proportion of incidents occasioned by sabotage as entries are made in the records without conclusive evidence and usually based on claims by the company or the result of an initial visit to the spill site by the regulatory agencies and the company.¹⁰¹

TABLE 3: PERCENTAGE OF OIL SPILLS ATTRIBUTED TO SABOTAGE FROM THE EASTERN REGION OPERATIONS IN NIGERIA FROM 1989-2001

⁹⁹ This includes but is not limited to burst/rupture of flowlines/pipelines, corrosion flowlines/pipelines, overpressure, tank overflow, valve failure, hose failure/single Bouy Moorings, (SBM). See S.A. Awobajo, "An Analysis of Oil Spill Incidents in Nigeria: 1976-1980" in *The Petroleum Industry and the Nigerian Environment: Proceedings of an International Seminar* sponsored by the Nigerian National Petroleum Company (1981), (Referred to after now as Awobajo).

¹⁰⁰ See Awobajo, Ibid, at pp. 60-61.

¹⁰¹ This was gathered from interview of enforcement agents in Nigeria in 2002. Furthermore, several entries are made in the official records as "suspected" sabotage.

Year	Total No Of Incidents	incidents due to sabotage	% due to sabotage
1989	92	26	28.26
1990	119	37	31.09
1991	117	27	23.08
1992	184	60	32.61
1993	251	73	29.08
1994	270	50	18.52
1995	245	56	22.86
1996	264	59	22.35
1997	266	57	21.43
1998	133	25	18.80
1999	260	78	30.00
2000	240	135	56.25
2001	297	138	46.46
TOTAL	2441	683	27.98

Source: Collated from DPR records over this period.

In various field reports by an environmental NGO, the Environmental Rights Action (ERA), communities have contested claims that spills were due to sabotage and that it was just a ploy by the companies to refuse payment of compensation.¹⁰² Also, the case of *Shell Petroleum Development Company of Nigeria Ltd. v Abel Isaiah and ors.*,¹⁰³ indicates just how unreliable such claims can be. In that case, Shell had alleged sabotage and therefore refused to pay compensation. When the matter went to trial, Shell's defence witnesses contradicted themselves, with three of them admitting in court that the damage to the pipeline was a result of a fallen tree. In their judgement, the Court of Appeal, "having regard to the facts and circumstances" of the case were "convinced that the defence of sabotage raised by Shell was an afterthought"¹⁰⁴

Gas Flaring

Associated or non associated natural gas is part of the process of production and development of oil. Since the inception of oil production in 1957, there has been continuous flaring of gas in Nigeria. It was estimated that about 704,461.6 million cubic metres (mcm) of associated gas was produced between 1961 and 1998 of which 577,830.1 mcm, representing an average of 82.02 percent of total production was flared.¹⁰⁵ A large number of these flares are close to local communities and farmlands. With an average of about 75-90% of produced gas being flared, Nigeria flares more gas than any other oil producing country, with the next highest country, Libya, flaring just 21%.¹⁰⁶ The volume of gas flared would be sufficient to meet the entire gas needs of the whole of West Africa.¹⁰⁷ Although it is expected that there will be greater

¹⁰² For instance after a recent spill in Bayelsa state by the Shell oil company, the local contractor has called for an independent investigation as he alleges that the claim of sabotage is unproven and the volume of spill declared by shell is less than it actually is. See Onwuka Nzeshi, "Shell Reports Oil Spill in Bayelsa", This Day, February 18, 2004.

¹⁰³(1997) 6 NWLR (Pt. 508) 236.

¹⁰⁴ Ibid, at p. 252.

¹⁰⁵ See R.N. Okoh., "Cost-Benefit Analysis of Gas Production in Nigeria" in NES, Natural Resource Use, the Environment and Sustainable Development, (Ibadan, Nigeria: NES, 2001) at pp. 389-412.

¹⁰⁶ World Bank Report, supra note 38 at p. 59; ERA Handbook supra note 38, at p. 137.

¹⁰⁷ Africa Recovery Online, A UN Publication, " Harnessing Abundant Gas Reserves"

utilization of gas owing to the various gas projects being developed in the country, there is no evidence as yet that this has impacted the volume of gas currently being flared.

Pipeline Fires

In recent times, pipeline fires caused either by accident or as a deliberate act of sabotage is another major environmental concern in the Niger Delta. The first major fire outbreak occurred at Jesse, a small village in the Niger Delta on the 15th of October 1998. In addition to pollution of farmlands and nearby streams, there was also a very high human fatality rate as well as several cases of victims with very serious burns. Since then there have been several other such fire outbreaks, although perhaps not on the same scale. Some of these include Ekakpamre Shell Fire disaster of 17th September 1999,¹⁰⁸ Egborode Fire disaster of 10th July 2000,¹⁰⁹ Elume fire disaster of 8th November 2000,¹¹⁰ and Shell installation in K-dere, Ogoni, August 2001.¹¹¹

In spite of this visible and clear evidence of environmentally damaging incidents, there has not been a single formal enforcement measure, whether administrative, civil, or criminal, taken against any oil company by any of the regulatory agencies.

5. Handling of Some Real Cases.

Before analysing the reasons for lack of enforcement, below are a few real examples to give just as an anecdotal indication of how cases are handled.

The Funiwa V Blowout 1980.

On the 17th of January 1980, there was an oil well blow out at one of Texaco's facility, the Texaco North Apoi 20 off Sangana in Rivers State, about 5 miles offshore in the Niger Delta (Referred to generally as the Funiwa V Blow-Out). This continued until the 30th of January when the well caught fire. A total of 420,971 barrels (although more conservative estimates put this at about 146,000 barrels)¹¹² of crude

<http://www.un.org/ecosocdev/geninfo/afrec/vol13no1/gas.htm> (Last visited 10th January, 2004).

¹⁰⁸ ERA Field Report: "Ekakpamre's Shell Fire Disaster" (September 17-18, 1999)

<http://www.waado.org/Environment/EkakpamreFire/EkakpamreFire.ERA.html>

(Last visited 05/09/03). Shell whose pipeline was leaking was notified by the community and two of its staff came to inspect and identify the source of the leak. They promised to return later that day to repair the damage but never did until the fire outbreak on the evening of the following day.

¹⁰⁹ ERA Report, "Egborode Fire Disaster" (ERA Field Report No 74, 2000);

http://www.waado.org/Environment/OilFires_2000/Egborode/EgborodeFire.html (Last visited 05/09/03); B. Phillips, "Nigerian Fire: A Familiar Tragedy". (BBC News, Friday, 14 July, 2000).

¹¹⁰ ERA Report On Elume River Fire Disaster (Mon, 20 Nov 2000)

http://www.waado.org/Environment/OilFires_2000/ElumeRiverFire/ERAReport.html (Last visited 05/09/03). A PPMC (subsidiary of NNPC, the national oil company) pipeline ruptured four months earlier and spread spilled refined petroleum products to surrounding rivers, streams and farmlands. The pipeline was mended without cleaning up the area. On the night of the 8th of December, the fire broke out.

¹¹¹ "Nigeria: IRIN Focus on Oil Pipeline Fires" a report of UN office for the Coordination of Humanitarian Affairs, 31st July 2000,

<http://www.reliefweb.int/L...a/countrystories/nigeria/20000731.phtml> (Last visited 05/09/03).

¹¹² E. Ekekwe "The Funiwa -5 Oil Well Blowout" in The Petroleum Industry and the Nigerian Environment: Proceedings of an International Seminar sponsored by the Nigerian National Petroleum Company (1981). However this estimate being from the company Texaco cannot be totally relied on.

oil was spilled and left to drift uncontrolled. This caused pollution of 2230.9 Km of various water courses such as estuaries, lagoons, lakes, rivers, rivulets, and creeks, and rendered usual sources of drinking water unsafe. A total of about 223,000 people were directly affected. 180 persons died in March 1980 at Sangana alone as a result of factors related to the pollution, mangrove forests were affected while certain sea foods were either killed or tainted, 321 fishing ports were impacted and the socio economic life of the people was paralysed.

An independent valuation of the damages assessed this as one hundred million, two hundred and thirty seven thousand, seven hundred and eighty nine naira (N100, 237,789.00).¹¹³ This did not include costs for remediation of the polluted waters. The then President of the country unilaterally directed the company to pay only twelve and half million Naira (N12, 500,000.00), representing only 2.5% of the independent valuation as full and final payment.¹¹⁴ No further action was taken against the company by the regulatory agencies.

Jesse Fire Disaster.

The state oil company, Nigeria National Petroleum Corporation (NNPC) pipeline rupture, alleged to have been caused by vandals, was left to continue spilling petroleum in spite of the fact that community leaders had reported the leak to the NNPC and even warned of the danger of fire. Some indigenes, owing to extreme poverty, and tempted by the little sums these products could fetch in the black market as a result of scarcity of refined products in the country at the time, went to the spill site to scavenge for the refined petroleum which was spilling from the pipeline. Two days later, on the 15th of October 1998, a fire erupted, spreading from the scene to nearby farms, polluting farmlands and rivers, and killing 1200 people including women and children and several others having very serious burns.¹¹⁵ The president in his visit to the site of the accident declared that the victims had died while committing a crime and therefore no compensation would be paid. No enquiry was conducted into the reasons why the rupture was not mended even after the reports by local community leaders, a fact that was not denied by NNPC. No actions were taken against the NNPC for the negligence on their part in not containing the spill and repairing the pipeline immediately.

The NLNG EIA Project

In order to harness the huge gas resources of the country, the federal government together with a consortium of oil companies, with the Shell Petroleum Development Company of Nigeria (SPDC) as the operator, set up the Nigeria Liquefied Natural Gas Project at Bonny. However, the mandatory environmental impact assessment required

¹¹³ The naira is Nigeria's local currency. Although stronger at the time, it currently exchanges for about N130 - \$1 US.

¹¹⁴ R. Abah (Ed) Texaco Oil Blow -Out , January 1980-Being Survey and Valuation Report-Re Disturbance and Injurious Affection and Other Effects Arising from the Texaco Oil Blow Out at Apoi 20 (Otherwise known as Funiwa 5) off Sangana, Rivers State (1980). See also Fekumo, supra note 97, at pp. 45-49.

¹¹⁵ D. Ola and D. Eighemhenrio, "Wasting Lives: Official Negligence Results In Grave Tragedy", Report for the Environmental Rights Action on the Jesse Disaster in Idjerhe Clan in Urhobo (October 20, 1998) http://www.waado.org/Environment/IdjerheFire/idjerhe_ERA_Ola.html (Last visited on 05/09/03); Oil Spill Intelligence Report, Vol. XXI, No. 4, 22 October 1998 and Vol. XXI, No.45, 19th Nov. 1998.

for establishment of the project was not done until after the project was under way. A private citizen's suit by an environmental activist challenging this was initially thrown out for lack of locus standi.¹¹⁶ Although on appeal this was reversed and the case sent back for trial, the project had by then been completed and the private citizen no longer continued with the trial. None of the regulatory agencies enforced attempted to enforce the law and when community problems broke out later, the federal government was actively involved in assisting to conclude a memorandum of understanding (MOU) between the NLNG and the community so that the first shipment of LNG would not be delayed.

6. Analysis

The pertinent question at this juncture is - why has there been no enforcement whatsoever by regulatory agencies against any oil company in spite of these laws? Admittedly there are some weaknesses in both the legislative and institutional framework of enforcement.¹¹⁷ However, do these alone or mainly account for the absolute lack of enforcement? If that is the case, how does one explain the fact that local communities and individuals have instituted several successful actions for compensation due to damage arising from oil activities within the same regulatory framework? Although the examples above are merely anecdotal, they give an indication of how other policy considerations and lack of supporting structures can impede the enforcement of environmental laws.

In the first instance, the priority of developing countries is achievement of economic growth through development projects. For this, there is a heavy reliance on in- flow of foreign direct investment. These projects, apart from contributing immensely to government revenue also create jobs. The priority therefore is the creation of a competitive and favourable investment climate to attract investment.¹¹⁸ Although countries such as Chile have successfully implemented strict environment regulation without discouraging investment, for most countries, less strict environment regulation is seen as one of the factors that gives the country a better competitive edge. Consequently, while there may apparently be integration of environment and development policy in a legislative framework, this is not followed through with a corresponding political will, not necessarily capacity, to enforce these laws.¹¹⁹

This is clearly evident in the policy focus of the government regarding the oil industry in Nigeria both prior to and after the Stockholm and Rio conferences. Although Nigeria participated in the 1972 Stockholm conference, there was no action taken to

¹¹⁶ *Oronto Douglas v. Shell Petroleum Development Company Ltd. and ors*, Federal High Court of Lagos Suit no. FHC/L/CS/573/96, which ruling was delivered on the 17th of February 1997. Reported in (1999) 2 NWLR (Pt. 591).

¹¹⁷ See the following for critical analysis of the legislative and institutional framework: O. Ibidapo-Obe, "Criminal Liability for Damages Caused by Oil Pollution", in *Environmental Laws in Nigeria Including Compensation* (J.A. Omotola, (ed.), Lagos, Nigeria: Unilag., 1990), p.235; O.A Olomola, "Nigeria's Environmental Laws- A Critical Review of Main Principles, Policy and Practice" in *Environmental Law and Policy* (S. Simpson and O. Fagbohun, eds. Lagos, Nigeria: LASU, 1998), p.10; Belgore, supra note 96.

¹¹⁸ See Bastida, supra note 24, at p. 4; V.N. Balasubramayam, "Foreign Direct Investment to Developing Countries" in *Regulating International Business: Beyond Liberalisation* (S. Picciotto and R.Mayne, Eds. London: Great Britain, Macmillan, 1999), p. 29; McCutcheon, supra note 27, at p. 397.

¹¹⁹ Slater, supra note 29, at pp. 528-529; P. Hassan and A. Azfar, "Securing Environmental Rights Through Public Interest Litigation in South Asia," (2004) *Virginia Env't'l L.J.* (Referred to after now as Hassan and Azfar)

specifically regulate the environmental impacts of the oil industry even upon recommendation from the national oil company.¹²⁰ Rather in 1978, the government enacted the Land Use Decree which made it easier for companies to have access to community land and thus further increased the socio-economic problems of the host communities.¹²¹ The impetus for action in 1988 was not a result of environmental impacts from internal development activities but rather the dumping of toxic wastes by an Italian company at one of the more remote port towns in Nigeria. Even then, the oil industry was the only sector that its sectoral regulatory body, DPR, was given supervisory roles over the new lead agency FEPA, a move that could be seen as a calculated attempt to impede effective enforcement against the industry. This is more so, as until 1988, DPR was a part of the state oil company, NNPC,¹²² which operates joint ventures with the companies it is supposed to monitor, thereby raising obvious issues of conflicts of interest

Shortcomings in legislation such as the one above could be due to various factors that existed at the time of drafting the laws. Nevertheless, a commitment to integration of environment in development laws would propel countries to ensure that these gaps are fixed in a similar way that investment promotion legislation are routinely reviewed. Consequently while it is conceded that lack of expertise and limited financial resources are some obvious challenges to establishing efficient legislative and regulatory structures in these countries, weak laws themselves may be due to lack of a political will to address them effectively.

The economic priority of government is also indicated in the handling of a couple of the anecdotal examples above such as the decision of the government regarding the Funiwa V blowout. Although it could be argued that environmental concerns had not gained as much prominence in 1980, the same argument is untenable with respect to the establishment of the NLNG project without an EIA. This also indicates an instance where enforcement would have been relatively easy if the only requirement was the existence of effective laws or the adequate institutional enforcement capacity since the issue of whether or not an EIA has been undertaken as required by the law is easily determinable. There would therefore have been no real problems of detection or proof. The enforcement agents interviewed did not even consider formal enforcement as an option for such a project. While there was no expressly written enforcement

¹²⁰ See the proceedings of two major conferences organised by the NNPC in 1979 and 1981. In particular, see the following papers delivered at the Conference, all of which were subsequently published by the NNPC in a volume entitled The Petroleum Industry and the Nigerian Environment: Proceedings of an International Seminar, (1981): M.M Olisa, "Legal Framework for Pollution Control in the Petroleum Industry" pp. 37-41. At the time, the author was a staff of the Legal Division of the NNPC; B.A. Asuno "Development and Implementation of Regulations to Control Petroleum Related Pollution in Nigeria" pp. 25, 26. The author was the then head of the Petroleum Inspectorate. In his paper he recounts the achievements of his department since the 1979 conference, including the issuing of guidelines "in anticipation" of the US EPA type of framework legislation; E.C. Odogwu, "Economic and Social Impacts of Environmental Regulations on the Petroleum Industry in Nigeria", pp. 49- 53.

¹²¹ For an in-depth analysis, see J.A. Omotola Essays on the Nigerian Land Use Act, 1978 (Lagos, Nigeria: Lagos University Press, 1980).

¹²² Even now, the independence of DPR is questionable, leading to calls for it to be made a part of the Ministry of Environment following the establishment of this Ministry in 1999. It was obvious from discussions with the enforcement agents that relationships were strained between the two enforcement agencies. See further M.M. Olisa, Nigerian Petroleum Law and Practice (Ibadan, Nigeria: Jonia Ventures, 1997), at p. 201-232.

policy, it was clear that cooperation rather than confrontation was the only approach used for oil companies.

Although gradual improvements are being made in some respect, most developing countries are characterised by weak governance structures and lack of accountability in governments and this is another major impediment to enforcement. As the UN secretary General, Kofi Annan says, “good governance and sustainable development are indivisible. This is the lesson from Africa to Asia to Latin America. Without good governance... no amount of funding, no amount of charity will set us on the path to prosperity.”¹²³ Corruption is one of the major problems of such states. Nigeria for instance has been at the bottom of the Amnesty International Corruption Index for several years. There have been publicised cases of corruption at the highest levels of government. Oil companies have been found to be complicit in some of these.¹²⁴ In addition, the federal government through the NNPC has significant equity participation in the oil industry through the operation of joint ventures. The NNPC also owns some of the pipelines where fire incidents have occurred. Consequently, the government is also liable for any harm caused to the environment. On the other hand, the executives of regulatory bodies are appointed by government and the agencies derive their funding from and are largely dependent on government.¹²⁵ In a state with weak governance structures and powers highly concentrated in the central government, it is not surprising that there is no aggressive monitoring and enforcement of laws against an industry in which that government has a lot of interest.

Public pressure contributes significantly to ensuring better environmental standards and enforcement all over the world. The ability to do so is however strongly influenced by the type of government and the political and economic power that the pressure group wields. A government that is not accountable to its people is very unlikely to react positively to protests and is more likely to crush these through the power of the state as has so often been the case in the Niger Delta.¹²⁶ In the same vein, communities in the oil producing areas being ethnic minorities are the weakest politically in the Nigerian polity. They are poor, educationally disadvantaged and lack access to media for dissemination of information. Their ability to launch an effective well orchestrated lobby is limited by these factors. Also owing to extreme poverty and lack of basic infrastructure, requests for job creation and development of

¹²³ ECA, Striving for Good Governance in Africa: Synopsis of the 2005 African Governance Report Prepared for the African Development Forum IV. Available online at www.uneca.org/agr/agren.pdf04/11/04 (Last visited 30/10/04).

¹²⁴ Harliburton is currently undergoing investigations concerning allegations of bribery of Nigerian government officials.

¹²⁵ See D. Biswas, *Environmental Legislation: Challenges of Enforcement* <http://www.cleantechindia.com/neweic/environment.html> (Last visited on the 25/02/03).

¹²⁶ some notable examples which have attracted international attention are the repression of the Ogonis between 1993- 1994, culminating in the conviction and execution for murder of an environmental activist, Ken Saro Wiwa and eight of his associates after a trial which has been widely criticised as not meeting the minimum standards of a fair trial; the Umuechem massacre of 1991; the Odi massacre of 2000; and the killing of Ijaw youths following the Kaiama Declaration 1998. For more details on these incidents, see the following, HRW “Corporations and Human Rights: Recent Human Rights Violations In Nigeria’s Oil Producing Region” (February 23, 1999) (last visited 20/01/04); HRW) Nigeria: Crackdown in the Niger Delta Vol. 11, No 2 (a) (1999) <http://www.hrw.org/reports/1999/nigeria2/Ngria993-03.htm> (last visited 20/01/04); Frynas supra note 41, at p.54; and “Nigeria, Odi Massacre Statements” <http://php.africaaction.org/docs99/odi9912.htm> (last visited 12/01/03).

infrastructure easily gain priority over environmental concerns even when some sort of lobby or protest is organised.¹²⁷ Dynamic non governmental organisations (NGOs) could address this gap. However, while there are several local NGOs, they are also severely limited by resources. For instance, while this action has been criticised, it is unlikely that any local NGO in a developing country could have embarked upon the kind of campaign that Greenpeace did in the Brent Spar case,¹²⁸ or practically force a regulatory body to pursue criminal prosecution as Friends of the Earth did in the Sea Empress tanker accident.¹²⁹

Public interest litigation is another means of ensuring environmental compliance in the absence of effective enforcement by state regulatory agencies. A vibrant and independent judiciary is however essential for this to be effective. South Asian countries have achieved considerable success in using public interest litigation to address environmental concerns. This has however only been possible because the judiciary has been willing to promote the achievement of sustainable development through the courts. In what has been described as judicial activism, technical procedural constraints have been done away with, and very broad interpretations given to constitutional provisions in order to ensure increased access to the courts by all. This has variously included holding in the absence of any express provision in the constitution that there is a fundamental right to a healthy environment and indeed a duty to unborn future generations.¹³⁰

Unfortunately, this has not been the experience of most developing countries. Under the common law, competence to institute an action in court is dependent on such person showing “sufficient interest” or what is referred to as locus standi. In Nigeria, courts have adhered to strict interpretations of this technical procedural rule by requiring that such person need to show that they have a special interest or have suffered harm over and above that suffered by the population at large.¹³¹ Even a

¹²⁷ A United Nations Interregional Crime and Justice Research Institute’s (UNICRI) study found that the public in developing countries see pollution as a much less important issue in the light of other pressing social and economic needs. See A. Alvazzi del Frate and J. Noberry (eds.) *Environmental Crime, Sanctioning Strategies and Sustainable Development* (Rome, Italy: UNICRI, 1993) <http://www.unicri.it/documentation/moreinfo/n50.htm> (Last visited on 07/03/02).

¹²⁸ In this campaign, Green Peace successfully stopped Shell from disposing of one of its offshore oil installations in the Sea.

¹²⁹ Milford Haven Port Authority gets record fine <http://www.edie.net/news/Archive/640.html> (Last visited 20/11/03); N. Greensmith “[The “Sea Empress” Prosecution](http://www.edie.net/news/Archive/640.html)” www.jseinc.org/en/bulletin/bulletin_42/sea_empress_prosecution.pdf (Last visited 20/11/03).

¹³⁰ Some of the ground breaking cases include, Shehla Zia v. WAPDA, P.L.D 1994 S.C. 693, where the Pakistani supreme court held that the right to life guaranteed by Article 9 of the Constitution of Pakistan included the right to a healthy environment; Ophosa v. Secretary of the Department of Environment and Natural Resources, (33 I.L.M. 173 (1994), where the supreme court of Philippines ruled that plaintiffs suing on behalf of themselves and for future generations yet unborn have sufficient interest or locus standi; Farooque v. Bangladesh (reported in SACEP/UNEP/NORAD Publication series on Environmental Law and Policy No 3 Sri Lanka 4-6 July 1997) where the court gave very broad interpretations to “an aggrieved person” under Article 102 of the Bangladesh constitution in order to ensure that the plaintiffs had access to court. See also the following: Hassan and Azfar, supra note 119; Z. M. Nomani, “The Human Right to Environment in India: Legal Precepts and Judicial Doctrines in Critical Perspective”, (2000) 5 Asia Pac. J. Envntl. L. 113; and N. A. Robinson, “A Common Responsibility: Sustainable Development and Economic, Social and Environmental Norms,” (2000) 4 Asia Pac. J. Envntl. L. 195.

¹³¹ See for instance the case of Oronto Douglas v Shell Petroleum Development Company Ltd. and ors, supra note 116 above. A long line of cases where this restrictive interpretation has been given include

representative action on behalf of all those who have suffered harm is not enough to discharge this requirement.¹³² This attitude of the courts has stifled the development of public interest litigation in the country.¹³³

Furthermore, the judiciary has also prioritised the economic interests of the state over the environment. In *Allar Iron v Shell- BP*, the judge's reason for not granting an injunction was because "[T]o grant the order...will amount to asking the defendant [Shell-BP] to stop operating in the area."¹³⁴ Care has been taken in this regard not to "upset" the companies even where there is sufficient evidence that their activities have resulted in harm to private individuals. In *Onyoh v Shell-BP*, the judge while finding that the amount claimed as compensation by the plaintiff against an oil company was justified in light of the damage suffered, nevertheless reduced this sum in order not to "sour the good relationship which already exists between the parties."¹³⁵ In this area of compensation however, there is some improvement in the damages awarded successful litigants in recent times thus indicting that perhaps some of the earlier decisions were due to lack of proper appreciation of environmental concerns. However, for there to be a vibrant judiciary along the lines of the South Asian example, a viable democracy which ensures the independence of the judiciary and secure tenure of judges, the rule of law and executive obedience of judgements of the court is essential.

Apart from shortcomings in the judiciary, the enormous power and resources (human, financial and technological) wielded by multinational companies makes them formidable opponents in any litigation. Litigation involves considerable financial input and in the absence of legal aid services can be crippling for private persons. Multinationals on the other hand do not have a similar problem. In fact companies can and do embark on long winded litigation that essentially wear out the weaker opponent.¹³⁶ They have the best lawyers and experts on their pay roll. In a technical field such as oil operations, they have better access to information regarding the true position of affairs and are also more able to efficiently assess and interpret scientific information in a manner that is favourable to them. Consequently, many private litigants have settled privately with the companies for very low sums of compensation that is essentially dictated by the companies.¹³⁷

Adeya v. The President of the Federal Republic of Nigeria (1981) 5 S.C. 112; *Akinyemi v. Governor of Ondo State* (1982) 2 NCLR 487; *Aliu Bello v. Attorney General of Oyo State* (1986) 12 SC 1.

¹³² In *Amos and anor. v. Shell BP Petroleum Development Company of Nigeria Limited and Anor*, 4 ECSR 486, the construction of a dam across a creek by the defendants caused flooding and damage to plaintiffs farmlands. The court held that since the creek was a public waterway, only the attorney general can institute an action in public nuisance.

¹³³ See A. Ogbuigwe "Judicial Activism in the Enforcement Rights in the Petroleum Industry: Past, Present and Future Trends," being a paper presented at the International seminar on the Petroleum Industry and the Nigerian Environment, Abuja, Nigeria: NNPC, 1998)

¹³⁴ See *Allar Iron v. Shell- BP*, unreported Suit No. W/89/71.

¹³⁵ *Onyoh v. Shell-BP* (1982) 12 C.A. 144, at pp. 159-160.

¹³⁶ One of the factors that influenced the Supreme Court's decision to make a controversial settlement order in the Bhopal gas leak civil trials in India appears to be the delay in the conclusion of the trial owing in part to various legal maneuvers by the multinational Union Carbide India Limited (UCIL) See J. Cassels, "Outlaws: Multinational Corporations and Catastrophic Law" (2001) 31 Cumb. L. Rev. 311.

¹³⁷ See Frynas, *supra* note 41, at pp. 18-20. Belgore, *supra* note 96, highlighting these challenges indicated that foreign forums with established contingency fee system may be better alternatives local communities.

This leads to the issue of accountability and governance of multinational corporations at international law. Development projects in most developing countries requires huge investments and hence the need to attract foreign investments which are largely made by multinational companies.¹³⁸ The current trends of globalisation not only ensure competitive and favourable investment climates in host countries but also greater protection of foreign investment at international law through bilateral and multilateral investments treaties.¹³⁹ As Waelde notes, what these have done effectively is to “weaken the regulatory grip national governments have over economic agents subject to their jurisdiction.”¹⁴⁰ There is however no corresponding binding international law instruments which ensures effective governance of multinational corporations especially in arrears such as environmental protection where host nations may be particularly vulnerable.¹⁴¹

In recognition of the low standards that could exist in some countries, one of the protections granted the foreign investor is the requirement for a minimum standard of treatment in accordance with international law.¹⁴² Also, investors are able to negotiate a choice of law clause that ensures its contract with the host state is governed by laws that meet international standards. Under the investment state dispute mechanism, the foreign investor can ensure that it is able to avoid the short comings of the legal system in the host state by resorting to binding and enforceable arbitration. In contrast, the foreign investor is liable to only the environmental standards and legal process of the host nation.¹⁴³ While there is some attempt at resorting to foreign forums, access to such forums for environmental litigation is fraught with difficulties.¹⁴⁴

These double standards in the treatment of foreign investment and the environment¹⁴⁵ sadly, do not promote effective environmental governance in the host state. As the secretary general of the UN stated in his millennium report, “if we are to get the best out of globalization and avoid the worst, we must learn to govern better, and how to

¹³⁸ See M. Sornarajah The International Law on Foreign Investments, (Cambridge, Great Britain: Cambridge Press, 1994) at p. 6.

¹³⁹ See, P.T. Muchlinski, “A brief History of Business Regulation” in Regulating International Business: Beyond Liberalization (S. Picciotto and R.Mayne, Eds. London: Great Britain, Macmillan 1999) 47-53. These include the more traditional rights as well as introduction of new mechanisms such as the investor state dispute mechanism, much broader definition of expropriation, post entry protection, reduction of the right of the host state to demand for certain protections such as requirement of local equity, etc.

¹⁴⁰ T. Waelde, “MITs (Multilateral Investment Agreements) in the Year 2000: A Contribution to Melanges Pillepe Kahn (Editors: Charles Leben, Eric Loquin), 4, (Vol4-15 CEPMLP Internet Journal) <http://dundee.ac.uk/cepmlp/journal/html/article4-15.html> (Last visited on 19/05/04).

¹⁴¹ Multinational corporations have caused some to the major environmental problems. See Hawken, The Ecology of Commerce, (New York, US: Harper, 1993); and D.C. Korten, When Corporations Rule the World (London, United Kingdom: Earthscan, 1995).

¹⁴² See Article 1105 of the NAFTA. Article 10 (1) of the ECT also provides inter alia that “in no case shall investments be accorded treatment less favourable than that required by international law...”

¹⁴³ See for example Article 3 of the NAAEC, which is the side treaty to the NAFTA which merely recognizes the right of each party to establish its own environmental standards without providing for any minimum standards.

¹⁴⁴ See Belgore, supra note 96, where the author reviews the hurdles that have to be faced by potential litigants in two foreign forums.

¹⁴⁵ See for instance D. Ayine and J. Werksman, “Improving Investor Accountability”, in Regulating International Business, at 126, where the authors highlight the double standard involved in environmental litigation in foreign courts and protection of foreign investment

govern better together.¹⁴⁶ This was affirmed by the Millennium Summit thus, "...only through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable. These efforts must include policies and measures, at the global level, which corresponds to the needs of developing countries and economies in transition ..."¹⁴⁷

7. Conclusions

The usefulness of law as a tool for policy integration is dependent on its enforcement. To ensure successful enforcement, it is important that there exist the right mix of rules together with suitable and adequate framework for enforcement. However, even the most efficient regulatory system and well trained and equipped enforcement officers cannot guarantee enforcement without a corresponding political will to do so. On the other hand, even a poor regulatory system can yield some positive results where there is commitment to enforcement. Lack of this political will partly explains the poor enforcement of environmental laws in developing countries.

Admittedly, there are regulatory and institutional lapses which may impede efficient enforcement in developing countries. This cannot however explain the absolute lack of enforcement in the Nigerian oil industry. Rather, the analysis above indicates that contrary to the policy expressed in legal and policy documents, economic development is still prioritised and pursued separately from environmental protection. Weak governance structures, lack of organized and effective public pressure groups and a vibrant judiciary are also contributory factors as the public are unable to bring the required pressure to bear on the government and regulatory agencies. Finally, the current trend of globalisation, the international governance of foreign investments and multinational corporations is skewed unfavourably against the environmental concerns of developing countries.

In light of the above, laudable projects which seek to build capacity for law making and enforcement may not achieve much if attention is not also paid to the issue of providing an enabling environment and establishing viable supporting structures at both national and international levels. This includes coherence of policy between international investment and environmental law.

¹⁴⁶ United Nations Secretary General's Report , "We the Peoples: The Role of the United Nations in the 21st Century," Found at <http://www.un.org/millennium/sg/report/>.

¹⁴⁷ *United Nations Millennium Declaration*, UNGA Res of 18th September 2000, A/Res/55/2.